

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS X LLC,
Petitioner,

v.

ANACOR PHARMACEUTICALS, INC.,
Patent Owner.

Case No. IPR2015-01776
Patent No. 7,582,621

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

I. Introduction

Patent Owner Anacor Pharmaceuticals, Inc. submits this reply to Petitioner's Response to Patent Owner's Motion to Exclude Evidence (Paper No. 63), filed on October 11, 2016.

II. Argument

A. Exhibits 1024, 1025, 1031, 1032, 1051, 1067, 1068, 1069, and 1071 should be excluded under FRE 901 due to a lack of authentication.

Petitioner has not submitted any evidence establishing that Exhibits 1024, 1025, 1031, 1032, 1051, 1067, 1068, 1069, and 1071 are admissible. Petitioner has still not provided the testimony of any witness with personal knowledge of the websites listed in Exhibits 1024, 1025, 1031, 1032, 1051, 1067, 1068, 1069 and 1071, and has not provided any other basis for concluding that the webpages are authentic or to establish their dates of publication. *See EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00084, Paper No. 64, p. 45-46 (citations omitted).

Petitioner's supplemental evidence is merely testimony of its counsel in Exhibits 1036 and 1080. With regard to Exhibit 1025, Petitioner asserts that its newly filed Exhibit 1038, a certified copy of a section of the *Brehove* prosecution history containing a purported copy of Biobor JF® MSDS indicating an effective date of 2000, is self-authenticating. Petitioner maintains that the MSDS of Exhibit 1038 "is the same as Exhibit 1025 with the exception of the publication date." Paper No. 63 at 6. However, the MSDS copy contained in Exhibit 1038 is *not* the

same MSDS document previously filed as Exhibit 1025. In addition to indicating a different effective date, Exhibit 1038 provides a different approximate weight percent for dioxaborinanes. *See* Exhibit 1038 at 10; Exhibit 1025 at 1. Further, newly filed Exhibits 1040 and 1041 fail to cure the deficiency in Exhibits 1031 and 1032, as they also do not indicate their respective online publication dates. Petitioner has submitted no authentication from the websites themselves and has not attempted to establish any online publication date.

Thus, Exhibits 1024, 1025, 1031, 1032, 1051, 1067, 1068, 1069, and 1071 lack authentication and are inadmissible under FRE 901.¹

B. Exhibits 1024, 1025, 1031, 1032, and 1051 should be excluded under FRE 801 and FRE 802 as inadmissible hearsay.

Exhibits 1024, 1025, 1031, 1032, and 1051 are also inadmissible hearsay under FRE 801 and FRE 802 because they are offered as evidence of what they assert. Regarding Exhibit 1024, Petitioner points to Exhibit 2006 but provides no rationale or evidence showing how Exhibit 2006 could verify the truth of unknown webpage contents with uncertain date. Petitioner has also not established that

¹ Petitioner asserts that Patent Owner has not objected to Exhibits 1024, 1025, 1067, and 1068 in the related IPR2015-01785 proceeding. The point is of no moment. Exhibits 1024, 1025, 1067, and 1068 pertain to the rejection ground involving *Brehove*, which is not in the IPR2015-01785 rejection grounds.

Exhibits 1024, 1025, 1031, and 1032 fall within the hearsay exception of FRE 803(17) because Petitioner provides no evidence that the Exhibits are “generally relied on” as market reports or similar commercial publications. Fed. R. Evid. 803(17). Further, Petitioner has not established that the contents of Exhibit 1051 constitute an opposing party’s statement. Petitioner does not even attempt to address how David Perry’s statement about Dr. Benkovic’s views would not constitute hearsay under FRE 801(d)(2)(A).

Accordingly, Exhibits 1024, 1025, 1031, 1032, and 1051 should also be excluded as inadmissible hearsay.

C. Exhibits 1031 and 1032 should be excluded as lacking relevance under FRE 402 and lacking probative value under FRE 403.

Petitioner argues that Exhibits 1031 and 1032 pertain to long-felt need and Patent Owner’s Exhibit 2063, but the Exhibits are in fact cited for the assertion that “[t]he public has a significant interest in ensuring monopoly privileges are not granted by an invalid patent where, as here, Kerydin[®] can cost up to \$500.00 per month per patient.” Petition p. 21. As set forth in the Motion to Exclude, this issue is separate and apart from the three grounds raised in the Petition. Consequently, both Exhibits should be excluded on relevance grounds.

Exhibit 1032 is also inadmissible as lacking probative value under FRE 403. Petitioner does not address how its limited, cherry-picked pricing data are sufficient to prove or demonstrate Kerydin[®] prices generally. Exhibit 1032 should

therefore be excluded under FRE 403.

D. Exhibits 1067, 1068, 1069, 1071, 1074, and 1075 should be excluded as lacking relevance.

Exhibits 1067, 1068, 1069, 1071, 1074, and 1075 are inadmissible as lacking relevance because they are not prior art. Petitioner does not address how these documents, with alleged publication dates that are significantly later than the priority date, are relevant to a POSA's knowledge in 2005. In attempting to respond to the relevance objections, Petitioner cites *Mylan Pharms. v. Yeda Res. & Dev. Co.*, IPR2015-00644, Paper 86 at 34 ("A post-filing date publication is not automatically excluded from consideration as irrelevant."). However, *Mylan* is inapplicable to the instant grounds for exclusion because the publication at issue was published three weeks after the priority date and described a study that began two years prior. *See id.* And Petitioner does not even attempt to address how these documents, with purportedly much later publication dates, could have contributed to a POSA's knowledge in 2005.

Additionally, with respect to Exhibit 1069 and Exhibit 1071, as set forth in Patent Owner's Motion to Exclude, long-felt need must be judged as of the priority date. *See Procter & Gamble Co. v. Teva Pharms. USA, Inc.*, 566 F.3d 989, 998 (Fed. Cir. 2009). Petitioner does not even attempt to address how Exhibit 1069 and Exhibit 1071 are relevant to long-felt need.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.