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.

IPR2016-00204[1]
Patent RE 38,551

PETITIONERS' REPLY IN SUPPORT OF MOTION TO EXCLUDE

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

Petitioners file this Reply in response to the Opposition (Paper 73).

I. Exhibits 2125 and 2141-2170

Patent Owner offers several responses to the motion to exclude, but none is a basis to admit the evidence. *First*, Patent Owner erroneously argues that Exhibits 2125 and 2141-2170 are not hearsay. Paper 73 at 5. These exhibits are certainly hearsay because they are out of court statements being offered for the truth of the matter asserted. Fed. R. Ev. 801(c). The relevant question is whether they fall under a hearsay exception.

Second, Exhibits 2125 and 2141-2170 do not fall within the hearsay exceptions of FRE 803(6) and 803(15). Patent Owner's evidentiary declarations are deficient on their face and do not establish the exhibits as business records. The declarations merely assert the "understand[ing]" of each declarant "[b]ased on a general investigation." Ex. 2185, ¶4-7; Ex. 2187, ¶3-6. For instance, the declaration of Paul Petigrow is inadequate. He has been employed at Harris FRC Corporation for less than a year, Ex. 2187 ¶2, and yet he purports to "understand" events and "the regular course of business" from approximately twenty years ago, *id.* at ¶3. For Exhibits 2151-2170, he makes assertions based "[o]n information and belief." *Id.* at ¶¶7-26. Neither declaration demonstrates personal knowledge of the facts necessary to establish the business-records exception. Even with the two declarations, significant concerns remain about the reliability and accuracy of

the evidence—the very reason by hearsay evidence is generally inadmissible.

Additionally, Patent Owner offers no legal support for its proposition that the vague letters fall under the hearsay exception of FRE 803(15). None of the letters establishes that a property interest was at issue, as none of the letters references patents, either generally or specifically. *See, e.g.*, Ex. 2141-2151. Perhaps patents were identified in correspondence not produced by Patent Owner.

Third, the incompleteness and inconsistencies of the purported correspondence were confirmed as this proceeding advanced. Dr. McDuff observed noted these issues:

> I note that both Dr. Vellturo and I testified at a public trial . . . . During this public testimony, and without objection from Patent Owner, my demonstrative exhibits DDX-404 and DDX-405 were publicly displayed in the courtroom. Ex. 1170 at 1060:15-1062:17. ***These demonstrative exhibits, which are attached in Ex. 1171, refer to several licensing letters that Patent Owner chose not to produce in this proceeding, even though these letters are inconsistent with the positions Patent Owner is taking in this proceeding.***

Ex. 1086 at 26-27 n.40 (emphasis added). Dr. Vellturo stated that, during the trial, he "may have seen" documents indicating that "UCB believed they had a high share of voice with respect to Vimpat compared to the competition." Ex.1049 at 244-245. Such documents are inconsistent with Patent Owner's position before the

Board that UCB did not engage in aggressive marketing efforts for Vimpat.

Patent Owner also asserts that Petitioners had an obligation to identify the inconsistent information. This was not possible, as Patent Owner knows, because a protective order was entered in the district court litigation. Patent Owner was best suited to produce all the relevant documents, not merely a cherry-picked selection.

Petitioner's expert McDuff did address the exhibits, and explained that the exhibits do not support the secondary considerations arguments Patent Owner presents. Petitioners and their experts merely addressed and responded to evidence while concurrently objecting to the admissibility of the evidence.

Petitioners' FRE 106 objection was timely, contrary to Patent Owner's argument. Evidence came to light after the deadline (August 22, 2016) cited by Patent Owner. Paper 73 at 8. The depositions of Drs. Vellturo and McDuff occurred on October 14 and December 8, respectively.

In short, Exhibits 2125 and 2141-2170 are a selective snippet of the story Patent Owner presents. Patent Owner possessed documents that are inconsistent with the assertions made before the Board. Patent Owner had the ability to provide the Board with the complete and accurate evidence, but it chose not to do so.

II. Exhibits 2174-2180

For the reasons described above, and as set forth in Petitioner's motion, Exhibits 2174-2180 should be excluded. The record demonstrates that Patent

Owner did not produce all documents relating to alleged commercial success, as were produced during the district court trial. Patent Owner's conduct here frustrates the goal of "secur[ing] the just, speedy, and inexpensive resolution of every proceeding." 37 C.F.R. § 42.1(b). The Board's rules cannot be construed to permit Patent Owner to rely on selectively chosen documents when it knows well that it possesses other documents containing information inconsistent with a position the Patent Owner is advancing before the Board.

III. Exhibits 2181 and 2182

Patent Owner's response to the objections avoids the differing legal standards, *e.g.*, patentability and claim construction, applicable to, and the differing bodies of evidence presented during, the two proceedings. Paper 72 at 10. For example, Patent Owner stipulated to LeGall's prior art status in the district court, Ex. 1004 at 20-21, but alleges here that it is not prior art, Paper 9 at 20. Patent Owner incorrectly contends that "the objective indicia in this proceeding were previously considered by the district court." As just one example, the district court did not consider the testimony of Dr. Kathryn Davis. Consequently, the district court's order and reasoning are not relevant to the present IPR.

Importantly, Patent Owner has waived any objection to the admissibility of the '301 patent as prior art. Patent Owner was on notice that the '301 patent was being presented as prior art. Pet. at 43 ("A further expectation of success arises

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