

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BRYCER, LLC, and BRYCER MANAGEMENT, INC.,
Petitioners

v.

TEGRIS, INC.,
Patent Owner.

Case No. IPR2023-01196
Patent No. 11,126,966

Before KAREN I. SWEENEY, *Trial Paralegal*

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

UPDATED PO EXHIBIT LIST

Ex. #	Description
2001	Declaration of David Williams
2002	David Williams CV
2003	https://www.wsp.wa.gov/wp-content/uploads/2021/09/Application-Level-ITT-Specialized-Certificate-of-Competency-420263.pdf
2004	Lynnwood Case Study
2005	https://www.nfpa.org/News-and-Research/Publications-and-media/Blogs-Landing-Page/NFPA-Today/Blog-Posts/2020/10/30/guide-to-fire-extinguisher-inspection-testing-and-maintenance
2006	U.S. Published App. No. 2008/0114638 to Colliau
2007	U.S. Published App. No. 2003/0171957 to Watrous
2008	U.S. Published App. No. 2005/0108038 to Cober
2009	U.S. Patent No. 6,446,053 to Elliott
2010	U.S. Published App. No. 2006/0235611 to Deaton
2011	Annual Hydrant Inspection Procedures 2001
2012	U.S. Publication No. 2008/0084291 to Champion
2013	Claim 8
2014	Potts v. Martin & Bayley, Inc. Case Opinion
2015	Declaration of Andrew Moren
2016	Declaration of Leroy McNulty
2017	Declaration of Mike A. Miller
2018	Claim chart mapping Challenged Claims to Tegrifire
2019	Claim chart mapping Challenged Claims to Brycer TCE
2020	Declaration of David Williams in Support of Patent Owner Response
2021	Excerpts from MacInnes Deposition Transcript
2022	Merriam-Webster Definition of Notice
2023	Anacortes, WA Fire Department Case Study
2024	Marysville, WA Fire Department Case Study
2025	Richland, WA Fire Department Case Study
2026	Welcome to ACS Firehouse Solutions—Website Aug 23, 2007
2027	Information system - Automation, Data Processing, Decision Support _ Britannica Website, accessed 4/12/2024
2028	www.researchgate.net/figure/Example-of-geographical-information-system-GIS-mapping-in-environmental-studies-Photo_fig1_330567969
2029	GIS electric utility map data layers - Search Images.pdf2

Ex. #	Description
2030	https://www.giscloud.com/blog/gis-for-electric-utilities/ , Accessed April 12, 2024
2031	EX2031 - fire hydrant gis map data layer, fire hydrant gis map data layer - Search (bing.com)
2032	examples of life safety map data layers inside a building - Search (bing.com) , Examples of life safety map data layers inside a building - Search.pdf
2033	Life Safety Plans - 2018 Project Standards (weebly.com) , Life Safety Plans - 2018 Project Standards.pdf
2034	fire hydrant map data layer - Search (bing.com) , Fire hydrant map data layer - Search.pdf
2035	Quantifying the High Cost of Delayed Em...pdf
2036	Fire Hydrant System in Buildings Office Industries Best 2022.pdf
2037	Fire Hydrant Systems - Torvac.pdf
2038	Standpipe Connection for Fire Protection - What You Need to Know.pdf
2039	Relational Database vs Flat File (Differences & Similarities) - DatabaseTown.pdf
2040	City of Tumwater Brycer RFP
2041	12/16/2011 Richland WA email
2042	Benefits of Proactive Compliance Program
2043	10 Ways to Improve Fire and Life Safety Instructions with Software
2044	Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/send , accessed on September 10, 2024
2045	Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/notify , accessed on September 10, 2024
2046	Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/access , accessed on September 10, 2024
2047	<i>Mitchell v. Holt</i> , Patent Interference No. 105,746 (Paper No. 352, Decision filed April 27, 2012)

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Federal Rule of Evidence 403.....	1, 4, 8, 14
Federal Rule of Evidence 702.....	1, 4, 8, 14

I. Statement of Relief Requested

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner Tegriss, Inc. (“PO”) moves to exclude the Declaration of Richard MacInnes (EX1003) based on Federal Rules of Evidence (“FRE”) 402, 403, and 702, as well as 37 C.F.R. § 42.65.

II. Objections Were Timely Made

Petitioners Brycer, LLC and Brycer Management, Inc. (“Petitioners”) served Exhibit 1003 on July 27, 2023 (as an exhibit to the Petition (Doc.1) – *i.e.*, during the preliminary proceedings). Trial was instituted on January 24, 2024 (Doc. 9). PO timely objected to that exhibit on February 7, 2024 (10 business days later), pursuant to 37 C.F.R. § 42.64(b).

III. Argument

Petitioners tendered Mr. MacInnes to provide expert opinion testimony pursuant to FRE 702 *See, e.g.*, Doc. 1 at 1, 6, 7, 9, 10, 21, 23-36, 38-77 and fns. 2, 4 and 8. Mr. MacInnes acknowledged in cross-examination that:

- (i) he has no experience inspecting fire hydrants or related life safety systems (EX2021, p. 25);
- (ii) he has no knowledge of the regulations or codes applicable to the inspection and maintenance of such devices (EX2021, pp. 46-49);
- (iii) he did not conduct any investigation into the inspection and maintenance of fire hydrants and related systems as of 2007, he did not

interview any POSA, and he has no knowledge of the typical methods or software used at that time (EX2021, pp. 33-38);

(iv) he did not interview Petitioners, conferring only with counsel, he has no knowledge of the parties' respective products or their commercial success, and he did not investigate Patent Owner's allegation that Petitioners copied Patent Owner's product (EX2021, pp. 33-37);

(v) he did not conduct any investigation to identify prior art, relying entirely on the references provided by counsel for Petitioners (EX2021, p. 33);

(vi) he did not write or revise the analyses or opinions of the prior art as set forth in his declaration, accepting without revision the first draft thereof as prepared by counsel for Petitioners (EX2021, pp. 39-42);

(vii) he has never opined in a patent matter outside of this proceeding or applied for a patent (EX2021, pp. 9-11, 15);

(viii) his declaration includes several false, material statements made under oath, attesting that he reviewed and considered the prosecution history of the challenged patent, when he did not (EX1003, ¶¶18, 48-49, 66-68; EX2021, p. 75);

(ix) his declaration includes other errors, but he could not recall where they are or what they relate to (EX2021, pp. 11, 116-117); and

(x) he was retained as an expert in one other case, and his opinions were

excluded in part for being unreliable and inadmissible. (EX2021, pp. 125126; EX2014, p. 4).

Mr. MacInnes’ lack of knowledge and/or his inexperience with the subject matter of the challenged patent undermines the credibility of Petitioners’ arguments in this proceeding. Petitioners argue that the challenged claims are expressly limited to fire hydrants. Reply, p. 6. They also rely on the alleged general knowledge of a Person of Skill in the Art (“POSA”) to satisfy several elements in the challenged claims that are otherwise missing from the art of record. (*Id.* at pp. 8, 10-13, 15-16.) Mr. MacInnes’ declaration, drafted by counsel, is Petitioners’ only evidentiary support for those arguments. By way of example, Mr. MacInnes’ lack of knowledge of the regulations and codes governing the inspection of fire hydrants underscores his inability to appreciate that the “inspection routine” for pressure vessels, described in Key (EX1005, Fig. 5), could not be used on fire hydrants because it would violate those same regulations and codes (*see* EX2015, ¶¶ 30-39). Similarly, Mr. MacInnes’ lack of relevant knowledge and/or his inexperience infects and invalidates his analysis regarding combining Key with Sweeney, McKinney, and Chauhan, the secondary references of Ground 1. (*Id.*) To the extent that Mr. MacInnes purports to opine on the prior art, his alleged expertise and understanding of a POSA is unsupported by his experience, disclosed facts, data, or adopted analysis, especially in this instance where he acknowledges that his declaration includes additional errors

that he could not identify or correct. The proffered testimony should thus be excluded or in the alternative afforded no weight.

FRE 702 permits expert testimony only if “the proponent demonstrates to the court that it is more likely than not that: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.” 37 C.F.R. § 42.65(a) limits the amount of weight that expert testimony is afforded: “Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.” *See cxLoyalty, Inc. v. Maritz Holdings Inc.*, 986 F.3d 1367, 1378 (Fed. Cir. 2021) (“We do not accord weight to conclusory expert testimony.” citing *TQ Delta, LLC v. CISCO Sys., Inc.*, 942 F.3d 1352, 1359 n.5, 1360 (Fed. Cir. 2019)). Further, FRE 402 provides, in relevant part, that “[i]rrelevant evidence is not admissible,” and FRE 403 provides, in relevant part, that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of...unfair prejudice, confusing the issues...”

Petitioners have proffered Mr. MacInnes to, *inter alia*, testify about:

- what a POSA would understand in the 2007/2008-time period (Ex1003 at 27

32, 65-68, 70, 106-109, 122, 125, 126, 129, 130, 131, 136, 139, 143, 150, 158, 159, 161, 162, 165, 171, 176, 177, 181, 187, 191, 197-200, 203, 215, 217, 226, 234-236, 238, 239, 241, 242, 244, 247-249, 252);

- the prosecution history of the ‘966 Patent (*Id.* at 48 and 49);
- whether the claims of the ‘966 Patent are supported by the provisional applications from which the ‘966 Patent claims priority (*Id.* at 50-64, 94);
- the state of the prior art (*Id.* at 69-102, 110, 111, 112, 115-121, 127, 128, 130, 132-138, 144-147, 151-157, 159, 161-164, 166-170, 175-189, 193-196, 198, 200-202, 204-216, 218-234, 236-255); and
- application of the prior art to the claims of the ‘966 Patent (*Id.* at 103-255).

Mr. MacInnes’ opinions, as discussed further below, are not supported by sufficiently disclosed facts or data, do not reflect the application of reliable principals or methods of analysis, are unreliable, and/or do not bear on any relevant issues in this case and their probative value, if any, is outweighed by the risk of unfair prejudice and confusion. Mr. MacInnes’ testimony should be excluded or afforded no weight.

A. MacInnes’ Offered Analyses and Opinions Are Not Trustworthy.

This Board must rely upon experts to provide reliable testimony regarding the technology recited in challenged claims, the disclosure of a challenged patent and

the scope of its claims, the knowledge of a POSA, and content of cited references. The overarching inquiry of Fed. R. Evid. 702 is the evidentiary relevance and reliability of a proposed submission. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594-95 (1993). In this instance, Mr. MacInnes has no knowledge or experience with the inspection of fire hydrants or applicable codes and regulations; he has no knowledge of the practices for doing so as of the priority date; he did not search for prior art or interview any POSA; and he did not author his opinions regarding the prior art or knowledge of a POSA, accepting whole-cloth without revision opinions devised and written by counsel.

Equally important, Mr. MacInnes attests several times in his declaration that he reviewed and considered the prosecution history of the Challenged Patent, then admitted under cross-examination that he did not. EX1003, ¶¶18, 48-49, 66-68; EX2021, p. 75) He also testified that his declaration includes other errors that he could not identify by location or subject matter. (EX2021, pp. 11, 116-117) His false sworn statements and unidentified errors therein undermine the trustworthiness of his declaration in its entirety, especially where he did not write his opinions or analyses, accepting them entirely as written by counsel for Petitioners.

In *Mitchell v. Holt*, Patent Interference No. 105,746 (Paper No. 352, Decision filed April 27, 2012) (EX2047), the Board of Patent Appeals and Interferences

excluded an expert's opinions where he falsely testified under oath and lacked the knowledge and experience of a POSA. It reasoned:

Telling a lie while under oath is a big deal, no matter what a witness is lying about. A person submitting testimony swears under oath that the statements they make are true, subject to penalties of perjury. In a situation like the one before us, where a witness has lied while under oath and admits as much, the veracity of the witness is questionable. The trier of fact in cases such as this one often relies on the testimony of witnesses to tell the trier of fact about the technology and about the knowledge that a person skilled in the relevant art would have had at the time the invention was made. Such testimony must be reliable.

* * *

Mr. Porter lied in the past and lied in this proceeding. On that basis, he is not a reliable witness and we exclude his testimony. Mr. Porter also admitted that he does not have the skill set for even a person with ordinary skill in the art. On that basis, he does not qualify as an expert and we exclude his testimony. In sum, Mr. Porter is not reliable and he does not have the requisite skill set and so he does not qualify as an expert witness.

(EX2047, pp. 21-24.)

Mr. MacInnes material misstatements under oath and unidentified errors in his declaration support the conclusion that he did not carefully review the declaration prepared by counsel, and some or all the opinions therein are not expert opinion, but rather, attorney argument, which still includes unidentified errors. His declaration extends for 259 paragraphs and 131 pages. Given the time constraints on depositions in these proceedings, no reasonable means exists to cross-examine Mr. MacInnes on every paragraph thereof. Mr. MacInnes' failure to adequately review the declaration written by counsel so that – at minimum – it truthfully and accurately discloses *his*

opinions supports the conclusion that his declaration is unreliable under FRE 702, lacks probative value under FRE 403, and fails to satisfy the requirements of 37 C.F.R. § 42.65(a).

B. MacInnes Is Not Qualified to Opine.

Because fire hydrants and related life safety assets are subject to unique codes and regulations that govern their inspection and maintenance, a POSA should at minimum have knowledge of the inspection and maintenance of fire hydrants and related assets, applicable regulations, and software available for use in connection therewith in 2007, as the Challenged Claims recite a method for tracking a *requisite* inspection. (EX1001, 15:16-18; EX2015, ¶¶21-29; EX2020, ¶¶40-43). However, Mr. MacInnes testified at his deposition that prior to this case, he “had never performed any other work as a business consultant, or otherwise related to monitoring the inspection of fire hydrants or related equipment” (EX2021 at 15:19-23), “had no personal experience managing fire hydrants” (*Id.* at 25:15-18) and “did not personally use the software that was used to manage fire hydrants.” (*Id.* at 25:19-22). Mr. MacInnes does not have the qualifications of an expert or even of a POSA as of 2007, and never bothered to consult with one. Accordingly, he is not qualified to opine on what a POSA would have known or believed at that time. *See Kyocera Senco Indus. Tools, Inc. v. ITC*, 22 F.4th 1369, 1376-1377 (Fed. Cir. 2022) (“To offer expert testimony from the perspective of a skilled artisan in a patent case—like

for claim construction, validity, or infringement—a witness must at least have ordinary skill in the art. Without that skill, the witness' opinions are neither relevant nor reliable.”). Because Mr. MacInnes, by his own admission, lacks the requisite qualifications to testify on this subject, his testimony thereto in EX1003 (identified above) should be excluded or provided no weight.

C. MacInnes Admitted That He Did Not Review Prosecution History, Notwithstanding Several Sworn Statements That He Did.

At page 6 of EX1003, one of the items listed in the chart of exhibits considered is “EX1002 File History of U.S. Patent No. 11,126,966.” Page 23 of EX1003 includes various statements about the prosecution history and the claims at issue. However, when asked at his deposition whether he had read the file history of the ‘966 Patent his response was “No.” (EX2021, 75:14-19). The fact that he did not read the prosecution/file history is further confirmed by the lack of reference in EX1003 to the January 23, 2008, amendment to the claims, in which the claims were amended to recite “A computer-implemented method for using a fire hydrant management software system accessible via a web registry...” or reference to the Remarks which stated:

Applicant respectfully suggests the present claims, as amended, are eligible pursuant to 35 U.S.C. 101. The Office Action specifically calls out that the prior version of the claims did not reflect features such as “standard format” or “fire hydrant management software” and was therefore ineligible. The amended claims include these specific eligible

features. Each claim recites an incredibly specific turn-key fire hydrant management invention...

or reference to the Notice of Allowance resulting from this amendment which specifically references the amended claim language. (EX1002, pp. 604-616, 622-623). Clearly this narrowing amendment and the fact that it was the reason for allowance is a significant fact that would have been addressed by any competent expert, yet it was not addressed in EX1003.

Finally, Mr. MacInnes testified at his deposition that counsel for Petitioners drafted EX1003, and he only modified the “The general nature of how we describe assets, the general nature of which we describe asset management systems, and then the very specific notations around general practices that one of a person of obviousness, in terms of what would have been normal practices of which these documents would reinforce.” (EX2021, 41:16-25). Notably, Mr. MacInnes did not modify the portion of EX1003 related to the prosecution history. Since Mr. MacInnes admittedly did not read the prosecution history of the ‘966 Patent, any testimony related thereto (identified above) must be excluded or provided no weight.

D. MacInnes Did Not Properly Review and Consider the Prior Art Analyses Prepared by Counsel.

As an initial matter, Mr. MacInnes testified at his deposition that counsel for Petitioners drafted everything in EX1003 related to the prior art references and that he made no edits to any of the analysis thereof. (*Id.* at 42:1-21). As discussed, he

acknowledged that the analysis includes “typos” but could not identify them. Additionally, EX1003 contains numerous opinions for which the factual bases have not been adequately disclosed, including numerous overly broad and/or conclusory statements made without sufficient analysis, citation to evidence, or explanation. (See, EX1003, ¶¶ 69-70, 73, 103, 106-150, and 158-165, 167, 171-177, 179-183, 185, 187-188, 191-194, 196-198, 200, 203, 209-210, 215-217, 221-223, 226, 230, 234-236, 238-241, 243-244, 247-256, *see also* PO Preliminary Response (Doc. 8), pp. 16-18 and 28-29.) Accordingly, each of the above paragraphs violate 37 C.F.R. § 42.65(a) and should be excluded or given no weight.

E. MacInnes Failed to Properly Apply the Prior Art to the Claims.

In *Inline Plastics Corp. v Lacerta Grp., LLC*, 974 F.4th 889, 900 (Fed. Cir. March 27, 2024), the Federal Circuit ruled that “when an expert purports to testify, not just to certain factual components underlying the obviousness inquiry, but to the ultimate question of obviousness, the expert must consider all factors relevant to that ultimate question.” “Obviousness is a question of law based on underlying factual findings: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness.” *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966): Notably, Mr. MacInnes in EX1003 proffers numerous opinions (prepared entirely by counsel) on the ultimate issue of obviousness. (See *e.g.*, EX1003, ¶¶ 103, 104,

105, 107, 108, 122, 140, 141, 143, 149, 150, 158, 159, 161, 165, 172, 185, 186, 191, 209, 210, 223, 226, 230, 236, 239, 240, 241, 244, 247, 249, 252, 255, and 256.) Mr. MacInnes did so without considering any of the above factors (instead relying on wholesale adoption of what Petitioners’ attorneys drafted without independent verification). As discussed above, he did not conduct his own investigation to identify relevant prior art, instead relying entirely on references supplied by counsel. He did not confer with any POSA, and he has no knowledge of or experience with the inspection of hydrants or the applicable regulations and codes.

Regarding objective indicia of nonobviousness, Mr. MacInnes misstates: “I am not aware of any objective indicia of non-obviousness relevant to the claims of the ’966 Patent” (EX1003, ¶21.) During cross-examination, Mr. MacInnes testified that counsel for Petitioners wrote the statement (EX2021, 91:16-21), and he did not consider these indicia at all (*e.g.* he “was not asked to compare the products” regarding alleged copying (EX2021, 92:2-9)). On this issue, Mr. MacInnes’ declaration is again false -- or intentionally misleading -- where he declares that he is “not aware” of any indicia of nonobviousness, when the truth is that he buried his head in the sand performing no investigation.

Further, as stated above, Mr, MacInnes failed to consider the claim construction implications of the prosecution history (*i.e.*, the January 23, 2008,

amendment which led to the allowance of the claims (EX1002, pp. 604-616. 622-623).

Finally, Mr. MacInnes failed to adequately explain the differences between the claims and the prior art, and improperly asserts “common sense” to supply missing limitations. (*See*, EX1003 ¶¶ 65-69, 72-102, 141-256; *see also* PO Preliminary Response, p. 16-18 and 28.) Since EX1003 fails to properly apply the cited references to the claims at issue, all testimony related thereto (identified above) should be excluded or provided no weight.

F. MacInnes’ Opinions Regarding Priority Are Unsupported.

At paragraphs 50-69 of EX1003, there is an alleged analysis of the provisional applications from which the ‘966 Patent claims priority and a conclusion that the claims at issue in this IPR should not benefit from such priority. However, as addressed above, Mr. MacInnes did not draft this section of EX1003 instead relying on counsel for Petitioners. Notably, none of the provisional applications is listed in the page 6 chart of exhibits considered. When asked about it during his deposition, Mr. MacInnes replied that he reviewed the chart of exhibits considered and it is complete. (*Id.* at 29:6-15.) The only reasonable conclusion is thus that paragraphs 50-69 merely reflect attorney argument and not the analysis and opinions of Mr. MacInnes. Accordingly, any testimony related to the provisional applications (identified above) should be excluded or provided no weight.

IV. CONCLUSION

For the foregoing reasons, Tegriss respectfully requests that the Board exclude EX1003 or alternatively give it no weight. FRE 702, and the U.S. Supreme Court's mandate in *Daubert*, require that expert opinion testimony meet the threshold standard of reliability for admissibility. FRE 402 and 403 further mandate that evidence must be relevant and probative to be admissible. Mr. MacInnes' declaration (EX1003) does not meet any of these tests.

Date: October 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE was served on the above referenced date via email on the following attorneys for the Petitioners:

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