

JOHNSON + JOHNSON BRIEF AT SECRET JAMS ARBITRATION

of the controls that Ortho put in place. Beginning in June 1993, the sales were even smaller because of the Certificate of Use program. There is no other explanation. Those are the facts. The facts are fatal to Amgen's case.

III. Amgen's Conspiracy Theory is Contrary to the Sworn Testimony of Ortho Executives

Amgen asks Your Honor to reject, virtually in whole, the testimony of Ortho executives as perjury. Executive after executive from Ortho testified about the reasons why the company implemented the programs that it did, its analysis of its marketing opportunities and its efforts to limit dialysis sales. If this testimony is true, then Amgen's case utterly fails. In that event, the documented handful of FSDC sales reflects no more, and no less, than this reality: they were simply an incidental and unintended by-product of Ortho's efforts to obtain its legitimate market.

Thus, Amgen is forced to take an extraordinary litigation position. It must argue, as it has, that every senior member of Ortho's management has secretly conspired to breach the Product License Agreement and to lie about it when questioned under oath. This go-for-broke strategy collapses under the weight of its utter implausibility.

The evidence is straightforward. The testimony of the Ortho executives is consistent with the documentary record and the small level of Procrit FSDC sales. The testimony is consistent with the economic motivations created by the Product License Agreement and Your Honor's 1990 order creating the spillover audit. The testimony is consistent with the legal obligations of the contract. And, of course, the testimony is sworn to under oath, subjecting each witness to the penalty of perjury. Why would so many people perjure themselves? Amgen has no good answer. The testimony of the Ortho executives should be rejected as lies, Amgen

EXHIBIT B

APPENDIX 3

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