

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 REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

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In IPRs, admissibility of evidence is governed by the Federal Rules of Evidence (“FRE”). *See* Trial Practice Guide at 8. Patent Owner (“PO”) apparently thinks the rules do not apply to it.

For example, PO erroneously claims that it is Vantage’s burden to “show that these exhibits lack authenticity.” Paper 48 (“Opp’n”) at 8. But, under FRE 901(a), the proponent of an item of evidence “must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” *See also, e.g., Ingenico Inc. v. Ioengine, LLC*, IPR2019-00929, Paper 53 at 99 (P.T.A.B. Sept. 21, 2020).

Similarly, PO baldly asserts that “EX 2048 was found in Floratech/Cargill’s files and is dated September 10, 1998, so it is authentic under FRE 901(8) [*sic*].” Opp’n at 7. But PO provides no evidence about the document, including as to where it was found; therefore, the document fails the “ancient documents” test. *See* FRE 901(b)(8) (requiring the document to be “in a place where, if authentic, it would likely be”); *Adobe Inc. v. RAH Color Techs. LLC*, IPR2019-00628, Paper 125 at 37 (P.T.A.B. Aug. 31, 2020) (excluding a purported ancient document on the basis that there was no admissible testimony as to where it was found).

Regardless of its authenticity, PO essentially admits that Exhibit 2048 is inadmissible hearsay. Opp’n at 7. PO’s only serious response as to hearsay is that

this evidence (as well as Exhibits 2012–2014¹) was discussed by its technical expert. *Id.* at 2, 7 (citing *RTI Surgical Inc. v. LifeNet Health*, IPR2019-00571, Paper 75 at 7–9 (P.T.A.B. Aug. 14, 2000)).² But Dr. Schultz simply related as true case-specific facts from the hearsay documents. With respect to Exhibit 2048, Dr. Schultz stated: “Indeed, I understand that Floratech’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,’ showing that the Floratech’s Jojoba Esters 15 and Jojoba Esters 60 products referenced in Cummings and *Trans* Isomers 2 had added tocopherol.” EX-2009, ¶140; *see also id.*, ¶127. With respect to Exhibits 2012–2014, Dr. Schultz described them thusly: “2004 certificate disclosing 0.05 wt% tocopherols in Floraesters 20”; “2004 certificate disclosing 0.05 wt%

¹ When PO submitted Dr. Schultz’s declaration, PO marked all three exhibits confidential and moved to seal them. *See* Paper 23 at 2 (“Undersigned counsel ... certifies that the information sought to be sealed has not, to their knowledge, been published or otherwise made public....”); Paper 25. Therefore, Dr. Schultz could not properly have drawn any inferences about a POSA’s knowledge from them.

² *RTI Surgical* is inapposite. The contested evidence was sworn district court trial testimony and exhibits—nothing like the contested evidence here.

tocopherols in Floraesters 15” and “Floraesters manufacturing process showing....” EX-2009, ¶141.

“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 ... other than transmitting it to the jury.” *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1374 (Fed. Cir. 2021) (internal citations and quotations omitted); *see id.* at 1375 (“[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.”) (internal citations and quotations omitted); *Mylan Pharms. v. Bausch Health Ireland Ltd.*, IPR2022-00722, Paper 78 at 63–65 (P.T.A.B. Sept. 8, 2023) (“[A]t least portions of Exhibit 1067 that Petitioner and Dr. Peterson rely upon are inadmissible hearsay.... Petitioner ... relies on the testimony of Dr. Peterson who Petitioner says reviewed the Curie submission and ‘concluded Dr. Currie’s experiments are more reliable than’ Patent Owner’s own data. In other words, Petitioner relies on statements (e.g., data) in the Curie submission, which were not offered as testimony in this proceeding, as proof that the results they describe are true. Those statements are, therefore, hearsay.”).

Worst of all, with respect to Exhibits 2012–2014, PO admits that the supporting declaration by Delrika Curry was false at the time it was submitted, with respect to Mr. Curry’s knowledge of the preparation, review, and maintenance of

these exhibits. Opp’n at 4 (“He gained that knowledge from having discussions with individuals at Cargill who had been employees of Floratech.... Although Mr. Curry did not talk to those individuals about these specific documents before he signed his Declaration....”) (emphasis added). PO posits that Mr. Curry’s after-the-fact investigation makes that of no matter. *Id.* at 6 (“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]....”) (emphasis added). But a false declaration—or one that simply parrots FRE 803(6)—cannot support either the authenticity or business records status of the proposed evidence. *See, e.g., Wi-LAN Inc. v. Sharp Elecs. Corp.*, 362 F. Supp. 3d 226, 232 (D. Del. 2019); *JPMorgan Chase Bank, N.A. v. AME Fin. Corp.*, 2009 WL 10668518, at *3 (N.D. Ga. Sept. 25, 2009). PO should not be rewarded for shielding knowledgeable witnesses from deposition.

In short, PO appears to believe that the disputed evidence is so beneficial to its case that the Board should ignore the FRE. *See, e.g.,* Opp’n at 7 (“Rather than exclude the document, the Board can give it appropriate weight.”). But, even if this were an appropriate legal view, the proposed exhibits do not benefit PO’s case in the manner PO asserts. For example, Exhibits 2012–2014 do not show that the disclosed “Jojoba Esters” in Cummings and *Trans* Isomers 2 (“TI2”) are identical to commercial Floraesters® products, which allegedly have added tocopherols.

First, the exhibits and prior art are not contemporaneous, and one exhibit appears unreliable. Cummings and TI2 are from 1999 and 2001, respectively, while Exhibits 2012 and 2013 are from 2004. Exhibit 2014 has a “Revision date” of 1998, is stamped “Confidential,” and indicates in a handwritten note that it is “obsolete.”

Second, Cummings and TI2 refer to “Jojoba Esters,” while Exhibits 2012–2014 call Floratech’s commercial products “Floraesters®.” In fact, Exhibits 2012 and 2013 show the Floraesters® commercial products are composed of (1) “Jojoba Esters” and (2) “Tocopherols.” And Cummings describes Floraesters® as “unique compositions” and “jojoba esters” as “made from 100% jojoba.” EX-1004 at 1.

Third, while PO argues that Exhibits 2012–2014 (as well as Exhibit 1028) show that Floraesters® include 0.05% tocopherols, Exhibit 1028 also indicates that jojoba oil naturally has 0.05% tocopherols. Ex. 1028 at 6. Therefore, even if the prior art jojoba esters had tocopherols added to bring the level back to that of the feedstock, the disclosed OSI increase could not be due to the added tocopherols.

Fourth, while the prior art teaches improved OSI for feedstocks comprising from ~0% to 100% hydrogenated jojoba oil, PO cherry-picked only two certificates of analysis. Even if PO were correct that these Floraesters® 15 and 20 lots are exactly the same as the Jojoba Esters 15 and 20 described in the prior art, PO conspicuously has not put forth similar evidence for any other Floraesters® product.

The Board should grant Vantage’s motion to exclude.

Dated: June 5, 2024

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner's Reply in Support of Its Motion to Exclude was served on June 5, 2024, via electronic mail upon counsel of record for Patent Owner, listed below, at the following email address:

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