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

Inter Partes Review No. IPR2023-00293
Patent No. 6,575,138

PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

I. THE KLÜGL TRANSLATION (EX. 1006) SHOULD BE EXCLUDED

Petitioners' Opposition (Paper 32 ("Opp.")) does not defend the methodology of their translator or the accuracy of the varied translations of the same German word in Ex. 1006. Instead, Petitioners contend the inaccuracies go to weight not admissibility. (Opp., 3-4.) This is not a weight or credibility issue, but a fundamental problem with the accuracy that must be resolved before any weighing. Rather than fixing the fatal deficiencies, Petitioners criticize Westport for not providing the Board with a reliable, accurate translation of Klügl and for not further developing the record. (*Id.*, 1, 4.) But it is Petitioners' burden—not Westport's—to prove Klügl discloses what they contend it discloses.

Again, Petitioners contend the disparate translations are merely "using equivalent words or synonyms" for the same word. (*Id.*, 2.) This attorney argument is not based on the assessment of any qualified German expert and is entitled to no weight. (Paper 30 ("Mot."), 2-3.)

Additionally, none of Petitioners' other cited submissions answer why the same word is translated differently in the same document. (Opp., 5.) Certain submissions Petitioners cite as confirmatory also are inadmissible (i.e., numbers 1 and 3), and none use the phrase "stroke ratio." Thus, none of what Petitioners contend "confirms" the accuracy of their translation actually does so. Petitioners' reliance on Dr. Quinlan fares no better. (*Id.*) While Dr. Quinlan relies heavily on the

disparate translations of Hubübersetzung, he does not read or speak German and cannot attest to the accuracy of the translation. (Ex. 2025, 13:12-22; Opp., 5.) Westport's expert, Dr. Atkinson, also explains that Dr. Quinlan's arguments are in direct conflict with other portions of the translation. (Ex. 2022, ¶¶73-89.) This is not the first time Bosch has attempted to rely on an inconsistent translation. *See*, *e.g.*, *Robert Bosch Tool Corp. v. SD3, LLC*, IPR2016-01755, Paper 15 at 10-12 (Mar. 31, 2017) (rejecting Bosch's inconsistent translation).

While Petitioners disagree their English translation is irrelevant and inauthentic (Opp., 5-6), in doing so they presume the translation is accurate and reliable. Petitioners do not dispute that it would be proper to exclude an inaccurate translation as irrelevant or inauthentic. (*Id.*)

As to hearsay, Westport is not challenging a declaration or an U.S. patent document. Westport challenges an inaccurate translation, which Petitioners offer as a "true and accurate translation of" Klügl. Such a translation ***is*** being offered for its truth and is properly excluded as hearsay.

II. EXHIBIT 1025 SHOULD BE EXCLUDED

Exhibit 1025 is a print out of a post with a string of responses in an online translator forum offered by Petitioners for the truth of the out-of-court statements contained within it. Specifically, Petitioners ask the Board to consider the "responses provided by ***other translators*** to an Internet forum question posed by Ms. Holthaus

regarding the meaning of 'Hubübersetzung' in Klügl." (Opp., 5 (emphasis added).) Petitioners incorrectly contend Exhibit 1025 is admissible as a party admission or for impeachment. (*Id.*, 6-7.) It does not constitute a party admission because Ms. Holthaus was not Westport's agent or authorized to make any statements on Westport's behalf in any forum apart from in her declaration and testimony. Even setting aside agency and authorization problems with Petitioners' argument, Ms. Holthaus did not make (or adopt) any of the responses; thus, the responses cannot be "made by" Westport. FRE 801(d) (providing an exception for inconsistent admissions "*made by* a person whom the *party authorized to make* a statement on the subject [or] was *made by* the *party's agent or employee* on a matter within the *scope of that relationship*."). The entirety of Exhibit 1025 is hearsay, but at the least, the portions reflecting statements of other translators should be excluded.

Exhibit 1025 also is not impeachment evidence. Petitioners contend that the responses somehow "challenge Ms. Holthaus's credibility." (Opp., 7.) Seeking input from peer translators does not impugn one's credibility as a translator. Because the post and responses are unrelated to Ms. Holthaus's opinion that the same word was translated into multiple different phrases and that translating the same word into multiple phrases within the same document is improper absent supportive context, Exhibit 1025 does not affect the credibility of her opinions. (Ex. 2026, ¶¶5-7.) Further, none of the responses propose "stroke ratio" as used in Exhibit 1006.

Finally, Exhibit 1025 expressly asks about a different German word. Rather than clarify the record, Petitioners deliberately muddied the record, ignoring this difference during Ms. Holthaus's deposition until Ms. Holthaus corrected them. (Ex. 1026, 24:12-17.) Ms. Holthaus explained that she asked "actually, what does ubertragung mean here." (*Id.,* 24:16-17, 32:21-33:12.) Finally, if Exhibit 1025 is excluded as hearsay that does not fit within any exception, Petitioners cannot backdoor the evidence through their use of it when questioning Ms. Holthaus.

III. UNTRANSLATED EXHIBITS 1029, 1031, 1033, 1035, AND 1037 SHOULD BE EXCLUDED

Petitioners' primary response on the untranslated references asserts form over substance. (Opp., 9-10.) While Westport could have sought leave to file a motion to strike, Westport's motion to exclude is proper. *Mylan Pharmaceuticals Inc. v. Bausch Health Ireland Ltd.,* IPR2022-00722 Paper 78 at 69 (Sept. 8, 2023) (excluding evidence after concluding "Petitioner's argument that we should excuse its non-compliance [with 42.65(b)] because Patent Owner has moved to exclude rather than strike is, on the record before us here, form over substance.").

Petitioners' arguments regarding the "purpose" of their untranslated exhibits are also misplaced. Petitioners' intentions are irrelevant—foreign language documents must be translated. Westport objected. Petitioners did not provide translations. And, in fact, Petitioners are ***relying*** on the untranslated references, and admit the purpose of these exhibits is to show how Petitioner Bosch, Petitioner

Daimler, and other third parties previously "translated the word 'Hubübersetzung.'" (Opp., 9.) To find otherwise would allow anyone to circumvent 37 C.F.R. §42.63 by submitting an uncertified English "version" of a foreign reference and argue that no verified translation is needed because the party is only ***relying on*** what they claim is the English "version." Without the untranslated references, the allegedly related English references have no relevance. Here Petitioners have done nothing more than guess—based solely on counsel—which English word may correspond to a German word. This is not reliable and undermines the requirement for certified translations.

Petitioners further request the Board waive the translation requirement, citing *Mexichem* and *K/S HIMPP*. (Opp., 11.) Neither case supports waiver here. *Mexichem* waived the requirement for a *compliant* affidavit—not for a translation itself—where the translator provided a non-compliant verification of the translation. IPR2013-00576, Paper 50 at 29. In *K/S HIMPP* the Board ultimately did not grant the requested waiver; rather, the same translation was resubmitted with a compliant verification. IPR2017-00781, Paper 26, at 4, n.2, 55. Here, the untranslated exhibits and argument relying thereon should be excluded. (Mot., 9-11.)

IV. CONCLUSION

Westport requests that the Board grant its motion to exclude the Petitioners' identified exhibits and the associated testimony/argument relying thereon.

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Respectfully submitted,

/s/ David W. Higer

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), the undersigned certifies that on October 29, 2024, a complete and entire copy of Patent Owner's Reply In Support of Its Motion to Exclude was served on the Petitioners by email to the following email addresses:

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