

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 REPLY IN SUPPORT OF MOTION TO EXCLUDE

Paragraphs 67, 80-84 of Mr. Temovsky's declaration (Exhibit 2071)

Patent Owners' Response misses the point. Mr. Temovsky lay opinions about Ddrops' success must be excluded as unsupportable. He does not merely attribute success to the most significant differences from competing products was the reason for success. Rather, he opines that it was due to one specific "method of administration of the composition to an infant by applying one drop to an exterior surface of an object, such as a mother's nipple or a clean surface, to allow the drop to be sucked or licked from the object." *See, e.g.,* EX2071, ¶81. This is an impermissible leap of logic. It must be excluded under FRE 607 and 701.

Patent Owners provide no foundation for Mr. Temovsky to make this very specific claim. The product was not "co-extensive with the claims of the '958 Patent." Paper 97, 5. A product is only "co-extensive" if "the product is essentially the claimed invention." *Fox Factory, Inc. v. SRAM, LLC*, 944 F. 3d 1366, 1374 (Fed. Cir. 2020). But the invention here is a method of administration and not the composition itself, nor its dispenser. It cannot be co-extensive as a matter of law. It is not necessary to use the invention with the composition or the product, and the product's label clearly indicates alternative, non-patented methods. EX2071, p. 52 ("Or mix one drop daily with milk, juice, or other food."), 53 (demonstrating "Into a drink"). Ddrops also highlighted the ease of use of its dispenser versus the dropper or syringe competitors use. EX2071, p. 53; *see also id.* at ¶ 52 ("not

requiring any additional tools or syringes”). This bottle and dispenser format is not claimed by the ’958 Patent. Unsurprisingly then, the record evidence contradicts Mr. Temovsky. Customers praised these unclaimed features. *See* EX2071, ¶83 (“drop in babies mouth directly”), Ex. T at 205 (“I just love how easy the drops are to add to food/drink making for easy consumption.”), 210 (“can calculate when it will drop and that's when I open my baby’s mouth.”), 213 (“It's only one tiny clear and tasteless drop I put in the milk.”), 217 (“easy to drop into her mouth. I did try it and did not find that it had a flavor.”), 219 (“no separate dropper to clean off.”), 229 (“I put one drop in his breast milk in the morning.”).

Mr. Temovsky is not testifying about general matters within his knowledge, experience, and perception. He jumps to a very specific, causal conclusion. He needed to set forth a factual basis for holding this very specific opinion. *See Hilgraeve, Inc. v. Symantec Corp.*, 271 F. Supp.2d 964, 974 (E.D. Mich. 2003). And his very specific conclusion “must have a rational connection to those facts” he points to. *Miss. Chem. Corp. v. Dresser–Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002). Patent Owners have not shown this. In fact, the record evidence contradicts him. What Mr. Temovsky testifies to are impermissible biased opinions, not “straightforward conclusions from observations” permitted by Rule 701. *US v. Riddle*, 103 F.3d 423, 428–29 (5th Cir. 1997).

Paragraph 69 and Exhibit R of Exhibit 2071

The journal article is classic hearsay offered for the truth of the matter asserted. Patent Owners do not dispute this. It is not admissible under Rule 803(18), which Patent Owners rely on. As Patent Owners concede, Rule 803(18) expressly states that the subject material may not be admitted into evidence. *See* FRE 803, advisory committee note (“the great weight of authority has been that learned treatises are not admissible as substantive evidence”). Moreover, Mr. Temovsky is not a qualified scientific expert that can explain the article under Rule 803(18). And Patent Owners cannot admit the statements through Dr. Vieth. He did not rely on the article in his direct examination. *See, generally*, EX2068; 37 CFR § 42.53(d)(5)(ii). For Patent Owners to proffer this paper, a qualified expert must have relied upon it in his or her direct examination for which they could be subject to cross-examination with the statement in the paper. FRE803(18); *Dartez v. Fibreboard Corp.*, 765 F. 2d 456, 465 (5th Cir. 1985). That is not the case here.

Paragraphs 46 and 83 and Exhibits G and T of Exhibit 2071

These customer reviews do not fall under the then-existing state of mind exception of FRE 803(3). First, Patent Owners have not shown that the statements reflect a motivation, *i.e.*, a customer’s reason for purchase. Rather, customer reviews reflect hearsay from observations *post-purchase*, regardless of the original motivation. Moreover, a customer’s stated motivation for purchase could only be

conditionally admissible. The proponent of the evidence must first prove the underlying act with other admissible evidence. Otherwise, the exception swallows the hearsay rule. FRE 803, advisory committee note (“The exclusion of ‘statements of memory or belief to prove the fact remembered or believed’ is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.”). Here, Patent Owners have not laid the foundation—with other evidence—that the reviewing customers purchased Ddrops’ products. Without that predicate, their purported motivation is inadmissible. See *Discover Fin. Servs. v. Visa U.S.A. Inc.*, 2008 WL 4560707 (S.D.N.Y. Oct. 9, 2008) (hearsay about Citibank’s motivation to not deal admissible “provided that there is otherwise admissible proof that business was lost” from the refusal to deal); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1274–1275 (3d. Cir. 1995) (admission of customer anecdotes was error). This makes sense in the context anonymous Internet reviews, where the reliability or authenticity of reviewers is always in question.

Paragraphs 106-116 of Dr. Reid’s declaration (Exhibit 2072)

With respect to paragraphs 106–111, Patent Owners’ reasoning is essentially this: Dr. Reid is a technically-trained patent lawyer; therefore, he is a qualified expert and can reach conclusions about Mommy’s Bliss’ motivations based upon

market share and financial matters. Paper 97, 9–11. But unlike the testimony allowed in *Midwest Energy*, these paragraphs are not directed at technical opinions. Instead, the conclusions reached are about alleged motivation to copy. Instead, they are similar to a different holding elsewhere in *Midwest Energy* excluding portions of expert testimony: “Expert witnesses are not permitted to opine on a person's intent, motive or state of mind—such conclusions are within the province of the” fact-finder. *Midwest Energy Emissions Corp. v. Arthur J. Gallagher & Co.*, 2023 U.S. Dist. LEXIS 202160 (Nov. 3, 2023) (quotation removed). These paragraphs should be excluded, or given no weight.

With respect to paragraphs 112–116, Patent Owners simply point to their defense of the inadmissible testimony of Mr. Temovsky. It has no response for the fact Mr. Temovsky’s and Dr. Reid’s testimony is improper speculation even contradicted by the record evidence. In particular, Petitioner’s Motion pointed out that it undisputed that Ddrop’s market share declined *before* Petitioner reformulated its product to the alleged patented invention, not *after*. See Paper 74 at 26–27. Patent Owners do not rebut this. Dr. Reid is not permitted to speculate that Petitioner’s product reformulation demonstrates that the patented features were the cause of Ddrops’ success or decline. FRE 702(d).

Date: June 5, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§42.6(e), the undersigned certifies that on June 5, 2024, a complete and entire copy of Petitioner's Reply In Support of 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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