

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VANTAGE SPECIALTY CHEMICALS, INC.,

Petitioner

v.

CARGILL, INC.,

Patent Owner.

Case No. IPR2023-00589

U.S. Patent No. 11,248,245

PETITIONER'S MOTION TO EXCLUDE

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND.....	1
III.	RELEVANT LEGAL STANDARDS	2
	A. Authentication	2
	B. Hearsay	3
	C. Relevance.....	4
IV.	ARGUMENT	5
	A. The Curry Declaration and Exhibits Should Be Excluded	5
	B. Exhibit 2048 Should Be Excluded.....	13
	C. Numerous Other Unauthenticated Exhibits Should Be Excluded	14
	D. Evidence Not Relied Upon Should Be Excluded as Irrelevant	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>ASM IP Holding B.V. v. Kokusai Elec. Corp.</i> , IPR2019-00369, Paper 8 (P.T.A.B. June 27, 2019)	2, 15
<i>GAF Materials LLC v. Kirsch Research and Development, LLC</i> , IPR2021-00192, Paper 45 (P.T.A.B. May 24, 2022)	3, 13
<i>JPMorgan Chase Bank, N.A. v. AME Fin. Corp.</i> , 2009 WL 10668518 (N.D. Ga. Sept. 25, 2009).....	<i>passim</i>
<i>Riverbed Tech., Inc. v. Realtime Data LLC</i> , IPR2016-00978, Paper 67 (P.T.A.B. Oct. 30, 2017).....	2, 14, 15
<i>Shimano, Inc. v. Globeride, Inc.</i> , IPR2015-00273, Paper 40 (P.T.A.B. June 16, 2016)	5, 15
<i>SK Innovation Co., Ltd. v. Celgard, LLC</i> , IPR2014-00679, Paper 58 (P.T.A.B. Sept. 25, 2015)	4, 6, 15
<i>Supercell Oy v. GREE, Inc.</i> , PGR2018-00008, Paper 42 (P.T.A.B. Jan. 2, 2019).....	3, 13
<i>Toyota Motor Corp. v. Am. Vehic. Sciences LLC</i> , IPR2013-00417, Paper 78 (P.T.A.B. Jan. 7, 2015)	4, 6
<i>TRW Automotive U.S. LLC v. Magna Elecs. Inc.</i> , IPR2014-01347, Paper 25 (P.T.A.B. Jan. 16, 2016)	2, 14, 15
<i>Wi-LAN Inc. v. Sharp Elecs. Corp.</i> , 362 F. Supp. 3d 226 (D. Del. 2019)	<i>passim</i>

Rules	Page(s)
37 C.F.R. § 42.64	1
Fed. R. Evid 401.	4
Fed. R. Evid 402.	4
Fed. R. Evid 801.	3
Fed. R. Evid 802.	3, 13
Fed. R. Evid 803.	<i>passim</i>
Fed. R. Evid 901.	<i>passim</i>
Fed. R. Evid 902.	4, 6, 14

PETITIONER’S UPDATED EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. 11,248,245
1002	File History of U.S. Patent No. 11,248,245
1003	Declaration of Dr. David A. Rockstraw, Ph.D., P.E.
1004	Melanie Cummings et al., <i>A natural alternative</i> , SOAP, PERFUMERY, AND COSMETICS (SPC) ASIA (May 1, 1999) <i>available at</i> https://www.floratech.com/PDFs/Articles_MKT/ART15.pdf (“Cummings”)
1005	James Brown & Robert Kleinman, <i>Trans Isomers in Cosmetics</i> , SOAP & COSMETICS at 33 (May 2001) (“ <i>Trans Isomers 1</i> ”)
1006	James Brown & Robert Kleinman, <i>Trans Isomers in Cosmetics Part 2</i> , SOAP & COSMETICS at 44 (June 2001) (“ <i>Trans Isomers 2</i> ”)
1007	U.S. Patent No. RE38,141E1 to Brown et al. (“Brown”)
1008	Xuebing Xu, <i>Engineering of enzymatic reactions and reactors for lipid modification and synthesis</i> , 105 EUR. J. LIPID SCI TECH. 289 (2003) (“Xu”)
1009	David J. Sessa, <i>Derivation of a Cocoa Butter Equivalent from Jojoba Transesterified Ester via a Differential Scanning Calorimetry Index</i> , 72 J. SCI. FOOD AGRI. 295 (1996) (“Sessa”)
1010	U.S. Patent No. 5,968,530 to Arquette et al. (“Arquette”)
1011	U.S. Patent No. 6,280,746 to Arquette et al. (“the ’746 patent”)
1012	Barbara Fitch Haumann, <i>Tools: hydrogenation, interesterification</i> , 5 INFORM 668 (June 1994)
1013	Otero et al., <i>Continuous Enzymatic Transesterification of Sesame Oil and a Fully Hydrogenated Fat: Effects of Reaction Conditions on Product Characteristics</i> , 94 BIOTECH. & BIOENG’G 877 (2006)
1014	James Brown & Robert Kleinman, <i>Trans Isomers in Cosmetics Parts 1 and 2</i> , Reprinted from SOAP & COSMETICS (May & June 2001) <i>available at</i> https://www.floratech.com/PDFs/Articles_MKT/ART17.pdf
1015	U.S. Patent App. Pub. No. 2005/0176597 to Kodali & Nivens
1016	U.S. Patent App. Pub. No. 2004/0208904 to Touitou & Bergelson
1017	X. Xu et al., <i>Chemical and enzymatic interesterification of lipids for use in food</i> , in <i>Modifying lipids for use in food</i> 234 (Frank D. Gunstone, ed., 2006)

Exhibit No.	Description
1018	Arnaldo Lopez-Hernandez et al., <i>Lipase-catalyzed Transesterification of Medium-chain Triacylglycerols and a Fully Hydrogenated Soybean Oil</i> , 70 J. FOOD SCI. C365 (Jul. 13, 2005)
1019	Declaration of Nancy Adams, MLIS, EdD
1020	Complaint (Dkt No. 1) filed in <i>Cargill, Inc. v. Vantage Specialty Chemicals, Inc.</i> , No. 1:22-cv-00979-RGA-SRF (D. Del. July 26, 2022)
1021	Scheduling Order (Dkt No. 15) filed in <i>Cargill, Inc. v. Vantage Specialty Chemicals, Inc.</i> , No. 1:22-cv-00979-RGA-SRF (D. Del. Oct. 3, 2022)
1022	Excerpt of United States District Courts, Federal Court Management Statistics Report for the 12-month period ending June 30, 2022, available at https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0630.2022_0.pdf
1023	T. Haryati et al., <i>Determination of Iodine Value of Palm Oil Based on Triglyceride Composition</i> , 75 J. AM. OIL CHEMISTS' SOC. 789 (1998)
1024	ASTM Int'l, ASTM D5554-95 Standard Test Method for Determination of the Iodine Value of Fats and Oils (Reapproved 2006)
1025	Am. Oil Chemists' Soc., <i>AOCS Recommended Practice Cd 1c-85</i> (Reapproved 2009), in Am. Oil Chemists' Soc., <i>Official Methods and Recommended Practices of the AOCS</i> (David Firestone, ed., 2013)
1026	Excerpt of Richard O'Brien, <i>Fats and Oils: Formulating and Processing for Applications</i> (CRC Press 3rd ed. 2009)
1027	Excerpt of <i>Physical and Chemical Characteristics of Oils, Fats, and Waxes</i> (AOCS Press, David Firestone, ed., 3rd ed. 2013).
1028	Cosmetic Ingredient Review, <i>Final Report of the Cosmetic Ingredient Review Panel: Safety Assessment of Simmondsia Chinensis (Jojoba) Seed Oil, Simmondsia Chinensis (Jojoba) Seed Wax, Hydrogenated Jojoba Oil, Hydrolyzed Jojoba Esters, Isomerized Jojoba Oil, Jojoba Esters, Simmondsia Chinensis (Jojoba) Butter, Jojoba Alcohol, and Synthetic Jojoba Oil</i> (Sept. 23, 2008) available at https://www.cir-safety.org/ingredient/simmondsia-chinensis-jojoba-seed-oil
1029	Junzo Otera, <i>Transesterification</i> , 93 CHEM. REV. 1449 (1993)

Exhibit No.	Description
1030	Ramesh Chandra Gupta & Gulab Kanwar, <i>Determination of Iodine Numbers of Edible Oils</i> , 22 Biomedical Education 47 (1994)
1031	Declaration of Thomas R. Makin in support of <i>pro hac vice</i> admission
1032	L. Deng, et al., “Synthesis of wax esters by lipase-catalyzed esterification with immobilized lipase from <i>Candida</i> sp. 99–125,” <i>Chinese Journal of Chemical Engineering</i> , vol. 19, no. 6 (2011), 978-982
1033	Hills, Geoffrey, “Industrial use of lipases to produce fatty acid esters,” <i>European journal of lipid science and technology</i> , 105(10) (2003), 601-607
1034	U.S. Patent Application Pub. No. 2014/0017741
1035	Lei, et al. “Functional monoesters of jojoba oil can be produced by enzymatic interesterification: reaction analysis and structural characterization,” <i>European Journal of Lipid Science and Technology</i> , 117(5) (2015)
1036	International Patent Appl. Pub. No. WO 2001/072683 A1
1037	International Patent Appl. Pub. No. WO 2008/092207 A1
1038	M.C. De Zoete, et al., <i>Ammonolysis of Carboxylic Esters Catalyzed by Lipases</i> , included as a chapter in Jonathan S. Dordick et al., <i>Enzyme Engineering XIII</i> , ANNALS OF THE NEW YORK ACADEMY OF SCIENCES, Vol. 799, New York Academy of Sciences (October 12, 1996)
1039	Kirk-Othmer, <i>Concise Encyclopedia of Chemical Technology</i> , United Kingdom, Wiley (1999)
1040	Second Declaration of Nancy Adams, MLIS, EdD
1041	Deposition Transcript of Thomas M. Schultz, <i>Vantage Special Chemicals, Inc. v. Cargill, Inc.</i> PTAB Proceeding No. IPR2023-00589, February 15, 2024

Exhibit No.	Description
1042	Exhibit 6 to the Deposition Transcript of Thomas M. Schultz, <i>Vantage Special Chemicals, Inc. v. Cargill, Inc.</i> PTAB Proceeding No. IPR2023-00589, February 15, 2024 (Lei, et al. “Functional monoesters of jojoba oil can be produced by enzymatic interesterification: reaction analysis and structural characterization,” <i>European Journal of Lipid Science and Technology</i> , 117(5) (2015))
1043	CONFIDENTIAL – Deposition Transcript of Jeff Addy, <i>Cargill, Inc., et al. v. Vantage Specialty Chemicals, Inc.</i> , No. 1:22-cv-00979-RGA-SRF (D. Del.), dated August 24, 2023
1044	U.S. Patent App. Pub. No. 2016/0177350
1045	CONFIDENTIAL – Exhibit 35 to the Deposition Transcript of Michael Savidakis, <i>Cargill, Inc., et al. v. Vantage Specialty Chemicals, Inc.</i> , No. 1:22-cv-00979-RGA-SRF (D. Del.), dated August 16, 2023
1046	CONFIDENTIAL – Exhibit 36 to the Deposition Transcript of Michael Savidakis, <i>Cargill, Inc., et al. v. Vantage Specialty Chemicals, Inc.</i> , No. 1:22-cv-00979-RGA-SRF (D. Del.), dated August 16, 2023
1047	Deposition Transcript of Delrika Curry, <i>Vantage Special Chemicals, Inc. v. Cargill, Inc.</i> PTAB Proceeding No. IPR2023-00589, dated February 20, 2024

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioner Vantage Specialty Chemicals, Inc., hereby moves to exclude the following evidence relied upon by Patent Owner Cargill, Inc. (“Cargill”): Exhibits 2010, 2011, 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, 2021, 2024, 2025, 2026, 2028, 2032, 2033, 2035, 2037, 2038, 2040, 2041, 2044, 2048, 2058, 2059, 2060, 2061, and 2064, as well as the portions of Exhibit 2009 that rely on these exhibits.

II. BACKGROUND

The Board instituted this IPR on September 13, 2023, (Paper 11), and Cargill filed its Response on December 6, 2023, (Paper 22; “POR”). With its Response, Cargill filed over fifty exhibits, many of which have not been demonstrated to be authentic, contain hearsay, or are not cited in Cargill’s papers. In fact, Cargill only sought to authenticate and establish an exception to hearsay (business records) with respect to three exhibits, 2012, 2013, and 2014, which purport to be two certificates of analysis and a standard manufacturing protocol. *See* Ex. 2049 [Declaration of Cargill employee Delrika Curry] (the “Curry Declaration”). Pursuant to 37 C.F.R. § 42.64(b)(1), Petitioner filed its objections to Cargill’s evidence on December 13, 2023. Paper 26. Cargill did not serve any supplemental evidence.

On December 29, 2023, counsel for Petitioner requested dates for an in-person deposition of business-record declarant Curry, which Cargill’s counsel refused after

meeting and conferring. The Board held a teleconference on January 16, 2024, during which it directed Cargill to make Mr. Curry available for a 2-hour in-person deposition. *See* Ex. 2066. Counsel for Petitioner deposed Mr. Curry on February 20, 2024 (“Curry Dep.”). The transcript is submitted herewith as Exhibit 1047.

III. RELEVANT LEGAL STANDARDS

A. Authentication

To satisfy the authentication requirement of Federal Rule of Evidence (“FRE”) 901(a), a proponent of an item of evidence “must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Exclusion of evidence that has not been properly authenticated is the appropriate remedy. *See, e.g., TRW Automotive U.S. LLC v. Magna Elecs. Inc.*, IPR2014-01347, Paper 25 at 5–12 (P.T.A.B. Jan. 16, 2016) (granting motion to exclude exhibit that was not self-authenticating and was not shown to be authentic); *Riverbed Tech., Inc. v. Realtime Data LLC*, IPR2016-00978, Paper 67 at 39–41 (P.T.A.B. Oct. 30, 2017) (“The burden is on Patent Owner to produce evidence sufficient to support a finding that Exhibit 2009 is what the Patent Owner claims it is. Patent Owner has provided no evidence to that effect. Accordingly, Exhibit 2009 shall be excluded from Evidence pursuant to FRE 901, as well as those portions of paragraphs 98–100 in Dr. Zeger’s Declaration (Ex. 2006) that rely expressly on Exhibit 2009.”); *ASM IP Holding B.V. v. Kokusai Elec. Corp.*, IPR2019-00369, Paper 8 at 21 (P.T.A.B. June

27, 2019) (“Applying the concept of website printout authentication to *inter partes* review proceedings..., ... the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website ... for example a web master or someone else with personal knowledge would be sufficient.”) (quotations omitted).

B. Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. FRE 801(c). Hearsay is inadmissible unless a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court, provide otherwise. FRE 802. Exclusion of impermissible hearsay is the appropriate remedy. *See, e.g., GAF Materials LLC v. Kirsch Research and Development, LLC*, IPR2021-00192, Paper 45 at 62–65 (P.T.A.B. May 24, 2022) (excluding exhibit containing statements made outside the course of the IPR that Patent Owner relied upon for their truth); *Supercell Oy v. GREE, Inc.*, PGR2018-00008, Paper 42, at 53–58 (P.T.A.B. Jan. 2, 2019) (excluding print-outs from “Exeter Chess Club” website as out-of-court statements offered for the truth of the matters asserted therein).

With respect to the business records exception of FRE 803(6), a business record is not excluded as hearsay if “(A) the record was made at or near the time by ... someone with knowledge; (B) the record was kept in the course of a regularly

conducted activity of a business ...; (C) making the record was a regular practice of that activity; (D) all these conditions are shown ... by a certification that complies with Rule 902(11) ...; and (E) the opponent does not show that the source of information or the method of circumstances of preparation indicate a lack of trustworthiness.” According to FRE 902(11), the certification must come from the “custodian [of the business records] or another qualified person.” *See Toyota Motor Corp. v. Am. Vehic. Sciences LLC*, IPR2013-00417, Paper 78 at 11–13 (P.T.A.B. Jan. 7, 2015) (granting motion to exclude exhibits on the grounds that they contain hearsay because declarant “has no stated knowledge of ... their record keeping practices” and because declarant “does not testify that she has any responsibility or role in generating or maintaining records”). “Mere ‘boilerplate recitation of the requirements under 803(6) fails to provide sufficient detail necessary to authenticate the exhibits or satisfy the requirement of Rule 803(6).’” *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 362 F. Supp. 3d 226, 232 (D. Del. 2019) (quoting *JPMorgan Chase Bank, N.A. v. AME Fin. Corp.*, 2009 WL 10668518, at *3 (N.D. Ga. Sept. 25, 2009)).

C. Relevance

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. FRE 401. Irrelevant evidence is not admissible. FRE 402. Exhibits not cited or relied on in IPRs are irrelevant and should be excluded. *See, e.g., SK*

Innovation Co., Ltd. v. Celgard, LLC, IPR2014-00679, Paper 58, at 49 (P.T.A.B. Sept. 25, 2015); *Shimano, Inc. v. Globeride, Inc.*, IPR2015-00273, Paper 40, at 26–28 (P.T.A.B. June 16, 2016).

IV. ARGUMENT

A. The Curry Declaration and Exhibits Should Be Excluded

Petitioner asserts that each of Cummings (Ex. 1004) and *Trans* Isomers 2 (Ex. 1014; “TI2”) teaches, *inter alia*, that transesterifying a jojoba ester feedstock results in an increased oxidative stability (“OSI”) in the resulting jojoba esters. *E.g.*, Petition, Section VI.B.1, VI.C.1; Petitioner’s Reply, Section III.B–C. To rebut that argument, Cargill alleges that it is the addition of tocopherols—rather than transesterification—that is responsible for the increase in OSI that is reported in Cummings and TI2. *E.g.*, POR, Section VI.D; Patent Owner’s Sur-reply (Paper 41; “Sur-reply”), Section II. Because Cummings and TI2 say no such thing, Cargill relies on a convoluted argument—that Cummings and TI2 (again, despite not saying so) must relate to Floratech commercial products and that such commercial products, at the relevant time, had tocopherols added post-transesterification. *Id.* In support thereof, Cargill relies on Exhibits 2012, 2013, and 2014, which Cargill alleges show that tocopherols are included in certain Floratech commercial jojoba products. *Id.*

Exhibits 2012, 2013, and 2014 are hearsay because Cargill offers them to prove the truth of the matter asserted—*i.e.*, that certain Floratech commercial jojoba

esters products contain added tocopherols. *See* POR at 42; Sur-reply at 6. Because these exhibits contain hearsay and would not otherwise be self-authenticating, Cargill submitted the Curry Declaration under FRE 902(11), which declaration attempts to establish the exhibits as business records and to authenticate them.

The Curry Declaration fails to do so because Mr. Curry is not a “custodian [of the alleged business records].” *See* Curry Decl. ¶¶ 2–3 (“I am the Sales Director, Beauty Care.... I have been employed by Cargill since January 2023.”); Curry Dep. at, *e.g.*, 52:18–25; 59:1–5; 65:25–66:25. Nor is Mr. Curry “another qualified person”: he had no relevant personal knowledge about Exhibits 2012, 2013, and 2014, nor did he conduct an investigation into those exhibits, before he signed his declaration—a declaration written for him by someone in Cargill’s legal department. *Toyota*, IPR2013-00417, Paper 78 at 11–13.

First, despite declaring that “I make this declaration based on my personal knowledge,” (Curry Decl., ¶ 1), Mr. Curry did not write or even edit the declaration:

Q. And how did Jenny contact you regarding the potential submission of this declaration?

A. I believe it was through e-mail and then a follow-up phone call.

Q. And at a high level, what did Jenny describe when she was asking you to do this?

THE WITNESS: “High level,” I sent you an e-mail. This is the gist of what it contains in the e-mail and you should review it and then sign it.

Q. So Jenny provided you a copy of the declaration in the e-mail?

A. Yes....

Q. Did you change any of the text in this declaration before signing it?

A. No....

Q. The only thing that you did was sign your name and scan it in and send it back to her, right?

THE WITNESS: I just signed it, sent it back.

Curry Dep. at 12:20–15:10 (objections omitted); *see also id.* at 13:9–12.

Second, despite declaring that “I am familiar with the review and maintenance of archival copies of historical Floratech documents,” (Curry Decl., ¶ 5), Mr. Curry did not speak with anyone at Cargill to verify the document retention policies specific to Exhibits 2012, 2013, and 2014 ***before*** he signed his declaration, *e.g.*:

Q. Did you speak with [Lynn Freed, Ryan Quinn, or Jeff Addy] specifically about the document retention policies that you’ve discussed in this declaration ***before*** you signed this declaration?

A. No.

Id. at 9:18–21 (emphasis added; objection omitted); *see also id.* at 6:13–7:15; 15:7–10; 26:21–27:8; 27:16–22; 36:16–37:8; 46:11–23; 56:14–21.

Third, despite declaring that “Exhibit 2012 is a true and correct copy of the Certificate of Analysis of Floratech’s Floraesters® 15 product with Lot Number FELM3S, signed and dated February 26, 2004 [and] [t]his certificate of analysis was made at or near the time Lot Number FELM3S was tested by a person who had knowledge of the testing,” (Curry Decl., ¶ 6), and declaring similarly with respect to Exhibits 2013 and 2014, (Curry Decl., ¶¶ 7–8), Mr. Curry did not speak with anyone at Cargill to verify these statements before he signed his declaration. *See* Curry Dep. at 36:16–37:8, 37:25–38:18, 46:11–23, 51:10–52:8, 56:14–21.

Fourth, that Mr. Curry was not a proper declarant is clear from his lack of knowledge regarding critical details of Exhibits 2012, 2013, and 2014, *e.g.*:

Q. Let’s move on to paragraph 6. You say: “Exhibit 2012 is a true and correct copy of the certificate of analysis of Floratech’s Floraesters 15 product with Lot Number FELM35, signed and dated February 26th, 2004.” Right?

A. Yes....

Q. Can you explain what Lot Number FELM35 means?

A. No, I cannot.

Q. In 2004, how many lots of Floraesters 15 did Floratech manufacture?

A. Do not know.

* * *

Q. You know that when David Ashley put together this certificate of analysis, it wasn't correct, right? You know there was a mistake in it, right?

A. I cannot attest or say anything related to what happened during that time....

Q. So someone corrected this value and put their initials next to it, right?

A. I see a line through it and I see a signature. You would have to discuss that with Jamie because that person made that signature and that statement, that signature there and made that line there.

* * *

Q. Let's move on to paragraph 8 of your declaration. Whoever wrote this says: "Exhibit 2014 is a true and correct copy of the standard manufacturing protocol, (SMP) 2-45 Floraesters, with a revision date of December 16th, 1998," right?

A. Yes....

Q. Do you know the actual date on which Exhibit 2014 was created?

A. No, I do not.

Q. All you know is that there is a revision date on it, right?

A. Yes.

Q. Have you seen the prior version of the standard manufacturing protocol for the Floraesters products?

A. No, I have not.

* * *

Q. So someone wrote in handwriting “obsolete” on this document, right?

A. Yes, they did.

Q. Do you know what the word “obsolete” means in the context of this document?...

THE WITNESS: Depends on what they mean because I didn’t write it, I didn’t write “obsolete” on there, at the top....

Q. Do you know who wrote “obsolete” on the top of this document?

A. No.

Q. And you don’t know when “obsolete” was written on the top of this document, right?

A. No.

Id. at 34:3–35:1; *see also id.* at 44:6–18; 41:11–42:20; 43:15–17; 52:18–21; 54:10–55:5; 58:7–59:11; 62:7–63:14.

In addition to the above-described deficiencies, the statements in paragraphs 6, 7, and 8 of the Curry Declaration are mere boilerplate that parrot the requirements of FRE 803(6) and are therefore insufficient to authenticate the exhibits or satisfy the requirements of Rule 803(6). *See Wi-LAN*, 362 F. Supp. 3d at 232 (excluding source code where “[t]he SoC declarations merely provide conclusory statements that the code is a business record without providing any factual basis for those statements”). *JPMorgan*, 2009 WL 10668518, at *3 (“The Court finds that Ms. Siepert does not provide enough information about her position, Plaintiff’s record-

keeping procedures, or Plaintiff's regularly conducted business activity to support the conclusion that she is qualified to authenticate the documents or to satisfy the business records hearsay exception."").

For example, in paragraph 6 of his declaration, Mr. Curry declared:

Exhibit 2012 is a true and correct copy of the Certificate of Analysis of Floratech's Floraesters® 15 product with Lot Number FELM3S, signed and dated February 26, 2004. This certificate of analysis was made at or near the time Lot Number FELM3S was tested by a person who had knowledge of the testing. Floratech regularly prepared certificates of analyses its Floraesters® products as part of its regular practice of conducting testing on its Floraesters® products prior to releasing a batch for sale. Floratech, and now Cargill, keeps these certificates of analysis, including the certificate of analysis in Exhibit 2012, as part of its regular business activities.

Similarly, in paragraph 8, Mr. Curry declared:

Exhibit 2014 is a true and correct copy of the Standard Manufacturing Protocol (SMP) 2-45 Floraesters, with a revision date of December 16, 1998. SMP 2-45 was made at or near the time Floraesters was being manufactured in 1998 by a person who had knowledge of the practices involved in manufacturing Floraesters. Floratech regularly prepared Standard Manufacturing Protocols as part of its regular manufacturing practice. Floratech, now Cargill, keeps these Standard Manufacturing Protocols, including SMP in Exhibit 2014, as part of its regular business activities.

The *Wi-LAN* court explained why Mr. Curry's declaration is insufficient:

In *JPMorgan*, the declarant attested that she is an employee of a particular office of the plaintiff, “that she has personal knowledge of Plaintiff’s practice of maintaining these records; that these records were created or received by Plaintiff in its regularly conducted business activity; and that they were retained by Plaintiff in its file on Defendant in the course of its regular practice for making and keeping such records.” *Id.* The Court determined that such statements were too vague to meet the requirements of the Rule because *the declarant failed to show her “familiarity with the creation and maintenance of these records” and failed to describe “any details about Plaintiff’s record-keeping procedures.”* *Id.*

Wi-LAN, 362 F. Supp. 3d at 232 (quoting *JPMorgan*, at *3) (emphases added).

Last, there is a lack of trustworthiness with respect to the documents, given their unexplained handwritten notations (*e.g.*, the correction on Exhibit 2012 and “Obsolete” on Exhibit 2014). *See, e.g., Wi-LAN*, 362 F. Supp. 3d at 232 (“Defendants have demonstrated a lack of trustworthiness in the materials; the source code contains inconsistent dates in the metadata, copyright, and revision histories as well as added commentary on the printed excerpts.”).

Thus, the Board should exclude from evidence the Curry Declaration, Exhibits 2012, 2013, and 2014, as well as the portions of paragraphs 141 and 154 of the Declaration of Thomas Schultz (the “Schultz Declaration”) (Ex. 2009) that expressly rely on these exhibits, under FRE 802 and 901.

B. Exhibit 2048 Should Be Excluded

Exhibit 2048 is a slide deck, which Cargill describes (POR at viii) as follows:

2048	Arquette, “Effects of Additives on the Oxidative Stability of Botanical Emollients”, International Flora Technologies, Ltd., SCC Ontario Chapter – Education Day September 10, 1998
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First, Exhibit 2048 is inadmissible hearsay. As with Exhibits 2012, 2013, and 2014, Cargill offers statements in this document to prove the truth of the matters asserted in the statements—*i.e.*, that tocopherols were allegedly added to certain commercial jojoba esters products. POR at 41; Sur-reply at 6. Unlike with respect to Exhibits 2012, 2013, and 2014, Cargill has provided no declaration to attempt to authenticate Exhibit 2048 or to establish it as a business record. Accordingly, Exhibit 2048, as well as the portions of paragraphs 127 and 140 of the Schultz Declaration (Ex. 2009) that expressly rely on Exhibit 2048, should be excluded from Evidence under FRE 802 as impermissible hearsay. *See GAF Materials LLC*, IPR2021-00192, Paper 45 at 62–65; *Supercell Oy*, PGR2018-00008, Paper 42, at 53–58.

Second, Cargill has not even alleged that Exhibit 2048 is self-authenticating (it does not fall into any category set forth in FRE 902), nor has Cargill otherwise authenticated it, *e.g.*, through a declaration. Cargill simply asserts: “Floritech’s former Technical Director gave a 1998 presentation to the Society of Cosmetic Chemists, titled ‘Effects of Additives on the Oxidative Stability of Botanical Emollients.’” POR at 41. But this is merely a description of what Cargill claims

Exhibit 2048 is, not evidence that would tend to show Exhibit 2048 is authentic. Accordingly, Exhibit 2048, as well as the portions of paragraphs 127 and 140 of the Schultz Declaration that expressly rely on Exhibit 2048, should be excluded from Evidence pursuant to FRE 901. *See, e.g., TRW Automotive*, IPR2014-01347, Paper 25 at 5–12; *Riverbed Tech.*, IPR2016-00978, Paper 67 at 39–41.

C. Numerous Other Unauthenticated Exhibits Should Be Excluded

Like Exhibit 2048, Cargill has not even attempted to authenticate numerous other (non-self-authenticating) exhibits, including what appear to be:

Textbooks: *Exhibit 2010* (footnote that reads “All content following this page was uploaded by Jayesh Gadhiya on 08 May 2018”); *Exhibits 2019, 2020, 2058, 2059, 2064* (unidentified online textbook excerpts); *Exhibit 2024* (two pages of a textbook); *Exhibit 2026* (purportedly available on LibreTexts), *Exhibit 2028* (one chapter of an online textbook; *see* “Check for updates” icon); *Exhibit 2061* (includes watermark behind each page)

Print-Outs from Websites: *Exhibits 2015, 2017, 2037, 2060*

Articles and Manuscripts: *Exhibit 2011* (footnote that reads “published by De Gruyter Open”); *Exhibit 2021* (footnote that reads “This manuscript is made available under the Elsevier user license”); *Exhibits 2025, 2032* (publication information unclear); *Exhibit 2033* (publication information unclear; manuscript available online at hndawi.com); *Exhibit 2035* (“[d]ownloaded via REPRINTS

DESK INC”); *Exhibit 2038* (“[r]esearch review paper” made available online through Elsevier); *Exhibits 2040, 2041* (made available through Elsevier)

Accordingly, these exhibits, as well as the portions of paragraphs 43–45, 51–55, 57–58, 64, 69, 77, 79–81, 85–86, 117, 120, 128, and 140 of the Schultz Declaration (Ex. 2009) that expressly rely on these exhibits, should be excluded from Evidence pursuant to FRE 901. *See, e.g., TRW Automotive*, IPR2014-01347, Paper 25 at 5–12; *Riverbed Tech.*, IPR2016-00978, Paper 67 at 39–41; *ASM IP Holding*, IPR2019-00369, Paper 8 at 21.

D. Evidence Not Relied Upon Should Be Excluded as Irrelevant

The following are neither cited nor relied on in the POR or Sur-reply and should be excluded as irrelevant: (1) Exhibit 2018 and (2) Exhibit 2044. *See, e.g., SK Innovation*, IPR2014-00679, Paper 58, at 49; *Shimano*, IPR2015-00273, Paper 40, at 26–28.

Dated: May 21, 2024

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner's Motion to Exclude was served on May 21, 2024, via electronic mail upon counsel of record for Patent Owner, listed below, at the following email address:

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