

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ELI LILLY AND COMPANY,
Petitioner

v.

TEVA PHARMACEUTICALS INTERNATIONAL GMBH,
Patent Owner

Case IPR2018-01710
Patent 8,586,045 B2

**TEVA PHARMACEUTICALS INTERNATIONAL
GMBH'S MOTION TO EXCLUDE**

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Teva Pharmaceuticals International GmbH (“Teva”) submits this motion pursuant to 37 C.F.R. §§ 42.62 and 42.64(c) and in accordance with Due Date 5 of the Scheduling Order (Paper 13). Teva requests exclusion of the entirety of Exhibits 1098, 1261-1262, 1264-1265, 1267-1279, 1286-1287, 1291-1293, 1296, 1311, 1313-1314, 1316-1317, 1331, 1335-1336, 1344, 1347, and 1349, and portions of Exhibits 1014-1015, 1301-1302, 1303-1304, 1337-1338, 1343, and 1345. Teva timely objected to all of these exhibits either through written Objections to Evidence or during deposition proceedings.

The Federal Rules of Evidence (FRE) govern the admissibility of evidence in *inter partes* review proceedings. 37 C.F.R. § 42.62. As shown herein, the challenged exhibits contain irrelevant and prejudicial information under FRE 401, 402, and 403, and/or are unauthenticated in violation of FRE 901. Accordingly, the Board should exclude the objected-to exhibits in their entirety for the reasons that follow.

The Board should not dismiss this Motion as moot if the Board does not rely on the inadmissible evidence in reaching its Final Written Decision. Instead, Teva respectfully requests that the Board rule on the motion so that petitioner Eli Lilly and Company (“Lilly”) cannot continue to rely upon the exhibits and paragraphs identified herein on appeal. Not excluding the exhibits would force Teva to address them again, e.g., on appeal, thereby wasting judicial and party resources.

I. Exhibit 1287 lacks foundation and should be excluded.

Teva moves to exclude Exhibit 1287 under FRE 901 because Lilly has failed to provide sufficient evidence indicating the origin of the exhibit and has not provided sufficient information regarding its authenticity as a publicly accessible document. Teva objected to Exhibit 1287 in a timely manner (Paper 34, 2-3; EX1303, 176:2-18), and Lilly's efforts to correct the evidentiary deficiencies with supplemental evidence only serve to highlight why Exhibit 1287 should be excluded from this proceeding.

Exhibit 1287 is purported to be the doctoral thesis of Keith Tan from the University of Cambridge. The public accessibility of EX1287 is an essential part of the foundation analysis because "the sufficiency of the foundation evidence must be assessed in light of the nature of the documents at issue." *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), as amended on reh'g in part (Jan. 2, 1997). And "[w]hether a reference is publicly accessible is determined on a case-by-case basis based on the 'facts and circumstances surrounding the reference's disclosure to members of the public.'" *Actavis, Inc. v. Research Corp. Techs., Inc.*, IPR2014-01126, DI, 9 (citing *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009)) (holding that the proponent "provide[d] no competent evidence to show that the library allows public access to the thesis"). For a thesis allegedly found within a library, "[d]etermining public accessibility of a thesis for prior art purposes

requires a showing of both shelving and meaningful indexing/cataloging” at that library. *Kayak Software Corp. v. International Business Machines Corp.*, CBM2016-00076, Paper 16, 8 (citing *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989); *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986); *In re Bayer*, 568 F.2d 1357, 1358–59 (CCPA 1978)). Further, evidence relating to public accessibility at a library must be “sufficiently probative of [the] Library’s indexing/cataloging practices” on the asserted prior art date. *Kayak Software*, CBM2016-00076, Paper 16, 8. And if a proponent of evidence provides evidence of *current* library practice, the proponent must then also “provide[] some analysis as to how the [evidence]... could be interpreted as supporting the conclusion that an analogous cataloging system existed [on the asserted prior art date].” *Id.* at 10.

Lilly introduced Exhibit 1287 late in this proceeding, during the deposition of Teva’s expert Dr. Ferrari on August 15, 2019. EX1303, 176:2-18. Teva immediately objected to its use as lacking foundation (among other objections). *Id.* As originally presented to Dr. Ferrari, Exhibit 1287 contained no indication of where the document came from or how it was obtained, no indication of whether it was publicly accessible, and no indication of when (if ever) the document became publicly available before November 14, 2005. EX1303, 176:2-24. Lilly subsequently filed a version of Exhibit 1287 with Lilly’s Reply (Paper 32) that was allegedly the same as that presented during Dr. Ferrari’s deposition. Teva then

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