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June 16, 1997

Honorable Roderick R. McKelvie  
United States Courthouse  
Boggs Federal Building  
844 King Street  
Wilmington, DE 19801Re: *Johns Hopkins University, et al. v. CellPro*  
Case No. 94-105 RRM

Dear Judge McKelvie:

In a letter to the Court dated May 28, 1997, plaintiffs' counsel charged that CellPro "has sought, by various means, to intimidate clinicians who signed declarations at plaintiffs' request." Although counsel mentioned the name of Dr. Scott Rowley in the same paragraph that contained the charge, counsel provided no specifics or other explanation of the basis of the charge.

At a telephonic hearing on June 3, 1997, plaintiffs' counsel, when pressed for specifics to support his allegations, named only a single clinician, Dr. Scott Rowley, and named only one CellPro agent, Mr. Murdock, as having been involved in the episode complained of (June 3, 1997 Tr. p. 11, LL. 6-10). CellPro's counsel undertook to investigate and report back to the Court as to what contact Mr. Murdock had with Dr. Rowley and -- as Mr. Ware posed it -- "also with his department chair and the president of the institution" (*id.*, p. 12, L. 14 - p. 13, L. 18).

My investigation included interviews with Mr. Murdock, but I have not interviewed anyone connected with Dr. Rowley's institution, the Fred Hutchinson Cancer Research Center ("FHCRC") and have not revealed to anyone there that Dr. Rowley has complained, if indeed he has.

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In summary, while Mr. Murdock did speak to Dr. Rowley about his declaration, Mr. Murdock did not speak about Dr. Rowley or his declaration either to the President of FHCRC nor to Dr. Rowley's department chair. It does appear that Dr. Rowley probably did receive, from at least one superior at FHCRC, a reprimand of some kind that was in some way connected with his Declaration. This was not, however, done at the request or suggestion of Mr. Murdock. The circumstances suggest (though I cannot be sure, not having interviewed FHCRC personnel) that if there was a reprimand, it may have had to do with the fact of Dr. Rowley's (apparent) failure to seek clearance from, or even to notify, FHCRC before permitting his declaration to be used in litigation that involves technology owned by FHCRC and licensed to CellPro.

From my investigation it also appears likely that the way in which Baxter's counsel handled the Rowley Declaration after it was signed -- i.e., distributing it to the press without serving CellPro, and timing the disclosure in such a way that CellPro, and FHCRC's management, first learned of the declaration because of a phone call from a reporter -- contributed greatly to whatever difficulty Dr. Rowley may have had with FHCRC over the matter.

By way of necessary background, CellPro has pending a petition asking the U.S. Department of Health and Human Services ("HHS") to exercise "march-in" rights under the Bayh-Dole Act with respect to the Civin patents. In support of that petition, the Fred Hutchinson Cancer Research Center ("FHCRC") offered to send, and did send, a supporting letter to the Secretary of HHS on CellPro's behalf. A copy of that letter, dated April 25, 1997, is attached hereto as **EXHIBIT A**. As will be seen, the letter argues strongly in support of CellPro's "march-in" petition; and it is jointly signed by Dr. Robert W. Day, the President and Director of FHCRC, and by Dr. Leland H. Hartwell, the President and Director Elect.

Nearly a month later, on or about May 21, 1997, Mr. Murdock received a phone call from Mr. Stephan Herrera, a reporter for Forbes Magazine, who solicited CellPro's comments on what he described as a declaration by FHCRC's Dr. Scott Rowley. Mr. Herrera told Mr. Murdock that he had received the declaration from Baxter, and that he understood that it had been filed with HHS. The call came as a surprise to Mr. Murdock, not only because he had heard nothing of any such declaration but also because FHCRC, via the **EXHIBIT A** letter, was already on record in support of CellPro.

CellPro attempted, unsuccessfully, to obtain a copy of the Rowley Declaration from its outside counsel, who either could not be reached immediately or were themselves unapprised of any such declaration. With a magazine reporter expecting comment, and with an urgent need to find out what the Rowley Declaration said, CellPro then phoned the offices of Mr. Douglas Schaeffer, General Counsel of FHCRC, and Ms. Catherine Hennings, FHCRC's Director of Technology Transfer. They both had been involved in getting the **EXHIBIT A** letter, so it was reasonable to expect that they would know about any declaration that Dr. Rowley had filed with HHS, and would

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be able to get CellPro a copy. To Mr. Murdock's surprise, and evidently to the surprise of Mr. Schaeffer and Ms. Hennings also, the Rowley Declaration was news to them as well. They said they would try to get a copy and said that if CellPro obtained a copy from somewhere else in the meantime, they would like to see it.

Neither Mr. Schaeffer nor Ms. Hennings ever did send CellPro a copy of the Rowley Declaration. On the evening of May 22, 1997, a copy arrived by fax to CellPro from Wilmer, Cutler & Pickering, CellPro's Bayh-Dole counsel.<sup>1</sup> CellPro promptly sent copies to Mr. Schaeffer and Ms. Hennings, as they had requested.

I would think that between the time when CellPro asked for Mr. Schaeffer's and Ms. Hennings' help in obtaining a copy of the Rowley Declaration and the time when CellPro sent them a copy, there would have been internal communications at FHCRC in the course of efforts by Mr. Schaeffer and/or Ms. Hennings to find a copy to send to CellPro. CellPro was not a party to those internal communications and does not know what, if anything, may have been said to or about Dr. Rowley in the course of them. Mr. Murdock assures me that neither he nor, to his knowledge, anyone else at CellPro ever requested or even suggested that Dr. Rowley be in any way rebuked, censured or criticized over his declaration.

When Mr. Murdock finally succeeded in obtaining a copy of the Rowley Declaration, he saw reason for concern that HHS would be confused as to what FHCRC's position actually was with respect to CellPro's march-in petition. The Rowley Declaration mentioned prominently and repetitively that Dr. Rowley was at the Fred Hutchinson Cancer Research Center; Mr. Ware's cover letter transmitting the declaration to HHS did the same, invoking the name of FHCRC nine times; and yet the Rowley Declaration was at variance with the views expressed by both Drs. Day and Hartwell, the outgoing and incoming Presidents of the FHCRC, in their letter to HHS Secretary Shalala dated April 25, 1997 (**EXHIBIT A**).

Mr. Murdock therefore concluded that clarification was needed from FHCRC as to whether its position had changed. He caused copies of the Rowley Declaration to be faxed to Drs. Day and Hartwell (the two signatories of the **EXHIBIT A** letter); to Dr. Fred Appelbaum (who, according to Mr. Murdock's understanding, is the second-ranking administrative person at FHCRC, was involved in the decision to write the **EXHIBIT A** letter, is knowledgeable about the clinical

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<sup>1</sup>I understand that Wilmer, Cutler obtained it directly from HHS, attached to a May 19, 1997 letter from Mr. Ware to Robert B. Lanman, Esq., of HHS, which letter Mr. Ware did not cause to be contemporaneously served on any lawyer for CellPro. As far as I can tell, Mr. Ware never served the Rowley Declaration on any lawyer for CellPro until nine days after Dr. Rowley signed it, when, on May 28, 1997, he caused it to be served on Lyon & Lyon as an attachment to his letter to the Court bearing that date.

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programs of which the Rowley Declaration spoke, and would be involved in any decision to write a further letter); and to Mr. Schaeffer and Ms. Hennings.

The fact that Plaintiffs' counsel chose to treat the Rowley Declaration in such a manner as to assure that the press would find out about it before CellPro, its counsel, and even Dr. Rowley's own employer did, is a fact that goes a long way to explain why CellPro found it necessary to react as it did to the Forbes reporter's phone call. It goes even farther toward explaining why FHCRC might have had legitimate cause to be embarrassed and displeased by Dr. Rowley's failure to seek clearance from, or even give prior notice to, his institution, and by the surprise manner in which the Declaration was handled by its sponsors – quite apart from any question of the merits of the Declaration, and quite apart from any question whether Dr. Rowley's institution properly should, or could, have had any say in the matter if he had told his institution, in advance, what he was going to do.

Mr. Murdock had been trying to set up a meeting with Mr. Schaeffer and Ms. Hennings since before he became aware of the Rowley Declaration. He had wished to discuss two topics: First, a proposal to make certain changes in the terms of CellPro license agreements with FHCRC; and second, plans for a speech that Mr. Murdock had been requested to give at an upcoming meeting. Upon becoming aware of the Rowley Declaration, Mr. Murdock had a third agenda item for the meeting: To discuss what response or clarification of its position, if any, FHCRC might make in light of the Rowley Declaration.

Mr. Murdock advises me that since he became aware of the Rowley Declaration he has never spoken to Dr. Day, Dr. Hartwell or Dr. Appelbaum,<sup>2</sup> about the Declaration nor anything else. He did, however, meet on Friday, May 23, 1997, with both Mr. Schaeffer and Ms. Hennings, who had by then seen the Rowley Declaration. Ms. Hennings, in particular, expressed great embarrassment that FHCRC management had not known that the Rowley Declaration was coming, and that Mr. Murdock had to learn of it, for the first time, in a phone call from a journalist. Ms. Hennings suggested that FHCRC, in order to dispel any confusion that the Rowley Declaration might have caused at HHS, might send a second letter to HHS Secretary Shalala which reaffirmed the views expressed in the April 25, 1997 letter from Drs. Day and Hartwell. Although Mr. Murdock had not instigated the idea, he did agree with it and Ms. Hennings followed through.

The result of Ms. Hennings' proposal was that FHCRC's President and Director, Dr. Day, issued a second letter to Secretary Shalala explaining that Dr. Rowley's views "do not represent

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<sup>2</sup>Mr. Ware requested that we report on any contacts between Mr. Murdock and Dr. Rowley's "department chair" (June 3, 1997 Tr. p. 13, L. 17). Mr. Murdock believes that "department chair" may be among Dr. Appelbaum's titles, but he is not certain. In any event, Mr. Murdock is certain he did not speak to Dr. Appelbaum nor to anyone he understood to be Dr. Rowley's "department chair." Nor did he speak to "the president of the institution." (Id. p. 13, L. 17.)

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the views of Fred Hutchinson Cancer Research Center," which "remains firmly committed to the views expressed to you in the letter from me and Dr. Hartwell dated April 25, 1997." A copy of that letter, dated May 27, 1997, is attached hereto as **EXHIBIT B**. The letter was obtained as a result of an approach to Dr. Day by Ms. Hennings herself, not by Mr. Murdock.

Another topic, which was brought up by FHCRC's General Counsel, Mr. Schaeffer, at the March 23, 1997 meeting, was whether Dr. Rowley himself might appropriately be approached about signing, for CellPro, a supplemental declaration that might explain, qualify or balance some of the more extreme statements in the declaration he had signed for Baxter, and thereby bring out points favorable to CellPro's own position.<sup>3</sup> Mr. Schaeffer spoke to the effect that due to "academic freedom" considerations, he did not think that he himself should approach Dr. Rowley; but he encouraged Mr. Murdock to contact Dr. Rowley directly if he wished to explore this possibility. Mr. Murdock said that he would be happy to talk to Dr. Rowley himself.

For the sake of context, something needs to be said about the relationship between Dr. Rowley and Mr. Murdock. First of all, they are anything but strangers from a social and business standpoint. Mr. Murdock has known Dr. Rowley for about five years; they are on a first-name basis; they have each other's home phone numbers; they have talked and met on many occasions; Dr. Rowley has been an investigator on a number of CellPro protocols; and Dr. Rowley has asked CellPro for, and has received, funding to underwrite his attendance at at least one professional gathering. Secondly, they know each other well in the physician-patient context. Dr. Rowley, in fact, was heavily involved in the preparation of the FDA Compassionate Use Application that paved the way for Mr. Murdock's cancer treatment, and during that time the two spoke on a very frequent basis. Mr. Murdock had never known, however, that Dr. Rowley was a paid consultant for Baxter until he read it in the declaration.

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<sup>3</sup>There would appear to be no doubt that Dr. Rowley, could, if willing, truthfully say some positive things under oath about the CellPro device. See, for example, **EXHIBIT C**, which indicates that at a recent professional gathering, in response to a question calling for a comparison of the CEPRATE and ISOLEX systems,

"Dr. Rowley responded that purity and yields varied due to a variety of factors, some patient-related and some technology-related. He did state that the new ISOLEX 300i showed somewhat better purities than the CEPRATE and the ISOLEX SA. However, he also stated that, from an ease-of-use point of view, his laboratory staff liked the CEPRATE system, as it was more user-friendly [emphasis supplied]."

These comments were, in the view of the witness reporting the incident, "contrary to those stated by Dr. Rowley in his signed declaration of May 19, 1997."

Another example of a CellPro-favorable comment that Dr. Rowley apparently could make under oath, if willing, is found in **EXHIBIT D**, an excerpt from the June 5, 1997 issue of Center News, which is FHCRC's biweekly faculty/staff newsletter. There a reporter attributes to Dr. Rowley the following remark:

"Rowley explains that the CellPro-sponsored study involves pediatric patients with mismatched related donors. The CellPro system removes the donor lymphocytes thought to produce graft-versus-host disease, and CellPro is ahead of Baxter in that area of research [emphasis supplied]."

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At the recommendation of FHCRC's General Counsel, Mr. Murdock did call Dr. Rowley, reaching his voice mail late on May 23, 1997, the Friday before Memorial Day weekend. He left a brief, polite message that asked Dr. Rowley to give him a call, and told him he could call at home on the weekend if he wished.

It was, according to Mr. Murdock's recollection, the Sunday morning of Memorial Day weekend (i.e., May 25, 1997) when Dr. Rowley called him back. Dr. Rowley reached Mr. Murdock at his home and they spoke for about 10 or 15 minutes. Mr. Murdock began by thanking Dr. Rowley for calling back and stating that he didn't really have to return the call so promptly. As Mr. Murdock recalls, Dr. Rowley himself then brought up the topic of his declaration and embarked on a fairly extended monologue about it, including comments to the effect that he was aware that a number of clinicians had signed declarations for CellPro; that he himself was a paid consultant to Baxter; and that he felt that he had to support Baxter with a declaration when asked. Mr. Murdock related to Dr. Rowley that he had learned of the declaration in a phone call from a reporter. Dr. Rowley expressed surprise at that, saying that the person or persons who had solicited the declaration from him had only told him that it would be filed with HHS, not that it would be circulated to the press. Mr. Murdock explained that because the Rowley Declaration was inconsistent with the letter that Drs. Day and Hartwell had already sent to HHS, CellPro would have to make some kind of response to the press and to HHS, but he did not yet know what the response was going to be.

Mr. Murdock recalls Dr. Rowley saying that "It looks like I got myself in a lot of trouble" over the declaration and that "Fred Appelbaum has talked to me." Dr. Rowley spontaneously suggested that if Mr. Murdock "had any thoughts" about what Dr. Rowley "might say," he should pass those thoughts along to Dr. Appelbaum, "because I respect what Fred tells me." Although Dr. Rowley did not elaborate as to the nature of the "trouble" he was in, Mr. Murdock sensed that he may have meant that he had received a lecture from Dr. Appelbaum. In the circumstances, Mr. Murdock judged it inappropriate to ask Dr. Rowley for a supplemental declaration and he did not broach the topic.

Nor did Mr. Murdock pursue Dr. Rowley's suggestion that he speak to Dr. Appelbaum. At no time before or since his telephone conversation with Dr. Rowley did Mr. Murdock ever speak to Dr. Appelbaum about the Rowley Declaration. If indeed Dr. Rowley was in any way criticized by Dr. Appelbaum, or any other of his superiors at FHCRC, over the declaration, the decision to deliver such criticisms could only have been made internally within FHCRC. Neither Mr. Murdock nor, to his knowledge, anyone else at CellPro ever urged or suggested that Dr. Rowley be reprimanded, disciplined or in any way censured over the declaration.

I can only speculate as to why Dr. Rowley was reprimanded, if indeed he was; but it seems not unreasonable to think that a person in his position might have been expected, as a matter of institutional policy, at least to give some notification within the institution before making a sworn

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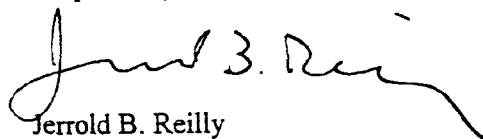
statement in a litigated matter that contained disclosures about the institution and its affairs and concerned technology licensed out by the institution to a party to the litigation. Whether FHCRC in fact has such a policy I do not know; but if it does, then it is understandable why FHCRC might have reckoned Dr. Rowley's violation of it to be a particularly embarrassing one, given not only the wholly unnecessary surprise that resulted to his institution, but also the fact that his sworn statement ostensibly contradicted an official written statement that had been issued a few weeks earlier to the United States government over the signatures of the institution's highest officials.

Moreover, we do not understand that even Dr. Rowley himself claims that the content of the declaration, or the fact that he was willing to make a declaration, is the cause of whatever "trouble" he "got in." In view of Mr. Schaeffer's remark to Mr. Murdock about "academic freedom," I would infer that if Dr. Rowley was indeed reprimanded by his superiors, the probable ground of the reprimand was not his willingness to give sworn testimony, not the content of the testimony he gave, but rather his failure to go through appropriate channels by notifying his institution beforehand.

Finally, to whatever extent this episode did cause Dr. Rowley to suffer criticism from the institution for which he works, it was within the power of Plaintiffs' counsel, more than anybody else, to have averted that consequence. We think the Court should be curious to know, for example, whether counsel pointed out to Dr. Rowley that the declaration he was being asked to sign would contradict the letter that Drs. Day and Hartwell had sent to the Secretary of HHS; whether counsel even told Dr. Rowley of the existence of the Day/Hartwell letter; whether counsel explored with Dr. Rowley the question whether he should seek clearance through FHCRC counsel, or at the very least notify the institution somehow, before signing a declaration in a litigated matter involving FHCRC technology; and whether counsel considered the possible consequences to the witness if the declaration were leaked to the press, without any forewarning to the witness or his institution, and before CellPro even knew that the declaration existed.

An entirely foreseeable result of the manner in which Plaintiffs' counsel orchestrated the handling of the Rowley Declaration was to exacerbate the surprise and embarrassment that Dr. Rowley's institution apparently experienced -- a result which Plaintiffs' counsel should bear responsibility for failing to avoid.

Respectfully,



Jerrold B. Reilly

cc: Donald R. Ware, Esq.