UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TEVA PHARMACEUTICALS USA, INC.
Petitioner,

v.

CORCEPT THERAPEUTICS, INC.
Patent Owner.

PGR2019-00048
Patent 10,195,214 B2

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

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I. INTRODUCTION

Corcept's motion to exclude Teva's Exhibit 1075 ("the 1992 Van der Lelij Thesis") should be denied for two independent reasons.

First, Corcept's motion does not contest the *admissibility* of the thesis at all; instead, Corcept argues that the thesis is not a prior-art printed publication because it was not publicly available before the priority date. This is a sufficiency-of-the-evidence argument, not an evidentiary one. It is therefore plainly improper under the Board's rules. *See* Trial Practice Guide, 79 (Nov. 2019) ("A motion to exclude . . . may not be used to challenge the sufficiency of the evidence to prove a particular fact."). Corcept's motion is a transparent attempt to belatedly bolster a deficient merits argument (and to flout the sur-reply page limit in the process).

Second, Corcept's public-accessibility argument fails on its own terms. The evidence shows that the 1992 Van der Lelij Thesis has been publicly available and indexed in the Central Catalogue of Dutch Libraries for nearly 30 years and available online since 2013. The reference thus qualifies as a prior-art printed publication under well-established Federal Circuit precedent.

II. ARGUMENT

A. Corcept's motion improperly challenges the *public accessibility*—not the *evidentiary admissibility*—of the 1992 Van der Lelij Thesis and should be denied for that reason alone.

Corcept's motion to exclude purports to request exclusion of the 1992 Van der Lelij Thesis for lack of authentication under Rule 901. *See* MTE, 1. But the

issue of authentication goes to whether the proponent has "produce[d] evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Corcept does not actually dispute that the thesis is what Teva claims it is: namely, a 1992 thesis by Aart Johannes van der Lelij entitled "Aspects of Medical Therapy of Neuroendocrine Disorders." This, standing alone, is fatal to Corcept's motion: Teva has presented evidence that Exhibit 1075 is a copy of the thesis in question, which Teva's counsel obtained from the online Erasmus University Repository, *see* TEVA1077; TEVA1081, ¶4, and Corcept does not even try to show otherwise.[1]

Corcept's actual argument has nothing to do with authentication. Instead, Corcept contends that Teva has not "establish[ed] that this thesis was *publicly available* before the March 2017 priority date." MTE, 2 (emphasis added). But "a motion to exclude is not the proper vehicle to challenge the sufficiency of the evidence used to demonstrate that [a reference] qualifies as a prior art printed publication within the meaning of § 102(b)." *Chicago Mercantile Exch., Inc. v. 5th Mkt., Inc.*, CBM2014-00114, Paper 35, 52 (P.T.A.B. Aug. 18, 2015); *see* Trial Practice Guide, 79 (Nov. 2019) ("A motion to exclude . . . may not be used to

[1] In any event, since the thesis is more than 20 years old, it would qualify as a self-authenticating ancient document under Rule 901(8).

challenge the sufficiency of the evidence to prove a particular fact.").[2] Corcept's arguments as to the public accessibility of the 1992 Van der Lelij Thesis should have been presented in its Patent Owner Sur-Reply—"not a motion to exclude." *Chicago Mercantile Exch.*, CBM2014-00114, Paper 35, 52. Corcept's sur-reply limited its argument on this issue to a single conclusory assertion, devoid of any supporting analysis. *See* POSR, 20. The present motion thus represents a transparent attempt by Corcept to supplement its deficient argument on public accessibility through an improper vehicle, in violation of the Board's rules. The Board should deny the motion for that reason alone.

B. The 1992 Van der Lelij Thesis was publicly accessible before the March 2017 priority date.

In any event, Corcept's public-accessibility argument lacks merit. The Federal Circuit squarely held in *In re Hall*, 781 F.2d 897 (Fed. Cir. 1986)—and has reaffirmed in many cases since—that a thesis that is indexed and catalogued in a university library and "available for general use" qualifies as a prior-art printed

[2] To be sure, a motion to exclude may properly be used to address the admissibility of evidence that underlies a factual determination about public accessibility. *See Chicago Mercantile Exch.*, CBM2014-00114, Paper 35, 52. But that is not what Corcept's motion does: Corcept simply argues that the thesis was not available to the public before the priority date.

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