

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| _____ |) | |
| AMGEN INC., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | CIVIL ACTION No.: 05-CV-12237WGY |
| F. HOFFMANN-LA ROCHE LTD |) | |
| ROCHE DIAGNOSTICS GmbH |) | |
| and HOFFMANN-LA ROCHE INC. |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION, IN THE
ALTERNATIVE, TO STRIKE UNTIMELY EXPERT TESTIMONY OF RALPH
A. BRADSHAW REGARDING AMGEN’S MOTION FOR SUMMARY
JUDGMENT OF NO OBVIOUSNESS-TYPE DOUBLE PATENTING**

Defendants (“Roche”) oppose¹ Amgen Inc.’s Motion to Strike Expert Testimony Regarding Amgen’s Motion for Summary Judgment of No Obviousness-Type Double Patenting, but if the Court allows the motion and strikes testimony of Dr. Harlow or Dr. Lowe, Defendants move, in that alternative, to strike the testimony of Amgen’s expert witness, Dr. Bradshaw. As grounds therefor, Roche asserts that, in Dr. Bradshaw’s declaration (Docket Item (“D.I.”) 504), he offers opinions never previously disclosed in any of his expert reports.

¹ See Roche’s Opposition to Amgen Inc.’s Motion to Strike Expert Testimony Regarding Amgen’s Motion for Summary Judgment of No Obviousness-Type Double Patenting, filed contemporaneously herewith.

Specifically, Amgen submitted along with its Motion for Summary Judgment of No Obviousness-Type Double Patenting, new opinions of Dr. Ralph A. Bradshaw. Dr. Bradshaw alleged for the first time in his Declaration filed June 14, 2007 that “it is my opinion that one of ordinary skill in the art in 1983-1984 would have found the erythropoietin purification process claimed in the Lai ‘016 patent claims, including claim 10, to be non-obvious over any of the claims in Dr. Lin’s ‘933, ‘422, ‘349, ‘868 and ‘698 patents” (D.I. 504 at ¶ 33), and further that “the United States Patent Office apparently also considered the erythropoietin purification process claimed in the Lai ‘016 patent to be new and not obvious, because it granted a patent to Drs. Lai and Strickland for their invention.” *Id.* at ¶34. Dr. Bradshaw had not previously made any comparison between the claims in suit and the ‘016 patent claims, nor had he given any indication of expertise or opinions with regard to actions by the USPTO. *See e.g.*, Ex. B,² 5/11/07 Rebuttal Report of Ralph A. Bradshaw, Ph.D. ¶¶ 12-14, 81; Ex. C, 6/1/07 Rebuttal Report of Ralph A. Bradshaw, Ph.D. to New Non-Infringement Arguments Raised in the Rebuttal Reports of Defendants’ Experts ¶¶ 4-5.

Defendants submit that Amgen Inc.’s Motion to Strike Untimely Expert Testimony Regarding Amgen’s Motion for Summary Judgment of No Obviousness-Type Double Patenting should be denied. But in the event it is granted, then, for the reasons set forth above the new opinions in paragraphs 33 and 34 of the Declaration of Dr. Ralph A. Bradshaw should be likewise stricken.

² Ex. __” refers to exhibits submitted herewith the Declaration of Timothy M. Murphy in Support of Defendants’ Memorandum in Opposition to Amgen Inc.’s Motion to Strike Untimely Expert Testimony and Defendants’ Motion, in the Alternative, to Strike Untimely Testimony of Ralph A. Bradshaw Regarding Amgen’s Motion for Summary Judgment of No Obviousness-Type Double Patenting, filed contemporaneously herewith.

Dated: July 16, 2007
Boston, Massachusetts

Respectfully submitted,

F. HOFFMANN-LA ROCHE LTD,
ROCHE DIAGNOSTICS GMBH,
and HOFFMANN-LA ROCHE INC.

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on the above date.

/s/ Keith E. Toms
Keith E. Toms