

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VANTAGE SPECIALTY CHEMICALS, INC.,
Petitioner

v.

CARGILL, INCORPORATED,
Patent Owner

Case IPR2023-00589
Patent 11,248,245

**PATENT OWNER'S OPPOSITION TO PETITIONER'S
MOTION TO EXCLUDE**

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I. INTRODUCTION

Petitioner’s Motion to Exclude (Paper 47, the “Motion”), which seeks to exclude large swaths of Patent Owner’s evidence, should be denied. The Curry Declaration (EX2049), particularly in light of his deposition testimony, clearly satisfies FRE 901. Moreover, Petitioner does not dispute that Exhibits 2012–2014 are what they say they are, *i.e.*, that the underlying information in the Exhibits is accurate. In fact, Petitioner’s own cited evidence confirms as much. And for the remainder of the challenged exhibits, they contain distinctive characteristics that more than meet the threshold standards of FRE 901.

Each of Patent Owner’s 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 EX2009 that rely on these exhibits—are admissible under the Federal Rules of Evidence (“FRE”). Petitioner fails to prove otherwise.

II. EXHIBITS 2012, 2013, 2014, 2049, AND 2009 SHOULD NOT BE EXCLUDED

Petitioner’s motion to exclude Exhibits 2012, 2013, 2014, 2049 (and portions of EX2009) is simply an attempt to keep the Board from considering highly relevant evidence. These exhibits show that a POSITA would have understood that the commercial products discussed in Cummings (Ex. 1004) and

Trans Isomers 2 (Ex. 1014)—two prior art references that Petitioner relies on in its asserted grounds of unpatentability—have added tocopherols to increase their OSI values. Importantly, Petitioner does not dispute that any of the information contained in these Exhibits is inaccurate or false; Petitioner simply appears to be objecting to information that undermines their case.

Exhibits 2012 and 2013 are Cargill Certificates of Analysis for its Floraesters® 15 and 20 products, respectively. EX2014 is the Standard Manufacturing Protocol 2-45 Floraesters®. EX2049 is a Declaration of Delrika Curry, a Sales Director at Cargill (“Curry Declaration”). The substantive documents include dates from the relevant time period and were pulled from Patent Owner’s regularly kept files. EX2009 is a Declaration of Dr. Thomas Schultz (“Schultz Declaration”) that relies on Exhibits 2012–2014 in paragraphs 141 and 154.

Petitioner argues that the Board should exclude the Curry Declaration, Exhibits 2012–2014, as well as paragraphs 141 and 154 of the Schultz Declaration, under FRE 802 and 901. Mot., 12. But these Exhibits are authentic and highly probative evidence of the patentability of the challenged claims. They contradict Petitioner’s argument that the OSI of the commercial products disclosed in Cummings and *Trans* Isomers 2 result from transesterification and not additives. Pet., 38, 51; Reply, 13. Critically, Petitioner’s *own evidence* confirms that the

information contained in these Exhibits is accurate. *See* EX1028, 5, 7. The Board should not exclude this evidence.

A. The Exhibits Meet the Low Bar of FRE 901

To authenticate a document under FRE 901, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is,” such as “testimony of a witness with knowledge.” FRE 901(b)(1). Along with Exhibits 2012, 2013, and 2014, Patent Owner submitted the Curry Declaration. Ex. 2049. In his Declaration, Mr. Curry provided testimony about the review and maintenance of Exhibits 2012, 2013, and 2014, based on his personal knowledge of how documents have been kept within the ordinary course of business at Floratech. *Id.*, ¶¶ 1, 5.

Petitioner objects to the Curry Declaration for four reasons, none of which is persuasive. *First*, Petitioner argues that the Board should exclude the Curry Declaration because Mr. Curry “did not write or even edit the declaration.” Mot., 6–7. *Second*, because 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.” *Id.*, 7–8. *Third*, because Mr. Curry “did not speak with anyone at Cargill to verify” whether Exhibits 2012, 2013, and 2014 are true and correct copies “before he signed his declaration.” *Id.*, 8. And *fourth*, because Mr. Curry allegedly “lack[s] of knowledge about the critical details of

Exhibits 2012, 2013, and 2014.” *Id.*, 8–12. But these arguments are either wrong, or don’t rise to the level to contravene Mr. Curry’s Declaration as precisely the type of information the Federal Rules of Evidence say can authenticate documents.

As Mr. Curry testified in his deposition, he learned of Cargill’s standard protocols for compliance with ISO certifications and governmental regulations around the time he started with the company in January or February 2023. *See* Curry Dep. at 70. In particular, he learned that it is a standard process in the chemical industry, followed by Floratech/Cargill, to have certificates of analysis for every single lot of product that is manufactured. *Id.* at 71. He gained that knowledge from having discussions with individuals at Cargill who had been employees of Floratech—including among others Lynn Freed, the product line manager; Jeff Addy, the inventor on the patent; and Ryan Quinn. *Id.* at 7-8, 24-25. Although Mr. Curry did not talk to those individuals about these specific documents before he signed his Declaration, by the time of his Declaration he had already had “several conversations with them about document retentions in general,” at the company, as well as “the review and maintenance of archival copies of historical Floratech documents.” *Id.* at 9, 25-26. In short, nothing about Mr. Curry’s averments or testimony suggests the documents are not what they purport to be. Rule 901 is thus satisfied.

Petitioner's complaints about who *wrote* the Curry Declaration, or the timing of his signature, are inapt. He swore to the truthfulness of his averments and nothing in this deposition undermined his credibility about how documents are kept in the ordinary course of business at Floratech/Cargill. FRE 602 requires only that "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter," which "may consist of the witness's own testimony." Here, Petitioner does not dispute that Exhibits 2012–2014 are what they say they are, *i.e.*, that the underlying information in the Exhibits is accurate. Nor could it, because, as explained below, their substance is confirmed by Petitioner's own exhibits. *Infra* § II.C. Petitioner does not dispute that Mr. Curry was knowledgeable about the retention of records at Floratech/Cargill before signing the declaration. And Petitioner cites nothing to show that a declarant must write and/or edit her own declaration to establish personal knowledge under FRE 602.

B. The Exhibits are FRE 803(6) Business Records

Petitioner argues that Exhibits 2012–2014 should be excluded as hearsay under FRE 801 because "Cargill offers them to prove the truth of the matter asserted—*i.e.*, that certain Floratech commercial jojoba ester products contain added tocopherols." Mot. 5–6. Petitioner is wrong. Exhibits 2012–2014 are admissible because they fall under the hearsay exception of Rule 803(6), as they

are business records of Floratech’s regularly conducted activity. Specifically, as required by the rule, Mr. Curry averred in his Declaration, and/or confirmed in his deposition, that Exhibits 2012-2014 are kept in the course of a regularly conducted activity of [Floratech],” that they were made at or near the time by a person with knowledge.” FRE 803(6)(B); Curry Dec. ¶¶ 6-8; *see also* Curry Dep Tr. at 26-28.

C. Petitioner’s Own Evidence Confirms the Substance of Exhibits 2012, 2013, and 2014

Exhibits 2012–2014 confirm that a POSITA reading Cummings would have known about added tocopherols in Jojoba Esters 15, 20, 30, 60, and 70 and its effect of increasing OSI. Sur-reply, 6; EX2012, 1 (showing 0.05% by weight tocopherols in Jojoba Esters 15); EX2013, 1 (showing 0.05% by weight tocopherols in Jojoba Esters 20); EX2014, 2, 7 (showing tocopherols in Jojoba Esters 15, 20, 30, and 60); EX2049. Moreover, Petitioner’s own cited evidence confirms that the information relied on in these exhibits is accurate and authentic.

As discussed in Cargill’s Sur-reply, Petitioner’s exhibits EX1004 and EX1028 show that Cummings’ commercial products—Jojoba Esters 15, 20, 30, 60, and 70—contain tocopherols to increase OSI. *See* EX1004, 1; EX1028, 5; Sur-reply, 4–6. For example, EX1028 shows that without tocopherols (“None”), Jojoba Ester 15 has an OSI of ~35 hours. *Id.* (“Jojoba Esters 15 had a stability of ~35 OSI hours”). But ***with tocopherols***, the OSI ***goes up to ~80 hours***. *Id.* This

increase in OSI demonstrates the effect of tocopherols and aligns with Cummings's disclosure of an increase from 35 hours to 100 hours. EX1004, 2; *see also* EX1014, 7; EX2009, ¶140.

EX1028 also confirms that *all of* Cummings' commercial products (Jojoba Esters 15, 20, 30, 60 and 70) contain added tocopherol. EX1028, 7 (*see* Table 6).

For at least these reasons, the Board should deny the motion to exclude this evidence.

II. EXHIBIT 2048 SHOULD NOT BE EXCLUDED

Petitioner's motion to exclude EX2048 should be denied. *See* Mot., 13-14. As discussed in PO's Sur-reply, EX2048, a 1998 presentation given by Floratech's former Technical Director that again shows it was widely known that tocopherols were added to the Jojoba Esters 15 and 60 commercial products. This document is consistent with and validates, one of Petitioner's own exhibits. *See* Sur-reply, 4-6. EX 2048 was found in Floratech/Cargill's files and is dated September 10, 1998, so it is authentic under FRE 901(8). Likewise, Dr. Schultz cites and discusses the exhibit in his declaration along with other evidence showing that tocopherols were added to the commercial products. EX2009, ¶¶ 140-141; *see also*, *RTI Surgical, Inc. v. LifeNet Health*, IPR2019-00571, Paper 75 at 7-9 (PTAB Aug. 14, 2020) (denying motion to exclude inadmissible documents relied upon by expert). Rather than exclude the document, the Board can give it appropriate weight.

III. EXHIBITS 2009, 2010, 2011, 2015, 2017, 2019, 2020, 2021, 2025, 2032, 2033, 2035, 2037, 2038, 2040, 2041, 2058, 2059, 2060, 2064, 2024, 2026, 2028, AND 2061 SHOULD NOT BE EXCLUDED

Petitioner moves to exclude several forms of evidence that the Board routinely considers during post-grant trials—including textbook excerpts, website printouts, articles, and manuscripts, as well as portions of the Schultz Declaration that cite to these exhibits (EX2009, ¶¶ 43–45, 51–55, 57–58, 64, 69, 77, 79–81, 85–86, 117, 120, 128, and 140), for allegedly lacking authenticity under FRE 901. Mot., 14–15. Petitioner argues that Patent Owner “has not even attempted to authenticate” these exhibits. *Id.*, 14. But the Board’s rules require Petitioner (as movant) to show that these exhibits lack authenticity, (37 C.F.R. §§ 42.20(c), 42.64(c)), and Petitioner’s cursory complaints about each exhibit fail to meet that burden. *See* Mot., 14–15.

Each of the complained-about exhibits are authentic. FRE 901 requires “evidence sufficient to support a finding that the item is what the proponent claims it is.” The Board considers “this is a low bar, simply requiring a rational basis for [the proponent’s] claim.” *Paragon 28, Inc. v. Wright Medical Tech., Inc.*, IPR2019-00894, Paper 41 at 9 (PTAB Sept. 23, 2020); *see also Medtronic Vascular, Inc. v. TMT Sys., Inc.*, IPR2021-01532, Paper 56 at 48 (PTAB Mar. 7, 2023) (stating that “a proponent’s burden of proof for authentication is slight” (quotation omitted)). Once that threshold is satisfied, “the evidence goes to the

[fact-finder] and it is the [fact-finder] who will ultimately determine the authenticity of the evidence.” *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1375 (3rd Cir. 1991).

FRE 901(b)(4) provides that “[d]istinctive [c]haracteristics” qualifying as “[a]uthenticating or [i]dentifying [e]vidence” includes “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” FRE 901(b)(4); *see also* Advisory Committee's Notes (“Example (4)). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety.”). Here, each exhibit contains distinctive characteristics that more than meet the low threshold of FRE 901:

- **Textbooks:** Petitioner’s request to exclude exhibits 2010, 2019, 2020, 2058, 2059, 2064, 2024, 2026, 2028, 2061, 2015, 2017, 2037, 2060, 2011, 2021, 2025, 2032, 2033, 2035, 2038, 2040, 2041, 2009 should be denied if not based on the references’ authenticating indicia, and even then are admissible because Cargill’s expert “cited and relied upon” these references in his declaration in accordance with FRE 703. *See Fedex Corp. v. Intellectual Ventures II LLC*, IPR2017-00859, Paper 45, 12 (PTAB Aug. 9, 2018) (“we find that Exhibits 1006 and 1039 are admissible under FRE 703 to the extent that Petitioner’s expert cited and

relied on the documents.”); *Hulu, LLC, v. Sound View Innovations, Inc.*, IPR2018-01039, Paper 29, 17–18 (PTAB Dec. 20, 2019) (The PTAB found that “the indicia on the face of a reference, such as printed dates and stamps, are considered as part of the totality of the evidence” to establish a reasonable likelihood that the book was a printed publication.).

- **Print-Outs from Websites:** Petitioner’s request to exclude Exhibits 2015, 2017, 2037, 2060 should be denied based on their webpage indicia and because none of these references are offered to prove the existence of a fact on a particular date. *See Luxshare Precision Industry Co. v. Bing Xu Precision Co.*, IPR2017-01657, Paper 47 at 52 (PTAB Jan. 10, 2019) (“We find the indicia on the webpages and the fact that they are not offered to prove the existence of a fact on a particular date is sufficient to rely on these web pages as authenticated.”).
- **Journal Articles:** Petitioner’s request to exclude Exhibits 2011, 2021, 2025, 2032, 2033, 2035, 2038, 2040, 2041 should be denied because each of these exhibits is self-authenticated by being an article published in a periodical journal of an identified and reputable publisher. FRE 902 (“Evidence That Is Self-Authenticating” includes “Printed material purporting to be a newspaper or periodical.”); *Hulu*, Paper 29 at 17–18.

Furthermore, these exhibits should not be excluded because they were “cited and relied upon” by Cargill’s expert in accordance with FRE 703. *Fedex Corporation*, Paper 45 at 12 (PTAB Aug. 9, 2018).

The Schultz Declaration also cites to and discusses the relevance of each of these exhibits. *See, e.g.*, EX2009, ¶¶ 43–45, 51–55, 57–58, 64, 69, 77, 79–81, 85–86, 117, 120, 128, and 140. Under FRE 703, an expert may base an opinion on facts or data that is not otherwise admissible “[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” FRE 703; *see also Argentum Pharms. LLC v. Research Corp. Tech., Inc.*, IPR2016-00204, Paper 85 at 47-48 (PTAB Aug. 14, 2020). Patent Owner contends all of its evidence is admissible, for the reasons described above. Evidence on which an expert relies, however, even if otherwise inadmissible, still can be disclosed to the factfinder provided that the probative value of the evidence substantially outweighs its prejudicial effect. *RTI Surgical, Inc. v. LifeNet Health*, IPR2019-00571, Paper 75 at 7–9 (PTAB Aug. 14, 2020) (denying motion to exclude as hearsay documents relied upon by an expert because the probative value outweighed any prejudicial effect). The PTAB routinely applies Rule 703 to deny motions to exclude evidence relied upon by experts, even if that evidence would not be admissible before a jury. *Id.* at 8–9 (collecting cases). Here, there is no

prejudice in admitting the subject documents but, to the extent there is any, the probative value of the evidence substantially outweighs that prejudice.

Dr. Schultz avers that he “reviewed various supporting references and other documentation as...noted in my opinions” and “consider[ed] these materials through the lens of one of ordinary skill in the art related to the ’245 patent.” EX2009, ¶¶17-18. The Board—a non-jury tribunal with administrative expertise—is well positioned to determine and assign the appropriate weight of these exhibits without any danger of being unfairly prejudiced, confused, or misled. *See, e.g., Google LLC, v. IPA Technologies Inc.*, IPR2019-00730, Paper 72 at 30 (PTAB Sept. 16, 2020).

The Board’s administrative process also counsels against exclusion of these types of documents. Textbooks, journal articles, manuscripts, and the like are some of the bread-and-butter exhibits of a post-grant trial. Requiring separate, individual authentication for all of these types of documents as a matter of course would greatly increase the cost and complexity of Board proceedings, contrary to Congress’s intention to provide “quick and cost effective alternatives” to litigation in the courts. *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, 815 F.3d 734, 741 (Fed. Cir. 2016). And, as the Board has consistently recognized, “there is a strong public policy for making all information filed in an administrative proceeding available to the public.” *SNF S.A. v. Chevron U.S.A.*,

Inc., IPR2022-01534, Paper 46 at 45 (PTAB Apr. 18, 2024). “Rather than excluding evidence that is allegedly hearsay, confusing, misleading, untimely, and/or irrelevant, we will simply not rely on it or give it little or no probative weight, as appropriate, in our analysis” because “it as the better course to have a complete record of the evidence to facilitate public access, as well as appellate review.” *Id.*

IV. EXHIBITS 2018 AND 2044

Petitioner moves to exclude EX2018 and EX2044 for lack of relevance under FRE 402. EX2018 is an article from the New York Times, and EX2044 is a research article published in the Journal of American Oil Chemists’ Society authored by Steinke (hereinafter, “Steinke”). Citing two non-precedential Board decisions from 2015 and 2016, Petitioner argues that these exhibits are irrelevant because they were “neither cited nor relied on in the POR or Sur-reply.” Mot., 15 (citing *SK Innovation Co. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015); *Shimano, Inc. v. Globberide, Inc.*, IPR2015-00273, Paper 40 at 26–28 (PTAB June 16, 2016)). The Board should deny and/or dismiss Petitioner’s motion to exclude these exhibits.

First, no rule or binding authority requires an exhibit to have been cited in a POR or Sur-reply to meet the relevance requirement of FRE 401. Even so, it is not true that the POR does not rely on Steinke. For instance, the POR discusses

Steinke and explains how, during prosecution, inventor Jeff Addy replicated a protocol disclosed in Steinke and submitted the unexpected results to the Office. *See* POR, 21–23 (“Addy replicated the protocol disclosed in Steinke.”); *see also id.*, 58. The POR cites the Schultz Declaration, which also discusses and cites to Steinke. *See id.*, 21; Ex. 2009 ¶ 106 (citing Ex. 2045). The POR explains how Addy’s testing supports the ’245 Patent’s disclosure of the unpredictable nature of transesterification reactions and the unexpected results achievable with the claimed invention. POR, 59. Thus, Steinke is highly relevant to the proceeding.

Second, Petitioner overreads *SK Innovation* and *Shimano*. Mot., 15. In *SK Innovation*, the excluded exhibit was not relied on anywhere in the *proceeding*. Paper 58 at 49. And in *Shimano*—a decision that issued before the rules allowed for sur-replies as a matter of right—the Board excluded documents directed to secondary considerations of nonobviousness the patent owner had relied on in its *preliminary* POR, but *not* in its POR after trial was instituted. Paper 40 at 26. The Board granted the petitioner’s motion to exclude those documents for hearsay, relevance, and lack of authentication. *Id.* at 26–27. In doing so, the Board held that “[t]he hearsay and authentication problems associated with Exhibits 2002–2023 are glaring,” and that, “in fail[ing] to establish a nexus between the information in Exhibits 2002–2023 and the claimed invention,” the patent owner

had failed to establish relevancy. *Id.* at 27. Thus, neither case stands for the proposition Petitioner asserts.

Finally, EX2018 is relevant to the background knowledge of the POSITA and the general knowledge in the art. As the Board has recently explained, “even if the exhibit is not discussed in a brief, we find that it gives context to the testimony of record.” *Medtronic Vascular, Inc. v. TMT Sys., Inc.*, IPR2021-01532, Paper 56 at 48 (PTAB Mar. 7, 2023). And if the Board does not rely on EX2018 in making its Final Written Decision, then the Board may dismiss as moot this portion of Petitioner’s motion. *See, e.g., TwinStrand Biosciences, Inc. v. Guardant Health, Inc.*, IPR2022-01400, Paper 41 at 46 (PTAB Jan. 26, 2024); *Eli Lilly & Co. v. Teva Pharms. Int’l GmbH*, IPR2022-00796, Paper 45 at 102 (PTAB Oct. 11, 2023).

V. CONCLUSION

Exhibits 2010-2015, 2017-2021, 2024-2026, 2028, 2032, 2033, 2035, 2037, 2038, 2040, 2041, 2044, 2048, 2049, 2058-2061, and 2064, as well as the portions of EX2009 that rely on these exhibits, are relevant and the Board is well-equipped to evaluate them. Petitioner’s Motion fails to articulate any sound reasoning for their exclusion under the Federal Rules of Evidence. The Motion therefore should be denied.

Respectfully submitted,

Dated: 5/29/2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§42.6(e), the undersigned certifies that on May 29, 2024, a complete and entire copy of this Patent Owner's Opposition to Petitioner's Motion to Exclude Evidence was provided via email to the Petitioner by serving the correspondence email address of record as follows:

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