

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

AMGEN, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 05 CV 12237 WGY
)	
F. HOFFMANN-LAROCHE LTD.,)	
a Swiss Company, ROCHE DIAGNOSTICS)	
GMBH, a German Company, and)	
HOFFMANN LAROCHE INC., a New)	
Jersey Corporation,)	
)	
Defendants.)	

**PLAINTIFF AMGEN’S MOTION *IN LIMINE* NO. 11:
EXCLUDE THE 1986 LAI ET AL. PAPER [ROCHE TRIAL EXH. 501]
BECAUSE IT IS NOT PRIOR ART**

Pursuant to FRE 402 and 403, Plaintiff Amgen Inc. ("Amgen") requests that this Court preclude Defendants F. Hoffmann-La Roche Ltd., Roche Diagnostics GmbH, and Hoffmann-La Roche Inc. (collectively "Roche") from offering as evidence at trial Roche Trial Exhibit No. 501, *Lai et al.*, "Structural Characterization of Human Erythropoietin," *J. Biol. Chem.* (1986) 261(7):3116-21 ("the 1986 *Lai et al.* paper"), and any testimony referring or relating to the experiments or results reported in that paper.

The 1986 *Lai et al.* paper was submitted for publication over one and one-half years (and was published over two years) after Dr. Lin filed his first patent application (December 13, 1983), and almost one year after Dr. Lin filed his last application (November 30, 1984). Consequently, the 1986 *Lai et al.* paper does not qualify as prior art under 35 U.S.C. §§ 102 or 103, and should be excluded as irrelevant under FRE 402.

The 1986 *Lai et al.* paper is also not probative of the level of skill in the art in 1983 or 1984 since it relies on technology, including Dr. Lin’s invention, that was not available to one of

ordinary skill in the art in 1983 or 1984. Therefore, it cannot be probative of what one of ordinary skill in the art in 1983-84 would have reasonably expected to accomplish. Admitting the 1986 Lai *et al.* paper into evidence will unfairly prejudice the jury's consideration of the prior art and state of the art of protein sequencing in 1983-84. Accordingly, the 1986 Lai *et al.* paper should be excluded from evidence pursuant to FRE 403.

In support of this motion, Amgen submits a brief with an accompanying declaration and exhibit thereto.

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Of Counsel:

STUART L. WATT
WENDY A. WHITEFORD
MONIQUE L. CORDRAY
DARRELL G. DOTSON
KIMBERLIN L. MORLEY
ERICA S. OLSON
AMGEN INC.
One Amgen Center Drive
Thousand Oaks, CA 91320-1789
(805) 447-5000

Respectfully Submitted,

AMGEN INC.,
By its attorneys,

/s/ Michael R. Gottfried

D. DENNIS ALLEGRETTI (BBO#545511)
MICHAEL R. GOTTFRIED (BBO#542156)
PATRICIA R. RICH (BBO#640578)
DUANE MORRIS LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
Telephone: (857) 488-4200
Facsimile: (857) 488-4201

LLOYD R. DAY, JR. (*pro hac vice*)
DAY CASEBEER
MADRID & BATCHELDER LLP
20300 Stevens Creek Boulevard, Suite 400
Cupertino, CA 95014
Telephone: (408) 873-0110
Facsimile: (408) 873-0220

WILLIAM GAEDE III (*pro hac vice*)
McDERMOTT WILL & EMERY
3150 Porter Drive
Palo Alto, CA 94304
Telephone: (650) 813-5000
Facsimile: (650) 813-5100
KEVIN M. FLOWERS (*pro hac vice*)
MARSHALL, GERSTEIN & BORUN LLP
233 South Wacker Drive
6300 Sears Tower
Chicago IL 60606
Telephone: (312) 474-6300
Facsimile: (312) 474-0448

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I certify that counsel for the parties have conferred in an attempt to resolve or narrow the issues presented by this motion and no agreement was reached.

/s/ Michael R. Gottfried
Michael R. Gottfried

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the Electronic Case Filing (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/ Michael R. Gottfried
Michael R. Gottfried