

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' RESPONSE TO PETITIONER'S
MOTION TO EXCLUDE EVIDENCE**

I. INTRODUCTION

Patent Owners submit this memorandum in opposition to Petitioner's Motion to Exclude Evidence (Paper 94). Petitioner's motion is entirely without basis. No part of the previously-submitted declaration of Mr. Chris Temovsky, the co-president of Ddrops Company ("Ddrops") – the exclusive licensee of the '958 Patent – should be excluded. Mr. Temovsky has years of experience operating Ddrops. As co-president, no person is more qualified than he is to provide lay opinion regarding the impact in the market and specifically on Ddrops' sales than him. None of the documents to which he refers in his declaration are inadmissible. Similarly, nothing in Dr. Steven Reid's declaration is objectionable or inadmissible. Dr. Reid is well-qualified to provide his analysis and opinions in this proceeding. At best, Petitioner's objections to the testimony and evidence of Mr. Temovsky and Dr. Reid go to the weight of this evidence, not its admissibility. The Board therefore should deny Petitioner's motion to exclude evidence in its entirety.

II. NO PART OF MR. TEMOVSKY'S DECLARATION SHOULD BE EXCLUDED

Petitioner first objects to paragraphs 67 and 80-84 of Mr. Temovsky's declaration (Exhibit 2071) based on Federal Rules of Evidence 602 (personal knowledge) and 701 (opinion testimony of lay witnesses). *See* Paper 94 at 1-2. Petitioner's argument is without merit.

As detailed in his declaration, Mr. Temovsky received an undergraduate degree in biology and an MBA in marketing and finance from Queens University. Ex. 2071, ¶3. He has over 35 years' experience in the pharmacy, health, wellness and vitamin supplement industry. He has "often been tasked with understanding the purchasing and consumption behaviors of consumers regarding products and supplements." He then uses this information to make marketing and advertising decisions, as well as future business development and product distribution determinations. *Id.*, ¶4. His experience in the pharmaceuticals and related industries is extensive. *Id.*, ¶s5-6.

Since July 2008, he has been co-president of Ddrops, the exclusive licensee under the '958 Patent. His areas of responsibility include overseeing sales, marketing, monitoring competitor activities, and global distribution of its products. He also monitors both Ddrops' and competitors' market data in the US and Canada. *Id.*, ¶s7-8, 15-16. As co-president, he has access to, and regularly relies on, various services that provide sales and market share information, including services from AC Nielsen Company. He also regularly attends tradeshow on behalf of Ddrops. *Id.*, ¶s9-11.

In paragraph 67 of his declaration, Mr. Temovsky states:

Based on my 35 years of experience in the vitamin and supplement industry, each of the above referenced awards [referring to various

awards given by third parties to Ddrops for its Baby Ddrops® product] occurred because of Ddrops’ innovative features – specifically the use of the 1 drop method of administration of Vitamin D to deliver a therapeutic dose. Ddrops’ innovative features are also praised by parents and physicians, as will be further identified below.

Id., ¶¶67. In paragraphs 80-84, he ascribes Ddrops’ loss of market share in 2021 and thereafter to Petitioner’s introduction of its knock-off product. He attributes the success of Ddrops’ product to the innovative features claimed in the ‘958 Patent. He also references customer product reviews as evidence to support his assertion. *Id.*, ¶¶80-84.

Petitioner extensively questioned Mr. Temovsky regarding the industry awards during his deposition. *See* Ex. 1038, 63:22-69:24. Petitioner also examined him regarding his statements in paragraphs 80-84 of his declaration, Ddrops’ loss of market share, and Mr. Temovsky’s opinions regarding the cause of that loss. *See, e.g., id.*, 69:25-76-19; 87:7-18; 93:5-95:6. Mr. Temovsky testified that he was personally involved with applying for the awards and the process of applying for and receiving them. *Id.*, 63:25-64:5; 64:14-66:15. Mr. Temovsky confirmed repeatedly that Ddrops’ product is “judged on its own merit” and that it received the awards “occurred of [*sic*] Ddrops’ innovative features, specifically the use of the one drop method of administration of vitamin D to deliver a therapeutic dose.” *Id.*, 67:4-7;

68:3-6. Mr. Temovsky testified regarding his personal involvement in the creation and knowledge of the information shown in Exhibit S, which details the Ddrops' increase and loss of market share. *See id.*, 70:9-73:23; 132:19-135:13.

Federal Rule of Evidence 701 permits lay witness opinion testimony if it is “(a) rationally based on a witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge with the scope of Rule 702.” Fed. R. Evid. 701. Under Rule 701, a lay witness is permitted “to testify to their personal perceptions in the form of inferences or conclusory opinions.” *United States v. Garcia*, 413 F.3d 201, 2011 (2nd Cir. 2005). Decisions under Rule 701 have long established that individuals may testify regarding their personal observations and opinions based on their experience in an industry. *See, e.g., Pacific Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 693 (Fed. Cir. 2001); *RPI Fuel Cell, LLC v. United States*, 120 Fed. Cl. 288, 319 (2015) (discussing cases). “[L]ay opinion testimony based upon extensive experience in an industry is admissible under Rule 701.” *Global Computer Enter., Inc. v. United States*, 88 Fed. Cl. 52, 67 (2009). *See generally Silver State Solar Power South, LLC v. United States*, 2020 U.S. Claims LEXIS 2056, at *4-10 (Fed. Cl., Oct. 19, 2020) (discussing cases). Courts have allowed lay opinion testimony based on employees’ personal knowledge of business operations and years of experience in an industry. *See, e.g.,*

Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc., 528 F.3d 1001 (8th Cir. 2008); *United States v. Munoz-Franco*, 487 F.3d 25 (1st Cir. 2007); *Accurso v. Infra-Red Servs., Inc.*, 169 F. Supp. 3d 612 (E.D. Pa. 2016).

Here, Mr. Temovsky clearly has foundation to provide his testimony, opinions and analysis regarding the various awards Ddrops has received for its product that is co-extensive with the claims of the ‘958 Patent (*see* Paper 61 at 46-48) and the market share lost following Petitioner’s introduction of its knock-off product. His declaration and testimony clearly establish that his evidence and opinions are based on his years of experience in the industry; his years as co-president of Ddrops primarily responsible for sales and marketing; and his personal involvement with the process of applying for and receiving the industry awards. Petitioner’s disdain for Mr. Temovsky’s evidence is no basis for exclusion. Moreover, Petitioner had a full opportunity to cross-examine him on his lay opinions. At best, Petitioner’s objections go to the weight of the evidence, not its admissibility.

Second, Petitioner objects to paragraph 69 and Exhibit R of Mr. Temovsky’s declaration as being inadmissible hearsay. *See* Paper 94 at 3-4. Contrary to Petitioner’s incorrect assertion that “Patent Owner has identified no applicable hearsay exceptions,” Patent Owners’ anticipated this objection in their Sur-Reply. *See* Paper 91 at 26-27. Petitioner ignores that fact and fails to consider clearly

applicable exceptions. Instead, it concocts a straw-man argument based on the residual exception to the hearsay rule. *See* Paper 94 at 3.

Again, Mr. Temovsky may testify regarding the import of the peer-reviewed article quoted in paragraph 69 of his declaration. *See also* Ex. 2017, ¶s55-57. The statement contained in Exhibit R, to which Petitioner objects due to its power, is admissible under Fed. R. Evid. 803(18). *See also* Fed. R. Evid. 803(3) (state of mind exception). Under Rule 803(18), a statement contained in a journal is admissible if it is established as a reliable authority. Once established, the pertinent statement in the periodical may be read into evidence and used in direct or cross-examination. Further, the Rule “does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness.” *See* Fed. R. Evid. 803(18), Notes of Advisory Committee on Proposed Rules.

Here, Dr. Reinhold Vieth, an expert in the field, established the reliability and authoritativeness of the article. It is a “well-recognized peer-reviewed journal.” Ex. 1039, 152:1-13. He read the quotation referenced by Mr. Temovsky into the record. *Id.*, 153:4-19. Mr. Temovsky’s declaration also quotes the relevant portion of the journal article. Ex. 2071, ¶69. Petitioner disputes the evidence of industry praise. *See* Paper 74 at 27-28. Accordingly, Patent Owners, through Mr. Temovsky and Dr. Vieth, are entitled to present evidence from the peer-reviewed journal *BMC Public*

Health to contradict Petitioner's argument. Paragraph 69 and Exhibit R are not inadmissible hearsay.

Lastly, Petitioner objects to paragraphs 46 and 83 and Exhibits G and T to Mr. Temovsky's declaration as inadmissible hearsay. Paper 94 at 4. Those paragraphs and exhibits reference various customer product reviews. *See* Ex. 2017, ¶s46, 83; Exs. G, T. Patent Owners again anticipated this objection, but Petitioner blithely ignores the clear basis for admissibility. *See* Paper 91 at 26.

Under Fed. R. Evid. 803(3), the state of mind exception to the hearsay rule, statements by consumers are admissible and are not hearsay. *See, e.g., Lincare Holdings Inc. v. Doxo, Inc.*, 2024 U.S. Dist. LEXIS 34800, at *6 (M.D. Fla. Feb. 29, 2024) ("customers' statements to Plaintiffs' customer representatives are not hearsay or are subject to the state of mind exception to hearsay.") (also listing numerous cases); *Fit, Inc. v. Pleasonton Fitness, LLC*, 2013 U.S. Dist. LEXIS 18106, at *17, n.13 (M.D. Fla. Feb. 11, 2013) (consumer postings on Yelp.com not hearsay); *Discover Fin. Servs. v. Visa U.S.A. Inc.*, 2008 U.S. Dist. LEXIS 80801, at *4-5 (S.D.N.Y. Oct. 9, 2008) (statements concerning motivation of customers not inadmissible hearsay under state of mind exception).

None of the statements by consumers are being offered to prove the truth of the matter asserted. Rather, they are being offered to prove the then-existing state of mind of the declarant. The statements by consumers reviewing the Ddrops'

product are admissible. *See also* Ex. 2071, ¶s55-57. The exception in Rule 803(3) also applies to paragraph 69 and Exhibit R. The quoted statement from the journal article is being offered to show the state of mind of the authors, not for the truth of the matter asserted. No basis therefore exists for the exclusion of any part of Mr. Temovsky's declaration.

III. NO PART OF DR. REID'S DECLARATION SHOULD BE EXCLUDED

Citing no case law whatsoever, Petitioner seeks to exclude paragraphs 106-116 of Dr. Reid's declaration (Exhibit 2072) pursuant to FRE 702. First, it incorrectly argues that Dr. Reid is unqualified to opine on secondary considerations of non-obviousness because he is not an economist. Paper 94 at 4-5. Second, Petitioner mischaracterizes Dr. Reid's opinions as "almost exclusively the testimony of Mr. Temovsky." *Id.* at 5. The Board should reject Petitioner's arguments because it is clear from the applicable case law that these issues at best concern the weight of Dr. Reid's testimony, not the admissibility of his opinion.

No special admissibility rules apply to experts in patent cases. *Sundance, Inc. v. Demonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008). "The admissibility standard embodied by FRE 702 is flexible and should be applied with a liberal thrust favoring admission." *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017). "Since Rule 702 is aimed at protecting jurors from

evidence that is unreliable for reasons they may have difficulty understanding, in a bench trial there is greater discretion regarding procedure and even the stringency of gatekeeping.” *Quality Plus Servs. v. Nat’l Union Fire Ins. Co.*, 2020 U.S. Dist. LEXIS 7337, at *35-36 (E.D. Va. Jan. 15, 2020); accord *FTC v. BurnLounge, Inc.*, 753.F.3d 878, 888 (9th Cir. 2014).

To meet the expert qualification requirement under Rule 702, an expert witness merely needs to “possess skill or knowledge greater than the average layman.” *Betterbox Commc’ns Ltd. v. BB Techs., Inc.*, 300 F.3d 325, 328 (3d Cir. 2002). It is not “necessary that the expert have expertise in the precise technology that is the subject of the [asserted] patent.” *Sonos, Inc. v. D & M Holdings Inc.*, 297 F. Supp. 3d 501, 510 (D. Del. 2017). Furthermore, an expert is permitted to obtain some knowledge through his work on the case. *Midwest Energy Emissions Corp. & Mes Inc. v. Arthur J. Gallagher & Co.*, 2023 U.S. Dist. LEXIS 202160, at *24 (D. Del. Nov. 3, 2023).

Dr. Reid has a Ph.D. in chemistry from M.I.T., where he studied under a Nobel Prize laureate. He worked at the USPTO as a patent examiner and examined many applications arising in the pharmaceutical arts, including chemical entities, their formulations, and methods of medical uses. As a patent attorney, Dr. Reid has prosecuted many patent applications in the fields of medicinal chemistry,

pharmaceuticals, formulations, drug delivery and medical uses. Ex. 2072, ¶s4-11, Ex. A; Ex. 1037, 7:10-11:14.

Petitioner attempts to pigeonhole Dr. Reid by arguing that “[h]e is only qualified to opine on the characteristics of the product compositions.” Paper 94 at 5. The law, however, is not so restrictive. “Experts routinely rely upon other experts hired by the party they represent for expertise outside of their field.” *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014); accord *Dura Automotive Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 609-613 (7th Cir. 2002) (“[I]t is common in technical fields for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the first expert.”). Here, Dr. Reid reviewed and relied on the expert opinions of Dr. Paul Horowitz. Ex. 2072, ¶12. In fact, he testified to having spent over 230 hours working on this matter. Ex. 1037, 12:8-15. This included extensively studying background documents, depositions transcripts, prior art references and declarations of other experts. *Id.* When Dr. Reid’s many years of experience working with pharmaceuticals and drug delivery systems are coupled with what he learned about the vitamin D market through his extensive work in this case, he clearly is qualified to opine beyond “the characteristics of the product compositions.” See, e.g., *Greatbatch Ltd. v. AVX Corp.*, 2015 U.S. Dist. LEXIS 182055, 2015 WL 9171042, at *4 (D. Del. Dec. 11, 2015) (rejecting argument that technical expert’s opinions should be excluded

because he “lacks specialized knowledge regarding the subject matter of this lawsuit[,]” where the expert had an advanced degree, many years of experience in the medical device field, and engaged in substantial preparation and work in forming his opinions in the case, including, *inter alia*, reviewing technical documents, prior art references and deposition transcripts).

Moreover, in the paragraphs at issue, Dr. Reid’s reference to market share and financial matters is limited. He combines his technical experience with the vast industry experience of Mr. Temovsky and industry standard Nielsen reports to form his opinions. Quite simply, the information at issue here is not so complex that one would need a degree in economics to understand it or impart it. The court in *Midwest Energy Emissions Corp.*, addressed similar facts when denying a motion to exclude expert opinions regarding secondary considerations of non-obviousness from a technical expert with a bachelor’s degree in mechanical engineering and 14 years of engineering experience. *Midwest Energy Emissions*, 2023 U.S. Dist. LEXIS 202160, at *34-35. Petitioner has not shown why the facts in this case are so complex that they can only be understood and explained by an economist. Ultimately, “[l]ack of particularized expertise goes to the weight accorded [an expert’s] testimony, not to the admissibility of [their] opinion as an expert.” *Ramirez v. ITW Food Equipment Group, LLC*, 686 F. App’x 435, 441 (9th Cir. 2017). Petitioner even cross-examined Dr. Reid regarding these issues. Rather than seeking the exclude Dr. Reid’s

testimony, Petitioner's obligation is to present what it believes to be contrary evidence to the Board. *See, e.g., Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d at 1296 (“[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

Petitioner's argument that Paragraphs 112-116 of Exhibit 2072 should also be excluded because Dr. Reid relied on the testimony of Mr. Temovsky similarly lacks merit. Paper 94 at 5-6. As set forth above, Mr. Temovsky's testimony is not inadmissible hearsay. Dr. Reid certainly can rely on evidence from others in reaching his opinions. Moreover, Dr. Reid was required to include the facts that support his opinions in his declaration, which included the testimony of Mr. Temovsky.

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires a written expert report to disclose both the opinions intended to be offered and the “basis and reasons for them.” Dr. Reid's declaration recites the facts he assumed to be true, the documents he reviewed, and the conclusions he drew as to the facts for his opinions. *See generally* Ex. 2072. Moreover, Petitioner's unfounded claim that the facts Dr. Reid relied upon are inaccurate is outside the scope of a motion to exclude under Rule 702. The factual basis of an expert opinion goes to the “credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.” *Bonner v. Isp Techs.*, 259 F.3d

924, 929 (8th Cir. 2001). In a motion to exclude, a court does not “determine that the expert testimony a litigant seeks to offer into evidence is irrefutable or certainly correct.” *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 596. The inquiry into the admissibility of an expert witness’ testimony does not “require a court to admit or exclude evidence based on its persuasiveness.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). The Board does not weigh the correctness of an expert witness, rather it must simply determine if the expert’s testimony is reliable.

Because Dr. Reid is qualified to address secondary considerations of non-obviousness and he relied on facts in the record to form his opinions, the Board should deny Petitioner’s motion to exclude. *See* Advisory Committee Notes to Rule 702, 2000 Amendments (proponents do not have to show by a “preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate to the judge by a preponderance of evidence that their opinions are reliable the requirement of reliability is lower than the merits standard of correctness”). Petitioner’s motion to exclude parts of Dr. Reid’s declaration should be denied.

IV. CONCLUSION

For the foregoing reasons, Patent Owners respectfully request that the Board deny Petitioner’s motion to exclude evidence in its entirety.

Dated: May 29, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Response to Petitioner's Motion to Exclude Evidence is being served on May 29, 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:

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