

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIQUIDIA TECHNOLOGIES, INC.,

Petitioner,

v.

UNITED THERAPEUTICS CORPORATION,

Patent Owner.

Case IPR2021-00406

Patent 10,716,793

**PETITIONER'S MOTION TO EXCLUDE
EXHIBITS 2092, 2100, 2101, 2102, AND 2103**

I. INTRODUCTION

Petitioner moves to exclude Patent Owner's Exhibits 2092, 2100, 2101, 2102, and 2103 under 37 C.F.R. § 42.64(c) and the Scheduling Order (Paper 19) on the following grounds:

Exhibit	Description	Reason to Exclude
EX2092 (attached to EX2094 at 63-65)	British Library Communication from Rupert Lee	Incomplete document; not authenticated
EX2100	Schill: Multisonic, Inhaling with ultrasonic infraControl, Instructions for Use (2004)	Not authenticated (no date or origin information)
EX2101	Schill: Multisonic, Inhaling with ultrasonic infraControl, Instructions for Use	Not authenticated (no date or origin information)
EX2102	DeVilbiss, UltraNeb, Ultrasonic Nebulizer User Manual	Not authenticated (no date or origin information)
EX2103	Lieberman, <i>et al.</i> , <i>In Vitro</i> Performance of the MyNeb™ Nebulizer: A New Portable Aerosol Delivery System	Not authenticated (no date or origin information)

Patent Owner relied on these exhibits in its Sur-Reply (Paper 55), and thus, Petitioner also moves to exclude the portions of Patent Owner's Sur-Reply that rely on these exhibits.

II. PETITIONER TIMELY OBJECTED

a. EX2092: British Library Communication

Petitioner timely objected to EX2092, attached to EX2094 at pages 63-65, under Federal Rule of Evidence (“FRE”) 106 and 901. Paper 56 at 2. As explained below, the supplemental evidence filed did not adequately address these objections. Thus, this exhibit should be excluded under each of these rules.

b. EX2100-2103: Schill, DeVilbiss, and Liebermann

Petitioner timely objected to EX2100-2103 under FRE 901, as there is no indication about the origins or dates of public availability for these documents. Paper 56 at 4. As explained below, the supplemental evidence filed did not adequately address these objections. Thus, these exhibits should be excluded under this rule.

III. ARGUMENT

a. EX2092: British Library Communication

EX2092, attached to EX2094 at pages 63-65, is an incomplete email chain containing two emails. One email is from a Rupert Lee to a Jim DiNatale that was “[i]n answer to . . . questions” that seem to have been deliberately excluded from the exhibit, since the subject line of Mr. Lee’s email is “RE: Questions about journal,” where “RE” generally indicates a reply to a prior e-mail in the same chain. The second email in the chain is from Mr. DiNatale forwarding the email to Mr. Maebius.

Both emails are dated in 2018 and do not appear to have been procured in relation to this matter, which was initiated in 2021.

Because the underlying email with the questions Mr. DiNatale posed to Mr. Lee are not included, it is not clear if Mr. DiNatale was answering questions about the British Library's practices as of 2018, or as of the priority date of the '793 patent in 2006. Further, Mr. Lee does volunteer that the "main reading rooms in London" have "searching and browsing facilities available" (EX2094 at 64-65 (EX2092 at 1-2)) but Patent Owner chose to ignore that in its Sur-Reply, and Petitioner had no papers left to address the issue.

Patent Owner raised this exhibit for the first time in the second deposition of Dr. Hall-Ellis (EX2094, conducted on 3/11/2022), even though Dr. Hall-Ellis had no reason to have seen the exhibit before or have knowledge of its origins or contents.

The only supplemental evidence Patent Owner provided to attempt to cure these deficiencies is a declaration from Mr. DiNatale, who is a "Research Librarian" at Patent Owner's counsel's law firm, Foley & Lardner LLP. The declaration provides no details as to exactly what questions led to the response in EX2092. In fact, the declaration states that Mr. DiNatale spoke to British Library employee Seema Rampersad, who provided signed letters in *this* proceeding (EX1116 and

EX1119) and whom Petitioner made available for deposition, but whose deposition Patent Owner cancelled the night before.

EX2092 appears to be Patent Owner attempting to get specific, undated, incomplete, out-of-context information into the proceeding, to somehow undermine the signed letters of British Librarian Ms. Rampersad (EX1116 and EX1119) and the signed declarations of library expert Dr. Hall-Ellis (EX1036 and EX1112), both prepared for *this* proceeding.

Accordingly, EX2092 should be excluded under FRE 106, because it is an incomplete document, where all of the prior email correspondence between the British Library contact and Patent Owner's counsel appear to be deleted.

Additionally, EX2092 should be excluded under FRE 901 because there is insufficient evidence to support a finding that the exhibit is what Patent Owner claims it is: it is unclear in what context this email originated (in part because the email chain is incomplete), in what capacity the British Library contact is responding, and is an unsigned email thread that was modified by Patent Owner's counsel (as evidenced by the deletion of the correspondence containing the questions to which Mr. Lee was responding).

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