

Paper No. ____
Filed: April 6, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INNOPHARMA LICENSING, INC., INNOPHARMA LICENSING LLC,
INNOPHARMA INC., INNOPHARMA LLC,
MYLAN PHARMACEUTICALS INC., and MYLAN INC.,
LUPIN LTD., and LUPIN PHARMACEUTICALS, INC.,
Petitioners,

v.

SENJU PHARMACEUTICAL CO., LTD.
Patent Owner.

Case IPR2015-00903 (Patent 8,129,431 B2)¹

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

¹ IPR2015-01871 has been joined with this proceeding.

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I. Introduction

Patent Owner respectfully opposes Petitioner's motion to exclude 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 Request To Exclude Portions of Dr. Laskar's Testimony (EX2272) and Exhibits Discussed Therein (EX2266-EX2268)

As discussed in Patent Owner's Motion to Exclude, during the Reply stage of these proceedings, Petitioner has gone beyond the scope of the original petition. Paper 59. A petitioner should not be permitted to go beyond the scope of its Petition, introduce wholly new arguments, and then protest when the patent owner cross examines a petitioner's expert witness to establish that a new argument is beyond the scope. If such actions were permissible, then petitioners would be incentivized to add new arguments at the Reply stage, and patent owners would not have an effective means—cross examination and the related Observations—to explore the bounds of the new argument and show that the new argument is impermissible. This would nullify one major purpose of the cross-examination following a reply declaration. Here, there was nothing improper about Patent Owner's use of EX2266-2268 during Dr. Laskar's cross examination, and nothing warrants exclusion of Dr. Laskar's cross examination testimony.

A. Patent Owner's Actions Are Not Contrary to the Board's Order of March 21, 2016

After Petitioner's March 18, 2016 Reply was filed, Patent Owner emailed the Board, objecting that Petitioner had included new exhibits, including the Laskar reply declaration, raising new arguments outside the scope of the Petition

and Patent Owner's Response, and Patent Owner requested a surreply. (EX1154 at 2.) The Board denied the request for a surreply, but stated:

The Board will determine whether, under 37 C.F.R. § 42.23(b), Petitioner's Reply briefs, and related evidence, are outside the scope of a proper reply and evidence, when the panel reviews the record and prepares any final written decision in connection with these proceedings. If there are improper arguments or evidence, or both, presented with the Reply briefs, the panel *may exclude* such argument and related evidence.

EX1154 at 1 (emphasis added). Thus, while the Board did not permit a surreply, the Board did not in any way restrict Patent Owner's ability to cross-examine Dr. Laskar or move to exclude Petitioner's out-of-scope reply and evidence.

B. Patent Owner's Properly Used EX2266-EX2268 to Examine the Veracity and Credibility of Dr. Laskar's Opinions

Accordingly, at Dr. Laskar's deposition, Patent Owner properly used EX2266-EX2268 to question the veracity and credibility of Dr. Laskar's opinions and to illustrate that Dr. Laskar's opinions are in fact new. *See Fed. R. Evid. 703* (experts can base opinions on facts or data expert has been made aware of even if not admissible). Indeed, Advisory Committee Notes to Rule 703 makes clear that one source contemplated by the rule consists of presentation of data to the expert outside the court and other than by his own perception, *e.g.*, an expert basing his opinion on statements from other experts, which would only be admissible in

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