

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

E.I. DU PONT DE NEMOURS & CO., )

PLAINTIFF, )

VS. )

CETUS CORPORATION, A DELAWARE )  
CORPORATION, )

DEFENDANT. )

NO. C 89-2860 MHP

SAN FRANCISCO, CALIFORNIA  
WEDNESDAY, FEBRUARY 27, 1991

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By: <u>S</u>
The attorney, whose initials appear below, has reviewed the applicable court rules, and has verified that the above dates are correct.
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LEGAL DEPARTMENT  
WILMINGTON, DELAWARE 19898

BY: GEORGE A. FRANK, ESQ  
ROSEANNE R. DUFFY, ESQ.

(APPEARANCES CONTINUED ON NEXT PAGE)

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BY: PETER D. STAPLE, ESQ.

1 WEDNESDAY, FEBRUARY 27, 1991

11:45 A.M.

2  
3 (PROCEEDINGS HELD IN OPEN COURT, JURY NOT PRESENT:)

4 THE COURT: GOOD MORNING, COUNSEL.

5 MR. FIGG: GOOD MORNING, YOUR HONOR.

6 THE COURT: I'M AMAZED THAT THEY SENT A NOTE IN SAYING  
7 THEY'VE REACHED A VERDICT. I GUESS THAT'S AS A RESULT OF  
8 YESTERDAY. I'M SO AMAZED. THIS IS A GOOD JURY, AT LEAST IN  
9 TERMS OF BEING DILIGENT. SO WE'RE GOING TO HAVE THEM BROUGHT  
10 OUT.

11 I DID ASK THE MARSHAL TO CHECK WITH THEM AND ASK THEM  
12 TO CHECK ONE MORE TIME TO MAKE SURE THAT THEY HAD GONE -- THE  
13 FOREPERSON HAD GONE OVER THE FORM AND FILLED OUT EVERYTHING  
14 THAT'S SUPPOSED TO BE FILLED OUT AND SIGNED IT AND DATE IT, AND  
15 THEY SAY THEY'VE DONE THAT.

16 IF YOU COULD BRING THEM OUT, PLEASE.

17 (PROCEEDINGS HELD IN OPEN COURT, JURY PRESENT:)

18 THE COURT: GOOD MORNING. YOU SOUND SOMEWHAT HAPPIER  
19 THAN THE LAST TIME I TALKED WITH YOU.

20 (LAUGHTER)

21 THE COURT: I UNDERSTAND YOU'VE REACHED A VERDICT?

22 FOREPERSON FIRO: THAT'S CORRECT.

23 THE COURT: MR. FIRO, ARE YOU THE FOREPERSON OF THE  
24 JURY?

25 FOREPERSON FIRO: YES.

1 THE COURT: YOU HAVE FILLED OUT THE FORM COMPLETELY AND  
2 DATED AND SIGNED IT?

3 FOREPERSON FIRO: YES, JUDGE.

4 THE COURT: WOULD YOU HAND IT TO THE MARSHAL, PLEASE.  
5 NOW, IN FACT, ALL OF THE JURORS PARTICIPATED IN THE  
6 DELIBERATION, I ASSUME?

7 FOREPERSON FIRO: YES, THEY DID.

8 THE COURT: AND BUT ONLY SIX JURORS, THE SIX REGULAR  
9 JURORS VOTED --

10 FOREPERSON FIRO: YES, THEY DID.

11 THE COURT: -- IS THAT CORRECT?

12 FOREPERSON FIRO: CORRECT.

13 THE COURT: SO THIS VERDICT REFLECTS THEIR VOTES?

14 FOREPERSON FIRO: YES.

15 THE COURT: YOU WERE UNANIMOUS AS TO EACH OF THE ITEMS  
16 YOU FILLED OUT?

17 FOREPERSON FIRO: YES, WE WERE.

18 THE COURT: OKAY.

19 OKAY. THEN WOULD YOU TO PLEASE LISTEN TO THE VERDICT  
20 AS IT IS READ BECAUSE I WILL ASK YOU A QUESTION AT THE END, AND  
21 THE ATTORNEYS MAY WISH TO HAVE THE JURY POLLED, IN WHICH CASE  
22 EACH OF THE REGULAR JURORS WILL BE ASKED IF THE ANSWER THAT I  
23 HAVE READ DOES REFLECT YOUR TRUE AND CORRECT VERDICT.

24 PART ONE WITH RESPECT TO THE '202 PATENT, ANTICIPATION:  
25 FOR EACH OF THE FOLLOWING CLAIMS OF THE '202 PATENT IS

1 THE CLAIM INVALID UNDER THE INSTRUCTIONS YOU HAVE BEEN GIVEN  
2 BECAUSE ANY PROCESS COVERED BY THE CLAIM IS ANTICIPATED BY A  
3 PRINTED PUBLICATION.

4 AND THEN, COUNSEL, BECAUSE OF THE WAY THESE QUESTIONS  
5 HAVE BEEN ANSWERED, I'M JUST GOING TO READ -- NOT READ EVERY  
6 CLAIM, BUT READ CLAIM 1 THROUGH 20 AS INCLUDED ON THE VERDICT  
7 FORM. OBVIOUSLY IT INCLUDES -- IT DOES NOT INCLUDE EVERY CLAIM  
8 1 THROUGH 20, BUT THOSE INCLUDED ON THE VERDICT FORM.

9 TO EACH OF THOSE ON THE VERDICT FORM THE ANSWER HAS  
10 BEEN CHECKED NO.

11 AS TO PART TWO UNDER ANTICIPATION:

12 FOR EACH OF THE FOLLOWING CLAIMS OF THE '202 PATENT IS  
13 THE CLAIM INVALID UNDER THE INSTRUCTIONS YOU HAVE BEEN GIVEN  
14 BECAUSE ANY PROCESS COVERED BY THE CLAIM WAS KNOWN OR USED BY  
15 OTHERS IN THE UNITED STATES BEFORE THE INVENTION THEREOF BY DR.  
16 KARY B. MULLIS.

17 AND IN RESPONSE TO CLAIMS 1 THROUGH 20 AS REFLECTED ON  
18 THE VERDICT FORM THE ANSWER TO EACH OF THOSE QUESTIONS IS NO.

19 NUMBER THREE:

20 FOR EACH OF THE FOLLOWING CLAIMS OF THE '202 PATENT IS  
21 THE CLAIM INVALID UNDER THE INSTRUCTIONS YOU HAVE BEEN GIVEN  
22 BECAUSE ANY PROCESS COVERED BY THE CLAIM WAS INVENTED IN THE  
23 UNITED STATES BY ANOTHER WHO HAD NOT ABANDONED, SUPPRESSED OR  
24 CONCEALED IT PRIOR TO ITS INVENTION BY DR. KARY B. MULLIS.

25 AND, AGAIN, CLAIMS 1 THROUGH 20 AS REFLECTED ON THE

1 VERDICT FORM, TO EACH OF THOSE THE ANSWER IS CHECKED NO.

2 PART ABOUT OBVIOUSNESS:

3 FOR EACH OF THE FOLLOWING CLAIMS OF THE '202 PATENT IS  
4 THE CLAIM INVALID UNDER THE INSTRUCTIONS YOU HAVE BEEN GIVEN  
5 BECAUSE ANY PROCESS COVERED BY THE CLAIM WOULD HAVE BEEN  
6 OBVIOUS.

7 AND AS TO EACH OF THE CLAIMS 1 THROUGH 20 UNDER THAT  
8 SECTION, THE ANSWER TO EACH OF THOSE IS NO.

9 PART TWO, THE '195 PATENT:

10 FOR EACH OF THE FOLLOWING CLAIMS OF THE '195 IS ANY  
11 CLAIM INVALID UNDER THE INSTRUCTIONS YOU HAVE BEEN GIVEN BECAUSE  
12 ANY PROCESS COVERED BY THE CLAIM WOULD HAVE BEEN OBVIOUS.

13 AND AS TO EACH OF THE CLAIMS UNDER THIS SECTION, CLAIMS  
14 1 THROUGH 15 TO EACH OF THOSE, THE ANSWER HAS BEEN GIVEN NO.

15 AND THE FORM IS SIGNED STEVEN FIRO, DATED FEBRUARY 27,  
16 1991.

17 MR. FIRO, DOES THIS REFLECT THE TRUE AND CORRECT  
18 VERDICT OF THE JURY AND EACH OF THE JURORS?

19 FOREPERSON FIRO: YES, IT DOES.

20 THE COURT: DO YOU WISH THE JURY POLLED?

21 MR. FIGG: NO, YOUR HONOR.

22 MR. PASAHOW: NO, YOUR HONOR.

23 THE COURT: ANY REASON WHY THIS JURY CANNOT BE EXCUSED  
24 FROM THIS MATTER?

25 MR. PASAHOW: NO, YOUR HONOR.

2 1 MR. FIGG: NONE, YOUR HONOR.

2 THE COURT: I KNOW ONE. I'D LIKE TO HAVE YOU COME BACK  
3 IN ANOTHER CASE I'M GOING TO SET FOR TRIAL IN A COUPLE OF WEEKS.

4 FOREPERSON FIRO: I'M BUSY FOR THE NEXT ONE.

5 THE COURT: WHAT WAS THAT?

6 FOREPERSON FIRO: I'M BUSY FOR THE NEXT SEVEN MONTHS.

7 THE COURT: YOU'VE BEEN SO DILIGENT AND ATTENTIVE.

8 THIS WAS NOT AN EASY CASE TO LISTEN TO, EVEN THOUGH THE  
9 ATTORNIES DID AN EXCELLENT JOB OF SUBMITTING THE MATERIALS TO  
10 YOU TRYING TO MAKE US ALL ABLE TO UNDERSTAND THE TECHNOLOGY.

11 AND I NOTICED THROUGH ALL OF THE PROCEEDINGS THAT, NOT  
12 ONLY WERE MOST OF YOU TAKING NOTES, BUT ALSO THAT YOU WERE  
13 LISTENING VERY ATTENTATIVELY. AND IT IS NOT EASY SUBJECT MATTER  
14 TO LISTEN TO AND DIGEST, AND AT THE SAME TIME IT WAS VERY CLEAR  
15 THAT YOU WERE KEENLY INTERESTED AND OBSERVANT.

16 SO I WANT TO THANK ALL OF YOU FOR YOUR HARD WORK AND  
17 FOR YOUR PATIENCE IN THE PROCESS. AND I ALSO WANT TO THANK  
18 ESPECIALLY THE ALTERNATES. I THINK IT'S AWFULLY HARD TO LISTEN  
19 ALL OF THAT TIME AND NOT BE ABLE TO PARTICIPATE AND ULTIMATELY  
20 TO VOTE.

21 UNFORTUNATELY COUNSEL WERE WILLING TO AGREE IN THIS  
22 CASE YOU COULD PARTICIPATE, AND YOU COULD ONLY HAVE DONE THAT IF  
23 THEY HAD AGREED TO DO SO, I COULDN'T HAVE COMPELLED IT.

24 AND SO I'M SURE THAT YOU'VE USED . . . AT LEAST IT  
25 HELPED TO HAVE YOUR VIEWS HEARD AND IT WASN'T FRUSTRATING TO

2  
1 HAVE TO SIT HERE THROUGH ALL OF THAT TIME AND THEN LEAVE AND  
2 WAIT TO HEAR WHAT THE REST OF THE JURORS HAVE DONE.

3 BUT, AGAIN, THANK YOU FOR YOUR TIME AND FOR YOUR  
4 PATIENCE AND FOR YOUR ATTENTION. IF YOU WISH TO TALK WITH THE  
5 ATTORNEYS AFTER THE PROCEEDINGS YOU MAY DO SO, BUT ONLY ABOUT  
6 THE PROCESS.

7 FOR EXAMPLE, IF YOU THOUGHT ONE OF THE WITNESSES COULD  
8 HAVE BEEN MORE CLEAR OR YOU WANT TO COMPLIMENT THE ATTORNEYS ON  
9 THEIR PERFORMANCES THAT'S UP TO YOU, YOU MAY DO THAT. BUT I'M  
10 GOING TO ASK THAT YOU NOT DISCUSS THE SUBSTANCE OF THE CASE AND  
11 HOW YOU ARRIVED AT YOUR DECISION AND SO FORTH AND THE ATTORNEYS  
12 KNOW WHY I SAY THAT.

13 BUT, IN ANY EVENT, I WOULD APPRECIATE KNOWING FROM YOU  
14 IF THERE'S ANYTHING ELSE WE COULD DO, BESIDES GIVING YOU MORE  
15 COMMODIOUS QUARTERS WITH A VIEW, TO MAKING YOUR JOB EASIER. BUT  
16 AGAIN, THANK YOU VERY, VERY MUCH.

17 ANY QUESTIONS?

18 OKAY. YOU ARE EXCUSED THEN.

19 (THE JURY IS EXCUSED)

20 (PROCEEDINGS HELD IN OPEN COURT, JURY NOT PRESENT:)

21 THE COURT: COUNSEL, HOW DO YOU INTEND TO PROCEED NEXT?  
22 OBVIOUSLY, THIS MEANS THERE ARE OTHER ASPECTS THAT WE HAVE. ARE  
23 THERE COUNTERCLAIMS IN THIS ACTION OR IS IT ANOTHER ACTION THAT  
24 WE HAVE PENDING?

25 MR. PASAHOW: THE ANSWER IS BOTH, YOUR HONOR.



1 THE COURT: I WAS AFRAID OF THAT.

2 MR. PASAHOW: THERE ARE COUNTERCLAIMS AS TO THESE  
3 PATENTS. AT THE END OF LAST YEAR CETUS WAS ISSUED STILL ANOTHER  
4 PATENT AND THAT PATENT WAS THE ONE THAT WAS THEN TRANSFERRED TO  
5 YOUR HONOR. THE CASE INVOLVING THAT LAST PATENT WAS TRANSFERRED  
6 TO YOUR HONOR.

7 COULD I SUGGEST THAT PERHAPS EARLY NEXT WEEK WE HAVE A  
8 PRETRIAL CONFERENCE OR A STATUS CONFERENCE RATHER, TO SET DATES  
9 AND FIGURE OUT WHERE WE GO FROM HERE.

10 I THINK MR. FIGG AND I PROBABLY OUGHT TO SPEND SOME  
11 TIME TALKING ABOUT THAT SUBJECT AND COME TO YOUR HONOR WITH THE  
12 PROPOSAL.

13 THE COURT: MR. FIGG, ARE YOU CONTEMPLATING, FOR  
14 EXAMPLE, TRYING TO GET A 54(B) JUDGMENT OR --

15 MR. FIGG: RIGHT NOW I REALLY CAN'T RESPOND TO THAT,  
16 YOUR HONOR. OBVIOUSLY I'M GOING TO HAVE TO CONSULT WITH MY  
17 CLIENT AND --

18 THE COURT: I UNDERSTAND.

19 MR. FIGG: AND ALSO WITH REGARD TO THE MATTERS MR.  
20 PASAHOW RAISES, THERE WAS AN AGREEMENT WITH RESPECT TO THE  
21 INFRINGEMENT COUNTERCLAIMS ON SOME TIMING ON DISCOVERY AND  
22 SETTING THAT MATTER.

23 THE COURT: THE OTHER THING I'D LIKE TO, CERTAINLY  
24 WOULD LIKE TO EXPLORE WITH YOU THE NEXT STATUS CONFERENCE BEFORE  
25 THINGS GEAR UP FOR ROUND TWO OR WHATEVER, IS THE POSSIBILITY OF

2  
1 SETTLEMENT AND WHETHER OR NOT THE USE OF THE SETTLEMENT MASTER  
2 OR SOMEONE ELSE TO ASSIST IN SETTLEMENT WOULD BE HELPFUL.

3 MR. FIGG: WELL, WE WILL CERTAINLY RAISE THAT WITH OUR  
4 CLIENT AND -- WITH RESPECT TO MR. PASAHOV'S SUGGESTION FOR  
5 PRETRIAL CONFERENCE NEXT WEEK, I WOULD AGREE THAT WOULD BE A  
6 GOOD IDEA. MAYBE NOT PRETRIAL AND POST-TRIAL, PRETRIAL FOR THE  
7 NEW MATTER POST-TRIAL FOR THIS ONE AND --

8 THE COURT: JUST A STATUS CONFERENCE.

9 MR. FIGG: -- I WOULD REQUEST THAT WE DO IT BY  
10 CONFERENCE CALL, IF POSSIBLE, BECAUSE WE WOULD LIKE TO GO BACK  
11 TO THE EAST COAST. WE'VE BEEN HERE A LONG TIME.

12 THE COURT: LONG ENOUGH TO REGISTER TO VOTE PROBABLY.

13 MR. FIGG: I THINK SO.

14 THE COURT: FINE. WE CAN DO IT BY PHONE. IF YOU WANT  
15 TO WORK OUT A TIME WITH MS. MORIYAMA, NOT ON A MONDAY OR FRIDAY  
16 BECAUSE OF THE LAW AND MOTION THAT IS ON THOSE DAYS, BUT THAT  
17 WOULD BE FINE.

18 THE OTHER THING I REALLY -- IF IT'S POSSIBLE, FOR YOU  
19 TO JUST GO AHEAD AND SEEK REVIEW, IF THAT'S WHAT YOU INTEND TO  
20 DO OR PRESERVE THE RECORD FOR REVIEW.

21 I'M NOT GOING TO SAY I HAVE NOT MADE ERRORS, IT'S JUST  
22 I DON'T PARTICULARLY LIKE TO VISIT MY OWN ERRORS BEFORE THEY GO  
23 TO THE COURT OF APPEALS.

24 BECAUSE ORDINARILY WE'VE THOUGHT THINGS THROUGH PRETTY  
25 CAREFULLY AND IF WE CAME TO THAT RESULT WE PROBABLY WILL COME TO

3  
1 IT AGAIN, NOT OUT OF INTRANSIGENCE, LITTLE LIKELIHOOD WE'RE  
2 GOING TO RESEARCH IT THE SECOND TIME AS WE DID THE FIRST TIME  
3 BECAUSE WE TRIED TO DO A THOROUGH JOB.

4 I DON'T HAVE ANY PROBLEMS TAKING IT UP ON APPEAL,  
5 THAT'S YOUR RIGHT. I ASSUME YOU'LL DO IT INSTEAD OF ASKING ME  
6 TO REVISE IT ALL ONCE AGAIN AFTER THE TRIAL. YOU MIGHT KEEP  
7 THAT IN MIND IN TERMS OF HOW YOU WANT TO HANDLE IT.

8 IF YOU WANT A 54(B) ON THIS, WHAT I THINK WOULD BE FAR  
9 MORE FRUITFUL FOR THE PARTIES INVOLVED GIVEN THE COST OF  
10 LITIGATING THIS MATTER AND PARTICULARLY THE INFRINGEMENT  
11 ASPECTS, IS SETTLEMENT CONFERENCE.

12 MR. FIGG: OKAY.

13 THE COURT: IT'S BEEN A PLEASURE. OBVIOUSLY IT WILL  
14 CONTINUE TO BE, I GUESS, BECAUSE THIS IS NOT THE END. BUT I  
15 THOUGHT YOU BOTH DID AN EXCELLENT JOB WITH PRESENTING THE  
16 MATERIAL TO THE JURY IN A MANNER THAT WAS COMPREHENSIBLE, IF NOT  
17 PLAGUED WITH TONS OF CHARTS AND THINGS, I THINK, YOU KNOW, WAS  
18 AN EXCELLENT PRESENTATION AND THAT YOU HANDLED YOURSELVES VERY  
19 WELL. OBVIOUSLY YOU'RE EXPERIENCED, I DON'T NEED TO TELL YOU  
20 THAT. I WAS VERY PLEASED TO HAVE YOU HERE.

21 MR. PASAHOW: THANK YOU VERY MUCH.

22 MR. FIGG: THANK YOU VERY MUCH.

23 MR. PASAHOW: WE APPRECIATE THAT.

24 THE COURT: SOMETIMES THERE'S SOME ATTORNEYS YOU WISH  
25 WOULD NEVER COME BACK. YOU'RE ALWAYS WELCOME.

3  
1 MR. FIGG: THANK YOU.

2 THE COURT: LURLINE, THEY'RE GOING TO WORK OUT WITH YOU  
3 A STATUS CONFERENCE SOME TIME, AS LONG AS IT'S NOT ON MONDAY THE  
4 FOLLOWING WEEK OR LAW AND MOTION, EITHER NEXT WEEK OR THE WEEK  
5 AFTER THAT.

6 THE CLERK: OKAY.

7 THE COURT: FINE.

8 MR. FIGG: THANK YOU VERY MUCH.

9 MR. PASAHOW: THANK YOU.

10 THE COURT: ANYTHING ELSE?

11 MR. FIGG: NO, YOUR HONOR.

12 THE COURT: EXCEPT I THINK YOU NEED TO WORK OUT WITH  
13 LURLINE ALL THE CHARTS AND THE EXHIBITS AND SO FORTH AND WHETHER  
14 YOU WANT . . . IF YOU CAN WORK OUT SOMETHING WITH LURLINE FOR A  
15 RECEIPT FOR THEM AND MAYBE TAKE THEM BACK. THEY'RE GOING TO  
16 NEED A NEW EXHIBIT ROOM FOR ALL OF THOSE EXHIBITS.

17 MR. FIGG: FOR EVERYTHING OR JUST THE POSTERS?

18 THE CLERK: WELL, FOR EVERYTHING.

19 THE COURT: TALK WITH HER. THERE ARE A LOT OF --  
20 CERTAINLY THE POSTERS. MAYBE YOU CAN WORK OUT SOMETHING TO HAVE  
21 THEM RELEASED TO YOU WITH A RECEIPT. THANK YOU.

22 MR. PASAHOW: THANK YOU, YOUR HONOR.

23  
24 (THE ABOVE MATTER ADJOURNED AT 11:55 A.M.)  
25

