

ESTTA Tracking number: **ESTTA612368**

Filing date: **06/26/2014**

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

Proceeding	92052897
Party	Defendant Galderma Laboratories, Inc.
Correspondence Address	JEFFREY M BECKER HAYNES AND BOONE LLP 2323 VICTORY AVENUE, SUITE 700 DALLAS, TX 75219 UNITED STATES jeff.becker@haynesboone.com, Lisa.Congleton@haynesboone.com
Submission	Reply in Support of Motion
Filer's Name	Lisa Normand
Filer's e-mail	lisa.normand@haynesboone.com, ipdocketing@haynesboone.com, kathy.mettee@haynesboone.com
Signature	/Lisa Normand/
Date	06/26/2014
Attachments	Reply in Support of Motion to Strike.pdf(786652 bytes)

1. Petitioner's Response offers no justification for his failure to make any disclosure of Exhibits T149 and T150 prior to his attempt to offer them into evidence.

Nothing in Petitioner's Response justifies Petitioner's failure to bring to light his intention to offer Exhibits T149 and T150 until the testimonial deposition was underway. Whether he had the documents for 4 hours or 4 minutes, there is no excuse for surprising Registrant with unproduced documents *on the record*.

Petitioner's Response only highlights the egregiousness of his mid-deposition revelation. Through Petitioner's Response, Registrant has learned that Petitioner was aware of the existence of Exhibit T150 *the night before* the deposition of Marks. *See* Decl. of Skold ¶ 8. Petitioner's counsel was also present with Petitioner and Marks the evening before the deposition, presumably when the discussion surrounding what would become known as Exhibit T150 took place. *See* Marks Depo., 14:4 – 14:10. As it turns out, Petitioner had far more than 4 hours to make preparations for his offer of previously undisclosed documents. This fact not only further negates Petitioner's argument that his conduct was justified, but highlights Petitioner's flagrant disregard for the rules governing these proceedings.

Nor can Petitioner's failure to prepare his case justify his attempt to offer undisclosed, unproduced evidence. That Petitioner only learned about Exhibit T150 the evening before Marks's deposition underscores Petitioner's lack of diligence in preparing his case in a manner that could both comport with the Rules and avoid undue surprise and prejudice to Registrant. Marks has been identified as a potential witness since at least as early as March 15, 2012. *See* Normand Decl. ¶ 4 and Ex. A.1 thereto. Marks testified that he would do anything to help his friend, Petitioner, so long as it was ethical and legal. *See* Marks Depo., 13:25 – 14:3. Yet, according to Petitioner's Response: "That Dr. Marks had documentary corroboration . . . was a pleasant surprise to [Petitioner's counsel]." *See* Brief in Opposition, 3. Petitioner may have only become aware of Exhibits T149 and T150 the evening before the deposition, but that does not mean they were unavailable to him. If Petitioner "did not have" these documents earlier, it can only be for lack of trying.

2. Registrant's Motion was timely.

Registrant objected to Exhibits T149 and T150 and moved to strike testimony relating thereto on the record immediately upon Petitioner's attempted offer. *See* Marks Depo., 4:20 – 4:5; 6:24 – 7:3. It does not get more timely than that.

Petitioner's assertion that Registrant did not timely file the present Motion overlooks several critical facts. Petitioner did not file the exhibits sought to be stricken until March 3, 2014. After several late-April 2014 email exchanges between the parties' counsel, in which Registrant's counsel sought clarity on what evidence Petitioner had filed with the Board, Registrant filed the current Motion on May 27, 2014. *See* Normand Decl. ¶ 5 and Ex. A.2 thereto. All of this was after an evidentiary dispute that arose in December 2013 regarding whether Petitioner had attempted to offer any documents at all during the November 13, 2013 deposition of Thomas Skold, which resulted in the Board's having "to reopen petitioner's testimony period for the sole purpose of conducting a second deposition of [Thomas Skold] previously deposed in order to introduce the disputed documents." *See* December 19, 2013 order of Ann Linnehan. That dispute did not relate directly to Exhibits T149 and T150, but it is indicative of ongoing ambiguities as to the state of the record, and it underscores that Registrant's May 27, 2014 Motion was timely and reasonable, especially after having moved on the record promptly upon offer.

3. Petitioner's discussion regarding the import of the matter to be stricken is misplaced and has no bearing on the present Motion.

Petitioner's entire case turns on his establishing trademark rights through use of the mark RESTORADERM that predate those of Registrant.¹ The evidence disputed herein relates no facts relevant to activities engaged in by Petitioner prior to Registrant's undisputed priority date of at least as early as February 28, 2002 that could amount to trademark use or other use analogous to trademark use. According to Petitioner's Response, the whole crux of the exhibits and testimony to be stricken amounts to: (a) the mere existence of a document that bore both the terms "Restoraderm" and "product" around

¹ Registrant objects to Petitioner's statement in his Response that "Registrant has presented, and admits it has, zero evidence of priority before 28 February 2002." Registrant has made no such admissions, and it filed evidence relevant to priority in its March 31, 2014 Notice of Reliance.

January 2002, and (b) a meeting among unidentified attendees held in January 2002 “to discuss Restoraderm.”

As for the document, no testimony was developed regarding why it was created or by whom, how it was used, whether anyone besides Petitioner and Marks had ever seen it, or any other facts that could imbue the document with some relevance to priority of use.² The existence of Exhibit T150 is probative of nothing if Petitioner never did anything with it. Regarding the meeting “to discuss Restoraderm,” no testimony regarding who attended, what was discussed, how long it lasted, or whether Petitioner did or said anything relevant to trademark use was developed.³ Again, the bare allegation that some sort of meeting took place in which the word “Restoraderm” was uttered has no probative value or relevance to activities that could give rise to trademark rights.

Relevance aside, Exhibit T150 lacks authentication in that the witness was unable to articulate why the document was created, and could only narrow the time frame in which he thought it probably came into his possession to a 5-year window.⁴ In his Response, Petitioner made extremely attenuated arguments in favor of an inference that the second page of Exhibit T150 can be assumed to have been created around January 2002 by virtue of its being stapled to an email, but that is an inference that Petitioner’s own witness was unwilling to make and ultimately not supported by the witness’s testimony.⁵

Moreover, Exhibit T150 comprises inadmissible hearsay, and Petitioner laid no foundation for the application of any exception to the inadmissibility of the document.⁶ To the extent Petitioner considered Exhibit T150 to fall under a business records exception to the prohibition against hearsay, no testimony

² See Marks Depo., 6:2 – 7:25 for Petitioner’s direct examination of Marks regarding Exhibit T150.

³ See *id.* at 5:18 – 5:25, 8:3 – 8:17.

⁴ Marks testified that he was named to the CollaGenex scientific advisory board at some time between the years 2000 and 2005, *see id.* at 10:3 – 10:12, and also that Exhibit T150 came from his time on the advisory board. *See id.* at 14:20 – 15:16.

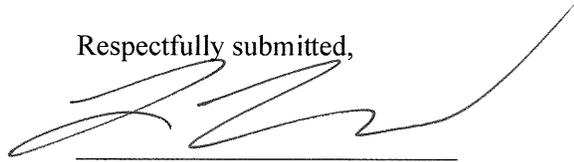
⁵ On direct examination, Marks ambiguously testified that “it” (“it” presumably being page one of Exhibit T150, the dated email) “was dated actually 11 January 2002 . . . and as I recall, this was sent in preparation for a meeting at the Caribbean Derm to discuss Restoraderm.” *Id.* at 7:17 – 17:21. On cross examination, however, Marks made clear that he could not be sure when the second page of Exhibit T150 came into existence, let alone into his possession, and that it could have been from some time period after early 2002. *See id.* at 20:2 – 20:13.

⁶ See *id.* at 6:2 – 7:25 for Petitioner’s direct examination of Marks, attempting to offer Exhibit T150.

was developed to lay a foundation for the application of the “business records” exception pursuant Fed. R. Civ. P. 803(6).

For the foregoing reasons, Registrant requests that the Board grant its Motion to Strike Exhibits T149 and T150 and the testimony relating thereto.

Respectfully submitted,



Date: June 26, 2014

Jeffrey M. Becker, Esq.
Richard D. Rochford, Esq.
Lisa Normand, Esq.
Attorneys for Registrant
HAYNES AND BOONE, LLP
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Telephone: 214-651-5262
Facsimile: 214-200-0853
lisa.normand@haynesboone.com

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

Thomas Sköld
Petitioner,

v.

Galderma Laboratories, Inc.
Registrant.

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Cancellation No.: 92052897

Mark: RESTORADERM

Reg. Nos.: 2,985,751 and 3,394,514

EXHIBIT A

Declaration of Lisa Normand

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

Thomas Sköld
Petitioner,

v.

Galderma Laboratories, Inc.
Registrant.

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Cancellation No.: 92052897

Mark: RESTORADERM

Reg. Nos.: 2,985,751 and 3,394,514

EXHIBIT A.1

**A True and Correct Copy of Petitioner's First Updated Initial Disclosures, Served on Registrant on
March 15, 2012**

MOSER TABOADA

ATTORNEYS AT LAW

March 15, 2012

Via First Class Mail and

Via Email

Jeff.Becker@hayesboone.com

Lisa.Congleton@hayesboone.com

HAYES AND BOONE, LLP
Attn: JEFFREY M. BECKER
2323 VICTORY AVENUE, SUITE 700
DALLAS, TX 75219

Re: Title: RESTORADERM
In the Matter of Registration Nos. 2985751; and 3394514
Dated: August 16, 2005 and March 2008, respectively
Cancellation No. 92052897
Our File: SKD007

First Updated Initial Disclosure

Dear Mr. Becker:

Attached on the following 7 pages are listings of our First Updated Initial Disclosure under Rule 26A(i) & (ii). Our updates over the initial disclosure are flagged with bold text. By separate mailing, I enclose most of the documents of the Initial Disclosure.

Sincerely,



Arthur E. Jackson, Ph.D., Esq.
Counsel

AEJ:amf
Enclosure

Jeffrey M. Becker
March 15, 2012
Page 2

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information— that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

Jeff Day, President & CEO, Founder, Quinnova Pharmaceuticals, Inc.

411 S. State Street
3rd Floor
Newtown, PA 18940
(877) 660-6263
(215) 860-6265 (fax)
Email: info@quinnova.com

Matts Silvander, Ph.D., Ponsus Pharma

Box 61
SE-186 21 Vallentuna
SWEDEN
011-46-7050-82-646
msilvander@yahoo.se

Andrew Powell, General Counsel

akwpowell@yahoo.com

Believed to be located in the Philadelphia area, but believed to
addressable through the company's main address:

Cornerstone Therapeutics
Cornerstone Therapeutics Inc.
1255 Crescent Green Drive
Suite 250
Cary, NC 27518
(888) 466-6505

Brian Gallagher

bgallagher100@comcast.net

Prof. James Marks

**Penn State University
jmarks@hmc.psu.edu**

Rob Ashley

rashley@ashleybiopharm.com

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

Part A

The following documents are being sent by mail dated today, with the documents in the highest class of confidentiality in a separate, appropriately labeled, envelop:

20020214	Jeff Day Email on using Restoraderm in P&G Collaboration	C
20031215	Emails on new Agreement terms	C
20040126	J Day Email on Scientific Adv Bd Agenda	C
20040204	Ruby Ghadial email	C
20040204	Slides Attached Ruby Ghadial Email	C
20040217	Skold Agmt Clean DRAFT	C
20040219	Nancy Broadbent Collagenex sending new Agmt Draft	C
20040602	N Broadbent Notes on June 2 meeting on terms (sent with Jun 11 email)	C
20040611	Nancy Broadbent of Collagenex on email revised terms	C
20040706	Silvander draft paper on Restoraderm	C
20040715	Day to Skold Email	C
20040908	Ranaxby Email re 20040909 TeleConf	C
20040908	CollaGenex-Ranaxby Agenda of 20040909 TeleConf	C
20040908	Slides Attached Ranaxby Email	C
20041026	G Ford on Galderma Meeting	C
20041118	Greg Ford to Skold re Galderma request	C
20090316	Art Clapp Email on New Proposal	C
20090602	Cassady Email	C
20090617	Cassady Email	C
20090622	Cassady Email setting Conf. Call	C
20091299	Skold Listing of Needed Returns, as sent to Galderma	C
20100322	JT Email on Bus. Dev.	TS
20100601	RW Email on Bus. Dev.	TS
20100721	DeBruyne Email	C
20100914	PR Newswire Press Release on Cetaphil Restoraderm	NC
20101004	Email on brand confusion	TS
20110210	TW Email on Bus. Dev.	TS
20110630	Email to LH	TS

C – Confidential

TS – Trade Secret/Commercially Sensitive

NC – Non-Confidential

Part B

~~Additionally, Sköld may rely on documentation available on his home computer (and to be forwarded as soon as practical in light of his current travels), as follows:~~

- ~~• From a leading researcher, on source confusion;~~
- ~~• From or to 4 dermatology companies, on business development.~~

~~This documentation will be labeled Trade Secret/Commercially Sensitive.~~

These are believed to be addressed by Part C of this mailing and the documents made available in connection with Petitioner's Response to Registrant's First Request for Production.

Part C

20010904	Fowler emails on early promotion of Restoraderm Technology	C	101
20011105	Version of Skold document "A theory of the "mode of action" concerning this new technology" that was shown to Collagenex 20011111	C	102
20020210	Technology description (Mode of Action)	C	103
20021022	Sheila Kennedy email on explaining Restoraderm delivery system to ad agency	C	104
20030000	Epitan Agreement	C	105
20031209	Ashley email on contract revisions for Skold	C	106
20031209	Attachment (contract draft) to 20031209 Ashley email	C	107
20040712	Day/Skold, Day using Skold as Restoraderm consultant	C	108
20040719	Day/Skold, Day asking about Restoraderm pH	C	109
20041004	Kennedy/Powala/Skold emails on use of "Restoraderm"	C	110
20051215	Ford/Skold emails on using Skold for development to 20 companies	C	111
20060227	Zerler email on stability	C	111.1
20060707	Bjorkman/Wiggin letter on lost milestones	C	112
20060717	Tomas Danielson emails indicative of Skold consulting	C	113
20070529	K/Skold emails on Bus. Dev.	TS	114
20070724	K/Skold emails on timing of non-Galderma promotion of Restoraderm	TS	115
20070801	Ford/Skold emails on meeting at AAD meeting	C	116
20070801	DS recommends Restoraderm to JO of Company M (Bus. Dev.)	TS	117
20070804	BH email on Bus. Dev. #1	TS	118
20070804	Attachment to both 20070804 BH emails (#1 & #2)	TS	119
20070804	BH email on Bus. Dev. #2	TS	120
20070804	Attachment 2 to BH email on Bus. Dev. #2	TS	121
20070804	Attachment 3 to BH email on Bus. Dev. #2	TS	122
20080113	Email introducing JW (Bus. Dev.)	TS	123
20080125	HJ/Skold emails on Bus. Dev.	TS	124
20080129	Wiggin letter to Collagenex	C	125
20080901	Shaimi/Skold: Galderma consulting Skold, plus draft meeting minutes	C	126
20080903	Shaimi/Skold: Galderma consulting Skold	C	127
20080904	Fredon/Skold: Galderma consulting Skold	C	128
20080908	Shaimi/Skold: Galderma consulting Skold, plus final meeting minutes	C	129
20090715	Email from Cassidy on marketing nasal analog of Restoraderm	C	130
20091201	Skold to DeBruyne Email on returns, attachment is the 21st item in Part A of the original Initial Disclosures	C	131
20100208	Email from Jim Wallace on Restoraderm returns	C	132

20100303	Skold email to Bus. Dev. Contact, plus attachments	TS	133
20100317	Email from EF on Bus. Dev.	TS	134
20100714	DeBruyne Email on new option agreement	C	135
20110822	F Email on Bus. Dev.	TS	136
20110829	CH Email on Bus. Dev.	TS	136.1
20110926	Email from Konrad Engelhardt on brand confusion	C	137
20111215	JW/Skold emails on Bus. Dev.	TS	138

Part D

Enclosed are:

Recollections of Promotional Meetings (with partial redactions)(CONFIDENTIAL)

Recollections of Promotional Meetings, with key to identify redacted companies and persons (TRADE SECRET/COMMERCIALY SENSITIVE)

Part E

Enclosed is: A listing of **RESTORADERM Technology Projects and Products Worked on by Sköld Since 2001.**

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

Thomas Sköld
Petitioner,

v.

Galderma Laboratories, Inc.
Registrant.

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Cancellation No.: 92052897

Mark: RESTORADERM

Reg. Nos.: 2,985,751 and 3,394,514

EXHIBIT A.2

A True and Correct Copy of the Email Exchange between Lisa Normand [Congleton], Counsel for Registrant, and Art Jackson, Counsel for Petitioner

Normand, Lisa

From: Arthur Jackson <ajackson@mtiplaw.com>
Sent: Tuesday, April 22, 2014 8:48 AM
To: Congleton, Lisa
Cc: Rochford, Richard; Becker, Jeffrey M.
Subject: RE: Skold - RESTORADERM Cancellation - "Confidential Exhibits" January 28, 2014 and "Paper Received" March 10, 2014

Lisa,

The papers I served on you recite that sealed exhibits have been filed with the Board. They were filed by (a) being sent by the reporter as specified in the rule (in which case I was not in the loop to give you a notice beyond the fact that it is in the rules, and we have had lengthy discussion on how to bring it about) and (b) by having the reporter deliver to me sealed copies for forwarding (also a mechanism specified in the rules).

In case (a), I did ask the reporter for a confirmation that they had forwarded the sealed exhibits, and they reported that they had done so Jan. 24 by express mail. If that was the Jan. 28 event, I do not know. As you deduce, in hindsight it seems likely.

I have, as you note in your email, noticed you of everything I have filed, and even that which the reporter filed pursuant to the rules.

Arthur E Jackson, Ph.D., Esq. | Counsel | Moser Taboada
1030 Broad Street, Suite 203 | Shrewsbury, NJ 07702
Direct 732.917.6323 | Main 732.935.7100 | Fax 732.935.7122
AJackson@mtiplaw.com

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From: Congleton, Lisa [mailto:Lisa.Congleton@haynesboone.com]
Sent: Friday, April 18, 2014 8:07 PM
To: Arthur Jackson
Cc: Rochford, Richard; Becker, Jeffrey M.
Subject: RE: Skold - RESTORADERM Cancellation - "Confidential Exhibits" January 28, 2014 and "Paper Received" March 10, 2014

Art,

Following up on my voicemail message, the March 10, 2014 entry would appear to pertain to your Notice of Filing of Certified Copies, served on March 3, 2014. This raises the question, of course, of whether the January 28, 2014 entry "Confidential Exhibits" relates to a filing you have made as well. Please advise.

Also, your Notice of Filing contains some confusing information. It stated that on March 3, 2014 you filed sealed exhibits pertaining to the November 13 and 14 depositions. However, page 1 of the Notice of Filing stated: "The certified exhibits from the January 14, 2014 supplemental deposition of Thomas Skold were sent revised under affixed certificate signed by the officer who took that deposition, to the same address by that officer." We were not advised of this.

Can you please clarify what has and has not been filed with the Board?

Please let me know if you would like to discuss further next week. Otherwise, we look forward to hearing from you soon to clarify these issues.

Kind regards,

Lisa Normand Congleton | *haynesboone*
(t) 214.651.5262 | lisa.congleton@haynesboone.com

From: Congleton, Lisa
Sent: Friday, April 18, 2014 4:58 PM
To: Arthur Jackson
Subject: RE: Skold - RESTORADERM Cancellation - "Confidential Exhibits" January 28, 2014 and "Paper Received" March 10, 2014

Art,

Thank you for confirming. Let us know if you find out anything else on this and we'll do the same.

Lisa

From: Arthur Jackson [<mailto:ajackson@mtiplaw.com>]
Sent: Friday, April 18, 2014 4:18 PM
To: Congleton, Lisa
Subject: RE: Skold - RESTORADERM Cancellation - "Confidential Exhibits" January 28, 2014 and "Paper Received" March 10, 2014

Nothing to do with us – to my knowledge.

Art

Arthur E Jackson, Ph.D., Esq. | Counsel | Moser Taboada
1030 Broad Street, Suite 203 | Shrewsbury, NJ 07702
Direct 732.917.6323 | Main 732.935.7100 | Fax 732.935.7122
AJackson@mtiplaw.com

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arrange for the retrieval of the original documents at no cost to you. Alternatively, notify the sender by replying to this transmission and delete the message without disclosing it. Thank you.

From: Congleton, Lisa [<mailto:Lisa.Congleton@haynesboone.com>]

Sent: Thursday, April 17, 2014 3:50 PM

To: Arthur Jackson

Cc: Becker, Jeffrey M.

Subject: Skold - RESTORADERM Cancellation - "Confidential Exhibits" January 28, 2014 and "Paper Received" March 10, 2014

Art,

There are 2 more entries reflected in the TTAB database for filings that I do not recognize. Did you file anything on January 28, 2014 or March 10, 2014?

By the way, I noticed that the February 5, 2014 entry that neither of us knew about was removed, so it looks like the Board caught the mistake.

Please feel free to give me a call if you would like to discuss.

haynesboone

Lisa Normand Congleton

Associate

lisa.congleton@haynesboone.com

Haynes and Boone, LLP

2323 Victory Avenue

Suite 700

Dallas, TX 75219-7673

(t) 214.651.5262

(f) 214.200.0765

[vCard](#) | [Bio](#) | [Website](#)

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