

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMNEAL PHARMACEUTICALS LLC AND
AMNEAL PHARMACEUTICALS OF NEW YORK, LLC,
Petitioners,

v.

ALMIRALL, LLC
Patent Owner.

Case IPR2018-00608
Patent No. 9,161,926 B2

**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE EVIDENCE UNDER 37 C.F.R §42.64**

I. ALMIRALL'S OBJECTIONS WERE TIMELY

Petitioner did not serve Exhibits 1041–1048 on Almirall until March 18, 2019. *See* Paper 30 at 7 (Certificate of Service stating that “Exhibits 1034–1059, were served in their entirety on March 18, 2019, upon [Patent Owner] via email”). Almirall served objections on March 25, within five business days. Paper 32. This is timely. 37 C.F.R. § 42.64(b)(1) (“Once trial has been instituted, any objection must be filed within five business days of service of evidence to which the objection is directed.”).

While Petitioner correctly quotes the rule requiring service of exhibits at a deposition, it has not shown that it did so. Nor did Almirall's counsel acknowledge that any exhibits were being served at Dr. Harper's deposition, as Petitioner asserts. *See* Paper 38 at 4 (citing Ex. 1049 at 152:20–153:3). As the record shows, Almirall's counsel asked whether the exhibit handed to Dr. Harper was “on file,” to which Petitioner's counsel responded that it was not, but would be. Ex. 1049 at 152:15–153:3.

II. EXHIBITS 1041–1048 ARE NOT SELF-AUTHENTICATING

As the Board has explained, “[p]rintouts from websites are not self-authenticating.” *Xactware Solutions, Inc. v. Pictometry Int'l Corp.*, Case IPR2016-00594, slip op. at 11–12 (PTAB Aug. 24, 2017) (Paper 46). In order “[t]o authenticate printouts from a website, the party offering the evidence must produce

IPR2018-00608

Patent Owner's Reply ISO Motion to Exclude

some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge.” *Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014-00148, slip op. at 10 (PTAB Apr. 23, 2015) (Paper 41) (quoting *EMC Corp. v. Personalweb Techs., LLC*, Case IPR2013-00084, slip op. at 45 (PTAB May 15, 2014) (Paper 64)); *accord Xactware Solutions*, slip op. at 11–12. Petitioner has not done so. Dr. Harper’s testimony generally stating that the amounts physicians are paid by pharmaceutical companies are available through the Sunshine Act, Ex. 1049 at 34:16–35:6, is not evidence that the website printouts provided by Petitioner are authentic. Nor is her testimony that she has no reason to believe she did not receive the amounts stated on the printouts evidence of the printouts’ authenticity. *See* Ex. 1049 at 154:20–22 (re Ex. 1041: “I’ve never seen this before and this is –this is ProPublica? I have not ever seen this before.”); *id.* at 155:4–7 (re same exhibit, accepting Petitioner’s counsel’s representation that “[t]his is the number that Allergan reported”). Attorney argument and citations to additional unauthenticated website cannot remedy Petitioner’s failure to provide the required affidavits.

Additionally, Petitioner’s contention that challenged exhibits are “publication[s] purporting to be issued by a public authority,” and hence self-authenticating pursuant to Federal Rule of Evidence 902(5), is incorrect. This rule speaks to “book[s], pamphlet[s]” and similar types of publications – not interactive

IPR2018-00608

Patent Owner's Reply ISO Motion to Exclude

website printouts. While “[o]fficial publications from government websites are generally considered to be self-authenticating,” the challenged website printouts are clearly not official government publications, but instead are snapshots of interactive websites. *Xactware Solutions*, Slip op. at 11. And Exhibits 1041, 1042, and 1048, which purport to be snapshots of a “Dollars for Docs” website, do not even purport to be from a government website.

III. CONCLUSION

For the reasons stated above and in its motion (Paper 36), Almirall requests that Exhibits 1041–1048 be excluded.

Dated: May 15, 2019

Respectfully submitted,

FENWICK & WEST LLP

By: James S. Trainor/
James S. Trainor (Reg. No. 52,297)

Attorneys for Patent Owner
Almirall, LLC

IPR2018-00608

Patent Owner's Reply ISO Motion to Exclude

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, I hereby certify that on May 15, 2019, the foregoing **PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE** was served by electronic mail on the following counsel of record for petitioner:

Dennies Varughese (dvarughe-PTAB@skgf.com)
Adam C. LaRock (alarock-PTAB@skgf.com)
PTAB@skgf.com
Sterne, Kessler, Goldstein & Fox
1100 New York Avenue, NW, Suite 600
Washington, DC 20005

Dated: May 15, 2019

Respectfully submitted,

FENWICK & WEST LLP

By: James S. Trainor/
James S. Trainor (Reg. No. 52,297)

Attorneys for Patent Owner
Almirall, LLC