

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 (EX2003) (PAPER 53)**

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I. Introduction.

Instead of addressing the hearsay and lack of personal knowledge in EX2003, PO relies on mischaracterizations and unsupported arguments. Petitioner demonstrated that the declaration is based on inadmissible hearsay, including secondhand information about competing products, customer complaints, and patent proceedings, without any personal knowledge from the declarant. Such testimony does not meet the admissibility standards under FRE 802. The Board should exclude the hearsay in EX2003 and any testimony derived from it.

II. Petitioner Properly Objected and Moved to Exclude PO's Evidence.

PO's claim that Petitioner was required to identify every instance where PO relied on hearsay is wholly without merit. (Paper 60, 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 Moreover, even that 2012 guide was not used to allow the admission of

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*,

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. (Paper 16, p. 2.) *See also*, Trial Practice Guide, pp. 78-80. In addition to the hearsay, the testimony based on it is identified. (Paper 16.) These are not "broad-brush" objections because as explained, Petitioner is objecting to the hearsay and the testimony it permeates. (*See e.g.*, Paper 53, p. 3 ("Therefore, any testimony based on this hearsay is also hearsay and should be excluded. FRE 802.)) The hearsay and testimony objected to--customer complaints, unexpected results and German patent proceedings--are relied on by PO throughout its response and sur-reply. (Paper 13, pp. 7, 9, 29-31, 51; Paper 47, pp. 2, 6, 23, 24.) The same hearsay is relied on by PO's expert which Petitioner seeks to exclude. (EX2001, ¶¶ 30, 31, 57; Paper 52, p. 8.) Thus, PO's claim that it was not put on notice and could not file supplemental evidence is without merit. Notice for supplementation purposes was provided with the submission of Petitioner's objections. 37 C.F.R. § 42.64(b)(1).

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

Petitioner fully complied with the requirements of 37 C.F.R. § 42.64; and the correct Trial Practice Guide, pp. 78-80.

PO's argument that hearsay objections do not apply to declarations because they are testimony is absurd and without merit. (Paper 60, p. 3.) That a party may submit testimony by affidavit under 37 C.F.R. § 42.53(a) does not mean the affidavit can be larded with inadmissible hearsay. *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.") Additionally, the case relied on by PO does not support its position. *Actifio, Inc. v. Delphix Corp.*, IPR2015-00050, Paper 57, pp. 9-12 (Mar. 31, 2016) (testimony and publication admitted based on personal knowledge and corroborating evidence.)

Finally, PO's claim that Petitioner added objections under FRE 803 is incorrect. (Paper 60, p. 3-4.) The motion mentions FRE 803 once in a section conclusion which is an obvious typo since FRE 803 is not mentioned in the argument. (Paper 53, p. 3.) Even so, FRE 803 (exceptions to hearsay), merely serves to highlight PO's failure to establish any exception for the hearsay identified by Petitioner. Tellingly, PO failed to identify any applicable exception or submit supplemental evidence. 37 C.F.R. §42.64(b)(2). Thus, PO failed to meaningfully address Petitioner's hearsay objections.

III. EX2003 Is Not Based on Personal Knowledge.

PO's claim that EX2003 is based on personal knowledge under FRE 602 is misguided and without merit. The general averment of personal knowledge relied on by PO that is divorced from the specific statements of fact that demonstrate the witness is relying on hearsay is not sufficient to overcome Petitioner's hearsay objections. PO's argument demonstrates a lack of understanding of personal knowledge and hearsay.

Personal knowledge is "a foundational requirement for fact witness testimony and is premised on the common law belief that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact."

Fed. Trade Comm'n v. Vyera Pharms., LLC, 2021 WL 5300019, at *1 (S.D.N.Y. Nov. 15, 2021); *see also*, Advisory Committee Notes to FRE 602. EX2003 is the declaration of a fact witness. As established by Petitioner, the testimony in EX2003 is based on hearsay, *e.g.*, he was merely "informed" of certain German patents and patent proceedings in Germany and certain patents owned by Huhtamaki. (Paper 53, pp. 2-3 discussing ¶¶ 12-18 of the EX2003.) The witness failed to establish any personal knowledge that would allow him to testify to these matters. For instance, the products Huhtamaki was not able to make, the products used by Huhtamaki's customers, the Huhtamaki films used in CIPP liners or problems with Huhtamaki films. (EX2003, ¶¶ 17-21.) The same is true for information allegedly provided by customers. (*Id.*, ¶¶ 22-24.) Thus, EX2003 itself demonstrates it is based on rank

hearsay that cannot be relied on for the truth of the matters asserted. *Nicholson v. Evangelical Lutheran Good Samaritan Soc'y, Inc.*, 2017 WL 3127799, at *3 (D.N.M. July 21, 2017).

Further, the general claim that he was responsible for “knowing all about competing products”, *i.e.*, he would have known about Huhtamaki’s film and its customers and what happened with its films if they occurred is improper. *AVM Technologies, LLC v. Intel Corp.*, 927 F. Supp. 2d 139, 146 (D. Del. 2013) (“Although a lay witness may testify to facts within his personal knowledge, a lay witness may not offer testimony as to events that ‘would have occurred.’”) Moreover, PO does not manufacture or install CIPP liners but instead manufactures and supplies only inner and outer films to CIPP liner manufacturers. (Paper 52, p. 8, n.1.) The witness failed to establish any personal knowledge of, for instance, the use of Huhtamaki films in CIPP liners; that no Huhtamaki film customer “could have ever used” Huhtamaki CIPP films to make UV-CIPP liners or have problems installing those CIPP liners. (EX2003, ¶18.) Other than what he heard, which is not admissible. *Ferguson v. Valero Energy Corp.*, No. CIV.A.06-540, 2010 WL 2164493, at *10 (E.D. Pa. May 27, 2010) (“A witness may not testify about what he or she heard happened, or speculated may have happened.”)

IV. Conclusion.

For all these reasons, Petitioner’s 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 (EX2003) (PAPER 53)*, 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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