

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MYLAN PHARMACEUTICALS INC.,  
Petitioner

v.

QUALICAPS CO., LTD,  
Patent Owner

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Case IPR2017-00203  
Patent 6,649,180

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**PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE  
PURSUANT TO 37 C.F.R. § 42.64**

## **I. Introduction**

Patent Owner moves to exclude Petitioner Exhibits 1011, 1012, selected passages of Exhibit 1028, and selected paragraphs of Exhibit 1029. Patent Owner also moves to exclude Exhibits 2064 and 2067–2072 for the manner in which Petitioner relies on them in its Reply (Paper 38). The bases for the motion were timely filed and served in Patent Owner's objections to evidence (Paper 17 and Paper 40).

## **II. Argument**

### **A. Exhibit 1011 – Dr. Kibbe's Declaration – Should Be Excluded.**

Patent Owner moves the exclusion of Exhibit 1011 under (i) FRE 802 as inadmissible hearsay, and (ii) FRE 702 and FRE 703 due to not meeting the standard for an expert to rely on hearsay. Paper 17, 3–5 (stating objections).

Dr. Kibbe's opinions—including those that allege invalidity of the '180 Patent—simply mirror the Petition, nearly verbatim. *See* Ex. 2021 (Workshare Compare software comparison between Dr. Kibbe's declaration and the Petition). For example, Dr. Kibbe's declaration purports to give his opinion on “Ground 1: Claims 1 and 4 are Unpatentable as Obvious in View of Yamamoto in Combination with Japanese Pharmacopeia.” Yet instead, Dr. Kibbe repeats the Petition essentially word-for-word. *See* Ex. 2021 at pages 47–77 (Dr. Kibbe's purported opinion regarding Ground 1 simply copies the Petition for about eighteen consecutive

pages); *see also id.* at pages 39–41, 95–102 (copying verbatim other sections of the Petition). In fact, Exhibit 2021 shows that the entirety of Dr. Kibbe's purported opinion is a virtual word-for-word copy of the Petition.

Although an expert may rely on hearsay under certain circumstance (*see, e.g.,* FRE 702 and 703) simply repeating what a party has told them provides no assistance to the trier of fact through the application of specialized knowledge, and therefore does not qualify for the exception. *See, e.g., Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424–25 (S.D.N.Y. 2009) (excluding portions of an expert's testimony under FRE 702 regarding facts related to defendant's technology, where the expert did not investigate those facts himself but only "scanned" some notes provided to him by defendant); *Robinson v. Sanctuary Record Groups, Ltd.*, 542 F. Supp. 2d 284, 292 (S.D.N.Y. 2008) (excluding portions of an expert's testimony under FRE 702 and 703 where expert's methodology was founded on hearsay supplied by the party itself, rather than "a source of first-hand, independent expert knowledge" and as such, it did not provide reliable evidence); *see also United States v. Mejia*, 545 F.3d 179, 197–98 (2nd Cir. 2008) (" . . . the expert must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever.") (internal

quotation marks and citations omitted). Therefore, Dr. Kibbe's declaration should be excluded as inadmissible hearsay.

**B. Exhibit 1012 – Shin-Etsu Website – Should Be Excluded.**

Patent Owner moves the exclusion of Exhibit 1012 under (i) FRE 901 due to a lack of authentication, (ii) FRE 801 and 802 as inadmissible hearsay, and (iii) FRE 401 and FRE 402 as lacking relevance. Paper 17, 5–6 (stating objections).

Exhibit 1012 purports to be two separate printouts of two separate websites describing products from Shin-Etsu Chemical Co., Ltd. including TC-5<sup>®</sup>. Petitioner cites Ex. 1012 in support of its assertions that “[i]n the United States, TC-5E has been sold under the name PHARMACOAT<sup>®</sup> since October 2002. *See generally* Ex. 1012” (Petition, p. 32) and “the technical information describing the commercial embodiment of TC-5E, PHARMACOAT<sup>®</sup>, includes ‘Substitution Type 2910.’ Ex. 1012” (Petition, p. 40). Petitioner's expert, Dr. Kibbe, relies exclusively on Exhibit 1012 in support of his assertions that “I understand that in the United States, TC-5E has been sold under the name PHARMACOAT<sup>®</sup> since October 2002. Ex. 1012. I further understand that prior to October 2002, TC-5E was sold under its generic name ‘Hypromellose.’ *Id.* The technical information for PHARMACOAT<sup>®</sup> (formerly known as ‘Hypromellose’) describes four different grades, each of which includes ‘Substitution Type 2910.’ *Id.*” Ex. 1011, ¶¶ 84, 110 (cited at Petition, pp. 32, 40).

Exhibit 1012, however, has not been authenticated and is unreliable. The exhibit is nothing more than a printout of webpages of uncertain dates. *See* Ex. 1012, pp. 1–2 (providing a different web address at the bottom of each page). Further, the web address at page 2 is not even complete. Ex. 1012, p. 2 (providing web address ending in “http...”). Petitioner submitted no evidence to authenticate the web pages reproduced in this exhibit, nor to establish that the websites actually contained what they are purported to have contained as of the date submitted, nor to establish their online publication date, nor to establish that they were published before the priority date of the '180 patent.

As a general matter, the proponent of evidence from a website must authenticate the information from the website itself, and not just from the downloaded pages. *See Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007), as amended (Nov. 20, 2007) (citing *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000)). The Board has required that, for authentication purposes, the party “proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge would be sufficient.” *EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00084, Paper No. 64, p. 45-46 (quoting *St. Luke's Cataract & Laser Inst. v. Sanderson*, 2006 WL 1320242, at \*2 (M.D. Fla. May 12, 2006)).

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