

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JUUL LABS, INC.,

Petitioner,

v.

NJOY, LLC,

Patent Owner.

IPR2024-00161

Patent 10,334,881

**PETITIONER'S OPPOSITION TO PATENT
OWNER'S MOTION TO EXCLUDE**

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A. Introduction

Patent Owner seeks to exclude exhibits that are probative of critical issues, including the scope and content of the prior art and the challenged claims, by arguing they are hearsay, irrelevant, or that their probative value is outweighed by their risk of unfair prejudice. Patent Owner’s heavy reliance on evidentiary rules addressing jury confusion is misplaced here, where the PTAB is capable of giving the evidence its proper weight. As the Supreme Court has stated, “[w]hen the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the [evidence] and will not rely on that information for any improper purpose.” *Williams v. Illinois*, 567 U.S. 50, 65, 69 (2012).

B. Legal Standards

“Rather than excluding evidence that is allegedly hearsay, confusing, misleading, untimely, and/or irrelevant, we may simply not rely on it, if appropriate under the circumstances, or give it little or no probative weight, as appropriate, in our analysis.” *ZF North America, Inc. et al v. Stoneridge Control Devices, Inc.*, IPR2023-00273, Paper No. 31 at 57-58 (PTAB June 12, 2024). “In an *inter partes* review, we regard it as the better course to have a complete record of the evidence to facilitate public access, as well as appellate review.” *Id.* at 58 (collecting cases). Moreover, “there is a strong public policy for making all information filed in an administrative proceeding available to the public.” *Id.* at 57-

58.

The Board’s threshold for excluding evidence is high. FRE 401 sets a low relevance bar, requiring only “any tendency to make a fact more or less probable.” FRE 401(a). The Board applies this standard liberally, having held exhibits merely “directed to subject matter that is similar to the claims at issue in the present IPR [], are relevant evidence under FRE 401–402.” *Murray & Poole Enterprises Ltd. v. Institut de Cardiologie de Montreal*, IPR2023-01064, Paper No. 50 at 11 (Jan. 16, 2025).

Specifically with respect to FRE 403, the Board has noted that the “applicability of Rule 403 to non-jury trials has been questioned,” and held that “[h]ere, where the Board is acting as factfinder, the risk of unfair prejudice is diminished. As the factfinders, we are able to consider the evidence offered by Petitioner and Patent Owner, in light of the parties’ arguments, and give it the appropriate weight, without risk of unfair prejudice.” *Trend Micro Incorporated (California) v. CUPP Computing AS*, IPR2019-00764, Paper 34 at 4-5 (PTAB Aug. 25, 2020).

C. Argument

I. Ex. 1007 – Declaration of Robert Sturges, PhD

Patent Owner objects to certain paragraphs of Ex. 1007 as having not been cited in the Petition or Reply. But that alone does not warrant exclusion, especially

where, as here, the cited discussion is clearly related to and supportive of Dr. Sturges’s surrounding analysis and Petitioner’s arguments. For example, the Board has declined to exclude paragraphs of an expert declaration that were not allegedly “not cited to or relied upon by any Paper,” where “Patent Owner does not explain why the paragraphs warrant the remedy of exclusion.” *Meta Platforms, Inc. v. Eight kHz, LLC*, IPR2023-01003, Paper No. 61 at 82 (PTAB Jan 7, 2025).

Patent Owner argues that “Dr. Sturges’ reliance on and discussion of Exhibits 1014, 1017, 1021, and 1023-1025 ... should be excluded because these exhibits are inadmissible.” Paper 29 at 1. However, evidence need not be admissible for an expert to rely on it in forming their opinions. *See* FRE 703 (evidence “need not be admissible for the opinion to be admitted.”); *Mianyan Boe Optoelects. Tech. Co. v. Samsung Display Co.*, IPR2023-00941, Paper No. 70 (PTAB Dec. 13, 2024) (denying motion to exclude allegedly hearsay evidence). Patent Owner’s argument that FRE 703 does not allow an expert to serve as a conduit for introducing hearsay is misplaced. Patent Owner cannot exclude “Dr. Sturges’s reliance on and discussion of” the evidence; whether the evidence itself is admissible is a different question, addressed with respect to each exhibit below.

Patent Owner also argues that “paragraphs 29 and 83 of Exhibit 1007 should be excluded under FRE 701/702 and/or FRE 403 for failure to disclose the underlying facts or data,” because they allegedly “provide an incorrect citation,

thus failing to no [sic] indicate where the figure came from, or who made the annotations.” Paper 29 at 1. However, paragraph 28 introduces the prior North Carolina litigation, and paragraph 29 states:

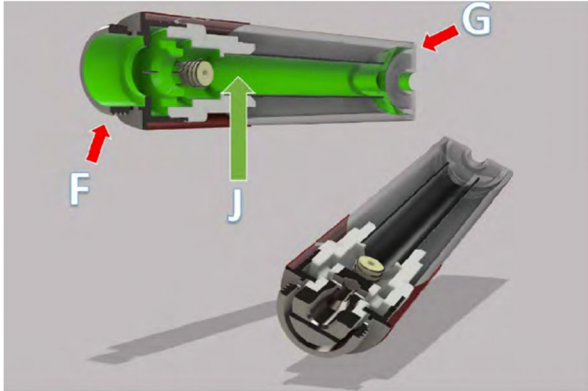
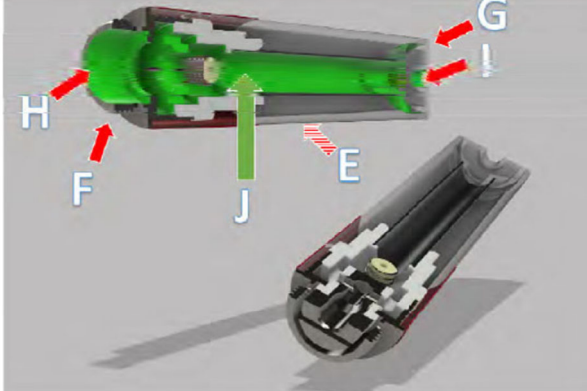
On summary judgement, the plaintiff/patent owner asserted that the claimed “first aperture on the first end” of the cartridge housing is met by a single opening inside the housing, where air entering the cartridge converges at that opening to pass through to the alleged airflow passageway. Ex. 1021 (Dkt. 133, Fuma Reply Brief) at 9-12.

Ex. 1007, ¶¶28-29. Paragraph 29 cites the location in Ex. 1021 of the image, which explains it is a “Vuse Ciro 3D View.” *See* Ex. 1021 at 9. Paragraph 83 re-uses the same exact image from Paragraph 29. And to the extent Patent Owner wanted more information about this image’s annotations, it had an opportunity to question Dr. Sturges during its deposition of him.

II. Exs. 1014, 1021, 1025 – Summary Judgment Briefing Involving Patent Owner’s Predecessor-In-Interest

Patent Owner objects to Exs. 1014, 1021, and 1025 (opening, responsive, and reply briefing on infringement from the North Carolina case) as irrelevant (FRE 402) and unfairly prejudicial (FRE 403). Patent Owner argues that they include statements by non-parties, but ignores that the non-party was the former patentee (Fuma), and that in the ITC litigation parallel to this proceeding, Patent Owner accused the same product (the Vuse Ciro) of meeting the ’881 patent claims in the same way as in that MDNC litigation—the Court’s decision as to that theory

is plainly relevant to the interpretation of what Patent Owner told the ITC the scope of its claims is. Indeed this is not just a third party’s theory, it is Patent Owner’s own theory: Patent Owner copied and pasted Fuma’s image of the allegedly infringing airflow passageway in the Vuse Ciro into its domestic industry chart at the ITC for the ’881 and ’864 patents, even using the same annotations element lettering:

Prior Patent Owner Fuma’s Infringement Contentions in MDNC	Patent Owner’s Domestic Industry Contentions In ITC
 “The Vuse Ciro has an airflow passageway—element J, shown in green—that extends in a straight path through the cartridge” Ex. 1025 at 15.	 “The VUSE Ciro comprises a cartridge where the housing [E] includes an airflow passageway [J] that extends centrally and axially with respect to the housing intermediate of the first and second aperture [H, I], and is configured to allow airflow from the first to the second aperture.” Ex. 1045 (’881 patent DI Contentions, Vuse Ciro) at 7; <i>see also</i> Ex. 1032 (’864 contentions) at 19.

Patent Owner also argues that all three exhibits are hearsay. Paper 29 at 2.

But they are not being offered for the truth of the matter asserted—whether the

Vuse Ciro infringes—but rather for what former patentee Fuma represented the scope of its claims was and so are not hearsay. This not only provides context for the MDNC’s holding about claim scope (*see* Ex. 1015), but also are representations to which Patent Owner should be held. Further, any objection to Ex. 1021 under FRE 802 has been waived. *See* 37 C.F.R. § 42.64; Paper 12 at 10 (not identifying objection to Ex. 1021 under FRE 802).

III. Ex. 1017 – Wang Declaration

Patent Owner asserts that Ex. 1017, Mr. Wang’s declaration, is hearsay. However, Mr. Wang resides in China, and was unavailable as a witness under FRE 804(a). For example, Petitioner had previously attempted to secure Mr. Wang’s testimony, having subpoenaed him in May 2024 to testify before the ITC in June 2024 during the pendency of this proceeding, to no avail. Moreover, ***Patent Owner*** had retained Mr. Wang as a witness as part of its assertion in the ITC. Only after Patent Owner and its counsel refused to pay Mr. Wang’s invoice did he refuse to participate further. Petitioner’s counsel contacted him after his falling out with Patent Owner, but was unable to retain him or secure his availability to testify.

Under FRE 804(b)(1), Mr. Wang’s declaration is not excluded because it was testimony provided for a prior trial, and is now offered against a party whose predecessor in interest had an opportunity and similar motive to challenge it by cross-examination. Mr. Wang’s deposition was taken by counsel for the prior

patentee, Fuma, after the declaration was signed and served on them. In that prior litigation, defendant R.J. Reynolds was asserting the same Wang reference as in this proceeding as invalidating prior art, and alleged, as Petitioner does here, that the cartridge in Wang contains a central airflow passageway.

Patent Owner asserts that Mr. Wang's declaration is irrelevant. However, Mr. Wang's declaration directly refutes Patent Owner's argument that there is no central airflow passageway in the Wang reference. His testimony regarding how air flows through the device he designed and described in the asserted Wang reference is relevant to the proper interpretation thereof, and refute Patent Owner's position that a POSITA would know that air could not flow through the fiber – both because it had been done in a device (probative of what a POSITA would have known), and because that was not how he described it in his reference (probative of the asserted art).

Patent Owner argues that Mr. Wang's declaration "is unreliable (FRE 403)." Paper 29 at 5. Even if FRE 403 were applicable here, Mr. Wang's declaration contains several indications of reliability. For example, it was signed under oath, and was later the subject of a deposition. That Mr. Wang was compensated for his time preparing his declaration and preparing for and participating in a later deposition (well after the declaration was signed), or that he traveled and stayed in a hotel for that deposition, are normal occurrences.

Patent Owner’s arguments that Ex. 1017 contains portions in a foreign language are misplaced, as the operative (and cited) portions—the actual declaration—have certified translations attached, and his patent, also in Exhibit 1017, has a translation submitted as Ex. 1005.

IV. Ex. 1018 – Patent Owner’s Predecessor-In-Interest’s Claim Construction Briefing

Patent Owner objects to Ex. 1018 as allegedly irrelevant. But the relevance of claim construction arguments made by Patent Owner’s predecessor in interest is readily apparent, and Ex. 1018 provides context for other exhibits cited repeatedly by Petitioner, including the claim construction order that followed (Ex. 1020) and summary judgment briefing (Exs. 1014, 1021, 1025).

Patent Owner also argues Ex. 1018 “should be excluded as inadmissible hearsay,” but Patent Owner did not make any objection to Ex. 1021 under FRE 802 or any hearsay rule, so any objection on the basis of hearsay has been waived. *See* 37 C.F.R. § 42.64; Paper 12 at 9 (not identifying objection to Ex. 1018 under FRE 802). Moreover, the statements are not hearsay because they are not being offered for the truth of the matter asserted, but rather for the effect the statements had.

V. Ex. 1023 – Conley Deposition in *Fuma v. RJR*

Mr. Conley is an inventor of the challenged patent, and is under Patent Owner’s control. Patent Owner argues Ex. 1023, the testimony of Mr. Conley—the first-named inventor—is “irrelevant (FRE 402).” Paper 29 at 7. Patent Owner uses

the wrong standard, citing a pre-*Phillips* case asserting that inventor testimony is “largely” irrelevant. *Phillips* clarified that inventor testimony is relevant: “[W]e have also authorized district courts to rely on extrinsic evidence, which consists of all evidence external to the patent and prosecution history, including expert and **inventor testimony**, dictionaries, and learned treatises.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (emphasis added); *id.* at 1313 (“[T]he starting point [of claim interpretation] is based on the well-settled understanding that inventors are typically persons skilled in the field of the invention and that patents are addressed to and intended to be read by others of skill in the pertinent art.”) (internal citation omitted). What an inventor considered his invention and what he understood his claims to mean is probative of claim scope and patentability.

Mr. Conley’s testimony is not excludable as hearsay. FRE 804(b)(1). Mr. Conley was unavailable to Petitioner, because he is Patent Owner’s witness. Indeed, Patent Owner required Petitioner to contact Mr. Conley through its counsel during the co-pending ITC matter. Petitioner could not therefore reasonably make Mr. Conley available under FRE 804(a). Further, Ex. 1023 is the transcript of a deposition given under oath, and is here offered against Patent Owner, whose predecessor in interest (Fuma) had an opportunity and identical motive to question.

Under FRE 807, the Board has previously declined to exclude depositions

where “the witness testimony was elicited via questioning during the ITC Investigation while the witnesses were under oath,” as it should here. *Apple, Inc. v. Massimo Corp.*, IPR2022-01291, Paper No. 75 at 137 (PTAB Jan. 30, 2024). The Board reasoned that “the testimony and documents have sufficient guarantees of trustworthiness, as well as [] probity ... to qualify for the residual exception to hearsay under Fed. R. Evid. 807.” *Id.*

VI. Ex. 1024 – Exhibit Used and Discussed During Prior Conley Deposition

Patent Owner objects to Ex. 1024 under FRE 402 and 802. However, any objection to Ex. 1024 under FRE 802 (or other hearsay rules) has been waived. *See* 37 C.F.R. § 42.64; Paper 12 at 12 (not identifying objection to Ex. 1024 under FRE 802). As discussed, the Conley deposition (Ex. 1023) is relevant, and Ex. 1024 is an exhibit thereto, making it relevant. *See Intex Recreation Co. v. Team Worldwide Corp. Inc.*, IPR2018-00874, Paper No. 149 at 131 (PTAB Oct. 25, 2019) (“it is proper to maintain [challenged exhibits] in the record, as they are relevant to testimony in the depositions”).

VII. Ex. 1036 – Statements and Testimony Regarding Testimony of Shanhong Wang

Patent Owner objects to Ex. 1036, which includes the prior deposition of Mr. Wang, under FRE 402, 403, and 802. Paper 29 at 8. As discussed above with respect to Ex. 1017, testimony by a prior artist is relevant to the disclosures of the

prior art, and to the knowledge of a POSITA. Moreover, in this testimony, Mr. Wang drew a line on an image from his patent, asserted in Grounds 1 and 2, indicating where the air flows, the precise question Patent Owner has raised as to the Wang reference. There is also no undue prejudice to Patent Owner, who worked directly with Mr. Wang as a consultant, and whose similarly-situated predecessor-in-interest had a full opportunity to question him under oath. As explained above, Mr. Wang's testimony is a hearsay exception under FRE 804(b)(1) and FRE 807. It is also not solely used for the truth of how the device operated, but demonstrates what a POSITA would know in light of the disclosures of the Wang reference.

VIII. Ex. 1038 – Hillenbrandt Deposition Transcript In This Proceeding

Patent Owner submitted and cites a declaration from inventor Daniel Hillenbrandt wherein he purports to explain (1) problems in the prior art, including the Smoke Fifty-One Duo device he and Mr. Conley sold and disassembled, (2) how he allegedly fixed shortcomings thereof, and (3) how they came up with their invention and what that invention is. Ex. 2023 at 2-4. Patent Owner now surprisingly wishes to exclude cross examination testimony on that very topic.

Patent Owner challenges "Excerpts 42:1-44:22 of Exhibit 1038" under FRE 402 and 403. This testimony regards the fact that Messrs. Hillenbrandt and Conley distributed and disassembled prior art devices that operate just as Wang does: with

a central airflow passageway. Like with Mr. Wang's testimony, this evidence corroborates Dr. Sturges' opinion about a POSITA's understanding of the Wang reference. Testimony that prior art devices had a central airflow passageway in a fiber is probative of how a POSITA would view Wang. And it rebuts Patent Owner's submission of the invention story according to Mr. Hillenbrandt.

Patent Owner challenges "Excerpts 88:16-92:1 of Exhibit 1038," which regards Mr. Hillenbrandt's interpretation of the "transverse" term as it relates to the heating element, under FRE 402 and 701/702. However, Patent Owner cites the same pre-*Phillips* case regarding inventor testimony to argue relevance. For the same reasons discussed above, an inventor's understanding of claim language is relevant and not expert testimony. Indeed, Mr. Hillenbrandt described his view of what the claims "recite" in his declaration (Ex. 2023 at ¶ 8) and his testimony about that very same claim language is clearly relevant.

Patent Owner challenges "excerpts 115:18-133:5 of Exhibit 1038," wherein he could not identify anything novel in any dependent claim, under FRE 402 and 403. However, as discussed above (Ex. 1023), inventor testimony about the novel or non-obvious aspects of an invention shed light on the invalidity analysis.

IX. Ex. 1039 – Yardimici Declaration

Patent Owner objects to Ex. 1039, which includes images of the Smoke 51 device, under FRE 402, 403, 701/702, and 802. Patent Owner asserts that the

photos of the Smoke 51 device contained in Ex. 1039 are hearsay, but photos are not out of court statements, and cannot be hearsay. Moreover, Mr. Yardimici's declaration has the hallmarks of reliability, as it was signed under penalty of perjury and he was subject to a deposition about its contents. FRE 807. Here, Patent Owner "has not identified any particular statement within [the challenged exhibit] for evaluation of the hearsay question. For that reason alone, the motion lacks merit regarding the assertion of hearsay." IPR2023-00941, Paper No. 68.

Patent Owner also challenges the relevance of Ex. 1039, but attacks the portions not used here. Petitioner cites Ex. 1039 for the photos of the Smoke 51 device, showing an airflow passageway down the middle. The fact that there existed prior art devices that had air flowing through a passageway in the middle of a fluid-soaked fiber corroborates Dr. Sturges' opinion about a POSITA's understanding of the Wang reference.

Patent Owner also challenges Ex. 1039 as improper expert opinion testimony, but ignores that Petitioner is using it for the limited purpose of demonstrating the CT scans of Smoke 51—not any "opinion." Regardless, the Board can give the proper weight to the CT scans that Dr. Yardimici testified under oath he directed two other scientists to perform on the Smoke 51 products.

X. Ex. 1040 – Exhibit Used and Discussed in Hillenbrandt Deposition

Patent Owner objects to Ex. 1040 under FRE 402, but concedes that Ex.

1040's "purpose is to provide context to Mr. Hillenbrandt's testimony" in Ex.

1038. That testimony is relevant, and the exhibits discussed by it are relevant also.

XI. Ex. 1041 –Hillenbrandt Co-Pending ITC Deposition Transcript

Patent Owner argues that Ex. 1041, Mr. Hillenbrandt's ITC deposition, defended by Patent Owner's same counsel as here, is hearsay. As explained above, Mr. Hillenbrandt is an inventor on the challenged patents, is Patent Owner's witness, and he submitted a declaration regarding his invention story on behalf of Patent Owner here. The testimony is thus a party admission and non-hearsay. Further, the challenged testimony is inconsistent with Mr. Hillenbrandt's testimony here and thus non-hearsay. FRE 801(d). For example, in this proceeding, Mr. Hillenbrandt echoed Patent Owner's position that a heating coil with several coils such as in Wang is not transverse (*see* Ex. 1038 at 36:10-16) but the cited portions of Ex. 1041 show in his prior deposition he testified that a longitudinal heating element "does extend transversely across the passageway." Ex. 1041, 240:12-242:15; Ex. 1042.

Moreover, Ex. 1041 is sworn deposition testimony that has sufficient guarantees of trustworthiness that it should not be excluded by the rule against hearsay. FRE 807. Patent Owner's same counsel defended Mr. Hillenbrandt's depositions here and in the ITC, and both were lawfully conducted under oath.

Nor is Mr. Hillenbrandt's testimony expert testimony, as explained above

with respect to Ex. 1038.

XII. Ex. 1042 – Exhibit Used and Discussed in Prior Hillenbrandt Deposition

Patent Owner objects to Ex. 1042 under FRE 402, but concedes that Ex. 1042’s “purpose is to provide context to Mr. Hillenbrandt’s testimony” in Ex. 1041. That testimony is relevant, and the exhibits discussed by it are relevant also.

XIII. Ex. 1044 – Article on E Cigarette Unit Sales

Patent Owner objects to Ex. 1044 under FRE 402. Ex. 1044 is an article discussing the market for e-cigarettes and consumer preferences, and is relevant to secondary considerations and motivations to combine references. Though it is dated after the alleged critical date, “[p]ost-filing evidence may be used to show the state of the art existing at the time of filing of the patent-at-issue.” *Motif Food Works, Inc. v. Impossible Foods, Inc.*, IPR2023-00206, Paper No. 55 at 18 (PTAB June 12, 2024) (citing *Plant Genetic Sys. N.V. v. DeKalb Genetics Corp.*, 315 F.3d 1335, 1344 (Fed. Cir. 2003)). And market preferences are borne out over time, including because the size and attention to the market had increased by the time of the article. Moreover, Ex. 1044 is used for the proposition that cheaper products with some technical drawbacks can be preferable to e-cigarette consumers, a proposition that is not required to be tied to a critical date.

Dated: February 7, 2025

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CERTIFICATE OF SERVICE

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