

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 OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE (PAPER 51)**

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I. INTRODUCTION

Patent Owner's motion to exclude evidence (Paper 51) seeks to improperly shield critical evidence that is directly relevant to the validity of the '882 Patent. Admission of the challenged exhibits, including product datasheets, contractual agreements, and declarations, are well-supported by law and admissible under the Federal Rules of Evidence. PO's motion should be denied in its entirety.

II. ARGUMENTS

A. The Product Datasheets.

PO seeks to exclude the product datasheets for Durethan C38 (EX1047 and EX1048), Durethan B40 (EX1049) and Constab PE-SA 270 (EX1051). Each of these brand name products is identified as a component of the various examples described in the '882 Patent. (EX1001, Col. 15:18-16:65.) These datasheets are highly relevant to the claims and allegations made by PO. (Petitioner's Reply, Paper 24 at pp. 10-12 and 15-20.) None of these datasheets should be excluded.

1. The Durethan C38 Datasheet from MatWeb (EX1047).

The underlying basis of hearsay objections is that the evidence is unreliable. *See e.g., Atkins v. Fischer*, 232 F.R.D. 116, 132 (D.D.C. 2005). PO's position is based on the assumption that information downloaded from the internet is unreliable and therefore there is no need to demonstrate it is hearsay; *i.e.*, that it is unreliable. (Paper 51 at p. 3). This is incorrect. "Countless contemporary judicial opinions cite

internet sources...” *Alfa Corp. v. OAO Alfa Bank*, 475 F. Supp. 2d 357, 361-62 (S.D.N.Y. 2007) (gathering cases admitting evidence from internet sources including Wikipedia and Nature.) “The Internet has become a source of reliable information both for courts and experts.” *Member Servs., Inc. v. Sec. Mut. Life Ins. Co. of New York*, No. 06-CV-1164, 2010 WL 3907489, at *24 (N.D.N.Y. Sept. 30, 2010).

EX1047 is the product datasheet for Durethan C38 downloaded from the MatWeb website.¹ This is the same website that PO used to download the product datasheet for Durethan C31 and relied on by PO’s expert. (EX2010; EX2001, ¶¶ 8 and 40.) PO’s expert testified that MatWeb is a reliable source for obtaining information about products such as Durethan and PO’s EX2021 and the information in it is reliable. (EX1052, pp. 19-22.) According to PO’s expert “...MatWeb is a very reliable source for looking at these things...” (EX1052, p. 20:20-21.) And “most everybody” considers what comes off MatWeb to be reliable and that’s why they go there to get information. (EX1052, p. 21:13-20.) And while it is not “infallible”, it is a good place to start in order to obtain information about products such as Durethan. (EX1052, p. 24:22-28:14). The specification sheets are sufficient for an expert report

¹ MatWeb provides a searchable online database of engineering material with over 180,000 product data sheets. <https://www.matweb.com/services/services.aspx>.

and there is no need to verify the information in a datasheet from MatWeb unless there are suspicions about the information in it. (*Id.*)

PO's expert adopted the information from MatWeb as reliable therefore the product data sheets are not hearsay. FRE 801 provides that a statement is not hearsay if the party adopts it. FRE 801(d)(2)(B). As explained by one court:

[A] manifestation of a party's intent to adopt another's statements, or evidence of the party's belief in the truth of the statements, is all that is required for a finding of adoptive admission. The way to determine if a party has manifested an adoption or belief in the truth of the [statements] is whether the surrounding circumstances tie the possessor and the [statement] together in some meaningful way.

U.S. Equal Emp't Opportunity Comm'n v. Rent-A-Center E. Inc., 303 F. Supp. 3d 739, 744-45 (C.D. Ill. 2018) (internal citations and quotations omitted.) PO's expert confirmed that he relied on the product data sheets or "specifications" from MatWeb to determine what a product is and its components. (EX1052, pp. 106:7-108:16.) He also confirmed that the information in EX1047 contains the same information he was able to obtain from MatWeb. (EX1052, p. 111:2-10.) Therefore, the product data sheets from MatWeb such as EX1047 are adopted admissions and not hearsay under FRE 801(d)(2)(B).

Further, the hearsay exception under FRE 803(17) for commercial publications "generally relied on by the public or by persons in particular occupations" is also applicable here. *See e.g., Jackpocket, Inc. v. Lottomatrix NY LLC*, 645 F. Supp. 3d 185, 222 n.11 (S.D.N.Y. 2022) (the information regarding

applications available on the Google Play Store is admissible under 803(17).) “The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.” FRE 803(17) advisory committee note. As explained by PO’s expert, “most everybody” considers what comes off MatWeb to be reliable and that’s why they go there to get information on products such as Durethan. (EX1052, p. 21:13-20.) Thus, the product data sheets are admissible under FRE 803(17) as commercial publications generally relied on by experts in the field.

Additionally, EX1047 and the testimony based on it should not be excluded because it is the type of information relied on by experts. FRE 703, *see also, e.g., DCHG Invs. LLC v. IAC Greenville LLC*, No. 6:15-CV-02013-DCC, 2018 WL 2045828, at *6 (D.S.C. May 2, 2018) (“Moreover, an expert may rely on information from others, even hearsay, if it is of a type normally relied upon by such experts.”) PO’s expert did not have any personal knowledge of Durethan C31 or C38. (EX1052, p. 107:12-15.) He relied on the product data sheets from MatWeb and the manufacturer for information regarding these products. (EX1052, p. 104:18-20; MatWeb is a “good source” to get product data information.) And used that information as a basis for his opinions. (EX1052, pp. 28:12-14; 106:14-108:20; 110:6-111:22; *see also*, EX2001, ¶¶ 8 and 40.) Therefore, EX1047 is admissible under FRE 703. Any claims regarding the accuracy or completeness of any specific

product datasheet, such as EX1047, goes to the weight of the evidence, not its admissibility.

PO's claims of lack of authentication are misplaced. As properly set forth in EX1073 (the affidavit of Mr. Rush), a true and correct copy of the product data sheet for Durethan C38 was downloaded from the MatWeb website. Thus, it is what purports to be — a true and correct copy of the product data sheet for Durethan C38 from the MatWeb website matching EX1047. It is therefore authentic. FRE 901(b)(1) and (2). *See e.g., Ericsson Inc. v. Intellectual Ventures ILLC*, IPR2014-00527, Paper 41 at 12 (P.T.A.B. May 18, 2015) (finding information accessible to the public through the IEEE on-line system authentic.) Especially here where there is no evidence that EX1047 was tampered with or is unreliable. *Id.*

Thus, EX1047—the product data sheet for Durethan C38 from MatWeb—is not inadmissible hearsay and should not be excluded as evidence.

2. The Durethan C38 Datasheet from Manufacturer (EX1048).

PO's expert also testified that the product datasheets from the manufacturer such as EX1048 are a good source of reliable product information. (EX1052, pp. 104:18-105:4; 108:1-109:10) Further, PO's expert identified EX1048 as the “sort of sheet” manufacturers put out to assist customers in selecting materials and that EX1048 goes beyond the basic product data sheet since it also provides information on how to use the product. (EX1052, pp. 118:18-119:10.) And PO's expert testified

he was able to access the product data sheet from Durethan C38 from the Envalior (f/k/a Lanxess) website; believing Envalior was a “spinoff.” (EX1052, pp. 120:8-121:11.)² EX1048 is not hearsay and admissible under the exceptions to hearsay.

First, EX1048 is not hearsay. A true and correct copy of EX1048 was downloaded from yumpu.com, a digital publishing platform that helps publishers distribute and manage printed materials. (EX1073, ¶4.) PO’s expert never questioned the reliability of the information in EX1048. (EX1052, p. 121:14-156:3.) And he testified extensively regarding EX1048 and the information it contains including the meaning of the acronym “FAM” and the number of additives in Durethan C38 F and Durethan C38 FAM. (*Id.*) By adopting EX1048 as a basis to testify regarding the Durethan C38 line of products including Durethan C38 F identified in the examples in the ’882 Patent (EX1001, Col. 15:18-16:65), EX1048 is an adopted admission under FRE 801(d)(2)(B) and is not hearsay.

Second, PO’s expert relied on EX1048 to correct his prior testimony regarding “F” in Durethan C38 F concluding that based on the nomenclature defined in EX1048 “F” does not mean “barefoot” or that there no additives in Durethan C38 F.

² On April 1, 2023, Lanxess High Performance Materials and DSM Engineering Materials formed a joint venture named Envalior. <https://techcenter.lanxess.com/scp/emea/en/home/index.jsp>.

(EX1052, pp. 107:6-8; 140:16-147:1; 152:19-156:1.) Pursuant to FRE 801(d)(2)(C), a statement qualifies as an evidentiary admission by a party-opponent, if, *inter alia*, it “is offered against a party and is ... a statement by a person authorized by the party to make a statement concerning the subject.” FRE 801(d)(2)(C). PO’s expert made evidentiary admissions regarding EX1048. *See e.g., Long v. Fairbank Farms, Inc.*, No. 1:09-CV-592-GZS, 2011 WL 2516378, at *10 (D. Me. May 31, 2011) (Expert’s testimony is admissible pursuant to Rule 801(d)(2)(C) when the expert was authorized by the party opponent to make statements regarding the issues in the cause of action.) The evidentiary admissions by PO’s expert regarding Durethan C38 F and Durethan B40 FAM that contradict the expert’s declaration and PO’s positions (Petitioner’s Reply, Paper 24, pp. 16-20) are not hearsay and are admissible. FRE 801(d)(2)(C).

Third, EX1048 and the testimony based on it should not be excluded because it is the type of information relied on by experts. FRE 703, *see also, e.g., DCHG Invs*, 2018 WL 2045828, at *6. PO’s expert did not have any personal knowledge of Durethan C38. (EX1052, p. 107:12-15.) So, he relied on the product data sheets from MatWeb and the manufacturer’s website for information regarding what the various Durethan products are and what is in them. (EX1052, p. 111:2-6.) As explained by PO’s expert, the product data sheets from the manufacturer are reliable and relied on

by experts such as himself. (EX1052, pp. 121:14-156:3.) Therefore, EX1048 is admissible under FRE 703.

Fourth, EX1048 is also admissible under FRE 803(17). EX1048 is copyrighted material containing the following notice: “© = LANXESS Deutschland GmbH 2012.” (EX1048, pp. 1-7.) The information in copyrighted material as evidence of its “date of publication and public accessibility” is relied on by those who publish and engage in research. *Ericsson Inc.*, IPR2014-00527, Paper 41 at 10-11 (finding a reference published on the IEEE website to be an anticipatory and not hearsay.) Thus, the copyrighted product data sheet for the Durethan C38 products is admissible under FRE 803(17). *Id.*

Fifth, EX1048 is also admissible under the residual exception of FRE 807 which provides that a hearsay statement is admissible if it is supported by sufficient guarantees of trustworthiness and is more probative on the issue than any other evidence. *Ericsson Inc.*, IPR2014-00527, Paper 41 at 11. That the product data sheet (EX1048) is copyrighted is more than sufficient indicia of trustworthiness. *Id.* (“The assignment of a publication date in the copyright line of an IEEE publication has equivalent circumstantial guarantees of trustworthiness as with other exceptions to the hearsay rule.”) Further, PO’s expert testified that these product data sheets are reliable and probative on the information contained in it and his declaration regarding the Durethan products identified in the ’882 Patent. (EX1052, pp. 121:14-

156:3; EX2001, ¶¶8 and 40.) Thus, the copyrighted product data sheet for the Durethan C38 products is admissible under FRE 807. *Ericsson Inc.*, IPR2014-00527, Paper 41 at 11.

Finally, as explained in *Ericsson*, admission of EX1048 serves the interests of justice.

An IPR proceeding may only be based on patents and “printed publications.” 35 U.S.C. § 311(b). Allowing IPR petitioners to rely on the IEEE publication date in an IPR proceeding, which is an administrative proceeding designed and intended to afford expedited and efficient relief, serves the interests of justice.

Ericsson Inc., IPR2014-00527, Paper 41 at 12. The same is true for EX1048--the copyrighted product data sheet for the Durethan C38 family of products from the manufacturer.

For all these reasons, EX1048 is not inadmissible hearsay and should not be excluded as evidence.

3. The Product Data Sheet for Durethan B40 FAM (EX1049).

EX1049 is another product data sheet downloaded from the MatWeb website. (EX1073, ¶¶ 6-7.) PO’s expert testified he did not have any more doubts regarding this MatWeb product data sheet than the other MatWeb product datasheets (EX2021 and EX1047). (EX1052, 139:3-140:11.) EX1049 is admissible for the same reasons EX1047 is admissible as set forth above. First, EX1049 is an adoptive admission under FRE 801(d)(2)(B) because, for instance, PO’s expert used it to support the

claims in his declaration. (EX1052, pp. 140:10-142:3.) Additionally, EX1049 is admissible under FRE 703 since it is regularly relied on by experts. (*See e.g.* EX1052, p. 142:4-11.) And it is admissible under FRE 803(17) for commercial publications “generally relied on by the public or by persons in particular occupations” is also applicable here. *See e.g., Jackpocket, Inc.*, 645 F. Supp. 3d at 222 n.11. PO’s claims regarding the accuracy or completeness of the information in EX1049 go to the weight of the evidence, not its admissibility.

As with EX1048, the testimony of PO’s expert contradicting the matters in his declaration and PO’s positions (Petitioner’s Reply, Paper 24, pp. 16-20) are not hearsay but evidentiary admissions excluded as hearsay under FRE 801(d)(2)(C). Therefore, the evidentiary admissions by PO’s expert regarding Durethan B40 FAM are not hearsay and are admissible. FRE 801(d)(2)(C).

EX1049 is certainly more probative and contains more indicia of trustworthiness than the unsupported hearsay of PO’s expert regarding the components of Durethan B40 FAM obtained from PO’s attorneys. (EX2001, ¶16; EX1052, pp. 203:6-204:12.) So EX1049 is also admissible under FRE 807 and in the interests of justice as explained above regarding EX1048.

For all these reasons, EX1049 is not an inadmissible hearsay and should not be excluded as evidence.

4. The Product Data Sheet for Constab PE-SA 270 (EX1051).

EX1051 is the product data sheet for Constab PE-SA 270 produced by PO in and acquired by Petitioner in the underlying lawsuit. (EX1073, ¶¶8-9; *see also*, EX1052, pp. 192:21-193:20.) PO's expert testified that the product data sheet for Constab PE-SA 270 would be of "interest" to him. (EX1052, p. 192:9-16.) PO's expert then identified EX1052 as the product datasheet for Constab PE-SA 270. (EX1052, p. 194:3-21.) PO's expert then testified extensively regarding EX1051 and its contents, never questioning the reliability of the information in it. (EX1052, pp. 195:2-202:19.)

PO's expert adopted the information in EX1051 and the information on the Constab line of products in the "reference manual" submitted as evidence by Petitioner (EX1050) (not objected to by PO) that he relies on and keeps in his office. (EX1052, p. 184:2-18). He relied on the information in both EX1050 and EX1051 to recant the opinions in his declaration. (EX1052, pp. 195:2-202:19.) For instance, he opined that the Constab PE-SA 270 "masterbatch" was "about 88 percent" polyethylene. (EX1052, pp. 199:12-200:14.) Contradicting his testimony that the examples B4-B6 contain 1%, 4% and 6% wax respectively, i.e., Constab PE-SA 270 is 100% wax. (EX2001, ¶72; EX1052, pp. 175:2-180:10.) PO's expert adopted the information from these exhibits therefore, as explained above, EX1051 and the information it contains are adoptive admissions and not hearsay under FRE

801(d)(2)(B). *See e.g., U.S. Equal Emp't*, 303 F. Supp. 3d at 744-45. And the testimony contradicting his declaration and PO's positions (Petitioner's Reply, Paper 24, pp. 16-20) based on EX1051 constitute evidentiary admissions under FRE 801(d)(2)(C).

EX1051 is also admissible under FRE 703 as information regularly relied on by experts. According to PO's expert, EX1051 is the same type of product datasheet previously discussed (EX1047, EX1048, EX1049) that would be relied on by a "person of skill in the art." (EX1052, p. 194:3-21.) An expert may rely on information if it is of a type normally relied upon by experts even if its hearsay. *DCHG Invs. LLC*, 2018 WL 2045828, at *6. PO's expert adopted and relied on the information in EX1051, therefore, it is admissible under FRE 703.

For all these reasons, EX1051 is not inadmissible hearsay and should not be excluded as evidence.

B. PO's Quality Agreement with Saertex (EX1058-EX1059).

EX1058 is the English translation of the Quality Management Contract (EX1059) between PO and Saertex. PO does not dispute this is a true and correct copy of the agreement that was executed by PO including by one of the inventors—Dr. Abdel-Kader Boutrid. (EX1059, p. 1.) PO's objection that its own contract is hearsay is without merit. The contract is admissible as a party admission under FRE 801(2)(d) and therefore not hearsay. *See e.g., Cooper v. Harvey*, No. 3:14-CV-4152-

B, 2016 WL 4427481, at *6 n. 22 (N.D. Tex. Aug. 21, 2016); *Crompton Greaves, Ltd. v. Shippers Stevedoring Company*, 776 F. Supp. 2d 375, 386 (S.D. Tex. 2011) (“A contract is not hearsay because it has independent legal significance.”); *Silicon Valley Telecom Exch., LLC v. Verio, Inc.*, No. C 12-00899 HRL, 2013 WL 4396744, at *4 n. 2 (N.D. Cal. Aug. 13, 2013) (“The settlement agreement is not hearsay because it is a written contract that memorializes the fact of a legal agreement, and falls outside the definition of hearsay.”) The contract is also an evidentiary admission under FRE 801(2)(d) since it serves to contradict PO’s positions and the declarations of two of the inventors. (Petitioner’s Reply, Paper 24, pp. 15-16). Therefore, it is not hearsay and is admissible.

C. The February 26, 2009 Saertex Email (EX1060-EX1061).

PO’s objections (Paper 25, pp. 12–14) and motion to exclude (Paper 51, pp. 2, 10–12) address only the February 26, 2009 email in EX1060–EX1061. They fail to address or object to EX1062–EX1063, which includes the declaration of Mr. Nils Fuechtjohann along with the original February 26, 2009 email as Exhibit A (EX1062) and the English translation thereof (EX1063). Mr. Fuechtjohann, a Saertex employee, drafted and sent the February 26, 2009 email to Mr. Goth and Dr. Boutrid, employees of PO. (EX1060-EX1063.) A true and correct copy of the email is attached to his declaration, which authenticates the email. (EX1063, p. 3 and Exhibit A; *see also* EX1062.)

Because the email and authenticating declaration are already admitted as evidence in EX1062–EX1063, PO has waived any objections to the February 26, 2009 email’s admission. Accordingly, the Saertex email, already part of the record, is not inadmissible hearsay and should not be excluded.

D. The False Draft Stark Declaration (EX1070, EX1071 and EX1072).

The false draft declaration submitted by PO (EX1070-1071) and Dr. Stark’s marked-up declaration (EX1072) identifying the false and incorrect factual statements in the draft are not hearsay. Fraudulent statements are not hearsay when they are offered as proof of the fraud. *Prudential Ins. Co. of Am. v. Sagers*, 421 F. Supp. 3d 1199, 1204 (D. Utah 2019) citing *Giove v. Stanko*, 977 F.2d 413, 417 (8th Cir. 1992) (holding that a false affidavit was not offered for the truth of the matter asserted but for the fact that it existed and that it constituted fraud). The draft declaration and the false and incorrect statements in it identified by Dr. Stark are proof of the fraud being committed by PO, including through the false declarations of the inventors submitted by PO. (EX2003 and EX2004). In addition, PO attempted to coerce Dr. Stark in signing the false declaration with threats of litigation and “damages” in EX1068-1069 which PO has not objected to. Therefore, the false draft declaration and identified false and incorrect statements are not hearsay.

As for the PO’s reliance on FRE 501-502 that the declaration is attorney work product is misplaced. These rules do not establish a basis to obtain or exclude

evidence. *See e.g., Mitre Sports Int'l Ltd.*, 304 F.R.D. 369, 371 (S.D.N.Y. 2015) (recognizing that “Fed. R. Evid. 502(a) addresses the precise issue of when a partial disclosure of protected information results in a waiver of undisclosed information”); *Winfield v. City of N.Y.*, 15-cv-05236 (LTS) (KHP), at *14 (S.D.N.Y. May 10, 2018) (“But, Rule 26 and Federal Rule of Evidence 502(d) recognize and accept the work product doctrine - they do not establish a procedure for compelling disclosure of work product over a party's objection.”)

Moreover, PO has already sought to strike and to seal EX1070, EX1071 and EX1072 based on work product. (Paper 33; Paper 55.) Petitioner submitted its oppositions and addressed PO’s baseless claims of work product, including its misplaced reliance on the *Twitter* case cited in the motion to exclude which only applies to expert declarations. (Paper 38; Paper 56.) There is no need to repeat those arguments here and any issues regarding PO’s efforts to exclude this evidence should be addressed with regard to those motions now pending.

III. CONCLUSION

For all these reasons set forth above, PO’s motion to exclude should be denied.

Dated: December 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE (PAPER 51)*, 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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