

Filed on behalf of Patent Owner Genentech, Inc. by:

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CELLTRION, INC.,
Petitioner,

v.

GENENTECH, INC.,
Patent Owner.

Case IPR2017-01373
U.S. Patent No. 6,407,213

**PATENT OWNER'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE EVIDENCE**

The Board should exclude Exhibit 1193 and the associated arguments and testimony that rely on this exhibit, including the first full paragraph of pages 15 and 21 of Petitioner's Reply (Paper 54), Ex. 1143 ¶30, and Ex. 1138 at 176:25 to 178:23. This evidence was newly introduced in reply and is an improper attempt to present a new theory of unpatentability not disclosed in the Petition and are therefore not relevant to the instituted grounds. (*See* Paper 59; Paper 61). As the Board recently explained, "Federal Circuit case law indicates that a motion to exclude is a proper vehicle for enforcing our rule and trial practice guide regarding the scope of evidence that may be submitted with a reply brief." *Dexcom, Inc. v. Waveform Techs, Inc.*, IPR2016-01679, Paper 53 at 50-51 (Feb. 28, 2018); *see also Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015) ("a party may move to exclude evidence ... as improper under the response-only regulation, under the Trial Practice Guide's advice"); *Genzyme Therapeutic Prods. L.P. v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1368 (Fed. Cir. 2016) (if Patent Owner "had wanted the Board to disregard those references, it could have filed a motion to exclude them," citing, *e.g.*, 37 C.F.R. § 42.64(c)); *Intelligent Bio-Systems, Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359 (Fed. Cir. 2016) (not error for the Board to exclude petitioner's new theory of invalidity supported by new evidence not relied upon in the petition).

Exhibit 1193 is thus *per se* irrelevant under Federal Rule of Evidence 401 because it is untimely and in violation of the Board's rules and its governing statute. 35 U.S.C. § 312(a); 37 C.F.R. § 42.23(b). Any relevance is greatly outweighed by the unfair prejudice to Patent Owner because Patent Owner has been denied any meaningful opportunity to substantively respond to Petitioner's positions. As a result, the Board should exclude Exhibit 1193 and the associated arguments and testimony that rely on this exhibit.

Respectfully Submitted,

July 10, 2018

By: /David L. Cavanaugh/

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CERTIFICATE OF SERVICE

I hereby certify that, on July 10, 2018, I caused a true and correct copy of the following materials:

- Patent Owner's Reply in Support of its Motion to Exclude

to be served via electronic mail on the following attorneys of record:

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