

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AQUESTIVE THERAPEUTICS, INC.

Petitioner

v.

NEURELIS, INC.

Patent Owner

Case: IPR2019-00451

U.S. Patent No. 9,763,876

**PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE**

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT.....1

 A. EX1009, EX1017, EX1021, EX1022, EX1033, EX1036, EX1038,
 EX1048, and EX1065.1

 B. EX1013.....1

 C. EX1041, paragraphs 29-63, 167-168, 171-191, 264-362, and Appendix A
 (pp. 197-224).....2

 D. EX1050.....3

 E. EX1069.....3

 F. EX1080.....6

 G. EX1081.....6

 H. EX1122.....7

 I. EX1150.....8

 1. EX1150 should not be excluded in its entirety.8

 2. EX1150, paragraphs 23-30, 59-89, 90-126, 146, 171-177, 191-194, and
 208 should not be excluded.....9

 J. EX1149 portions.....12

K. Limiting Request Under FRE 105.....14

III. CONCLUSION14

I. INTRODUCTION

Pursuant to the Board's Scheduling Order (Paper 9), Petitioner Aquestive Therapeutics, Inc. submits this opposition to Patent Owner's ("PO's") Motion to Exclude Evidence (Paper 35).

II. ARGUMENT

A. EX1009, EX1017, EX1021, EX1022, EX1033, EX1036, EX1038, EX1048, and EX1065.

EX1009, EX1017, EX1021, EX1022, EX1033, EX1036, EX1038, EX1048, and EX1065 were proffered as evidence relevant to the broad state of the prior art. If PO filed a Motion to Amend, PO would have had to consider that art. However, PO did not file a Motion to Amend. The challenged exhibits are relevant to the state of the art and not confusing, wasteful, or prejudicial and should not be excluded.

B. EX1013.

EX1013 (Sonne) provides relevant disclosures regarding the state of the prior art, as testified by Petitioner's expert Dr. Peppas, and it was part of the file history of the '876 patent. *See, e.g.*, PeppasDec. EX1041, ¶¶ 169-191 ("Summary of the Prior Art References"). "Art can legitimately serve to document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness. . . . Ariosa's Petitions and opening declarations invoked Exhibit 1010 in that way. . . . Given those references in the

Petitions and supporting declarations, Exhibit 1010 had to be considered by the Board even though it was not one of the three pieces of prior art presented as the basis for obviousness.” *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1365 (Fed. Cir. 2015).”

C. EX1041, paragraphs 29-63, 167-168, 171-191, 264-362, and Appendix A (pp. 197-224).

Paragraphs 29-63, 167-168, 171-191, 264-362, and Appendix A (pp. 197-224) of Peppas Declaration, EX1041 should not be excluded.

EX1041, ¶¶29-63 discuss the ‘876 patent and its prosecution history, including, priority claims, the prior art cited during prosecution, and statements regarding criticality therein and elsewhere.

EX1041, ¶¶167-168 discuss the understanding that a POSA would have regarding dodecyl maltoside, supported by public information (see previous paragraphs) involving one of the co-inventors of the ‘876 patent.

EX1041, ¶¶171-191 discuss Sonne (Exhibit 1013) and “document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness.” *Genzyme Therapeutic Prod. Ltd. v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1369 (Fed. Cir. 2016) (quoting *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1365 (Fed. Cir. 2015)).

EX1041, ¶¶264-362 discuss the application of the prior art to the claims of the ‘876 patent, which is not used as a ground in this proceeding, but which

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