

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 MOTION TO EXCLUDE

I. Relief Requested

Patent Owner Buergofol GmbH (“Patent Owner”) requests that the Board exclude from the record inadmissible exhibits submitted by Petitioner Omega Liner Company, Inc. (“Petitioner”). More specifically, the Board should exclude Exhibits 1047, 1048, 1049, 1051, 1060, 1061, 1070, 1071, and 1072. It is not enough for the Board to find that this Motion is moot if the Board does not rely on the inadmissible exhibits in reaching its Final Written Decision. If the exhibits remain in the record, Petitioner may seek to rely on them on appeal to the Federal Circuit, and Patent Owner could be unfairly forced to face them again.

II. The Board should exclude Exhibit 1047

The Board should exclude Exhibit 1047 because it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1047 is irrelevant because it has not been shown to have been a printed publication or publicly available prior to the critical date of the ’882 patent. Exhibit 1047 was downloaded more than 12 years after the critical date of the ’882 patent, and after Lanxess had ceased production of Durethan brand products. In Exhibit 1073, Petitioner fails to present any facts or evidence to indicate that Exhibit 1047 was publicly available prior to the critical date of the ’882 patent. In the absence of any competent evidence that Exhibit 1047 was publicly available or otherwise published prior to the critical date, it is not

relevant to this proceeding. *See Stewart-Warner Corp. v. City of Pontiac*, 767 F.2d 1563, 1570 (Fed. Cir. 1985).

Exhibit 1047 purports to be a Material Data Sheet for Lanxess Durethan C 38 F. Petitioner's Reply cites Exhibit 1047 to assert the truth of its assertion that: "Stark-Hummel, ... describes Comparative Example 5 using a polyamine without additives (Durethan C38F), resulting in a film 'permanently bonded' to the cured resin." Reply at 24. Petitioner has not shown that any hearsay exception applies.

Petitioner offers Exhibit 1047 for the truth of the composition prior to the critical date of the '882 patent of "Lanxess Durethan C 38 F 000000 Copolyamid (Unverified Data **)". Petitioner's reliance is impermissible because Patent Owner cannot cross examine the unidentified declarant on this statement. Exhibit 1047 explicitly states, "This data sheet is not an active part of MatWeb and the information on it *should not be considered reliable*." (emphasis added). As clearly outlined in the document itself, Exhibit 1047 contains *unreliable* hearsay statements. Further, Exhibit 1047 does not fall under any exception to the rule against hearsay. Exhibit 1047 is an unreliable compilation by the unrelated party MatWeb and is not and cannot be established as a business record of Lanxess or even Bayer AG.

Exhibit 1047 lacks sufficient authentication under F.R.E. 901(a). Dr. Brant testified that he had never seen this document, nor could he attest to its authenticity. Petitioner has produced a supplemental declaration in Exhibit

1073, in an attempt at authentication. However, Exhibit 1073 only states that the document was downloaded from MatWeb's website. The information was compiled by the unrelated party MatWeb, and the document explicitly states the information "should not be considered reliable." As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1047 is also not self-authenticating. F.R.E. 902.

Accordingly, the Board should exclude Exhibit 1047.

III. The Board should exclude Exhibit 1048

The Board should exclude Exhibit 1048 because it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

First, Exhibit 1048 is not cited in Petitioner's Petition or its Reply. Therefore, Petitioner is not legitimately relying on this exhibit or identifying with any particularity how this exhibit is relevant to this proceeding. *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper 58, p. 49 (P.T.A.B. Sept. 25, 2015).

Second, the only reference to Exhibit 1048 in this proceeding is in the transcript of the Deposition of Dr. Brant (EX 1052, 118-127). Exhibit 1048 was offered for the truth of the matters asserted, the composition of "Durethan C 38 FAM," prior to the critical date of the '882 patent. To the extent that Petitioner might be relying upon Exhibit 1048 for anything, it would be the truth of this assertion. This is inadmissible hearsay. F.R.E. 801-02. Further, Petitioner has not established Exhibit 1048 as a business record of Lanxess, nor

has it established any other hearsay exception.

Third, Exhibit 1048 has not been authenticated as required under F.R.E. 901(a). Dr. Brant testified that he had never seen this document and that he could not attest to its authenticity. Petitioner has not sufficiently authenticated 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. As stated in Exhibit 1073, Petitioners acquired the contents of Exhibit 1048 from “yumpu.com.” (EX1073, ¶4). This is a far cry from establishing that Exhibit 1048 is truly what Petitioner claims it is. The fact that the document was not even procured from Lanxess itself, and instead was procured from an unverified third-party website does not satisfy the authentication requirements of F.R.E. 901(a). Exhibit 1048 is also not self-authenticating. F.R.E. 902.

Accordingly, the Board should exclude Exhibit 1048.

IV. The Board should exclude Exhibit 1049

The Board should exclude Exhibit 1049 because it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1049 is irrelevant because it has not been shown to have been a printed publication or publicly available prior to the critical date of the '882 patent. As stated in Exhibit 1073, Exhibit 1049 was downloaded on 10/7/2024, 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. Exhibit 1073 provides no indication that the contents of Exhibit 1049 are relevant or applicable to the prior Durethan product made by Bayer AG. In the absence of any competent evidence that Exhibit 1049 was publicly available or otherwise published before the critical date of the '882 patent, it is not relevant to this proceeding. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

Exhibit 1049 should be excluded as hearsay because it is an out-of-proceeding statement offered to establish the truth of the matter asserted. F.R.E. 801-802.

Exhibit 1049 purports to be a Material Data Sheet for Envalior Durethan B40 FAM). Petitioner relied on this exhibit in the Reply at page 20, to establish the truth of the matter asserted, namely the composition prior to the critical date of the '882 patent of “Envalior Durethan B 40 FAM 000000 Nylon 6 (PA6) Conditioned.” Petitioner relies on Exhibit 1049 for the proposition that Durethan B 40 FAM, as produced in 2024 by Envalior, is a composition and has the same properties and components as those produced in 2012 by Bayer AG. Petitioner’s reliance is impermissible, because Patent Owner cannot cross examine the unidentified declarant on this statement. *See 1964 Ears, LLC v. Jerry Harvey Audio Holding, LLC*, IPR2016-00494 (P.T.A.B July 19, 2017, *aff’d*, 753 F.App’x 915 (Fed Cir. 2019). Further, Petitioner has presented no evidence to show that the compositions and properties of the two companies’ products are the same.

No hearsay exceptions apply. The information was compiled by the unrelated party MatWeb and is not reliable. There is no evidence that the record was made by a person with firsthand knowledge, that it was made in the normal course of events, nor that it is reliable. Further, as discussed in Exhibit 1047, the information within the documents “*should not be considered reliable.*”

Petitioner has produced a supplemental declaration in Exhibit 1073, in an attempt at authentication. However, Exhibit 1073 only states that the document was downloaded from MatWeb’s website. The information was compiled by the unrelated party MatWeb, and the document explicitly states the information “should not be considered reliable.” As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1047 is also not self-authenticating. F.R.E. 902.

Accordingly, the Board should exclude Exhibit 1049.

V. The Board should exclude Exhibit 1051

The Board should exclude Exhibit 1051 because it is an out-of-proceeding statement offered to establish the truth of the matter asserted. F.R.E. 801-802. Exhibit 1051 purports to be a product information sheet for Constab PE-SA 270. Petitioner relied on this exhibit in the Reply at pages, 4, 5, 10, 11, 12, 14, 17, and 18 to support Ground 3 of its obviousness argument, its secondary considerations argument, and its argument of “false statements.” Petitioner did not show that any hearsay exception applies.

Petitioner offers Exhibit 1051 for the truth of the matter asserted, namely the composition prior to the critical date of the '882 patent of "Constab PE-SA 270." Exhibit 1041 cautions that "the information and recommendations contained in this document are based upon data collected by KafritGroup and believed to be correct," but recommends that users of the product consult additional sources, such as safety data sheets and the like, *before* using the material. Petitioner's reliance on Exhibit 1051 is impermissible because Patent Owner did not and cannot have an opportunity to cross-examine the declarant on the statements. *See 1964 Ears, LLC v. Jerry Harvey Audio Holding, LLC*, IPR2016-00494 (P.T.A.B July 19, 2017, *aff'd*, 753 F.App'x 915 (Fed Cir. 2019)).

The information on Exhibit 1051 was compiled by KafritGroup states that the information is only *believed* to be correct and expressly warns that "[s]pecific recommendations and application for specific products should be considered and prechecked by the user to ensure compatibility with user's equipment and product requirements." Dr. Brant also repeatedly testified that the information contained in such 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, 11.8-18; 24, 11.4-21; 27, 11. 11-22; and 28, 11. 5-11. Even the putative author of Exhibit 1051 states, as did Dr. Brant during his deposition, that the information

in datasheets should be verified (“prechecked”) for accuracy before using the product. 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.

Accordingly, Exhibit 1051 should be excluded.

VI. The Board should exclude Exhibits 1058 & 1059

The Board should exclude Exhibits 1058 and 1059 because they are irrelevant and cited for inadmissible hearsay.

Exhibits 1058 and 1059 should be excluded as hearsay because they are out-of-proceeding statements offered to establish the truth of the matter asserted. F.R.E. 801-802. Exhibit 1058 is an English translation of Exhibit 1059, which purports to be a Quality Agreement between Patent Owner and third-party Saertex from February 27, 2006. Petitioner relied on these exhibits in the Reply at 16, to support its argument regarding adhesion problems. Petitioner has not shown that any hearsay exception applies

Petitioner offers Exhibits 1058 and 1059 for the truth of the matter asserted, namely that Buergofol had knowledge of “adhesion problems,” (Reply, 24, 16:6-8). Aside from mischaracterizing the document, Petitioner’s reliance is impermissible because Exhibits 1058 and 1059 purport to be an agreement between parties who are not providing testimony in these proceedings, and Patent Owner will not have an opportunity to cross-examine

them. *See 1964 Ears, LLC*, IPR2016-00494 (P.T.A.B. July 19, 2017).

Moreover, Petitioner mischaracterizes the teachings of Exhibits 1058 and 1059. The exhibits are simply a quality agreement between a manufacturer and a customer, with section (§7) identifying how customer complaints would be processed by the manufacturer, **if** 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.

Exhibits 1058 and 1059 should also be excluded because they are not relevant. F.R.E. 401, 402. The statements in Exhibits 1058 and 1059 are irrelevant to the instituted grounds and do not relate to validity, secondary considerations, or any of the references, Hummel, Schuhmann, or Nagai. Even if relevant, Exhibits 1058 and 1059 should be excluded because their probative value is substantially outweighed by a danger of unfair prejudice by accepting Petitioner's incorrect interpretation of the hearsay statements of the third-party declarant (who cannot be cross-examined).

Accordingly, Exhibits 1058 and 1059 should be excluded.

VII. The Board should exclude Exhibits 1060 & 1061

The Board should exclude Exhibits 1060 and 1061 because they are irrelevant and cited for inadmissible hearsay.

Exhibits 1060 and 1061 should be excluded as hearsay because they are out-of-proceeding statements offered to establish the truth of the matter asserted. F.R.E. 801-802. Exhibit 1060 is an English translation of Exhibit

1061, which purports to be an email from third-party Saertex to PO describing an alleged complaint made by an unknown 4th party. Petitioner relied on these exhibits in the Reply at 16, to support its “false statements” argument.

Petitioner has not shown that any hearsay exception applies.

Petitioner offers Exhibits 1060 and 1061 for the truth of the matter asserted, namely that Buergofol supplied “film with adhesion problems” (Reply, 24, 16:5), even though Exhibits 1060 and 1061 do not mention any problems with “adhesion.” Aside from mischaracterizing the document, Petitioner’s reliance is impermissible because Exhibits 1060 and 1061 purport to be emails from individuals who are not providing testimony in these proceedings, and only reference an alleged (which could have been fabricated by Saertex) complaint by an unknown, un-related 4th party, and Patent Owner will not have an opportunity to cross-examine them. *See 1964 Ears, LLC*, IPR2016-00494 (P.T.A.B. July 19, 2017).

Moreover, Exhibits 1060 and 1061 are hearsay within hearsay because they present one or more statements of a third-party declarant (Nils Fuechtjohann) regarding a complaint alleged to have been made by an unknown, un-related 4th party, 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-proceeding statement by a third-party who references an alleged, not verified, complaint by yet another un-related 4th party, neither of whom can be cross examined and thus cannot be properly used for the truth

of the matters asserted as Petitioner attempts to do here.

Exhibits 1060 and 1061 should also be excluded because they are not relevant. F.R.E. 401, 402. The statements in Exhibits 1060 and 1061 are irrelevant to the instituted grounds and do not relate to validity, secondary considerations, or any of the references, Hummel, Schuhmann, or Nagai. Even if relevant, Exhibits 1060 and 1061 should be excluded because their probative value is substantially outweighed by a danger of unfair prejudice by accepting Petitioner's incorrect interpretation of the hearsay statements of the third-party declarant (who cannot be cross-examined) regarding an alleged problem by an unknown 4th party, as being true.

Accordingly, Exhibits 1060 and 1061 should be excluded.

VIII. The Board should exclude Exhibits 1070, 1071, & 1072

The Board should exclude Exhibits 1070, 1071, and 1072 because they are privileged, protected work product, and are cited for inadmissible hearsay.

Exhibits 1070, 1071, and 1072 should be excluded as privileged attorney work product. F.R.E. 501-02. As discussed in Paper No. 33, Exhibits 1070-72 are at least protected as attorney work product, are confidential, and PO did not waive any privilege or protection accorded these documents. The *draft* declaration (EX1070, EX1071) clearly states the attached was "prepared by the patent attorneys" and is on its face is attorney work product. *See Twitter, Inc. v. Palo Alto Research Center Inc.*, IPR2021-01398, paper No. 33, pg. 5 (holding a *draft* declaration prepared by counsel is privileged, protected, and not

discoverable, citing 37 C.F.R. § 45.51(b)(1)(iii)).

Exhibits 1070, 1071, and 1072 should be excluded as hearsay because they are out-of-proceeding statements offered to establish the truth of the matter asserted. F.R.E. 801-02. Petitioner has not established any exceptions to hearsay. Exhibit 1072, for example, contains the impressions of a hostile and inherently unreliable declarant, who cannot be cross-examined.

Accordingly, Exhibits 1070, 1071, and 1072 should be excluded.

IX. Conclusion

For the foregoing reasons, the Board should exclude Petitioner's Exhibits 1047, 1048, 1049, 1051, 1058, 1059, 1060, 1061, 1070, 1071, and 1072.

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, 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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