

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OMEGA LINER COMPANY, INC.,

Petitioner

v.

BUERGOFOL GmbH,

Patent Owner.

IPR2023-01372
Patent 9,657,882 B2

PETITIONER'S MOTION TO EXCLUDE EVIDENCE (EX2003)

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I. Introduction.

Petitioner moves to exclude the testimony of Mr. Gregor Schleicher contained in EX2003. The declaration is replete with inadmissible hearsay, improper legal conclusions, and testimony unsupported by reliable methods or personal knowledge as required under the Federal Rules of Evidence (FRE) and 37 C.F.R. § 42.65. The declaration incorporates information that constitutes hearsay or double hearsay, including assertions about the contents of resins and includes improper legal conclusions. Such testimony fails to meet the reliability standards outlined in FRE 702 and 703, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related case law.

For these reasons, Petitioner respectfully requests that the Board exclude the identified portions of EX2003 that rely on inadmissible hearsay and improper legal conclusions. The exclusion of this testimony is necessary because it is unreliable and to preserve the integrity of the record and ensure a fair determination in this proceeding.

II. Legal Standard.

The admissibility of exhibits submitted in a PTAB proceeding is governed by the Federal Rules of Evidence. 37 C.F.R. § 42.61; Office Patent Trial Practice Guide, 77 Fed. Reg. 48,758 (Aug. 14, 2012). The Federal Rules of Evidence apply in an *Inter Partes* Review. 37 C.F.R. 42.62(a).

A statement is hearsay if it was made out of court and is offered to prove the truth of the matter asserted. FRE 801(c). FRE 802 provides that hearsay is not admissible unless a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. FRE 802. “Hearsay is generally inadmissible as evidence because it is considered unreliable.” *United States v. Lozado*, 776 F.3d 1119, 1121 (10th Cir. 2015).

III. Patent Owner’s Inadmissible Evidence Should Be Excluded.

A. EX2003, ¶¶ 12-14 (Hearsay and Improper Legal Conclusions).

The witness admits he has no personal knowledge of the matters set forth in EX2003, ¶¶ 12-14 but was “informed” of the certain German patents and patent proceedings in Germany. The information he received is hearsay and the testimony based on it is inadmissible hearsay and should be excluded. Further, the witness makes several unsupported legal conclusions regarding what allegedly happened in the German patent office, apparently under German patent law. EX2003, ¶¶ 12-14. But the witness fails to establish any competency to testify or opine regarding what the legal ramification of what occurred in Germany, the results of those proceedings and the meanings of the submissions under German patent law. The witness is not an attorney and appears to rely on what was revealed to him by some identified person(s). Further raising the possibility his testimony is double hearsay. *Zaben v. Air Products Chemicals, Inc.*, 129 F.3d 1453, 1456 (11th Cir. 1997) (“Moreover, as

the district court suggested, Lewis’ testimony concerning what Carter and Dunning said to him about what others in the company told them presents a classic “double hearsay” problem.”) The witness fails to identify the alleged source much less submit evidence from them that would support his testimony or establish an exception to the hearsay. There is no indication this testimony is relevant or reliable and should be excluded. *See, e.g., Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999).

For all these reasons, EX2003, ¶¶ 12-14 should be excluded for improper legal conclusions and hearsay. FRE 803, 701, 702; 37 C.F.R. §42.65.

B. EX2003, ¶¶ 15-18 (Hearsay).

The witness admits he has no personal knowledge of the matters set forth in EX2003, ¶¶ 15-18 and was merely “informed” of the certain German patents owned by Huhtamaki Deutschland GmbH & Co. KG (“Huhtamaki”) and the patent proceedings in Germany involving Huhtamaki’s films. Therefore, any testimony based on this hearsay is also hearsay and should be excluded. FRE 802. *See e.g., U.S. v. Casas*, 356 F.3d 104, 119 (1st Cir. 2004) (“And, evidence which is based on inadmissible hearsay is itself inadmissible.”); *Flores v. Pennsylvania State Police*, No. CV 18-0137, 2019 WL 251948, at *2 (E.D. Pa. Jan. 17, 2019) (“These documents are comprised of inadmissible hearsay and any conclusions contained within them are inadmissible based on their reliance on such hearsay.”)

Further, based on this and other hearsay, the witness then makes several unsupported claims regarding Huhtamaki's products and Huhtamaki's customers. EX2003, ¶¶ 15-18. The witness purports to testify regarding Huhtamaki's products based on knowledge of the market as an officer of PO. EX2003, ¶¶ 15-18. The witness fails to identify the alleged source much less submit evidence that would support his testimony or establish an exception to hearsay. Further raising the possibility his testimony is double hearsay. *Zaben*, 129 F.3d at 1456. Further, the conclusions are based on inadmissible hearsay, therefore all the testimony is hearsay. *U.S.*, 356 F.3d at 119. The hearsay and any testimony based on it is inadmissible hearsay and/or double hearsay and should be excluded. FRE 802.

Finally, the witness purports to testify regarding Huhtamaki's customers what they knew and did not know and actions they could or could not have taken. EX2003, ¶¶ 15-18. This testimony is nothing, but rank speculation based on inadmissible hearsay and should be excluded. *U.S.*, 356 F.3d at 119; *Flores*, 2019 WL 251948, at *2. Finally, the witness is not competent to testify regarding the state of mind or the actions of Huhtamaki's customers. *See e.g., Buckmaster v. Wyman*, No. 05-C-0166, 2006 WL 1785845, at *3 (E.D. Wis. June 23, 2006) ("The opinions and conclusions of plaintiff concerning another party's state of mind are not admissible, since one person is not competent to testify what another person is thinking.")

The hearsay and any testimony based on it in EX2003, ¶¶ 15-18 is inadmissible hearsay and should be excluded. FRE 802.

C. EX2003, ¶¶ 19-21 (Hearsay).

This testimony is another example of the witness improperly using hearsay regarding Huhtamaki and its products and making conclusions based on that hearsay in EX2003, ¶¶ 19-21, which is nothing but empty speculation based on hearsay and inadmissible. *U.S.*, 356 F.3d at 119; *Flores*, 2019 WL 251948, at *2. The witness is not competent to testify regarding the German patent to Huhtamaki or the hearsay within it. EX2003, ¶19. Nor does he have any knowledge regarding Huhtamaki's products, when they were produced, or any problems with them. EX2003, ¶20-21. Therefore, any testimony based on the German patents to Huhtamaki or Huhtamaki's products is hearsay and should be excluded. FRE 802.

IV. Conclusion.

For all the reasons set forth above, EX2003, ¶¶ 12-21 should be excluded as containing inadmissible hearsay and testimony based on hearsay and containing inadmissible legal conclusions. FER 802.

Dated: November 26, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *PETITIONER'S MOTION TO EXCLUDE EVIDENCE (EX2003)*, 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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