

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SLAYBACK PHARMA LLC,
Petitioner,

v.

EYE THERAPIES, LLC,
Patent Owner.

Case No.: IPR2022-00142

U.S. Patent No.: 8,293,742

PETITIONER'S MOTION TO EXCLUDE EVIDENCE
37 C.F.R. § 42.64(c)

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner Slayback Pharma LLC, respectfully submits this motion to exclude evidence submitted by Patent Owner. Petitioner requests exclusion of the entirety of Exhibits 2152–2156 and portions of Exhibits 2023 and 1052. Petitioner timely objected to these exhibits through written objections (*see* Paper 34) and/or during the relevant deposition.

The Federal Rules of Evidence (“FRE”) govern the admissibility of evidence and expert testimony in *inter partes* review proceedings. 37 C.F.R. § 42.62(a). The party moving to exclude the evidence bears the burden of establishing that the material requested to be excluded is inadmissible under the FRE. *See Microsoft Corp. v. FG SRC LLC*, IPR2018-0605, Paper 72, 11 (P.T.A.B. Apr. 9, 2020). As shown herein, the exhibits that are the subject of this motion should be excluded as containing inadmissible hearsay under FRE 802 or as improper testimony under FRE 701, 702, and/or 703.

The Board should not dismiss this motion as moot even if the Board does not rely on the inadmissible evidence in reaching its Final Written Decision. Rather, Petitioner respectfully requests that the Board grant the motion so that Patent Owner cannot continue to rely upon the exhibits identified herein on appeal. Not excluding the exhibits at issue in this motion would force Petitioner to address them again on appeal, thus wasting judicial and party resources. To the extent that any exhibit or portion of an exhibit is not excluded, use of the exhibit should be

restricted by the Board to the use for which it was originally submitted. *See* FRE 105.

I. Paragraph 7 of Exhibit 2023 and Portions of Exhibit 1052

Paragraph 7 of Exhibit 2023 and the portion of Exhibit 1052 appearing at page 105, line 10 through page 107, line 16 should be excluded as improper testimony under FRE 701, 702, and/or 703.

Exhibit 2023 is the declaration of John Ferris, an employee within the Bausch + Lomb family of companies (“Bausch”). *See* Ex. 2023, ¶ 3. Bausch & Lomb, Inc. and Bausch & Lomb Ireland are real parties in interest in this proceeding. Paper 4 at 2. Mr. Ferris’s testimony relates to the marketing and commercial performance of Lumify, an alleged embodiment of certain claims of the challenged patent. Patent Owner has made no attempt to qualify Mr. Ferris as an expert in this case. Mr. Ferris did not include his curriculum vitae or resume with his declaration, and his declaration does not identify any “knowledge, skill, experience, training or education” that would qualify Mr. Ferris as an expert in this proceeding. FRE 702; *see also* Ex. 2023. As a non-expert witness, any opinion testimony from Mr. Ferris cannot be “based on scientific, technical, or otherwise specialized knowledge.” FRE 701(c).

In Paragraph 7 of Ex. 2023, Mr. Ferris recites specific statistics about the use of Lumify, but his testimony does not point to any support for these statements.

Ex. 2023, ¶ 7. At his deposition, Mr. Ferris confirmed that the statements in Paragraph 7 were not based on his personal knowledge, but on data from a study performed by a third party, IQVIA. Ex. 1051, 17:16–18:15. The study allegedly supporting these statistics, however, was not submitted as an exhibit in this proceeding, as confirmed by Mr. Ferris and Patent Owner’s counsel. *Id.*, 18:16–20:5. As a result, Paragraph 7 of Mr. Ferris’s declaration (Ex. 2023) is, at best, inadmissible opinion testimony from a lay witness under FRE 701 because it is based on scientific, technical, or specialized knowledge and Mr. Ferris is not qualified to provide such an opinion regarding the precise outcome of a study, as described above. FRE 701(c). Therefore, Paragraph 7 should be excluded as improper testimony under FRE 701. Even if the Board finds that Mr. Ferris is qualified to provide opinion testimony in this proceeding, however, the statements in Paragraph 7 should still be excluded because they are not based on sufficient facts or data that are in the record of this case. The underlying document was not produced, and Petitioner had no ability to challenge the basis for these data. Therefore, Paragraph 7 of Exhibit 2023 fails to be proper opinion testimony under FRE 702. FRE 702(b).

Patent Owner attempted to circumvent the deficiencies in Paragraph 7 of Mr. Ferris’s declaration by having Dr. Jarosz state the information in response to re-direct questioning at Dr. Jarosz’s deposition. Specifically, Patent Owner’s counsel

asked Dr. Jarosz to look at Paragraph 7 of Mr. Ferris’s declaration (Exhibit 2023) and repeat the same unsupported data and statistics that appear in that paragraph. Ex. 1052, 105:5–107:17. This gamesmanship should not be permitted. The testimony at Exhibit 1052, 105:5–107:17 remains unsupported by any facts or data that are in the record of this proceeding. Given this lack of disclosure of the supporting documents, the testimony appearing in Exhibit 1052, 105:5-107:17 is not based on sufficient facts or data as required by FRE 702(b), and Mr. Jarosz’s redirect testimony should be excluded.

II. Exhibit 2156 and Paragraphs 14-18 of Exhibit 2023

Petitioner respectfully requests the Board to exclude Exhibit 2156 as impermissible hearsay under FRE 802. Petitioner similarly seeks to exclude Paragraphs 14–18 of Exhibit 2023, which exclusively rely on Exhibit 2156, as containing inadmissible hearsay and as improper testimony under FRE 701, 702, and/or 703.

A. Exhibit 2156

Patent Owner relies on Exhibit 2156 to prove Lumify’s market performance. Exhibit 2156 is a presentation of third party Ipsos’s analysis of data from a survey it performed.¹ Ex. 1051, 27:5–16, 30:6–20. Thus, Exhibit 2156 contains out of

¹ Mr. Ferris’s declaration states that Bausch “conducted” the study, but he clarified

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