IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

RESEARCH CORPORATION TECHNOLOGIES, INC.,
Patent Owner.

Case No. IPR2016-00204[1]
Patent No. RE 38,551

PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE

[1] Case IPR2016-01101, Case IPR2016-01242, and Case IPR2016-01245 have been joined with this proceeding.

I. Introduction

In accordance with 37 C.F.R. § 42.64 and the Scheduling Order (Paper No. 20), Patent Owner Research Corporation Technologies, Inc. opposes Petitioners' Motion to Exclude (Paper No. 72) Patent Owner's Exhibits 2125, 2141-70 and 2174-82. For the reasons stated below, Petitioners' motion should be denied.

II. Argument

A. The Board Should Deny Petitioners' Motion to Exclude Because the Objections Failed to Comply with 37 C.F.R. § 42.64(b)(1)

Petitioners' Objections to Patent Owner's Evidence (Paper No. 41) did not provide "sufficient particularity to allow correction" by the Patent Owner, as required by 37 C.F.R. § 42.64(b)(1). Instead, Petitioners' objections were copied and pasted—grammatical mistakes and all—from one exhibit to the next. For example, every authenticity objection referenced in Petitioners' motion simply states, "Exhibit [#] is lacks [sic] authentication and is therefore inadmissible under FRE 901." Petitioners never identified with particularity why an exhibit failed to satisfy FRE 901 or the sorts of supplemental evidence sufficient to prove authenticity. Similarly, every hearsay objection for every exhibit challenged in Petitioners' motion states nothing more than "Exhibit [#] is hearsay under FRE 801 and is inadmissible under FRE 802." No hearsay objection particularly identifies an alleged hearsay statement contained in any exhibit. Consequently, the Board

should deny Petitioners' motion to exclude evidence because the underlying objections failed to comply with 37 C.F.R. § 42.64(b)(1).

B. Exhibits 2125 and 2141-70 Relate to Objective Indicia of Nonobviousness, Including the Failure of Others and Industry Skepticism, and Are Admissible

Petitioners move to exclude Exhibits 2125 (a letter from Eli Lilly explaining the termination of its license to Dr. Kohn's FAA compounds) and 2141-70 (letters from other companies declining to pursue licenses to the FAA compounds) because the exhibits allegedly (i) lack authentication under FRE 901, (Paper No. 72 pp. 2-4); (2) are hearsay under FRE 801 and 802, (*id*. at 4-5); and (3) are incomplete under FRE 106 or 37 C.F.R. § 42.51(b)(1)(iii), (*id*. at 5-7).

Petitioners' Motion to Exclude (Paper No. 72), however, does not mention the multiple instances of Petitioners themselves relying on some of the same exhibits they now seek to exclude. For example, Dr. McDuff cited Exhibits 2145-46, 2152-53, 2159 and 2168-69 to argue that lacosamide represented a poor business opportunity. Ex. 1086 ¶ 41. Dr. McDuff also cited Exhibit 2155 to argue that the industry as a whole was generally disinterested in epilepsy treatments, and Exhibit 2141 to argue that there was general disinterest in lacosamide. *Id*. To the extent the Board excludes any of these exhibits, the Board should also disregard Petitioners' arguments relying on the same evidence. *See* Reply p. 26 (citing in

part Ex. 1086 ¶ 41). Regardless, for the reasons described below, Petitioners' motion to exclude Exhibits 2125 and 2141-70 should be denied.

1. Exhibits 2125 and 2141-70 Are Sufficiently Authenticated

Petitioners correctly observe that FRE 901's standard for admissibility is "slight." Paper No. 72 p. 2 (citing *United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013)). An exhibit is excluded under FRE 901 only when record evidence is insufficient "to support a finding that the item is what the proponent claims it is." Petitioner's motion to exclude Exhibits 2125 and 2141-70 under FRE 901 should be denied because the evidence in this case strongly supports the conclusion that Exhibits 2125 and 2141-70 are genuine letters from pharmaceutical companies detailing a general lack of interest in Dr. Kohn's FAA compounds—just as Patent Owner maintains.

First, Petitioners' Motion to Exclude (Paper No. 72) ignores Patent Owner's evidentiary declarations, timely served as Supplemental Evidence on September 6, 2016 (*see* Ex. 2197 pp. 1-2) and filed herewith as Exhibits 2185 and 2187,[2] and

[2] As noted on page 12 of Patent Owner's Updated Exhibit List (Paper No. 69) and in Exhibit 2197 (Patent Owner's service emails), Patent Owner timely served three other evidentiary declarations (Exhibits 2184, 2186, and 2188). Because Petitioners have not moved to exclude the documents referenced in Exhibit 2186, (continued…)

falsely claims that Patent Owner does not "provide testimony from a witness with knowledge of what the exhibits are." *See* Paper No. 72 p. 3. In fact, Patent Owner served the declaration of its President, Shaun Kirkpatrick (Ex. 2185), and the declaration of Paul Petigrow (Ex. 2187), the Vice President and General Counsel of Harris FRC Corporation (previously known as Federal Research Consultants), a licensee of Dr. Kohn's FAA technology that was working to license the technology to pharmaceutical companies in the late 1990s. *See* Paper No. 69 (Patent Owner's Updated Exhibit List) p. 12; *see also* Ex. 2197 pp. 1-2. Mr. Kirkpatrick's testimony confirms that Exhibits 2125 and 2141-50 are authentic letters from various pharmaceutical companies that were made and filed during the ordinary course of business. Ex. 2185 ¶¶ 11, 13-22. Mr. Petigrow's testimony similarly authenticates Exhibits 2151-70. Ex. 2187 ¶¶ 5-26.

Second, "[t]he appearance, contents, substance, internal patterns, [and] other distinctive characteristics of the [exhibits], taken together with all the circumstances" strongly support a finding that Exhibits 2125 and 2141-70 satisfy the authentication requirement. *See* FRE 901(b)(4). For example, Exhibit 2125

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this exhibit has not been filed. Because Petitioners have not moved to exclude Exhibits 2174-2180 on authenticity grounds, Exhibits 2184 and 2188 have not been filed.

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