

Paper No. \_\_\_\_  
Filed: April 6, 2016

INNOPHARMA LICENSING, INC., INNOPHARMA LICENSING LLC,  
INNOPHARMA INC., INNOPHARMA LLC,  
MYLAN PHARMACEUTICALS INC., and MYLAN INC.,  
Petitioner

v.

SENJU PHARMACEUTICAL CO., LTD.,  
Patent Owner

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Case IPR2015-00902 (Patent 8,669,290 B2)

**PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO  
EXCLUDE**

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## I. Introduction

Patent Owner respectfully opposes Petitioner's motion to exclude two broad categories of documents: (a) the preservative efficacy testing by Drs. Paulson and Myers (EX2126 and EX2128) and the supplemental evidence, served but not yet filed by Patent Owner, related to that testing (EX2247-EX2263) and (b) certain exhibits and testimony properly used by Patent Owner to challenge the scope of Dr. Laskar's opinion during his reply cross-examination (EX2272 at 119:7-121:12, 127:18-129:1, 141:7-145:21, 134:13-139:19, 177:3-179:15, and 183:5-17; and EX2266-EX2268). Petitioner's arguments lack merit, and none of these exhibits should be excluded.

The party moving to exclude evidence bears the burden to establish that it is entitled to the relief requested—namely, that the material sought to be excluded is inadmissible under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.20(c), 42.62(a). A motion to exclude may not be used to challenge the sufficiency of the evidence to prove a particular fact. Office Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012). It is within the Board's discretion to assign the appropriate weight to be accorded the evidence. *Id.*; *see also, e.g., In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1368 (Fed. Cir. 2004). As discussed

below, Petitioner has failed to establish entitlement to exclusion. Patent Owner respectfully requests that the Board deny Petitioner's motion to exclude.

**II. The Board Should Deny Petitioner's Motion To Exclude Dr. Paulson's and Dr. Myers' Timely-Submitted Declarations (EX2126 and EX2128)**

**A. Petitioner Did Not Timely Object to the Paulson and Myers Declarations**

Under 37 C.F.R. § 42.64(b), once trial has been instituted, any objection must be filed within five business days of service of evidence to which the objection is directed. *Id.* The objecting party must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence. *Id.* The party relying on the objected-to evidence may respond to the objection by serving supplemental evidence within ten business days. *Id.*

In connection with Patent Owner's Response, Patent Owner filed the Declaration of Dr. Myers (EX2126) and the Declaration of Dr. Paulson (EX2128) on December 28, 2015. *See* Paper Nos. 32-33. Petitioner did not object to EX2126 and EX2128 within the five-day period. If Petitioner had objected, Patent Owner would have been permitted to respond by serving supplemental evidence.

Having first learned of Petitioner's criticisms of Dr. Paulson's testing methodology in the parallel district court litigation on February 10, 2016, Patent Owner served the additional test results and related materials, EX2247-EX2263, in

advance of Petitioner's cross-examinations of Dr. Paulson and Dr. Myers. (EX2274, EX2275, Paper Nos. 48, 45.) Patent Owner did **not** file Exhibits 2247-2263 at that time. Instead, at Dr. Paulson's cross-examination, Petitioner marked EX2249, EX2250, and EX2257 as exhibits. (EX1082 at 60:15-61:4, 64:16-17, 128:8-10.) At Dr. Myers' cross-examination, Petitioner marked EX2256 as an exhibit. (EX1083 at 103:20-104:3.) In other words, Petitioner attempted to use these exhibits in support of its cross-examination, and then Petitioner later disingenuously moves to exclude those same exhibits from being filed into the record.

In fact, not until February 24, 2016, *fifty days* after the period for objecting to EX2126 and EX2128 had expired, did Petitioner purport to object to Dr. Paulson's and Dr. Myers' timely submitted declarations (EX2126 and EX2128), allegedly due to "certain deficiencies." See Myers Tr. at 41:9-17. Petitioner also purported to "reserve [its] right to move to exclude those declarations," notwithstanding Petitioner's failure to timely object under 37 C.F.R. § 42.64(b)(1). *Id.* But this was far too late.

Petitioner's reliance on *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-01149, Paper 68 at 9 (PTAB, Dec. 9, 2015)<sup>1</sup> is misplaced. Paper No. 62 at 4, n.3. In *Ericsson*, the Board noted that it had the power to waive the

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<sup>1</sup> Petitioner cites Paper No. 50, but that appears to be an error.

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