

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OMEGA LINER COMPANY, INC.,

Petitioner

v.

BUERGOFOL GmbH,

Patent Owner.

CASE NO.: IPR2023-01372
U.S. PATENT NO. 9,657,882

**PATENT OWNER'S OBJECTIONS TO PETITIONER'S EVIDENCE
PURSUANT TO 37 C.F.R. 42.64(b)(1)**

Pursuant to 37 C.F.R. §42.64(b)(1) and the Federal Rules of Evidence (“F.R.E.”), Buergofol, GmbH (“Patent Owner”) hereby submit the following objections to Omega Liner Company, Inc.’s (“Petitioner”) Exhibits 1047, 1048, 1049, 1051, 1054, 1058, 1059, 1060, 1061, 1070, 1071, and 1072, and any reference to/reliance on the foregoing, in Petitioner’s Reply (Paper No. 24, “Reply”) to Patent Owner’s Response in the above-captioned *inter partes* review. As required by 37 C.F.R. § 42.62, Patent Owner’s objections below apply the Federal Rules of Evidence (“F.R.E.”). Patent Owner’s objections are timely under 37 C.F.R. § 42.64(b)(1) because they are being filed and served within five (5) business days of the filing of Petitioner’s Reply on October 7, 2024. Patent Owner’s objections provide notice to Petitioner that Patent Owner may move to exclude these exhibits under 37 C.F.R. § 42.64(c).

1. Objections To Exhibit 1047 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1047 and any reference to or reliance thereon, including testimony of Dr. Brant (Exhibit 1052) regarding this document. (Material Data Sheet for Lanxess Durethan® C 38 F, https://www.matweb.com/search/datasheet_print.aspx?matguid=b743d35d2c4b4d4da2864e128b8f21ba, downloaded July 31, 2024)

Grounds for objection: Patent Owner objects to Exhibit 1047, and Petitioner’s reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 (“Relevance”), F.R.E. 801, 802 (“Hearsay”), and F.R.E. 901

(“Authentication”).

Patent Owner objects to Exhibit 1047 as inadmissible hearsay under F.R.E. 801 and 802 because it is an out-of-court statement offered for the truth of the matters asserted, namely the composition prior to the critical date of the ‘882 patent of “Lanxess Durethan® C 38 F 000000 Copolyamide (Unverified Data**)”. After the **, Exhibit 1047 states, “This data sheet is not an active part of MatWeb and the information on it should not be considered reliable.” Moreover, Exhibit 1047 was downloaded on 7/31/24, more than a dozen years after the critical date of the ‘882 patent, at which time the Durethan brand products were produced by Bayer AG instead of Lanxess. Exhibit 1047 contains unreliable hearsay statements that do not fall under any exception to the rule against hearsay. For example, Exhibit 1047 is not a business record of Lanxess or even Bayer AG. The information on Exhibit 1047 was compiled by the unrelated party MatWeb, which explicitly states that the information on Exhibit 1047 “should not be considered reliable.”

Dr. Brant also repeatedly testified that information contained in data sheets and other technical information alleged to have been provided by a manufacturer of a product, is useful as a starting point, but that the information must be verified by contacting the manufacturer before using it in a commercial product. EX1052, pg. 111, ll. 15-22 with respect to Exhibit 1047.

Patent Owner further objects to this exhibit as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The information on Exhibit

1047 is not relevant to the merits of this IPR. Even if relevant, Patent Owner objects to this exhibit under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting any information on Exhibit 1047 as being true.

Patent Owner further objects to this exhibit as lacking sufficient authentication under F.R.E. 901(a). Dr. Brant testified that he had never seen this document, he could not attest to its authenticity, and Petitioner has not produced any evidence that Exhibit 1047 is what Petitioner contends it to be. Exhibit 1047 is not a business record of Lanxess or even Bayer AG. The information on Exhibit 1047 was compiled by the unrelated party MatWeb, which explicitly states that the information on Exhibit 1047 “should not be considered reliable.”

2. Objections To Exhibit 1048 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1048 and any reference to or reliance thereon, including testimony of Dr. Brant (Exhibit 1052) regarding this document. (*Technical Information Durethan® C 38 F Series*, Lanxess, August 21, 2012).

Grounds for objection: Patent Owner objects to Exhibit 1048, and Petitioner’s reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 (“Relevance”), F.R.E. 801, 802 (“Hearsay”), and F.R.E. 901 (“Authentication”).

Patent Owner objects to Exhibit 1048 as inadmissible hearsay under

F.R.E. 801 and 802 because it is an out-of-court statement offered for the truth of the matters asserted, namely the composition prior to the critical date of the '882 patent of "Durethan C 38 FAM." Exhibit 1048 contains unreliable hearsay statements that do not fall under any exception to the rule against hearsay. For example, Exhibit 1048 has not been established as a business record of Lanxess.

Dr. Brant also testified that information contained in data sheets and other technical information such as Exhibit 1048 are not complete, and that Dr. Boutrid might have spoken with the supplier of the resin to obtain more information about the type and amount of slip agent used in the resin. EX1052, pg. 136, ll. 3-21 with respect to Exhibit 1048.

Patent Owner further objects to Exhibit 1048 as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The information on Exhibit 1048 is not relevant to the merits of this IPR. Even if relevant, Patent Owner objects to this exhibit under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting any information on Exhibit 1048 as being true.

Patent Owner further objects to this exhibit as lacking sufficient authentication under F.R.E. 901(a). Dr. Brant testified that he had never seen this document, he could not attest to its authenticity, and Petitioner has not produced any evidence that Exhibit 1048 is what Petitioner contends it to be, that it was ever actually published, or that it is a business record of Lanxess.

3. Objections To Exhibit 1049 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1049 and any reference to or reliance thereon, including testimony of Dr. Brant (Exhibit 1052) regarding this document. (Material Data Sheet for Envalior Durethan® B 40 FAM, https://www.matweb.com/search/datasheet_print.aspx?matguid=f1e36ee80e74408caa8eaa023ca5af0b, downloaded July 2, 2024)

Grounds for objection: Patent Owner objects to Exhibit 1049, and Petitioner's reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 ("Relevance"), F.R.E. 801, 802 ("Hearsay"), and F.R.E. 901.

Patent Owner objects to Exhibit 1049 as inadmissible hearsay under F.R.E. 801 and 802 because it is an out-of-court statement offered for the truth of the matters asserted, namely the composition prior to the critical date of the '882 patent of "Envalior Durethan® B 40 FAM 000000 Nylon 6 (PA6), Conditioned". Exhibit 1049 was downloaded on 7/2/24, more than a dozen years after the critical date of the '882 patent, at which time the Durethan brand products were produced by Bayer AG. Products under the brand name Durethan were then produced by Lanxess, and Exhibit 1049 states that Durethan B 40 FAM is now produced by Envalior. The composition and properties of Durethan B 40 FAM produced in 2024 by Envalior may be different from those of Durethan B 40 FAM produced in 2012 by Bayer AG, and Petitioner has presented no evidence to show that the compositions and

properties are the same. Exhibit 1049 contains unreliable hearsay statements that do not fall under any exception to the rule against hearsay. For example, Exhibit 1049 is not a business record of Envalior, Lanxess or Bayer AG. The information on Exhibit 1049 was compiled by the unrelated party MatWeb and is not reliable.

Dr. Brant testified on a number of occasions that information contained in data sheets such as Exhibit 1049 is useful as a starting point, but that the information must be verified by contacting the manufacturer before using it in a commercial product. EX1052, pg. 23, ll. 8-18; 24, ll. 4-21; 27, ll. 11-22; and 28, ll. 5-11.

Patent Owner further objects to this exhibit as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The information on Exhibit 1049 is not relevant to the merits of this IPR. Even if relevant, Patent Owner objects to this exhibit under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting any information on Exhibit 1049 as being true.

Patent Owner further objects to this exhibit as lacking sufficient authentication under F.R.E. 901(a). Dr. Brant testified that he had never seen this document, (Exhibit 1052, pg. 139, ll. 1-2), he could not attest to its authenticity, and Petitioner has not produced any evidence that Exhibit 1049 is what Petitioner contends it to be, that it was ever actually published, or that it is a business record of Envalior.

4. Objections To Exhibit 1051 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1051 and any reference to or reliance thereon, including testimony of Dr. Brant (Exhibit 1052) regarding this document. (Product Information Sheet for Constab PE-SA 270, Antiblock-Slip Masterbatch, Constab Polyolefin Additives GmbH, (October 1, 2012).

Grounds for objection: Patent Owner objects to Exhibit 1051, and Petitioner's reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 ("Relevance"), F.R.E. 801, 802 ("Hearsay"), and F.R.E. 901 ("Authentication").

Patent Owner objects to Exhibit 1051 as inadmissible hearsay under F.R.E. 801 and 802 because it is an out-of-court statement offered for the truth of the matters asserted, namely the composition prior to the critical date of the '882 patent of "Constab PE-SA 270." Exhibit 1051 cautions that the "information and recommendations contained in this document are based upon data collected by KafritGroup and believed to be correct," and recommends that users of the product consult additional sources, such as safety data sheets and the like, before using the material. Exhibit 1051 contains unreliable hearsay statements that do not fall under any exception to the rule against hearsay. For example, Exhibit 1051 has not been established as a publication or a business record of Constab or KafritGroup.

Dr. Brant also repeatedly testified that information contained in data

sheets and other technical information alleged to have been provided by a manufacturer of a product, is useful as a starting point, but that the information must be verified by contacting the manufacturer before using it in a commercial product. EX1052, pg. 23, ll. 8-18; 24, ll. 4-21; 27, ll. 11-22; and 28, ll. 5-11. The information on Exhibit 1051 was compiled by the KafritGroup, who explicitly states that the information contained in Exhibit 1051 is “believed to be correct,” and expressly states that “[s]pecific recommendations and applications for specific products should be considered and prechecked by the user to ensure compatibility with user’s equipment and product requirements.” Even the putative author of this document states, consistently with the numerous statements of Dr. Brant during his deposition, that information in data sheets such as Exhibit 1051 are useful for providing some information to a user, but that the user should verify (“prechecked”) its accuracy before using the product.

Patent Owner further objects to this exhibit as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The information on Exhibit 1051 is not relevant to the merits of this IPR. Even if relevant, Patent Owner objects to this exhibit under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting any information on Exhibit 1051 as being true.

Patent Owner further objects to this exhibit as lacking sufficient authentication under F.R.E. 901(a). Dr. Brant testified that he had never seen

this document, he could not attest to its authenticity, and Petitioner has not produced any evidence that Exhibit 1051 is what Petitioner contends it to be. Exhibit 1051 is not an ordinary business record of Constab Polyolefin Additives GmbH, or even KafritGroup. The information on Exhibit 1051 was compiled by the KafritGroup, who explicitly states that the information contained in Exhibit 1051 is “believed to be correct,” and expressly states that “[s]pecific recommendations and applications for specific products should be considered and prechecked by the user to ensure compatibility with user’s equipment and product requirements.”

5. Objections To Exhibit 1054 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1054 and any reference to or reliance thereon (Buergofol’s Infringement Contentions, May 7, 2024).

Grounds for objection: Patent Owner objects to Exhibit 1054, and Petitioner’s reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 (“Relevance”).

Patent Owner objects to this exhibit as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The infringement contentions of Exhibit 1054 are not relevant to the merits of this IPR because the Board does not determine issues of infringement, and the Board’s application of the broadest reasonable interpretation for claim construction is different from the

standard applied by U.S. district courts. The differing claim construction standards used by the Board and district courts confirm that infringement contentions are irrelevant to the invalidity analysis. *See* MPEP § 2111.01; *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1371 (Fed. Cir. 2013).

6. Objections To Exhibits 1058 and 1059 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibits 1058 and 1059 (Exhibit 1058 is the certified translation of Exhibit 1059) and any reference to or reliance thereon, regarding this document. (Quality Agreement (Buergofol and Saertex), February 27, 2006, with certified English translation (translation of EX1059 - Quality Agreement (Buergofol and Saertex), February 27, 2006, in original German language).

Grounds for objection: Patent Owner objects to Exhibits 1058 and 1059, (collectively, “Exhibit 1058”) and Petitioner’s reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 (“Relevance”), and F.R.E. 801, 802 (“Hearsay”), and F.R.E. 901 (“Authentication”).

Patent Owner objects to Exhibit 1058 as inadmissible hearsay under F.R.E. 801 and 802 because it is an out-of-court statement offered for the truth of the matters asserted. Exhibit 1058 is simply a quality agreement between a manufacturer and a customer regarding a product sold to the customer, with a section (§7) identifying how the customer complaints would be processed by

the manufacturer, to the extent those complaints were ever to be made.

Exhibit 1058 contains unreliable hearsay statements that do not fall under any exception to the rule against hearsay.

Patent Owner further objects to this exhibit as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The information on Exhibit 1058 is not relevant to the merits of this IPR. The Quality Agreement identified in Exhibit 1058 covered products sold by the Patent Owner that were not insertion tubes for use in trenchless sewage pipe renovation comprising an external tubular film, a carrier material impregnated with a reactive plastic resin, and an inner tubular film; rather it only pertains to the inner tubular film. Even if relevant, Patent Owner objects to this exhibit under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting any information on Exhibit 1058 as being true.

Patent Owner further objects to this exhibit as lacking sufficient authentication under F.R.E. 901(a). Petitioner has not produced any evidence that Exhibit 1058 is what Petitioner contends it to be.

7. Objections To Exhibits 1061 and 1060 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1061 and any reference to or reliance thereon (Saertex email to Buergofol, February 26, 2009, in original German language) and Exhibit 1060 and any reference to or reliance thereon (Saertex

email to Buergofol, February 26, 2009 (translation of EX1061)).

Grounds for objection: Patent Owner objects to Exhibits 1061 and 1060, and Petitioner's reference to or reliance thereon in this proceeding, under F.R.E. 401, 402 ("Relevance") and F.R.E. 801, 802 ("Hearsay").

Exhibits 1061 and 1060 are hearsay under F.R.E. 801 and inadmissible under F.R.E. 802 because they are out-of-court statements offered for the truth of the matters asserted, namely that Buergofol supplied "film with adhesion problems" (Doc. 24, 16:5) even though Exhibits 1061 and 1060 do not mention any problems with "adhesion". Each of Exhibits 1061 and 1060 contains hearsay, as they purport to be emails from individuals who are not providing testimony in these proceedings, but are used to prove the truth of the matters asserted therein. Exhibits 1061 and 1060 present one or more statements of a third-party declarant (Nils Fuechtjohann) for the truth of the matters asserted, and do not fall under any exception to the rule against hearsay. For example, the email of Exhibit 1061 is an out-of-court statement of a third-party declarant who cannot be cross-examined, and thus cannot properly be used for the truth of the matters asserted as Petitioner attempts to do here.

Patent Owner further objects to Exhibits 1061 and 1060 as not relevant under F.R.E. 401 and therefore inadmissible under F.R.E. 402. The statements in Exhibits 1061 and 1060 lack relevance to the instituted grounds and do not relate to validity, secondary considerations or any of the references Hummel, Schuhmann or Nagai. Even if relevant, Patent Owner objects to this exhibit

under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice by accepting Petitioner's incorrect interpretation of the out-of-court statements of the third-party declarant (who cannot be cross-examined) as being true.

8. Objections To Exhibits 1071 and 1070 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1071 and any reference to or reliance thereon (Buergofol's Email to Dr. Stark, June 21, 2024, in original German language and with original English language declaration attached to email) and Exhibit 1070 and any reference to or reliance thereon (Buergofol's Email to Dr. Stark, June 21, 2024, with certified translation (translation of EX1071 without attached declaration)).

Grounds for objection: Patent Owner objects to Exhibits 1071 and 1070, and Petitioner's reference to or reliance thereon in this proceeding, under F.R.E. 501, 502 ("Privilege and Work Product") and F.R.E. 801, 802 ("Hearsay").

Patent Owner objects to these exhibits because Patent Owner asserts work-product protection and privilege over the subject matter at issue. Draft declarations prepared by Patent Owner's counsel for a third inventor after discussing the issues with the first two inventors is attorney-client privileged and work-product protected. In addition, draft affidavits prepared by a

company's counsel and forwarded to a former employee who is under an affirmative duty and obligation to assist the company in the matter in which the declaration is to be used (as is the case here), and which concerns the former employee's knowledge and conduct while employed, are protected by the attorney client privilege and work product immunity. Exhibits 1071 and 1070 are not admissible, and Petitioner should immediately expunge them from this record.

Patent Owner objects to Exhibits 1071 and 1070 because they were obtained by Petitioner's counsel in violation of court Order (Dkt. 19) in the underlying district court litigation *Buergofol v. Omega*, 4:22-cv-04112 in the District of South Dakota. Petitioner's counsel was ordered to terminate any interview with the inventor Dr. Stark if it appeared that Dr. Stark might reveal "privileged or confidential matters". The draft declaration in Exhibits 1071 and 1070 from Buergofol's counsel to the inventor and former employee Dr. Stark relating to confidential pre-filing activity relating to the '882 Patent, which Petitioner's counsel obtained from Dr. Stark, clearly reveals "privileged or confidential matters". Exhibits 1070 and 1071 state clearly that the declaration that was attached was "prepared by the patent attorneys."

Patent Owner also objects to Exhibits 1071 and 1070 because they are hearsay under F.R.E. 801 and do not fall within any hearsay exceptions. The exhibits are inadmissible under F.R.E. 802.

9. Objections To Exhibit 1072 And Any Reference To/Reliance Thereon

Evidence objected to: Exhibit 1072 and any reference to or reliance thereon (Dr. Stark's email to Omega with Marked Up Declaration, June 26, 2024).

Grounds for objection: Patent Owner objects to Exhibit 1072, and Petitioner's reference to or reliance thereon in this proceeding, under F.R.E. 501, 502 ("Privilege and Work Product"), F.R.E. 403 (unfair prejudice outweighs probative value) and F.R.E. 801, 802 ("Hearsay").

Patent Owner objects to Exhibit 1072 because Patent Owner asserts work-product protection and privilege over the subject matter at issue. The draft declaration of Exhibit 1072 was prepared by Patent Owner's counsel for a third inventor after discussing the issues with the first two inventors and is therefore work-product protected. In addition, draft affidavits prepared by a company's counsel and forwarded to a former employee who is under an affirmative duty and obligation to assist the company in the matter in which the declaration is to be used (as is the case here), and which concerns the former employee's knowledge and conduct while employed, are protected by the attorney client privilege and work product immunity. Exhibit 1072 is not admissible, and Petitioner should immediately expunge it from this record.

Patent Owner objects to Exhibit 1072 because it was obtained by Petitioner's counsel in violation of court Order (Dkt. 19) in the underlying

district court litigation *Buergofol v. Omega*, 4:22-cv-04112 in the District of South Dakota. Petitioner's counsel was ordered to terminate any interview with the inventor Dr. Stark if it appeared that Dr. Stark might reveal "privileged or confidential matters". The draft declaration of Exhibits 1072 from Buergofol's counsel to the inventor and former employee Dr. Stark relating to confidential pre-filing activity relating to the '882 Patent, which Petitioner's counsel obtained from Dr. Stark, clearly reveals "privileged or confidential matters". In addition, the annotations by Dr. Stark in the marked-up declaration clearly are matters confidential to the patent assignee and Dr. Stark's employer at the time of the invention and filing of the patent application.

Patent Owner also objects to Exhibit 1072 under F.R.E. 403 because its probative value is substantially outweighed by a danger of unfair prejudice. Dr. Stark is adverse to Buergofol considering that there have been over a dozen lawsuits between Buergofol and Dr. Stark over the past few years; many of them are still ongoing. Statements from Dr. Stark are obviously biased against Buergofol. From Dr. Stark's conduct over the past few years, Dr. Stark appears to be motivated more to harm Buergofol than to tell the truth. Because of assignor estoppel, Dr. Stark is estopped from disparaging his own patent (the '882 Patent) and from providing evidence or otherwise challenging the enforceability of the patent that he assigned to Buergofol. In addition, some of the markings on Exhibit 1072 that were made by Dr. Stark appear to contradict

(and Petitioner is alleging they contradict) statements made in the background section of the '882 patent regarding tearing problems with the inner film when used in an insertion tube for trenchless sewage pipe renovation, the filing of which was accompanied by an oath and declaration signed by Dr. Stark. The probative value of any statement by Dr. Stark relating to the '882 Patent is substantially outweighed by the danger of unfair prejudice to Buergofol.

Patent Owner also objects to Exhibit 1072 because it is hearsay under F.R.E. 801 and does not fall within any hearsay exceptions. The exhibit is inadmissible under F.R.E. 802.

For example, Dr. Stark's annotations and comments on the declaration of Exhibit 1072 are out-of-court statements of a declarant who cannot be cross-examined. Thus, Exhibit 1072 cannot properly be used for the truth of the matters asserted.

Dated: October 14, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PATENT OWNER'S FIRST SET OF OBJECTIONS TO PETITIONER'S EVIDENCE PURSUANT TO 37 C.F.R. 42.64(b)(1), was served by filing this document on the date indicated below through the Patent Trial and Appeal Case Tracking System (P-TACTS) and via e-mail to the following attorneys of record for the Patent Owner listed below:

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Dated: October 14, 2024

Respectfully submitted,

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