

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SPECTRUM SOLUTIONS L.L.C.,
Petitioner,

v.

DNA GENOTEK INC.,
Patent Owner.

U.S. Patent No. 11,536,632

Inter Partes Review No. IPR2023-01424

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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Under 37 C.F.R. § 42.64(c), the Board’s Revised Scheduling Order (Paper 30) and the Board’s subsequent correspondence relating to the Revised Scheduling Order (Exhibit 1040), Patent Owner DNA Genotek Inc. (“Genotek”) hereby moves to exclude Exhibit 1013, a document entitled *Workbook for Designing, Implementing, and Evaluating a Sharps Injury Prevention Program* (“Workbook”), and Exhibit 1042, a document entitled *Saint Gobain Performance Plastics Brochure for Stopcock Valves* (“Brochure”).

I. LEGAL STANDARD

Except as otherwise provided, the Federal Rules of Evidence (“FRE”) govern the admissibility of evidence before the Board. 37 C.F.R. § 42.62; *see also* 37 C.F.R. § 42.64(c) (providing for motions to exclude evidence).

II. DNA GENOTEK TIMELY OBJECTED

As detailed below, Genotek timely objected to Exhibits 1013 and 1042 under 37 C.F.R. § 42.64(b).

- **September 15, 2023**: Petitioner filed the Petition and supporting exhibits. Exhibit 1013 was included with the Petition but Exhibit 1042 was not.
- **March 26, 2024**: The Board issued its Institution Decision (Paper 10).
- **April 9, 2024**: Genotek timely object to Exhibit 1013. (Paper 12 at 5.)
Genotek objected to Exhibit 1013 “as lacking foundation and lacking authentication under FRE 901.” (*Id.*) Genotek explained that “Spectrum

fails to offer sufficient evidence that Exhibit 1013 was publicly accessible in its presented form as of the alleged publication date.” (*Id.*) Genotek also objected “to this exhibit as containing hearsay to the extent that Spectrum attempts to rely on it to prove the truth of any matter described therein under FRE 801 and FRE 802.” (*Id.*)

- **April 23, 2024**: In response to the objection to Exhibit 1013, Petitioner served Exhibits 1023 and 1024 as supplemental evidence. *See* 37 C.F.R. § 42.64(b)(2).
- **December 13, 2024**: Petitioner filed its Opposition (Paper 32) to the revised Motion to Amend (Paper 26) (“Opposition”). With its Opposition, Petitioner submitted Exhibit 1042.
- **December 18, 2024**: Genotek timely object to Exhibit 1042. (Paper 33 at 2.) Genotek objected to Exhibit 1042 “as lacking foundation and lacking authentication under FRE 901.” (*Id.*) Genotek explained that “Petitioner fails to offer sufficient evidence that Exhibit 1042 was publicly accessible in its presented form as of the alleged publication date.” (*Id.*) Genotek also objected “to this exhibit as containing hearsay to the extent that Petitioner attempts to rely on it to prove the truth of any matter described therein under FRE 801 and FRE 802.” (*Id.*)

- **December 19, 2024:** In response to the objection to Exhibit 1042, Petitioner served Exhibit 1045 as supplemental evidence. *See* 37 C.F.R. § 42.64(b)(2).

III. PETITIONER HAS NOT SHOWN THAT THE WORKBOOK AND THE BROCHURE WERE PUBLICLY AVAILABLE DURING THE RELEVANT TIME

Petitioner and its expert rely upon Exhibits 1013 and 1042 and contend that they were publicly available in 2008 and 2001, respectively. (*See, e.g.*, Paper 1 at 15; Paper 32 at 16; Ex. 1002 at ¶ 69; Ex. 1041 at ¶ 23.) Genotek timely objected under Rule 901(a), which states: “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). In response, Petitioner relied upon a 2008 date of the Workbook on a website that its counsel accessed in 2024 (*see* Exhibits 1023 and 1024) or a copyright date (*see* Exhibit 1045). Neither is probative evidence of public availability. Therefore, the Board should grant this Motion to Exclude Exhibits 1013 and 1042 for lack of authentication.

In *TRW Automotive U.S. LLC v. Magna Electronics, Inc.*, IPR2014-01347, Paper 25 (P.T.A.B. Jan. 6, 2016), the Board excluded an exhibit like the ones at issue here under FRE 901 for lack of authentication. There, the petitioner had claimed that an exhibit was published in 1999. (*Id.* at 6.) The only support for that claim was a footnote in the Petition that recited the author, the document’s title,

where it was allegedly published, and an alleged publication date. (*Id.*) The petitioner “did not cite or otherwise provide any evidence for this claim.” (*Id.*) The Board rejected the petitioner’s argument that the document was self-authenticating. (*Id.* at 8.) Even though the document included a date in a copyright notice within the document, the Board held that the date “is not probative that the article was ever published” (*Id.*) As the Board noted, the exhibit “does not bear any statement of publication.” (*Id.* at 9.) The Board also rejected the argument that the document could be authenticated even though the article ““is immediately accessible to the public through [the alleged publisher’s] on-line library system.”” (*Id.* at 10.)

Here, the Workbook does not contain a date of publication, a copyright, or any indication that it was publicly available in 2008. Petitioner has tried to address this deficiency by submitting a webpage from an OSHA website (Ex. 1023) that purportedly contains a link to the Workbook and references 2008 for the Workbook. Once the link is selected, the Workbook can apparently be downloaded. (Ex. 1024.) But Exhibit 1024 at most establishes that the link is accessible as of 2024. There is no evidence in the record to indicate that the Workbook was publicly available through this link in 2008. *In re Homestore.com, Inc. Sec. Litig.*, 347 F.Supp.2d 769, 782-83 (C.D. Cal. 2004) (holding that “[p]rintouts from a web site [sic] do not bear the indicia of reliability demanded for

other self-authenticating documents under Fed. R. Evid. 902[]” and thus were not authenticated absent a declaration by someone with personal knowledge such as a “web master,” even when the printouts bore a “URL address and date stamp”); *Spectrum Solutions LLC v. DNA Genotek*, IPR2022-01347, Paper 43 at 26-28 (P.T.A.B. February 7, 2024). Furthermore, the webpage’s reference to 2008, as reflected in the printout of Exhibit 1023, is insufficient. *See TRW Automotive U.S. LLC*, IPR2014-01347, Paper 25 at 9-10 (holding that neither a copyright date, nor an ISBN, nor present-day online access is probative of a document’s prior publication date).

The same analysis—and conclusion—should apply to the Brochure. The Brochure of Exhibit 1042 does not contain a date of publication, a copyright, or any indication that it was publicly available in 2001, as Petitioner asserts. In response to the objection, Petitioner submitted the Brochure with a copyright date of 2001 (*see* Exhibit 1045). But, once again, a copyright date on its own is insufficient as discussed above.

Therefore, the Board should exclude Exhibits 1013 and 1042 because Petitioner has not shown that it was publicly available during the relevant time.

IV. CONCLUSION

For the reasons set forth above, Patent Owner asks the Board to grant this Motion to Exclude Exhibits 1013 and 1042.

Dated: December 20, 2024

Respectfully submitted,

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Certificate of Service (37 C.F.R. § 42.6(e)(4))

I hereby certify that the attached PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE was served as of the below date via e-mail (by agreement) to the following counsel of record for the Petitioner:

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