Filed: October 31, 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 REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

Stratus concedes that most of the evidence Avanos moved to exclude is hearsay.[1] Unless one of the exceptions to the rule against hearsay applies, that hearsay is inadmissible. Stratus argues the Board should just admit the hearsay anyway and "assign appropriate weight." PO Opp MTE, 1. Avanos does not dispute that the Board *can* take that approach, in certain circumstances.[2]

But some of Stratus's authorities contradict or undermine that point. Stratus quotes *Google v. Meiresonne* for the proposition that the Board can "admit … and weigh" hearsay appropriately (PO Opp MTE, 3), but there the Board *granted* the motion to exclude Exhibits 2005 and 2009 as impermissible hearsay. IPR2014-01188, Paper 38, 10 (Jan. 20, 2016). Stratus also argues that *Denso* "caution[s]"

[1] Stratus only contends that its "press release and website post[s]," and Jorgensen's testimony about them, are not hearsay. PO Opp MTE, 8.

[2] Stratus's cited Supreme Court holding was nowhere as broad as suggested. The Court held only that "a written report by a licensed physician … in his area of competence," among other qualifications inapplicable here, could be considered in an SSA proceeding. *Richardson v. Perales*, 402 U.S. 389, 402 (1971). The Court reasoned that courts had "recognized the reliability and probative worth of written medical reports even in formal trials." *Id.* at 405. Nothing at issue here approaches the "reliability" of such "written medical reports."

against exclusion because the Board can "simply not rely on it or give it little or no probative weight" (PO Opp MTE, 4). That is precisely what the Board did there: it denied the motion and gave the hearsay "no probative weight." *Denso Corp. v. Collision Avoidance Tech. Inc.*, IPR2017-01715, Paper 27, 30 (Jan. 22, 2019).

Avanos does not oppose that alternative relief—admitting the hearsay and giving it zero weight. In any case, the Board plainly can and does exclude hearsay when there is no applicable exception. *E.g.*, *Comcast Cable Commc'ns., LLC v. Promptu Systems Corp.*, IPR2018-00344, Paper 70, 83-84 (Sept. 13, 2021) (excluding certain testimony by PO's CTO that repeated impermissible hearsay).

Jorgensen "market data" testimony: Stratus's argument that Avanos could have contested the accuracy of Jorgensen's testimony misses the point: Cross-examining him about the purported market data would not allow Avanos to challenge the credibility of *the market data* for the very reason it is inadmissible hearsay—Jorgensen had no personal knowledge of it.[3] This is exactly why Avanos *requested the data*. Stratus opposed producing it, claiming that it would "require many hours" for Jorgensen to "check" the documents that allegedly corroborate his

[3] Stratus's latest brief abandons its position that Jorgensen had "personal knowledge" of the market data. *Compare* Sur-reply, 25 *and* Ex-2015 ¶2, *with* PO Opp MTE, 10-11.

testimony. PO Opp to Mot. for Add'l Disc., 6-7. So Stratus's argument that that Avanos "had every opportunity to contest" his testimony and should have *asked* Jorgensen to "specifically identify" the numerous undisclosed sources" (PO Opp MTE, 10-11) rings hollow. It is Stratus's burden—not Avanos's—to put forward admissible, credible evidence to support its "commercial success" argument. It did not. Moreover, Avanos's ability to present data about its *own* sales does not substitute for an opportunity to challenge the market data as a whole because the market data is about *and from* numerous *third parties*.

Stratus also suggests that under Avanos's position, "virtually every market analysis would be inadmissible." PO Opp MTE, 13. Not so. Some might be "business records" under FRE 803(6). *E.g.*, *Comcast*, IPR2018-00344, at 82 (admitting internal market research). And under FRE 803(17), "market reports" and "other compilations" are admissible *if* the proponent invokes that exception and lays a proper foundation (e.g., that they are "generally relied on … by persons in particular occupations"). Here, Stratus has done neither.

There is no dispute that other documentary or testimonial sources for the data exist; some of it might have been admissible to corroborate Jorgensen's testimony, as noted above. That fact defeats Stratus's reliance on FRE 807, which requires the hearsay (1) have "guarantees of trustworthiness" *and* be (2) "more probative" of the issue than "other evidence" Stratus could "obtain through

reasonable efforts." The *only* basis argued here to trust Jorgensen's testimony is his own say-so. PO Opp MTE, 12-13 (arguing "sworn declaration" and "deposition" give "guarantees of trustworthiness"). But "credibility of the witness relating the statement" is "not a part of [the trustworthiness] enquiry." Committee Notes on the 2019 Amendment to FRE 807 (emphasizing corroboration requirement).

Second, Jorgensen's testimony about information from other documents and sources cannot be "more probative" than the underlying data itself. If that evidence was in the record (or even *produced* to Avanos for review), then one could judge its *and Jorgensen's* credibility. Instead, Stratus blocked review of the data and presented blatant hearsay from undisclosed sources via Jorgensen—an inherently biased, employee-witness. FRE 602 and 802 bar this evidence. See MTE, 3-5. The Board should exclude Jorgensen's testimony or give it *zero* weight.

Exhibits 2021-24, "biographies": Stratus contends Ex-2021 to -2024 are admissible under FRE 703 because Dr. Russo applies his "experience … to assess the [inventors'] biographies." PO Opp MTE, 6. But Stratus's quotation from *Mejia* shows why this is improper: Its "expert is simply repeating hearsay evidence" to "circumvent" the rule. PO Opp MTE, 6. No physician *experience* is needed to read (and repeat) website bios, and Russo did not offer any *opinion* based on them. He simply stated facts about the inventors' occupations, lifted from the hearsay exhibits. Ex-2001, ¶145. In fact, Stratus concedes these are not opinions by arguing

that Russo "personally knows" two of the inventors and the exhibits were only "illustrative support" for his "known and asserted-to facts." PO Opp MTE, 5.[4] Nor do these exhibits fall under FRE 807. For example, Ex-2021 purports to be a Wikipedia article, but multiple several courts have been "troubled by Wikipedia's *lack* of reliability." *United States v. Lawson*, 677 F.3d 629, 650 (4th Cir. 2012) (citing cases). The Board should exclude the biographies.

Exhibits 2025-26, Stratus PR: Contrary to Stratus's argument, these exhibits are offered for the "truth" of their contents, namely that Deloitte and Pepperdine praised Stratus. *Fox Factory* is inapposite because there the exhibits were from *third parties*—not the patent owner's own statement. *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-01440, Paper 62, 80 (Dec. 6, 2018). Similarly, FRE 807 does not apply because the "more probative" evidence would be from these third parties. And FRE 803(6) also does not apply because (a) Jorgensen did not testify to the elements and (b) making self-serving statements is not a "regular" business activity. And like Russo, Jorgensen did not point to his "personal knowledge" of the facts in his direct testimony—only these self-serving press releases. They should be excluded, and Jorgensen's testimony at best given no weight.

[4] Stratus cites *no support* for this "fact," and Russo says nothing about any alleged "personal knowledge." He *only* cites these hearsay exhibits. Ex-2001, ¶145.

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 31, 2025, a copy of this Petitioner's Reply in Support of Its Motion to Exclude was served on counsel for the Patent Owner by email to:

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