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July 18, 1997

By Facsimile

Donald R. Ware
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One Post Office Square
Boston, MA 02109

Re: Bayh-Dole Petition of CellPro, Inc.

Dear Don:

I am writing in response to your letter of July 15 requesting certain information you say Hopkins needs to assist it in evaluating CellPro's July 2, 1997, submission to NIH.

At the outset of your letter, you state that "CellPro's entire 'patient access' argument" rests on the financial impact of the form of injunction proposed by your clients. That is not correct. In fact, there are important health needs that can only be satisfied by ensuring that CellPro's CEPRATE SC System and second generation products and the unique cell populations they produce continue to be available to patients who need them. Similarly, the disadvantages of the Baxter Isolex 300SA compared to the CellPro System have nothing to do with the financial impact of the injunction being sought but rather with the term of the proposed injunction that would force the CellPro System off the market upon approval of the 300SA "alternative." And, as you pointed out in your letter to Barbara McGarey of June 17 (and as echoed in Dr. Hausman's accompanying declaration), while the problem is exacerbated by the terms of the proposed injunction, the real issue relates to the lack of a license that would enable CellPro to make the kinds of investments that are needed in order to move forward and provide the technology to victims of cancer and other diseases.

I assume your letter seeks information you believe is relevant to assessing the consequences that the absence of a license (Bayh-Dole or other) will have on public health needs in this country. In that connection, I had previously seen your letter of June 10 and know that it was regarded by patent counsel not really as being intended to elicit information, in large part because it would have been clearly impossible to comply within the time demanded. Your letter of July 15 provides only slightly more time. It also has many of the same defects in terms of seeking far more detail than CellPro could possibly provide or you could possibly need (or use) and raising serious issues of maintaining the confidentiality of sensitive business and financial information. Accordingly, I am not in a position to respond to that June 10 letter.

Nevertheless, CellPro has no intent to "conceal" any information. We have tried to answer all questions raised by the staff at NIH and stand ready to respond to any further requests they may make. In addition, I have tried below to respond to the new questions raised in your letter of July 15 as best I can given the time available.

You first appear to question how CellPro could project sales in the United States of 1,360 disposable kits in the fiscal year from April 1, 1997, through March 31, 1998, when it sold only approximately 20 such kits in this country in the preceding three months. As you know, CellPro could not market the CEPRATE System in the United States until after FDA approval in December 1996. Until that time, it essentially had no sales force or marketing organization in this country. The 1997/98 projections were based on the placement of additional Systems (which is happening, though at perhaps a reduced rate because of the uncertainty created by the ongoing patent dispute) and increasing demand for the system by physicians and their patients. Most of the 1,360 units estimated to be sold under the conservative United States sales projections -- which I note are only about 50 percent of the estimated sales for the same period in the rest of the world assuming no injunction interferes with those sales -- are projected to occur in the last half of the fiscal year, and year to date results are consistent with achieving those projections if CellPro has the assurance that it will not be forced out of business by an injunction of the type you are seeking.

It is not clear to me what the relevance is of the inventory data sought in your letter. I am advised, however, that of the $5 million in inventories reported in CellPro's 10-K as of March 31, 1997, approximately half was in the form of finished goods, including (among other things) varying quantities of different components (e.g., columns, tube sets, reagents, vials of antibody) used in CellPro CEPRATE SC, LC, and TCD System disposable antibody kits. Financial data for the quarter ended June 30, 1997, is not yet available, and I am not in a position to provide the kind of detailed cost accounting data that would have to be generated to respond to the remainder of your inquiry.

Alex. Brown's March 1997 Form 13f filing with the SEC indicates that the firm holds 548 shares of CellPro stock. To the best of CellPro's knowledge, the number has not changed since that time. The agreement for financial advisory services between Alex. Brown and CellPro does not contemplate Alex. Brown's arranging a financing. Thus, there is no basis for the implication in your letter that Alex. Brown may have been biased in giving its opinion on account of a financial incentive related to CellPro's obtaining a Bayh-Dole license.

CellPro's July 2 Response did not attempt to make "an issue of Dr. Rowley's relationship with Baxter." The only mention of Dr. Rowley was in the statement "Even Dr. Scott Rowley of the Fred Hutchinson Cancer Research Center, a member of Baxter's scientific advisory board who is often quoted by Baxter, has admitted that CellPro is ahead of Baxter in terms of developing a way to remove the donor lymphocytes thought to produce graft versus host disease." CellPro currently has no active scientific advisory board and has not had one for several years. All of the 26 clinicians who submitted declarations in support of CellPro's opposition to the injunction being sought by your clients had participated in one or more clinical

trials involving the CellPro CEPRATE System. (Since CellPro's product was not available for commercial sale until December 1996, these were the only clinicians to whom CellPro's product was available and who therefore were knowledgeable enough about it to submit a declaration. I assume the same must be true of Baxter's declarants.) Of the 26 clinicians, only one, who served on a CellPro data safety monitoring committee, received any direct financial support from CellPro. Fourteen others were investigators in CellPro-sponsored clinical trials. Each such trial was conducted under a contract with a research institution that provided for payment to the institution of an amount agreed to by the institution. CellPro has no way of knowing what, if any, portion of these amounts went to support the clinicians involved in the trials. Consistent with FDA requirements, CellPro also provided free product used in these trials. The only "financial support" provided to the remaining clinicians was in the form of free or cost recovery product for use in investigator-supported clinical trials.

I was surprised by the claim in your letter that CellPro's July 2 Response and my cover letter "grossly mischaracterize the CellPro proposal" to take a license, thereby ensuring patient access to stem cell technology and mooting the pending Bayh-Dole and court injunction proceedings. Your letter of July 3 certainly did not make such a claim. We did not attempt to lay out the back and forth on CellPro's proposal because I understood you to believe that to be unproductive (a belief I share). If you think the reference was unfair, I am sorry and would be happy to take any reasonable step to remedy that situation. We could, if you would like, put on the Internet our proposal, your response, my letter commenting on your response, and whatever additional commentary either side would like to add. I am inclined to think that that would probably not advance the process, but I would recommend it if that is what your clients would like.

In fact, I think it is you who are being unfair in your characterizations of CellPro's proposal and Baxter's response. CellPro never "insisted" on anything. It made a proposal. I wish that proposal had been accepted, but it was not. The proposal did envision continuation of the litigation as a way of getting a definitive determination from the Federal Circuit of the claim construction and validity issues that have divided the parties. I subsequently suggested an alternative dispute resolution approach to factoring in the litigation risk that both parties continue to face. I continue to be open to considering any counterproposal you may make on that or any other subject. As you know, however, it is the patent law (not anything unique in CellPro's proposal) that gives the right to any licensee not to pay royalties on an invalid patent. Moreover, CellPro's proposal did deal with the issue of past royalties and litigation expenses -- expressly offering either to abide by the court's decision on those issues or to liquidate the amounts at issue through separate negotiation.

As we have discussed, I continue to believe that the proposal made to your clients was more favorable to Baxter than the terms of the Systemix and AIS licenses. Certainly that was the intent. (Five years of royalty at 10 percent followed by six years at 7 percent would likely have a higher present value to Baxter than a flat 8 percent royalty, while at the same time mirroring the terms of the license Baxter has from Becton Dickinson.) Moreover, your clients would surely be in a far more favorable position were they to accept the proposal than would

have been the case had CellPro simply taken a license on the terms you say were available in the 1992 time frame and then sought a declaratory judgment on the claim construction and validity issues. If ensuring that a license today would have the same value as that discussed in 1992 were all that separated the parties, I am sure we could reach a resolution. I am also sure that NIH, which had the actual proposal and your response, was not misled. Again, if you think anyone else has been, I am prepared to take any reasonable steps you suggest to remedy that situation.

Sincerely,

Gary D. Wilson

cc: Barbara M. McGarey
Robert B. Lanman
Frederick G. Savage