UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ROBERT BOSCH LLC, and
MERCEDES-BENZ USA, LLC,

Petitioners,

v.

WESTPORT FUEL SYSTEMS CANADA INC.,

Patent Owner.

Case No. IPR2023-00292
U.S. Patent No. 6,298,829

PETITIONERS' OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE

I. INTRODUCTION

Petitioners Robert Bosch LLC, and Mercedes-Benz USA, LLC (collectively, "Petitioner") submit the following opposition to Patent Owner's Motion to Exclude (Paper 30, "MTE"). Patent Owner has not carried its burden to show that exclusion is appropriate. Its motion must be denied.

Patent Owner begins by asking the Board to exclude Petitioner's certified translation of Klügl (Ex. 1006). Klügl is one of the primary references at issue in the Petition's grounds. The only support Patent Owner provides for the extreme, draconian relief it requests—which would effectively end this IPR—is that it submitted a declaration from a translator who states that Ex. 1006 includes a "translation error" because it translates the word "Hubübersetzung" "differently" in different places. But, the mere fact that Patent Owner and its translator have expressed disagreement with Petitioner's certified translation does not justify exclusion. This goes to the weight—not the admissibility—of the evidence.

Patent Owner's argument and the declaration on which it relies are also conclusory, lack basis, and are effectively meaningless. Patent Owner has submitted no actual evidence relating to the interpretation of "Hubübersetzung." It did not depose Petitioner's translator. Patent Owner's own translator Heike Holthaus translated none of Klügl. Ms. Holthaus also purposefully declined in her declaration to take a position on the meaning of "Hubübersetzung." In contrast, Petitioner

submitted a wealth of evidence confirming that "Hubübersetzung" means exactly what the Petition says it does. If there were any evidence supporting Patent Owner's understanding of "Hubübersetzung," Patent Owner presumably would have pointed to it. Its failure to do so is effectively a concession that ***there is no such evidence***. So Patent Owner does the only thing it can to preserve its misinterpretation of how Klügl operates: it tries to create confusion and exclude the reference entirely. The Board should not countenance this blatant attempt by Patent Owner to read words unhelpful to it out of the prior art and muddy the factual record.

The rest of Patent Owner's motion is no better. It seeks to exclude an Internet post (Ex. 1025) generated by its translator Ms. Holthaus and a collection of patent publications (Exs. 1029, 1031, 1033, 1035, 1037) using the term "Hubübersetzung." Not only does Patent Owner fail to articulate any real basis for doing so, but the mere fact that Patent Owner would rather the Board not consider the exhibits highlights the effect they have on its arguments. The Internet post shows that Patent Owner's translator—and Patent Owner itself—lacks credibility. And the patent publications not only confirm that a POSITA would have understood "Hubübersetzung" to refer to the application of a stroke ratio, but also that Petitioner's translator was entirely justified and did nothing unusual in using equivalent words or synonyms when translating the term.

II. ARGUMENT

A. Ex. 1006 (Petitioner's Translation of Klügl) Is Admissible

Ex. 1006 is the translation of Klügl—one of the primary prior art references at issue in this IPR—filed along with the Petition. Ex. 1006 included both a certified translation of the German language version of Klügl and an accompanying translator's declaration. *See* Ex. 1006. Patent Owner argues that this translation should be excluded because it is purportedly "fundamentally inaccurate and unreliable" making it irrelevant, inauthentic, and inadmissible hearsay. MTE at 2-7. Patent Owner's sole basis for so arguing is that its own translator conclusorily declares—with no supporting explanation, citation, or evidence—that Ex. 1006 is not "reliable" because it translates the word "Hubübersetzung" "differently" in four places. *See id.*; *see also* Ex. 2026, ¶ 7.

To begin, while Patent Owner does give lip service to certain evidentiary rules, its motion is directed to the weight that should be afforded the evidence, not its admissibility. Patent Owner's motion effectively asks the Board to reject the testimony of Petitioner's translator—along with all the other evidence Petitioner introduced regarding the meaning of "Hubübersetzung"—and accept only the testimony of Patent Owner's translator Ms. Holthaus. The Board has explained that a motion to exclude "may not be used to challenge the sufficiency of the evidence to prove a particular fact." Consolidated Trial Practice Guide at 79; *see also Siemens*

Mobility, Inc. v. Metrom Rail, LLC, IPR2023-00470, Paper 71 at (P.T.A.B. June 18, 2024) (denying motion to exclude that improperly challenged the weight to be afforded to testimony, not its admissibility). That, however, is exactly what Patent Owner is attempting to do here.

In addition to improperly raising substantive and weight-of-the-evidence issues, Patent Owner's motion grossly mischaracterizes the record. Patent Owner repeatedly states that Petitioner has somehow failed to present "evidence" regarding the meaning of "Hubübersetzung," and that only Patent Owner's declaration is "competent." MTE at 1-2. This is nothing more than puffery and projection. It is Patent Owner—not Petitioner—that failed to support its positions with "competent" evidence. For example, despite characterizing Petitioner's certified translation as "fundamentally inaccurate and unreliable," Patent Owner declined to take the deposition of Petitioner's translator. Thus, it never explored nor challenged the basis of the testimony it now tries to call into question. This separately merits denial of Patent Owner's motion. *See, e.g.*, *Banerji v. Leggett & Platt, Inc.*, 2016 WL 11759104, at *2 (C.D. Cal. Dec. 21, 2016) (denying motion to exclude a witness's testimony under Rules 403 and 703 where party "could have deposed" the witness to "question[] their methodology" but "chose not to"). Moreover, Patent Owner's translator Ms. Holthaus did not herself translate Klügl. *See generally* Ex. 2026. She also did not offer an opinion on the meaning of "Hubübersetzung." *See id.*; *see also*

Ex. 1026, 12:14-13:4, 15:2-16:10. Thus, Patent Owner presents the Board with nothing beyond bald, unsupported assertions.

In contrast, Petitioner supports its positions with meaningful evidence. Unlike Ms. Holthaus, Petitioner's translator ***did*** translate Klügl (including, of course, the passages that use the term "Hubübersetzung"). *See generally* Ex. 1006. Moreover, Petitioner's expert Dr. Quinlan explained at length—in response to questioning from Patent Owner—why the English translation makes sense given the totality of what Klügl discloses. *See, e.g.*, Ex. 2025, 13:23-14:6, 21:9-14. If this were not enough, Petitioner also submitted: (1) other industry player patent filings with translations of "Hubübersetzung," (2) an excerpt from a German-to-English dictionary on which Patent Owner itself relies defining both "Hub" and "übersetzung," (3) responses provided by other translators to an Internet forum question posed by Ms. Holthaus regarding the meaning of "Hubübersetzung" in Klügl, and (4) other prior art patents discussing Klügl's operation. *See* Reply (Paper 23) at 3-5. Together, this confirms the accuracy of Ex. 1006 and makes it abundantly clear that Klügl operates in the way the Petition said it did.

None of the evidentiary rules cited by Patent Owner merit exclusion either. Patent Owner argues that Ex. 1006 "has no probative value" and thus is inadmissible as irrelevant. MTE at 6-7. But Klügl—as translated in Ex. 1006—is admittedly prior art to the '829 patent and thus is undeniably relevant to patentability. This

continues to be the case regardless of Patent Owner's arguments regarding "Hubübersetzung." Next, Patent Owner is wrong that Ex. 1006 is inauthentic. Patent Owner did not depose Petitioner's translator and thus has no basis to argue that Ex. 1006 is anything other than what that translator said it is: a certified translation of Klügl. Finally, Ex. 1006 is not hearsay. Prior art in an IPR is introduced to show that subject matter was publicly known and available to a POSITA before the patent-at-issue's filing. This is a non-hearsay use. Ex. 1006 was also accompanied by a declaration and thus is testimonial in nature: it is not an out-of-court statement.

B. Ex. 1025 (a Web Posting Authored by Patent Owner's Translator) Is Admissible

Ex. 1025 is a post to an Internet forum authored by Patent Owner's translator Ms. Holthaus. The post was intended to elicit advice from Ms. Holthaus's translator colleagues regarding the meaning of the term "Hubübersetzung" in Klügl. Ex. 1025 was discussed extensively at Ms. Holthaus's deposition. *See generally* Ex. 1026. Patent Owner argues that the exhibit is inadmissible hearsay and irrelevant. *See* MTE at 8-9. It is wrong on both counts.

First, Ms. Holthaus confirmed during her deposition both that she generated the initial post in Ex. 1025 and that her translator colleagues responded to that post in the way reflected by the exhibit. *See* Ex. 1026, 17:18-20:9, 21:18- 22:16, 25:13-21 (Ms. Holthaus confirming that she generated the post); *id.*, 22:17-23:18, 25:22-31:20 (Ms. Holthaus confirming that her colleagues responded). Patent Owner has

not moved to exclude any of that testimony. Nor could it. Ms. Holthaus's testimony in this proceeding is an in-court statement and is not hearsay. Because of this, exclusion of Ex. 1025 will have no impact. The very same evidence will continue to be of record regardless of Patent Owner's motion.

Second, at least part of Ex. 1025 is non-hearsay because it is a party admission. Ms. Holthaus starts the post by noting that she "found" various definitions for "Hubübersetzung" in the patent literature, including "stroke translation," "stroke step-up," and "stroke ratio." Ex. 1025, p. 1. That statement is directly at odds with her opinion that it somehow constitutes an "error" to use different words when translating "Hubübersetzung." Because Ms. Holthaus is a translator retained by Patent Owner to offer opinions on its behalf, FRE 801(d)(2) applies. Ms. Holthaus was acting as Patent Owner's agent at the time she made the statement regarding definitions of "Hubübersetzung," the statement concerns a matter within the scope of her agency (the translation of Klügl), and she made the statement while under the employ of Patent Owner.

Third, Ex. 1025 serves yet another non-hearsay purpose: it is impeachment evidence on which Petitioner properly relies to challenge Ms. Holthaus's credibility. Ex. 1025 shows that Ms. Holthaus was unsure of the meaning of "Hubübersetzung" before making her post, and then was informed of multiple different translations of "Hubübersetzung" both from her own research and because her translator colleagues

responded to the post. At the very least, this casts substantial and serious doubt on her opinion that it constitutes an "error" to translate "Hubübersetzung" "differently." This is not a hearsay use. Instead, it merely shows that Ms. Holthaus (1) herself located various definitions of "Hubübersetzung" and (2) that she was provided with further definitions of the term before rendering her opinion.

Finally, Patent Owner argues that Ex. 1025 is irrelevant because it purportedly "address[s] a different German word 'Übertragung[.]'" MTE at 8. This, like much of what Patent Owner says in this proceeding, is directly contradicted by the record. Ms. Holthaus's post is entitled "Hubübersetzung" and reproduces a passage from Klügl with the word "Hubübersetzung" emphasized. *See* Ex. 1025, p. 1. The post—and the responses her colleagues provided—are thus undeniably directed to the meaning of that word. Indeed, Ms. Holthaus repeatedly and consistently confirmed this at her deposition. Every time she was asked, she testified that her colleagues' responses related to the meaning of "Hubübersetzung." *See* Ex. 1026, 25:22-31:20. She did not testify that the responses were only meant to define "Übertragung." *See generally id.* As an aside, "Übertragung" appears to simply be another German word that may have a meaning similar to "Übersetzung." *See, e.g.*, Ex. 1037, Title; Ex. 1038, Title. So, Ms. Holthaus's post points to a passage using the word "Hubübersetzung" in Klügl, and then uses what she appears to believe is a synonym—"Übertragung"—to ask her colleagues what "Hubübersetzung" means.

Ms. Holthaus's use of a synonym in her own writing is yet another example of why her opinion in this proceeding lacks merit: Ms. Holthaus apparently is of the view that she can freely use what she considers synonyms to the term at issue. But, when Petitioner's translator does so, that somehow constitutes "error."

C. Exs. 1029, 1031, 1033, 1035, and 1037 (Other Industry Player Patents Using the Term "Hubübersetzung") Are Admissible

Exhibits 1029, 1031, 1033, 1035, and 1037 are German language patent publications. The Reply pointed to these patent publications along with Exhibits 1030, 1032, 1034, 1038, and 1038—English language equivalents of the German publications—to show how various auto industry players like Robert Bosch, Siemens, Continental, and Daimler translated the word "Hubübersetzung" in their own patent filings. *See* Reply (Paper 23) at 4-5. Patent Owner seeks to exclude the patent publications on a variety of grounds. These arguments lack merit.

Patent Owner begins by arguing that the exhibits should be excluded under 37 C.F.R. § 42.63 because they were not accompanied by a "certified translation" or "an affidavit attesting to the accuracy of the translation." MTE at 9. A motion to exclude is not the proper vehicle in which to raise this type of argument. Per the Board's rules, motions to exclude are to address only "why the evidence is not admissible (e.g., relevance or hearsay)…." Consolidated Trial Practice Guide at 79. Whether or not evidence complies with the Board's formatting and procedural rules has nothing to do with its admissibility. Arguments regarding purported rule

violations—like that raised by Patent Owner here—are to be made in a motion to strike. *See id.*; *see also See, e.g., Apple Inc. v. Parus Holdings, Inc.,* IPR2020-00686, Paper 37 at 41 (P.T.A.B. Sept. 9, 2021) (explaining that "[a] motion to exclude should be directed to the admissibility of evidence"; other issues must be presented in a motion to strike). Patent Owner has not filed a motion to strike. Moreover, the time to do so has long since passed. Petitioner's Reply and the exhibits that accompany it were filed months ago. Patent Owner's § 42.63 argument has been waived.

Next, even if it were proper for Patent Owner to raise its procedural argument in a motion to exclude (it is not), the exhibits accompanying Petitioner's reply do not run afoul of § 42.63. This rule only requires a translation and affidavit when "a party ***relies*** on a document … in a language other than English." 37 C.F.R. § 42.63(b). Here, Petitioner is not relying on the German language patent publications themselves. Instead, it is relying on how those publications were previously ***translated into English*** by auto industry players in the ordinary course of applying for, and obtaining, U.S. patents. This distinguishes the present case from the those cited by Patent Owner in its motion. In each of those cases, a party was relying on a foreign language document standing alone as part of its grounds. *See, e.g., Volkswagen Grp. of Am., Inc. v. Emerachem Holdings,* LLC, IPR2014-01555, Paper No. 20 at 2 (P.T.A.B. March 16, 2015) (discussing translations of "prior art relied

upon in support of the Petitions" grounds); *Zhongshan Broad Ocean Motor Co., Ltd. v. Nidec Motor Corp.*, IPR2014-01121, Paper No. 20 at 6, 9 (P.T.A.B. Jan. 21, 2015) (again addressing the translation of one of the primary references in the grounds); *Square, Inc. v. REM Holdings 3, LLC*, IPR2014-00312, Paper No. 58 at 5, 35-36 (P.T.A.B. July 7, 2015) (similar).

Further, the Board has explained that—in appropriate circumstances—the translation and/or affidavit requirement may be waived. *See, e.g., Mexichem Amanco Holdings S.A. de C.V. v. Honeywell Int'l, Inc.*, IPR2013-00576, Paper 50 at 29-30 (PTAB Feb. 26, 2015); *K/S HIMPP v. III Holdings 4, LLC*, IPR2017-00781, Paper 26 at (P.T.A.B. July 23, 2018). Petitioner submits that if for some reason it is determined that it did not fully comply with the requirements of § 42.63(b), waiver is appropriate here. Petitioner filed English language equivalents of Exhibits 1029, 1031, 1033, 1035, and 1037 issued by the U.S. Patent Office. *See* Exs. 1030, 1032, 1034, 1038, 1038. Patent Owner has not contested that these English language equivalents correspond to the German publications. Nor has it pointed to any errors with Petitioner's identification of the passages in the publications that use and translate "Hubübersetzung." Moreover, further translation would serve no purpose. Petitioner cited Exs. 1029-1038 to show how others in the industry themselves previously translated "Hubübersetzung." A translation generated by a paid, party retained translator adds nothing to this and would be redundant.

There is also no basis to exclude the exhibits under Rules 602, 701, or 702. These rules all relate to testimonial evidence, not published documents. While Patent Owner's motion appears to argue that Petitioner's briefing somehow itself constitutes inadmissible testimony, this ignores that the purpose of briefing is to discuss and explain the import of the evidence of record. This is all Petitioner's briefing did here: it simply pointed out that Exs. 1029-1038 collectively show that "Hubübersetzung" has been translated in a variety of equivalent ways (*i.e.*, "stroke boost," "stroke step-up," "stroke boosting action," "stroke transmission ratio," or "stepping up or transmitting … strokes"). *See* Reply (Paper 23) at 4-5. Patent Owner was free to respond. It chose not to do so.

Patent Owner is also wrong when it argues that the exhibits "lack relevancy" and are "unfair[ly] prejudice[ial]." MTE at 10. The exhibits are highly relevant as they provide examples of how disinterested, third parties translated "Hubübersetzung" (a term on which Patent Owner attempts—baselessly—to cast doubt and sow confusion). And, evidence does not become prejudicial simply because it is shows that the '829 patent's claims are obvious over Klügl and other references. That, however, appears to be Patent Owner's primary argument here.

III. CONCLUSION

For the reasons outlined above Patent Owner's motion to exclude lacks merit and must be denied.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

Dated: October 22, 2024

/K. Patrick Herman/

K. Patrick Herman, Reg. No. 75,018
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-3596
Email: P52PTABDocket@orrick.com

Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby confirms that the foregoing paper was caused to be served on October 22, 2024 via email upon the following counsel of record for Patent Owner:

David W. Higer (dhiger@winstead.com)
Miranda Y. Jones (mjones@winstead.com)
Phillip B. Philbin (pphilbin@winstead.com)
Jamie H. McDole (jmcdole@winstead.com)
WINSTEAD PC

/K. Patrick Herman/

K. Patrick Herman, Reg. No. 75,018
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-3596
Email: P52PTABDocket@orrick.com