

Filed on behalf of: CMS Cepcor Ltd., and
CMS Cepcor Americas LLC

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CMS CEP COR LTD., and
CMS CEP COR AMERICAS LLC,
Petitioners,

v.

SANDVIK INTELLECTUAL PROPERTY AB,
Patent Owner.

Case No. IPR2024-01380
Patent No. . 9,827,568

PETITIONERS' MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioners, CMS CEPCOR LTD., and CMS CEPCOR AMERICAS LLC (hereafter “Petitioners”), move to exclude evidence submitted by Patent Owner, SANDVIK INTELLECTUAL PROPERTY AB (hereafter “Patent Owner”), in connection with the above-referenced proceeding. Specifically, Petitioners seek to exclude portions of the third declaration of Harri Kytömaa, Ph.D. submitted as Exhibit 2022 and the entireties of Exhibits 2023 – 2024 as violating the Federal Rules of Evidence (“FRE”) or rules of the Board. Petitioners timely objected to this evidence on December 23, 2025. (Paper38).

II. PROCEDURAL POSTURE AND RESERVATION OF RIGHTS

Petitioners submit this Motion to Exclude concurrently with its objections to Patent Owner's evidence served on December 16, 2025 (Paper 34). This timing is compelled by and in compliance with the Board's Scheduling Order, which required Patent Owner to file its Patent Owner's Reply to Petitioner's Opposition to Revised Non-Contingent Motion to Amend (Paper 34, hereafter the “Reply”) only five business days before the deadline for filing motions to exclude. As a result, Patent Owner has not yet had an opportunity to submit any supplemental evidence to cure the defects identified in Petitioners' objections. Accordingly, this Motion is based on the evidentiary record as it currently stands.

Petitioner respectfully reserves the right to renew or supplement this Motion to Exclude to address any additional evidence Patent Owner may later submit in an effort to cure the identified deficiencies in accordance with 37 C.F.R. § 42.64(b)(2).

III. ARGUMENT

Patent Owner and its witnesses rely on multiple categories of inadmissible evidence to support their claims that no person of ordinary skill in the art (“POSITA”) would consider certain materials as prior art, lack of motivation to combine and to support Patent No. 9,827,568’s validity (hereafter the “’568 Patent”). Particularly, they submit (i) portions of Mr. Kytömaa’s declaration that rest on mischaracterized evidence and on information outside his personal knowledge and on admitted hearsay; (ii) third-party maintenance materials unrelated to the technology at issue; and (iii) Patent Owner press releases and materials that do not actually speak to the claims at issue, lack technical support, and have not been authenticated.

Each of these submissions violates the Federal Rules of Evidence because they reflect hearsay and/or the witness lacks personal knowledge of their content. For these reasons, paragraphs 13 – 38 of Exhibit 2022 should be excluded in their entirety. Additionally, some of the submissions have not been properly authenticated and/or are irrelevant, confusing, or prejudicial in a manner that undermines the

reliability of the record. For these reasons Exhibits 2023 through 2024 should be excluded in their entirety.

A. Paragraphs 17 – 21 and 29 - 31 of Exhibit 2022 are inadmissible under FRE 602 and/or 802 because Mr. Kytömaa's purported "knowledge" of the asserted facts depends on hearsay

Paragraphs 17 - 21 and 29 - 31 of Exhibit 2022 - Third Declaration of Harri Kytömaa, Ph.D. contain a discussion of specifics for embodiments of the patent at issue. *See, e.g.*, Ex. 2022 relying on Ex. 2023 and Ex. 2024 ¶¶ 17 – 18 (discussing the purported "embodiments, functions, and structure" of a coal pulverizer); and Ex. 2022 relying on Ex. 2024 ¶¶ 29 - 31 (discussing the replacement schedule of the main shaft sleeve). Mr. Kytömaa does not have firsthand knowledge of this information; he is merely stating as fact information he read or was told by 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." *See* 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." *See* 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.” *See* 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.

See 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.” *See 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. Kytömaa's testimony

Mr. Kytömaa's testimony about the ideal embodiment, function, and structure of either a coal pulverizer and gyrating crusher run afoul of both the requirement of personal knowledge and the prohibition on hearsay.

First, while Mr. Kytömaa testified that he “all statements made [in his declaration]” are of “[his] own knowledge” (Ex. 2022 p. 23), his analysis reveals he 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. *See 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. Kytömaa did. For example, when discussing his view of how the technology in Piepho works, he shifts his discussion to idealized sizes of coal to be supplied and idealized particle output size all based on the directive of Ex. 2024 rather than his own knowledge and experience. (Ex. 2022 ¶ 17). In fact, the source for his entire subsequent discussion regarding these “embodiments” seems to rely solely on what he read and repeated from Ex. 2023 and his belief that it applies. (Ex. 2022 ¶¶ 17 – 18). Similarly, when Mr. Kytömaa shifts the discussion to compare and contrast the input and output sizes of a coal pulverizer and gyratory crusher, he similarly relies solely on the direction of Ex 2023 and.2024 by parroting their application without

applying his own knowledge and experience. (Ex. 2022 ¶¶ 19 - 21). In reality, the source of his purported “knowledge” was, in fact, documents he merely read. (Ex. 2022 ¶¶ 17 - 21).

And with respect to his testimony regarding the replacement schedule of the main shaft sleeve (Ex. 2022 ¶¶ 29 – 31), Mr. Kytömaa relies solely on a comparison between Ex. 2024 and the Piepho patent rather than any actual personal knowledge or experience. Then, Mr. Kytömaa uses the replacement schedule discussed in Ex. 2024 as the basis for his “opinion” that “no POSITA would consider a gyratory crusher of the ‘568 patent to be in the same field as Piepho’s coal pulverizer,” which is not only unrelated but also not based on any knowledge or experience. (Ex. 2022 ¶ 31).

The above-referenced paragraphs 17 – 21 and 29 - 33 of Exhibit 2022 reflect classic hearsay. Patent Owner offers Mr. Kytömaa’s testimony for its truth to establish the alleged different functions of structure of the “‘568 patent’s gyratory crusher” and “Piepho’s coal pulverizer” and how a POSITA would readily understand that the “two apparatuses are functionally and structurally different.” (Reply, p. 3). However, based on Mr. Kytömaa’s analysis, this data and information was sourced from these items outside Mr. Kytömaa’s personal observations.

As discussed further below, these sources have not been authenticated, and the authors of these sources have not testified in this in the record of this proceeding.

Also as discussed further below, the data Mr. Kytömaa relies on may or may not be reliable (or is inadmissible on its own) and the veracity cannot be confirmed at this time. Then, rather than cite Ex. 2023 – 2024 directly within its papers, Patent Owner chooses to present only Mr. Kytömaa's to parrot the information himself. Frankly, 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 paragraphs 17 – 21 and 29 - 33 of Exhibit 2022 should be excluded as hearsay and/or for lack of personal knowledge. *See Rotec Indus. v. Mitsubishi 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 2023 – 2024 are inadmissible hearsay, not self-authenticating, and should be excluded

Patent Owner cites Exhibits 2023 – 2024 alongside its Reply; however, these documents are not cited directly and are merely referenced in support of the declaration of Mr. Kytömaa. These exhibits reflect third-party manuals and webpages prepared by Patent Owner themselves.

As a preliminary matter, Exhibits 2023 – 2024 have not been authenticated prior to their submission in accordance with FRE 901 and 902. These documents are not self-authenticating, and Patent Owner has failed to establish that they demonstrate what they claim to demonstrate.

Despite the issues with the authenticity and the content of Exhibits 2023 – 2024, both Patent Owner and Mr. Kytömaa rely on these documents information for their truth. Specifically, Mr. Kytömaa relies on this information to allege that the '568 patent actually operates in a particular way rather than pointing to what the documents actually teach. For example, as discussed in detail above, Mr. Kytömaa relies on these documents – both directly and indirectly - to allege in his declaration that coal pulverizers and gyratory crushers provide specific input and output particle sizes, maintenance/replacement periods, and the “benefits” provided by the configuration of the '568 patent. (Ex. 2022 ¶¶ 17 – 19, 29, 32). Patent Owner then indirectly relies on this information (through citation to Mr. Kytömaa's testimony) to argue that “no POSITA would consider Piepho as pertinent art,” that “Piepho is not directed to a gyratory crusher at all,” and that the two apparatuses are functionally and structurally different.” (Reply, p. 1 - 3) Both Mr. Kytömaa and Patent also rely on the documents to allege analyze the “problems” that are allegedly the focus of the '568 patent rather than presenting any corroborating evidence to demonstrate the same. (Reply, p. 1 – 3). Significantly, no expert testimony has been

proffered as to these issues, which has prevented Petitioners from even exploring this line of questioning.

Considering the circumstances, Exhibits 2023 - 2024 are hearsay for which no exception applies and should be excluded.

C. Paragraphs 13 - 18, 29, 22, 24 - 25, 27 – 28, and 30 – 38 of Exhibit 2022 are inadmissible under FRE 403 and/or 802 because Mr. Kytömaa's mischaracterization of evidence confuses the issues and remains unfairly prejudicial

Notwithstanding the deficiencies identified above, paragraphs 13 - 18, 29, 22, 24 - 25, 27 – 28, and 30 – 38 of Exhibit 2022 should be excluded under FRE 403 because Mr. Kytömaa repeatedly mischaracterizes record evidence in a manner that risks confusing the issues and unfairly prejudicing Petitioners. Rather than accurately summarizing the cited materials and accurately presenting the previously submitted evidence, Mr. Kytömaa presents overstated, selective, or misleading descriptions of Petitioners evidence by framing unsupported inferences as factual conclusions. Not only does this testimony reiterate and rely on hearsay – as described above - this testimony also further distorts the evidentiary record and threatens to mislead the Board regarding what the underlying evidence actually shows. For example, Mr. Kytömaa's declaration quotes Mr. Smith in conjunction with the assertion that the '568 patent resolves the "problem" of assembling and disassembling a "wear sleeve from a main shaft of a gyratory crusher"; however, Mr.

Smith's testimony was actually limited to his assessment of the '568 patent's disclosures. (Ex. 2022, ¶ 32); (Ex. 2006, p. 21:9-22:1). There was no discussion of the success or ability to actually resolve any "problems" through the use of the '568 patent. Similarly, Mr. Kytömaa's declaration claims that "Mr. Smith testified that he did not consider Piepho beyond is disclosure of a tapered shaft," yet Mr. Kytömaa fails to quote the section featuring the testimony. (Ex. 2022, ¶ 37); (Ex. 2011, p. 65:5-16). That is because it is nonexistent. A similar pattern is featured throughout Mr. Kytömaa's declaration through paragraphs 13 - 18, 29, 22, 24 - 25, 27 - 28, and 30 - 38.

Any minimal probative value of the challenged testimony is substantially outweighed by the danger of confusion of the issues. Expert testimony carries an aura of authority, and when an expert inaccurately characterizes record evidence, there is a heightened risk that the expert's desired description - rather than the evidence itself - would be credited in this matter. Allowing such testimony would improperly substitute Mr. Kytömaa's characterization of the record for the record evidence, contrary to the Board's role as the finder of fact.

The challenged paragraphs are also unfairly prejudicial because they present argument and advocacy cloaked as expert analysis. By selectively paraphrasing or embellishing the cited evidence, Mr. Kytömaa conveys conclusions that extend beyond the contents of the underlying materials, thereby, lending undue weight to

Patent Owner's positions without any actual support. This creates a risk that this proceeding may be influenced by mischaracterized testimony rather than an objective evaluation of the evidence.

For these reasons, paragraphs 13 - 18, 29, 22, 24 - 25, 27 – 28, and 30 – 38 of Exhibit 2022 should be excluded under FRE 403, or, at a minimum, accorded no weight.

IV. IDENTIFICATION OF WHERE IN THE RECORD THE EVIDENCE SOUGHT TO BE EXCLUDED WAS RELIED UPON BY PATENT OWNER

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

As used below, “Reply” refers to Patent Owner’s Reply at Paper 34 and “Third Dec. of Kytömaa” refers to Exhibit 2022 in this proceeding that has been discussed at length in this document.

Evidence	Where Relied Upon
Ex. 2022 ¶ 13	Reply at 1
Ex. 2022 ¶ 14	Reply at 2
Ex. 2022 ¶ 15	Reply at 2
Ex. 2022 ¶ 16	Reply at 3
Ex. 2022 ¶ 17	Reply at 3
Ex. 2022 ¶ 18	Reply at 3
Ex. 2022 ¶ 19	Reply at 3
Ex. 2022 ¶ 20	Reply at 3
Ex. 2022 ¶ 21	Reply at 3
Ex. 2022 ¶ 22	Reply at 3

Ex. 2022 ¶ 23	Reply at 3
Ex. 2022 ¶ 24	Reply at 3
Ex. 2022 ¶ 25	Reply at 3
Ex. 2022 ¶ 26	Reply at 3
Ex. 2022 ¶ 27	Reply at 3
Ex. 2022 ¶ 28	Reply at 3
Ex. 2022 ¶ 29	Reply at 3
Ex. 2022 ¶ 30	Reply at 3
Ex. 2022 ¶ 31	Reply at 3, 5, 7
Ex. 2022 ¶ 32	Reply at 8
Ex. 2022 ¶ 33	Reply at 8
Ex. 2022 ¶ 34	Reply at 8
Ex. 2022 ¶ 35	Reply at 9
Ex. 2022 ¶ 36	Reply at 10
Ex. 2022 ¶ 37	Reply at 10
Ex. 2022 ¶ 38	Reply at 12
Ex. 2023 (Innovative Combustion Technologies, Inc. "Optimum Operation and Maintenance of EL Pulverizers")	Third Dec. of Kytömaa at ¶¶ 18 - 21
Ex. 2024 (https://www.rockprocessing.sandvik)	Third Dec. of Kytömaa at ¶¶ 17 - 21, 29 - 31

V. CONCLUSION

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

Dated: December 23, 2025

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CERTIFICATE OF SERVICE

I hereby certify that, on December 23, 2025, a true and correct copy of the foregoing Motion was served on the Patent Owner via electronic means (by agreement of the parties) at the address listed below:

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