

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JUUL LABS, INC.,

Petitioner,

v.

NJOY, LLC,

Patent Owner.

IPR2024-00160
U.S. Patent No. 11,497,864

PATENT OWNER'S MOTION TO EXCLUDE

Pursuant to 37 C.F.R. § 42.64(c), the Scheduling Order (Paper 12), and the Federal Rules of Evidence, Patent Owner moves to exclude Exhibits 1007 (in part), 1014, 1017, 1018, 1021, 1023-1025, 1036, 1038 (in part), 1039-1042, and 1044.

I. Ex. 1007, Paragraphs 29, 30, 32, 33, 40, 55, 57, 82, 83, 134, 141, 143 – Declaration of Robert Sturges (FRE 402, 403, 701, 702, and 802)

Exhibit 1007 is the declaration of Petitioner’s expert, Dr. Sturges. Petitioner cites paragraphs 29, 30, 32, 82, 141, 143 of Exhibit 1007 in its Petition at pages 14, 15, 17, 35, 36, 61, and 66 and in its Reply at page 23. Petitioner does not cite paragraphs 33, 40, 55, 57, 83, or 134 in its Petition or Reply. Patent Owner timely objected to Exhibit 1007 under FRE 402, 403, 701, 702, and 802. Paper 13 at 3.

Dr. Sturges’s reliance on and discussion of Exhibits 1014, 1017, 1021, and 1023-1025 in paragraphs 29, 30, 32, 33, 40, 55, 57, 83, 134, 141, and 143 of his declaration (Exhibit 1007) should be excluded because these exhibits are inadmissible for the reasons set forth below for each respective exhibit. *See infra* Sections II, III, V, VI. Indeed, these exhibits are hearsay, and FRE 703 does not permit, as is the situation here, an expert to serve “as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.” *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1374-75 (Fed. Cir. 2021) (quoting *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013)). Further, Mr. Wang’s testimony (Ex. 1017) presents additional indicia of unreliability as noted below, making paragraphs 55, 57, 141, and 143 all the more inadmissible.

Additionally, paragraphs 29 and 82 of Exhibit 1007 should be excluded under FRE 701/702 and/or FRE 403 for failure to disclose the underlying facts or data on which the opinion is based. Paragraphs 29 and 82 include and describe an annotated figure of a so-called “accused apparatus” but provide no citation indicating where the figure came from, what the device is, or who made the annotations.

II. Exs. 1014, 1021, 1025 – Summary Judgment Briefing from the Fuma Litigation (FRE 402, 403, 802)

Exhibits 1014, 1021, and 1025 are third-party summary judgment briefs from *Fuma Int’l LLC v. R.J. Reynolds Vapor Co.*, No. 1:19-cv-00260 (M.D.N.C.) (“Fuma Litigation”), a case where neither Patent Owner nor Petitioner were parties and where the ’864 patent was not at issue. Exhibit 1014 is Reynolds’s brief in support of non-infringement; Exhibit 1025 is Fuma’s brief in support of infringement; and Exhibit 1021 is Fuma’s reply brief in support of infringement. Petitioner cites these exhibits in its Petition at pages 14, 15, 17, and 53. Patent Owner timely objected to these exhibits under FRE 402, 403, and 802. Paper 13 at 6-7, 10, and 12.

These exhibits should be excluded as irrelevant to any instituted Ground (FRE 402), and their probative value is substantially outweighed by confusion and unfair prejudice (FRE 403). Exhibits 1014, 1021, and 1025 contain arguments made in another case by non-parties about the infringement of not-at-issue devices by not-at-issue patents.

These three exhibits should also be excluded as inadmissible hearsay (FRE

802). They are out-of-court statements offered as evidence to prove the truth of the matter asserted—*i.e.*, the positions purportedly taken by Fuma and Reynolds regarding claim construction. Petition at 13-15, 17, 53. Legal briefs do not fall within the public record exception to hearsay. *See Mylan Pharm., Inc. v. Bausch Health Ireland Ltd.*, IPR2022-00722, Paper 78 at 65-66 (P.T.A.B. Sept. 8, 2023) (declining to apply exception to “legal briefing . . . submitted to the EPO”).

III. Ex. 1017 – Declaration of Shanhong Wang from the Fuma Litigation, Including Various Attached Documents (FRE 402, 403, 701, 702, 802, and 37 C.F.R. § 42.63)

Exhibit 1017 is an English-language translation of a declaration by Mr. Shanhong Wang, filed on December 20, 2019 in the Fuma Litigation. Exhibit 1017 includes six of its own exhibits, spanning forty-five pages. Patent Owner requested that Petitioner make Mr. Wang available for deposition, but Petitioner indicated that it would not because it does not represent Mr. Wang. *See* Ex. 2044. Petitioner cites Exhibit 1017 in its Petition at pages 24, 41, 58, 61, and 94 and in its Reply at page 29. Patent Owner timely objected to Exhibit 1017 under FRE 402, 403, 701, 702, 802, and 37 C.F.R. § 42.63. Paper 13 at 8-9.

Exhibit 1017 should be excluded because Mr. Wang’s declaration is i) inadmissible hearsay (FRE 802), ii) irrelevant (FRE 402), iii) unreliable and prejudicial (FRE 403), and iv) includes untranslated foreign-language documents (37 C.F.R. § 42.63).

First, Exhibit 1017 is inadmissible hearsay (FRE 802). Bare declarations are inadmissible. *California v. Green*, 399 U.S. 149, 154 (1970) (stating “out-of-court statements are inadmissible” if they “have not been subject to cross-examination”). Exhibit 1017 is an out of court statement offered to prove the truth of the matters asserted—*i.e.*, what the Wang reference discloses. *E.g.*, Petition at 24 (“Mr. Wang confirmed that his invention’s absorbent organic fiber 105 ‘surrounds a complete central air passageway, in which the heater is positioned.’”). Moreover, Petitioner refused to make Mr. Wang available for deposition, in violation of the Board’s rules. *See* Ex. 2044; *see also Adobe Inc. v. Rah Color Techs. LLC*, IPR2019-00628, Paper 125 at 19 (P.T.A.B. Aug. 31, 2020) (“Despite Dr. Green’s status of being outside of Petitioner’s control, Petitioner was nonetheless required to make him available for cross-examination.” (citing PTAB Consolidated Trial Practice Guide at 23 (Nov. 2019))).

Second, Exhibit 1017 is irrelevant (FRE 402). Petitioner relies on Exhibit 1017 for statements by Mr. Wang about the physical characteristics of a product that purportedly embodies the Wang reference (Ex. 1005) to argue by implication that the Wang reference also discloses those characteristics. *E.g.*, Petition at 24 (citing Exhibit 1017 as “describing a product he testified embodies the Wang reference invention”); *see also* Petition at 41, 58, 61, 94; Reply at 29. Mr. Wang’s product is not relevant to this proceeding, and Petitioner’s reliance on Mr. Wang’s testimony

to supplement the Wang reference's disclosures is improper. 35 U.S.C. § 311(b) (limiting the basis of grounds to "prior art consisting of patents or printed publications"). Additionally, Mr. Wang's lay opinions about what the Wang reference covers or discloses are irrelevant.¹

Third, Exhibit 1017 is unreliable (FRE 403). Petitioner previously tried to rely on Mr. Wang's declaration in ITC Inv. No. 337-TA-1372, but the ALJ precluded Petitioner from doing so due to its unreliability. *Certain Vaporizer Devices*, Inv. No. 337-TA-1372, Order No. 51 at 8-10 (May 29, 2024) (EDIS Doc. ID 824341). Mr. Wang is not a neutral third party but was hired by Reynolds in the Fuma Litigation as a consultant to help invalidate Fuma's patents. Indeed, Petitioner's own Exhibit 1036 reveals that Mr. Wang was compensated \$23,343 and given several nights in a luxury hotel suite for just a five hour deposition. Ex. 1036 at 8. As noted by the ALJ in the 1372 Investigation, Mr. Wang's deposition during the Fuma Litigation further demonstrated that his testimony is unreliable:

Based on his conduct related to this investigation, and his conduct at his deposition in the North Carolina litigation, as detailed above, I

¹ If Petitioner claims that Mr. Wang's testimony is relevant to how a POSITA would have understood the Wang reference in 2009, Exhibit 1017 should be excluded as improper expert testimony (FRE 701/702) for failure to establish that Mr. Wang meets the definition of a POSITA. *See* Paper 13 at 8-9 (objections).

conclude that Mr. Wang's deposition testimony is not reliable. . . . In addition, for the reasons explained above with respect to Mr. Wang's deposition transcript, I conclude that Mr. Wang's declaration is inadmissible under Commission Rule 210.37 because it is not reliable.

Certain Vaporizer Devices, Inv. No. 337-TA-1372, Order No. 51 at 9-10 (internal citations omitted). In addition to reliability concerns, it would be prejudicial to permit testimony by a non-party from a prior litigation in which Patent Owner was not represented and had no opportunity for cross-examination (FRE 403).

Fourth, Exhibit 1017 includes a foreign language document without a translation, in violation of 37 C.F.R. § 42.63. *See* Ex. 1017 at 25-29.

IV. Ex. 1018 – Fuma International LLC's Opening Claim Construction Brief from Fuma Litigation (FRE 402, 802)

Exhibit 1018 is Fuma International LLC's opening claim construction brief from the Fuma Litigation, filed January 13, 2020. Patent Owner timely objected to Exhibit 1018 under FRE 402 and 802. Paper 13 at 9. It is not relevant under FRE 402, as it is not cited in the Petition, Petitioner's Reply, or in Petitioner's expert declaration (Ex. 1007). Moreover, it should be excluded as inadmissible hearsay for the same reasons discussed above in Section II.

V. Ex. 1023 – G. Conley Deposition Transcript from the Fuma Litigation (FRE 402, 802)

Exhibit 1023 is a deposition transcript of a Mr. Gregory Conley dated December 4, 2019 from the Fuma Litigation. Mr. Conley is a named inventor on the

'864 patent. Mr. Conley did not submit a declaration in this proceeding and is not a party. Petitioner cites Exhibit 1023 in its Petition at page 3. Patent Owner timely objected to Exhibit 1023 under FRE 402, 403, and 802. Paper 13 at 11.

Exhibit 1023 is inadmissible hearsay (FRE 802) because it is an out of court statement offered as evidence to prove the truth of the matter asserted—*i.e.*, for the proposition that “the only possible inventive aspect of [Mr. Conley’s] ‘invention’ . . . was that he moved the heating element in or around the airflow passageway.” Petition at 3 (citing² Ex. 1023). Accordingly, Exhibit 1023 should be excluded.

Mr. Conley’s testimony regarding “inventive aspect” should also be excluded because it is irrelevant (FRE 402). The “inventive aspect” of a patent claim has no bearing on what the alleged prior art discloses in an IPR. Moreover, “it is not unusual for there to be a significant difference between what an inventor thinks his patented invention is and what the ultimate scope of the claims is after allowance by the PTO.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 985 (Fed. Cir. 1995). Indeed, “what a patentee subjectively intended his claims to mean is largely irrelevant to the claims’ objective meaning and scope.” *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir. 2000).

² Petitioner’s characterization is quoted above. There is no such statement in Mr. Conley’s deposition transcript.

Finally, Mr. Conley's testimony should be excluded because it would be prejudicial to permit testimony by a non-party from a prior litigation in which Patent Owner was not represented and had no opportunity for cross-examination (FRE 403).

VI. Ex. 1024 – G. Conley Deposition, Exhibit 2A from the Fuma Litigation (FRE 402, 802)

Exhibit 1024 is exhibit 2A from Mr. Conley's deposition (Ex. 1023) in the Fuma Litigation. Exhibit 1024 appears to include a hand-drawn figure and text. It is cited once (Petition at 3) but never explained or discussed by Petitioner. Patent Owner timely objected to Exhibit 1024 under FRE 402 and 802. Paper 13 at 12.

Like Exhibit 1023 (Section V, *supra*), Exhibit 1024 should be excluded because it is irrelevant to any instituted ground (FRE 402) and because—to the extent Petitioner alleges Exhibit 1024 reflects statements or opinions by Mr. Conley—it is inadmissible hearsay (FRE 802).

VII. Ex. 1036 – Motion to Preclude Testimony of Shanhong Wang from Fuma Litigation, Including Various Attached Documents (FRE 402, 403, 802)

Exhibit 1036 is Fuma International LLC's motion to preclude testimony of Shanhong Wang (filed Nov. 3, 2021) in the Fuma Litigation. Exhibit 1036 includes seventy-six pages of attached documents, including excerpts of a deposition of Mr. Shanhong Wang (dated Sept. 24, 2021). *See* Ex. 1036 at 42-79. Petitioner cites Exhibit 1036 once, in its Reply, exclusively to refer to the deposition transcript of

Mr. Wang. Reply at 28. Specifically, Petitioner cites Mr. Wang's characterization about what his patent allegedly discloses regarding airflow through the device. *Id.* Patent Owner timely objected to Exhibit 1036 under FRE 402, 403, and 802. Paper 23 at 2-3.

Exhibit 1036 should be excluded for the same reasons discussed above with respect to Exhibit 1017 (Wang Declaration), *i.e.*, it is inadmissible hearsay (FRE 802), irrelevant (FRE 402), and unreliable and prejudicial (FRE 403).

VIII. Ex. 1038, 42:1-44:22, 88:16-92:1, and 115:18-135:5 – D. Hillenbrandt Deposition Transcript (FRE 402, 403, 701/702)

Exhibit 1038 is the deposition transcript of Daniel Hillenbrandt from this proceeding. Patent Owner timely objected to Exhibit 1038 (including the excerpts specifically referenced below) under FRE 402, 403, 701, and 702. Paper 23 at 3-5.

Excerpts 42:1-44:22 of Exhibit 1038 should be excluded as irrelevant (FRE 402) and any probative value is substantially outweighed by unfair prejudice (FRE 403). Here, Mr. Hillenbrandt describes his time working at a company called "Smoke 51 Ohio." Petitioner cites these excerpts in its Reply at page 30³ to claim that Mr. Hillenbrandt copied a device distributed by Smoke 51 Ohio. There is nothing in the testimony to suggest Petitioner's copying allegation is true, and even

³ Petitioner's Reply cites "Ex. 1038, 421:22-45:10," which is assumed to be a typo referring to page 42, not 421.

assuming, *arguendo*, that there were, such testimony would still have no bearing on what the Wang reference discloses to a POSITA. The testimony is therefore irrelevant to the instituted Grounds, and it is also unfairly being used to launch a baseless attack on Mr. Hillenbrandt's character.

Excerpts 88:16-92:1 of Exhibit 1038 should be excluded as irrelevant (FRE 402) and for including improper expert testimony from a lay witness (FRE 701/702). Petitioner cites these excerpts in its Reply at page 32. In these excerpts, Petitioner's counsel attempts to have Mr. Hillenbrandt apply claim language to hypothetical device configurations not depicted in the '864 patent. These excerpts are irrelevant because "what a patentee subjectively intended his claims to mean is largely irrelevant to the claims' objective meaning and scope." *Solomon v. Kimberly-Clark Corp.*, 216 F.3d 1372, 1379 (Fed. Cir. 2000). Moreover, these excerpts include improper opinion testimony, because Mr. Hillenbrandt clearly stated he was not familiar with the hypothetical configuration presented. Ex. 1038 at 87:9-11 ("I'm familiar with my heating coil that – I'm not familiar with what you're trying to draw or actually see there."). Applying claim language to hypothetical device configurations is the domain of expert testimony.

Finally, excerpts 115:18-133:5 of Exhibit 1038 should be excluded as irrelevant (FRE 402) and as confusing and more prejudicial than probative (FRE 403). Petitioner cites these excerpts at page 36 of its Reply. These excerpts concern

what is “innovative” about individual claims. The conception of the challenged claims is not at issue in any instituted Ground. Likewise, the notion of an “innovative concept” is not at issue in any instituted Ground, and even if it were, Mr. Hillenbrandt’s opinion on it would not be relevant. *See Markman*, 52 F.3d at 985 (“[I]t is not unusual for there to be a significant difference between what an inventor thinks his patented invention is and what the ultimate scope of the claims is after allowance by the PTO.”). It would be substantially more prejudicial and confusing than probative to admit this testimony given that Patent Owner has no burden to prove “conception” or an “innovative concept.”

IX. Ex. 1039 – Declaration of Atif Yardimici from the Fuma Litigation, Including Various Attached Documents (FRE 402, 403, 701, 702, 802)

Exhibit 1039 is a declaration by a Mr. Atif Yardimici, filed on January 21, 2020 in the Fuma Litigation. Exhibit 1039 includes its own exhibits, spanning one hundred twenty pages. Mr. Yardimici claims to have conducted technical analyses on “three cartridges and two Fifty-One Duo boxes.” Ex. 1039 at 3. Petitioner cites Exhibit 1039 in its Reply at pages 30 and 37. Patent Owner timely objected to Exhibit 1039 under FRE 402, 403, 701, 702, and 802. Paper 23 at 5-6.

Exhibit 1039 should be excluded because it is i) inadmissible hearsay (FRE 802), ii) irrelevant to any instituted Ground (FRE 402), iii) improper expert testimony (FRE 701/702), and iv) unreliable and prejudicial (FRE 403).

First, Exhibit 1039 is hearsay (FRE 802) because it is an out of court statement

offered as evidence to prove the truth of the matters asserted. Mr. Yardimici never submitted a declaration in this proceeding, nor was he deposed. Petitioner relies on Exhibit 1039 for the physical characteristics of a purported “Smoke 51 cartridge.” Reply at 30, 37. Exhibit 1039 furthermore contains hearsay within hearsay because it relies on the “Wang Declaration” for its analysis. *See* Ex. 1039 at 36 (citing “Wang Declaration”).

Second, Exhibit 1039 is irrelevant (FRE 402) because it is applying claim language from a non-challenged patent to three devices not at issue in this proceeding. Petitioner has failed to explain what these devices are, when they became available, or how they would be relevant to any asserted Ground. To the extent Petitioner seeks to combine Wang’s limited disclosure with these devices, that would violate 35 U.S.C. § 311(b), which limits the basis of IPR grounds to “patents or printed publications.”

Third, Exhibit 1039 is improper expert testimony (FRE 701/702). Petitioner concedes that the Yardimici declaration is an expert report (Reply at 30), but Petitioner has not established that Mr. Yardimici qualifies as an expert in this proceeding or is qualified to testify regarding the issues in his declaration. Ex. 1039 should thus be excluded. *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008) (“[I]t is an abuse of discretion to permit a witness to testify as an expert on the issues of noninfringement or invalidity unless that witness

is qualified as an expert in the pertinent art.”).

Fourth, and finally, Exhibit 1039 is substantially more unreliable and prejudicial than probative (FRE 403). Exhibit 1039 is unreliable because it relies on the Wang declaration, discussed above. *See supra* Section III. Exhibit 1039 would be prejudicial to include because it is an expert report from a prior litigation involving different parties in which Patent Owner had no opportunity for cross examination or to inspect the devices purportedly being analyzed.

X. Ex. 1040 – Exhibit 7 to D. Hillenbrandt Deposition (IPR2024-00160) (FRE 402)

Exhibit 1040 comprises a set of four annotated versions of Figure 2 from U.S. Pat. No. 10,334,881. These figures were presented to Mr. Hillenbrandt during his deposition as a part of series of questions about how certain claim language would read on these hypothetical configurations. *See* Ex. 1038 at 88:16-92:1; Reply at 4-5, 32-33. Petitioner refers to these figures and hypothetical questions in its Reply to support its claim construction arguments. Reply at 4-5, 32, 33. Patent Owner timely objected to Exhibit 1040 under FRE 402. Paper 23 at 6-7.

Exhibit 1040 is irrelevant because its only purpose is to provide context to Mr. Hillenbrandt’s testimony regarding these hypothetical configurations. As discussed above in Section VIII, such testimony should be excluded as irrelevant, so these figures should likewise be excluded.

XI. Ex. 1041 – Excerpts of D. Hillenbrandt Deposition Transcript from ITC Inv. No. 337-TA-1372 (FRE 701, 702, 802)

Exhibit 1041 comprises excerpts from a deposition transcript of Mr. Hillenbrandt dated February 13, 2024 from ITC Investigation No. 337-TA-1372. Petitioner cites Exhibit 1041 in its Reply at 6, 23, and 34. Patent Owner timely objected to Exhibit 1041 under FRE 701, 702, and 802. Paper 23 at 7-8.

Exhibit 1041 should be excluded as inadmissible hearsay (FRE 802) because it is an out of court statement offered as evidence to prove the truth of the matter asserted. Petitioner cites Exhibit 1041 for the proposition that Mr. Hillenbrandt “agree[s] that a design such as the below . . . ‘does not extend transversely across the passageway.’” Reply at 33-34.

Exhibit 1041 should also be excluded as comprising improper expert testimony (FRE 701/702). Exhibit 1041 includes inventor testimony applying claim language to hypothetical device configurations. Exhibit 1041 should be excluded for the same reasons discussed above with respect to Exhibits 1038 and 1040 regarding hypothetical configurations. *See supra* Section VIII.

XII. Ex. 1042 – Exhibit 17 to D. Hillenbrandt Deposition from ITC Inv. No. 337-TA-1372 (FRE 402)

Exhibit 1042 is exhibit 17 from Mr. Hillenbrandt’s deposition in ITC Investigation No. 337-TA-1372. Exhibit 1042 includes a hand-drawn figure and text, showing a hypothetical device configuration. Petitioner cites Exhibit 1042 in

conjunction with Mr. Hillenbrandt's deposition transcript in Exhibit 1041, which discusses the drawing. Reply at 34. Petitioner cites Exhibit 1042 in its Reply at page 34. Patent Owner timely objected to Exhibit 1042 under FRE 402. Paper 23 at 8.

Exhibit 1042 is irrelevant (FRE 402) because its only purpose is to provide context to Mr. Hillenbrandt's testimony regarding these hypothetical configurations. As discussed above in Section XI, such testimony should be excluded, so this exhibit should likewise be excluded.

XIII. Ex. 1044 – Dr. Fatma Romeh M. Ali et al., *E Cigarette Unit Sales by Product and Flavor Type, Top Selling Brands, 2020-2022*, Centers for Disease Control and Prevention (June 23, 2023) (FRE 402)

Exhibit 1044 is an article dated June 23, 2023. In support of its motivation to combine arguments, Petitioner cites Exhibit 1044 for the proposition that “customers prefer cheaper devices, especially for e-cigarettes, as the rise of disposable devices has proven.” Reply at 21. The critical date of the '864 patent is July 27, 2009. Petition at 17. Patent Owner timely objected to Exhibit 1044 under FRE 402. Paper 23 at 9-10.

An article from 14 years after the critical date about consumer preference in the 2020s has no bearing on any instituted Ground. Exhibit 1044 should therefore be excluded as irrelevant (FRE 402). *Cf. Brookhill-Wilk 1, LLC. v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir. 2003) (declining to consider references “dated well after” a patent's filing date for claim construction).

Date: January 31, 2025

By: /Anish R. Desai/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2025, the foregoing
PATENT OWNER'S MOTION TO EXCLUDE was served via electronic mail,
upon the following:

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