

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 REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE
EXHIBITS 2092, 2100, 2101, 2102, AND 2103**

I. EX2092: British Library Communication

First, Patent Owner (“PO”)’s reliance on FRE 901(b)(4) overlooks what PO does not contest: that the *document is incomplete* (Paper 69, 2-3), leaving the Petitioner and Board with no reason to believe that the email “is what the proponent claims it is.” FRE 901(a). Unlike EX2092, the authenticated email in *U.S. v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000) was complete and corroborated by deposition testimony of individuals included in the email chain. *Siddiqui*, 235 F.3d at 1322-23. Here, PO prevented Petitioner from cross-examining any party subject to the email chain by first identifying EX2092, and supplemental evidence EX2105 (Declaration from Foley & Lardner’s Research Librarian James DiNatale), *after* Petitioner submitted its Reply. *See Hamilton Techs. LLC v. Fleur Tehrani*, IPR2020-01199, Paper 57 at 52 (PTAB Dec. 28, 2021). Unlike Mr. DiNatale’s declaration, the communications in *U.S. v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007) were authenticated by live trial testimony and cross-examination. *Id.* at 151.

Second, contrary to PO’s contention, EX2092 is not admissible because it was used in a different proceeding (IPR2017-01621) involving a different patent and different Petitioner. Paper 69, 5-7. The admissibility of the document underlying EX2092 was disputed in that proceeding (*see* IPR2017-01621, Paper 43, 23-24) but never decided, because the case was voluntarily terminated before motions to exclude were filed or a FWD issued. More troubling, the premise of PO’s argument

is that Petitioner and/or Dr. Hall-Ellis should have responded to EX2092 *before* PO ever submitted EX2092 during a deposition or in this proceeding.

Finally, PO's attempt to frame EX2092 as only providing context to Dr. Hall-Ellis' second deposition (Paper 69, 7-9) is misleading because PO relied on EX2092 directly in its Sur-Reply to support its public availability arguments. *See* Paper 55, 8-9 (citing EX2092 as EX2094, 63-65). The Board in *Ascend*, which PO relies on, cautioned against such usage, which gives "parties the incentive to raise completely new evidence during a deposition, and then introduce that evidence into the record with a sur-reply, depriving the opposing party the opportunity to fully address that evidence." IPR2020-00349, Paper 53, at 12 (P.T.A.B. July 15, 2021). The Board has rejected such attempts to enter exhibits under the guise of "provid[ing] context." *Netflix, Inc. v. DivX, LLC*, IPR2020-00558, Paper 50 at 35 (P.T.A.B. Aug. 23, 2021) (excluding deposition exhibit filed with Sur-Reply, where the witness "had not prepared for the deposition using the document," and Petitioner did "not have an opportunity to respond to [the] new evidence"). If PO truly intended to contest the British Library's practices with EX2092, it should have used the exhibit with Ms. Rampersad, the British Library declarant of EX1116 and EX1119. Petitioner made Ms. Rampersad available for deposition, but PO cancelled her deposition the night before, after improperly shoehorning EX2092 in Dr. Hall-Ellis's deposition.

None of PO's arguments address the real issue with EX2092: whether the alleged practices described in 2018 were in effect as of 2006 or if they refute Ms. Rampersad's or Dr. Hall-Ellis's statements about the public availability of the Voswinckel JAHA and JESC abstracts. EX2092 confirms that the "main reading rooms in London" have a "range of searching and browsing facilities" (EX2094, 64-65) and then does not speak to the particular abstracts at all. PO only asked Dr. Hall-Ellis during her deposition whether she had any reason to doubt the veracity of EX2092, to which she responded that the document is "incomplete" and does not "necessarily speak to the same issue." EX2094, 23:4-24. EX2092 was not used to "test" Dr. Hall-Ellis' testimony. For these reasons, EX2092 should be excluded.

II. EX2100 and EX2101: Schill Instructions for Use

PO does not contend that EX2100 and EX2101 have information about their origins or date of public availability. Instead, PO first argues that dating is a "substantive," not "evidentiary issue." Paper 69, 10. But this argument against exclusion runs straight into the issue in Papers 60 and 62: PO submitted the exhibits with its Sur-Reply, when Petitioner had no papers left for "substantive" challenges—exactly why PO was prohibited from filing any "new evidence other than deposition transcripts." Trial Practice Guide, 73; Paper 50. PO instead tries to shoehorn these exhibits into the record under the guise of "testing witness' testimony" (Paper 69, 11-12)—the "gamesmanship" the Board cautioned against (EX2104, 24:16-29:23).

These exhibits, in deposition, had no date or Internet Archive declaration, nor did PO elicit testimony re date or authenticity. *See* EX2099, 164:1-177:17. PO entered the exhibits over Petitioner's objections (*id.* (raising Paper 50)). Dr. Gonda thus testified based on the unauthenticated documents alone. EX2099, 164:1-177:17. PO then cited *directly* to the exhibits, rather than as "testing" Dr. Gonda's testimony. Paper 55 at 14, 16. Thus, "testing" Dr. Gonda's opinions is not the basis for including these exhibits, nor were they authenticated even in that context.

PO now tries to establish authenticity with an Internet Archive Declaration (EX2106), arguing that "Petitioner has both [the documents in the declaration and EX2100 and EX2101], which can easily be compared, and failed to identify any differences between them." Paper 69, 11 n.3. The same applies to EX1087 and EX1115.¹ Accordingly, if the Board finds EX2106 sufficiently authenticates EX2100 and EX2101 under FRE 901, Petitioner asks the Board to find the same for EX1087 and EX1115, and the documents they authenticate (EX1037 and EX1114).

III. EX2102: DeVilbiss, UltraNeb, Ultrasonic Nebulizer User Manual

There is no evidence as to the authenticity or date of EX2102 under FRE 901. PO argues that the exhibit "tested the basis for [Dr. Gonda's] assumptions about

¹ EX1037's German version is the same as the document dated in EX1087; EX1114 is the same document dated in EX1115. PO has failed to identify any differences.

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