

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALAMAR BIOSCIENCES, INC.,
Petitioner

v.

OLINK PROTEOMICS AB,
Patent Owner

Case IPR2024-01353
U.S. Patent No. 7,883,848

**PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE
UNDER 37 C.F.R. § 42.64(c)**

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U.S. Patent and Trademark Office
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Patent Owner Olink Proteomics AB (“Patent Owner”) files this motion pursuant to 37 C.F.R. §§ 42.62 and 42.64(c) and in accordance with DUE DATE 5 of the Scheduling Order (Paper 8). Patent Owner requests exclusion of Exhibit 1008, to which Patent Owner timely objected through written Objections to Evidence on March 21, 2025 (Paper 11).

The Federal Rules of Evidence (FRE) govern the admissibility of evidence in *inter partes* review proceedings. 37 C.F.R. § 42.62. As shown herein, Exhibit 1008 is inadmissible in this IPR under FRE 408(a) and does not meet any exceptions under FRE 408(b). Accordingly, the Board should exclude Exhibit 1008 in its entirety.

I. STATEMENT OF PRECISE RELIEF REQUESTED

Patent Owner moves to exclude Exhibit 1008 under FRE 408.

II. STATEMENT OF MATERIAL FACTS

1. The Federal Rules of Evidence (FRE) govern the admissibility of evidence in *inter partes* review proceedings. 37 C.F.R. § 42.62.

2. Petitioner filed Exhibit 1008 with its Petition on August 23, 2024. *See generally*, Paper 2; EX1008.

3. Exhibit 1008 states “CONFIDENTIAL COMMUNICATION RE: C.A. No. 23-cv-01303-MN (D. Del.)” and “SUBJECT TO FRE 408” on each page of the document.

4. Exhibit 1008 was “sent by counsel for Olink to counsel for Alamar on January 18, 2024.” EX1041, ¶5; Paper 2 at 13.

5. Patent Owner timely objected to Exhibit 1008 on March 21, 2025. *See* Paper 11 at 1.

6. Patent Owner objected to Exhibit 1008 as being inadmissible under FRE 408. *See id.*

7. Petitioner failed to serve any supplemental evidence in response to Patent Owner’s objections to evidence.

8. Petitioner relies on Exhibit 1008 in its Petition arguments for Grounds 3 and 4. *See* Paper 2 at 13, 46, 55-67, 72; EX1005, ¶¶15, 66, 206-208, 214, 223, 232, 235, 242, 247, 251, 255, 262, 265, 267, 271, 276, 281, 285, 290, 296; Paper 24 at 22; EX1051, ¶¶85, 91.

9. Patent Owner cites Exhibit 1008 once in its POR (Paper 18 at 63), and once in its Sur-Reply (Paper 32 at 23).

III. ARGUMENT

As shown herein, the Board should exclude Exhibit 1008 because it is inadmissible under FRE 408(a) and does not meet any exceptions under FRE 408(b).

A. Rule 408 bars admission of settlement statements offered to impeach or contradict the other party.

Rule 408(a) identifies prohibited uses of compromise offers and

negotiations:

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim *or to impeach by a prior inconsistent statement or a contradiction*:

- (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
- (2) *conduct or a statement made during compromise negotiations about the claim* — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

FRE 408(a) (emphasis added). Rule 408 thus serves to prevent admitting into evidence statements made during settlement or compromise negotiations for purposes of impeachment. Indeed, “[t]he primary purpose of Rule 408 is the promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of such evidence.” *Manko v. United States*, 87 F.3d 50, 54 (2d Cir. 1996) (internal citations omitted).

It is well settled that Rule 408 prevents using settlement communications for impeachment purposes. *See, e.g., Eid v. Saint-Gobain Abrasives, Inc.*, 377 Fed. Appx. 438, 444-45, 445 n.6 (6th Cir. 2010) (“The plain text of Rule 408 precludes the use of settlement communications ‘to impeach through prior inconsistent

statement or contradiction’ ...”); *AgroFresh Inc. v. Essentiv LLC*, 2018 WL 9578196, *3 n.3 (D. Del., Dec. 11, 2018) (“Federal Rule of Evidence 408(a) expressly prohibits the use of evidence of settlement negotiations for impeachment purposes.”); *Jones v. Life Ins. Co. of N. Am.*, 2015 WL 8753996, *4 (N.D. Cal., Dec. 15, 2015) (“To permit disclosure for impeachment purposes would undermine the policy goal of Federal Rule of Evidence 408—encouraging settlement.”).

Further, “[t]he dispute [involving settlement negotiations] need not be the one being tried in the case where the settlement is being offered” to fall within Rule 408’s prohibition. *See, e.g., Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 296-98 (5th Cir. 2010) (internal citations omitted); *Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 687 F.2d 563, 568-569 (2d Cir. 1982) (evidence of plaintiff’s settlement dealings with another alleged infringer were not admissible as evidence).

Rule 408(b) provides a narrow set of exceptions where settlement negotiations may be admissible, “such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” FRE 408(b). Just as these exceptions themselves are narrow, the courts narrowly apply them. *See, e.g., Arnold v. Wilder*, 657 F.3d 353, 366-67 (6th Cir. 2011); *Ray Comm’ns, Inc. v. Clear Channel Comm’ns, Inc.*, 673 F.3d 294, 306 (4th Cir. 2012). “[W]hen the issue [of admissibility] is doubtful, the

better practice is to exclude evidence of compromises or compromise offers.”

Weems v. Tyson Foods, Inc., 665 F.3d 958, 965 (8th Cir. 2011) (citation omitted).

B. The Board should exclude Exhibit 1008 because it contains settlement statements and is being offered to impeach or contradict Patent Owner.

Petitioner concedes that Exhibit 1008 was “sent by counsel for Olink to counsel for Alamar on January 18, 2024.” EX1041, ¶5; Paper 2 at 13. Petitioner, however, omits the fact that Exhibit 1008 was sent by counsel from Olink to counsel for Alamar *to facilitate settlement discussions*. There can be no dispute that Exhibit 1008 explicitly states on every page of the document that it is “Subject to FRE 408.” Petitioner alleges that “no duty of confidentiality existed,” but even if that is the case, it does not resolve the issue of *admissibility* of Exhibit 1008 under Rule 408. Paper 2 at 13. After all, “Rule 408 speaks to admissibility and not confidentiality.” *Sleep Number Corp. v. Young*, 2022 WL 3045036, *1 (D. Minn., Aug. 2, 2022). Thus, Petitioner has offered Exhibit 1008 into evidence in contravention of Rule 408. The Board should accordingly exclude Exhibit 1008 under Rule 408(a).

Petitioner may argue that Exhibit 1008 is outside the scope of Rule 408(a) because Exhibit 1008 relates to a disputed claim of infringement while this *inter partes* review involves a dispute over patentability. Such an argument would be misplaced, because the dispute involving the settlement discussions need not be the

same dispute where the evidence is offered to be within the scope of Rule 408(a).

Lyondell, 608 F.3d at 296-98; *Playboy Enters.*, 687 F.2d at 568-569. Petitioner cannot argue that Exhibit 1008 is outside the scope of Rule 408(a).

Nor can Petitioner argue that Rule 408(b)'s exceptions apply. Petitioner is not offering Exhibit 1008 to prove "a witness's bias or prejudice, negat[e] a contention of undue delay, or prov[e] an effort to obstruct a criminal investigation or prosecution." FRE 408(b); *see* Paper 2 at 12-13.

IV. CONCLUSION

For the foregoing reasons, EX1008 does not meet the threshold for admissibility and should be excluded from the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e))

I certify that the above-captioned **PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE UNDER 37 C.F.R. § 42.64(c)** was served in its entirety on November 7, 2025, upon the following parties via electronic mail:

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