

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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KVK-Tech, Inc.,  
Petitioner,

v.

Shire LLC,  
Patent Owner.

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Case IPR2018-00290  
Patent 8,846,100

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PETITIONER'S OBJECTIONS AND MOTION TO  
EXCLUDE

Patent Trial and Appeal Board  
P.O. Box 1450  
Alexandria, VA 22313-1450

Petitioner hereby objects and moves to exclude Patent Owner's Exhibit No. 2083 and a portion of Exhibit No. 2082 as improper new evidence submitted on March 7, 2019 with its sur-reply brief.

The Board on February 25, 2019 (Paper 38) ruled that no additional evidence shall be submitted with Patent Owner's sur-reply brief except for evidence relating to the credibility of Petitioner's additional declarant (Dr. McCracken). The Order reflected the parties' agreement, as noted in the Order.

### **I. Exhibit 2083**

Exhibit 2083 is a 2009 publication authored by Swanson et. al, none of whom are Petitioner's Declarant, Dr. McCracken. Patent Owner relies on this publication on page 9 of its sur-reply.

Evidence of impeachment or of a witnesses' credibility is governed by the Federal Rules of Evidence, and consists of evidence of the witnesses' character or reputation (F.R.E 608(a)), the witnesses' prior conduct (F.R.E 608(b)), or the witnesses' prior inconsistent statements (F.R.E. 613). None of these categories are applicable here.

Exhibit 2083 is a publication, not authored by Dr. McCracken, or addressing Dr. McCracken's conduct, character or reputation. Nor can Patent Owner point to any inconsistent statement by Dr. McCracken in Exhibit 2083 as he is not quoted in the reference. Therefore, Exhibit 2083 cannot be evidence of Dr. McCracken's credibility. Patent Owner may point to statements in Exhibit 2083 that Dr.

McCracken disagrees with, but that is not impeachment evidence. Patent Owner's submission of Exhibit 2083 with Patent Owner's sur-reply brief is contrary to the Board's Order and the agreement of the parties, and thus should be excluded.

## **II. Exhibit 2082**

For the same reason, Petitioner objects and moves to exclude the portion of the deposition transcript of Dr. McCracken (Exhibit 2082, p. 184 line 4 – p. 186, line 24) in which Patent Owner asked Dr. McCracken to read portions of Exhibit 2083 into the record. Exhibit 2082 was also submitted with Patent Owner's sur-reply brief, and Patent Owner relied on the relevant portion from the transcript on pages 5 and 9 of the sur-reply brief. Patent Owner's deliberate insertion into exhibit 2083 of quotations from an improperly submitted exhibit should also be excluded.

Respectfully submitted,

Dated: March 7, 2019

/s/Steven Roth/  
Steven Roth, PTO Reg. No. 47,039  
Lucas & Mercanti, LLP

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to 37 C.F.R. §§ 42.6(e) a copy of the foregoing PETITIONER'S OBJECTIONS AND MOTION TO EXCLUDE as served electronically via email on March 7, 2019 on the following:

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Patent Owner has consented to electronic service.

Date: March 7, 2019

By: /Steven Roth/  
Steven Roth  
Reg. No. 47,039