

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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GRÜNENTHAL GMBH,  
Petitioner

v.

ANTECIP BIOVENTURES II LLC,  
Patent Owner

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Case PGR2019-00028  
U.S. Patent No. 10,052,338

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**PATENT OWNER'S MOTION TO EXCLUDE**

DATED: April 3, 2020

Respectfully submitted,

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ANTECIP BIOVENTURES II LLC

***Mail Stop "PATENT BOARD"***

Patent Trial and Appeal Board

U.S. Patent and Trademark Office

P.O. Box 1450

Alexandria, VA 22313-1450

Patent Owner moves to exclude or partially exclude the following of Petitioner's exhibits: 1004, 1006, 1007, 1008, 1009, 1010, 1038, 1040, 1043, 1044, 1045, 1046. Exhibits numbered 1040 and higher were first present with the Reply.

**I. Patent Owner timely filed and served objections to the subject exhibits.**

Patent Owner objected to Exs. 1004, 1006–1010, and 1038 in Paper 8 (Sept. 3, 2019), and to Exs. 1040 and 1043–1046 in Paper 15 (Jan. 21, 2020).

**II. Exhibit 1004 (Poree Declaration)**

Patent Owner requests exclusion of those parts of the Poree Declaration (Ex. 1004) that rely on Varenna 2011 (Ex 1006), Muratore (Ex. 1007), Gatti (Ex. 1008), Harden (Ex. 1009), and/or Drummond (Ex. 1010) in opining that the claims of the '338 patent would have been obvious and are therefore unpatentable. Petitioner relies upon Dr. Poree's obviousness opinions throughout its Petition and Reply to support Grounds 1 and 3. Rule 703, Fed. R. Evid., allows that "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted," while Rule 702(b) requires expert testimony be "based on sufficient facts or data." None of the multiple references cobbled together by Dr. Poree to reach his obviousness conclusions is admissible under the Federal Rules of Evidence (as discussed below), which govern these proceedings. 37 C.F.R. § 42.62(a). Dr. Poree cites to and relies upon all these references but fails to testify that experts in the field would reasonably rely on such sources, or on the facts or data they allegedly

contain, in forming an opinion on the subject. No other evidence in the record proves that other experts would so rely. All of Dr. Poree's obviousness conclusions are based on these inadmissible references and all of his obviousness opinions should be excluded accordingly under Rule 702(b) and 703.

### **III. Exhibit 1006 (Varenna 2011)**

Patent Owner requests exclusion of at least the date information appearing on the face of Varenna 2011 (Ex. 1006). Petitioner relies on Varenna 2011 to prove obviousness in connection with Grounds 1 and 3 throughout both the Petition and the Reply, and specifically cites the date information at p. 28 of the Petition. Dr. Poree cites the date information at ¶ 40 of his declaration (Ex. 1004). Petitioner treats the date information as testimony to establish the fact of publication and the legal conclusion that Varenna 2011 is a printed publication under 35 U.S.C. § 102(a). Specifically, Petitioner asks the Board to accept these statements appearing on the face of Varenna 2011 as truthful testimony, despite being words on a page and not the testimony of a declarant testifying under oath in connection with the present trial: "OTTOBRE 2011", "ARTICOLO ORIGINALE", "Ricevuto il 15 luglio 2011", and "Accettato il 30 agosto 2011." These statements constitute hearsay under Fed. R. Evid. 801 and are inadmissible under Fed. R. Evid. 802.

### **IV. Exhibit 1007 (Muratore)**

Patent Owner requests exclusion of at least the date information appearing on the face of Muratore (Ex. 1007). Petitioner relies on Muratore to prove

obviousness in connection with Grounds 1 and 3 throughout both the Petition and the Reply, and specifically cites the date information at p. 32 of the Petition. Dr. Poree cites the date information at ¶ 50 of his declaration (Ex. 1004). Petitioner treats the date information as testimony to establish the fact of publication and the legal conclusion that Muratore is a printed publication under 35 U.S.C. § 102(a). Specifically, Petitioner asks the Board to accept these statements appearing on the face of Muratore as truthful testimony, despite being words on a page and not the testimony of a declarant testifying under oath in connection with the present trial: “S/2004”, “2004-07-19”, “Volume 5”, “Supplemento 1/2004”, “2004 ISSUE 1 SUPPLEMENT”, and “Maratea (PZ), 16-18 aprile 2004.” These statements constitute hearsay under Fed. R. Evid. 801 and are inadmissible under Fed. R. Evid. 802.

#### **V. Exhibit 1008 (Gatti)**

Patent Owner requests exclusion of at least the date information appearing on the face of Gatti (Ex. 1008). Petitioner relies on Gatti to prove obviousness in connection with Grounds 1 and 3 throughout both the Petition and the Reply, and specifically cites the date information at p. 31 of the Petition. Dr. Poree cites the date information at ¶ 46 of his declaration (Ex. 1004). Petitioner treats the date information as testimony to establish the fact of publication and the legal conclusion that Gatti is a printed publication under 35 U.S.C. § 102(a).

Specifically, Petitioner asks the Board to accept these statements appearing on the face of Gatti as truthful testimony, despite being words on a page and not the testimony of a declarant testifying under oath in connection with the present trial: “Published online: 17 Sep 2009” and “© 2009 Inform UK Ltd.” These statements constitute hearsay under Fed. R. Evid. 801 and are inadmissible under Fed. R. Evid. 802.

#### **VI. Exhibit 1009 (Harden)**

Patent Owner requests exclusion of at least the date information appearing on the face of Harden (Ex. 1009). Petitioner relies on Harden to prove obviousness in connection with Grounds 1 and 3 throughout both the Petition and the Reply, and specifically cites the date information at pp. 26–27 of the Petition. Dr. Poree cites the date information at ¶ 61 of his declaration (Ex. 1004). Petitioner treats the date information as testimony to establish the fact of publication and the legal conclusion that Harden is a printed publication under 35 U.S.C. § 102(a).

Specifically, Petitioner asks the Board to accept these statements appearing on the face of Harden as truthful testimony, despite being words on a page and not the testimony of a declarant testifying under oath in connection with the present trial: “PAIN 150 (2010) 268-274”, “Received 18 November 2009”, “Received in revised form 19 March 2010”, “Accepted 20 April 2010”, and “© 2010 International Association for the Study of Pain.” These statements constitute hearsay under Fed.

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