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Filed on behalf of: Aventis Pharma S.A.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN LABORATORIES LIMITED

Petitioner,

v.

AVENTIS PHARMA S.A.

Patent Owner.

Case IPR2016-00712
U.S. Patent No. 8,927,592

**PATENT OWNER'S REPLY IN SUPPORT OF
PATENT OWNER'S MOTION TO EXCLUDE EXHIBITS 1089-1090**

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Patent Owner Aventis Pharma S.A. (“Aventis”) submits this Reply to Petitioner’s Opposition to Patent Owner’s Motion to Exclude Exhibits 1089-1090 (Paper 77, “Opp.”). Petitioner (“Mylan”) spends much of its brief asserting the reliability of IMS, but fails to prove whether Exhibits 1089-1090 are in fact from IMS. As explained in Paper 61 (“Mot.”) and below, they should be excluded.

I. Mylan Has Not Authenticated Exhibits 1089-1090 as IMS Data

A. Exhibits 1089-1090 Are Not Self-Authenticating

There can be no question that Exhibits 1089-1090 are not self-authenticating because they lack identifying information. (Mot. at 2-3). Mylan asserts that Aventis’s *Neste Oil* case is inapposite because allegedly there was an enhanced standard for testimony establishing prior invention. (Opp. at 1-2). But the portion of the case upon which Aventis relies is relevant because it shows that spreadsheets such as Exhibits 1089-1090 need testimony to establish their authenticity. *Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52 at 3-5 (P.T.A.B. Mar. 12, 2015). As explained below, such testimony is lacking here.

B. Mr. McSorley’s Testimony Is Insufficient

Mylan repeatedly attempts to establish the authenticity of Exhibits 1089-1090 by stating that Mr. McSorley received the documents from counsel. (Opp. at 1-4). But Mr. McSorley’s evidentiary declaration does not say that the exhibits came from counsel at his request, and at his deposition he specifically said that he was not relying on communications with counsel. (Exh. 2261 at 86:15-87:5,

95:22-97:1, 98:13-24). Nor did Mylan's counsel submit a declaration establishing where Exhibits 1089-1090 came from. (*See* Exh. 2262). It is improper for Mylan to now simply state that counsel provided the documents, still without explaining how they were retrieved.¹ *See Alessandra v. Colvin*, No. 12CV397A, 2013 WL 4046295, at *3 (W.D.N.Y. Aug. 8, 2013) (unsworn attorney assertion was not a substitute for sworn testimony on personal knowledge).

Moreover, Mylan's assertion that Mr. McSorley's testimony establishes authenticity under Federal Rule of Evidence 901(b)(1), (3), (4), and (9) is incorrect. For Rule 901(b)(1), while Mr. McSorley testified that "Wilson Sonsini got it from IMS Health," he has no foundation to provide this testimony, and only bases this testimony on his assumption that it is IMS data in the first place. (*Opp.* at 3-4). For Rule 901(b)(3), (4), Mr. McSorley has not compared Exhibits 1089-1090 with an "authenticated specimen" that has been established to be IMS data or testified that the appearance of Exhibits 1089-1090 is so distinct as to necessarily be IMS data. Even if Mr. McSorley believed the exhibits are similar to IMS data he has seen in the past, he did not know when Exhibits 1089-1090 were created, and was not sure how the documents were obtained, which means he would not

¹ Mylan's assertion that Mr. McSorley was "not permitted" to see the exhibits is incorrect; Aventis's counsel offered to provide any exhibit at any time if he wanted it to "assist" in providing testimony. (*Opp.* at 4; Exh. 2261 at 8:10-15).

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