

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM ENTERPRISES, LLC,
Petitioner,

v.

ELAINE AND REINHOLD W. VIETH,
Patent Owners

Case IPR2023-00726
Patent 9,066,958 B2

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, Petitioner MOM Enterprises, LLC moves to exclude portions of:

- Exhibit 2071 (Declaration of Chris Temovsky)
- Exhibit 2072 (Declaration of Steven M. Reid)

The objected-to portions of these exhibits lack foundation for lay or expert opinion and/or contain inadmissible hearsay statements made outside of this proceeding submitted for the truth of the matter asserted.¹

Petitioner timely objected to these exhibits in Objections to Evidence filed on Feb. 16, 2024. *See* Paper 66. For the reasons described below, the identified portions of Exhibits 2071 and 2072 should be excluded from evidence in this proceeding.

Portions of Exhibit 2071 Should be Excluded

First, Paragraphs 67, 80–84 of Exhibit 2071 (Declaration of Chris Temovsky) should be excluded under FRE 602, 701 because they include testimony for which the declarant lacks foundation to opine on the basis of Ddrops’

¹ Patent Owner’s pre-institution evidence includes much of the same objectionable material. However, Patent Owner did not rely on this pre-institution evidence in its post-institution papers.

praise or Mommy's Bliss' success. These paragraphs of Exhibit 2071 are cited at, for example, pages 61–62 of the POR. These paragraphs include statements such as “the above referenced awards occurred because of Ddrops' innovative features—specifically the use of the 1 drop method of administration,” “I attribute the decrease in Ddrops' market share ... to Mommy's Bliss changing its baby vitamin D product composition...” and “I attribute the financial successes to the innovation of formula and administration instructions contained in the Ddrops' Patented Product...” These paragraphs contain opinion testimony from a lay person that is not rationally based upon first-hand knowledge or observation. FRE 602, 701.

Patent Owner has not laid sufficient foundation to show that Mr. Temovsky can attribute the events he describes to the patented method of administration of a one-drop composition rather than, for example, the mere convenience of a one-drop composition regardless of whether the patented method of administration is used. For example, paragraph 83 recites several customer reviews that point to praise for features of the product that is not the specific patented method of administration of administering via a surface to suck or lick off (“just one drop vs the vitamin D we prescribed”; “free from any gross and unnecessary stuff (dyes, etc.)”; “taste and smell like nothing” “only require one tiny drop”; “baby actually enjoys the taste”; “drop in babies mouth directly”).

Second, Paragraph 69 and Exhibit R of Exhibit 2071 should be excluded under FRE 802 because they contain a statement in an article made outside of this proceeding that is relied upon for the truth of the matter asserted. These materials were cited at, for example, pages 60–61 of the POR. The statements are offered for the truth of the matter asserted. These paragraphs include the speculation by the authors of a journal article made outside this proceeding as to a suspected “reason for the popularity of Ddrops.”

Patent Owner has identified no applicable hearsay exceptions, and indeed, the above-identified exhibits also do not fall under any such exception. The “residual exception” of Federal Rule of Evidence 807 is illustrative, and does not apply here. The residual exception requires that a statement must: 1) have equivalent circumstantial guarantees of trustworthiness; 2) be offered as evidence of a material fact; 3) be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and 4) be in the interests of justice to admit. Fed. R. Evid. 807. The Federal Circuit has been clear that the residual exception to the hearsay rule is to be reserved for exceptional cases,” and is not “a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.” *See Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996), *as amended on reh’g in part* (Jan. 2, 1997)

(internal quotations omitted). The hearsay statements in Paragraphs 54 and 55 of Exhibit 2071 do not rise to this level of exceptionality and should be excluded.

Third, Paragraphs 46, 83, and Exhibits G and T of Exhibit 2071 should be excluded under FRE 802 because they contain statements made outside of this proceeding that are relied upon for the truth of the matter asserted. These materials were cited at, for example, pages 38, 56, 57, 60, and 62 of the POR. The statements contain customer reviews that are offered for the truth of the matter asserted. With only some exceptions set forth in the Federal Rules of Evidence, but which are not applicable here, hearsay statements are deemed unreliable and should not be admitted into evidence. Consistent with this policy, Paragraphs 46, 83, and Exhibits G and T of Exhibit 2071 should be excluded.

Portions of Exhibit 2072 Should be Excluded

Paragraphs 106-111 and 112-116 of Exhibit 2072 (Declaration of Steven M. Reid) should be excluded under FRE 702 because Dr. Reid does not meet the qualifications for this expert testimony under Rule 702. He is not an expert in a relevant field for the cited testimony and therefore reaches conclusions that are conclusory and based on unreliable facts, data, or methods. The testimony in these paragraphs is outside the scope of Dr. Reid's purported areas of expertise that will not assist the trier of fact. These paragraphs should be excluded.

First, Paragraphs 106-116 recite a chronology of product development, market share, and the relative commercial success and decline related to Ddrops' vitamin D product and Petitioner's vitamin D product. Dr. Reid concludes from this that Petitioner "copied" Ddrops' vitamin D product. *See* Ex. 2072, ¶¶ 106, 117. But Dr. Reid is a chemist and not an economist or industry expert. He is only qualified to opine on the characteristics of the product compositions, not their impact in the marketplace. FRE 702. Unsurprisingly then, he does not reliably apply the facts of the case. He fails to consider, for example, that Ddrops' market share dropped prior to the introduction of Petitioner's reformulated product, or other marketplace explanations for the events that occurred. *See* Paper 74 at 26–27.

Second, Paragraphs 112-116 of Exhibit 2072 also parrot statements made by Ddrops president Chris Temovsky about the chronology of product development, market share, and the commercial success related to Ddrops' vitamin D product and Petitioner's vitamin D product. Dr. Reid ultimately opines that these events were due to the "innovative composition and administration method that delivers an effective and therapeutic dose of the Patented Product." *See, e.g.*, Ex. 2072, ¶116. But Dr. Reid is a chemist, not an economist or industry expert, and is not qualified to reach this conclusion. FRE 702. Unsurprisingly, Dr. Reid's basis for this conclusion is not his own expertise but almost exclusively the testimony of Mr. Temovsky. As set forth above, Mr. Temovsky's testimony on these issues lack

personal knowledge and/or rely upon inadmissible hearsay. Moreover, Dr. Reid’s chronology relies on testimony of Petitioner’s employee, Stephanie Medina, who “can’t recall the exact year” Petitioner introduced a change to its composition and speculated “2020 or 2021.” *See, e.g.*, Ex. 2072, ¶116 (citing Ex. 2027 at 82:12-16.) But it is undisputed that Petitioner only introduced the change in 2021—after Ddrop’s 2020 decline in market share. *See* Paper 74 at 26–27. Paragraphs 112-116 of Dr. Reid’s testimony is not the product of an expert qualified to opine on the issues therein and as a result merely parrots inadmissible testimony and argument. FRE 702.

Date: May 22, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§42.6(e), the undersigned certifies that on May 22, 2024, a complete and entire copy of Petitioner's Motion to Exclude Evidence was provided via email to the Patent Owners by serving the correspondence email address of record as follows:

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