

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., MYLAN INC., LUPIN LTD., and LUPIN
PHARMACEUTICALS, INC.

Petitioner,

v.

SENJU PHARMACEUTICAL CO., LTD., BAUSCH & LOMB, INC., and
BAUSCH & LOMB PHARMA HOLDINGS CORP.

Patent Owner.

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

Filed: April 11, 2016

**PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE UNDER 37 C.F.R. § 42.64(c)**

¹ IPR2015-01871 has been joined with IPR2015-00903.

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I. Patent Owner Fails to Justify its Improper Conduct

Patent Owner really does not dispute that it violated the Board’s Order barring a surreply, but instead asserts that back-dooring in its surreply declaration of its expert during Dr. Laskar’s cross-examination is proper because Dr. Laskar was being cross-examined. Opp’n, Paper 64 at 2-3. Patent Owner’s right to cross-examine Dr. Laskar does not give *counsel* for Patent Owner the right to violate this Board’s Order and read *pages upon pages* of surreply evidence into the record under the guise that counsel was properly “cross-examining” Dr. Laskar.

Patent Owner argues that under Fed. R. Evid. 703 “experts can base opinions on facts or data expert (sic) has been made aware of even if not admissible.” Patent Owner's Opp’n, Paper 64 at 3. However, Patent Owner fails to show how Dr. Laskar relied upon the Reply Expert Report of Dr. Davies (EX2267) or the deposition transcripts of Dr. Heathcock and Dr. Cykiert that Patent Owner’s counsel read into testimony. For example, there is no evidence that Dr. Laskar was even aware of Dr. Davies’ Reply Expert Report or the testimony provided Dr. Heathcock and Dr. Cykiert—let alone relied on it. *See, e.g.*, EX2272 at 139:14-19.

Moreover, Patent Owner’s questioning does not even test the veracity of Dr. Laskar’s opinions as Dr. Laskar’s deposition transcript shows that Patent Owner’s counsel merely reads portions of the exhibits into the record and fails to substantively engage Dr. Laskar in any substantive line of questioning. EX2272 at

119:7–121:12 (reading portions of Exhibit 2266), at 134:15-139:19 (reading portions of Exhibit 2267), at 141:7–144:20 (reading portions of Exhibit 2268).

Accordingly, it is clear that Patent Owner was uninterested in using the exhibits to question Dr. Laskar and was focused on attempting to ensure that the substantive portions of the exhibits were received, albeit improperly, into evidence.

Lastly, Rule 703 does not excuse Patent Owner’s conduct by which it violated a Board Order. Indeed, Patent Owner does not dispute that the purpose of its use of Exhibits 2266 – 2268 was to introduce evidence that would have been incorporated into a surreply. Patent Owner concedes as much in its Opposition. Opp’n, Paper 64 at 6 (“Moreover, in light of the Board’s denial of Patent Owner’s request for a surreply . . . EX2267 is more probative . . . than any other evidence that the proponent can obtain at this stage of these proceedings.”) (internal quotations omitted). The Board should put a stop to Patent Owner’s egregious conduct, which stands in derogation of the Board’s Order, by excluding Exhibits 2266 – 2268.

II. EX2267 Is Not Being Offered Under Fed. R. Evid. 702

Continuing its effort to justify defying the Board’s Order, Patent Owner then asserts that EX2267 should not be excluded because it is cited to support of its motion to exclude Dr. Laskar under Fed. R. Evid. 702. Opp’n, Paper 64 at 4-5. Patent Owner does not explain the relevance of surreply evidence to Dr. Laskar’s

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