

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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

**AMGEN INC.'S OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO  
PRECLUDE PLAINTIFF FROM OBJECTING TO DEPOSITION DESIGNATIONS IN  
LIEU OF LIVE TESTIMONY**

## I. INTRODUCTION

Roche insists on presenting its case before a jury, but at the same time seeks to deprive the jury from fully assessing the evidence and credibility of witnesses by offering deposition testimony when live witnesses are available to testify at trial. Because deposition testimony “has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand,”<sup>1</sup> and Amgen has repeatedly attempted to coordinate the availability of its witnesses for live trial testimony, Roche should provide live testimony whenever possible. Since Amgen has offered to bring each witness to court, none are “unavailable” within the meaning of FRCP 32.

Roche would have the Court believe that trial-by-deposition is more “orderly and efficient,” would “streamline” the presentation of information to the jury and allow for “minimal inconvenience” to witnesses.<sup>2</sup> Unfortunately, as courts have noted, trial-by-deposition deprives the jury of critical information and interferes with jurors’ understanding of the evidence.<sup>3</sup> The practice should be eliminated whenever possible.

Roche asserts that Amgen “agreed” to Roche’s plan to try its case-in-chief through deposition testimony.<sup>4</sup> This assertion is false. Amgen objected to Roche’s voluminous and repeatedly-supplemented deposition designations. Amgen reiterated its request that Roche provide notice regarding the Amgen witnesses that Roche intended to call in its case-in-chief so that Amgen could ensure the availability of witnesses for live testimony. Simply put, Amgen

---

<sup>1</sup> *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Learned Hand, J.); *Loinaz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990) (quoting *Napier*).

<sup>2</sup> 9/1/07 Mem. of Law in Supp. of Defs.’ Mot. *In Limine* to Preclude Pl. From Objecting to Deposition Designations in Lieu of Live Testimony (Docket No. 937) [hereinafter Roche Mem.].

<sup>3</sup> *See, e.g., Loinaz*, 901 F.2d at 8 (abuse of discretion for trial court not to delay or reorder trial to allow presentation of live evidence, especially when credibility at issue).

<sup>4</sup> Roche Mem. at 1, 2.

never consented to the use of depositions over live testimony.<sup>5</sup>

For the reasons set forth below, Amgen respectfully requests that the Court deny Roche's motion *in limine* and require that Roche provide live witness testimony (Docket No. 936).

## II. ARGUMENT

### A. LIVE TESTIMONY PROVIDES THE JURY WITH A MORE FULSOME UNDERSTANDING OF EVIDENCE AND IS PREFERRED IN U.S. COURTS.

The preference for live testimony is reflected in the Federal Rules of Civil Procedure: “the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise.”<sup>6</sup> Although the Federal Rules permit the limited use of deposition testimony at trial in certain circumstances,<sup>7</sup> the First Circuit has noted that the practice should be limited: “The Federal Rules of Civil Procedure that allow the use of deposition testimony in place of live testimony ‘have not changed the long established principle that *testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.*’”<sup>8</sup>

The availability of videotaped depositions does not alter the preference for live testimony. Jurors are most engaged when presented with the testimony of a live witness; deposition testimony—even if videotaped—often interferes with jurors' understanding,

---

<sup>5</sup> Indeed, recognizing that deposition testimony would not be required for live witnesses, Roche agreed that the parties would not exchange counter-designations for witnesses appearing live. *See* Exh. 1, 7/30/07 Letter from Brown to Fleming; Exh. 2, 8/2/07 Letter from Brown to Fleming. All citations to numbered exhibits herein refer to exhibits to the Declaration of Aaron R. Hand Brown in Support of Amgen Inc.'s Opposition to Defendants' Motion *In Limine* to Preclude Plaintiff From Objecting to Deposition Designations In Lieu of Live Testimony.

<sup>6</sup> Fed. R. Civ. P. 43(a).

<sup>7</sup> *See, e.g.*, Fed. R. Civ. P. 23.

<sup>8</sup> *Loiniz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990) (quoting 8 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2142 (1970)) (emphasis added).

particularly when presented with complex issues:

To best fulfill its fact-finding duties, a jury should be engaged and highly sensitive to each witness. As this Court knows all too well, *the deposition, whether read into the record or played by video, has the opposite effect. It is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom.*<sup>9</sup>

The same court noted that parties should be precluded from the tactical use of deposition testimony to avoid “surprises” that live testimony may introduce.<sup>10</sup>

Although the admission of deposition testimony is within the Court’s discretion, live testimony is universally preferred. A court “cannot possibly cause unfair prejudice” by requiring live testimony.<sup>11</sup> Even if requiring live testimony is inconsistent with the Fed. R. Evid. (which is not the case here), there is still no prejudice.<sup>12</sup> Roche will not be unfairly prejudiced by calling Drs. Goldwasser, Egrie, Strickland and Elliott live at trial—especially since Roche expressed its intent to call live Amgen witnesses in the Joint Pre-Trial Memorandum.<sup>13</sup>

Furthermore, it may be legal error to permit testimony by deposition when live testimony is available. The First Circuit held that a district court erred in admitting videotaped depositions instead of requiring live testimony where there was no showing that the requirements of Rule 32 were satisfied.<sup>14</sup> Other courts have explained that witness availability must be assessed

---

<sup>9</sup> *In re Vioxx Prods. Liab. Litig.*, 438 F. Supp. 2d 664, 668 (E.D. La. 2006).

<sup>10</sup> *In re Vioxx Prods. Liab. Litig.*, 439 F. Supp. 2d 640, 643-44 (E.D. La. 2006).

<sup>11</sup> *Dhyne v. Meiners Thriftway, Inc.*, 184 F.3d 983, 990 (8th Cir. 1999) (“Precluding a party from reading the deposition testimony of an available adverse party witness is at worst harmless error.”).

<sup>12</sup> *Id.*

<sup>13</sup> 8/10/07 Joint Pre-Trial Memorandum, Exh. F (Docket No. 807-7).

<sup>14</sup> *Frechette v. Welch*, 621 F.2d 11, 14 (1st Cir. 1980) (“We therefore conclude that the district court erred in allowing defendant, over objection, to use the depositions . . . without an adequate showing that any of the conditions of Fed.R.Civ.P. 32(a)(3) were met.”).

throughout trial.<sup>15</sup> And to prevent gamesmanship, some courts hold that deposition testimony introduced in earlier parts of trial is rendered inadmissible if a witness later appears live at trial.<sup>16</sup>

Roche's previous demand for a trial-by-jury is wholly inconsistent with its current attempt to deprive the jury from hearing live testimony. Roche should be precluded from arguing that Amgen's witnesses are "unavailable" because Amgen has repeatedly offered to secure their attendance at trial so long as Roche provided appropriate notice.

**B. AMGEN NEVER CONSENTED TO THE USE OF DEPOSITION TESTIMONY IN LIEU OF LIVE TESTIMONY, AND HAS REPEATEDLY OFFERED TO SECURE WITNESSES FOR LIVE TESTIMONY.**

Amgen never consented to the use of deposition testimony when live witnesses were available. Instead, Amgen repeatedly objected to Roche's last minute designation of deposition testimony, and to Roche's unilateral supplementation after every agreed-upon deadline.

The availability of Dr. Egrie to testify live at trial has never been questioned. In exchange for Roche's consent that her deposition not be videotaped, Dr. Egrie agreed to appear live should Roche seek to introduce her testimony at trial. In witness lists exchanged between the parties on July 28, 2007, Roche indicated that it planned to call Dr. Egrie live at trial. On July 30, 2007 Amgen requested that Roche provide a "date certain for when [Roche plans] to call Joan Egrie at trial," and stated, "if you plan to call any other Amgen witnesses in your case-in-chief, please provide us with notice immediately of who you plan to call and when you plan to call them."<sup>17</sup> Roche did not respond.

Until filing its instant motion, Roche indicated that it intended to introduce live testimony

---

<sup>15</sup> *Hartman v. United States*, 538 F.2d 1336, 1345 (8th Cir. 1976).

<sup>16</sup> *Klepal v. Pennsylvania Railroad Co.*, 229 F.2d 610 (2d Cir. 1956) (use of depositions of three witnesses who later testified was error); *United States v. IBM Corp.*, 90 F.R.D. 377, 382 (S.D.N.Y. 1981) ("[FRCP 32] was not intended to allow parties to combine deposed with live testimony").

<sup>17</sup> Exh. 3, 7/30/07 Letter from Brown to Fleming.

of Amgen witnesses in its case-in-chief. On August 10, 2007, Roche identified Drs. Lin, Egrie, Goldwasser and Strickland as “live” witnesses in the Joint Pretrial Memorandum.<sup>18</sup>

On August 15, Roche reiterated its intention to call Dr. Lin in its case-in-chief.<sup>19</sup> Amgen requested a three-day window so that Amgen could coordinate Dr. Lin’s availability, requested that Roche provide immediate notice of other Amgen witnesses that Roche intended to call, and reiterated its request for the dates that Roche intended to call Dr. Egrie.<sup>20</sup>

Roche did not respond until late August. Although Roche provided a three-day window for Dr. Lin’s appearance, Roche provided no information about other Amgen witnesses, nor did it provide dates so that Dr. Egrie could plan her travel schedule.<sup>21</sup> Instead, in separate correspondence, Roche performed an about-face, disclosing its intention to use the deposition testimony of Drs. Egrie, Goldwasser, Elliott, and Strickland, as well as other Amgen witnesses.<sup>22</sup>

Amgen objected the same day: “Joan Egrie, Eugene Goldwasser, Steven Elliott and Thomas Strickland are all scheduled to appear live at trial, and Roche should examine them live instead of using deposition designations.”<sup>23</sup> Amgen requested three-day windows during which Roche intended to call the witnesses, and reiterated its request the following day.<sup>24</sup>

Instead of simply answering Amgen’s repeated inquiries or providing Amgen with reasonable notice so that it could ensure the availability of live witnesses, Roche unnecessarily burdened the court with its instant motion. Amgen attempted to facilitate Roche’s introduction

---

<sup>18</sup> 8/10/07 Joint Pre-Trial Memorandum, Exh. F (Docket No. 807-7).

<sup>19</sup> Exh. 4, 8/15/07 Email from Fleming to Fishman.

<sup>20</sup> Exh. 5, 8/16/07 Letter from Brown to Fleming.

<sup>21</sup> Exh. 6, 8/27/07 Letter from Fleming to Fishman.

<sup>22</sup> Exh. 7, 8/27/07 Letter from Fleming to Brown.

<sup>23</sup> Exh. 8, 8/27/07 Letter from Brown to Fleming.

<sup>24</sup> Exh. 9, 8/28/07 Letter from Brown to Fleming.

of live trial testimony, but Roche refused to respond. Because Roche misrepresents Amgen's position regarding live trial testimony, and because American courts uniformly embrace live testimony instead of deposition testimony, Roche's motion should be denied.

**C. THE COURT SHOULD NOT BE PERSUADED BY ANY CLAIMS THAT ROCHE IS SOMEHOW INCONVENIENCED BY INTRODUCING LIVE WITNESS TESTIMONY; ANY INCONVENIENCE IS THE RESULT OF ROCHE'S ATTEMPTED GAMESMANSHIP.**

Both Amgen and Roche agreed that the parties owed each other advance notice before calling a fact witness of the opposing party. In the Joint Pre-Trial Memorandum, Roche agreed to provide "reasonable notice," while Amgen requested at least three days notice.<sup>25</sup>

To the extent that Roche may now need to adjust its trial schedule to accommodate the availability and travel schedules of the Amgen witnesses that Roche intends to call in its case-in-chief, such inconvenience is Roche's own fault. Amgen in good faith attempted to ensure the availability of Amgen witnesses on the dates that Roche wished to call those witnesses. Roche's gamesmanship and attempts to inconvenience Amgen and its witnesses are unfair and prejudicial and this Court should not allow it. Roche cannot expect that every potential witness in this case will be available at a moment's notice when Roche consistently refused to participate in efforts to coordinate their availability.

As a result of Roche's delay tactics, it may be necessary for Roche to adjust its schedule to accommodate the last-minute travel of certain witnesses. The Court should not entertain any claims of prejudice or inconvenience that Roche may advance, because any inconvenience is properly attributed to Roche. Furthermore, the Court should not consider witnesses to be "unavailable" when Roche prevented their timely attendance by refusing to cooperate in securing live witness testimony.

---

<sup>25</sup> 8/10/07 Joint Pre-Trial Memorandum, at 39 (Docket No. 807).

### III. CONCLUSION

The law is clear that witnesses should be called live whenever possible: “[A] videotape deposition is usually better than a stenographic deposition when the witness cannot appear at trial; however, since demeanor is best judged by live testimony, live testimony is usually better than videotaped testimony.”<sup>26</sup>

Because Roche’s position is inconsistent with the Federal Rules and established case law, and because Amgen has consistently offered to make various witnesses available for live testimony in Roche’s case-in-chief, Amgen respectfully requests that the Court deny Roche’s motion *in limine* (Docket No. 936), and instead require that Roche offer the live testimony of Drs. Goldwasser, Egrie, Strickland and Elliot after providing Amgen and the witnesses with reasonable notice of the dates on which they can expect to be called to testify.

---

<sup>26</sup> *Windsor Shirt Co. v. New Jersey Nat’l Bank*, 793 F. Supp. 589, 608 (D. Pa. 1992).



Respectfully Submitted,

AMGEN INC.,  
By its attorneys,

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

/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

September 3, 2007

