

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

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

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Patent Trial and Appeal Board
U.S. Patent and Trademark Office
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Patent Owner's Motion to Exclude Evidence Under 37 C.F.R. § 42.64(c)

demonstrated that the Board should exclude EX1008 in its entirety under FRE 408 because it is inadmissible under FRE 408(a) and it does not meet any exceptions under FRE 408(b). *See generally*, Paper 33 ("Mot."). Petitioner's Opposition (Paper 34, "Opp.") fails to show otherwise.

I. PETITIONER RELIES ON EX1008 FOR IMPEACHMENT PURPOSES.

Patent Owner showed that EX1008 should be excluded under FRE 408 because EX1008 relates to settlement discussions and Petitioner relied on EX1008 for impeachment purposes, in direct contravention of FRE 408(a). Mot. at 2–6; *See* FRE 408(a). Petitioner's Opposition fails to undermine this showing.

Petitioner does not dispute that counsel for Patent Owner sent EX1008 to counsel for Petitioner to facilitate settlement discussions. Mot. at 5; *See* Opp. at 1–2; 5–11. Rather, Petitioner only disputes whether it submitted EX1008 in this IPR for purposes of impeachment. Opp. at 1–2.

Petitioner argues that it relies on EX1008 for purposes other than impeachment, but this argument is contradicted by express language in the Petition. Opp. at 7; *See* Paper 2 at 72. According to Petitioner, EX1008 was submitted in this IPR "to demonstrate how a POSA would understand and apply the claim language[] as PO has applied it in related litigation" Opp. at 1; *see also* Pet. (Paper 2) at 12–13. However, Petitioner conveniently omits the second

half of its reasoning stated in the Petition. According to the Petition, the “interpret[ation of] the claims” set forth in EX1008 “directly *contradicts*” disclosures in the ‘848 patent specification. Pet. at 72 (emphasis added). Thus, Petitioner expressly relies on EX1008 to allege a prior inconsistent statement or contradiction, and EX1008 *must* be excluded in accordance with FRE 408(a). FRE 408(a); Opp. at 6 (“[T]he 2011 Advisory Committee Notes to Rule 408 explain, ‘if offered for an impermissible purpose, it *must* be excluded....’” (emphasis added)).

II. PETITIONER’S USE OF EXHIBIT 1008 DOES NOT QUALIFY FOR AN EXCEPTION UNDER RULE 408(b).

Petitioner’s use of EX1008 in this IPR does not meet an exception under FRE 408(b). Petitioner argues at length that the exceptions under FRE 408(b) are “not exhaustive,” and that EX1008 is admissible for “any other purpose,” such as alleged “evidence of [Patent Owner’s] application of the claim terms in litigation....” Opp. at 10–11. The facts do not support Petitioner’s argument.

First, as explained above, Petitioner’s argument is belied by its own statements in the Petition. Petitioner expressly relies on EX1008 for *impeachment* purposes, alleging that EX1008 evinces a “directly *contradicts*” the ‘848 patent specification. *See supra* Section I; Pet. at 72 (emphasis added). This ends the inquiry because EX1008 fails to pass FRE 408(a) and should be excluded. *See supra* Section I; Mot., 5-6.

Second, none of Petitioner’s relied-upon authority supports its argument for

admissibility. For example, Petitioner’s Opposition relies heavily on dicta in *In re MSTG Inc.*, 675 F.3d 1337 (Fed. Cir. 2012), discussing FRE 408(b)’s exceptions for “any other purpose.” Opp. at 6, 10–11; *In re MSTG*, 675 F.3d at 1344. *MSTG*, however, related to whether a “settlement negotiation privilege” existed under FRE 501. *Id.* at 1348. *MSTG* discussed FRE 408 only to explain that “settlement negotiation evidence would be admissible where the *settlement itself or its interpretation is at issue* or where evidence of the ingredients of the settlement might be relevant to an issue of double recovery.” *Id.* at 1345 (emphasis added). There are no such issues here.

Petitioner also relies on *Rhoades v. Avon Prods, Inc.*, 504 F.3d 1151 (9th Cir. 2007), but *Rhoades*, too, fails to support Petitioner’s argument. Opp. at 10–11. In *Rhoades*, the issue was whether a letter from Avon threatening an infringement lawsuit was admissible under FRE 408(b) to show subject matter jurisdiction. *Rhoades*, 504 F.3d at 1154; 1160–62. *Rhoades* concluded that the letter was admissible because “DermaNew does not rely on the [letter] in an attempt to prove whose trademark is valid, or to impeach Avon.” *Id.* at 1161. Thus, in *Rhoades*, the evidence at issue did not trigger FRE 408(a) at all. Instead, the court found the evidence admissible under FRE 408(b) because it was used “to satisfy the *jurisdictional requirements* of an action for declaratory relief.” *Id.* (emphasis added). Again, there are no such issues here. *See also Ebay Inc. v. Purple Leaf*,

LLC, CBM2015-00052, Paper 22 at 12 (P.T.A.B. July 30, 2015) (allowing settlement discussion evidence in “to establish that [petitioner] was *charged with infringement . . .*”) (emphasis added); *OpenSky Indus., LLC v. VLSI Tech. LLC*, IPR2021-01064, Paper 102 at 24 (P.T.A.B. Oct. 4, 2022) (precedential) (stating that FRE 408(b) permits admission of settlement discussion evidence “to show a party’s *knowledge or intent.*” (citation omitted)) (emphasis added)).

None of Petitioner’s cited authority aligns with the facts here, because here, Petitioner expressly relies on EX1008 for purposes of impeachment. *See supra* Section I; Mot., 5-6. As discussed above, Petitioner is not offering EX1008 for “any other purpose” other than to allege a contradiction in the ’848 patent’s specification. *Id.* Such use is precluded under FRE 408(a).

III. CONCLUSION

For the reasons set forth in Patent Owner’s Motion and further explained above, 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 **REPLY TO PETITIONER'S
OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EXHIBIT
1008** was served in its entirety on November 21, 2025, upon the following parties
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