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February 1, 2001

David C. Franceski, Jr., Esq.
Keith R. Dutil, Esq.
Stradley, Ronon, Stevens & Young, LLP
2600 One Commerce Square
Philadelphia, PA 19103-8000

Re: *Hemispherx Biopharma, Inc. v. Manuel P. Asensio, Asensio & Company, Inc., and Asensio.com, Inc.*, Court of Common Pleas, Philadelphia County, July Term, No. 3970.

Dear Sirs:

You have asked me to review certain evidence concerning the actions of Manuel P. Asensio in connection with trades of Hemispherx Biopharma, Inc. ("Hemispherx" or "HBI") common stock by Asensio & Company, Inc. ("ACI") and others, and Mr. Asensio's dissemination of statements about HBI and its product, Ampligen. The purpose of this review is to enable me to render an opinion, based on my experience and background in the prosecution and defense of federal criminal offenses, whether Mr. Asensio engaged in criminal conduct.

It is my opinion, to a reasonable degree of certainty in the fields of federal securities law, fraud, and/or federal criminal offenses, that based on the facts set forth below and the reasons outlined herein, Mr. Asensio engaged in criminal conduct constituting federal securities fraud and wire fraud. I summarize these opinions and conclusions in more detail below, as well as my professional background, a summary of the pertinent facts, and an analysis of the relevant law.

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I. PROFESSIONAL BACKGROUND AND EXPERIENCE

The opinions I have formed in connection with this matter are based upon my substantial experience in the prosecution and defense of allegations involving federal criminal law, both as a federal prosecutor and as a private practitioner, as well as my educational experience. Prior to my engagement in connection with rendering this opinion, I did not know any of the litigants or counsel in this matter, nor had I previously performed any legal work for them, or any related person or entity.¹

My background and experience are fully summarized in my curriculum vitae, which is attached to this report. As my CV makes clear, I have substantial experience in the prosecution of federal crimes. From the Fall of 1989 through the Summer of 1996, I was a federal prosecutor in the Northern District of Georgia, in Atlanta. In my capacity as an Assistant United States Attorney, I oversaw the investigation, prosecution, and trial of numerous matters involving fraud and financial transactions, including several matters involving securities fraud and mail and wire fraud. In that seven-year period, I tried approximately two dozen federal jury trials, negotiated in excess of fifty guilty pleas, and investigated hundreds of other cases involving allegations of federal criminal conduct. Also during that time, two lawyers from the U.S. Securities and Exchange Commission were assigned to work with me to assist in the prosecution of federal securities cases.

Through this work, I gained substantial experience in the evaluation of evidence and the application of the principles of federal prosecution. As an Assistant United States Attorney, I was called upon on an almost daily basis to evaluate evidence presented to me, not only in the context of seeking indictments before federal grand juries, but also in determining the sufficiency of evidence to support issuance of an arrest warrant or a summons upon a complaint, *see* Fed. R. Crim. P. 4(a), to hold a defendant to answer in district court, *see* Fed. R. Crim. P. 5.1(a), and, significantly in the day-to-day work of a federal prosecutor, to support a search warrant for the seizure of evidence, *see* Fed. R. Crim. P. 41. In my day-to-day work, I was also frequently called upon to advise law enforcement officers on the elements of federal criminal offenses and the sufficiency of evidence to make out an offense under the federal criminal code.

In June, 1996, as a result of my work as an Assistant United States Attorney, I was awarded the John Marshall Award for Outstanding Achievement in Litigation. In addition, I was an instructor in trial advocacy at the Attorney General's Advocacy Institute. Prior to becoming an Assistant United States Attorney, I was a trial attorney in the Criminal

¹ Approximately five years ago, as an Assistant U.S. Attorney, I appeared on one American Bar Association program with Mr. Dutil.

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Section of the Tax Division of the United States Department of Justice in Washington, DC. Before that, I was an associate in the Washington, DC, law firm of Howrey & Simon. I am a 1981 graduate of Dartmouth College and a 1984 graduate of the University of Virginia School of Law.

Since November, 1996, I have been a partner in the Washington, DC, office of Foley & Lardner. I am chairman of Foley & Lardner's Counseling, Compliance and Government Enforcement Practice Group. My practice focuses on white collar criminal defense and counseling and compliance advice in connection with federal criminal law.

I have previously testified as an expert witness in two matters: *Juan Fabri Sr. and Juan F. Fabri Jr. v. United Technologies International, Inc.*, No. 396 CV 358 (CFD), and *Breezevale Limited v. Exxon Corp.*, No. 96-08063-E (D. Tex., Dallas Co.). Foley & Lardner is being compensated for my time and the time of other Foley & Lardner personnel who work on this matter at our usual hourly rates. My hourly rate is currently \$400.

II. THE FACTS

In connection with this matter, I have reviewed the following materials: (1) the Second Amended and Supplemental Complaint of Plaintiff Hemispherx Biopharma, Inc., filed September 10, 1999, including Exhibits A and B ("Second Amended Complaint"); (2) Defendants' Answer, Affirmative Defenses, and Counterclaim to Plaintiff's First Amended Complaint, dated April 19, 1999, including Exhibits A, B, and C; (3) the deposition testimony of Manuel P. Asensio given on August 24-25, 1999, April 19-20, 2000, with exhibits, and December 21, 2000, including deposition exhibits P-435 through P-447; (4) the deposition testimony of William A. Carter, M.D., given on November 11-12, 1999, and May 2-3, 2000, without exhibits; and (5) the expert reports of Robert Lowry dated May 31, 2000 and January 31, 2001. For purposes of rendering this opinion, I take as true the following facts.

Hemispherx is a Delaware corporation with its principal place of business in Philadelphia, PA. Hemispherx's Chairman, President, and CEO is Dr. William Carter. Its common stock is listed on the American Stock Exchange. Throughout the relevant time period in this case, Hemispherx was engaged in the development and testing of pharmaceutical products for regulatory approval and commercial sale. Hemispherx's efforts focused primarily on a type of double-stranded ribonucleic acid ("RNA") drug product, trademarked "Ampligen." Hemispherx has developed and tested Ampligen as a potential treatment for human immunodeficiency virus ("HIV") associated disorders, chronic hepatitis B virus ("HBV") infection, certain cancers, and chronic fatigue syndrome ("CFS").

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As of September, 1998, Hemispherx's efforts were focused primarily on the development and testing of Ampligen in the treatment of CFS. As of that time, Hemispherx had clinically tested Ampligen on over 300 patients for different indications in over twenty clinical trial sites across the United States. In most of those trials, Ampligen was generally well tolerated with no serious side effects.

As Hemispherx developed and tested potential uses for Ampligen, it sought and received use patents, both on Ampligen alone and in combination with other drugs, for the treatment of various indications, including CFS. These patents gave Hemispherx and its licensees the right to exclude others from making, using, and marketing Ampligen for the claimed uses. Thus, although the original composition patents for Ampligen had expired as of September, 1998, Hemispherx had patent protection for the uses of Ampligen that it was seeking to develop, including uses in the treatment of CFS, HBV infection, certain cancers, and HIV associated disorders.

Manuel P. Asensio is the founder, Chairman, President, and Chief Executive Officer of Asensio & Company, Inc. ("ACI"). ACI is a registered broker-dealer, engaged in, among other things, the issuance of research reports on publicly traded companies whose stock it short-sells for its own account. In a case in which ACI has taken a short position on a company's stock, ACI stands to make money if its reports depress the price of the stock. ACI is a wholly owned subsidiary of Asensio.com, Inc. ("Asensio.com"). Mr. Asensio is a principal and majority owner of Asensio.com.

Between August 28, 1998, and September 21, 1998, Mr. Asensio caused ACI to short-sell for its own account approximately 100,000 shares of Hemispherx common stock. In essence, this meant that ACI stood to make approximately \$100,000 for each \$1 decline in the price of Hemispherx common stock and, conversely, to suffer a loss of approximately \$100,000 for each \$1 increase in the price of Hemispherx common stock. Under applicable rules and regulations of the National Association of Securities Dealers, Inc. ("NASD"), a self-regulatory organization established pursuant to §15A of the Securities Exchange Act of 1934, broker-dealers such as ACI were prohibited from effecting short sales in its own account unless it or a person associated with it had made an affirmative determination that it could borrow the securities or otherwise provide for delivery of the securities by the settlement date. *See* NASD Rule of Conduct 3370(b)(2)(B). During this time period, Mr. Asensio repeatedly caused ACI to violate this rule. Indeed, a letter of Acceptance, Waiver, and Consent ("AWC"), which Mr. Asensio signed and consented to, contains findings by the NASD Regulation, Inc. ("NASDR") that between August 1, 1998 through July 31, 1999, ACI failed to keep written records of affirmative determinations in connection with 306 short sales, in violation of NASD rules. One of ACI's employees has testified that the relevant order tickets were not stamped at

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the time of the sales, and Mr. Asensio and his employees could not determine when they were stamped.

On or about September 17, 1998, Business Week posted on its website an article entitled, "Why Hemispherx Could Take Sick." The author of the article, Gary Weiss, noted that a number of short-sellers had taken the position that Hemispherx's stock was overvalued, principally because Ampligen's potential as a treatment for CFS had been overstated. The article prominently featured statements by Mr. Asensio, whom the article identified as one of the short-sellers, and quoted a comment by Mr. Asensio that Ampligen was "a highly toxic, obsolete drug that is ineffective in the treatment of any disease."

At the time that Mr. Asensio made this statement to Business Week, however, he knew that there was no reasonable basis for calling Ampligen "highly toxic" or "obsolete." Further, he made this statement knowing, or at least foreseeing, that the statement was likely to be published and widely disseminated and that its publication would drive down the price of Hemispherx's stock. Although not a part of the basis of my opinion, it appears that the statement had the intended effect: on September 17, 1998, Hemispherx's stock closed at a price of 9 7/8; on September 18, 1998, it closed at 8.

On September 22, 1998, Mr. Asensio caused to be published on Asensio.com's publicly available website a three-part report purporting to contain an analysis of Hemispherx's background and business prospects. The report contained a number of materially deceptive statements concerning Hemispherx and Ampligen, as set forth in ¶15 of the Second Amended Complaint, including statements that,

- Ampligen is toxic;
- Ampligen is medically useless;
- Ampligen is off patent; and,
- Hemispherx is promoting futile projects to enable insiders to sell their otherwise worthless stock to the public.

Mr. Asensio knew these statements were materially deceptive at the time he authored the reports and posted them on the website. The fact that Mr. Asensio uses the Internet to publish deceptive information is bolstered by the AWC, which includes NASDR findings that Mr. Asensio violated Rule 2210(d)(2)(A) regarding communications with the public in connection with bulletin board postings that failed to disclose a connection with ACI. These findings would constitute evidence of Mr. Asensio's modus operandi and would negate any defense of mistake to the conduct at issue here.

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Mr. Asensio's intention in publishing these deceptive statements was to drive down the price of Hemispherx's stock as much as possible, thereby maximizing the gain ACI would realize on the short sales it had made. As intended by Mr. Asensio, the price of Hemispherx's stock fell from 8 at the September 21, 1998, close to a low of 5 on September 22, 1998. Mr. Asensio profited from this decline by purchasing, on September 22, 1998, 40,000 and 5,000 shares of Hemispherx stock at 5 5/8 and 5, respectively.

Subsequent to publishing the foregoing statements on September 22, 1998, Mr. Asensio continued to disseminate materially deceptive statements concerning Hemispherx and Ampligen, as set forth in ¶17 of the Second Amended Complaint. At the time he made these additional statements, Mr. Asensio knew the statements were materially deceptive, and his intention in publishing them was again to drive down the price of Hemispherx's stock as much as possible. At the time of these statements, ACI and others, through short-selling of Hemispherx stock, were again in a position to profit from a decline in the price of the stock, and the steeper the decline in the price of the stock, the greater the profit they would realize from the short position they had taken.

III. THE LAW

A. Securities Fraud

Section 32(a) of the Securities Exchange Act of 1934 (the "Exchange Act") makes it a crime for any person willfully to violate Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. 15 U.S.C. §78ff(a). Section 10(b) of the Exchange Act and Rule 10b-5 make it unlawful, in connection with the purchase or sale of any security, for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. §240.10b-5. To make out a violation, there must be some element of deception, and the person must have acted with scienter.

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B. Federal Wire Fraud

The federal wire fraud statute criminalizes the use of interstate wire communications in furtherance of a scheme or artifice to defraud. There are three essential elements to wire fraud: (1) the formation of a scheme or artifice to defraud another of money or property; (2) the use of interstate wire communications to further that scheme; and (3) specific intent to defraud. *See* 18 U.S.C. §1343.

Whether someone was actually defrauded by the scheme is not an element of the offense. The essence of the crime of wire fraud is the scheme itself, not the result, and the critical element is intent to defraud. Proof of such intent to defraud is not typically established by direct evidence, but rather inferred from the totality of the circumstances. Fraudulent intent can be inferred from false or misleading statements or representations and even from representations made with reckless indifference to their truth or falsity.

IV. OPINIONS AND CONCLUSIONS

Based on the foregoing and assuming the facts set forth above, it is my opinion that Mr. Asensio committed the crimes of securities fraud, in violation of Section 32(a) of the Exchange Act, and federal wire fraud, in violation of 18 U.S.C. §1343.

It is my opinion that Mr. Asensio committed the crime of securities fraud inasmuch as the facts set forth above establish that: (1) the element of "willfulness" is satisfied because Mr. Asensio made statements that he knew to be materially deceptive in order to drive down the price of Hemispherx stock so that he could cover his short position at a profit; (2) the "deception" element is satisfied because the reports authored by Mr. Asensio that he caused to be posted on the ACI website contained materially deceptive statements regarding Hemispherx and Ampligen; (3) the "scienter" element is satisfied for the same reasons that the "willfulness" element is satisfied; (4) the "means or instrumentality of interstate commerce" element is satisfied by Mr. Asensio's use of the Ascensio.com website; and (5) the "in connection with the purchase or sale of any security" element is satisfied by the fact that Asensio intended that the reports would drive down the price of Hemispherx stock so that ACI could cover its short position at a profit.

It is also my opinion based on these facts that Mr. Asensio devised and participated in a scheme to defraud in violation of the federal wire fraud statute. The essence of the scheme was to drive down the price of Hemispherx's shares through the dissemination of false and misleading statements about Ampligen, Hemispherx, and Hemispherx's officers. This was accomplished, in part, through the dissemination of Mr. Asensio's reports on the

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Asensio.com website. Mr. Asensio's motive in doing this, of course, was to profit from the short position ACI had previously taken on the stock. The use of interstate wire communications in the form of the internet played an essential part in the scheme's execution, inasmuch as its success depended upon the dissemination of the reports over as wide an audience as possible, thereby maximizing the impact they would have on the price of Hemispherx's stock. In addition, Mr. Asensio caused ACI to sell short without having affirmatively determined that ACI could borrow or provide delivery of the securities by the date of settlement. Such "naked" short selling is a violation of NASD rules, and that violation is additionally probative of a scheme to defraud.

Indeed, Mr. Asensio committed these crimes both in connection with the initial deceptive statements on September 22, 1998, and in connection with the additional deceptive statements thereafter. At both times, Mr. Asensio was in a position to profit from publishing materially deceptive statements about Hemispherx and Ampligen and his conduct on each occasion amounted to separate criminal offenses.

It is my understanding that as of the date of this letter Mr. Asensio has not been indicted. This does not change the opinions that I have set forth, in view of the fact that a variety of factors enter into a prosecutor's decision whether to seek an indictment, including the adequacy of civil remedies, resource allocation, and law enforcement priorities. Thus, a prosecutor may decline to seek an indictment even where he or she believes a crime has been committed. In addition, the applicable statute of limitations has not yet expired and federal prosecutors still have time to seek an indictment.

This is a summary version of my opinion that there is probable cause to believe that Mr. Asensio engaged in criminal conduct in violation of the securities fraud statute and the federal wire fraud statute. I look forward to reviewing additional documents as they become available and to answering any additional questions you may have.

Sincerely,



Martin J. Weinstein

MJW:cjb
Enclosure