

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PHIGENIX, INC.
Petitioner

v.

IMMUNOGEN, INC.
Patent Owner

Case IPR2014-00676
Patent 8,337,856 B2

**IMMUNOGEN, INC.'S OPPOSITION TO PHIGENIX'S
MOTION TO EXCLUDE**

The Board should deny entirely Petitioner Phigenix's motion to exclude evidence (Paper 28).

I. Overview

Phigenix has moved to exclude four categories of evidence submitted by Patent Owner ImmunoGen. ImmunoGen will show why none of these categories warrant exclusion and why the Board should deny Phigenix's motion to exclude:

Category 1: *Supplemental IMS Data*. Phigenix advances three faulty reasons why the IMS data should be excluded:

- Phigenix argues that the IMS Data was not "filed as an exhibit" under Rule 42.63, but Rule 42.63 does not require all evidence to be filed as an exhibit. (For example, Rule 42.63(e) addresses the circumstance when evidence is *not* filed.)
- Phigenix argues that the IMS Data lack foundation, but ImmunoGen served Phigenix with a declaration attesting to the foundation of the IMS Data at the same time the IMS Data were served.
- Phigenix argues that the IMS Data are inadmissible hearsay, but the IMS Data are excepted from the preclusion of hearsay as a market report under FRE 803(17).

Category 2: *Summaries of the IMS Data* (Exhibits 2240-44, 2256, 2319, and 2320). Phigenix argues that summaries of IMS Data should be excluded as

hearsay, but the summaries are admissible under FRE 1006, which makes summaries of voluminous documents admissible.

Category 3: *Portions of the Jarosz Declaration relying on the summaries of the IMS Data.* Phigenix argues that portions of the Jarosz Declaration should be excluded under FRE 703 because Jarosz relied on the allegedly inadmissible IMS Data and summaries of that data. But Phigenix is wrong about the inadmissibility of the IMS Data and the data summaries. What is more, FRE 703 explicitly states that experts *may* rely on inadmissible evidence if experts would reasonably rely on such evidence for their opinion, a predicate established by Jarosz's own testimony.

Category 4: *Evidence incorporated by reference.* Phigenix asks the Board to exclude all evidence improperly incorporated by reference, but Phigenix waived such an argument by failing to serve an objection to this effect, and the motion fails to identify any evidence that Phigenix contends was improperly incorporated.

II. Background

Phigenix's motion to exclude centers on evidence relevant to ImmunoGen's showing of commercial success in its Patent Owner Response.¹ Through its expert

¹ The evidence at issue not related to commercial success falls into a catch-all category of evidence that Phigenix contends was improperly incorporated by reference.

Jarosz, ImmunoGen presented charts summarizing revenue and prescription data for Kadcyła®. *See* Exhibits 2240-44, 2256, 2319 & 2320. Jarosz's declaration explained: "Exhibits 2240-2244, 2256, 2319-2320 provide a summary of voluminous IMS revenue and prescription data, as well as marketing and promotional efforts relating to Kadcyła. I and others working under my direction prepared these exhibits." *See* Exhibit 2131, ¶12.

On January 29, 2015, Phigenix served evidentiary objections to the summary charts, and the Jarosz declaration for relying on these summary charts, stating that the summaries lacked foundation, had no "indication of the origin or creator" of the charts, and because the underlying data for the charts was not provided. *See* Paper 28, Exhibit A (Phigenix's Objections to Evidence), p. 11.

In response to Phigenix's objections, ImmunoGen served the underlying IMS Data for the summary charts (Exhibits 2347 and 2348) and a supplemental declaration from Jarosz that explained what the summary charts were and how they were compiled. *See* Paper 28, Exhibit C (Jarosz's Supplemental Declaration), ¶6.

Unsatisfied by ImmunoGen's supplemental evidence, Phigenix lodged another set of evidentiary objections, this time directed to the supplemental evidence, and has filed its motion to exclude.²

III. Argument

On a motion to exclude evidence, the moving party, here Phigenix, "bears the burden of proof to establish that it is entitled to the relief requested" *Athena Automation Ltd. v. Huskey Injection Molding Systems Ltd.*, Case IPR2013-00290, Paper 45, at 52 (Oct. 23, 1014). Phigenix's motion to exclude evidence fails to meet its burden as to any of ImmunoGen's evidence.

A. Patent Owner's IMS Data should not be excluded.

Phigenix raises three arguments for excluding the IMS Data: (1) they were not filed as exhibits under Rule 42.63, (2) they lack foundation, and (3) they are inadmissible hearsay. None of these arguments has merit.

² There is no procedure for objecting to supplemental evidence, nor a procedure permitting or requiring a party to serve supplemental evidence in response to such an objection. The proper course is for a party to file a motion to exclude, rather than to serve additional objections. *See* IPR2013-00020, Paper 17, p. 3.

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