

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 REPLY IN SUPPORT OF
MOTION TO EXCLUDE EVIDENCE (EX2001) (PAPER 52)**

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I. Introduction.

Rather than rebutting the specific hearsay objections raised by Petitioner, Patent Owner mischaracterizes Petitioner's arguments, relies on irrelevant case law, and presents unsupported positions. Petitioner properly identified and moved to exclude inadmissible hearsay under 37 C.F.R. § 42.64 and demonstrated why it fails to meet the standards of reliability and admissibility under FRE 802. Patent Owner's efforts to rely on hearsay and improperly use its expert as a conduit for inadmissible evidence must be rejected. The Board should grant Petitioner's motion to exclude the hearsay in EX2001 and all testimony derived from it.

II. Petitioner Properly Submitted Its Objections to PO's Evidence.

PO's claim that Petitioner was required to identify every instance PO relied on hearsay is wholly without merit. (Paper 59, pp. 2-3.) PO mentions the decision in "*Mutual Insurance Co.*" as support but fails to provide a specific cite within the decision. That is because it relies on the Trial Practice Guide from 2012 instead of the current one amended in 2019. *Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, CBM2012-00002, Paper 66, p. 61 (Jan. 23, 2014).¹

¹ The 2019 guide advises what "should" be included in a motion to include while the 2012 guide identified what "must" be included in a motion. *See*,

Moreover, even that 2012 guide was not used to allow the admission of evidence but to highlight the fact the motion included improper arguments, before the Board went on to address the merits of the motion to exclude. *Id.* at pp. 62-63. Thus, PO's misguided reliance on *Liberty Mutual* to avoid the merits of Petitioner's objections must be rejected.

Further, Petitioner identified and explained the objections in compliance with 37 C.F.R. § 42.64(b)(1). (Paper 15, pp. 2-4.) *See also*, Trial Practice Guide, pp. 78-80. In addition to the hearsay, the testimony based on it is identified. (Paper 15.) These are not "broad-brush" objections because as explained, Petitioner is objecting to the hearsay and the testimony it permeates. (*See e.g.*, Paper 52, pp. 6-10.) That was relied on by PO and its expert. (*See* Paper 13, pp. 6-9, 12-16, 19-21, 23, 25, 26, 28-30, 33, 35-38, 42, 44-59, 62-64, 67, 68; Paper 47, pp. 1, 3, 4, 6, 10, 12, 13, 17-21.) Especially the hearsay from other witnesses relied on by PO's expert. (*See e.g.*, Paper 52, p. 9); *Biotechnology Value Fund, L.P. v. Celera Corp.*, No. C 13-03248 WHA, at *1 (N.D. Cal. Jan. 9, 2015) ("An expert may not vouch for one side's fact scenario and purport to tell the jury what actually occurred.") Thus, PO's claim that it was not put on notice and could not file supplemental evidence is without merit.

respectively, the Consolidated Trial Practice Guide ("Trial Practice Guide") Trial Practice Guide, p. 79 (Nov. 21, 2019); *Liberty Mutual*, Paper 66, p. 61.

Notice for supplementation purposes was provided with the submission of the objections. 37 C.F.R. § 42.64(b)(1). Petitioner fully complied with the requirements of 37 C.F.R. § 42.64; and the correct Trial Practice Guide, pp. 78-80.

PO's claim that Petitioner failed to identify the Federal Rules of Evidence is without merit. (Paper 59, pp. 3-4.) The basis for its hearsay objections (FRE 801 and 802) and improper legal conclusions (FRE 702, 703, 37 C.F.R. § 42.65) are set forth in Petitioner's objections, and the "Legal Standard" section of the motion. (Paper 15; Paper 52, p 2.) There is no requirement to repeatedly identify these rules.

PO's claim that EX2001 ¶¶29-35 "were not objected to" because Petitioner only objected to EX2001 ¶¶26-35 is nonsensical. (Paper 59, p. 3.) Obviously, EX2001 ¶¶26-35 is inclusive of EX2001 ¶¶29-35. (Paper 15.) Further, Petitioner is not required to move to exclude based on every objection. 37 C.F.R. § 42.64(c). Moreover, Petitioner's specific objections to EX2001 ¶¶29-35 and supporting authority are fully explained in the motion. (Paper 52, pp. 8-9.) None of which are specifically addressed or countered by PO.

III. Petitioner's Objections Are Directed to Inadmissible Evidence and the Improper Testimony Based on It.

PO attempts to contort Petitioner's objections and motion into arguments against the weight of the inadmissible hearsay and legal conclusions are improper and without merit. (Paper 59, pp. 4-5.) As explained, not only is Petitioner objecting and seeking to exclude the hearsay in EX2001, but the testimony based on it. (Paper

52, pp. 1, 2, 5-10, 12-13.) Thus, Petitioner is not objecting to the sufficiency of the inadmissible evidence but seeks to exclude it. *Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2016-00130, Paper 35 at 19 (P.T.A.B. May 8, 2017) (“We agree with Knauf that hearsay is not admissible under Fed. R. Evid. 802.”) Further, PO cannot use an expert as a “conduit” to introduce inadmissible hearsay. (Paper 52, p. 7, 9, 10, 13). Thus, the hearsay, and the testimony based on it, are inadmissible. FRE 802.

Moreover, as the lone case cited by PO makes clear, an expert in some situations may rely on inadmissible evidence, but only “if experts in the field would reasonably rely on such data” and it is reliable, citing FRE 702(b) and (c). *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373 (Fed. Cir. 2013) (excluding expert testimony because the source and reliability of the information was unknown.) The hearsay in EX2001 is not the type relied on by experts in the field, *e.g.*, unsubstantiated information from attorneys, uncorroborated allegations of inventors and double hearsay. (Paper 52, pp. 6 (Durethan); 8-9 (customer complaints); 12-13 (Constab)). Further, Petitioner already demonstrated that the sources of the hearsay are unknown, and it is unreliable. (*Id.*)

IV. PO Failed to Address of Overcome Petitioner’s Hearsay Objections.

PO’s argument that hearsay objections do not apply to declarations because it is testimony under 37 C.F.R. § 42.53(a) is absurd and without merit. (Paper 59, p.

6.) First, simply because evidence testimony from a party may be submitted by affidavit does not mean the affidavit can be larded with inadmissible hearsay. *Johns Manville Corp.*, Paper 35 at 19.

Second, the cases relied on by PO are inapposite. *Johns Manville Corp.*, Paper 35 at 17-19 (testimony and brochures admitted based on personal knowledge); *Actifio, Inc. v. Delphix Corp.*, IPR2015-00050, Paper 57, p. 9-12 (Mar. 31, 2016) (testimony and publication admitted based on personal knowledge and additional corroborating evidence). Petitioner demonstrated the hearsay is not based on the personal knowledge of the declarant or the source of the hearsay. (Paper 52, pp. 6 (Durethan); 8-9 (customer complaints); 12-13 (Constab)).

Third, Petitioner has already discussed the requirements of *Power Integrations* above regarding when an expert may rely on hearsay. The *Fox Factory* decision relied on by PO is consistent. The *Fox Factory, Inc. v. SRAM, LLC*, IPR2016-01876, Paper 59 at 56, (P.T.A.B. Apr. 2, 2018) (expert's analysis established nexus between "professional opinion and praise" in magazine articles and challenged claims.) Therefore, the hearsay and the testimony based on it should be excluded.

V. Conclusion.

For all these reasons, the motion to exclude should be granted.

Dated: December 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE (EX2001) (PAPER 52)*, 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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