UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMGEN INC.,

Plaintiff,

v.

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

Defendants.

Civil Action No. 05-12237-WGY

U.S. District Judge William G. Young

**ROCHE'S OPPOSITION TO AMGEN'S MOTION *IN LIMINE* NO. 2: EXCLUDE REFERENCE TO ALLEGATIONS AGAINST AMGEN'S WITNESS MADE IN UNRELATED SECURITIES LITIGATIONS**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES

## MISCELLANEOUS

## I. INTRODUCTION

Amgen seeks to call at trial Dennis Fenton, a high-ranking Amgen executive whom Amgen never identified as having knowledge of relevant facts or discoverable information prior to the close of discovery in this case. As a result of Amgen's failure timely to identify Mr. Fenton, Roche has little idea of what, if any, relevant information Mr. Fenton could testify to, which is the basis for Roche's motion to preclude his testimony.[1] Mr. Fenton's lack of pertinent knowledge and status as a soon-to-be-retired long-serving executive suggests that Amgen will call him as a face-of-the-company witness to testify generally about Amgen's business practices, values and integrity in developing and securing patents on its products.

Although Amgen has disclosed precious little information about what Mr. Fenton may testify about, Amgen seeks, prior to his taking the stand, to forestall any inquiry during Mr. Fenton's cross-examination about multiple securities complaints accusing him and others at Amgen of deceiving and misleading investors, and illegally trading stock on inside information. The Court should reject Amgen's attempt to preclude these areas of Mr. Fenton's cross-examination. The pending securities complaints, and charges of insider trading against Mr. Fenton, are potential impeachment material to contradict

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[1] This Court deferred ruling on Roche's motion to preclude Mr. Fenton's testimony, stating that whether he may testify is a "very close question" that will "turn on the mandatory disclosure provisions of Rule 26." (Order denying Defs.' Mot. To Preclude Test., Aug. 21, 2007, Docket No. 774). In fact, prior to the close of discovery Amgen never disclosed Mr. Fenton as a person with relevant information, a glaring failure that should preclude his testimony. Nor is it any excuse, as Amgen suggests in a supplemental brief for which it has sought leave to file, that Mr. Fenton was not disclosed because Amgen planned to call another person, who is now unwell, to testify. Rule 26(a)(1) requires the disclosure of "each individual likely to have discoverable information," that the disclosing party "may" use, not only the individuals that it actually plans to use. FRCP 26(a)(1)(A).

testimony regarding Amgen's integrity and forthrightness. Moreover, the complaints are admissible under FRE 608(b) to challenge Mr. Fenton's credibility, which Amgen will invariably put in issue on direct. Nor is any reference to the securities complaints unduly prejudicial or likely to confuse the jury. Accordingly, Amgen's motion should be denied or, at a minimum, deferred until Mr. Fenton appears at trial and there is greater clarity as to the subject of his testimony.

## II. FACTS

Dennis Fenton is a 55-year-old Executive Vice-President at Amgen, who Amgen recently announced would retire at year-end after 25 years with Amgen.[2] In announcing his retirement, Amgen noted that Mr. Fenton is a research scientist who "worked in and led virtually every part of Amgen over the years."[3] In addition, Amgen's CEO commented that Mr. Fenton is "one of the greatest champions of the Amgen values and a true ambassador of our heritage."[4]

Despite his involvement in "virtually every part" of Amgen's business over 25 years, Amgen did not within the discovery period identify Mr. Fenton pursuant to FRCP 26(a)(1) as someone with discoverable information who Amgen may use to support its claims against Roche. Nor has Amgen ever identified Mr. Fenton as someone with knowledge of matters raised in Roche's interrogatories. Only in a supplemental

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2 Press Release, Amgen Inc., Dennis Fenton, Executive Vice President of Operations, Elects to Retire after 25 Years with Amgen (Aug. 1, 2007), *available at* http://www.amgen.com/media/media_pr_detail.jsp?releaseID=1035406.

3 *Id.*

4 *Id.*

Rule 26(a)(1) list served on July 10, 2007, long after the close of discovery, did Amgen for the first time identify Mr. Fenton as having any information about this case.

Amgen's late identification of Mr. Fenton fails to provide details of just what it is Mr. Fenton has information about. In its July 10 Rule 26 supplement, Amgen included Mr. Fenton among numerous others as someone on whom it may rely upon to support its claims regarding the broad topics of research and development of inventions described and claimed in the patents-at-suit, prior art, and objective evidence of non-obviousness of Dr. Lin's inventions. In its brief, Amgen is no more specific, stating with deliberate vagueness that Mr. Fenton's proposed testimony at this trial will concern "the development of products in Amgen's laboratories." (Amgen's Br. 4).

At issue in Amgen's motion *in limine* are ten complaints against Mr. Fenton and Amgen pending in California federal and state courts alleging that Mr. Fenton and others have from May 2005 to March 2007, deliberately misrepresented facts and concealed information from Amgen's shareholders that have artificially inflated Amgen's stock price and harmed Amgen's business. Contrary to Amgen's claim that Mr. Fenton is only named in these suits because he is a controlling person under § 20 of the Securities Exchange Act of 1934, the complaints themselves reveal that Mr. Fenton is charged individually with deceiving investors and misrepresenting facts about Amgen's clinical trials and whether it properly marketed its products -- including Epogen, the very product covered by the patents-in-suit in this case.[5] In particular, the complaints outline a series of Amgen statements that it was properly marketing its products, and that various of its

[5] *See* Compl. ¶¶ 12, 20, *Kairalla v. Amgen Inc.*, No. CV07-2536 (C.D. Cal. Apr. 17, 2007) (charging Mr. Fenton as an individual defendant); Compl. ¶¶ 13, 39, *Larson v. Sharer*, No. SC050311 (Cal. Super. Ct. Apr. 30, 2007) (same).

clinical studies showed positive results, statements the complaints allege Mr. Fenton and others knew were false.

Even more specific to Mr. Fenton, various of the complaints allege insider trading -- that Mr. Fenton sold millions of dollars of Amgen stock while in possession of material adverse information that negatively affected Amgen's stock price.[6] Mr. Fenton's stock selling alleged in the complaints is corroborated by Amgen's securities filings.

## III. ARGUMENT

### A. The Securities Actions Constitute Potential Impeachment Material

Mr. Fenton's position as the highest ranking Amgen executive expected to testify at trial (Amgen's Br. 1), combined with his notable absence from Amgen's interrogatories and timely-filed mandatory Rule 26(a)(1) disclosures as a person with knowledge about the matters at issue at trial, makes it very likely that Mr. Fenton will simply be a face-of-the-company witness that Amgen will proffer to testify as to Amgen's business practices generally to demonstrate that Amgen is an exemplary corporate citizen. The few clues as to the subject of his testimony -- such as the "development of products" by Amgen -- suggest that Mr. Fenton will offer general testimony to the jury that Amgen is an upstanding company that develops products in accordance with high ethics and values, that will suggest to the jury that Amgen would not deceive, or withhold information from, the U.S. Patent and Trademark Office in securing patents for its inventions. To the extent Amgen seeks to portray itself before the jury in such a manner via the putative testimony of Mr. Fenton, the fact of the securities

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[6] *See, e.g.*, Compl. ¶ 64, *Larson*, No. SC050311; Compl. ¶ 61, *Mendell v. Amgen Inc.*, No. CV07-02849 (C.D. Cal. Apr. 30, 2007).

complaints, including the insider trading allegations against Mr. Fenton and others, will contradict such testimony. Thus, the complaints constitute potential impeachment material, to which Roche should not at this juncture be precluded from referring.

**B. The Securities Complaints Are Probative Under FRE 608**

In addition to being relevant as potential impeachment material, the securities complaints are also probative at trial under FRE 608(b) as material with which Roche can challenge the credibility of Mr. Fenton on cross-examination.

A witness "puts his credibility at issue when he takes the stand." *United States v. Mateos-Sanchez*, 864 F.2d 232, 237 (1st Cir. 1988). FRE 608(b) "allows specific instances of misconduct to be 'inquired into' on cross-examination to attack credibility." *Id.* The specific instances of conduct referred to during cross-examination should be probative of the witness's character for truthfulness. *United States v. Abel*, 469 U.S. 45, 55 (1984). Such determination lies within the "very substantial" discretion of the trial court. *Mateos-Sanchez*, 864 F.2d at 236. Factors pertinent to the Court's discretion include whether there is "some similarity" between the misconduct and the conduct at issue at trial, whether the misconduct is remote in time, whether the evidence is cumulative, and whether there is "some likelihood" that the misconduct happened. *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001). The particular prior act probative of untruthfulness, however, need not be the same as the conduct at issue at trial. *See Simonelli*, 237 F.3d at 23 (holding that the trial court, in a prosecution for tax fraud, did not err in permitting cross-examination about the defendant's altering time-cards, inflating bills, and stealing company records).

Here, the allegations against Mr. Fenton and others at Amgen of deceiving investors and trading on inside information plainly go to the witness's character for

truthfulness. Numerous courts have held that fraud, including securities fraud as alleged against Mr. Fenton, are relevant to a witness's character for truthfulness.[7] Moreover, the factors in *Simonelli* counsel for admissibility of the complaints under FRE 608(b): Amgen's deception of, and withholding information from, its investors bears "some similarity" to whether Amgen deceived and withheld information from the U.S. Patent and Trademark Office; the misconduct is not remote in time or cumulative of other evidence; and there is some likelihood that the misconduct happened because the allegedly false statements were made by Amgen, and Amgen's securities filings corroborate Mr. Fenton's extensive stock sales as alleged in the complaints.

Contrary to Amgen's position, it is of no significance that the securities complaints contain only allegations against Mr. Fenton and others rather than final judgments of fraud and insider trading. There is no limitation in Rule 608(b) that requires past misconduct to have been adjudicated. Indeed, the First Circuit has held that the fact that a witness was named as a defendant in civil complaints, alleging medical malpractice, "pertained to his credibility as a witness." *Navarro de Cosme v. Hosp. Pavia*, 922 F.2d 926, 932-33 (1st Cir. 1991).[8]

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[7] *See, e.g.*, *United States v. Gay*, 967 F.2d 322, 328 (9th Cir. 1992) ("[P]rior frauds [are] considered probative of the witness's character for truthfulness or untruthfulness."); *Varhol v. Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1567 (7th Cir. 1990) ("Acts involving fraud clearly raise . . . doubt" as to "a witness's reliability for telling the truth."); *see also United States v. Thiango*, 344 F.3d 55, 60 (1st Cir. 2003) (engaging in deceptive practices to facilitate sham marriage and avoid immigration laws is fairly probative of truthfulness).

[8] Amgen's reliance on *United States v. Morrison*, 98 F.3d 619 (D.C. Cir. 1996), is misplaced. *Morrison*'s holding that affirmed the preclusion of inquiry about the fact of a complaint filed against a witness, *id.* at 628, did not address the situation where the cross-examination inquired into the substance of the complaint -- a shortcoming noted by the D.C. Circuit in a later case. *See United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004) ("We did not address [in

Nor can Amgen legitimately claim that Mr. Fenton's character for truthfulness will not be at issue. Testimony that he offers on direct, whether about Amgen's development of products or about Amgen generally, will be premised on the jury believing what he says is true.

### C. Jury Confusion and Undue Prejudice Will Not Result From Reference To the Securities Complaints

Amgen further claims that cross-examination of Mr. Fenton about the securities complaints should be barred under FRE 403 because the jury "may not understand" that the complaint consists of allegations as opposed to a final judgment. (Amgen's Br. 1). Amgen sorely underestimates the capability of the jury to comprehend such distinctions. Amgen is free to clarify to the jury that the securities complaints are only allegations, not judicial determinations of wrongdoing. A Boston jury is fully capable of understanding the difference between allegations and proven charges, especially given their role at trial to determine if the parties' allegations are in fact proven. Nor will undue prejudice result that outweighs the probative value of the securities complaints to Mr. Fenton's character for truthfulness, or to contradict assertions about Amgen's business practices.

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*Morrison*] what difference it might have made had the defendant sought to cross-examine the witness about the *substance* of the complaint."). Moreover, the holding in *Morrison* is inconsistent with the ruling of the First Circuit in *Navarro de Cosme* cited above.

## IV. CONCLUSION

For the reasons set forth above, Amgen's motion *in limine* to exclude references to allegations against Amgen witnesses in securities litigations should be denied.

Dated: September 1, 2007
Boston, Massachusetts

Respectfully submitted,

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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/ *Thomas F. Fleming*
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