

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

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

I. INTRODUCTION

United Therapeutics Corporation (“Patent Owner” or “UTC) opposes Petitioner’s Motion to Exclude (Paper No. 65) (“Pet. MTE”) Exhibits 2100, 2101, 2102, 2103, and deposition exhibit 2092 of Exhibit 2094. Petitioner moved to exclude the Exhibits for the following alleged grounds:

Exhibit	Description	Alleged Reason to Exclude
Deposition Exhibit 2092 (attached to EX2094 at 63-65)	British Library Communication from Rupert Lee	Allegedly incomplete document; not authenticated
EX2100	Schill: Multisonic, Inhaling with ultrasonic infraControl, Instructions for Use (2004) (Exhibit from March 14, 2022 Deposition of Dr. Gonda, referenced as “Tab 6”)	Allegedly not authenticated (no date or origin information)
EX2101	Schill: Multisonic, Inhaling with ultrasonic infraControl, Instructions for Use (Exhibit from March 14, 2022 Deposition of Dr. Gonda, referenced as “Tab 5”)	Allegedly not authenticated (no date or origin information)
EX2102	DeVilbiss, UltraNeb, Ultrasonic Nebulizer User Manual (Exhibit from March 14, 2022 Deposition of Dr. Gonda, referenced as “Tab 9”)	Allegedly 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 (Exhibit from March 14, 2022	Allegedly not authenticated (no date or origin information)

	Deposition of Dr. Gonda, referenced as "Tab 4")	
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II. ARGUMENT

A. Deposition Exhibit 2092 of EX2094: British Library Communication

There is no basis to exclude deposition exhibit 2092, which is authentic and not incomplete. In fact, it is an exact copy of EX2092 from IPR2017-01261 showing an email communication from the British Library, and was used at the deposition of Dr. Hall-Ellis to impeach the basis for her opinions. *See, e.g.*, EX2094 at 20:22-4 (introducing Exhibit 2092). Unable to identify a legitimate reason to exclude this exhibit, it appears that Petitioner challenges this exhibit as a way to further argue on the merits.¹

First, Petitioner's half-hearted attempt to exclude deposition exhibit 2092 on

¹ Petitioner's attempts to argue the merits of the underlying issues in its MTE brief (*e.g.* Pet. MTE, 3) is improper. P.T.A.B. Consol. Trial Practice Guide (Nov. 2019) at 79 ("A motion to exclude must explain why the evidence is not admissible (*e.g.*, relevance or hearsay) but may not be used to challenge the sufficiency of the evidence to prove a particular fact."). Thus, while Patent Owner disagrees on the merits, it does not address the merits in this Opposition.

authenticity grounds under FRE 901 (Pet. MTE, 4) fails as a matter of law and fact. Under FRE 901, an email may be authenticated by reference to its “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, take together with all the circumstances.” *See United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000), cert. denied, 533 U.S. 940 (2001). On its face, deposition exhibit 2092 of EX2094 shows that the document is indeed an April 2018 email from Mr. DiNatale to Mr. Maebius, forwarding an email from Mr. Rupert Lee of the British Library.

Further, testimony from a witness with knowledge of an email exchange is *prima facie* evidence of authenticity. *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) (“[T]he standard for authentication is one of ‘reasonable likelihood’...and is ‘minimal’...both the informant and Agent Berglas testified that the exhibits were in fact accurate records of [defendant’s] conversations with Lorie and Julie. Based on their testimony, a reasonable juror could have found that the exhibits did represent those conversations, notwithstanding that the e-mails and online chats were editable.”). As explained by the email’s author, Mr. Jim DiNatale, the document in this exhibit is a true and correct copy of an email he forwarded to attorney Steve Maebius at Foley & Lardner LLP, sharing the response Mr. DiNatale had received from Mr. Rupert Lee of the BIPC Research

Services team at the British Library after a series of telephone calls and email exchanges. *See* EX2105, ¶¶2-3.

Accordingly, deposition exhibit 2092 has been properly authenticated, and Liquidia's objection under FRE 901 should be denied.

Second, Petitioner contends that deposition exhibit 2092 should be excluded under FRE 106 because it is allegedly an incomplete document, based upon Petitioner's pure speculation that there was an original list of questions or other correspondence that were intentionally deleted from this document. *Pet. MTE*, 3-4. This argument likewise fails.

First and foremost, FRE 106 is not even a rule by which evidence is excluded. *See* FED. R. EVID. 106; *see also U.S. v. Jamar*, C.A.4 (Va.) 1977, 561 F.2d 1103 (noting that the purpose of this rule is "to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading."); *U.S. v. Branch*, C.A.5 (Tex.) 1996, 91 F.3d 699 (noting that FRE 106 codifies the common-law "rule of completeness," and its purpose is to permit contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading). Petitioner's motion under FRE 106 fails for this reason alone.

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