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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052897
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corrects responses to requests for admission nos. 116 and 117 in a manner that is near-to implied by other of Petitioner's responses, as found in Exhibit T157.

Assertion That Only Admissions Are Admissible

Section II.A of Registrant's brief asserts that the only *admissions* in Petitioner's Exhibit T157 are found in Admissions Nos. 109, 116-7, 203 and 205, which were noticed by Registrant in its Exhibit 8 (Dkt. No. 67), and that the remaining responses are therefore inadmissible. Remarkably, the June 2014 Motion to Strike ***quotes very the statutory section that tears asunder its assertion***. As stated at 37 CFR §2.120(j)(5):

if fewer than all of the... answers to interrogatories, or fewer than all of the admissions, are offered in evidence by the... inquiring party, the disclosing... ***party may introduce under a notice of reliance*** any other ***written***... answers to interrogatories, or any other ***admissions, which should in fairness be considered so as to make not misleading what was offered by the... inquiring party***.

This is exactly what Petitioner's Responsive Notice of Reliance provided as the reason for putting of record an additional 33 responses to requests for admission.¹

Admissions 116 and 117, noticed in Registrant's Exhibit 8, state that Petitioner did not present documents 102 and 103 (Petitioner's Trial Exhibits T8 and T9, respectively) to Ortho-McNeil prior to Feb. 28, 2002 (the "Time Frame"), but would-be hidden Admissions 101 – 106 make clear that Petitioner does not deny delivering these documents to Ortho-McNeil's parent company, Johnson & Johnson,² in the Time Frame, and thus provide needed context for Admissions 116 and 117 so that they are not

¹ Specifically, "responses 101-108, 110-115, 125-131, 189-193, 199-202, 204 and 206 are needed to put the cherry picked responses provided by Registrant in context."

² Sköld Dep. 102:13-17 makes clear that Johnson & Johnson and Ortho-McNeil were one entity; Sköld Dep. 19:22 – 20:2 makes clear that "representatives of representatives of Neutrogena and Ortho and McNeil at the Johnson & Johnson meeting" in 2001. The Board can and should take Judicial Notice that Johnson & Johnson is the parent corporation for Ortho-McNeil, since the fact is generally well known in the United States, and readily determinable from sources whose accuracy cannot reasonably be questioned. See, e.g., www.sec.gov/edgar/searchedgar/companysearch.html, searching ticker symbol "JNJ".

misleading. Admissions 113 – 115 make clear that Petitioner does not deny that he interacted with Ortho-McNeil with respect to Restoraderm in the Time Frame, and thus provide needed context for Admissions 116 and 117 so that they are not misleading.

Admissions 164, 166-74, 177-87, 203 and 205 (“Public Level Admissions”), presented by Registrant’s Exhibit 8, deny various general public-level promotions in the Time Frame. Admissions 107-12, 125-31, 189-93, 199-202, 204 and 206, put these responses in context, and render them not misleading, since these responses make clear that Petitioner does not deny *marketing to company-level consumers* in the Time Frame. Similarly, Admissions 101-115 comprise denials consistent with testimonial evidence from Sköld and Jeff Day that, in the Time Frame, Petitioner met with Johnson & Johnson, Ortho-McNeil and Medcis, delivered substance labeled Restoraderm to Johnson & Johnson, Ortho-McNeil and Medcis, and utilized Exhibits T8 and T9 (describing “Restoraderm”) with Johnson & Johnson and Medcis. These indicators of company-level promotions provide context for the Public Level Admissions, needed to render them non-misleading. Moreover, Admissions 190-93 and 199-202, 204 and 206 comprise more than denials, they verify that “Petitioner’s papers to the Board or to the Registrant have all emphasized that its technology was marketed to companies.” Thus, these provide still further context for the Public Level Admissions.

Company-level promotions will be supported in the Trial Brief with testimonial and documentary evidence. Nonetheless, it should be before the Board that the responses that Registrant cherry picked do not seem to mean the same thing if read in context of the Admissions provided by Exhibit T157. In other words, as positive

evidence for Petitioner, Exhibit T157 has small weight, but as context and counterweight for the evidence in Registrant's Exhibit 8, it does have substantial weight.

This context information of Exhibit T157 is the very stuff contemplated by Rule 2.120(j)(5) as that "which should in fairness be considered." Turdin v. Trilobite, Ltd., 109 U.S.P.Q.2d 1473, Concurrent Use No. 94002505 (TTAB 2014), is not to the contrary:

[Disclosing party] Trilobite objects to [Inquiring party's] Turdin's submission of Trilobite's response to Turdin's request for admission no. 6, which denies the request. Trilobite's objection is sustained.³

In other words, Turdin stands for: if Sköld were to oppose, Galderma could not rely on Sköld's denials. Turdin does not stand for the proposition that Sköld cannot put its denials in the record to provide a fair context for the admissions that Galderma elects to notice. Life Zone Inc. v. Middleman Group Inc., 87 U.S.P.Q.2d 1953, Opp. No. 91160999 (TTAB 2008), is in the same vein as, and no more supportive than, Turdin.

Accordingly, Registrant's June 2014 Motion to Strike is, with respect to Exhibit T157, without foundation, and should be denied.

Pin-Pointed Explanation of Why Admissions Are Relied Upon

Petitioner specifically identified the Admissions on which it sought to rely. Registrant well understood why each was sought to be relied upon. In the logical progression of the trial briefs, a highly specific recitation of why they were relied upon would have been laid out for the Board. Petitioner's briefing would have laid out the context for Admissions 116, 117, 164, 166-74, 177-87, 203 and 205 provided by Admissions 101-12, 113-15, 125-31, 189-93, 199-202, 204 and 206, as set forth above.

³ Slip Op. at 7.

To the extent that Petitioner made a formal error in not earlier not setting forth more detail on the context needed for Registrant's cherry-picked admissions, that error is now made harmless by the accounting provided above.

Accordingly, Registrant's June 2014 Motion to Strike should be denied.

Exhibit T158

Petitioner concedes that an inadvertent error was made in not moving for leave to amend Admissions 116 and 117. The requests and corollary revised admissions are as follows, with additions underlined:

Request for Admission 116:

Prior to February 28, 2002, Petitioner did not present Petitioner's Document No. 102 to Ortho-McNeil.

Petitioner confirms this assertion only in that Petitioner regarded the entity to which he did present Document No. 102 to be Johnson & Johnson, consistent with his response to Request for Admission 104.

Request for Admission 117:

Prior to February 28, 2002, Petitioner did not present Petitioner's Document No. 103 to Ortho-McNeil.

Petitioner confirms this assertion only in that Petitioner regarded the entity to which he did present Document No. 102 to be Johnson & Johnson, consistent with his response to Request for Admission 104.⁴

As outlined above, Johnson & Johnson and Ortho-McNeil are in the same corporate family, with Johnson & Johnson being the parent company. Trial evidence will show that the meetings with Johnson & Johnson and Ortho-McNeil were in fact a consolidated meeting, on September 11, 2001.⁵ Put in the context of Admissions 101-106, and 113-115, the meaning of Admissions 116 and 117 could near only have been as amended above. As the context provides, Petitioner did give documents 102 and 103

⁴ Sic: Admission 105.

⁵ Sköld Dep. 18:6 – 18; 19:9-12; 36:14 – 37:2; 102:18 – 107:16; Day Dep.20:12 – 21:19.

to Johnson & Johnson in the time frame, and did other marketing with Johnson & Johnson and Ortho-McNeil. Thus, as the revised admissions make clear, Sköld delivered the documents to a highly related company.

Registrant was well aware of this context and has suffered no surprise. Admitting these modest revisions into evidence enhances fair fact-finding. Further, the context provided by Admissions 101-106, and 113-115 corroborates the veracity of the amendments provided above, further indicating the equity of allowing these revisions. Accordingly, Petitioner moves for the Board to admit Exhibit T158.

Conclusion

In light of the discussion above, clearly the Motion with respect to Exhibit T157 should be denied. Further, the equities weigh towards denying the motion and allowing entry of Exhibit T158.

Date: June 26, 2014

Respectfully submitted,

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Thomas Sköld,)	
Petitioner,)	
)	
v.)	
)	Cancellation No. 92052897
Galderma Laboratories, Inc.,)	
Registrant)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Brief in Registrant's Opposition to June 2014 Motion to Strike, along with the referenced exhibits, was sent by email on this 26th of June, 2014 to:

Jeff.Becker@haynesboone.com

/Arthur E. Jackson/
Arthur E. Jackson, Esq.