

Filed on behalf of: Corcept Therapeutics, Inc.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TEVA PHARMACEUTICALS USA, INC.,
Petitioner

v.

CORCEPT THERAPEUTICS, INC.,
Patent Owner

Case PGR2019-00048
U.S. Patent No. 10,195,214

PATENT OWNER'S MOTION TO EXCLUDE

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I. Introduction

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Patent Owner Corcept Therapeutics, Inc. (“Patent Owner”) submits this motion to exclude Exhibit 1075. Patent Owner timely objected to this Exhibit through written Objections to Evidence on June 11, 2020.

The Federal Rules of Evidence (“FRE”) govern the admissibility of evidence in post-grant review proceedings. 37 C.F.R. § 42.62. As shown herein, the challenged exhibit is unauthenticated in violation of FRE 901. Accordingly, the Board should exclude the objected-to exhibit for the reasons that follow.

II. Exhibit 1075 Lacks Foundation and Should Be Excluded

Exhibit 1075 should be excluded pursuant to FRE 901 because Petitioner has failed to offer sufficient information establishing its authenticity as a publicly accessible document as of the priority date of the '214 patent. The public accessibility of Exhibit 1075 is an essential part of the foundation analysis under FRE 901 because “the sufficiency of the foundation evidence must be assessed in light of the nature of the documents at issue.” *Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996); *see also Open Text S.A. v. Box, Inc.*, No. 13-cv-04910, 2015 WL 428365, *2 (N.D. Cal. Jan. 30, 2015) (granting patentee summary judgment that a computer program could not be used as prior art because the accused infringer failed to authenticate the documentary evidence). Patent Owner

objected to Exhibit 1075 in a timely manner, and Petitioner's efforts to correct the evidentiary deficiencies with supplemental evidence only serve to highlight why Exhibit 1075 should be excluded.

Petitioner represents that Exhibit 1075 is a doctoral thesis written by Dr. Aart Johannes van der Lelij while attending Erasmus University in Rotterdam, Netherlands. Petitioner has failed to establish that this thesis was publicly available before the March 2017 priority date. Indeed, while the thesis bears a date of "Woensdag 27 Mei 1992," the Board has held on numerous occasions that a purported copyright or publication date, "standing alone, does not establish public availability as of that date." *See Apotex Inc. v. Celgene Corp.*, IPR2018-00685, Paper 8 at 29-30 (P.T.A.B. Sept. 27, 2018) (citing *Ford Motor Co. v. Versata Dev. Grp.*, IPR2016-01019, Paper 9 at 5-6 (P.T.A.B. Oct. 4, 2016)). Instead, in order to prove that a thesis was publicly available, the Petitioner must provide evidence regarding "when the thesis was indexed in the library catalog" and the "general library procedure as to indexing, cataloging, and shelving of theses." *In re Hall*, 781 F.2d 897, 899 (Fed. Cir. 1986). The Board has therefore held that "[d]etermining public accessibility of a thesis for prior art purposes requires a showing of both shelving and meaningful indexing/cataloging" at the relevant library as of the priority date. *Kayak Software Corp. v. International Business Machines Corp.*, CBM2016-00076, Paper 16 at 8 (P.T.A.B. Dec. 15, 2016)

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