

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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**SLAYBACK PHARMA LLC,**  
Petitioner,

v.

**EYE THERAPIES, LLC,**  
Patent Owner.

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Case No.: IPR2022-00142

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

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**PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION  
TO PETITIONER'S MOTION TO EXCLUDE EVIDENCE**

37 C.F.R. § 42.64(c)

Patent Owner’s arguments regarding the admissibility of the evidence that Petitioner seeks to exclude are flawed. Therefore, the Board should exclude Exhibits 2152–2156 and portions of Exhibits 2023 and 1052.

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

Patent Owner argues that Paragraph 7 of Exhibit 2023 “is admissible as a summary to prove content of voluminous IQVIA data that cannot be conveniently examined in court,” citing FRE 1006. Paper No. 62 at 2. But FRE 1006 requires that “[t]he proponent must make the originals...available for examination...by other parties.” FRE 1006. Patent Owner did not produce the originals, so FRE 1006 is inapplicable. *Mylan Pharms., Inc. v. Yeda Rsch. & Dev. Co. Ltd.*, IPR2015-00643, Paper No. 90 at 37–38 (P.T.A.B. Dec. 2, 2016) (denying motion to exclude because the underlying documents had been made available to the moving party); *see also*, e.g., *Trend Micro Inc. v. Cupp Computing AS*, IPR2019-00765, Paper No. 30 at 8 (P.T.A.B. Aug. 25, 2020); *Designing Health, Inc. v. Erasmus*, 132 F. App’x 826, 833 (Fed. Cir. 2005) (“Failure to make available the materials underlying a summary exhibit, renders that summary exhibit inadmissible.”).

Patent Owner mistakenly attempts to shift the burden to Petitioner, alleging that Petitioner never “asked for [the underlying data],” (Paper No. 62 at 2), but it is Patent Owner who “**must** make the originals or duplicates available for examination or copying.” FRE 1006 (emphasis added). Patent Owner relies on Paragraph 7 of

Exhibit 2023 to bolster its claims of secondary considerations of non-obviousness, for which Patent Owner bears the burden of production. *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1360 (Fed. Cir. 2007) (“[P]atentee has the burden of going forward with rebuttal evidence.”). It was not Petitioner’s burden to request the underlying data, and this contention should not support the inclusion of inadmissible data.

Patent Owner attempts to preserve its ability to get this same, undisclosed data into the record through Dr. Jarosz’s re-direct examination, simply because he is an expert, but this is nothing but gamesmanship. FRE 702(b) requires that an expert’s testimony be “based on sufficient facts or data.” FRE 702(b). Dr. Jarosz’s testimony is nothing more than a regurgitation of Mr. Ferris’s unsupported statements. There is no evidence that Dr. Jarosz reviewed the underlying IQVIA data—it is not in his materials considered list, was not mentioned in his declaration, and was not shown to him at the deposition. Therefore, Dr. Jarosz was not made aware of the data that supports Mr. Ferris’s testimony, and Dr. Jarosz’s testimony should be excluded.<sup>1</sup>

## **II. Exhibit 2156 and Paragraphs 14–18 of Exhibit 2023**

Patent Owner’s arguments that Exhibit 2156 falls into an exclusion or

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<sup>1</sup> Patent Owner’s arguments that Petitioner allegedly failed to preserve its objections are similarly misplaced. Petitioner timely objected to the questions Petitioner seeks to exclude during the deposition. *See* EX-1052 at 105:10–107:16.

exception to the rule against hearsay are also flawed. Patent Owner is wrong that Exhibit 2156 qualifies as a market report under FRE 803(17).<sup>2</sup> FRE 803(17) “applies to ‘objective compilations of easily ascertainable facts,’ not reports containing ‘conclusions reached after analysis by a specialized marketing company.’” *Bianco v. Globus Med., Inc.*, No. 2:12-CV-00146-WCB, 2014 WL 119285, at \*2 (E.D. Tex. Jan. 12, 2014) (quoting *JIPC Mgmt., Inc. v. Incredible Pizza Co.*, No. CV 08-04310 MMM (PLAx), 2009 WL 8591607, at \*24 (C.D. Cal. 2009)). Here, Ipsos—a specialized market research company—conducted a survey of eye care professionals, analyzed the data, and created a presentation for Patent Owner to communicate its conclusions. This is exactly the type of subjective analysis that was excluded in *Telebrands* and *Bianco*, and it should be excluded here.

Patent Owner is also wrong that Exhibit 2156 qualifies as a business record under FRE 803(6). FRE 803(6) requires that the conditions of the exception “are shown by the testimony of the custodian or another qualified witness.” FRE 803(6)(d). Patent Owner has not supplied the foundational testimony to establish

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<sup>2</sup> Patent Owner mistakenly complains that the *Telebrands* decision on which Petitioner relies is unavailable, but the redacted version of that decision is publicly available as Exhibit 3001. *Telebrands Corp. v. Tinnus Enters.*, PGR2016-00030, EX-3001 (P.T.A.B. Feb. 7, 2018).

how Exhibit 2156 was generated—either at Ipsos or Bausch. Mr. Ferris has no knowledge of how Ipsos creates or maintains its documents. EX-1051 at 23:8–24:3. Mr. Ferris is the “Senior Vice President, Global Consumer” and admitted that he was not the “content owner” for Exhibit 2156. EX-2023 at ¶3; EX-1051 at 10:8–12. None of his testimony provides any information regarding the creation of this document as it was kept at Bausch. Courts routinely “decline to admit business records under Rule 803(6) based on declarations of upper management employees who never claim to be a ‘witness...familiar with the record keeping system.’” *Fambrough v. Wal-Mart Stores, Inc.*, 611 F. App’x 322, 328–29 (6th Cir. 2015) (quoting *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986)). Patent Owner cites to Paragraph 14 of Exhibit 2023, but this paragraph does not provide the information necessary to trigger FRE 803(6), such as, that the record was created at or near the time by someone with knowledge. Thus, Mr. Ferris has not provided the requisite testimony to establish Exhibit 2156 as admissible hearsay.

Patent Owner’s arguments that Mr. Ferris should be allowed to provide lay opinion testimony in Paragraphs 14–18 of his declaration (EX-2023), consisting simply of repeating the data and conclusions drawn in Exhibit 2156, is misplaced. Exhibit 2156 represents the scientific, technical, and specialized knowledge of *Ipsos*, not Mr. Ferris. *See Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1362 (Fed. Cir. 2008) (excluding testimony where witness did not have proper expertise).

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