

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

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE EXHIBIT 1008**

MAIL STOP PATENT BOARD

Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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I. Introduction

Patent Owner's ("PO") motion to exclude Exhibit 1008 rests on a misapplication of Rule 408 and a fundamental misunderstanding of the record. Exhibit 1008 is PO's infringement claim chart purportedly applying the '848 Patent's claims to the well-known, prior art steps of proximity ligation assay as reflected in Petitioner's accused assay. Petitioner introduced Exhibit 1008 for a proper and expressly non-impeaching purpose: to demonstrate how a POSA would understand and apply the claim language, as PO has applied it in related litigation, and to show that that application reads on prior art references Baez and Landegren.

Rule 408 does not bar Petitioner's use. Rule 408 excludes settlement communications only when offered to prove or disprove the amount or validity of a disputed claim, or "to impeach by a prior inconsistent statement or contradiction." First, PO identifies no inconsistency, no contradiction, and no impeachment theory at all. That omission is dispositive. The Board routinely refuses to consider arguments that are "skeletal" or undeveloped, and the Motion offers nothing more than a conclusory "impeachment" argument heading.

Second, PO's reliance on cases enforcing Rule 408's impeachment bar is misplaced. Those decisions turn on a proponent's express effort to use settlement evidence to impeach credibility or contradict a position. Petitioner has done no such thing. Instead, consistent with Federal Circuit and PTAB authority, Petitioner relies

on Exhibit 1008 for “another purpose”—to show PO’s application of the claims and how that application reads on the prior art—an application permitted by Rule 408, as well as the Board’s precedent recognizing that the Rule’s enumerated exceptions are illustrative, not exhaustive. Moreover, Petitioner submitted Exhibit 1008 before PO made any statements in this proceeding that could even be impeached, and PO has never disavowed the chart’s application of the claims.

PO failed to substantiate its impeachment theory, but nonetheless Exhibit 1008 is offered for a permissible, non-impeaching purpose. Excluding Exhibit 1008 would deprive the Board of material that directly informs how PO reads the claims on the core elements of PLA, which in turn bears on patentability in view of Baez and Landegren. The Motion should be denied.

II. Listing of Facts

Pursuant to 37 C.F.R. § 42.23, Petitioner provides the following responses to PO’s Statement of Material Facts:

1. Petitioner agrees that the Federal Rules of Evidence apply to this proceeding.
2. Petitioner agrees.
3. Petitioner agrees.
4. Petitioner agrees.
5. Petitioner agrees that PO objected to Exhibit 1008 on March 21, 2025.

6. Petitioner agrees.

7. Petitioner agrees that it did not serve supplemental evidence regarding Exhibit 1008.

8. Petitioner agrees.

9. Petitioner agrees.

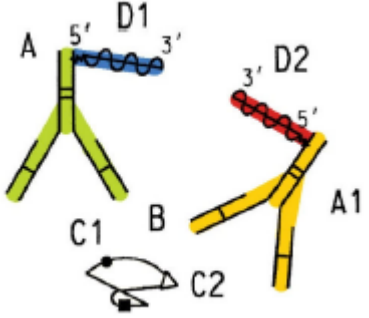
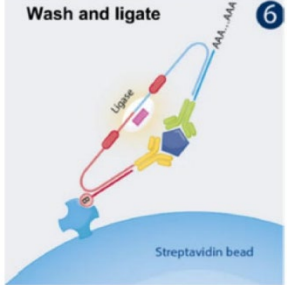
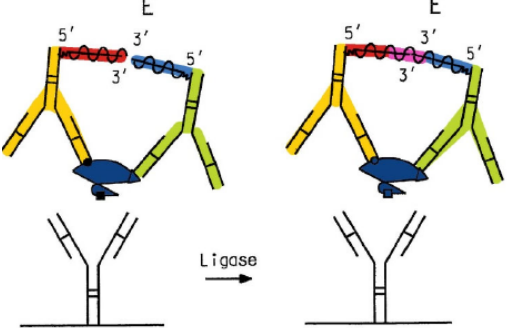
III. Background

On November 15, 2023, PO sued Petitioner in the District of Delaware asserting that Petitioner's NULISA platform to detect a known analyte infringes the '848 Patent. Ex. 1007. The complaint alleged that Petitioner's NULISA platform "is based on the proximity litigation [sic] assay [PLA] originally commercialized by Olink Bioscience[.]" Ex. 1007, ¶¶18–20, 35–39 (quotation omitted).

PO asserted the '848 Patent against Petitioner's PLA-based NULISA despite the patent's disclaimer that its alleged invention is not PLA. Ex. 1005, ¶¶203–210. PO's complaint applied each claim element to the fundamental steps of PLA. Ex. 1007, ¶¶21–27. Further, PO provided Petitioner an infringement chart (Ex. 1008) further applying each limitation of claims 1–8, 11–12, and 14–15 to the foundational steps of PLA. Ex. 1005, ¶¶207–208.

In the Petition, Grounds 3 and 4 (Baez and Landegren) apply PO's positions taken in the district court litigation as if a POSA would have applied the claims in the same way at the time of the application, relying on Exhibit 1008's infringement

mapping. As shown in the figures below and the Petition, PO's infringement read against NULISA maps precisely to the Baez and Landegren prior art methods. In its sur-reply, PO acknowledged that under its infringement reading, antibodies were the “molecules of interest” and that an antibody plus a nucleic acid forms an interactor. Sur-Reply at 23; Ex. 1008 at 1–4. As explained with identical coloring from Exhibit 1008, using PO's infringement theory, the prior art discloses the same antibodies as molecules of interest (green and yellow) and nucleic acid moieties (light blue and red), forming the interactors as required by PO's claims:

<u>NULISA (Ex. 1008 at 1)</u> 	<u>Baez (Ex. 1003 Fig. 1)</u> 
<u>NULISA (Ex. 1008 at 4)</u> 	<u>Baez (Ex. 1003, Fig. 2)</u> 

Petition at 57–59; Ex. 1051 at ¶83–92; Ex. 1005 at ¶234–247.

IV. Argument

A. PO Does Not Identify Any Impeachment, Whether By Inconsistent Statement Or Contradiction, That Justifies Excluding Exhibit 1008.

PO's argument that Exhibit 1008 should be excluded as impeachment evidence fails because PO has not identified any inconsistent statement or contradiction caused by Exhibit 1008 and because Petitioner's reason for offering the evidence is unrelated to impeachment.

Fed. R. Evid. 408 provides:

(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.

(b) Exceptions. The court may admit this evidence for another purpose, 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.

In assessing whether Rule 408 applies, courts first ask whether the evidence is offered for a permissible purpose—“a purpose other than . . . to impeach by a prior inconsistent statement or a contradiction.” *Wockhardt Bio AG v. Janssen Oncology, Inc.*, IPR2016-01582, Paper 29 at 15 (PTAB Jan. 19, 2019) (“We are not persuaded at this juncture that FRE 408 applies to the email exchange, as the evidence is being offered for a purpose other than . . . to impeach by a prior inconsistent statement or a contradiction.”). As the 2011 Advisory Committee Notes to Rule 408 explain, “if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.”¹ “The rule specifically permits [settlement negotiation] evidence, however, for *any* other purpose, including, ***but not limited to***, ‘proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.’” *In re MSTG, Inc.*, 675 F.3d 1337, 1344 (Fed. Cir. 2012) (emphasis added) (quoting Rule 408(b)). As the PTAB has explained:

¹ PO does not argue that Exhibit 1008 is inadmissible due to any rule other than Rule 408.

Rule 408 does not bar the admission of settlement discussion for all purposes. Rather, it only excludes certain settlement statements offered for the purpose of “prov[ing] or disprove[ing] the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction.” Settlement discussions may be admissible for other purposes.

OpenSky Indus. LLC v. VLSI Tech. LLC, IPR2021-01064, Paper No. 102 at 23–24 (PTAB Oct. 4, 2022) (precedential) (citation modified).

Here, Petitioner introduced Exhibit 1008 to apply PO’s district court litigation position in Grounds 3 and 4 as if a POSA would have applied the claims as PO did to Baez and Landegren. Petitioner has never argued that Exhibit 1008 is for impeachment (because it is not)—Petitioner did not submit Exhibit 1008 to impeach any statement PO has made. By contrast, the Petition explained that Exhibit 1008 “reflect[ed] PO’s application of claim terms” in the district court litigation and that Petitioner’s Grounds 3 and 4 were “based on PO’s application of the claims” in the litigation. Petition at 12–13. This is not an impeaching use under Rule 408 at least because it was submitted as evidence before PO had even made any statements in the record that could be impeached. And still, even after completion of all briefing, PO has never argued that Exhibit 1008 reveals an “inconsistency” or “contradiction” in its arguments—including in the Motion.

Indeed, despite its sole argument for exclusion being based on Rule 408’s prohibition on using settlement negotiation evidence for impeachment (Motion at 3, 5–6), the Motion does not identify how PO has been impeached at all, and this fact alone justifies denial of the Motion. Rule 408 prohibits impeachment using settlement evidence through either (1) “a prior inconsistent statement,” or (2) “a contradiction.” And the PTAB has declined to consider “skeletal” and “undeveloped” arguments as PO makes here. *See, e.g., BioNTech SE v. ModernaTx, Inc.*, IPR2023-01359, Paper 86 at 40–41 n.19 (PTAB Mar. 5, 2025) (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006)); *Micron Tech., Inc. v. Lone Star Silicon Innovations, LLC*, IPR2017-01561, Paper 34 at 32 (PTAB Dec. 12, 2018) (“Patent Owner’s undeveloped argument is waived.”).

Here, PO does not identify (1) any statements with which Exhibit 1008 is inconsistent or (2) any PO positions that Exhibit 1008 contradicts. PO does not make a single impeachment argument—or even use the words impeachment, inconsistent statement, or contradiction—in its section dedicated to impeachment. Motion at § III.B. The only time the Motion states “impeach” or “contradict” in its impeachment argument section is in its conclusory argument heading. *Id.* PO’s failure to articulate any impeachment justifies dismissal of its “skeletal” argument. *BioNTech SE*, IPR2023-01359, Paper 86 at 40–41.

The cases cited by PO in its background law section (Motion at III.A) demonstrate only that Rule 408 operates where the proponent explicitly seeks to use settlement evidence to impeach; they do not support PO's position that a conclusory allegation that evidence is impeaching makes it so and triggers Rule 408. In *Eid*, the plaintiff sought to introduce evidence of a settlement letter and "assert[ed] that he sought to use the letter . . . to impeach" the witness who wrote it, despite that the "plain text of Rule 408 precludes the use of settlement communications 'to impeach through prior inconsistent statement or contradiction.'" *Eid v. Saint-Gobain Abrasives, Inc.*, 377 Fed. App'x 438, 445 (6th Cir. 2010) (quoting Rule 408(b)) (impeachment was "precisely the purpose for which [plaintiff] sought to offer the evidence"). Similarly, in *AgroFresh*, the proponent argued that "impeachment" was a permissible use of Rule 408 evidence and that the evidence would "impeach [defendant's] credibility," despite Rule 408's express language "prohibit[ing] the use of evidence of settlement negotiations for impeachment purposes." *AgroFresh Inc. v. Essentiv LLC*, No. 16-662-MN-SRF, 2018 WL 9578196, at *3 n.3 (D. Del. Dec. 11, 2018). Likewise, in *Jones*, the plaintiff sought to introduce mediation evidence and "propose[d] to use the evidence for impeachment purposes" to disprove the defendant's positions taken in district court. *Jones v. Life Ins. Co.*, No. 08-cv-03971-RMW, 2015 WL 8753996, at *1, 4 (N.D. Cal. Dec. 15, 2015). These cases simply stand for the unremarkable

proposition that Rule 408 prohibits a proponent's specific use of settlement evidence for impeachment.

Here, unlike the proponents in PO's case law, Petitioner offers Exhibit 1008 for a non-impeachment purpose; to demonstrate that applying the claims in the same way that PO applied them in related litigation shows that such claims are not patentable in view of Baez and Landegren. Petitioner has never asserted that Exhibit 1008 is for impeachment, and PO has not identified any impeachment. The Motion should be denied.

B. Rule 408's Listed Exceptions Are Not Exhaustive, And Petitioner's Use Of Exhibit 1008 Is Not Barred.

Because Exhibit 1008 is not offered to impeach PO, Rule 408's prohibition is not implicated and it is therefore irrelevant whether Rule 408's exceptions apply. Nonetheless, PO implies that Rule 408's listed exceptions are exhaustive—and argues none are applicable here. Motion at 4–6.

But, the opposite is true. Rule 408's "prohibited uses" are exclusive, while exceptions exist for "*any other purpose.*" *In re MSTG, Inc.*, 675 F.3d at 1344 (emphasis added) ("The rule specifically permits such evidence, however, for any other purpose, including, but not limited to, proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.") (citation modified); *see also, e.g., Rhoades v. Avon Prods, Inc.*, 504 F.3d 1151, 1161 n.9 (9th Cir. 2007) ("[T]hose [exceptions] mentioned

by Rule 408 are not an exhaustive list, but are instead only illustrative.”) (citation modified).

And the PTAB has recognized that Rule 408 has other unlisted “exceptions,” despite PO’s suggestion to the contrary. *See, e.g., Ebay Inc. v. Purple Leaf LLC*, CBM2015-00052, Paper 22 at 10 (PTAB July 30, 2015) (admitting settlement evidence because “Rule 408 does not preclude Petitioner’s reliance upon the parties’ settlement discussion to establish that it was charged with infringement of the ’963 patent”); *cf. OpenSky*, IPR2021-01064, Paper 102 at 23–24 (reviewing case law and noting “settlement discussions may be admissible for other purposes”).

As explained above, the Motion fails to establish a prohibited use, and so Exhibit 1008 is admissible for “any other purpose.” *In re MSTG, Inc.*, 675 F.3d at 1344.² Petitioner’s “other purpose” here, as explained in the Petition, is as evidence of PO’s application of the claim terms in litigation such that a POSA would understand that the claims read on the prior art proximity litigation references Baez and Landegren. Petition at 13.

² Petitioner cites no case law holding that the listed exceptions are exhaustive, Motion at 4–5, which in any event would conflict with *In re MSTG* and *OpenSky*.

V. Conclusion

The Motion fails to identify the use of Exhibit 1008 for any impeachment whatsoever. Nor could it, because Petitioner offered Exhibit 1008 for a non-impeachment purpose and PO has never disavowed, or disagreed with, its infringement claim chart. Accordingly, Rule 408 does not apply here. Petitioner respectfully requests that the Board deny the Motion.

Date: November 14, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Petitioner's Opposition to Patent Owner's Motion to Exclude Exhibit 1008**, including all Exhibits, was served on November 14, 2025 upon the following parties via electronic mail:

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