

FOLEY, HOAG & ELIOT LLP

ONE POST OFFICE SQUARE  
BOSTON, MASSACHUSETTS, 02109-2170-31  
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Donald R. Ware  
(617) 832-1167  
dware@fhe.com

TELEPHONE 617-832-1000  
FACSIMILE 617-832-7000  
<http://www.fhe.com>

1615 L STREET, N.W., SUITE 850  
WASHINGTON, D.C. 20036  
TEL: 202-775-0600  
FAX: 202-857-0140

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VIA FEDERAL EXPRESS

Mr. Robert B. Lanman, Esq.  
Department of Health and Human Services  
Office of General Counsel  
Room 2B50, Building 31  
31 Center Drive  
MSC211  
Bethesda, MD 20892-2111



Re: Johns Hopkins University

Dear Mr. Lanman:

After leaving with you a copy of plaintiffs' reply brief in support of their motion for entry of a permanent injunction, I discovered a typographical error in the last line of page 28 that should be corrected. As you will see from the enclosed corrected page 28, it was Baxter, not CellPro, that offered a license on July 22, 1992.

I apologize for any confusion.

Sincerely yours,

A handwritten signature in cursive script that reads "Donald R. Ware".

Donald R. Ware

DRW/kaw

Enclosures

270114.1

At this stage of the proceedings, CellPro's patent misuse defense could not withstand a Rule 11 motion, and if CellPro does not withdraw the defense voluntarily, plaintiffs intend to file one. CellPro's patent misuse defense asserts, first, that plaintiffs sought to enforce the '204 patent knowing of Hopkins' inequitable conduct during prosecution of the patents. D.I. 621, Twelfth Affirmative Defense, ¶ 29. Because the Court has determined that there was no inequitable conduct, this theory of the patent misuse necessarily fails.

CellPro's alternative theory asserts that Baxter improperly sought to extend the reach of the patents by "demand[ing] rights, in exchange for a license under the '204 and '680 patents, to CellPro's technology outside the United States." D.I. 621, ¶ 30. CellPro has made clear in prior proceedings that this allegation is based upon Baxter's April 15, 1992 letter to CellPro (DTX 709) proposing an agreement that included exclusive distribution of CellPro's infringing products in Europe. This allegation does not support a defense of patent misuse. First, there is no case law support for the conclusion that a patent license which includes a right to distribute the infringer's otherwise infringing product constitutes patent misuse. Second, nothing materialized from the request, apart from CellPro's ill-considered lawsuit. A mere proposal in the course of business negotiations which is rejected by the other side does not constitute patent misuse. Finally, it is black letter law that even where patent misuse is found to have occurred, the equitable bar to enforcement of the patent disappears when the restrictive practice ceases and the misuse is thereby "purged." United States Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 465 (1957); see, e.g., Virginia Panel Corp. v. Mac Panel Co., 1996 WL 335381 at \*11 (W.D. Va. 1996). As the Court is well aware, by letter dated July 22, 1992 (DTX 637), Baxter reinstated its original offer of a license on the same terms