

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Mylan Pharmaceuticals Inc., Petitioner

v.

Nissan Chemical Industries Ltd.
Patent Owner

Inter Partes Review No.: IPR2015-01069

**PETITIONER'S MOTION TO EXCLUDE NISSAN'S EXHIBITS UNDER
37 C.F.R. 42.64(c)**

I. Introduction

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner Mylan Pharmaceuticals Inc. (“MPI”) respectfully moves to exclude Exhibit Nos. 2035-36, 2038-41, 2046, 2049, and 2052 (collectively, the “Challenged Exhibits”) submitted by Patent Owner Nissan Chemical Industries Ltd. (“Nissan”) in alleged support for its Reply Regarding Petitioner’s Failure to Name a Real Party-In-Interest (“Reply”) (Paper 21). MPI also moves to exclude Nissan’s references to certain portions of Mr. Thomas Jenkins’s deposition testimony (Ex. 2031) from the Reply. As explained below, the Challenged Exhibits and deposition testimony are inadmissible under the Federal Rules of Evidence (“FRE”) and therefore should be excluded and/or stricken from Nissan’s Reply.

II. MPI Timely Objected to the Challenged Exhibits

Pursuant to C.F.R. § 42.64, MPI timely objected to the Challenged Exhibits and Nissan’s references to Mr. Jenkins’s deposition testimony on multiple grounds. *See* Petitioner’s Evidentiary Objections Pursuant to 37 C.F.R. § 42.64 (attached as App. A) at 3-6. In response, on October 5, 2015, Nissan submitted supplemental evidence in the form of a Declaration by its outside counsel, Kathleen B. Carr (attached as App. B). Nissan’s evidence does not cure Petitioner’s evidentiary objections as stated herein.

III. The Challenged Exhibits are Inadmissible under the FRE

A. Exhibit 2035, Entitled “Articles of Association of Mylan N.V.”

Nissan's counsel asserts that Ex. 2035 represents Mylan N.V.'s (“MNV”) Articles of Association allegedly authorizing it to conduct certain activities in the United States. Reply at 3-4. This exhibit is a legal document prepared under Dutch Law. See Ex. 2035, §§ 1.02, 1.03, 4.01 and 12.01. Yet, Nissan offers no accompanying testimony from any witness having specialized knowledge about Dutch corporate law and the meaning of the exhibit's contents under such law relative to the legal and factual issues at hand. Instead, Nissan' counsel merely asserts that Ex. 2035 (a legal document prepared under Dutch law) shows that MNV is not a “non-operational” company under U.S. law. Here, Nissan's counsel inappropriately attempts to substitute its own opinion for that of a competent expert capable of providing the necessary testimony evidence establishing the relevance of Ex. 2035 to the legal and factual issues in dispute. See e.g., *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1068 (Fed. Cir. 2005); *In re Schulze*, 346 F.2d 600, 602 (C.C.P.A. 1965). Accordingly, the relevance of Ex. 2035 has not been properly shown and is therefore inadmissible under FRE 401-03.

Moreover, Ex. 2035 constitutes inadmissible hearsay, as Nissan offered no supplemental evidence indicating that the exhibit falls within the scope of any

exceptions to the rule against hearsay. Finally, Nissan offered no supplemental evidence showing proper authentication of Ex. 2035 as required under FRE 901.

B. Exhibit 2036, Entitled “Mylan N.V. – Other”

Exhibit 2036 purports to contain an internet posting of a transcript from a conference call taken from an Internet source. Nissan offers Ex. 2036 as alleged proof that MNV is not a “non-operational holding company” and was involved in other IPR proceedings (Reply at 4), and as evidence of MNV’s “active business activities.” In doing so, Nissan relies on several pages of a transcript attributing alleged statements from four MNV corporate officers. Reply at 4-5 (citing Ex. 2036 at 8-11, 18-19). The cited portions of Ex. 2036 constitute inadmissible hearsay and do not fall within the scope of any exception thereto. Moreover, Ex. 2036 does not contain any information regarding its author, or the method it was transcribed. *See Novak v. Tucows, Inc.*, No 06-CV-1909, 2007 U.S. Dist. LEXIS 21269, at *15-16 (E.D.N.Y. Mar. 26, 2007) (“Where postings from internet [sic] websites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay”), *aff’d*, 330 Fed. Appx. 204 (2d Cir. 2009). Accordingly, Ex. 2036 should be excluded as evidence.

C. Exhibit 2038, Partial LinkedIn Page

Exhibit 2038 purports to be a partial LinkedIn Internet page of Steve Flynn. However, this exhibit was not filed in accordance with the Board’s rules

because Nissan failed to cite or otherwise rely on this exhibit in its Reply. This alone is sufficient grounds for the exclusion of Ex. 2038 from the Board's consideration. *See* 37 CFR § 42.6(c); *see also* 37 CFR § 42.63(a) ("All evidence must be filed in form of an exhibit."); 37 CFR § 42.7 (The Board may expunge any exhibit not submitted in accordance with the Board's rules).

D. Exhibit 2039, MYPAC FEC Form 3X

Nissan failed to cite or otherwise rely on Ex. 2039 in its Reply. As is the case with Ex. 2038 discussed above, and for the reasons expressed therein, Ex. 2039 should be excluded from this dispute and expunged from the record.

E. Exhibit 2040, Walker, J., "Drug-Industry Rule Would Raise Medicare Costs," *The Wall Street Journal*, Aug. 31, 2015

Exhibit 2040 purports to be a Wall Street Journal Internet article by Joseph Walker. Nissan offers the statements made in the article for the alleged fact that MNV itself has filed its own IPR challenges. Reply at 4. Nissan also relies on statements from an MNV officer, Ms. Heather Bresche. *Id.*

Internet articles are considered unauthenticated hearsay. *See Johnson v. Prince George's County*, No. DKC 10-0582, 2011 U.S. Dist. LEXIS 20343, at *28-30 (D. Md. Mar. 1, 2011) (citations omitted). In fact, Internet articles are considered "analogous to the newspaper articles that courts [] have frequently recognized as hearsay." *Id.*; *see also Jones v. Dolgencorp, Inc.*, 789 F. Supp. 2d 1090, 1098 (N.D. Iowa 2011) (newspaper articles considered "classic hearsay"). Further, in *Dobson*

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