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June 25, 1997

The Honorable Roderick R. McKelvie  
United States District Court for the District of Delaware  
844 King Street  
Wilmington, Delaware 19801

Re: The Johns Hopkins University, et al. v. CellPro  
C.A. No. 94-105 RRM

Dear Judge McKelvie:

We are in receipt of CellPro's letter to the Court dated June 16, 1997 in response to the Court's directive that counsel report back on CellPro's contacts with Dr. Rowley and his employer following plaintiffs' submission of Dr. Rowley's declaration to the Court.

CellPro's letter is yet another example of counsel's abuse of the processes of this Court. CellPro took the Court's directive as an invitation to submit a seven-page letter attacking Dr. Rowley's character, offering counsel's speculation about Dr. Rowley's relationship with his employer, and presenting self-serving hearsay statements of Mr. Murdock and others seeking to impeach Dr. Rowley's testimony. CellPro's letter should be stricken from the record lest CellPro attempt to use it for other improper purposes.<sup>1</sup>

CellPro's excuse for contacting Dr. Rowley and senior officials at the Fred Hutchinson Cancer Research Center ("FHRC") is contrived and unbelievable. Dr. Rowley's declaration focuses on clinical data demonstrating the extent of FHRC's usage of Baxter's system and the comparative results achieved by FHRC using both the Baxter system and the CellPro system. It

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<sup>1</sup> Indeed, we learned yesterday that CellPro has submitted a copy of Mr. Reilly's letter to the Department of Health and Human Services ("HHS") in support of its march-in petition. Since HHS had made no request for information about CellPro's contacts with Dr. Rowley and FHRC, it is evident that the letter was drafted and is being used for ulterior purposes.

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addresses the performance of Baxter's system, and the ability of FHCRC to meet its cell processing needs even in the absence of the CellPro system. It does not in any way purport to express FHCRC's position as an institution as to whether FHCRC would prefer that CellPro be permitted to continuing selling its infringing product, thereby (according to the FHCRC article attached to Mr. Reilly's letter as Exhibit D) "generating millions of dollars in royalties" for FHCRC.

Nevertheless, CellPro represents to the Court that Mr. Murdock's reason for contacting Dr. Rowley's employer was simply his "concern" that Dr. Rowley's declaration might be misconstrued as a change in FHCRC's position in support of CellPro's march-in petition. This explanation is implausible. Dr. Rowley said nothing in his declaration about FHCRC's "position" regarding CellPro's march-in petition. He simply reported on FHCRC's clinical experience with the two systems. It is a measure of CellPro's disregard for the truth that CellPro views Dr. Rowley's recitation of FHCRC clinical data as "contradictory" of FHCRC's statement of its institutional position; for CellPro, it is loyalty, not the facts, that matters.

Upon further investigation, I confirmed with Dr. Rowley that in his telephone conversation with Mr. Murdock, Mr. Murdock did not suggest in any way that Dr. Rowley's declaration might be misconstrued as representing a change in FHCRC's position. Nor did Mr. Murdock suggest that any of the factual information contained in Dr. Rowley's declaration was inaccurate or untrue. Instead, Mr. Murdock criticized Dr. Rowley for disloyalty, pointing out that CellPro had given FHCRC more than \$1 million over the past several years.

A more likely explanation for CellPro's conduct than the one Mr. Reilly offers to the Court is that CellPro wanted to put pressure on Dr. Rowley, through his employer, to discourage any further testimony detracting from CellPro's one-sided and distorted presentation of the facts. This should not be permitted to happen again.

CellPro attempts to excuse its contacts with at least five senior FHCRC officials regarding Dr. Rowley's declaration on the ground that it needed to respond to a reporter's inquiry. This explanation is not only contrived, but also ironic. CellPro has been responsible for what undoubtedly is the most extensive and costly media campaign ever launched on behalf of a willful patent infringer. Plaintiffs are besieged regularly by reporters asking for comment on CellPro's latest statements to the media or for copies of plaintiffs' most recent filings. CellPro can scarcely complain when it finds itself on the receiving end of a reporter's call.

CellPro's objection that it was not served with a copy of Dr. Rowley's declaration on the day it was filed with HHS is disingenuous. CellPro fails to disclose that none of its filings with HHS were ever served on plaintiffs; plaintiffs have received copies of them only if and when HHS passed them along for comment. As of this date, HHS has not commenced any formal proceeding as a result of CellPro's petition, and the practice has been that neither side has served the other

with papers submitted to the agency.

A few other observations are in order. CellPro repeatedly describes Dr. Rowley as a "paid consultant for Baxter." In fact, as CellPro acknowledges, Dr. Rowley has received financial support from both CellPro and Baxter, and Dr. Rowley's relationship with Baxter has been well known to CellPro. What distinguishes Dr. Rowley from the twenty-six clinicians who submitted declarations on behalf of CellPro is that Dr. Rowley is the only one who disclosed the nature of his relationships with the parties. We have no doubt that many, if not all, of the clinicians who submitted declarations for CellPro could be described as "paid consultants for CellPro," but it evidently did not occur to CellPro's counsel when they prepared the declarations to make such disclosure to the Court. One also wonders, in light of Mr. Murdock's comment on the amount of financial support CellPro has provided to FHCRC, why CellPro did not disclose the amount of financial support it has provided to the institutions at which its clinician-declarants are employed. The absence of such disclosures is further reason why CellPro's declarations should be given little, if any, weight.

CellPro inquires as to whether Dr. Rowley was informed of FHCRC's letter supporting CellPro's march-in petition at the time he executed his declaration. As noted earlier, CellPro has made it a practice not to serve plaintiffs with copies of any of the materials submitted on its behalf to HHS, and in fact plaintiffs' counsel did not see either of the two FHCRC letters until receiving Mr. Reilly's June 16, 1997 letter attaching them. In retrospect, the FHCRC letters of support procured by CellPro are misleading. Like CellPro's clinician declarations, the FHCRC letters make no disclosure of FHCRC's financial interest, an interest amounting to "millions of dollars of royalties" if CellPro succeeds in obtaining the compulsory license it seeks from HHS. Reilly letter, Exh. D. Nor do the FHCRC letters make any disclosure of FHCRC's extensive and very successful use of Baxter's Isolex® system for stem cell selection and tumor cell depletion, as described in Dr. Rowley's declaration. Although the second FHCRC letter states that Dr. Rowley's views do not represent those of the institution, the letter does not contradict or in any way question the clinical results reported in Dr. Rowley's declaration. In submitting the FHCRC letters to the Court, CellPro is once again confusing FHCRC's financial interest in CellPro's success with FHCRC's actual clinical experiences using the CellPro and Baxter systems.

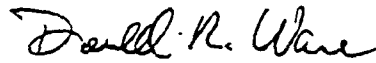
In the end, the most revealing aspect of Mr. Reilly's letter is that in seven pages of attacking Dr. Rowley, CellPro does not contest the clinical results reported in Dr. Rowley's declaration, nor does it challenge his conclusion that FHCRC, one of the leading transplant centers in the world, could meet all its cell separation needs using Baxter's system in lieu of CellPro's system. CellPro's public health argument is simply not supported by the facts.

CellPro's transparent effort to intimidate Dr. Rowley and put pressure on him through his employer was improper. The Court should make clear that conduct of this nature will not be tolerated. Further, CellPro's attempt to supplement the record with representations of counsel

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and a variety of self-serving hearsay, all in the guise of a response to the Court's inquiry concerning CellPro's contacts with Dr. Rowley and his employer, should be rejected.

Respectfully submitted,



Donald R. Ware

DRW/kaw

cc: Coe A. Bloomberg, Esq.  
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