

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 IPR 2023-00726
Patent 9,066,958

PATENT OWNERS' MOTION TO EXCLUDE

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2001	Docket Sheet: 1:22-cv-00332-GBW Ddrops Company. et al. v. MOM Enterprises, LLC, Gregory B. Williams, presiding, Date filed: 03/16/2022, Date of last filing: 06/22/2023. Accessed through PACER, June 23, 2023.
2002	CIVIL DOCKET FOR CASE #: 0:15-cv-03981-WMW-SER, U.S. District Court, U.S. District of Minnesota (DMN), Accessed through PACER, June 23, 2023.
2003	CIVIL DOCKET FOR CASE #: 0:16-cv-04278-JNE-TNL, U.S. District Court, U.S. District of Minnesota (DMN), Accessed through PACER, June 23, 2023.
2004	Declaration of Chris Temovsky, dated June 28, 2023, with attached Exhibits A-D
2005	Claim Construction Order, Case 1:22-cv-00332-GBW, Ddrops Company, et al. v. MOM Enterprises, LLC, Gregory B. Williams, presiding, D.I. 72, Filed 06/02/23
2006	MARC STANDARDS, Library of Congress Network Development and MARC Standards Office, MARC 21 Format for Bibliographic Data, https://www.loc.gov/marc/ last accessed June 23, 2023
2007	U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, Interpreters and Translators, https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm , last accessed June 23, 2023.
2008	Declaration of Reinhold Vieth, dated June 28, 2023, with attached Exhibits A-B
2009 WITHDRAWN	Declaration of Warren D. Woessner WITHDRAWN
2010	Transcript of Markman Hearing, June 1, 2023, Case No. 1:22-cv-00332-GBW Ddrops Company, et al. v. MOM Enterprises, LLC, Gregory B. Williams, presiding

Exhibit Number	Description
2011	Oxford English Reference Dictionary, 2 nd Edition, the Oxford University Press, 1996 (Definitions of adhere and viscosity)
2012	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF ALAN M. ANDERSON
2013	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF L. REAGAN FLORENCE
2014	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF MATTEW PALEN
2015	Transcript of 27 Oct. 2023 Board Conference Call
2016	EXPUNGED
2017	EXPUNGED
2018	[Proposed] PROTECTIVE ORDER
2019	REDLINE OF [Proposed] PROTECTIVE ORDER AGAINST DEFAULT PROTECTIVE ORDER
2020	[REVISED PROPOSED STIPULATED] PROTECTIVE ORDER
2021	REDLINE OF [REVISED PROPOSED STIPULATED] PROTECTIVE ORDER AGAINST DEFAULT PROTECTIVE ORDER
2022	Rule 30(b)(6) Deposition Transcript of Innovative Labs, taken September 6, 2023, and Exhibits 1-23
2023	Deposition Transcript of Stephen Benyunes, taken December 5, 2023
2024	Deposition Transcript of David J. Sherman, taken December 5, 2023
2025	Deposition Transcript of Robert O. Williams, III, taken December 7, 2023

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2026	Deposition Transcript of Yasmin Kaderali, taken January 30, 2024
2027	Deposition Transcript of Stephanie Medina, taken February 1, 2024
2028	Benyunes Deposition Ex. 5
2029	Benyunes Deposition Ex. 6
2030	Benyunes Deposition Ex. 7
2031	Benyunes Deposition Ex. 8
2032	Sherman Deposition Ex. 9
2033	Sherman Deposition Ex. 10
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2041	Williams Deposition Ex. 23
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2043	Kaderali Deposition Ex. 25
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2065	Medina Deposition Ex. 47
2066	Medina Deposition Ex. 1027
2067	Email Chain, dated November 10 & 11, 2020
2068	Declaration of Reinhold Vieth, dated February 3, 2024, and Exhibits A-F
2069	Declaration of Paul Horowitz, dated February 5, 2024, and Exhibits A-M
2070	Declaration of Casey MacKenzie, dated February 7, 2024, and Exhibits A-B
2071	Declaration of Chris Temovsky, dated February 8, 2024, and Exhibits A-X
2072	Declaration of Steven M. Reid, dated February 9, 2024, and Exhibits A-B
2073	Exhibit 2073 to the Deposition of J. Usha Raj, MD, MHA
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2078	Redacted Exhibit 2068 - Declaration of Ronald Vieth
2079	Redacted Exhibit 2079 - Declaration of Chris Temovsky
2080	Redacted Exhibit 2072 - Declaration of Steven M. Reid
2081	Deposition of Julia Usha Raj, M.D. taken May 1, 2024
2082	Errata Sheet – Deposition of Reinhold Vieth, Ph.D. taken April 2, 2024
2083	Errata Sheet – Highly Confidential – Deposition of Chris Temovsky taken March 27, 2024
2084	Errata Sheet – Deposition of Paul Horowitz, MD taken March 19, 2024
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<i>Coastal Indus., Inc. v. Shower Enclosures America, Inc.</i> , IPR2017-00573, Paper 27 (PTAB Feb. 20, 2018)	11
<i>Dairyland Power Coop. v. United States</i> , 2008 U.S. Claims LEXIS 467 (Fed. Cl. June 20, 2008)	1
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<i>International Business Machines Corp. v. Intellectual Ventures II, LLC</i> , IPR2015-01322, Paper 15 (PTAB Feb. 2, 2016)	11

<i>Jackson v. Wexford Health Sources, Inc.</i> , 2023 U.S. Dist. LEXIS 22419 at *10-16 (S.D. Ill. Dec. 15, 2023).....	7
<i>Legend3D, Inc. v. Prime Focus Creative Servs. Can. Inc.</i> , IPR2016-00806, Paper 73 (PTAB Sept. 18, 2017)	12
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I. INTRODUCTION

Patent Owners move to exclude expert testimony and new evidence submitted by Petitioner in connection with its Reply that is not responsive to any argument raised by Patent Owners in their Response. Many of the new exhibits submitted by Petitioner are inadmissible. Indeed, some of the new exhibits are not even cited or referenced by Petitioner in its Reply or by any expert. Petitioner's expert testimony, new evidence and inadmissible exhibits therefore should be excluded.

II. RAJ'S TESTIMONY IS INADMISSIBLE AND SHOULD BE EXCLUDED UNDER *DAUBERT*

The Board "may exclude evidence that is based upon unreliable principles or methods, legally insufficient facts and data, or where the reasoning or methodology is not sufficiently tied to the facts of the case." *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1295 (Fed. Cir. 2015); *accord Apple Inc. v. Corephotonics, Ltd.*, 81 F.4th 1353, 1360 (Fed. Cir. 2023). "*Daubert* and Rule 702 are safe-guards against unreliable or irrelevant opinions." *i4i Ltd. v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010). "The proponent of the evidence has the burden of proving the admissibility of the expert testimony by a preponderance of the evidence." *Dairyland Power Coop. v. United States*, 2008 U.S. Claims LEXIS 467, at *30 (Fed. Cl. June 20, 2008).

A. Dr. Raj is Unqualified to Opine on the Harder Translations

Raj does not speak or read German. Ex. 2081, 28:6-10. She has no training in linguistics. *Id.*, 28:16-18. This is the first time she has been asked to “opine on a translation of an original document in German.” *Id.*, 29:14-21. Raj admitted she “cannot opine whether the translation is accurate or not because I do not know the original language.” *Id.*, 30:3-11.

Despite the foregoing, Raj’s declaration only quotes the Sherman translation. At her deposition, Raj testified she relied on Sherman, “Because it is to my reading the most complete and most recent translation.” *Id.*, 44:7-13. Asked why she picked Sherman over Petitioner’s other translations, she stated, “he’s added something there” to the Tinsworth translation. *Id.*, 47:3-15; 48:3-7. In other words, she picked Sherman merely because his translation is longer and more recent than Tinsworth. Raj never applied any technical methodology or relied on any skills or training when picking the Sherman translation. Her opinions and testimony regarding the various translations lack foundation and offer no insight to the Board regarding whether the disclosures in Harder are clear and unambiguous. *See, e.g., MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159, 1172 (Fed. Cir. 2015) (conclusory expert testimony does not qualify as substantial evidence). Therefore, the Board should exclude all opinions of Raj regarding which translation of Harder is more complete or more accurate or how it would be understood. *See Daubert v. Merrill Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 592-93 (1993) (the Board must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”)

B. Raj’s Opinion About How a Pediatrician Might Understand Harder is Irrelevant

Raj has testified in medical malpractice cases, but has never testified in a patent action. Ex. 2081, 31:10-14. *See also id.*, 31:15-32:1 (never previously testified in any case involving vitamin D or its administration to infants or children). Not surprisingly, therefore, her declaration is silent on obviousness, motivation to combine, level of ordinary skill in the art or any other invalidity-related issue.

Here, the Board has determined that a POSITA “would have a doctorate degree in Pharmaceutics or a related field with several years of experience in formulating compositions of and delivering medicines and nutritional supplements.” Paper 10 at 13. In her declaration, however, Raj opines how a pediatrician would understand the instructions from the Sherman translation of Harder. Ex. 1040, ¶14. A pediatrician does not meet the Board’s definition for a POSITA. Raj’s opinion thus is irrelevant. *See AZ v. Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013) (“[Evidence that] simply does not tend to prove a fact that is of consequence to the action[] ... is not relevant.”) (citation omitted).

Even if Raj’s opinion were somehow relevant, it is classic *ipse dixit*. She merely provides a conclusion devoid of any analysis or supporting documents. Raj is not a “typical” pediatrician, but since the 1980s a neonatal specialist. Ex. 2081, 16:16-25. She does not have a pediatric clinic and does not “see a general baby.” *Id.*, 16:4-15. Other pediatricians consult with her on unique problems. *Id.* Thus, while Raj has training and experience substantially above that of a typical pediatrician, she provides no bridge of analysis between her opinion and that of a typical pediatrician. The Board cannot simply assume that Raj is qualified to provide an opinion on what a typical pediatrician might understand. Her opinion is speculative, conclusory and lacks foundation.

C. Raj’s Testing of “Munchkin” Brand Baby Spoons is Irrelevant

After being retained, Raj received an unsolicited package from Petitioner’s counsel containing a bottle of Baby Ddrops and “12 Munchkin Soft Tip Infant Spoons.” Ex. 1040, ¶s15-16. Raj conducted an experiment using the Baby Ddrops product and the Munchkin spoons. She did not “use multiple spoons.” Ex. 2081, 110:18-21. In preparing her opinions, Raj never looked at the ‘958 Patent. *Id.*, 51:24-52:2. When asked if she knows the earliest priority date of the ‘958 Patent, she testified, “I vaguely remember it’s in the 2000s.” *Id.*, 52:3-23.

The Munchkin spoon used in Raj’s experiments was first available on January 9, 2012, approximately six years *after* the priority date of the ‘958 Patent. *See* Ex.

1041, p. 3; Ex. 2081, 89:16-90:3. Raj’s experiments and opinions based thereon are clearly irrelevant. *See Genetics Inst., LLC v. Novartis Vaccines & Diagnostics, Inc.*, 655 F.3d 1291, 1307 (Fed. Cir. 2011) (the §103 analysis remains properly focused “at the time the invention was made”).

After learning that the Munchkin spoon postdates the patent application, Raj tried to expand her opinion to apply to any “generic, small plastic spoons which has small edges.” Ex. 2081, 95:16-96:12. In trying to explain the new scope of her opinion, Raj testified:

When you say based on my experiment, I’ll repeat again, that [*sic*] I did was with the Munchkin spoons. But my opinion is that any spoon that is like the Munchkin spoon, I guess, I didn’t say it, but any spoon that’s small and smooth that’s not going to hurt the baby’s mouth will function quite well.

Id., 97:1-7. Raj offers no analysis or data to show how her test results from the Munchkin spoon can be extrapolated to the entire universe of small generic spoons. Her newly expanded opinion is again merely *ipse dixit*. Raj’s declaration and testimony should be stricken in its entirety.

III. WILLIAMS' EVIDENCE SHOULD BE EXCLUDED OR GIVEN LITTLE WEIGHT

The evidence of Petitioner's expert, Williams, should be excluded or given little weight by the Board. Petitioner's counsel improperly blocked Patent Owners' counsel from adequately and properly examining Williams concerning the facts and information he was provided in forming his opinions. Williams revealed that he did little or no work himself regarding his opinions or declaration. Rather, Petitioner's counsel spoon-fed him. He also revealed significant defects in his opinions.

Federal Rule of Civil Procedure 26(b)(4)(C) provides a "*limited* work-product protection for collaborative interactions between counsel and testifying experts." *Davita Healthcare Partners, Inc. v. United States*, 128 Fed. Cl. 584, 589 (Fed. Cl. 2016) (emphasis added). *See* Fed. R. Civ. P. 26, 2010 Advisory Comm. Note (the rule does "not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions"). This limited protection does *not* extend to communications between the expert and counsel that "identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or ... identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Fed. R. Civ. P. 26(b)(4)(C)(ii) & (iii). *See Davita*, 128 Fed. Cl. at 589; *Medicines Co. v. Mylan Inc.*, 2013 U.S. Dist. LEXIS 82964, *11 (N.D. Ill. June 13,

2013). *See also* Fed. R. Civ. P. 26, 2010 Advisory Comm. Note (the protection “does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions”).

The development, foundation or basis for an expert’s opinions, or information provided to the expert, are subject to discovery. *Jackson v. Wexford Health Sources, Inc.*, 2023 U.S. Dist. LEXIS 22419, *18 (S.D. Ill. Dec. 15, 2023); *Ross v. City of Rockford*, 2018 U.S. Dist. LEXIS 51398, *4-5 (N.D. Ill. Mar. 27, 2018). This includes facts or information provided to the expert, “even if in the end he does not rely on them in formulating his expert opinion, because such materials often contain effective ammunition for cross-examination.” *Fidelity Nat. Title Ins. Co. of New York v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005). *Accord Jackson*, 2023 U.S. Dist. LEXIS 22419, *11-15. Further, yes/no questions are preliminary and not protected. *See id.* at *16-18; *Hood v. City of Chicago*, 2021 U.S. Dist. LEXIS 263257, *15-16 (N.D. Ill. Mar. 30, 2021).

Despite the established limited scope of Rule 26(b)(4)(C), Petitioner’s counsel repeatedly instructed Williams not to answer essential and proper questions based on disingenuous claims of privilege. *See, e.g.*, Ex. 2025, 43:6-16; 48:2-8; 49:5-11; 51:10-16; 58:7-13; 61:12-62:4; 63:17-22; 68:8-15; 67:8-13; 75:12-16; 76:6-19; 77:8-11; 79:6-11; 81:9-16. For example, Williams was instructed not to answer the extent to which he reviewed prior art cited in his declaration or what constituted

prior art or what he was told regarding prior art. *Id.*, 55:17-59:7; 58:7-23; 72:14-73:1; 92:4-8; 95:7-11. He was instructed not to answer what he was told regarding factors considered in determining the level of ordinary skill in the art, even though his understanding came directly from counsel. *Id.*, 63:3-21; 64:8-22. Williams was instructed not to answer questions about what documents he was given or what information he was told regarding the factors for determining obviousness or secondary indicia. *Id.*, 75:3-16; 75:20-79:14; 93:4-10. He was instructed not to answer if he had spoken with any of Petitioner's employees in preparing or revising his declaration. *Id.*, 59:12-18. Williams was instructed not to answer whether he was provided any legal summaries to review in preparing or revising the draft declaration given to him by Petitioner's counsel. *Id.*, 61:22-61:4. He was instructed not to answer what he was told regarding the prior art references or the combinations that Petitioner's counsel gave him, even though he relied on what he was told in forming his opinions. *Id.*, 72:14-75:16.

Williams was instructed not to answer questions regarding how much of his declaration was initially provided or prepared by Petitioner's counsel. *E.g., id.*, 45:7-14; 48:2-8; 49:5-9; 61:12-18; 63:8-21; 72:6-9; 111:11-22. He was instructed not to answer how much of his 2017 declaration was simply copied to create his declaration in this matter. *Id.*, 47:2-7. He was instructed not to answer the questions about inconsistencies between 2017 declaration and his 2023 declaration. *Id.*, 66:1-10;

81:9-16; 82:10-16; 83:7-13; 85:4-8; 85:23-86:9; 104:17-105:2; 106:3-107:1. He was instructed not to answer questions about the differences between the competing translations of the Harder reference and what he was told regarding them. *Id.*, 97:7-14; 98:15-19. He was instructed not answer what he was told regarding the Wolf reference. *Id.*, 129:14-22. Williams was also instructed not to state who provided him with a document to review that is not referenced in his declaration but was provided to him the night before his deposition. *Id.*, 169:23-170:6. He was instructed not to answer numerous yes/no questions. *E.g., id.*, 81:9-19, 82:10-17; 83:7-16.

Petitioner's counsel instructed Williams not to answer proper questions so many times that his deposition transcript is more a recitation of instructions not to answer than substantive answers. Williams was instructed not to answer approximately ninety (90) times!

To the extent Petitioner's counsel permitted him to answer, Williams revealed he did little (if any) work himself regarding his opinions or declaration. Rather, Petitioner's counsel spoon-fed him. Parts of Williams' declaration clearly were copied from a 2017 declaration prepared for use in a different patent infringement action brought by Ddrops. *Id.*, 19:24-20:1-24; 21:4-10; 22:1-23:9; 30:13-31:8; 37:16-24; 45:22-46:2; 46:16-47:16; 51:10-16.

Williams revealed significant defects in his opinions. Petitioner's counsel provided him with the five prior art references identified in his report. Petitioner's

counsel told Williams the three prior art combinations asserted against claims 1 and 3-5. He did not search for prior art on his own. *Id.*, 19:24-20:16; 21:4-10; 22:3-15. He never even reviewed the Petition or the Board's Decision instituting this proceeding. *Id.*, 66:15-23.

Williams testified that without the later-doctored translations of Harder that added the words "lick off," he cannot render his opinions regarding obviousness. *Id.*, 99:5-100:21; 120:10-19. Despite the importance of those words, Williams admitted he did not know what would be required for an infant to receive a nutritionally-sufficient dose of vitamin D from a spoon or surface. He never considered the nutritional or therapeutic dose limitation in the claims of the '958 Patent. *Id.*, 137:4-138:9. Williams admitted that if a drop of liquid drips or rolls down into a spoon, it no longer is available to be administered. *See id.*, 154:25-155:6. Williams repeatedly disqualified himself by stating he would have to speak with a clinician, such as a physician, in order to answer questions. *Id.*, 138:17-24; 139:1-6; 139:23-140:10; 144:23-145:3; 145:21-146:6.

Williams opinions and testimony are so riddled with gaps, deficiencies and instructions not to answer that the Board should disregard his evidence. *See Fed. R. Civ. P. 37(b)(2)* (court may prohibit party that violates discovery rules from introducing designated matters in evidence). *Cf. Howard v. City of Durham*, 2021 U.S. Dist. LEXIS 211307, *23 (M.D.N.C. Nov. 2, 2021) (Fed. R. Civ. P. 26 bars

“counsel from “ghost writing” an expert’s report”). MOM’s counsel improperly precluded Patent Owners’ counsel from obtaining legitimate “fodder” for cross-examination. The Board should not permit Petitioner’s counsel to blatantly stonewall the obtainment of important testimony – undoubtedly because the truth would be more damning than a non-answer. Due to the improper and numerous instructions not to answer, Williams effectively was not available for cross-examination, and so his direct testimony should not be considered. *See Coastal Indus., Inc. v. Shower Enclosures America, Inc.*, IPR2017-00573, Paper 27 at 4 (PTAB Feb. 20, 2018); *International Business Machines Corp. v. Intellectual Ventures II, LLC*, IPR2015-01322, Paper 15 at 3 (PTAB Feb. 2, 2016).

Even if the Board does not entirely exclude William’s evidence, it should be given little weight. The Board may draw an adverse inference from a witness’s refusal (or instruction not) to answer questions. *Maxlinear, Inc. Cresta Technology Corp.*, IPR 2015-00592, Paper 72 at 14 (PTAB Aug. 11, 2016) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976)). It should do so here. Because Williams’ declaration and opinions lack credibility, the Board should give them, at a minimum, little or no weight. *See Acco Brands Corp. v. Think Products, Inc.*, IPR2015-01168, Paper 40 at 30-31 (PTAB Oct. 11, 2016) (Board “determined and ascribed the appropriate weight to all proffered evidence”). The Board should not permit Petitioner to profit from improper instructions and Williams’ spoon-fed report.

IV. PETITIONER’S REPLY EXHIBITS SHOULD BE EXCLUDED

Many of Petitioner’s exhibits submitted with its Reply should be excluded. Patent Owners timely objected to Petitioner’s untimely exhibits and evidence. *See* Paper 77. Petitioner’s belated submissions are simply attempts to backfill the record and bolster its deficient invalidity arguments. Petitioner’s new exhibits are inadmissible, improper, and would cause substantial prejudice to Patent Owners.

A petitioner “may not submit new evidence or argument in reply that it could have presented earlier.” *See* 37 C.F.R. §42.23(b). Considering new grounds at a late stage in an IPR may constitute reversible error. *M&K Holdings, Inc. v. Samsung Elecs. Co.*, 985 F.3d 1376, 1385 (Fed. Cir. 2021). The rules ensure that the patent owner has notice of and a fair opportunity to meet and respond to the alleged grounds of invalidity. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). Submitting new evidence in a reply that could have been raised earlier indicates a new ground has been raised. *See* Consolidated Trial Practice Guide (“CTPG”) at 73, 74 (Nov. 2019); *accord* 37 C.F.R. §42.23(b). New evidence, presented without prior authorization, should be excluded. CTPG at 73; 37 C.F.R. §42.23(b).

The Federal Rules of Evidence govern IPRs. *Legend3D, Inc. v. Prime Focus Creative Servs. Can. Inc.*, IPR2016-00806, Paper 73 at 8-9 (PTAB Sept. 18, 2017); *see also* 37 C.F.R. §42.62. A party may submit a motion to exclude inadmissible

evidence, describing “why the evidence is not admissible (e.g., relevance or hearsay).” CTPG at 73.

Here, Petitioner’s new evidence could have been presented earlier to make out its *prima facie* case of invalidity. The Board should not consider such evidence now. Petitioner’s new exhibits and evidence were submitted without prior authorization, causing prejudice to Patent Owners.

Further, because many of Petitioner’s newly submitted exhibits violate the Federal Rules of Evidence, they are inadmissible and their admission would be highly prejudicial and improper. As explained below, the following exhibits should be excluded from the record.

Exhibits 1042-1046: These exhibits are short excerpts allegedly from a variety of dictionaries and third-party translation websites containing alleged German definitions. But these uncertified and unauthenticated exhibits have no foundation and constitute hearsay for which no exception applies. *See* Fed. R. Evid. 801, 802, 901. Moreover, none of Petitioner’s experts relied on these exhibits in preparing their opinions, so no hearsay exception applies. *See* Fed. R. Evid. 703. *See also* 37 C.F.R. §42.23(b).

Patent Owners’ did not submit any competing or additional translations of the Harder reference in their Response. They relied solely on Petitioner’s original, untainted translation by Tinworth. *See* Ex. 1021. Accordingly, these exhibits are

untimely because they were produced to bolster Petitioner's invalidity arguments rather than to reply to an issue newly raised in Patent Owner's Response.

Exhibits 1026 & 1027: These new exhibits allegedly show Petitioner's product drawings and specifications. Exhibit 1026 contains unauthenticated hearsay handwriting and should be excluded for that reason alone. *See* Fed. R. Evid. 801, 802. The relevance of these exhibits is unknown, because they were not cited in Petitioner's reply or any expert declaration. *See generally* Paper 74. No hearsay exception applies. *See* Fed. R. Evid. 703. Regardless, they lack foundation. *See* Fed. R. Evid. 901.

Exhibits 1030-1032, 1034 & 1035: These exhibits allegedly show a variety of website screenshots of advertisements for Ddrops' and Petitioner's products. Exhibits 1030 and 1031 have been "annotated" by Petitioner. *See* Paper 74 at 17. Exhibits 1031 and 1032 are for unrelated, different Ddrops products ("Tummy Relief Liquid Drops") and so are not relevant. *See* Fed. R. Civ. P. 402, 403. Exhibits 1034 and 1035 are unauthenticated screenshots of MOM's advertisements. They lack foundation under Fed. R. Evid. 901 and also constitute hearsay to which no exception applies. *See* Fed. R. Evid. 801, 802.

Exhibits 1029 and 1048: These exhibits supposedly are copies of articles that are not cited in Petitioner's Reply or referenced in any deposition. *See generally* Paper 74. They lack authentication. Fed. R. Evid. 901. They also are hearsay for

which no exception applies. *See* Fed. R. Evid. 801, 802. None of Petitioner's experts relied on them in their opinions and so they are inadmissible for that reason as well. *See* Fed. R. Evid. 703; 37 C.F.R. §42.23(b).

Exhibit 1047: Petitioner submitted an email from Patent Owner's counsel to Petitioner's counsel. Why Patent Owners decided not to depose Tinworth is of no moment. Patent Owners have no burden of proof in this proceeding. The email does not prove or disprove an issue in this case and therefore is not relevant. *See* Fed. R. Evid. 402, 403. The email also is unauthenticated and inadmissible hearsay. *See* Fed. R. Evid. 801, 901.

V. CONCLUSION

For the foregoing reasons, Patent Owners respectfully request that the Board grant their motion to exclude in its entirety.

Dated: May 22, 2024.

Respectfully submitted,

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Counsel for Patent Owners

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Motion to Exclude is being served on May 22, 2024, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petition upon the following counsel of record for Petitioners:

David B. Conrad
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