

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 (EX2003)**

I. Introduction

Patent Owner respectfully submits its Opposition to Petitioner's Motion to Exclude Evidence (EX2003). Petitioner failed to meet its burden of demonstrating that Patent Owner's Exhibit is inadmissible. 37 C.F.R. § 42.29. Instead, the Motion seeks 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.

The Motion fails on its merits. Petitioner failed to meet its burden of demonstrating that the challenged exhibit is inadmissible under the Federal Rules of Evidence. Petitioner does not, and in fact, cannot make any showing that the challenged evidence should be excluded because EX2003 properly and plainly shows that the statements in the declaration are based on Mr. Schleicher's personal knowledge. (EX2003 ¶2).

II. Petitioner's Motion To Exclude Evidence (EX2003), Paper 053 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 053 is improper as based on Petitioner's wholly insufficient objections to Mr. Schleicher's declaration, Exhibit 2003. 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 053, failed to point out in the record where the objection was

made.

Petitioner's objections consist of 3 broad-brush statements alleged to explain the objections to 10 full paragraphs of EX2003. Nowhere does Petitioner point to any specific statement made in these paragraphs, but rather lumps them into three (3) generalized categories: (i) paras. 12-14; (ii) paras. 15-18; and (iii) paras. 19-21, 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 finally presented more particularity in its motion to exclude, which is improper.

Second, Paper 053 fails to point out where in the record Petitioner objected to Mr. Schleicher's declaration, and 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).

Finally, Paper 053 adds additional objections to EX2003 that were not identified in its objections to evidence. For example, with respect to paragraphs 12-14 of EX2003, Petitioner only object to these paragraphs under

FRE 02, 03, and 37 C.F.R. 42.65, but Paper 053 further objects to these paragraphs under FRE 803, which is improper.

III. Exhibit 2003 Is Properly Founded on Personal Knowledge under FRE 602 and Is Not Hearsay

Mr. Schleicher's declaration shows that he has personal knowledge of the matters set forth in EX2003, ¶¶ 12-14, 15-18, 19-21. In fact, contrary to Petitioner's assertion, the record specifically reflects that Mr. Schleicher's statements in the declaration are "based on my personal knowledge." (EX2003, ¶2). Further, Mr. Schleicher is named as the co-inventor of the '882 patent, and that, as part of his job responsibilities, he was responsible for "aware[ness] of all customer complaints," "knowing all competing products". (EX2003, ¶¶1, 8, 9). These statements indicate that Mr. Schleicher has the proper personal knowledge to make the assertions within EX2003.

Petitioner continually asserts that Mr. Schleicher's declaration must be hearsay or based on hearsay, because Mr. Schleicher did not have personal knowledge of his statements. However, Petitioner neglected to read ¶2 of EX2003, which specifically states that the statements in the declaration are based on Mr. Schleicher's personal knowledge. Further, Mr. Schleicher's position and background within Patent Owner's organization support the fact that Mr. Schleicher has and would have had personal knowledge of all of the assertions in EX2003.

Petitioner misconstrues Mr. Schleicher's statements and alleges that he

does not have knowledge of competitor's products or actions. However, Petitioner's argument is seeking to prove a negative statement. The fundamental assertion in Mr. Schleicher's statement is that neither of the films made by Hummel or Hutamaki were ever commercially sold. *See* (EX2003, ¶¶17, 18). Mr. Schleicher's statement is offered as proof that such products were never produced, because he would have had knowledge of the product **had it ever been commercially produced**. As such, an absence of knowledge is the proper proof and assertion for such a statement.

Moreover, Petitioner had the opportunity to cross-examine Mr. Schleicher on the matter but **chose not to**. Petitioner scheduled, and had an opportunity to cross-examine Mr. Schleicher on his statements and the basis thereof. However, Petitioner decided to cancel the deposition at the last minute and is attempting to retroactively cure their strategic mistake. *See Actifio, Inc.*, IPR2015-00050, Paper 57. Petitioner's failure to consider the statements of and the basis of Mr. Schleicher's personal knowledge renders their Motion to Exclude fatally deficient.

In view of the foregoing, Patent Owner respectfully requests that the Board deny Petitioner's Motion to Exclude Evidence (EX2003) 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 (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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