

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 OPPOSITION TO PETITIONER'S MOTION TO
EXCLUDE EVIDENCE (EX2001)**

I. INTRODUCTION

Patent Owner respectfully submits its Opposition to Petitioner's Motion to Exclude Evidence (EX2001) ("Motion"). Petitioner failed to meet its burden of demonstrating that Patent Owner's Exhibit is inadmissible. 37 C.F.R. § 42.20. Instead, Petitioner's Motion seeks an impermissibly broad exclusion of Patent Owner's properly submitted evidence that will assist the Board in addressing the patentability of the '882 Patent's claims and should be denied in its entirety.

II. Petitioner's Motion To Exclude Evidence (EX2001), Paper 052 Should Be Denied For Improperly Objecting to the Evidence, For Failing to Identify Where Patent Owner Relied Upon That Evidence, and Hearsay is Not a Permissible Objection To Declaration Evidence

First, Paper 052 is improper as based on Petitioner's wholly insufficient objections to Dr. Brandt's declaration, Exhibit 2001. 37 C.F.R. § 42.64(b)(1) requires: "The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence." Petitioner failed to do so, and in its motion to exclude, Paper 052, failed to point out in the record where the objections were made.

Petitioner's objections consist of broad-brush statements alleged to explain the objections to 63 full paragraphs of EX2001. Nowhere does Petitioner point to any specific statement made in these paragraphs, but rather lumps them into generalized categories based on multiple paragraphs, in which each paragraph contains multiple statements. Patent Owner had no opportunity

to submit additional evidence in response to Petitioner's objections that lacked any particularity. Instead, Petitioner waited until the end of this proceeding to include any particularity when it filed its motion to exclude, which is improper.

Second, Paper 052 fails to point out where Patent Owner relied upon any of the evidence Petitioner seeks to exclude, as set forth in *Mutual Insurance Co. v. Progressive Casualty Insurance Co.* (CBM2012-00002), Paper 66 (Jan. 23, 2014).

Third, statements made by a declarant in an IPR proceeding are not hearsay under FRE 801(c), but rather are sworn testimony that is subject to cross-examination, as explained in *Actifio, Inc. v. Delphix Corp.*, IPR2015-00050, Paper 57 (Mar. 31, 2016). And here, Petitioner cross-examined Dr. Brandt, but yet failed to cross-examine Dr. Brandt on numerous paragraphs to which Petitioner objects.

Finally, Paper 052 fails to provide the basis for excluding evidence, other than to allege multiple paragraphs contain hearsay or improper legal conclusions. For example, with respect to paragraphs 13-25 of EX2001, Paper 052 simply states that the evidence should be excluded "for improper legal conclusions and hearsay," but fails to identify any Federal Rule of Evidence that supports its statement. Paper 052, at 3. The same issue is present with respect to paragraphs 29-35, which were not objected to in Petitioner's Objections (Petitioner's Objections, Paper 15 objected to paragraph 26-35 on multiple basis, but never once stated on objection to only paragraphs 29-35

solely on the basis of hearsay). The remaining portions of Paper 052, headings C-H, likewise fail to disclose which Federal Rule of Evidence support exclusion of the respective paragraphs, (FRE 701, 702, 801, 802, 803?), although curiously mentions FRE 602 in heading H, but never listed that as a basis for objecting to the evidence.

For any one of these reasons set forth above, Petitioner's Motion to Exclude EX2001, Paper 052 should be denied.

III. Petitioner's Objections are Directed to the Weight of the Evidence, Not Its Admissibility

The Motion is improper because Petitioner fails to identify *legitimate* evidentiary objections regarding the *admissibility* of Patent Owner's evidence. Petitioner instead uses the motion as a vehicle to challenge the *weight* of the evidence. 37 C.F.R. § 42.64. "A motion to exclude ... may not be used to challenge the sufficiency of the evidence to prove a particular fact."

Consolidated Trial Practice Guide (Nov. 2019), 79. "A motion to exclude must explain why the evidence is not admissible (e.g., relevance or hearsay) but may not be used to challenge the sufficiency of the evidence to prove a particular fact. A motion to exclude is not a vehicle for addressing the weight to be given evidence—arguments regarding weight should appear only in the merits documents." *Id.* "Similar to a district court in a bench trial, the Board, sitting as a non-jury tribunal with administrative expertise, is well positioned to determine and assign appropriate weight to evidence presented." *Corning Inc.*

v. DSM IP Assets B.V., IPR2013-00053, Paper 66 at 19, 2014 WL, 2014 WL 1783280 (P.T.A.B. May 1, 2014) (citations omitted).

Petitioner asserts that sections of Exhibit 2001 are inadmissible because they rely on hearsay. (Mot., 3, 8, 9, 12). However, Petitioner is actually asserting that the Board should discredit this evidence, not that it is truly inadmissible under the Rules or the FRE. Petitioner's assertions regarding Exhibit 2001 go to the weight, not admissibility of the evidence because Dr. Brandt's opinions may properly be supported by otherwise inadmissible facts or data. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373 (Fed. Cir. 2013).

Dr. Brandt is a qualified expert retained by Patent Owner for this proceeding. Because Dr. Brandt is offering his opinion as an expert, the facts and data underlying his opinion do not need to be independently admissible. Further, Petitioner asserts that (somehow) Dr. Brandt's opinions must be excluded because of hearsay, because he was "informed of" the material that supports his testimony. However, Petitioner misunderstands the language of the declaration, and the explicit statement containing the list of materials that Dr. Brandt reviewed when preparing his declaration. *See* (EX2001, ¶8). As stated previously, Petitioner does not have a legitimate basis to request exclusion of Dr. Brandt's declaration, and instead is improperly arguing the weight that should be accorded to the exhibit.

The Board is perfectly capable of assessing the weight of the evidence

and if for no other reason, the Motion should be denied for this reason alone.

IV. Petitioner's Hearsay Arguments Fail Anyways

Hearsay is an out-of-court statement offered for its truth. *See* F.R.E. 801. EX2001 is not hearsay because it is testimony from the expert declaration of Dr. Patrick Brandt. (EX2001). This Exhibit is therefore trial testimony, and thus is not hearsay because it is not an out-of-court statement. *See* 37 C.F.R. § 42.53(a); *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2016-00130, Paper 35 at 19 (P.T.A.B. May 8, 2017) (“[W]e do not consider [expert] declarations to be hearsay, as they are not out-of-court statements ... direct testimony is typically provided via affidavit, with cross-examination taken via deposition.”), *aff'd*, 730 F. App'x 934 (Fed. Cir. 2018); *see also*, *Actifio, Inc. v. Delphix Corp.*, IPR2015-00050, Paper 57 (Mar. 31, 2016).

Further, the facts and data underlying an expert's testimony do not need to be independently admissible. *Power Integrations, Inc.*, 711 F.3d at 1373 (Fed. Cir. 2013). An expert may rely on hearsay evidence in forming an opinion. *See* FRE 703; *Fox Factory, Inc. v. SRAM, LLC*, IPR2016-01876, Paper 59 at 56, 2018 WL 1633754, at *21 (P.T.A.B. Apr. 2, 2018) (finding hearsay objection without merit and denying motion to exclude). Petitioner's arguments for exclusion should fail regardless of Petitioner's assertion, simply because Dr. Brandt's declaration may properly rely on inadmissible facts and data. As such, Peitioner's Motion should be denied.

In view of the foregoing, Patent Owner respectfully requests that the Board deny the Petitioner's Motion to Exclude Evidence (EX2001) in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO EXCLUDE EVIDENCE (EX2001), 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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