

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PROLLENIUM US INC.,
Petitioner,

v.

ALLERGAN INDUSTRIE, SAS,
Patent Owner.

IPR2019-01505 (Patent 8,450,475 B2)
IPR2019-01506 (Patent 8,357,795 B2)
IPR2019-01508 (Patent 9,238,013 B2)
IPR2019-01509 (Patent 9,358,322 B2)
IPR2019-01617 (Patent 8,822,676 B2)
IPR2019-01632 (Patent 8,357,795 B2)
IPR2020-00084 (Patent 9,089,519 B2)

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE¹

¹ Authorization for Allergan to file a single motion to exclude, not to exceed 18 pages, was received on December 8, 2020. The Board previously authorized use of a joint caption page on April 27, 2020. An identical paper has been filed in each case recited in the joint caption.

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner Allergan Industrie, SAS (“Allergan”) moves to exclude the declarations of Dr. Dale DeVore (EX1002) and Dr. Glenn Prestwich (EX1105) and other exhibits as violating the Federal Rules of Evidence and regulations governing *inter partes* review.² Patent Owner timely objected on August 19, 2020 (Paper 39) and November 12, 2020 (Paper 46).

Dr. DeVore offered conclusory, unreliable opinions untethered to the science, contradicted by his own contemporaneous patents, and which he abandoned on cross. His declaration should be excluded under Rule 702 and for lack of candor. For its Replies, however, Petitioner turned to a new expert, Dr. Prestwich, who submitted declarations in prior unsuccessful IPR challenges for two patents at issue.³ Dr. Prestwich’s declaration here, and the new evidence he cites, should be excluded as untimely, unfairly prejudicial, irrelevant, unreliable, and violating the APA, AIA, and Board rules.

² All bases for exclusion of evidence pertain to all related IPRs unless otherwise noted. Common citations are to documents filed in the -01617 IPR.

³ EX2200G and EX2200I (*Teoxane v. Allergan*, IPR2017-01906 and -02002 (institution denied on merits)); EX2200B and EX2200E (*Galderma v. Allergan*, IPR2014-01417 and -01422). The ’519, ’013, and ’322 patents issued after the examiner considered the *Galderma* declarations. EX2200L; EX2200M; EX2200N.

II. BACKGROUND

From August to October 2019, Petitioner filed seven IPR petitions for the six patents at issue, along with extensive declaration testimony from Dr. DeVore. Paper 2; EX1002. Dr. DeVore's then-unrebutted declaration was "at the core of [the Board's] decision whether to institute." Paper 17 at 25 (PTAB, Mar. 20, 2020). Allergan cross-examined Dr. DeVore in August 2020, where he acknowledged that his declaration does not reflect the complex state of the art and uses hindsight. Paper 40 at 26-29. Dr. DeVore repeatedly reversed course from his declaration, acknowledging he does not agree with the purported ease of the art. *Id.* On September 1, 2020, Allergan filed its Responses, along with an expert declaration from Dr. Berkland, well-supported by the contemporaneous literature, and Dr. DeVore's cross-examination.

Shortly after Dr. DeVore's deposition, Petitioner hired Dr. Prestwich. EX2200, 17:11-16. In November 2020, Petitioner filed its Replies and a new 109-page declaration by Dr. Prestwich. Allergan objected to Dr. Prestwich's declaration and sought approval to move to strike or, in the alternative, to submit responsive evidence, which was denied. EX3003.⁴ Instead, the Board permitted a short paper identifying improper arguments and evidence. Allergan then had a

⁴ Allergan understands that Paper 50 preserves its request to strike the material identified there and does not duplicate that earlier request in this motion.

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