

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

Petitioner's Motion to Exclude
Under 37 C.F.R. § 42.64(c)¹

¹ Authorization for the use of a joint caption page was received on April 27, 2020. Neither party opposes the use of a joint caption page. An identical paper has been filed in each case recited in the consolidated caption.

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IPR2019-01617, IPR2019-01632, IPR2020-00084

TABLE OF ABBREVIATIONS

Abbreviation	Term
BDDE	butanediol diglycidyl ether
Challenged Patents	U.S. Patent Nos. 8,450,475; 8,357,795; 9,238,013; 9,358,322; 8,822,676; and 9,089,519, collectively
HA	hyaluronic acid
POSITA	Person of Ordinary Skill in the Art
1505 Sur-Reply	IPR2019-01505, Patent Owner's Sur-Reply, Paper 52
0084 Sur-Reply	IPR2020-00084, Patent Owner's Sur-Reply, Paper 48
Sur-Replies	IPR2019-01505, Patent Owner's Sur-Reply, Paper 52; IPR2019-01506, Patent Owner's Sur-Reply, Paper 54; IPR2019-01508, Patent Owner's Sur-Reply, Paper 55; IPR2019-01509, Patent Owner's Sur-Reply, Paper 53; IPR2019-01617, Patent Owner's Sur-Reply, Paper 53; IPR2019-01632, Patent Owner's Sur-Reply, Paper 54; and IPR2020-00084, Patent Owner's Sur-Reply, Paper 48, collectively
1505 Response	IPR2019-01505, Patent Owner Response, Paper 41 (cited as exemplary of citations for the remaining proceedings)

I. INTRODUCTION

Under 37 C.F.R. § 42.64(c), Petitioner Prollemium US Inc. (“Prollemium”) moves to exclude certain evidence, submissions, and information presented by Patent Owner Allergan Industrie, SAS (“Allergan”) in the IPRs of the Challenged Patents. A single, combined motion to exclude is filed in each proceeding in the joint caption above, given the overlap in evidence and issues.²

II. ARGUMENT

As described below, certain of Petitioner’s evidence should be excluded and not considered by the Board under applicable rules of the Federal Rules of Evidence (“FRE”) or rules of the Board. Petitioner timely objected to this evidence in accordance with 37 C.F.R. § 42.64 (whether by filing or on the record during a deposition). *See, e.g.*, Petitioner’s Objections, IPR2019-01505, Paper 42 (filed in each proceeding).

A. Exhibits 2083 and 2084 are inadmissible hearsay

Statements by a declarant not made in this proceeding offered to prove the truth of the matter asserted in the statement are inadmissible as hearsay. FRE 801(c). Allergan’s Exhibits 2083 and 2084 are inadmissible as hearsay without an exception.

² The Board authorized this combined motion by email on December 8, 2020.

These two exhibits contain lab reports submitted by a third-party, Vivacy Laboratories, during its opposition proceedings of European Patent EP2349203 (the “Vivacy Reports”). EX2083, 1; EX2084, 1; *see also* EX2050 ¶¶ 7-8.³ The Vivacy Reports purportedly provide the results of two sets of testing on rheological properties of the HA gels with lidocaine and polyols claimed in those patents, before and after sterilization. *Id.* The documents are signed by three individuals collectively (some of whose identities cannot even be determined), in 2010 and 2014. EX2083, 3; EX2084, 6 (noting “illegible” signatures on original French document at page 12). None of those declarants, whoever they are, have offered testimony in these IPRs.

Both Allergan and its declarant Dr. Berkland rely on these declarants’ statements—testing supposedly performed by the individuals identified within the documents, as well as those individuals’ conclusions about the testing, contained within the documents—for their truth. Allergan offers the Vivacy Reports to allege “surprise” or “disbelief” at the ability to sterilize an HA filler with lidocaine due to supposed concerns with lidocaine degradation. *E.g.*, 1505 Response 34-35. Dr. Berkland similarly cites the Vivacy Reports because they “showed” that lidocaine

³ The opposed patent is the European counterpart of Allergan’s Molliard exhibit.

See EX2067, 1(30); *see also* 1505 Sur-Reply 11.

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