Paper No. __
Filed: May 18, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LUPIN LTD. and LUPIN PHARMACEUTICALS INC.
Petitioners,

v.

SENJU PHARMACEUTICAL CO., LTD.
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]

PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE

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[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

Patent Owner respectfully opposes Petitioners' motion to exclude Exhibit 2323 and testimony from Mr. John Jarosz relating to Exhibit 2323. (Paper No. 43 in IPR2015-1099; Paper No. 45 in IPR2015-1097; and Paper No. 44 in IPR2015-1105 and 1100.) Petitioners' arguments for exclusion lack merit, and Exhibit 2323 and Mr. Jarosz's testimony should not be excluded. The party moving to exclude evidence bears the burden of establishing 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). Petitioners themselves placed at issue the very materials involving Mr. Jarosz that they now are seeking to exclude, and thus Petitioners have wholly failed to establish entitlement to exclusion under any Federal Rule of Evidence. Accordingly, the Board should deny Petitioners' Motion to Exclude.

II. The Board Should Deny Petitioners' Motion to Exclude Because Exhibit 2323 and Mr. Jarosz's Testimony Were Within the Scope of Petitioners' Cross-Examination

As Petitioners concede, during the March 16, 2016, cross-examination of Mr. Jarosz, Petitioners asked several questions about Mr. Jarosz's expert reports in the parallel district court litigation, including his reply expert report, Exhibit 2323. (EX1089 at 69:7-75:20; 78:8-81:7; 83:3-14.) Petitioners inquired into many issues during their cross examination, including attempting to characterize Mr. Jarosz's

opinions and asking him about his opinions on commercial success as a whole, the marketplace success of Prolensa®, the nexus between the market success and the patents at issue, and whether the marketplace success of Prolensa® was tied to any particular patent. (*Id.* at 70:15-71:12; 71:18-72:6; 72:16-9.) Further, as Petitioners readily admit, they also probed whether there were any differences between the opinions offered in Exhibit 2323 and Mr. Jarosz's opinions in the declarations submitted in the instant IPRs and whether Mr. Jarosz applied different analytical frameworks for them. (*Id.* at 73:11-75:20; 78:8-81:7; 83:3-14.) By directly exploring these issues and the substance of Mr. Jarosz's expert reports from the parallel district court proceeding, Petitioners opened the door for Patent Owner to explore Mr. Jarosz's expert reports from the district court proceedings, and specifically Exhibit 2323, on redirect examination.

To the extent that Petitioners argue that door was not opened specifically as to Mr. Jarosz's opinions in Exhibit 2323, there can be no question that the portions of Exhibit 2323 discussed on redirect examination are directly related to the issues explored initially by Petitioners during cross-examination. For example, during cross-examination Petitioners extensively questioned Mr. Jarosz on his reliance on IMS data to support his commercial success opinions. (*E.g.*, EX1089 at 91:8-92:4; 93:10-105:1; 108:8-111:7; 129:5-131:7). On redirect, Mr. Jarosz testified about Exhibit 2323, explaining why the IMS data he used to support his commercial

success opinions are reliable. (*Id.* at 183:14-185:22.) Exhibit 2323 and Mr. Jarosz's testimony are therefore plainly relevant and probative to the issue of whether the patents at issue are commercially successful, and fall within the scope of Petitioners' cross-examination. *See Phigenix, Inc. v. Immunogen, Inc.*, IPR2014-00676, Paper 39, Final Written Decision (finding Mr. Jarosz's commercial success opinions provide probative value and rejecting Petitioner's motion to exclude his opinion). Accordingly, and contrary to Petitioners' arguments, Exhibit 2323 and Mr. Jarosz's testimony do not warrant exclusion under Federal Rules of Evidence 401 or 611(b) and should be allowed under Federal Rules of Evidence 702 and 703.

Undoubtedly, Petitioners somehow sought to gain an advantage by questioning Mr. Jarosz during his cross-examination about his expert reports from the parallel district court litigation, regardless of whether or not Petitioners chose to mark any reports as exhibits during his cross-examination. Petitioners cannot now complain that Patent Owner seeks to elicit testimony about Mr. Jarosz's prior report (Exhibit 2323), when Petitioners first tried to use those reports as a sword

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