

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ARGENTUM PHARMACEUTICALS LLC, MYLAN  
PHARMACEUTICALS INC., BRECKENRIDGE PHARMACEUTICAL,  
INC., and ALEMBIC PHARMACEUTICALS, LTD.,  
Petitioners,

v.

RESEARCH CORPORATION TECHNOLOGIES, INC.  
Patent Owner

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Case IPR2016-00204<sup>1</sup>

Patent RE38,551 E

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**PETITIONER'S MOTION TO EXCLUDE**

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<sup>1</sup> Case IPR2016-01101, Case IPR2016-01242, and Case IPR2016-01245  
have been joined with this proceeding.

Pursuant to 37 C.F.R. §§ 42.62, 42.64(c) and the Board's Scheduling Order (Paper 9), Petitioner Argentum Pharmaceuticals LLC hereby respectfully moves to exclude Exhibits 2125, 2141-2170, and 2174-2182.<sup>2</sup> The Federal Rules of Evidence apply to *inter partes* proceedings. 37 C.F.R. § 42.62; *LKQ Corp. v. Clearlamp, LLC*, IPR2013-00020, Paper 17, at 3 (PTAB Mar. 5, 2013).

**Exhibits 2125 and 2141-2170**

The Board should exclude Exhibits 2125 and 2141-2170. Petitioner timely objected to these exhibits. (Paper No. 41.) Patent Owner relies on these exhibits in its Patent Owner Response. *See, e.g.*, Patent Owner Response, Paper No. 35, at 8, 54.

First, each of the exhibits lacks any authentication, and therefore the exhibits are inadmissible under Federal Rule of Evidence 901. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). Although the standard for admissibility under Rule 901(a) has been described as "slight," *see United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013), Patent Owner has offered no evidence from any witness having personal

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<sup>2</sup> Petitioner timely objected to Exhibits 2125, 2141-2170, and 2174-2182. *See* Pet'r Objections, Paper No. 23, filed June 7, 2016; Pet'r Objections, Paper No. 41, filed Aug. 8, 2016.

knowledge concerning Exhibits 2125 and 2141-2170.

Patent Owner offers no evidence regarding the identity of the purported authors of the letters, whether those purported authors did in fact write the letters, or whether those purported authors did in fact work for the companies or entities identified on the letters (for those letters that in fact identify companies).

Nor does Patent Owner provide testimony from a witness with knowledge of what the exhibits are. *See* Fed. R. Evid. 901(b)(1). In fact, Patent Owner's witness, Dr. Velluro, demonstrated very little understanding of the letters during his cross-examination. *See* Ex. 1049, at 90-197.

Patent Owner also does not offer “[a] nonexpert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.” Fed. R. Evid. 901(b)(2). Nor does Patent Owner offer evidence about “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” Fed. R. Evid. 901(b)(4).

Patent Owner also fails to authenticate the letters under the “reply doctrine.” *See United States, v. Reilly*, 33 F.3d 1396, 1407-08 (3d Cir. 1994) (citing 5 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence ¶ 901(b)(4)[05] at 901-76 (1993) (“A letter can be authenticated by testimony or other proof that it was sent in reply to a duly authenticated writing. A reply letter often needs no further

authentication because it would be unlikely for anyone other than the purported writer to know and respond to the contents of an earlier letter addressed to him.”)).

In short, Patent Owner offers no evidence to authenticate the letters purportedly written by various individuals who have not testified in the present proceeding. Accordingly, Exhibits 2125 and 2141-2170 should be excluded under Rule 901.

Second, each of the exhibits constitutes hearsay under Rule 801 and are inadmissible under Rule 802. If an exception does not apply, the rule against hearsay operates to prohibit out-of-court statements from being offered to prove the truth of the matter asserted. *Neste Oil OYJ v. Reg Synthetic Fuels, LLC*, IPR2013-00578, at 5-6 (Mar. 12, 2015) (citing Fed. R. Evid. 801–803).

Exhibits 2125 and 2141-2170 are all plainly hearsay and should be excluded. They are out-of-court statements sought to be admitted for the truth of the matters asserted therein. This is hearsay. Fed. R. Evid. 801(c). No exception applies.

For example, the documents are letters written by various individuals, none of whom have testified in the present proceeding. In certain instances, the documents appear to be facsimiles of the underlying letters, without any clear indication of the source of the facsimile.

These exhibits do not fall under the any applicable hearsay exception. For

example, Exhibits 2125 and 2141-2170 do not qualify as business records for numerous reasons. Under the business records exception, a hearsay record may be admitted if: “1) it was made at or near the time by, or from information transmitted by, someone with knowledge; 2) it was kept in the course of a regularly conducted activity of a business; 3) making the record was a regular practice of that activity; 4) all these conditions are shown by the testimony of the custodian or another qualified witness; and 5) the method or circumstances of preparation do not indicate a lack of trustworthiness.” *Neste Oil OYJ v. Reg Synthetic Fuels, LLC*, IPR2013-00578, at 5-6 (Mar. 12, 2015) (citing Fed. R. Evid. 803(6)).

Here, there is no indication that the record was a regular practice of a regularly conducted activity of a business. Nor does Patent Owner proffer the required testimony from a business custodian or other qualified witness. Indeed, Patent Owner offers no reliable information about the genesis of these exhibits.

In addition to the above objections, Exhibits 2125 and 2141-2170 should be excluded under Federal Rule of Evidence 106 as being incomplete and only part of the relevant correspondence. *See* Fed. R. Evid. 106 (“If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”).

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