

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 (EX2004) (PAPER 54)**

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I. Introduction.

Patent Owner's opposition fails to address Petitioner's well-founded hearsay objections. PO mischaracterizes them, relies on unsupported legal positions, and cites irrelevant case law. Petitioner properly objected and moved to exclude under 37 C.F.R. § 42.64, demonstrating the hearsay in EX2004 and the derived testimony fail to meet the standards of reliability or admissibility under the FRE 802. The Board should reject PO's attempts to use inadmissible hearsay and grant Petitioner's motion to exclude.

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

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

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*,

Guide was not used to allow the admission of hearsay evidence but to highlight the fact the motion included improper arguments, before the Board went on to address the merits of the objections. *Id.* at pp. 62-63. 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 14, pp. 2-3.) *See also*, Trial Practice Guide, pp. 78-80. In addition to the hearsay, the testimony based on it is identified. (Paper 14.) As explained, Petitioner is objecting to the "inadmissible hearsay and any testimony based on it." (Paper 54, p. 3.) 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 the objections. 37 C.F.R. § 42.64(b)(1).

Petitioner's motion to exclude also identifies where in PO's opposition, sur-reply and its expert's declaration this inadmissible hearsay is relied on. (Paper 54, p. 4.) *See also*, for instance, the customer complaints and unexpected results relied on by PO throughout its response and sur-reply. (Paper 13, pp. 7-9, 11, 31-33, 51-52, 54, 61-64, 67, 68; Paper 47, pp. 2-4, 6, 17, 20, 21, 23, 24.) Thus, Petitioner has more

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

than 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 61, p. 3.) Simply because 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 additional corroborating evidence.)

PO's claim that Petitioner's objections are based on FRE 602 are incorrect. (Paper 61, pp. 3-4.) Petitioner refers to FRE 602 to point out that the witness improperly adopts hearsay and presents it as based on personal knowledge when it is not. (*See e.g.*, Paper 54, p. 8 ("Leaving the misimpression the testimony is based on the knowledge of the witness under FRE 602.") Petitioner is not moving to exclude based on FRE 602 but hearsay under FRE 802. (*See e.g.*, Paper 54, pp. 2-11.)

Finally, PO admits that at best, English is the witness's second language. (Paper 61, 4.) The burden is on PO—not Petitioner—to submit evidence sufficient

to show that the witness knew what he was signing. (Paper 54, p. 8.) Also, the burden is on PO to submit a declaration sworn to under penalty of perjury or it cannot be considered. *See e.g., Seabrooks v. Cooper*, 2008 WL 4414250, at *1 (D.S.C. Sept. 23, 2008); *Trapaga v. Cent. States Joint Bd. Loc. 10*, No. 05 C 5742, 2007 WL 1017855, at *5 (N.D. Ill. Mar. 30, 2007).

III. Petitioners Objections Are Directed to Excluding 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 evidence are without merit. (Paper 61, pp. 5-6.) (Paper 54.) Petitioner is objecting to and seeking to exclude the hearsay in EX2004 as well as the testimony based on it. (Paper 54, pp. 2-11.) Both should be excluded. For example, Dr. Boutrid "provided testimony" about the German cancellation proceeding but that does not mean he can testify regarding what he was "informed" of regarding the Hummel patent outside of his testimony and personal knowledge. (EX2004, ¶10; Paper 54, pp. 2-4.)

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 EX2004 is not the type relied on by

experts in the field. (Paper 54, pp. 4-8 (unidentified customer complaints); 10-13, (composition of Durethan B40 FAM and Constab PE-SA-270)). Further, Petitioner already demonstrated that the sources of the hearsay are unknown, and unreliable. (*Id.*) Finally, PO cannot use an expert as a “conduit” to introduce inadmissible hearsay. (Paper 54, pp. 2-11.) Thus, the hearsay, and the testimony based on it are inadmissible. FRE 802.

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

PO’s argument that hearsay objections do not apply to declarations because they are testimony under 37 C.F.R. § 42.53(a) is circular and without merit. (Paper 61, pp. 6-8.) Hearsay in an affidavit is not admissible. *Johns Manville*, IPR2016-00130, Paper 35 at 19. *Wilson Orthopedics Med. & Rehab. Ctr. LLC v. Car Accident Comp. Admin. (ACAA)*, 2023 WL 6226394, at *6 (D.P.R. Sept. 26, 2023) (Hearsay evidence, is not based on personal knowledge.) It was PO’s burden to demonstrate the testimony is not hearsay or based on hearsay. *See e.g., Wilson v. Budco*, 762 F. Supp. 2d 1047, 1057 (E.D. Mich. 2011). Petitioner’s decision not to depose the witness on his hearsay statements is irrelevant. PO bears the burden of proving the testimony is not hearsay or qualifies for a hearsay exception under FRE 801 and 803.

V. Conclusion.

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

Dated: December 10, 2024

Respectfully submitted,

/Michael S. Neustel/

Michael S. Neustel (Reg. No. 41,221)

Monte M. Bond (*Pro Hac Vice*)

Neustel Law Offices, LTD

2534 South University Drive, Suite #4

Fargo, North Dakota 58103

michael@neustel.com

monte@neustel.com

Telephone: (701) 281-8822

Scott A. McKeown (Reg. No. 42,866)

Wolf, Greenfield & Sacks, P.C.

601 Massachusetts Avenue, NW

Washington, D.C. 20001

Scott.McKeown@WolfGreenfield.com

Telephone: (202) 389-6025

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE (EX2004) (PAPER 54)*, 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:

Darien Wallace - darien@imperiumpw.com

T. Lester Wallace - lester@imperiumpw.com

David Jakopin - david.jakopin@pillsburylaw.com

Dated: December 10, 2024

Respectfully submitted,

/Michael S. Neustel/

Michael S. Neustel (Lead Counsel)

Reg. No. 41,221

NEUSTEL LAW OFFICES, LTD

2534 South University Drive, Suite #4

Fargo, North Dakota 58103

Telephone: 701-281-8822

Email: michael@neustel.com

Attorney for Petitioner