

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HOLOGIC, INC.
Petitioner

v.

ENZO LIFE SCIENCES, INC.
Patent Owner

Case No. IPR2016-00822
U.S. Patent No. 7,064,197

PETITIONER'S OBJECTIONS TO PATENT OWNER'S EXHIBITS

Pursuant to 37 C.F.R. § 42.64(b)(1), Petitioner submits the following objections to certain exhibits filed by Patent Owner on January 11, 2017.

Petitioner's objections apply equally to Patent Owner's reliance on these exhibits in any subsequently-filed documents. These objections are timely, having been filed within five business days of Patent Owner serving the evidence (January 16, 2017 being a federal holiday).

Petitioner objects to the follow exhibits:

Exhibit 2117 — Deposition Transcript of Dr. Norman Nelson.

Exhibits 2131-2134 — Enzo Biochem's Infringement Contentions from

Related Litigations

Exhibits 2135, 2137-2141— Enzo Laboratory Notebooks and Documents

Exhibit 2142 — Expert Declaration of Dr. Gregory Buck.

Exhibit 2143 — Expert Declaration of Barry Weiner.

Exhibit 2117

Petitioner preserves its objections to specific portions of Dr. Nelson's cross-examination testimony taken during the deposition on December 21, 2016. To the extent Patent Owner has relied or will rely on portions of the testimony that were objected to during the deposition, Petitioner maintains those objections and the grounds for such objections.

Exhibits 2131-2134

Petitioner objects to Exhibits 2131-2134 under Fed. R. Evid. 401, 402, and 403 as lacking relevance and being more prejudicial than probative, and under 37 C.F.R. § 42.120(a) (Outside Scope). These exhibits appear to be infringement contentions from litigations, but the underlying evidence (i.e., accused products and information about them) and exhibits have not been made available for consideration or evaluation by the Board or Petitioner. Furthermore, these exhibits relate to infringement only and, therefore, are irrelevant and outside the scope of this proceeding.

Exhibits 2135, 2137-2141

Petitioner objects to Exhibits 2135, 2137-2141 under Fed. R. Evid. 901 for lack of authentication. These exhibits are purported to include pages from laboratory notebooks and other documents, many of which are undated, unsigned, and unwitnessed, and appear to not have been bound together and consecutively numbered. Some of the pages are also not dated consecutively. Therefore, these exhibits lack proper authentication. Further, these exhibits do not qualify as self-authenticating documents under Fed. R. Evid. 902 and, thus, are inadmissible. The testimony of Barry Weiner cannot be used to authenticate these exhibits for the reasons stated below with respect to Exhibit 2143.

Petitioner further objects to Exhibits 2135, 2137-2141 under Fed. R. Evid.

802. To the extent Patent Owner relies on the contents of these exhibits for the truth of the matter asserted, Petitioner objects to such contents as inadmissible hearsay (*see* Fed. R. Evid 801), that does not fall under any exceptions, including those of Rules 803, 804, and 807. In particular, these exhibits are not admissible under Fed. R. Evid. 803(16) as statements contained in ancient documents because the authenticity of these exhibits has not been established. These exhibits also do not fall under the business records exception (Fed. R. Evid. 803(6)) or the catchall exception under Fed. R. Evid. 807. *See Chen v. Bouchard*, 347 F.3d 1299, 1308 (Fed. Cir. 2003).

Exhibit 2142

Petitioner objects to ¶¶ 161, 180-197 and 243-249 of Exhibit 2142 under Fed. R. Evid. 802 and 805 as containing hearsay and/or hearsay within hearsay. To the extent Patent Owner relies on the contents of these paragraphs for the truth of the matter asserted, Petitioner objects to such contents as inadmissible hearsay and/or hearsay within hearsay (*see* Fed. R. Evid. 801 and 805), that does not fall under any exceptions, including those of Rules 803, 804, 805, and 807.

Petitioner objects to ¶¶ 161, 180-197 and 243-249 of Exhibit 2142 under Fed. R. Evid. 602 for lack of personal knowledge because Dr. Buck (the declarant) lacks personal knowledge of the matters asserted.

Petitioner objects to ¶¶ 161, 180-197 and 243-249 of Exhibit 2142 under Fed. R. Evid. 702 and 703 as improper expert testimony, because these paragraphs include conclusory statements and lack explanation for bases of opinions, particularly to the extent exhibits relied upon also fail to identify the factual bases for the declarant's opinions.

Petitioner further objects to ¶¶ 243-249 of Exhibit 2142 under Fed. R. Evid. 401, 402, and 403 as lacking relevance to the extent they fail to establish a basis or requirement (e.g., nexus) for secondary considerations of non-obviousness.

Exhibit 2143

Petitioner objects to ¶¶ 3-10, 12, 14, 16, and 17 of Exhibit 2143 under Fed. R. Evid. 802 and 805 as containing hearsay and/or hearsay within hearsay. To the extent Patent Owner relies on the contents of these paragraphs for the truth of the matter asserted, Petitioner objects to such contents as inadmissible hearsay and/or hearsay within hearsay (*see* Fed. R. Evid. 801 and 805), that does not fall under any exceptions, including those of Rules 803, 804, 805, and 807.

Petitioner objects to ¶¶ 3-10, 12, 14, 16, and 17 of Exhibit 2143 under Fed. R. Evid. 602 for lack of personal knowledge because Mr. Weiner (the declarant) lacks personal knowledge of the matters asserted.

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