Filed October 17, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVANOS MEDICAL, INC.,

Petitioner,

v.

STRATUS MEDICAL, LLC,

Patent Owner.

Case IPR2024-01211
Patent 10,736, 688

PETITIONER'S MOTION TO EXCLUDE EVIDENCE
37 C.F.R. § 42.64(c)

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Pursuant to 37 C.F.R. § 42.64(c), Petitioner Avanos moves to exclude portions of the declaration of Cody Jorgensen—Exhibit 2015 (designated Confidential by Patent Owner) and corresponding portions of Exhibits 2016, 2039, and 1037—and the entirety of Exhibits 2021-2026 as violating the Federal Rules of Evidence ("FRE") or rules of the Board.[1] Petitioner timely objected to this evidence on June 2, 2025 (Paper 19).

I. ARGUMENT

Stratus and its witnesses rely on multiple categories of inadmissible evidence to support their claims of commercial success, industry recognition, and a lack of cross-pollination between medical specialties. Specifically, they submit (i) portions of Mr. Jorgensen's declaration that rest on information outside his personal knowledge and on admitted hearsay, (ii) third-party website printouts

[1] For the remainder of this motion, Avanos will refer to the designated confidential version of the Jorgensen declaration (Ex-2015). However, Avanos moves to exclude the same portions of the Jorgensen declaration appearing in Exhibits 2016, 2039, and 1037. Similarly, Avanos only refers to the designated confidential versions of Stratus's Patent Owner Response and Sur-reply, when citing those papers.

regarding the professional backgrounds of non-testifying individuals, and (iii) Stratus press releases that repeat the content of third-party announcements.

Each of these submissions violates the Federal Rules of Evidence because they are hearsay and/or the witness lacks personal knowledge. Moreover, because Stratus and its witnesses cite these materials for the truth of the matters asserted—rather than for any non-hearsay purpose—their use directly undermines the reliability of the record. For these reasons, paragraphs 16-27, 47, and 54-55 of Exhibit 2015 and Exhibits 2021-2026 should be excluded in their entirety.

A. Paragraphs 16-27 and 47 of Exhibit 2015 are inadmissible under FRE 602 and/or 802 because Mr. Jorgensen's purported "knowledge" of the asserted facts depends on hearsay

Paragraphs 16-27 and 47 of Exhibit 2015, the first declaration of Cody Jorgensen, contain a discussion of the RFA cannula market, including four diagrams illustrating various information about the RFA cannula market. *See, e.g.,* Ex-2015 ¶¶ 16 (discussing size of RFA cannula market), 17-18 (illustrating and discussing relative shares of RFA cannula market over time by certain market participants), 19-20 (illustrating and discussing size of sales teams and market shares for RFA cannula market participants), 21-23 (illustrating and discussing compounded annual growth rate of RFA cannula market participants), 24-26 (illustrating and discussing year-by-year market shares for RFA cannula market participants), 27 (discussing other characteristics of the RFA cannula market), 47

(referring to previous discussion of RFA cannula market). Mr. Jorgensen does not have firsthand knowledge of this information; he is merely stating as fact information he read or was told by unknown third parties.

1. The relationship between personal knowledge requirements and the rule against hearsay

"A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." FRE 602. "[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." Notes of Advisory Committee on Proposed Rules, FRE 602 (emphasis added) (noting the rule is the "'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'"); *see also, e.g.*, *United States v. Householder*, 137 F.4th 454, 488 (6th Cir. 2025) ("Testimony is excluded for lack of personal knowledge when no reasonable juror could believe that the witness had the ability and opportunity to perceive the event he testified about.").

As to hearsay, the Advisory Committee notes clarify that FRE 602 does not prevent a witness from testifying about the *existence* of a hearsay statement "if he has personal knowledge of the making of the statement," but the rules against hearsay do "prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it." Notes of Advisory Committee on Proposed Rules, FRE 602. The Wright & Miller treatise explains that the

personal knowledge and hearsay rules are linked by a shared "concern for the reliability of testimony unsupported by firsthand observation":

> While a witness who gives testimony containing hearsay may have perceived an out-of-court statement with her senses, the matters asserted by that statement usually relate to facts perceived by the hearsay declarant, not the in-court witness. Thus, the secondhand version of the facts related by the in-court witness is unreliable because the witness cannot meaningfully be cross-examined concerning those facts. … If the testimony of the witness purports to repeat an out-of-court statement, hearsay is the proper objection. If the testimony on its face purports to be based on direct perception of the facts described but is actually based on an out-of-court statement about those facts, the objection should be lack of personal knowledge. Without Rule 602, the witness could avoid the hearsay rule simply by restating the facts contained in the hearsay statement without purporting to repeat that statement.

27 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 6022 (2d ed. 1995) (footnotes omitted); *see also id.* at § 6023 n.10 ("The proper objection is determined by the form of the testimony. If the witness quotes or paraphrases an out-of-court statement, the objection is hearsay. If the witness does not quote or paraphrase, but simply relies on another person's perception as described in that person's out-of-court statement, the proper objection is lack of personal knowledge.").

The FRE thus "demonstrate that testimony based on hearsay is equally inadmissible as direct hearsay testimony." *United States v. Mandel*, 591 F.2d 1347, 1369 (4th Cir. 1979) (holding witnesses' testimony about "their own … feelings or beliefs" should have been excluded even though it was "not hearsay in form" where those feelings and beliefs were "based in whole or in part" on hearsay rather than their "first-hand knowledge"); *see also Kemp v. Balboa*, 23 F.3d 211, 213 (8th Cir. 1994) (affirming exclusion of testimony that was "based not upon [witness's] personal knowledge of the facts about which she testified, but solely upon what she had read in the medical records prepared by others").

2. Analysis of Mr. Jorgensen's testimony

Mr. Jorgensen's testimony about the purported market runs afoul of both the requirement of personal knowledge and the prohibition on hearsay.

First, while Mr. Jorgensen testified that he had actual, "personal knowledge of the facts stated in [his] declaration," Ex-2015 ¶ 2, his cross-examination revealed he (or Stratus's counsel) has a legally incorrect view of what that means. As explained above, FRE 602 requires a witness to have the ability and opportunity to actually perceive the facts testified about. *E.g.*, *Householder*, 137 F.4th at 488. This means that a witness cannot simply repeat statements from others or that the witness read in a document and claim those facts as his own "personal knowledge." But this is exactly what Mr. Jorgensen did.

He admitted on cross-examination that his understanding of personal knowledge included information that he was "testifying about on information and belief," rather than his personal observations, and that he believed his "personal knowledge" extended to facts where "someone tells you something or you read something in a document." Ex-1047, 21:10-23:2; *see also id.* at 18:9-20:6 (explaining his understanding of "statements on information and belief" as including facts "given by someone else" and facts that are "not necessarily … my own information"). In one example, Mr. Jorgensen testified on direct that "Avanos completed the acquisition of Diros" in 2023. Ex-2015 ¶ 51 (citing Ex-2030). But on cross-examination, he admitted that he "didn't observe" the closing of the acquisition "with any of [his] five senses" and the source of his purported "knowledge" was in fact documents he read and calls that he listened to. Ex-1047, 23:3-25:3.[2]

And with respect to his testimony regarding other market participants, *e.g.*, Ex-2015 ¶¶ 17-26, Mr. Jorgensen admitted that that he had *no access* to personally

[2] To be sure, Avanos does not dispute that the fact asserted in that paragraph of the declaration is true or that it might be otherwise admissible, e.g., under FRE 801(d)(2). This example merely illustrates Mr. Jorgensen's incorrect understanding of "personal knowledge."

observe any of those companies' financial information, so that "when it comes to … exact numbers and ensuring that information is correct" he was relying exclusively on "information that comes from [a] document." Ex-1047, 73:10-75:6. Mr. Jorgensen admitted that his testimony about the market data (generally given in chart form) "requires knowing which company is selling how much in the US RFA cannula market," and he also admitted the data he relied on—and testified as to its truthfulness—was "given to [him] by someone or even multiple someones … outside of Stratus." Ex-1047, 86:5-88:3; *see also id.* at 75:7-77:5 (admitting that his testimony about size of sales forces of other market participants came from various, unidentified "third-party sources" including "what we're told" and "told by customers, whatnot").

Put simply, Mr. Jorgensen's understanding of the threshold for "personal knowledge" does not meet the legal standard. *See also id.* 72:16-74:1 (admitting that when he testified he had "personal knowledge" of competitor market performance, he was "talking about what [he] read from a document").

Second, Mr. Jorgensen's testimony about Stratus's market competitors is classic hearsay. Stratus offers Mr. Jorgensen's testimony about the market share data for its truth to establish Stratus's alleged success in the market. Patent Owner Response, Paper 15 ("POR"), 69-72; Patent Owner's Sur-Reply, Paper 42 (Sur-Reply), 25, 27. For example, Mr. Jorgensen offers the information to allege that

"Stratus has enjoyed remarkable commercial success with [its] Nimbus device." Ex-2015 ¶ 13. Similarly, Stratus argues the market data itself supports its commercial success arguments. POR, 69-72. This information is *only* probative of Stratus's commercial success arguments if it is *true*.

But both Stratus and Mr. Jorgensen admit that the data was sourced from unidentified, out-of-court statements and sources outside Mr. Jorgensen's personal observation. Sur-Reply, 25 ("[T]he specific figures he analyzed were obtained from third parties …."); Patent Owner Reply to Motion to Seal, Paper 29, 3 (conceding that "[c]ompetitor data always originates with third parties" and suggesting some of the data was "privately commissioned by Stratus" or that Stratus "paid [unidentified] third parties to assist" with its collection); Ex-1047, 86:5-88:3. Of course, none of these declarants have testified—*or even identified*—in the record of this proceeding. Similarly, when asked for documents underlying Mr. Jorgensen's testimony, Stratus replied with "a hard no" and opposed Avanos's motion for additional discovery. Ex-2038, 3; Patent Owner Opp'n to Mot. for Add'l Discovery, Paper 23, 6-9.

Nevertheless, Paragraphs 16-27 and 47 of Mr. Jorgensen's direct testimony either relay this data or are based on these unnamed sources. And Mr. Jorgensen admitted that "the accuracy of [his] testimony," presenting the data in his charts, "depends on the accuracy of the … information provided to [him]" by "somebody

else who doesn't necessarily have access to the confidential information internal to those companies." Ex-1047, 87:19-90:11.

The data that Mr. Jorgensen relies on may or may not be reliable (or at least admissible on its own), but unless the source of that data is made available for cross-examination—or even *identified*—its veracity cannot be confirmed. Rather than make the source of that data available however, Stratus chose to present only Mr. Jorgensen to parrot the information himself. The hearsay rule exists to exclude such unreliable, unverified testimony. *See, e.g.*, *Taxinet Corp. v. Leon*, 114 F.4th 1212, 1226 (11th Cir. 2024) ("The primary purpose of the hearsay rule is the protection of the right of litigants to confront the witnesses against them and to test their credibility through cross-examination." (cleaned up)). Thus, because no exception applies,[3] paragraphs 16-27 and 47 of Exhibit 2015 should be excluded as hearsay and/or for lack of personal knowledge. *See Rotec Indus. v. Mitsubishi*

[3] Stratus has never attempted to lay a foundation for any hearsay exception. While Stratus served a second Jorgensen declaration purportedly as supplemental evidence, Jorgensen only doubled down on his supposed "personal knowledge" of the facts that he later agreed, on cross-examination, he only learned about from third parties. Avanos reserves the right to respond to any arguments about hearsay exceptions in its reply to this motion.

Corp., 215 F.3d 1246, 1256 (Fed. Cir. 2000) (affirming district court's exclusion of declaration that was "based upon hearsay and lack[ed] the personal knowledge required to be admissible").

B. Exhibits 2021-2024 are inadmissible hearsay

Stratus offers Exhibits 2021-2024 as printouts of various websites that provide information on the professional backgrounds of Dr. Racz, Dr. Finch, Dr. Fitz, and Dr. Lee. None of those individuals have offered direct testimony in this proceeding.

Both Dr. Russo and Stratus rely on this information for its truth. Dr. Russo relies on this information in his declaration to allege that Mr. Racz is "a board-certified anesthesiologist," Mr. Finch is "an Australian pain physician," Mr. Fitz is "a pain physician," and Mr. Lee is "a board-certified gynaecologist [sic]." Ex-2001 ¶145. Stratus then indirectly relies on this information (through citation to Dr. Russo's testimony) to argue "the inventors of … all references at issue are physicians." POR, 28. Dr. Russo and Stratus also rely on this information to allege a "lack of cross-pollination of RF neurotomy and other specialties." Ex-2001 ¶ 147 (explaining "[w]hereas the RF neurotomy devices of Racz and Fitz were invented solely by pain medicine specialists, Lee's uterine fibroid ablation device was invented by a gynaecologist [sic]"), POR, 26. These exhibits are hearsay for which no exception applies and should be excluded.

C. Exhibits 2025-2026 are inadmissible hearsay, and paragraphs 54-55 of Exhibit 2015, which rely on Exhibits 2025-2026, are inadmissible hearsay within hearsay

Exhibits 2025-2026 are Stratus press releases—i.e., its own out-of-court statements—purporting to report announcements from Deloitte and Pepperdine University ("Pepperdine"), respectively. The original announcements from Deloitte and Pepperdine are not offered as evidence.

Exhibits 2025-2026 are asserted as truth. Exhibit 2025 is a Stratus statement that Stratus was ranked by Deloitte as the "number 483 fastest growing company in North America." Ex-2025 (cleaned up). Exhibit 2025 also purports to provide details on Deloitte's selection process. *See* Ex-2025 (noting "winners are selected based on percentage fiscal year revenue growth"). Likewise, Exhibit 2026 is a Stratus statement that it was "recognized … by the Pepperdine Most Fundable Companies List" and purports to provide details on Pepperdine's selection process and objectives. Ex-2026 (noting the "Pepperdine Most Fundable Companies List initiative aims to … recognize exceptional entrepreneurs"). Thus, Exhibits 2025 and 2026 should be excluded as hearsay.

Paragraphs 54-55 of Jorgensen's declaration (Ex-2015) contain a discussion of alleged praise for Stratus and its Nimbus device. These paragraphs cite or otherwise rely on the Stratus press announcements in Exhibits 2025-2026. *See,*

e.g., Ex-2015 (noting "Stratus Medical was recognized as one of the fastest-growing companies in North America").

Both Mr. Jorgensen and Stratus rely on Exhibits 2025 and 2026 for their truth. Mr. Jorgensen relies on the original announcements to allege that "Stratus and its Nimbus device have received awards and accolades for its innovation and effectiveness." Ex-2015 ¶ 53. Stratus, in turn, relies on paragraphs 54-55 of Mr. Jorgensen's first declaration to allege "[t]he industry has praised the Nimbus devices by awards recognizing the amazing success Stratus has enjoyed based on physician acceptance of the Nimbus devices." POR, 67. Accordingly, paragraphs 54-55 of Exhibit 2015 should be excluded as hearsay within hearsay. FRE 805.

II. Identification of where in the record the evidence sought to be excluded was relied upon by Stratus

In accordance with Part II.K of the Trial Practice Guide, the table below identifies each reference by Stratus (or its declarants) to the evidence sought to be excluded.

As used below, "Sur-Reply" refers to Stratus's Sur-Reply—Paper 40 in IPR2024-01209 and IPR2024-01212 and Paper 42 in IPR2024-01210 and IPR2024-01211.

Evidence	Where Relied Upon
Ex-2015 (declaration of Cody Jorgensen), ¶ 16	

Evidence	Where Relied Upon
Ex-2015, ¶ 17	Paper 13 in IPR2024-01209 and IPR2024-01212, at 71; Paper 15 in IPR2024-01210 and IPR2024-01211, at 70
Ex-2015, ¶ 18	
Ex-2015, ¶ 19	Paper 13 in IPR2024-01209 and IPR2024-01212, at 72; Paper 15 in IPR2024-01210 and IPR2024-01211, at 71; Sur-Reply, 29
Ex-2015, ¶ 20	Paper 13 in IPR2024-01209 and IPR2024-01212, at 71-72; Paper 15 in IPR2024-01210 and IPR2024-01211, at 70-71; Sur-Reply, 29
Ex-2015, ¶ 21	Paper 13 in IPR2024-01209 and IPR2024-01212, at 73 (reproducing table from ¶ 21); Paper 15 in IPR2024-01210 and IPR2024-01211, at 72 (same); Sur-Reply, 28
Ex-2015, ¶ 22	POR, 72; Sur-Reply, 28
Ex-2015, ¶ 23	
Ex-2015, ¶ 24	Paper 13 in IPR2024-01209 and IPR2024-01212, at 70; Paper 15 in IPR2024-01210 and IPR2024-01211, at 69
Ex-2015, ¶ 25	
Ex-2015, ¶ 26	
Ex-2015, ¶ 27	Paper 13 in IPR2024-01209 and IPR2024-01212, at 72; Paper 15 in IPR2024-01210 and IPR2024-01211, at 71
Ex-2015, ¶ 47	
Ex-2015, ¶ 54	Paper 13 in IPR2024-01209 and IPR2024-01212, at 68; Paper 15 in IPR2024-01210 and IPR2024-01211, at 67
Ex-2015, ¶ 55	Paper 13 in IPR2024-01209 and IPR2024-01212, at 68; Paper 15 in IPR2024-01210 and IPR2024-01211, at 67

Evidence	Where Relied Upon
Ex-2021 (Gabor B. Racz)	Ex-2001 ¶¶ 145, 147 (referring to Mr. Racz and Mr. Fitz as "pain medicine specialists"); Paper 13 in IPR2024-01209 and IPR2024-01212, at 29 (referring to the inventors of the patent as "physicians"); Paper 15 in IPR2024-01210 and IPR2024-01211, at 28 (same)
Ex-2022 (Philip Finch)	Ex-2001 ¶ 145; Paper 13 in IPR2024-01209 and IPR2024-01212, at 29 (referring to the inventors of the patent as "physicians"); Paper 15 in IPR2024-01210 and IPR2024-01211, at 28 (same)
Ex-2023 (William R. Fitz)	Ex-2001 ¶¶ 145, 147 (referring to Mr. Racz and Mr. Fitz as "pain medicine specialists"); Paper 13 in IPR2024-01209 and IPR2024-01212, at 29 (referring to the inventors of the patent as "physicians"); Paper 15 in IPR2024-01210 and IPR2024-01211, at 28 (same)
Ex-2024 (Bruce Lee)	Ex-2001 ¶ 145; Paper 13 in IPR2024-01209 and IPR2024-01212, at 29 (referring to the inventors of the patent as "physicians"); Paper 15 in IPR2024-01210 and IPR2024-01211, at 28 (same); Ex-2006 ¶ 56 (stating "Dr. Bruce Lee")
Ex-2025 (Deloitte Tech)	Paper 13 in IPR2024-01209 and IPR2024-01212 at 68; Paper 15 in IPR2024-01210 and IPR2024-01211 at 67; Sur-Reply, 25 (stating "praise Stratus has received")
Ex-2026 (Pepperdine)	Paper 13 in IPR2024-01209 and IPR2024-01212, at 68; Paper 15 in IPR2024-01210 and IPR2024-01211, at 67; Sur-Reply, 25 (stating "praise Stratus has received")

III. CONCLUSION

For the foregoing reasons, the challenged evidence does not meet the threshold for admissibility and should be excluded from the record.

Respectfully submitted,

/Warren Thomas/
Warren J. Thomas (Reg. No. 70,581)

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and agreement of the parties, I certify that on October 17, 2025, a copy of Petitioner's Motion to Exclude was served on counsel for the Patent Owner by email to:

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