

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 OPPOSITION TO
PATENT OWNERS' MOTION TO EXCLUDE**

Patent Owners' Motion to Exclude (Paper 95) should be denied. The Motion improperly tries to use the additional fifteen pages allowed for the Motion to argue the merits of exhibits rather than their admissibility. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012); *Vibrant Media, Inc. v. General Electric Co.*, IPR2013-00170, Paper 56 at 31 (Jun. 26, 2014).

At the outset, "there is a strong public policy for making all information filed in an administrative proceeding available to the public." *Liberty Mut. Ins. Co. v. Progressive Cas. Ins.*, CBM2012-00010, Paper 59, 40 (Feb. 24, 2014). The Board explained in *Caterpillar, Inc. v. Wirtgen Am., Inc.*, "[r]ather 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." IPR2017-02187, Paper 42, 15 (May 21, 2019) (citations and quotes omitted). Here, the Motion does not demonstrate that any objected-to evidence is unpersuasive, much less should be excluded.

Exhibit 1040: Declaration of Dr J Usha Raj

Dr. Raj's testimony is relevant and responsive to Patent Owners' experts. First, Patent Owners' miss the mark complaining of her supposed translation of Harder. Dr. Raj offers no opinions on the accuracy of any translations and explained the same in her deposition. EX2081, 27:17-28:5. And Patent Owners cite no direct testimony from Dr. Raj purporting to translate Harder or to assess the

accuracy of translations. Although Dr. Raj did examine Harder to confirm that it was related to the translations before proceeding, she did not purport to translate Harder herself. EX1040, ¶3 n.1; EX2081, 42:7-15.

Patent Owners' objections appear to stem from testimony it elicited during Dr. Raj's deposition. Dr. Raj had noted in her declaration that counsel had informed her that the Sherman translation, EX1007, was the primary translation Petitioner relied on in its petition. EX1040, ¶3. In response, Patent Owners chose to engage in an extensive argument with Dr. Raj during her deposition about which translation is more accurate. EX2081, 46:5-51:1, 54:16-60:20. Under questioning, Dr. Raj pointed out the obvious: if a supervising translator added something to a translation and declares under oath that it is now an accurate translation, as Sherman did, then the parties would probably go and check that translation to be sure. EX2081, 57:6-20. And they would also check with the first translator, Tinsworth, to see whether she agreed with the change—something Patent Owners did not do. EX2081, 57:21-60:21. But beyond that, she did not pass judgement on their accuracy.

Second, as the Board already found, Dr. Raj's opinions about how a pediatrician might understand the instructions in Harder responds to Patent Owners' pediatrician's testimony. Paper 89 at 12. Patent Owners asked Dr. Horowitz to opine on how a pediatrician might understand Harder. EX2069, ¶3

(“This testimony will respond to ... whether medications/supplements can effectively and consistently be administered via the tip of a spoon to an infant as described by the ‘Harder reference’.”) He argued that Harder’s method of using a spoon would not be “efficacious” and would be “suboptimal.” EX2069, ¶7. Dr. Raj responded by explaining how she was able to follow the steps for administration in Harder and concluded that it “would make it very easy to give it to a baby to lick off.” EX1040, ¶¶20-22. Dr. Raj need not be a POSITA to testify to this, as she is not opining on the scope or the application of claims. She is well-qualified to provide this opinion—Patent Owners concede she has training and experience well above that of a typical pediatrician. Paper 95 at 4.

Third, Dr. Raj’s opinion derived from the use of a “Munchkin” brand spoon is relevant. It does not matter whether this brand was available before the patent’s priority date. In her declaration she noted the properties of the brand that made it suitable for infants: it was a “smaller plastic spoon, which has smooth edges.” EX1040, ¶17. This allowed a baby to take the whole spoon into its mouth to suck or lick. *Id.* Dr. Raj did not need to perform scientific experiments or obtain original, decades-old products to confirm what is, essentially, common sense. Her opinion on using small spoons came in part from first-hand experience as a mother using spoons with her own kids and observing “hundreds of mothers” in India using spoons. EX2081, 90:14-91:11; 130:8-18; *Perfect Web Techs. Inc. v. InfoUSA*

Inc., 587 F.3d 1324, 1329 (Fed. Cir. 2009) (“[R]ecourse to logic, judgment, and common sense available to the person of ordinary skill in the art [does] not necessarily require explication in any reference or expert opinion.”); *Centricut, LLC v. Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) (“In many patent cases expert testimony will not be necessary because the technology will be easily understandable without the need for expert explanatory testimony.”) (citation omitted). In any event, relevancy of her opinion “goes to the weight of the evidence rather than its admissibility” *Merck Sharp & Dohme Corp. v. Pfizer Corp.*, IPR2017-02131, Paper 59, 79 (Mar. 13, 2019).

Exhibit 1004: Declaration of Dr. Bill Williams III, Ph.D.

Patent Owners do not challenge the admissibility of Dr. William’s testimony. Instead, they improperly seek to strike Dr. William’s testimony for alleged deficiencies at deposition. This is a continuation of its argument about the sufficiency of Dr. Williams’ cross-examination in its Response. *See* Paper 61 at 23-27. A motion to exclude is not the place for additional briefing to advance this argument. Patent Owners needed to obtain the Board’s prior authorization if it wanted to move to strike. 37 C.F.R. § 42.20(b). They did not. On this basis alone Patent Owners’ Motion should be denied. *See Apple, Inc. v. Parus Holdings, Inc.*, IPR2020-00686, Paper 37 at 40-41 (Sept. 9, 2021) (denying motion to exclude

challenging exhibit as new evidence where Patent Owners should have and did not move to strike).

Moreover, Patent Owners have not shown that it was unable to obtain information from Dr. Williams that it (1) was justified in seeking or (2) legitimate purpose. Although the Federal Rules of Civil Procedure do not apply here, the rule Patent Owners rely on does not authorize exclusion if the conduct was justified or harmless. Fed. R. Civ. P. 37. Patent Owners did not move to strike because they were not, in fact, prejudiced by anything improper.

First, the objections were justified to prevent inquiry into protected work product. As explained in Petitioner's Reply, counsel's insistence early in the deposition on asking questions that invaded protected attorney-expert collaboration prompted these proper objections. Paper 75 at 23–24; See *Adobe Inc. v. Rah Color Techs. LLC*, IPR2019-00627, Paper 59 at 7-8 (Dec. 12, 2019); 37 C.F.R. §42.51(b)(1)(iii). The objections began after Patent Owners began early with improper questions about preparation of declaration drafts and collaboration with counsel in this proceeding and a prior proceeding. EX2025, 37:3–41:9. Although the objections were not all perfect, they were motivated by this improper questioning. See, e.g., EX2025, 45:7-14 (“With regard to Exhibit 18, who prepared the first draft of that document?”), 48:2-49:15 (“[D]o you recall whether Exhibit 18 was prepared in the first case by counsel ... back in 2017 ... as occurred here?”).

The questions Patent Owners framed their objectionable questions to invade collaboration with counsel rather than to test the substance or methodology of Dr. William's work. The apparent goal, as the Response and the Motion demonstrated, was to manufacture a false story of a ghost-written declaration. *See* Paper 61 at 23–24 (“Williams revealed that he did little if any no work [sic] regarding his opinions or his report himself.”); Paper 95 at 9 (“Petitioner’s counsel spoon-fed him”). But Dr. William’s explicitly testified that the declaration was based on his conversations, his opinions, and his thoughts on the prior art, and that he made revisions before signing. *See, e.g.,* EX2025, 30:3-31:8 (“I was provided a first draft of my based on conversations I had, opinions that I expressed.”), *see also* 33:10-13, 34:18-36:9. Dr. Williams testified that the declaration accurately reflects his opinions, and that he would not have signed it otherwise. *See id.*, 31:1-8, 167:20-168:25.

Second, even if some objections were imperfect, there is no harm. Patent Owners try to argue that its questions implicate the weight the Board should give some of Dr. Williams’s opinions, but the fact that counsel assisted Dr. Williams in preparing his declaration does not affect their weight. The portions of testimony of which Patent Owners were primarily attempts to inquire about alleged similarities or “inconsistencies” between a declaration Dr. Williams signed in 2017 and the declaration prepared in the instant proceeding. Yet, despite having both

declarations, Patent Owners did not identify in their Response or Motion any result of comparing the two that could affect Dr. Williams' credibility. Patent Owners did not even submit the 2017 declaration as an exhibit to its papers. Although it argues that it wanted more "fodder" to try to allege that Dr. Williams' declaration was "ghost written," Paper 95 at 10-11, the testimony it received rebuts that. None of its attorney argument contradicts that the first draft was a product of Dr. William's own opinions, included his revisions, and the final version still reflected his opinions. EX2025, 30:3-31:8, 31:1-8, 33:10-13, 34:18-36:9, 33:10-13, 34:18-36:9, 167:20-168:25.

Patent Owners' other conduct, or lack thereof, also demonstrates that it did not need the information for a legitimate purpose. Patent Owners raised no concerns at the end of the deposition that more deposition time was needed because of any improper objections. EX2025, 176:19–178:12. It did not lodge any complaint with Petitioner after the deposition, either. It never requested Petitioner produce Dr. Williams for another deposition. Nor did it ever suggest it could not prepare its Response without the answers it sought. Patent Owners also never requested a conference with the Board to address any concern about the deposition, or to seek other relief. Instead, Petitioner's aim was only to gather "fodder" (whether by inquiring into the assistance in drafting or by being prevented from doing so) to present a false narrative about Fish and Dr. William's credibility. Had

Patent Owners timely raised its concerns with Petitioner or the Board, the proper remedy, if meritorious, would have been to grant Patent Owners more deposition time to add to the record—not to expunge information from the public record.

Patent Owners’ pursuit of a false narrative is exactly the reason the evidentiary rules preclude the discovery its questions sought. The procedural rules acknowledge that attorney assistance in drafting can be necessary in a proceeding like this. *See* Fed. R. Civ. P. 26(a)(2)(B) advisory committee’s note (1993) (the rule requiring a testifying expert to produce a report “does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with [some technical experts] this assistance may be needed.”). The Advisory Committee explained the rationale behind adding protection from discovery into expert-attorney collaboration and drafts as work product:

The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts—one for purposes of consultation and another to testify at trial—because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Fed. R. Civ. P. 26 advisory committee's notes (2010 amendments).

As predicted by the Advisory Committee, Patent Owners' conduct impeded Petitioner's later work. It was forced to adopt strategies to guard how it collaborated with Dr. Raj in preparing her declaration to avoid giving Patent Owners more "fodder" for its false narrative if it pursued the same line of improper questions with her. Unsurprisingly, Patent Owners did pursue those questions. *See, e.g.*, Ex. 2081, 23:21-22 ("Q. Did you write the first draft of your declaration and the following eight pages?") Throughout her deposition, Patent Owners tried to elicit testimony about who wrote which words in the draft. 25:7-14, 51:20-23, 75:6-19, 76:14-21, 78:25-79:7, 83:7-10, 88:4-8, 98:18-20, 116:21-24.

The issues Patent Owner has chosen to dispute in these proceedings—like whether an instruction to use spoon with an infant is "stupid"—are not complex matters that rise or fall on rigorous examination of a technical expert. *See, e.g.*, EX1007 ("Use of the oil is simple..."); *Wyers v. Master Lock Co.*, 616 F. 3d 1231, 1240 ("no expert opinion was required to support the obviousness determination, because the technology was easily understandable"). The Board is more than capable of reviewing Dr. William's testimony in view of the current record and providing it the appropriate weight in the analysis. Patent Owners' motion to exclude should be denied.

Petitioner's Reply Exhibits are Proper

Patent Owners argue that Petitioner's exhibits submitted with its Reply are "untimely." Paper 95 at 12. Once again, this is an improper motion to strike. Petitioner already moved to strike alleging new argument and evidence in its Reply, including portions of EX1040. *See* Paper 81. Patent Owners did not move to strike any other exhibits. The Board did not authorize Patent Owners to move to strike any exhibits, Paper 89, citing *Apple*, IPR2020-00686, Paper 37 at 40-41. *See Corephotonics, Ltd. v. Apple Inc.*, 84 F.4th 990, 1009 (Fed. Cir. 2023) (no prohibition of new evidence if responsive to the patent owner or the Board). Patent Owners' Motion to exclude exhibits as untimely should be denied. That said, Petitioner addresses below how each exhibit is responsive.

Exhibits 1042-1046 Should Not Be Excluded

Patent Owners objections to Exhibits 1042-1046 are misplaced. First, each establish a reasonable probability that they are what they are purported to. Authentication requires a reasonable probability that the document is what its proponent claims. *U.S. v. Cruz*, 352 F.3d 499, 506 (1st Cir. 2003). The authentication standard is slight. *U.S. v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013)

It is undisputed that Exhibits 1042-1044 are true and accurate copies of excerpts of dictionaries showing the meaning of German words, bearing the expected indicia of such a publication such as copyright dates and ISBN numbers.

It is undisputed that Exhibits 1045-1046 are true and accurate copies of webpages from Google Translate and Microsoft Bing containing a certain German text as an input bearing expected indicia such as logo and copyright markers. Each exhibit is therefore properly authenticated under Rule 901(a) because it contains “evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a); *See Trend Micro Inc. v. Cupp Computing AS*, IPR2019-00767, Paper 32, 11 (Aug. 25, 2020) (indicia of publication from recognized sources is sufficient “proof of their authenticity”); *Luxshare Precision Indus. Co., v. Bing Xu Precision Co.*, IPR2017-01657, Paper 47, 52 (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.”); *Hulu, LLC, v. Sound View Innovations, Inc.*, IPR2018-01039, Paper 29 at 17–18 (PTAB Dec. 20, 2019) (“[T]he indicia on the face of a reference, such as printed dates and stamps, are considered as part of the totality of the evidence.”) (precedential). There are no inconsistencies. And these exhibits contain trade inscriptions such as library stamps or trade logos and thus are self-authenticating. Fed. R. Evid. 902(7); *Biomarin Pharm. Inc. v. Genzyme Therapeutic Prods. Ltd.*, IPR2013-00537, Paper 79, 24 (Feb. 23, 2015).

Exhibits 1042-1046 are also not hearsay or untimely. Petitioner offers them only to corroborate certified translations whose accuracy was challenged in the

Response. Paper 74 at 10. Thus, they are offered not as truthful statements in their own right, but to show their effect on would-be translators attempting to translate German to English. FRE 801; *Biomarin*, IPR2013-00537, Paper 79, 25 (“Ex. 1002 is offered as evidence of what it describes to an ordinary artisan, not for proving the truth of the matters addressed in the document”)

Exhibits 1026 & 1027 Should Not Be Excluded

These exhibits are relevant, not hearsay, and authentic. Ms. Kaderali testified about EX1026. It was the carton packaging for Petitioner’s probiotic drops in 2015, and contained an instruction for “applying directly to breast during feeding,” which came from its manufacturer. EX2026 at 137:5-140:14. Because it preceded Petitioner’s vitamin D drops, it is not offered for its truth (or for its handwriting), but for its effect on Petitioner as an alternative source of Petitioner’s instructions rather than the “copying” of Ddrops’ product alleged in the Response. *Id.*; *see also* EX2027, 28:13-29:14. Ms. Medina testified about EX1027. It was the vitamin D product specification created with the formula manufacturer. EX2027, 91:19-94:22. Because it reveals that the manufacturer’s vitamin D3 component is already formulated in MCT oil, it is offered not for its truth but for its effect on Petitioner as an alternative source of Petitioner’s use of MCT in its composition rather than the “copying” of Ddrops’ product alleged in the Response. *Id.*

Exhibits 1030-1032, 1034 & 1035 Should Not Be Excluded

These exhibits are relevant, not hearsay and authentic. EX1030 is undisputedly an Amazon product page for Ddrops' patented vitamin D drops for infants. Its president, Chris Temovsky, recognized this page and testified about it. EX1038, 39:22-43:22. Its instruction to use a spoon attacks the credibility of Patent Owners and their declarants who contend that the claimed invention cannot be administered to an infant with a spoon. FRE 607. Paper 74 at 16-18. It is not hearsay because it offered in its capacity as an instruction for administration, not for the truth of the statement. FRE 801(c). It is also an admission of Patent Owners, who founded Ddrops, authorize Ddrops as an exclusive licensee, and remain co-owners of Ddrops. FRE 801(d)(2). Paper 4 at 2; EX1038, 15:4-16:19, 20:1-20:10; EX1039, 132:20-134:10. The page content is provided by Ddrops, not Amazon. EX1038, 43:2-18. There is no reason to question its trustworthiness and is the most probative evidence attacking Patent Owner's credibility. FRE 807. It speaks volumes that Patent Owner is trying to run from its own admissions.

EX1031 is an archived Ddrops product landing page from 2021. Once again, we have a party admission. FRE 801(d)(2). Mr. Temovsky recognized this page and testified about it. EX1038, 53:2-54:14. It is not hearsay because it is offered in its capacity as marketing to customers, not for its truth. FRE 801(c). It shows Ddrops did not previously market its product as organic (whereas Petitioner did),

rebutting Patent Owners' arguments attributing marketplace challenges to the patent rather than other competitive factors. Paper 74 at 26. It too falls under the residual exception. FRE 807. EX1030 and EX1031 are not "annotated." Petitioner indicated only that EX1030 was annotated in the Reply for use of a red arrow. Paper 74 at 17. The filed exhibits are unadulterated.

EX1032 is undisputedly an Amazon product page for another one-drop product from Ddrops. Mr. Temovsky recognized this page and testified about it. EX1038, 84:4-87:6. As with EX1030, its instruction to use a spoon attacks the credibility of Patent Owners and their declarants who contend that an infant cannot receive a drop by a spoon. FRE 607; FRE 801(c); It likewise is an admission of Patent Owner and falls under the residual exception. FRE 801(d)(2), 807.

As for EX1034 and 1045, Petitioners do not rely on them.

Exhibit 1029 and 1048 Should Not Be Excluded

EX1029 is a descriptor of keywords used by the National Library of Medicine for Harder. It is cited in the reply. *See* Paper 74 at 9. It shows that the keywords relate to the first few months of newborn care and to the prevention of diseases. This rebuts Patent Owners' argument that a POSITA would not look to Harder. *Id.* at 8-9. As the .gov URL confirms, it is a government publication and thus self-authenticating and not hearsay. FRE 902(5); FRE 803(8). It is offered as evidence of what it describes to an ordinary artisan searching for prior art, not for

proving the truth of the statements. FRE 801(c). There also is no requirement than an expert must cite to it. Rather, it corroborates Ms. Munford, who testified as to Harder's accessibility by these keywords. EX1025, ¶15.

EX1048 is a journal article from the periodical Journal of Perinatal Education and is self-authenticating. FRE 902(6). It also is cited in the Reply. Paper 74 at 18. It is offered to demonstrate to a POSITA that using a spoon with infants would be common sense, and therefore offered for its effect on the listener. *Id.*; *Biomarin*, IPR2013-00537, Paper 79, 25 ("Ex. 1002 is offered as evidence of what it describes to an ordinary artisan, not for proving the truth of the matters addressed in the document").

Exhibit 1047 Should Not Be Excluded

Patent Owners admit that EX1047 is an email from Patent Owners' counsel to Petitioner's counsel, and therefore authentic and not hearsay. FRE 801(c); 901. The Board can evaluate from this whether Petitioner's voluntary decision to not depose the one translator it exalts as imperfect was an attempt to prevent unfavorable evidence from becoming part of the record in this proceeding. *Merck Sharp & Dohme Corp. v. Pfizer Corp.*, IPR2017-02131, Paper 59, 79 (Mar. 13, 2019) (relevancy goes to weight not exclusion).

Date: May 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 Petitioner's Opposition to Patent Owners' Motion to Exclude was provided via email to the Patent Owners by serving the correspondence email address of record as follows:

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