

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JUN 5 4 03 PM '97

FILED
DISTRICT

THE JOHNS HOPKINS UNIVERSITY, a : Case No. 94-105 RRM
Maryland corporation, BAXTER :
HEALTHCARE CORPORATION, a Delaware :
corporation, and BECTON DICKINSON AND :
COMPANY, a New Jersey corporation, :

Plaintiffs, :

v. :

CELLPRO, INC., a Delaware corporation, :

Defendants. :

DECLARATION OF JAMES MACK FOLSOM

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DECLARATION OF JAMES MACK FOLSOM

I, James Mack Folsom, declare as follows:

1. I am Senior Vice President of Glassman Oliver Economic Consultants, Inc. of Washington, D.C., having been employed by the firm for over 18 years. Prior to employment at Glassman Oliver, I worked for the Bureau of Economics at the Federal Trade Commission for over 14 years where my highest position was Acting Director of the Bureau. Prior to employment at the FTC's Bureau of Economics, I taught at Duke University for four years. A copy of my curriculum vitae is attached hereto. I have reviewed the financials of CellPro, including the material attached to Mr. Larry Culver's May 28, 1997 Declaration, and the declaration of Professor Hausman in this matter dated April 27, 1997.

2. The question examined in the Hausman declaration and in this declaration is when a firm like CellPro would cease production and sale of a good. Economic theory tells us that in both the short and long run, a firm will cease sales when its variable costs exceed its revenue. The difference between the short run case and the long run case is that some costs are fixed in the short run and no costs are fixed in the long run. Economic theory also tells us that a firm may sell below cost in the short run if it believes that in the long run it will make a profit that will more than offset the losses. That condition would not apply if the relief requested were granted, forcing CellPro to pay all of its "incremental profit" to the Plaintiffs until the Plaintiffs' product obtains FDA approval and to cease sales shortly thereafter.

3. Economic theory teaches us that a multi-product firm may continue to operate if it must continue to bear all other costs even if it ceases to produce a particular product. CellPro is, however, essentially a single product firm, with sales of the products in question amounting to more than 90 percent of the firm's total sales. This means that the remaining products of CellPro cannot support the overhead and research and development expenditures that are occurring.

4. I understand that it may well be two to three years before FDA approval could be obtained by the Plaintiffs in this matter. Accordingly, CellPro's decision making mode is a long run one. From a practical standpoint, an examination should be made of what CellPro's incentives would be if it could only recover, at a maximum, its short run variable costs when it is operating in a "long run" decision mode. It is obvious that virtually all of CellPro's costs would disappear if it shuts down operation. This would include its overhead costs and its research and development costs. It follows that CellPro should close its operations down if the overhead and research and development costs can be avoided by closing down but would have to be paid if CellPro continued to operate.

5. The argument that CellPro has a substantial sum of cash should not be a factor in the decision which must be made by CellPro as to whether it should continue to do research and development and to produce and sell the relevant products. CellPro has a responsibility to its stockholders not to throw that money

away. And, stockholders could well take the view that this is what CellPro would be doing if it were to operate while losing more funds than it would lose by closing down.

6. Mr. Larry Culver, Chief Financial Officer of CellPro, has examined what would happen to CellPro's cash under several scenarios in his declaration dated May 28, 1997. His models demonstrate that even if CellPro is required to pay only a 4 percent Bayh-Dole royalty during the time that the appeal of the matter is being heard, CellPro would be unable to operate for more than two years without going to the capital market to raise more funds. Mr. Culver believes that with the cash flow situation and certainty that would result from a 4 percent royalty, CellPro could raise capital to allow it to continue to operate. The models also confirm my expectation, as indicated above, that CellPro would have to go into a shutdown mode if it were required to pay the royalty urged by the Plaintiffs in this matter. The reason is that the approximately 50 percent royalty and other injunctive relief requested by Plaintiffs would make the cash flow situation and future prospects of CellPro so bad that it would eliminate reasonable access to the capital market to raise the funds that would allow CellPro to continue to operate. Such a shutdown decision by CellPro would, of course, result in a loss of any and all public health advantages that flow from continued availability of the CellPro product.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C., this 2nd Day of June, 1997.



James Mack Folsom

CERTIFICATE OF SERVICE

I, Gerard M. O'Rourke, do hereby certify that on June 5, 1997, I caused to be served copies of the foregoing DECLARATION OF JAMES MACK FOLSOM upon the following counsel of record by the means indicated:

BY HAND:

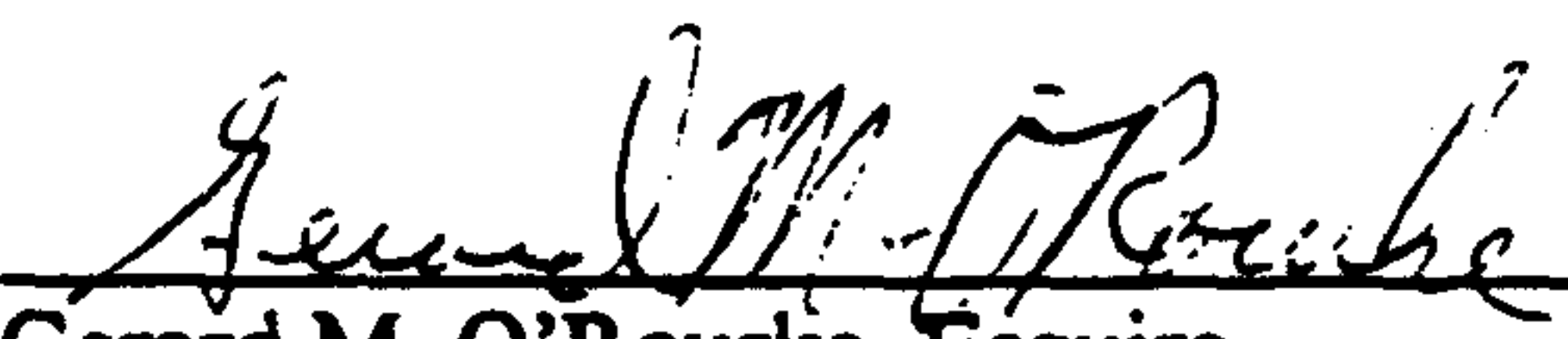
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