

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZF NORTH AMERICA, INC., ZF ACTIVE SAFETY US INC.,
Petitioners,

v.

STONERIDGE CONTROL DEVICES, INC.,
Patent Owner.

IPR2023-00273
Patent No. 7,021,415 B2

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), and the Board's September 5, 2023 Amended Scheduling Order (Paper 15), Petitioners hereby move to exclude Exhibits 2009-2012, 2016-2018, and paragraphs 160-166 of Ex. 2005, relied upon by Patent Owner ("PO") to allegedly show secondary indicia of non-obviousness. POR, 60-63. None of this evidence possesses the requisite nexus to the claims at issue, and is thus irrelevant and unduly prejudicial. Other reasons for exclusion include the fact that many of the objected-to exhibits are unauthenticated webpages being used as hearsay to prove the truth of the matter contained therein. A fact declaration is proffered from someone who admits to lacking the proper foundation for his factual testimony, and also is filled with improper expert testimony from a lay witness. Finally, PO's expert's testimony on secondary considerations lacks the necessary factual basis or reliable scientific methodology.

II. STATEMENT OF MATERIAL FACTS

Petitioner timely objected to Exhibits 2009-2012, 2016-2018, and paragraphs 160-166 of Ex. 2005 on September 6, 2023. (Paper 16). On September 18, 2023, PO offered supplemental evidence as to Exhibits 2009, 2010, and 2016-2018, including a declaration from a paralegal to PO's counsel.

III. PARAGRAPHS 160-166 OF EXHIBIT 2005 ARE UNSUPPORTED, UNRELIABLE EXPERT TESTIMONY

PO relies on Exhibit 2005 in support of certain alleged secondary

considerations, *i.e.*, copying, industry praise, and commercial success. POR, 60-63. But Dr. Stein's opinions at Exhibit 2005, ¶¶ 160-166 are simply his conclusory "understandings" of the law and Exhibits 2010 and 2016 (and potentially Exhibits 2011 and 2012, implicitly). They are bereft of any substantive analysis, and are inadmissible under F.R.E. 401-403, 702, and 703.

Expert testimony is inadmissible if it is irrelevant, based on insufficient facts or data, not the product of reliable principles or methods, or where the expert has not reliably applied the principles and methods to the facts of the case. F.R.E. 401-403, 701-702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999). In paragraphs 160-66, Dr. Stein does not disclose any technical analysis, he simply provides a series of unsupported statements to the effect that he "understands" facts exist that might constitute secondary considerations.

With respect to copying, Dr. Stein "understands" (without even providing any citation) a presentation was made of a prototype design to an affiliate of Petitioners. Ex. 2005, ¶ 163. He provides no facts or analysis showing that the prototype design was an embodiment of the '415 patent, or that it was copied. Dr. Stein's statement that he reviewed infringement contentions (Ex. 2016) which "he understands" show products sold by Petitioners, and that he agrees with PO's lawyers "that the claim charts establish that there is a component in each of the photographed products that corresponds to each one of the claim elements" is an inadmissible bald conclusion.

Arendi S.A.R.L. v. Apple Inc., 832 F.3d 1355, 1366 (Fed. Cir. 2016) (conclusory statements by expert may not be relied upon); *Bosch Auto. Serv. Sols., LLC v. Matal*, 878 F.3d 1027, 1036-37 (Fed. Cir. 2017) (conclusory statements that a product is covered by the patent lack foundation).

Dr. Stein’s testimony with respect to industry praise and commercial success likewise consist of bare conclusions and understandings, lacking supporting analysis. It is not the product of reliable principles applied to the facts of the case. It is not based on sufficient facts or data, or any factual underpinnings that Dr. Stein has properly investigated to determine their truth. As such the testimony is irrelevant, and will not help the Board understand the evidence.

Moreover, PO has put forth insufficient evidence that the exhibits Dr. Stein relies upon are those an expert would “reasonably rely” on to form an opinion on the subject matter at issue. *Abbott Vascular, Inc. v. FlexStent*, IPR2019-00882, Paper 48 at 35-36 (PTAB Oct. 2, 2020) (excluding portions of expert declaration that relied on “inadequate and untrustworthy” data); *Riverbed Tech., Inc. v. Realtime Data LLC*, IPR2016-00980, Paper 71 at 37-38 (PTAB Oct. 27, 2017) (excluding portions of expert declaration that relied on unauthenticated evidence). “Rule 703 does not authorize admitting inadmissible evidence ‘on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the [inadmissible evidence] other than transmitting [it] to the [fact finder].’” *Wi-LAN Inc. v. Sharp Elecs. Corp.*,

992 F.3d 1366, 1374 (Fed. Cir. 2021)(citations omitted).

IV. EXHIBIT 2009 IS IRRELEVANT, UNAUTHENTICATED HEARSAY

Exhibit 2009 is an unauthenticated website printout excludable under F.R.E. 901(a). Courts have recognized the unreliable nature of webpages and required authentication by witnesses with personal knowledge of the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. Dec. 17, 1999); *Wady v. Provident Life*, 216 F. Supp. 2d 1060, 1064 (C.D. Cal. Apr. 30, 2002) (one who “has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents... cannot authenticate these documents [from the website].”). Here, PO responded to Petitioner’s objections with the declaration of a paralegal, Ms. Stringfield. However, the declaration is unhelpful, since it simply states that Ms. Stringfield printed certain webpages. She has no first-hand knowledge about the websites or the contents thereof and is not a custodian of these websites. This supplemental evidence fails to cure Petitioner’s authenticity objection.

Exhibit 2009 is also hearsay excludable under F.R.E. 802. PO cites Exhibit 2009 as allegedly showing that an accused product is standard on Jeep Cherokees and thus has a “significant” market share. POR, 62. While Exhibit 2009 says no such thing (and thus is irrelevant for lack of nexus, as explained below), if it did,

those would be out-of-court statements being used for the truth of the matter, excludable as hearsay. *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, p. 5-6 (PTAB Mar. 12, 2015) citing F.R.E. 801-803; *see also Ingenico Inc. v. IOENGINE, LLC*, IPR2019-00929, Paper 53, 99-101 (PTAB. Sept. 21, 2020).

However, Exhibit 2009 is also excludable as irrelevant under Rules 401-402 or at least as having so little relevance as to be excludable under Rule 403. Exhibit 2009 says nothing about market share, and does not state that any accused products were sold on Jeep Cherokees. It does not show commercial success of anything. And, it does not link any sales of any products to any claimed features. In short, there is no nexus between Exhibit 2009 and the challenged claims, rendering it irrelevant and excludable. *Bosch*, 878 F.3d at 1036-37 (Fed. Cir. 2017); *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (burden of showing nexus lies with patent owner); *Shimano, Inc. v. Globberide, Inc.*, IPR2015-00273, Paper 40, 26-28 (PTAB Jun. 16, 2016) (excluding exhibits under FRE 402 based in part on patent owner's failure to establish nexus with claimed invention).

For secondary considerations such as commercial success to be relevant, the patentee must establish a nexus between each asserted secondary consideration and the novel features of the claimed invention. *Prometheus Labs., Inc. v. Roxane Labs., Inc.*, 805 F.3d 1092, 1101–02 (Fed. Cir. 2015); *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1312 (Fed. Cir. 2006). “Nexus” is a legally and factually sufficient

connection between the objective evidence and the claimed invention, such that the objective evidence should be considered in determining non-obviousness. *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988). In order to demonstrate a nexus, a patentee must show that “the asserted objective evidence is **tied to a specific product and that product embodies the claimed features, and is coextensive with them.**” *Fox Factory*, 944 F.3d at 1373 (emphasis added). A nexus exists only if the commercial success of the product is limited to the features of the claimed invention. *Id.* Absent establishment of the required nexus, evidence such as Ex. 2009 is irrelevant and should be excluded. *Bosch Auto.*, 878 F.3d at 1036-37 (Fed. Cir. 2017).

V. EXHIBIT 2010 IS IRRELEVANT, UNAUTHENTICATED HEARSAY

Exhibit 2010 is an unauthenticated website printout excludable under F.R.E. 901(a). As with Ex. 2009, PO has made no attempt to authenticate Exhibit 2010 by witnesses with personal knowledge of, e.g., the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair*, 76 F. Supp. 2d at 774-75; *Wady*, 216 F. Supp. 2d at 1064.

Exhibit 2010 is also hearsay excludable under F.R.E. 802. PO cites Exhibit 2010 as allegedly showing that Petitioners have sold 200 million units of accused products. POR, 62. But Exhibit 2010 does not identify any particular product and thus says no such thing (and is irrelevant for lack of nexus, as explained below). If

it did state that a certain product had sold 200 million units, that would be an out-of-court statement being used for the truth of the matter, excludable as hearsay. *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, p. 5-6 (PTAB Mar. 12, 2015) citing F.R.E. 801-803.¹

Exhibit 2010 is also excludable as irrelevant under Rules 401-402 or as having so little relevance as to be excludable under Rule 403. Ex. 2010 says nothing about any particular product, much less an accused product, having any amount of sales. Exhibit 2010 at best only states that “ZF pioneered Electric Brake Technology” and is the first to produce “200 million units” worldwide. The units referenced refer to all electronic parking brakes ever sold by ZF AG anywhere in the world and are not limited to products that allegedly infringe the ’415 patent. And, it does not link any sales of any products to any **claimed** features. Features that are discussed such as “enhanced fuel economy” are unrelated to the ’415 patent. In short, there is no nexus between Exhibit 2010 and the challenged claims, rendering it irrelevant and properly excluded. *Bosch*, 878 F.3d at 1036-37.

¹ The unauthenticated press release allegedly contained in Ex. 2010 is not from a Petitioner (ZF Friedrichshafen AG is not a Petitioner), and thus is not subject to F.R.E. 801(d)(2).

VI. EXHIBIT 2011 IS IRRELEVANT AND CONTAINS BOTH UNFOUNDED FACTUAL STATEMENTS AND IMPROPER EXPERT TESTIMONY FROM A LAY WITNESS

Exhibit 2011 is a declaration from Rolf Patrick, a purported fact witness. PO relies on Exhibit 2011 for its alleged secondary consideration of copying. POR, 60. Exhibit 2011 should be excluded in its entirety under F.R.E. 401, 402, 403, 602, 701, 801, 802, and 901.

F.R.E. 602 provides that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Mr. Patrick surmises what occurred during an alleged presentation to TRW (Ex. 2011, ¶¶ 4-9) but admits that **he did not attend any alleged presentation**. Ex. 2011 ¶ 4. Accordingly, any and all statements suggesting what was presented to whom lack foundation and (if based on anything at all besides imagination) are based on undisclosed statements from others that constitute inadmissible hearsay. F.R.E. 602, 801, 802.

Mr. Patrick’s testimony also opines on what the “current design” of TRW’s EPBA was in 2003, and on the alleged presence of TRW’s design in the Audi A8 in the same year. Ex. 2011, ¶¶ 9-13. However, Mr. Patrick was not involved in TRW’s EPBA design in 2003, nor is there any evidence presented showing that Mr. Patrick has personal knowledge of what EPBA systems were included in the Audi A8 in 2003. Thus, Mr. Patrick’s testimony regarding these matters is not based on his

personal knowledge and is instead impermissible speculation or hearsay (F.R.E. 602, 701, 801, 802), or, as discussed below, an improperly introduced, presently-formed expert opinion from a lay witness.

Exhibit 2011 also appears to include improper expert testimony from a fact witness that purports to rely on scientific, technical, or other specialized knowledge. F.R.E. 602, 701, 801, 802. Ex. 2011, ¶¶ 4-13. Mr. Patrick is not an expert or a POSITA and does not claim to be one. Ex. 2011, ¶¶ 2-3. Nevertheless, he offers testimony requiring scientific, technical, or other specialized knowledge that is outside the scope of proper testimony by a lay witness. In ¶ 6, he interprets the '415 patent's disclosure. In ¶¶ 9-10, he describes that an EPBA design from another company that "he understands" was in an Audi "lacks a sub-frame, and likewise lacks any vibration isolators mounted between the non-existent sub-frame and gear set or motor." This is an opinion that is based on scientific and technical knowledge within the scope of Rule 702. Due to the restriction under Rule 602 that a fact witness' opinions cannot be based on scientific, technical, or other specialized knowledge with the scope of Rule 702, it is axiomatic that fact witnesses "cannot testify on any issues regarding invalidity, which includes the level of skill in the art, the scope and content of the prior art, and any secondary considerations." *Munchkin, Inc. v. Luv N'Care, Ltd.*, No. 2:13-CV-07228-ODW, 2015 WL 774046, at *3 (C.D. Cal. Feb. 24, 2015); *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356,

1362 (Fed. Cir. 2008); *Verizon Servs. Corp. v. Cox Fibernet Virginia, Inc.*, 602 F.3d 1325, 1339-40 (Fed. Cir. 2010).

Any argument offered by PO that relies on this declaration to prove: (1) what might have occurred during the alleged presentation; (2) the technical details included in the alleged Stoneridge presentation deck (Ex. 2012); (3) how the actuator allegedly described in the presentation relates to the '415 patent; (4) the characteristics of various actuators such as those allegedly in an Audi in 2003 and how they compare to either the actuators in the '415 patent or the actuator in the alleged presentation; or (5) whether any design is a copy of another, should be struck entirely because it would include information admittedly outside Mr. Patrick's personal knowledge, hearsay statements about the contents of a presentation Mr. Patrick did not attend, and inadmissible and irrelevant lay opinion testimony. F.R.E. 401, 402, 403, 602, 701, 801, and 802.

Moreover, Exhibit 2011 is irrelevant and excludable under FRE 401-403 because the alleged presentation is unrelated to the claims of the '415 patent. Evidence of copying, like any secondary consideration, requires that the patentee establish a nexus to the novel features of the claimed invention. *Prometheus Labs.*, 805 F.3d at 1101-02 (Fed. Cir. 2015); *Ormco Corp.*, 463 F.3d at 1312 (Fed. Cir. 2006); *Fox Factory*, 944 F.3d at 1373. There is no evidence, e.g., that the presentation disclosed an actuator that met the claims of the '415 patent, that the

presentation was given to anyone who had anything to do with the design of the accused products, or even that the design was ever copied by anybody. Without this, there is no possible foundation for any copying that would be relevant to obviousness. *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)(copying is only a secondary indicia of nonobviousness where the “evidence of efforts to replicate a specific product” have been proffered in conjunction with evidence of substantial similarity to the patented product.)

VII. EXHIBIT 2012 IS IRRELEVANT HEARSAY

PO relies on Exhibit 2012 for its alleged secondary consideration of copying. POR, 60. F.R.E. 401, 402, 403, 801, 802, and 901 require exclusion of Exhibit 2012. Exhibit 2012 is an alleged Stoneridge presentation to TRW. First, the exhibit lacks foundation and proper authentication under F.R.E. 901. F.R.E. 901(a) (“[T]he proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”); *Riverbed Tech., Inc. v. Realtime Data LLC*, IPR2016-00980, Paper 71, 37-38 (PTAB Oct. 27, 2017) (excluding exhibit as unauthenticated under F.R.E. 901, as well as portions of evidence relying expressly on said exhibit). Exhibit 2012 is not self-authenticating under F.R.E. 902(b) and any argument that Exhibit 2011 (discussed above) provides such authenticating evidence is misplaced as the declarant, Mr. Patrick, did not attend the alleged presentation. Ex. 2011, ¶ 4.

PO offers Exhibit 2012 as proof of the truth of the matter asserted therein (e.g.,

technical information related to its electric park brake actuator), but it does not meet any exception under F.R.E. 803-804, 807 and thus constitutes inadmissible hearsay. F.R.E. 801-803; *Neste Oil OYJ*, IPR2013-00578, Paper 52, p. 5-6.

Exhibit 2012 should further be excluded under FRE 401-403 for lack of nexus. *Prometheus Labs.*, 805 F.3d at 1101–02; *Ormco Corp.*, 463 F.3d at 1312; *Fox Factory*, 944 F.3d at 1373. PO has provided no admissible evidence that the design allegedly shown in Exhibit 2012: (1) meets the claims of the '415 patent; (2) is coextensive with the claimed features of the '415 patent; or (3) was copied. Absent establishment of the required nexus, Exhibit 2012 is irrelevant and unduly prejudicial. *Bosch Auto.*, 878 F.3d at 1036-37 (Fed. Cir. 2017).

VIII. EXHIBIT 2016 IS IRRELEVANT AND UNAUTHENTICATED

Exhibit 2016 is an unauthenticated claim chart prepared by PO's counsel, and cited as showing that ZF's products are coextensive with the claims of the '415 patent. POR, 62. There is no evidence authenticating the products shown therein and it is excludable under F.R.E. 901(a). It at best shows an irrelevant, unqualified opinion of infringement of an unidentified product from PO's litigation counsel. As such it should be excluded under F.R.E. 401-403, or 701 for this reason alone. *See, Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1362 (Fed. Cir. 2008) (abuse of discretion to permit opinion testimony from unqualified person).

IX. EXHIBIT 2017 IS IRRELEVANT, UNAUTHENTICATED HEARSAY

Exhibit 2017 is an unauthenticated website printout excludable under F.R.E. 901(a). As with Exhibit 2009, PO has made no attempt to authenticate Exhibit 2017 by witnesses with personal knowledge of, e.g., the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair*, 76 F. Supp. 2d at 774-75; *Wady*, 216 F. Supp. 2d at 1064.

Exhibit 2017 is also hearsay excludable under F.R.E. 802. PO cites Exhibit 2017 as allegedly showing that Petitioners are a “key player” in the EPB market, which has a total value of over \$1B globally. POR, 62. Any such statement is an out-of-court statement being used for the truth of the matter, excludable as hearsay. *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, p. 5-6 (PTAB Mar. 12, 2015) citing FRE 801-803.

Exhibit 2017 is also excludable as irrelevant under Rules 401-402 or at least as having so little relevance as to be excludable under Rule 403. Exhibit 2017 says nothing about any particular product, much less an accused product, having any amount of sales. And, it does not link any sales of any products to any claimed features. In short, there is no nexus between Ex. 2017 and the challenged claims, rendering it irrelevant and excludable. *Bosch*, 878 F.3d at 1036-37.

X. EXHIBIT 2018 IS IRRELEVANT, UNAUTHENTICATED HEARSAY

Exhibit 2018 is an unauthenticated website printout excludable under F.R.E.

901(a). As with Exhibit 2009, PO has made no attempt to authenticate Exhibit 2018 by witnesses with personal knowledge of, e.g., the maintenance of websites, the authors of webpages, and the accuracy of contents therein. *St. Clair*, 76 F. Supp. 2d at 774-75; *Wady*, 216 F. Supp. 2d at 1064.

Exhibit 2018 is also hearsay excludable under F.R.E. 802. PO cites Exhibit 2018 as allegedly showing that Petitioners are a “key company” in the EPB market, which has a total value of over \$1B globally. POR, 62. Any such statement is an out-of-court statement being used for the truth of the matter, excludable as hearsay. *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, p. 5-6 (PTAB Mar. 12, 2015) citing FRE 801-803.

Exhibit 2018 is also excludable as irrelevant under Rules 401-402 or at least as having so little relevance as to be excludable under Rule 403. Exhibit 2018 says nothing about any particular product, much less an accused product, of having any amount of sales. And, it does not link any sales of any products to any claimed features. In short, there is no nexus between Exhibit 2018 and the challenged claims, rendering it irrelevant and excludable. *Bosch*, 878 F.3d at 1036-37.

XI. CONCLUSION

For the reasons stated above, Petitioner respectfully requests the Board to exclude Exhibits 2009-2012, 2016-2018, paragraphs 160-166 of Ex. 2005, and arguments in Patent Owner’s Response relying thereon.

Respectfully submitted

Dated: February 1, 2024

By: / John R. Hutchins /

John R. Hutchins
Reg. No. 43,686

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.105, I hereby certify that I caused a true and correct copy of this PETITIONER’S MOTION TO EXCLUDE EVIDENCE in connection with IPR2023-00273 to be served via e-mail on February 1, 2024, in its entirety on the following counsel of record for Patent Owner:

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Dated: February 1, 2024

By: /Valerie Koleno/

Valerie Koleno