

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' REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO EXCLUDE**

I. INTRODUCTION

In an effort to backfill the many gaps in its case, the Petitioner disclosed a new expert witness and produced numerous new documents with its Reply. The opinions of its new expert, Raj, lack sound scientific reasoning under *Daubert*, are irrelevant and based on speculation. Petitioner relies on strawman arguments and other litigation tactics to defend the defective opinions of Raj, but it is clear under the rules of evidence that the Board should exclude her opinions concerning: (1) the ambiguous and inconsistent translations of Harder; (2) how general pediatricians would interpret the Sherman translation of Harder; and (3) use of a “Munchkin” spoon or similar shaped spoon to perform the Harder method. Petitioner’s other untimely evidence is inadmissible and should also be excluded.

II. RAJ’S OPINIONS SHOULD BE EXCLUDED IN THEIR ENTIRETY

Petitioner apparently misunderstands the consequences of a motion to exclude. It argues that Patent Owners’ motion to exclude should be denied because “there is a strong public policy for making all information filed in an administrative proceeding available to the public.” Paper 96 at 1. But, a motion to exclude does not result in information being removed from the public record. Patent Owners are not asking the Board to remove anything from the public record. Rather, their motion to exclude seeks to prevent inadmissible information and testimony from being entered into evidence for consideration by the Board when making its final decision. Thus,

Petitioner's argument that the Board should simply ignore inadmissible evidence rather than exclude it is a battle of semantics. Both parties agree that this Board cannot base its final decision on inadmissible evidence. *See Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1370 n.6 (Fed. Cir. 2021) ("the Federal Rules of Evidence apply to IPR proceedings before the Board."). Further, Rule 802 makes it clear that hearsay is "not admissible" unless an exception applies. Petitioner cannot satisfy its burden of proof by filing hearsay evidence. *See, e.g., Bosch Auto. Serv. Sols., LLC v. Matal*, 878 F.3d 1027, 1037 (Fed. Cir. 2017) (affirming Board's exclusion of claim chart based on hearsay and foundation violations).

Petitioner created an evidentiary morass by filing multiple, inconsistent translations of Harder. Petitioner acknowledges, as it must, that Raj is unqualified under *Daubert* to opine on the various translations of Harder. However, it continues to defend Raj's allegedly spontaneous testimony that Sherman is the more complete and more accurate translation of Harder. Raj is a professional expert witness and has testified as an expert witness over 20 times! Ex. 2081, 8:16-18. It is clear that her testimony simply parrots the arguments of Petitioner's counsel. Because Petitioner failed to show that Raj is qualified under *Daubert* to testify regarding the ambiguous Harder translations, all of her opinions and testimony must be excluded. *See Ex. 1040 ¶14, and Ex. 2081, 41:25-51:1, 54:16-25-61:1-21, 99:14-25-100:1-24, 116:21-25-117:1-6, 117:24-25-118:1-3.*

Patent Owners' motion seeks to exclude Raj's opinions about how a general pediatrician would interpret Harder because a pediatrician is not a POSITA. Whether it is a veterinarian or an oncologist, how any non-POSITAs would interpret Harder is clearly irrelevant. In an obvious attempt to deflect the fatal flaw in Raj's declaration, Petitioner argues that, "Dr. Raj need not be a POSITA to testify." Paper 96 at 3. This is a strawman argument. Patent Owners have not objected to Raj on the grounds that she is not a POSITA. In fact, one of Patent Owners' experts, Dr. Horowitz, is a renowned pediatrician. The clear difference between their opinions is that Dr. Horowitz addresses Harder from the perspective of a POSITA whereas Raj opines on Harder from the perspective of a non-POSITA, i.e., a pediatrician. *See* Ex. 2069, ¶s4(a)-(e), ¶6(f)-(q), Ex. A; Ex. 1036, 8:2-12:5, 55:3-5. Thus, Raj's opinions are neither "responsive" to Dr. Horowitz's testimony, nor relevant to the issues in this action. Whether the result of confusion or carelessness, her opinions on how a non-POSITA would understand the prior art is off target and should be excluded. *See, e.g., HVLPO2, LLC v. Oxygen Frog, LLC*, 949 F.3d 685, 686 (Fed. Cir. 2020) (explaining that the scope of the prior art or motivations for combining various components "are analyzed from the perspective of a person of skill in the art").

Another obvious flaw is Raj's decision to base her opinions on testing she conducted on a "Munchkin" style spoon that was not available until long after the priority date of the '958 Patent. In her declaration, she generally described the

“Munchkin” spoon she used as a “smaller plastic spoon, which has smooth edges.” Ex. 1040, ¶17. In its opposition, Petitioner tries desperately to spin her opinion as applying more broadly to any “smaller plastic spoon, which has smooth edges,” but that is not the opinion provided in Raj’s declaration. There is no scientific basis to apply test results from a single post-priority date spoon universally to pre-priority date spoons. Expanding her opinion so broadly renders it speculative and mere *ipse dixit*. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (“Proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”). As a second fallback position, Petitioner argues that her opinion is basically just “common sense.” Paper 96 at 3. But expert testimony on common sense issues is unnecessary and generally excluded. See, e.g., *Greater Hall Temple Church of God v. S. Mut. Church Ins. Co.*, 820 F. App’x 915, 919 (11th Cir. 2020) (affirming exclusion of expert opinions that were based on “common sense”); *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.”).

III. PETITIONER'S REPLY EXHIBITS SHOULD BE EXCLUDED

Petitioner produced numerous translations of Harder in this action. Patent Owners reasonably relied on the first translation from Tinsworth, because it is the only one uninfluenced by Petitioner's counsel. Patent Owners have not produced any translations. Their opposition to the petition focuses on Tinsworth.

To support its reply, Petitioner improperly submitted multiple excerpts from a variety of dictionaries to support its preferred translations. *See* Exs. 1042-1046. But these new exhibits are inadmissible hearsay and lack foundation. *See* Fed. R. Evid. 801, 802, 901. No expert or other witness has provided any opinions or testimony regarding these dictionary definitions.

Petitioner's claim that these untimely exhibits are responsive to the Patent Owners' opposition lacks merit. Patent Owners did not produce a new translation of Harder. Rather they simply pointed out the inconsistencies and ambiguities in the Petitioner's own translations. Noting the defects in Petitioner's submissions does not open the door to Petitioner being allowed to backfill the record with new evidence that should have been filed with the Petition. *See* 37 C.F.R. §42.23(b). Therefore, the Board should exclude the exhibits listed in Patent Owner's motion to exclude.

IV. CONCLUSION

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

Dated: June 5, 2024.

Respectfully submitted,

/Mark E. Ungerman/

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Reply Memorandum in Support of Its Motion to Exclude is being served on June 5, 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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