

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioners

v.

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

Patent Owner

IPR2015-01097 (US Patent No. 8,751,131)
IPR2015-01099 (US Patent No. 8,669,290)
IPR2015-01100 (US Patent No. 8,927,606)
IPR2015-01105 (US Patent No. 8,871,813)¹

PETITIONERS' MOTION TO EXCLUDE UNDER 37 C.F.R. § 42.64(c)

¹ The word-for-word identical paper is filed in each proceeding identified in the heading. IPR2016-00089 has been joined with IPR2015-01097; IPR2016-00091 has been joined with IPR2015-01100; and IPR2016-00090 has been joined with IPR2015-01105. Each of these joined proceedings includes Petitioners InnoPharma Licensing, Inc., InnoPharma Licensing LLC, InnoPharma Inc., Mylan Pharmaceuticals Inc., and Mylan Inc. (collectively, "InnoPharma") in addition to the parties identified above.

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I. Introduction

Pursuant to 37 C.F.R. § 42.64(c) and the Scheduling Order (Paper 10) as modified (Paper 14), Lupin Ltd., Lupin Pharmaceuticals, Inc., InnoPharma Licensing, Inc., InnoPharma Licensing LLC, InnoPharma Inc., InnoPharma LLC, Mylan Pharmaceuticals Inc., and Mylan Inc., (collectively, “Petitioners”) respectfully move to exclude Exhibit 2323 submitted by Senju Pharmaceutical Co., Ltd., Bausch & Lomb, Inc., and Bausch & Lomb Pharma Holdings Corp. (collectively “Patent Owner”) as well as all testimony relating to Exhibit 2323 elicited from Mr. John Jarosz, Patent Owner’s expert, during redirect following the cross-examination on March 16, 2016. *See* EX1089 at 178:9-203:6. Patent Owner’s Exhibit 2323 was introduced for the first time during the redirect of Mr. Jarosz in an effort to backdoor evidence into the record. *See* EX1089 at 178:9-203:6. Notwithstanding the disregard of the Board’s rules, Patent Owner’s Exhibit 2323 and all related testimony must be excluded.

II. Petitioners Timely Objected

Timely objections were made to Exhibit 2323 and the testimony related to Exhibit 2323 during the redirect of Mr. Jarosz as outside the scope of cross, improper redirect, calling for narrative, foundation, and as not of record in the proceeding. *See* EX1089 at 179:4-5, 18-21; 180:6; 183:11-12; 184:12-14; 185:10-

12; 186:8-10; 187:5-7, 17-19; 188:10-12; 189:6-13; 190:1-17; 191:22-192:2;
192:12-14; 193:8-10, 16-18; 194:2-4; 195:8-10; 195:16-196:3; 197:4-6, 14-16;
198:7-9, 19; 201:7-9; 202:3-5.

III. Exhibit 2323 and Related Testimony During the Redirect of Mr. Jarosz Should Be Excluded

During the March 16, 2016 deposition of Mr. Jarosz, the Patent Owner improperly elicited redirect testimony from Mr. Jarosz responding to opinions proffered by the economics expert in the co-pending district court litigation, Mr. Ivan Hofmann. Mr. Hofmann was not part of the IPR proceeding at the time of the deposition. Exhibit 2323, entered into the record during redirect, is the district court Reply Report of John C. Jarosz on Objective Indicia of Non-obviousness, which, as stated at paragraph 2 of Exhibit 2323, was written in order to reply to a report by Mr. Ivan Hofmann. EX2323 at ¶2. Patent Owner focused exclusively on paragraphs of Exhibit 2323 that mentioned Mr. Hofmann's opinions and included the rebuttal thereto. Thus, Patent Owner's introduction of Exhibit 2323 was a blatant attempt to introduce rebuttal evidence to Mr. Hofmann.

To the extent that Patent Owner wanted to preemptively rebut possible arguments that might be made by Mr. Hofmann, not yet a witness in this proceeding, the time to do so would have been in Mr. Jarosz's expert declaration submitted with the Patent Owner Response. *See* 37 CFR 42.53(a) (requiring

uncompelled direct testimony be submitted in the form of an affidavit). As Mr. Jarosz admitted on recross, he had a copy of Mr. Hofmann's report in the district court litigation prior to filing his declaration in these IPRs. *See* EX 1089, 203:13-16. And his declaration in these IPRs was filed after Exhibit 2323 was signed by Mr. Jarosz. Further, Mr. Jarosz admitted in recross that he chose to respond to some of Mr. Hofmann's points in his declaration, but not all of them. *See* EX1089 at 204:3-12.

By circumventing the rules, Patent Owner has prevented Petitioners from having a meaningful opportunity to cross-examine the evidence. Thus, the evidence improperly offered through Exhibit 2323 and during the redirect examination should be given no weight. *See HTC Corp.*, IPR2014-01198, Paper 41, pp. 3-5.

Moreover, Patent Owner's use of Exhibit 2323 during the deposition was improper. Patent Owner's counsel did not use Exhibit 2323 to ask Mr. Jarosz substantive questions. Rather, the majority of counsel's questions on redirect consisted of directing Mr. Jarosz's attention to a particular paragraph of his Reply Expert Report, and asking "what opinions do you set forth" in that particular paragraph number. These questions prompted Mr. Jarosz to directly read and/or summarize at least 20 paragraphs from the report. *See* EX1089 at 179:14-203:8. This shows that the intent of the Patent Owner was not to further develop the

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