

Served on behalf of Petitioner COALITION FOR AFFORDABLE DRUGS X LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COALITION FOR AFFORDABLE DRUGS X LLC,  
Petitioner,

v.

ANACOR PHARMACEUTICALS, INC.,  
Patent Owner.

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Case IPR2015-01776 (Patent 7,582,621 B2)

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**PETITIONER'S RESPONSE TO PATENT OWNER'S MOTION TO  
EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64**

Petitioner Coalition for Affordable Drugs X, LLC (“CFAD” or “Petitioner”) responds to Patent Owner’s Motion To Exclude Evidence Pursuant To 37 C.F.R. § 42.64. (Paper No. 57.) Patent Owner (“PO”) does not move to exclude any evidence upon which the Board relied in properly granting institution of the Petition. (Paper No. 24.) The Board should deny PO’s motion because each of the challenged exhibits complies with the Federal Rules Evidence (“FRE”), relevant case law, and the PTAB’s rules as codified in the Code of Federal Regulations, Title 37, at Part 42.

## **I. PROCEDURAL BACKGROUND**

1. On March 8, 2016, PO filed its objections to evidence served with Petitioner’s petition for *inter partes* review pursuant to 37 C.F.R. § 42.64.
2. The Parties met and conferred on March 11, 2016 concerning the adjustment of DUE DATES 1 and 2 in the Scheduling Order dated February 23, 2016 and an extension of the deadline for serving supplemental evidence from the original date of March 22, 2016 to the new agreed upon date of April 5, 2016.
3. The Parties submitted a Joint Notice Of Stipulation To Adjust Schedule on March 17, 2016 reflecting the parties’ agreements and the Board granted the Joint Notice of Stipulation to Adjust the Schedule by e-mail on March 22, 2016.

4. Petitioner timely served its supplemental evidence on April 5, 2016.<sup>1</sup>  
(Ex. 1085.)

5. Petitioner filed its Reply to Patent Owner's Response on August 24, 2016. (Paper No. 47.)

6. On August 31, 2016, PO filed its objections to evidence served with Petitioner's Reply pursuant to C.F.R. § 42.64.

## II. PETITIONER'S RESPONSES TO PO'S ARGUMENTS

### A. Exhibit 1024: BioborJF® Specification Sheet Is Admissible

Ex. 1024 is a BioborJF® Specification Sheet. Petitioner timely served a supplemental declaration (Ex. 1036) updating the web address for Ex. 1024 and a supplemental declaration form its expert (Ex. 1042). (Ex. 1036 at ¶ 3; Ex. 1085.) Ex. 1036 merely updates the web address for the location of the BioborJF® Specification Sheet, which changed after the original declaration was filed. Ex. 1042 merely updates Dr. Murthy's reliance on the supplemental exhibits. PO moves to exclude the BioborJF® Specification Sheet on grounds of authenticity and hearsay. Petitioner notes **PO does not move to exclude this very same**

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<sup>1</sup> PO's motion mistakenly asserts that no supplemental evidence was served in response to PO's objections to Exs. 1024, 1025, 1031, and 1032, but Petitioner timely served supplemental Exs. 1036, 1038, 1040, 1041, and 1042. (Ex. 1085.)

**exhibit in related IPR2015-01785.**

1. The BioborJF® Specification Sheet Is Properly Authenticated

Petitioner has produced evidence sufficient to support a finding that the BioBorJF® Specification Sheet is what Petitioner claims. Fed. R. Evid. 901(a). The burden of proof for authentication is “slight.” *Google Inc. v. Intellectual Ventures II LLC*, IPR2014-01031, Paper 41 at 7-9 (PTAB Dec. 7, 2015). Rule 901(a) only requires sufficient evidence of authenticity to support a prima facie case that the item is genuine. *Id.* In addition, “the Board, sitting as a non-jury tribunal with administrative expertise, is well positioned to determine and assign appropriate weight to evidence.” *Mylan Pharms. Inc. v. Yeda Research & Development Co. LTD.*, IPR2015-00644, Paper 86 at 35 (PTAB Aug. 24, 2016).

Petitioner timely served a supplemental declaration from counsel (Ex. 1036 at ¶ 3) with the new web address for the BioborJF® Specification Sheet on April 5, 2016, which had changed since counsel’s declaration was originally filed (Ex. 1030 at ¶ 2). Ex. 1024 is properly authenticated because counsel’s declaration recites the proper web address and that Ex. 1024 is a true and correct copy of the BioborJF® Specification Sheet currently available at said web address, a web address that specifically recites Biobor and BioBorJF® within its name. *ForeWord Magazine, Inc. v. OverDrive, Inc.*, Case No. 10-1144, 2011 U.S. Dist. LEXIS 125373, at \*9-11 (W.D. Mich. Oct. 31, 2011); *Osborn v. Butler*, 712 F. Supp. 2d

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1134, 1146 (D. Idaho 2010); *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, No. 06-0827, 2008 U.S. Dist. LEXIS 78353, at \*16-17 (C.D. Cal. Mar. 27, 2008); *Google*, IPR2014-01031, Paper 41 at 7-9; *SIDI Tech., Inc. v. Bose Corp.*, IPR2013-00350, Paper 36 at 16-18 (PTAB Nov. 7, 2014). PO does not identify a single reason why the BioBorJF® Specification Sheet is unreliable.

The BioborJF® Specification Sheet is also authenticated because it includes distinctive characteristics pursuant to FRE 901(b)(4) and is self-authenticating pursuant to FRE 902(7). *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009). The BioborJF® Specification Sheet includes the HAMMONDS® and the BioborJF® trade logos in bold, red print across the top of the first page and the address for Hammonds Fuel Additives along with the Biobor website at the bottom of the first page.

Patent Owners reliance on *EMC Corp. v. PersonalWeb Techs., LLC* is inapposite because the relevant part of the *EMC* decision addressed a party's submission of documents from the Wayback Machine as prior art. IPR2013-00084, Paper No. 64 at 42-46. Petitioner is not relying on the Biobor® Specification Sheet as prior art. Rather, Petitioner is offering the Biobor® Specification Sheet for the purpose of providing relevant context and background concerning a product specifically mentioned by *Brehove* (Ex. 1003 at ¶ [15]), the contents of which are further corroborated by Patent Owner's Exhibit 2006, a 1993 EPA report

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