

The Philadelphia Inquirer

Published on Sunday, July 14, 2002 in the "Inquirer Magazine" of the Philadelphia Inquirer.

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One man has struggled for 30 years to bring a drug to the market. The other shrieks that it's all a fraud and a scam. Their collision in a Philadelphia courtroom was more circus than trial.

By L. Stuart Ditzen

Ampligen is a clear liquid in a small glass bottle that might be good for a lot of things. It might be good for AIDS. It might be good for chronic fatigue syndrome. It might be good for kidney cancer. And liver cancer. And hepatitis. Ampligen might even be good for the war on terror if a smallpox epidemic were let loose on America.

Then again, Ampligen might not be good for anything.

The drug has been pacing the sidelines for 30 years hoping to jump into action against some high-profile disease, but in all that time the Food and Drug Administration never once has seen fit to put it in play.

In Philadelphia, Ampligen's inventor, an intense and guarded man named William A. Carter, pursues a marathon quest to bring his wonder drug to market. Investors have poured more than \$145 million into Carter's Ampligen research.

But not many of them have put up money lately. They tend to shut their doors when they see Carter coming. Everywhere he goes, Carter is preceded by the clamor and bombast of a vociferous New York securities trader named Manuel P. Asensio, who for four years has been trumpeting to the world that Ampligen is a big fraud and that Carter is engaged in "one of the darkest medical stock scams in modern U.S. capital market history."

In the absence of any fraud charge by government authorities, Asensio bases his accusations on his own research and opinions. He contends that Ampligen is a useless drug that Carter continually hypes so as to sell overpriced stock in his company, Hemispherx Biopharma Inc., to the public.

To say that Carter denies this is an understatement.

But Asensio disregards all denials. And he has been sticking to Carter like a bad case of the flu.

On Wall Street, Asensio is widely viewed as a loose cannon. But somehow that doesn't stop the stock market from paying attention to his opinions.

When Asensio started shouting fraud in September 1998, the stock of Hemispherx Biopharma went into free fall. And by a tactic called short selling, Asensio made a lot of money on the stock's decline.

Stunned and furious, Carter sued for defamation.

This offended Asensio, who intensified his attack.

A remarkable hatefest developed between the two men. Each, from a radically opposing perspective, cast himself in the glow of altruism. Carter was the dedicated scientist struggling to bring forth a drug for the benefit of mankind. Asensio was the crusader, seeking to expose a purported fraud on the stock market and investors.

There were - and are - money angles on both sides, and millions of dollars at stake.

Carter felt sure that eventually a nice big defamation verdict would shut Asensio's mouth.

But when the two men met for trial on Feb. 1, it turned out to be one of the zoiest proceedings - with Carter's lawyers leaping up to protest as Asensio hurled insults and defied court orders - ever to unfold under the broad roof of City Hall.

Fredric Goldfein had done this dozens of times before, walking a client from his office at 1600 Market St. over to court at City Hall on the first day of a trial.

After years in the courtroom, the stocky 46-year-old lawyer was accustomed to the stresses of defense work in big civil trials. The rituals of picking a jury, putting on evidence, making arguments all were a matter of routine.

This time, as he held open the door and his client, Manuel Asensio, walked into the courtroom, Goldfein realized things were going to be different.

Asensio, a slender, carefully groomed man in an elegant tailored suit, strode abruptly across the room and confronted a gray-haired man seated at a table. He moved so aggressively that the other man leaped to his feet, bringing them almost nose to nose.

"You're the devil incarnate!" hissed Asensio.

Goldfein stared in amazement. Having joined the case at the last minute, he had no idea who the devil incarnate was.

A moment later, Asensio informed him: This was his nemesis, William Carter. The battle of the two had begun.

Albert W. Sheppard Jr. is an avuncular man whose slightly weary, down-to-earth manner generally wins the affection of lawyers, jurors and fellow judges.

In Common Pleas Court, where he long has presided over complex civil cases, the gravelly voiced Sheppard is regarded as a skilled problem-solver.

But Asensio became a problem the judge could not solve.

Before the trial began, Sheppard ruled that several matters Asensio considered powerful evidence for his defense would not be admitted at trial. Carter's long endeavor to bring Ampligen to market had taken more than twice the usual 10 to 15 years for an experimental drug to be developed and win FDA approval. And the process had been spiked with turbulence and controversy. Asensio had dug up - and stirred up - a lot of history in his self-propelled crusade. He wanted the jury to hear all about it. The judge wanted the jury to hear very little about it.

The story of Ampligen began in the early 1970s, when Carter was a young researcher at Johns Hopkins University. Carter and another scientist invented the drug. Carter saw dazzling possibilities for Ampligen in the treatment of epidemic diseases and cancers.

A thin man with chiseled features and a pompadour of gray hair, Carter describes Ampligen as a compound that can "turn on" the body's natural healing powers. It is an antiviral drug purportedly able to stimulate the immune system while simultaneously preventing viruses and cancer cells from reproducing themselves.

When the 63-year-old Carter stepped to the witness stand to tell the jury how much harm Asensio had inflicted on him and his company, he held his head high and, with an upward tilt of his jutting chin, gave a history of himself:

After finishing first in his class at Duke University Medical School in 1963, Carter worked at the National Institutes of Health for two years and then moved to Johns Hopkins in Baltimore, where he taught medicine and microbiology.

For 18 years, beginning in 1980, he was director of clinical research at the cancer center at Hahnemann University in Philadelphia.

At Hemispherx Biopharma, Carter is chairman, CEO, chief scientific officer, and principal stockholder.

Ampligen is, and always has been, his consuming interest.

Prospects for the drug, he told the jury, were looking very hopeful back in 1998. After many unsuccessful attempts, it looked as though the drug might be on track for FDA approval.

And then along came Asensio, putting reports on his Web site saying the drug was medically useless, toxic, obsolete, ineffective. Saying Ampligen had failed in clinical trials. Saying Hemispherx wasn't seriously developing the drug, it was hustling a stock scam. And then Business Week quoted Asensio saying he had put a "target price" of zero on Hemispherx stock.

As if in obedience to Asensio's command, the stock price of Hemispherx went spinning downward. In five days in September 1998, the price dropped from \$9.87 to \$5.25.

At the company's headquarters at the Suburban Station Building at 16th and JFK Boulevard, nobody had ever heard of Asensio.

Who was this guy?

"I have been portrayed in the media as a 'stockbuster,' 'demolition man,' 'Attila the Hun,' and a 'company's worst nightmare.'"

So boasts Manuel Asensio in his 2001 book *Sold Short*.

The 47-year-old stock trader casts himself as a self-appointed watchdog who roams the securities markets rooting out bum stocks and exposing their promoters. His profits - he has been reported to make \$6 million a year - are the fair spoils of a bounty hunter.

Asensio, a native of Cuba, holds degrees from the Wharton School of the University of Pennsylvania and Harvard's Graduate School of Business. He has developed a unique brand of securities trading, which he calls "hostile adversarial short selling."

Short selling is a game of betting a stock price will go down rather than up. It is played with borrowed stock. A short seller spots a stock he thinks is heavily overvalued, selling, say, at \$10 a share. He thinks the price will drop to \$5. He borrows 100,000 shares from a brokerage for a fee and sells the stock immediately for \$1 million. He waits. A month later, the stock drops to \$5. The short seller buys back 100,000 shares for \$500,000 and returns the stock to the owner. He's made a \$500,000 profit, minus the borrowing fee.

But short selling is dicey. If the stock goes up to \$15 instead of down to \$5 and the owner calls for its return, the short seller is cooked.

Most short sellers keep low profiles. Asensio has earned considerable notoriety doing exactly the opposite.

With streams of volcanic rhetoric, he charges after his targets, making public attacks and posting vituperative research reports laced with fraud allegations on his Asensio & Co. Web site. But always, before going hostile, he borrows lots of stock and sells it high. When the price falls, he buys the stock back, returns it to the owner and counts his winnings.

Since 1996, Asensio has made 28 such "hits" on publicly traded companies. Most of those stocks have plummeted. Several companies have gone bankrupt or been delisted from securities exchanges. But in his biggest battle - Hemispherx - the target has not gone down so easily. William Carter is a stubborn adversary.

Asensio has never disclosed how much profit he made selling Hemispherx short, except to say it was "enormous."

Hemispherx contends that the stock drop sparked by Asensio's accusations cost the company \$80 million in corporate value.

That is the sum Hemispherx sought to recover.

Whenever some dread new disease emerged, William Carter seemed to come along shortly afterward holding out a bottle of Ampligen.

Critics have derided it as a drug in search of a disease.

That reputation has been enhanced by the fact that Hemispherx does a lot of business by news release.

After the terrorist strikes last fall, for example, Hemispherx put out a release announcing its "911 Project": Ampligen would be tested for treatment of smallpox as a precaution against a strike by bioterrorists.

Asensio started challenging Hemispherx's news-release claims right after going "hostile adversarial" in 1998.

He did not go about it subtly.

When Hemispherx put out a release announcing it had made an Ampligen presentation at an AIDS conference in Boston in 1999, Asensio called the conference sponsor and denounced him for associating with "known scum."

David Scondras, founder of the AIDS organization Search for a Cure, was so upset by Asensio's repeated telephone calls and demands for information that he wrote to the New York attorney general pleading for help to get the short seller's "teeth out of our necks."

"In 10 years of public service," lamented Scondras in his letter, "I never ran into a man as arrogant, self-centered, pushy or disrespectful as this person has been to me."

Even so, after seeing the news release in which Hemispherx boasted of participation in Search for a Cure's conference on AIDS, Scondras wrote to William Carter pointedly contradicting the claim.

"Hemispherx did not make a presentation at the conference," Scondras corrected Carter acidly, "and its many requests to make a presentation were turned down."

Hemispherx's explanation for the statement in its news release was that, although no formal presentation was made, a company representative talked about Ampligen at a private dinner during the conference.

In another press release, Hemispherx announced in 1998 that Ampligen had "shown tremendous promise" in the treatment of chronic fatigue syndrome and quoted an advocacy group, the CFIDS Network Inc., as calling it "an especially safe drug."

The president of the CFIDS Network, Ronald G. Smith, fired off a letter to Carter denying any endorsement of Ampligen. Going further, he asserted: "We consider your unauthorized use of our name and comments attributed to our corporation to be slander."

The Hemispherx explanation for this flap was that a CFIDS board member had endorsed Ampligen - apparently without the president's knowledge.

Asensio forwarded those releases and others to the Food and Drug Administration.

The FDA sent letters chastising Carter in 1998 and 2000, saying that Hemispherx had illegally promoted Ampligen by describing the drug as safe and effective before it had been approved for market. The agency ordered an immediate halt to the hype.

Yet Judge Sheppard ruled the FDA letters inadmissible at trial. In the jargon of the law, the judge found that the "prejudicial effect outweighed the probative value." Translation: The letters made Carter and Hemispherx look bad - which could create a negative impression on the jury - but they didn't substantiate Asensio's charge of fraud.

Lots of juicy material fell into the same category.

In the late 1980s, the scientific community was taking Ampligen very seriously as a potential treatment for AIDS.

E.I. duPont de Nemours & Co. entered into a venture with Carter's company, then known as HEM Research, to finance a major HIV study.

DuPont invested \$30 million, but Ampligen performed poorly in clinical tests. Carter blamed the failure on the fact that the drug had been administered from plastic rather than glass containers. DuPont didn't buy that excuse.

DuPont charged that HEM had provided misleading information about earlier Ampligen studies, and sued to recover its investment.

Carter countersued the chemical giant for breach of contract.

In the midst of that wrangle, a wealthy Houston AIDS patient named Peter Frost sued Carter, making a stunning charge. Frost contended that Carter had charged him \$1 million for an overpriced bloc of HEM stock as a condition of joining the Ampligen study.

Carter did not dispute selling the stock - drawn from his personal holdings - but he denied that it was overpriced and denied that the sale was a condition of Frost's inclusion in the study. Carter was able to produce statements in which Frost had disavowed any link between the stock purchase and his inclusion in the Ampligen study.

Ultimately, all the litigation involving Carter, Frost, HEM and DuPont was settled on terms favorable to Carter. DuPont paid HEM \$2.7 million and abandoned all interest in Ampligen. Frost dropped his suit. (He has since died.) Everyone went their separate ways.

HEM became Hemispherx Biopharma and Carter turned to private investors for financing.

By 1995, the company was nearly out of money. To stay afloat, Hemispherx went public with a \$16 million stock issue.

A year later, the lead underwriter, Stratton Oakmont Inc. of Lake Success, N.Y., was expelled from the securities industry for stock manipulation. The firm's principals, Jordan R. Belfort and Daniel M. Porush, pleaded guilty in New York in 1999 to charges of securities fraud and money laundering, admitting to the manipulation of the stock prices of 34 companies, including Hemispherx. The promoters had engaged in what Asensio calls a "pump and dump." They had secretly acquired stock at heavily discounted prices before taking it to market. Using high-pressure sales tactics, they then hyped the stock to the public, sold it at inflated prices and extracted millions in profit.

Neither Carter nor anyone at Hemispherx was implicated in the fraud. That did not prevent Asensio from insisting that Hemispherx had engaged in "criminal" activity. He pressed this view on the Securities and Exchange Commission. The SEC in 1999 opened an investigation to determine whether Hemispherx had been involved in any investor fraud. The SEC, which does not comment on pending investigations, has taken no action on the public record since then.

All the information concerning the legal problems of the stock underwriters, the SEC probe of Hemispherx and the DuPont and Frost litigation was barred from trial. Sheppard ruled that the material could create prejudice against Carter and Hemispherx.

As Carter told it on the witness stand, the phones started ringing off the hook at Hemispherx headquarters in late September 1998.

Asensio's "ambush" set off a panic among researchers, investors and patients who were receiving Ampligen in clinical studies.

And the panic erupted just when Hemispherx was embarked on an FDA-authorized advanced study on chronic fatigue patients and when another HIV study was in the works.

"We had enormous numbers of calls from patients, some of whom were crying over the phone accusing us of not telling the truth," Carter testified. Physicians threatened to sue if patients got worse. "There was just a flood of investor calls."

"Obviously we tried to convey the accurate picture, but it was such an aggressive Pearl Harbor-type attack that it was basically impossible to control the damage."

The company began cranking out news releases disputing Asensio.

Carter insisted that Asensio's charges were "completely untrue." There was no stock fraud. No medical fraud. There was no evidence that Ampligen was toxic or dangerous.

His efforts did no good. Investors pulled back.

The company needed regular infusions of revenue to keep Ampligen studies going. Its "burn rate" - the amount of money needed to keep operating - was \$607,000 a month.

Carter, whose compensation last year was \$456,000, went looking for financial backers in Switzerland, Germany, France and England. Everywhere, he told the court, "I was confronted by Mr. Asensio's reports."

Carter described going to a potential investor in New York just three days before the defamation trial began.

"Within a minute and a half, the manager . . . came in and put the report, the last report of Mr. Asensio, on the table and said, 'What is this?' "

Asensio never let up.

Month after month, he posted reports - 45 in all - lambasting Hemispherx, calling it a "criminally organized company," and repeating like a mantra his charges: nobody seriously expected to make money selling Ampligen; the game was to sell Hemispherx stock, to hype the price, to pump and dump.

A lot of Hemispherx stock was on the market, more than 30 million shares. The public sale had accounted for 4.6 million shares. The company had made a series of "private placements" after that, selling blocs to small groups of investors.

Asensio put the company's marketing methods under a microscope.

For example, Hemispherx had posted on its Web site research reports that made "strong buy" recommendations for the stock. One report, produced in 1998 by a German firm called Value Management & Research, had predicted the stock could soar to \$50 a share within 24 months.

In a news release, Hemispherx quoted the "strong buy" recommendation, but did not disclose that Value Management would profit fabulously if the stock met the \$50 prediction. The German firm had agreed to buy 750,000 shares of Hemispherx at \$3 a share.

Another "strong buy" recommendation came in 1997 from a Honolulu firm, Watumull & Co. That report predicted that Hemispherx would be making \$200 million to \$400 million by the year 2000 and paying \$3 in earnings on every share.

Small print at the end of the report said: "Watumull & Co. has received a fee in the form of [stock] warrants in connection with the preparation of this report." Hemispherx posted the entire report on its Web site - except for the last line about the fee.

All of that became more fodder for Asensio's attack.

Another target was Hemispherx's quest to market Ampligen in Europe.

Beginning in December 1998, the company issued a series of news releases detailing its application for fast-track approval for Ampligen before the European Medical Evaluation Agency (EMEA) - the counterpart of the FDA. But there was no news release in 1999 when the European agency denied the application with the notation: "The general quality of this application is considered as very low. Major objections are raised and fundamental questions are posed."

Hemispherx later said it was "withdrawing" its EMEA application and would submit a new one.

Out came an Asensio report declaring: "Yet more damning evidence."

In defense of Ampligen, Hemispherx lawyers David C. Franceski Jr. and Michael A. Walsh summoned researchers who had worked with the drug to testify about their clinical experience.

A Nevada physician, Daniel L. Peterson, said he had treated 135 chronic fatigue patients with Ampligen and 70 percent had shown improvement. Another doctor, Gary Blick, of Stamford, Conn., said Ampligen had shown promising results, sharply reducing virus levels, in a study of 10 HIV patients.

Blick said Asensio telephoned him last year, asked about his research and then came on strong, telling him his HIV test results were "fraudulent."

"Then he proceeded to eventually threaten me," Blick added. "Mr. Asensio told me he could take me down if he wanted to."

The trial had been going on for two weeks. At the end of each day, Ric Goldfein walked Asensio back to his law office and the two men holed up there into the night. Goldfein crammed his head with details of the complex, document-laden case while Asensio paced and bristled and raged.

All he had done was give his opinions. Why was he being put on trial for opinions? What happened to freedom of speech? How could he get a fair trial if he couldn't tell his story? He couldn't tell the jury about the FDA letters, the SEC investigation, the DuPont lawsuit, the Peter Frost accusation, the criminal case against the stock underwriters - what was going on with this judge?

It mattered not that Carter had never been accused of stock manipulations, that the DuPont and Frost cases had ended in a fizzle, that the SEC probe had produced no charges, that the FDA letters had amounted to no more than scoldings. To Asensio, these were the foundation stones upon which his opinions were built. The judge was trying to gag him. A serious threat to freedom was being created here that could have consequences for all Americans.

Goldfein listened and listened. One night, he and Asensio left the office together long after midnight, and Goldfein went home and fell into bed.

At 4:30 a.m., his phone rang. "I'm in your office," Asensio said. "I want to go over a few things."

The trial began skidding out of control on Feb. 12.

That was the day Asensio took the witness stand.

In words penned later by Hemispherx lawyer Dave Franceski, the proceeding became a "complete circus."

Asensio went into "hostile adversarial" mode and started expressing some fiery opinions. Even about the judge. To the judge.

He said: "Your rulings are very questionable. ... You're totally biased and it's obvious. ... You've caused me unnecessary expense. ... You've allowed them to defraud the public."

Sheppard tried being nice. With the jury out of the room, he said:

"Mr. Asensio, listen ... I don't care what you think of me personally. But you have to have some respect for this robe. ... You have no right to be disrespectful to a court. You can be disrespectful to me as a person, I don't care."

"I'm not being disrespectful to you personally," Asensio replied. "This is not personal. This is business. ... You have trampled upon the law for the purposes of harming me and assisting them. ... You have done things here that are illegal."

Sheppard: "Mr. Asensio ... I can't let myself get angry and overreact. I'm begging you to behave yourself at least until you get your testimony on the record."

"Change your rulings," Asensio stormed. "Change those rulings and I'll play your game. ... Change them, your honor. Change them."

"Mr. Asensio, you've said this three or four times and I've made my rulings. Now - "

"OK! So you will not change your rulings? Then don't expect me to condescend."

Asensio's lawyers led him away as he shouted: "I will not be silenced, your honor! I will not be silenced!"

Shortly afterward, with the eyes of the jurors fixed on him, Asensio proclaimed from the witness stand:

"We have ... documents that show that William Carter is doing dirty deals with people that are career stock swindlers."

Franceski and Walsh jumped to object.

Sheppard instructed the jury: "It's stricken. Ladies and gentlemen, there's no need for those kind of words. Please disregard that."

Asensio blurted: "They were career stock swindlers, your honor."

Sheppard: "I don't want those words used, sir. Just answer the lawyer's questions."

Next, Asensio asserted: "There was a great deal of litigation surrounding William Carter.... "

Sheppard: "Sustained. ... Mr. Asensio, please. Ladies and gentlemen, that's not part of the case. Please disregard it."

Asensio: "How can it not be part of the case? ... This is very important for the jury to know that this man here stole a million dollars from an AIDS patient."

Walsh and Franceski asked Sheppard to remove Asensio from the stand and bar him from giving further testimony.

"We need to sanction this man for what he's done," Franceski said. "He's disregarded this court. He's a total rule-breaker. He has no regard for any rules. He thinks he has rights but no responsibilities."

Sheppard tried being tough. He ordered Asensio out of the courtroom. He threatened to throw him in jail. He told him to shut up. He threatened to fine him. He even threatened to stop the trial and grant judgment to Hemispherx. Nothing worked. By the count of Hemispherx's lawyers, Asensio, while testifying, violated Sheppard's orders more than 40 times.

"I want you to answer the questions asked," Sheppard told Asensio at one point. "... Because that's the rules and that's what we should do."

"Well, the rules is that I shouldn't even be here because I have a freedom to give my opinions," snapped Asensio. "... And I live in New York and you don't even have jurisdiction over me. That's the rules that I know."

In his closing argument, Franceski told the jury that Hemispherx was down to \$2.7 million in cash.

"If the company cannot raise additional cash, the company will go out of business," Franceski said. "... The life's work of Dr. Carter who invented Ampligen will be extinguished and the company will go out of business. Literally, the lights will be turned out on the company."

Franceski argued that Asensio should be made to pay \$80 million for the damage he had caused. "What you saw in this courtroom was a complete and utter disregard for any rules, responsibilities, or any common decency. ... It's up to you to say to us that kind of conduct won't be condoned, won't be tolerated, and it must be stopped."

Goldfein told the jury: "They're looking for silence. They're looking for silence because they don't want to hear from Mr. Asensio. They want to continue selling their stock. ... They haven't sold a single bottle of Ampligen. ... They've been selling stock. That's all they've been selling."

The 12-member jury, six men and six women, deliberated from 2:20 to 5 p.m. on Feb. 21 and until 3:30 p.m. the following day. The lawyers for Carter were confident they had won: The wild man was going to get whacked.

But when the jury finally spoke, one lawyer related later, "You could have knocked us over with a feather."

The verdict was 11-to-1 in Asensio's favor. No finding of defamation for calling Hemispherx a fraud. No finding of liability for disparaging Ampligen. No damages of any kind. Jurors told the lawyers afterward they couldn't see that Asensio had done any harm.

The moment the jury left, Franceski told Sheppard: "I want to put on the record we're moving for a new trial."

Sheppard had vowed not to allow Asensio to force a mistrial. But that didn't work either. On July 2, the judge ruled that Asensio's "obdurate, contumacious and prejudicial misconduct" had gone too far. He ordered a new trial.

Five months after the trial, the lights are still on at Hemispherx. News releases with updates on Ampligen continue to flow. Research studies proceed. The stock is still above water, though last month the price slid below \$3 a share.

Carter declines interview requests and keeps a frosty silence.

Up in New York, Asensio still smolders. He seems not to notice that the jury ruled his way. The war on Carter dominates his mind. He seethes at the judge's rulings. He says there has been a massive failure of government. The FDA, the SEC, the civil justice system - all have failed. They have failed to see things as he sees them. Speaking softly and thoughtfully, Manuel Asensio says this has been a very profound failure indeed.

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