

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MULTI-COLOR CORPORATION
Petitioner

v.

BROOK & WHITTLE LIMITED
PO

PGR2025-00025
Patent No. 11,961,422

PATENT OWNER'S MOTION TO EXCLUDE

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All emphasis added unless otherwise noted

TABLE OF EXHIBITS

EX	DESCRIPTION
2001	"Going for Gold," Multi-Color Corporation, available at https://www.mcclabel.com/en/resources/going-for-gold
2002	"NESCAFÉ® Debuts Gold Espresso and Ice Roast Instant Coffee in the U.S., Offering Rich Variety for Every Occasion," Nestle, April 3, 2024, available at https://www.nestleusa.com/media/pressreleases/gold-espresso-ice-instant-coffee
2003	recycLABEL™ Shrink Sleeve brochure, Multi-Color Corporation
2004	"Labeled with Care – Sustainability Update," Multi-Color Corporation, available at https://issuu.com/mcclabel/docs/mcc_2024_sustainability_update?fr=sOTFjMjY0MTE4OTQ
2005	"Nestlé to use recyclable, light-blocking shrink sleeves on some beverage products," Packaging Dive, April 17, 2024, available at https://www.packagingdive.com/news/nestle-recyclable-shrink-sleeve-label-light-blocking/713427/
2006	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, Docket Report, generated May 13, 2025
2007	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, D.I. 16 (Docket Control Order)
2008	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, D.I. 50 (Defendants' Unopposed Motion for Leave to Supplement Invalidity Contentions Under P.R. 3-6(b))
2009	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, D.I. 51 (Order granting D.I. 50)
2010	Deposition Transcript of Mr. Craig Bushman
2011	Deposition Transcript of Dr. Michael Deible
2012	Declaration of Dr. Maureen Reitman
2013	Declaration of Dr. Scott Phillips
2014	"Gatorade and Cheetos are Among the Pepsi Products Getting a Natural Dye Makeover," NY Post
2015	"Can I Drink Gatorade Past the Best Before Date on the Bottle," PepsiCo
2016	US Patent Application No. 2025/0273094
2017	"Nesquik Makes Bottles Easier to Recycle for Consumers," Nestle
2018	Email from A. Leonard (Nestle) to S. Figueroa (B+W)

EX	DESCRIPTION
2019	PACKAGING EUROPE, <i>Winners of the Sustainability Awards 2024 Announced!</i> , (Nov. 14, 2024).
2020	PACKAGING EUROPE, <i>Sustainability Awards 2024 Finalist Interview: Brook+Whittle's Recyclable, Light-Blocking Shrink Sleeve</i> , (Sept. 24, 2024).
2021	<i>AWA Sleeve Label Awards 2024 - Winners</i> (October 28, 2024)
2022	US Plastics Pact 2023 LinkedIn Post
2023	US Plastics Pact 2024 LinkedIn Post
2024	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, Dkt. 1 (Complaint)
2025	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, Dkt. 1, Ex B (Claim Chart)
2026	PET-S-09, Evaluation of PET Plaques for Color, Haze and Inclusions
2027	US Patent Application No. 18/667,677 September 3 Remarks
2028	US Patent Application No. 18/667,677 October 24 Final Rejection
2029	"Heat Treatment Impacts on Film Morphology in Biaxially Oriented Polypropylene Films," Kivilcim, Fadime Nulufer, <i>Food Sci. & Nut.</i>
2030	"The Amazing Shrink Inks," Packaging Impressions
2031	"Wrinkling-to-delamination Transition in Thin Polymer Films on Compliant Substrates," Nolte, Adam J., <i>Soft Matter</i> , 2017
2032	"Review Article: Stress in Thin Films and Coatings: Current Status, Challenges, and Prospects," Abadias, Gregory, <i>J. Vac. Sci. Technol.</i> 2018
2033	"Product Decoration Technologies: Sleeving," Finishing & Embellishment
2034	"Brook + Whittle's GreenLabel BlockOut Receives Important Recyclability Recognition and Prequalification," Brook + Whittle
2035	"MCC Receives APR Recognition for recycLabel Roll-Fed Label on PET Bottles," MultiColor Corp
2036	"Trap (printing)," Grokipedia
2037	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, Dkt. 112, Claim Construction Order
2038	Plastics Forming Enterprises LLC, Laboratory Report #2467 APR PET Benchmark
2039	Declaration of Steven Dirks in support of Admission <i>Pro Hac Vice</i>
2040	Declaration of Tera Stone in support of Admission <i>Pro Hac Vice</i>
2041	Declaration of Kelly Tripathi in support of Admission <i>Pro Hac Vice</i>

I. INTRODUCTION

Patent Owner ("PO") moves to exclude evidence in this proceeding. 37 C.F.R. §42.64. This motion is timely under the Board's scheduling order. Paper 47.

II. STATEMENT OF RELIEF REQUESTED

PO respectfully requests the Board exclude:

- Dr. Deible's opinions in their entirety under Federal Rule of Evidence ("FRE") 702 and 703 for: (1) making false statements under oath, rendering his opinions unreliable; and (2) because he does not qualify as a POSITA;
- Dr. Deible's opinions regarding Mitchell under FRE 403;
- Dr. Bushman's and Dr. Deible's opinions contradicting their earlier opinions;
- Portions of Dr. Bushman's declarations as improper lay opinion, improper expert opinion, and failure to provide all relevant evidence;
- Portions of Dr. Deible's declarations related to prior art, recyclability, and indefiniteness as improper expert opinion;
- Exhibits 1016, 1018, and 1019 as unauthenticated documents under FRE 901 and inadmissible hearsay (and portions of Dr. Bushman and Dr. Deible's declarations that purport to rely on those exhibits); and

- Portions of Exhibits 1003 and 1004 as lacking authenticity and as inadmissible hearsay (and portions of Dr. Bushman and Dr. Deible's declarations that purport to rely on those exhibits).

III. ARGUMENT

A. Dr. Deible's Opinions Should be Wholly Excluded (EX1014 and EX1046)

Dr. Deible's opinions should be excluded in whole under FRE 702 and 703 as unreliable because: (1) his first declaration contained materially false statements rendering his opinions unreliable; and (2) he does not qualify as a POSITA. PO timely objected to EX1014 (Paper 16 § H) and EX1046 (Paper 55 § A).

First, Dr. Deible signed a declaration (EX1014) containing indisputably false information and admitted as much at deposition. He declared under oath that he considered "*the prior art cited below, the materials discussed and referenced herein, ...*" in forming his opinions. EX1014 ¶ 3. That was false, as Dr. Deible later admitted, he did not review: (1) Mitchell (EX3002, a Board-added exhibit); or (2) Dr. Bushman's declaration (EX1013) prior to his deposition—let alone prior to signing his declaration. These were material false statements that go to the core of Dr. Deible's invalidity opinions, as he opined repeatedly that both Mitchell and Dr. Bushman's declaration—neither of which he had read—supported his opinions.

Mitchell (EX3002). Mitchell is the only secondary reference Dr. Deible identifies in Ground 2. In his first declaration, Dr. Deible called Mitchell "prior art,"

EX1014 ¶ 110, and cited Mitchell over thirty times, opining on Mitchell's teachings, how a POSITA would understand Mitchell, how Mitchell would have motivated a POSITA to rearrange the Gatorade label's order of layers, and how a POSITA would have had a reasonable expectation of success in doing so. EX1014 ¶¶ 107–123. Despite declaring he had reviewed “the prior art cited below” and the “materials discussed and referenced herein” (both including Mitchell), EX1014 ¶ 3, those statements were false.

On cross examination, Dr. Deible admitted *he had never reviewed Mitchell*. EX2011 at 118:1–9 (“Q. ... [D]id you independently review the patent application, Mitchel [*sic*], in connection with forming your opinion? A. No.”). Worse, Petitioner then attempted to cure this defect by having Dr. Deible conduct a post-hoc review and assert his opinions remained “unchanged.” Paper 54 at 10; EX1046 ¶ 135. Even setting aside the impropriety of that gamesmanship, Dr. Deible's late-founded review cannot fix that his first declaration contained a materially false statement.

Dr. Bushman's Declaration (EX1013). Dr. Deible cited Dr. Bushman's declaration over twenty times in his Grounds 1–3 opinions. *See* EX1014, §§ VIII.C–E. Dr. Bushman's declaration was not only one of the “*the materials discussed and referenced herein*,” but Dr. Deible also expressly stated he “considered and relied upon the Declaration of Mr. Craig Bushman.” EX1014 ¶¶ 3, 25. But at deposition, Dr. Deible testified twice that he *never reviewed* it. EX2011 at 162:4–7 (“Q. All

right. You've testified twice today that you have not reviewed the Bushman declaration, correct? A. Yes."). Even more alarming, despite never reviewing Dr. Bushman's declaration, the *entirety* of Dr. Deible's indefiniteness opinion is *identical* to Dr. Bushman's. Compare EX1013 ¶¶ 77–78 with EX1014 ¶¶ 150–151; see also EX2011 at 257:11–258:16. Petitioner cannot use Dr. Deible as a mouthpiece to lend credence to arguments for which he has no foundation.

“Expert evidence must be reliable.” *Mitchell v. Holt*, Pat. Interference No. 105,746, Paper 352 at 21 (Apr. 27, 2012) (citing FRE 702). Dr. Deible's declaration that he reviewed two documents that he admittedly did not, severely undercuts his reliability. As the BPAI explained: “Telling a lie while under oath is a big deal, no matter what a witness is lying about. A person submitting testimony swears under oath that the statements they make are true, subject to penalties of perjury.” *Id.* In such circumstances, “the veracity of the witness is questionable.” *Id.*

Dr. Deible's false statements obfuscated his failure to review material evidence at the heart of his opinions: the only secondary reference for an invalidity contention, and a declaration upon which Dr. Deible purportedly relied. His materially false statements and the unexplained copied language in his Ground 4 opinions render him unreliable; his opinions should be entirely excluded under at least FRE 702. See *id.* at 24 (granting motion “to exclude [expert]'s testimony in its entirety” because “he is not a reliable witness”).

Second, the Board should exclude Dr. Deible's opinions because he does not qualify as a POSITA under the proper definition (i.e., "experience related to packaging films or containers"). "[W]here an issue calls for consideration of evidence from the perspective of [a POSITA], it is contradictory to Rule 702 to allow a witness to testify on the issue who is not qualified as a technical expert in that art." *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1363 (Fed. Cir. 2008). Given his lack of recycling experience, Dr. Deible has no foundation to opine on the validity of the '422 patent. See EX1014 ¶¶ 5–9; EX2011 at 23:13–26:2, 16:16 ("Q. [] As an expert that has been retained in this litigation, have you ever provided an opinion about the recyclability in whatever context that material was? ... A. No.").

B. Dr. Deible's Opinions Regarding Mitchell Should be Excluded (EX1014 and EX1046)

Even if the Board opts not to exclude Dr. Deible's opinions entirely, it should exclude under FRE 402 and 403 opinions related to Mitchell. PO timely objected to EX1014 (Paper 16 § H) and EX1046 (Paper 55 § A). It is undisputed Dr. Deible did not review Mitchell before rendering his opinions. EX2011 at 47:12–48:3; Paper 54 at 11 (admitting "Dr. Deible had not independently reviewed Mitchell before deposition[.]"). Now, Dr. Deible declares, "*since then*, I have reviewed Mitchell...[and] My opinions are unchanged." Paper 54 at 10; EX1046 ¶ 135.

Dr. Deible's post-hoc review highlights both the unreliability of his first declaration and the prejudicial nature of his second declaration. Both should be

excluded. It is unclear how Dr. Deible could proffer credible opinions about a piece of prior art without having read the prior art in question. *See* EX1014 ¶¶ 107–123. His subsequent conclusory assertion that his “opinions are unchanged[]” cannot cure this fatal flaw. This ex-post rehabilitation attempt comes far too late. Dr. Deible only reviewed Mitchell *after* submission of his first declaration for the sole purpose of bolstering his prior unsupported opinion. Endorsing such a tactic incentivizes litigants to pursue lackadaisical theories, all while knowing that, if called out, a simple ex-post review and affirmation would cure any defects. Despite such post-hoc affirmation carrying minimal probative value, it simultaneously prejudiced and deprived PO of a meaningful opportunity to cross examine him on Ground 2 prior to submitting its POR. Now, PO is forced to address Dr. Deible's late-founded opinions on sur-reply on an underdeveloped record as the rules of procedure preclude PO from introducing new rebuttal evidence on sur-reply. 37 C.F.R. § 42.23(b).

C. Opinions Contradicting Earlier Testimony Should be Excluded

1. Dr. Bushman Declarations (EX1013 and EX1047)

Dr. Bushman's second declaration is unreliable under FRE 702 and 703 because it is internally contradictory and irreconcilable with Petitioner's arguments under Grounds 1–3. This inconsistency renders both opinions unreliable. PO timely objected to EX1013 (Paper 16 § G) and EX1047 (Paper 55 § B). As discussed in the

concurrently filed Motion to Strike, the Petition and Dr. Bushman's original declaration *rely* on APR recognition to assert the Gatorade label is recyclable under Grounds 1–3. Paper 2 at 31; Paper 54 at 7; EX1013 at ¶¶ 56–57. Yet, in EX1047, Dr. Bushman apparently disavows this opinion, arguing the APR guideline “is not consistent with the understanding of a POSITA” and that “meeting the [APR] guidelines is a subjective determination made by a panel of three members.” EX1047 at ¶¶ 32, 39. Petitioner cannot have it both ways; Dr. Bushman's indefiniteness opinions should be excluded as unreliable. *See Interactive Commc'ns Int'l v. Blackhawk Network, Inc.*, IPR2024-00465, Paper 40, 3 (PTAB Oct. 9, 2025) (Director Review) (“The Board abused its discretion by improperly crediting expert testimony that has multiple material contradictions and that the Board found lacked credibility at least in certain respects.”).

2. Dr. Deible's Declarations (EX1014 and EX1046)

Portions of EX1014 should also be excluded under FRE 702 and 703. PO timely objected to EX1014 (Paper 16 § H) and EX1046 (Paper 55 § A). For the reasons above, Dr. Deible's indefiniteness opinions in EX1014— identical to Dr. Bushman's—should also be excluded as unreliable. Similarly, Dr. Deible's first declaration stated caustic wash testing was performed “[t]o determine if a label is recyclable with a PET container.” EX1014 ¶ 71. After PO refuted Dr. Deible's testing and conclusions, he submitted a reply declaration disavowing the initial

purpose of his caustic wash testing, claiming “[m]y testing was therefore *not* intended to establish recyclability.” EX1046 ¶ 45. Notwithstanding that this is the very Ground underlying the Board’s Institution Decision, Paper 14 at 19–20, this about-face likewise renders Dr. Deible’s opinions unreliable and of little probative value. *See Interactive Commc’ns*, IPR2024-00465, Paper 40, 3. Any minimal probative value of Dr. Deible’s conclusory disavowal is far outweighed by the prejudice to PO, who cannot submit new evidence to address Dr. Deible’s shifting opinions and whose briefing and deposition strategy were based on Dr. Deible’s pre-disavowal opinions. 37 C.F.R. § 42.23(b).

Dr. Deible’s opinions are also unreliable because he now claims the primary support for the Gatorade label being “recyclable” is that “the APR[] has recognized that label system as meeting or exceeding APR’s Critical Guidance Protocol” EX1046 ¶ 45. Yet, Petitioner disavowed APR recognition, arguing “whether APR guidelines...are met is a subjective determination made by a panel of three members” and therefore “cannot provide any objective standard [for recyclability].” Paper 54 at 18. Petitioner cannot have it both ways. There is no way to reconcile Dr. Deible’s opinions under Grounds 1–3 with the Ground 4 opinion that APR recognition is unreliable. Dr. Deible’s opinions should be excluded. *See Interactive Commc’ns Int’l*, IPR2024-00465, Paper 40 at 3.

D. Dr. Bushman’s Improper Opinions, and Dr. Deible’s Opinions Dependent Thereon, Should be Excluded

1. *Dr. Bushman's Declarations (EX1013 and EX1047)*

Dr. Bushman's opinion testimony should be excluded entirely under FRE 403 because Petitioner's role-switching—from “Mr.” Bushman, a non-hourly employee fact witness (EX1013 ¶¶ 1–4), to “Dr.” Bushman, an hourly-compensated expert (EX1047, cover page, ¶ 4) in the middle of the proceeding—creates substantial risk of unfair prejudice and confusion. In his original declaration, Dr. Bushman was not tendered as an expert; to the contrary, he was introduced as an “employee” having “personal[] experience...with the recyclable process,” EX1013 ¶¶ 2, 68, indicating he was offering only lay testimony. Yet, Dr. Bushman's declaration improperly included opinions from the perspective of “a POSITA.” EX1013 ¶¶ 67–86; EX1047 ¶¶ 13–87. After PO objected, Dr. Bushman retroactively purported to be acting as an expert at deposition. *See* EX2010 at 15:22–25.

That is a problem. This maneuver bootstraps an interested former employee's factual familiarity into expert authority while evading the scrutiny applicable to experts and the disclosure obligation under 37 C.F.R. § 42.65(a). The probative value of opinions offered under this ambiguous dual role is substantially outweighed by confusion and prejudice. FRE 403; Paper 55 at 2–3 (objection preserved).

Dr. Bushman's indefiniteness opinion should be excluded regardless of whether he is treated as a lay or expert witness. PO timely objected to EX1013 (Paper 16 § G) and EX1047 (Paper 55 § B). To the extent Petitioner disclaims Dr. Bushman

as an expert, his lay opinions should be excluded under FRE 701 which precludes lay testimony “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FRE 701(c). Indefiniteness is a legal question that requires assessing claim language from a POSITA's perspective. *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 517 (Fed. Cir. 2012). Dr. Bushman should be precluded from doing so without the requisite tendering of “specialized knowledge.”

Alternatively, if Dr. Bushman's indefiniteness opinion is treated as expert testimony, it should be excluded for several reasons. **First**, bias. Dr. Bushman is not an independent expert. Until October 2025, he was Petitioner's salaried Vice President of R&D overseeing global product development, and was personally involved in Petitioner's decision not to license the '422 patent before filing the Petition. EX2010 at 7:22–8:19, 45:11–46:6. Moreover, he owned an equity stake in Petitioner and “receiv[ed] a bonus” “based on” Petitioner's “financial performance” with no evidence he divested. EX2010 at 38:2–40:6, 41:7–19.

Dr. Bushman is not only an interested witness; he is the **only** witness attesting to the alleged priority dates of the Gatorade and Febreze labels. *See, e.g.*, EX1013 ¶¶ 35, 52. But “[a]n expert's testimony, absent corroborating evidence, is not sufficient to establish priority.” *Intell. Ventures I, LLC v. Motorola Mobility, LLC*, 13 F. Supp. 3d 369, 411 (D. Del. 2014) (citing *Price v. Symsek*, 988 F.2d 1187, 1194 (Fed. Cir. 1993)). And “[o]f course, the need for corroboration takes on special

force” where, as here, the “witness shows some reason to be biased in favor of the interested party[.]” *Finnigan Corp. v. ITC*, 180 F.3d 1354, 1368 (Fed. Cir. 1999). Accordingly, Dr. Bushman’s opinions are tainted by bias and should be excluded.

Second, Dr. Bushman applies an incorrect legal standard, opining that the claim language “has multiple possible meanings, making it impossible for a POSITA to determine a definitive meaning.” EX1047 ¶ 16. That is not the indefiniteness standard. *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014). This flawed analysis should be excluded.

Third, Dr. Bushman’s opinions should be excluded under 37 C.F.R. § 42.65(a) for failing to disclose underlying facts and bases. He repeatedly references his “personal experience” serving on an APR panel, but does not provide any information about which panels, when, what labels were evaluated, which tests were performed and analyzed, or what specific experiences he had on the panel that demonstrate any subjectivity. EX1047 ¶¶ 39, 66; *see also* 37 C.F.R. § 42.65.

2. Dr. Deible Declarations (EX1014 and EX1046)

Dr. Deible’s indefiniteness opinions are poisoned by Dr. Bushman’s bias and Petitioner’s attempt to circumvent it. PO timely objected to EX1014 (Paper 16 § H) and EX1046 (Paper 55 § A). Petitioner’s attempt to launder Dr. Bushman’s biased opinions through Dr. Deible should be rejected. The indefiniteness analysis in EX1014 is copied and pasted *verbatim* from EX1013, down to the spacing between

paragraphs. *Compare* EX1013 ¶¶ 77–78 with EX1014 ¶¶ 150–151. Petitioner's belt-and-suspenders approach cannot overcome that: (1) Dr. Deible was not qualified to opine on indefiniteness; and (2) Dr. Bushman's bias and lack of experience precludes him from offering this opinion. This error is particularly egregious in light of Dr. Deible's admission that he had not reviewed Dr. Bushman's declaration. EX2011 at 162:4–7. The Board should exclude those opinions. EX1014 ¶¶ 143–159.

E. Evidence of Alleged Recyclability of Gatorade Label Should be Excluded as Unauthenticated Hearsay

1. EX1016, EX1018, and EX1019

The Board should exclude Exhibits 1016, 1018, and 1019 as unauthenticated hearsay. PO timely objected to EX1016 (Paper 16 § I), EX1018 (Paper 16 § I), and EX1019 (Paper 16 § J). Under FRE 901, a proponent must produce evidence sufficient to support a finding that the item is what the proponent claims. Here, Petitioner asserts these exhibits demonstrate the Gatorade label is recyclable, but *none* actually mentions the Gatorade label. EX1016, EX1018, EX1019, EX2010 at 89:10–12 (“Q. Okay. Is there any mention of the Gatorade label [in EX1018]?” A. No.”), 112:11–15 (Q. What is your basis for – for saying that [the Gatorade label is an SKC Ecolabel]? A. ... I’ll say this, the Gatorade label uses EL62 as the substrate.”). EX1016 is a product description for shrink film EL62, but relates to a “clear” label (without ink) and cannot establish the Gatorade label's recyclability. EX1019 is a printing ink technical data sheet for SB/INK-98004, but relates only to

“silver ink” (not a printed label, let alone the Gatorade label). EX1018 is an APR recognition letter for the Fort Dearborn Washable Ink System, but does not mention the Gatorade label. After the Board compelled production, Petitioner provided the underlying test data that shows the tests were performed on a generic label with no connection to the Gatorade label whatsoever. *See* EX1044. Thus, Petitioner's evidence fails to show that these exhibits relate to the recyclability of the Gatorade label and should be excluded.

Moreover, to the extent Petitioner relies on the statements in the documents to support its allegations that the Gatorade label is recyclable, those should be excluded as hearsay under FRE 801 and 802. They are out-of-court statements offered for the truth of the matter asserted and do not fall within any recognized exception to the hearsay rule. The Board should therefore exclude Exhibits 1016, 1018, and 1019 on both authentication and hearsay grounds.

2. *Dr. Bushman's Declaration (EX1013)*

The portions of Dr. Bushman's declaration relying on Exhibits 1016, 1018, and 1019 should also be excluded as inadmissible double hearsay. EX1013 ¶¶ 56–57 (conclusory characterizations that the Gatorade label is associated with those exhibits). These out-of-court statements are themselves inadmissible and incorporate further inadmissible out-of-court statements from the exhibits themselves for which there are no applicable exceptions and no indicia of reliability.

3. *Dr. Deible's Declarations (EX1014 and EX1046)*

As with EX1013, the portions of Dr. Deible's declarations (EX1014 and EX1046) that rely on Exhibits 1016, 1018, and 1019 should similarly be excluded as inadmissible hearsay. EX1014 ¶ 78.

F. Evidence of Articles as Prior Art Should Be Excluded (EX1003, EX1004, EX1013 ¶¶ 58, 64, EX1014 ¶ 98)

The Board should exclude portions of EX1003 and EX1004 as lacking authenticity (FRE 901) and as inadmissible hearsay without exception (FRE 801–803). EX1003 comprises: (1) a photo of an Orange-flavored Gatorade label affixed to a container; and (2) a factory production Gatorade label for “28 oz Gatorade Orange.” EX1004 comprises: (1) a photo of a Febreze label affixed to a container; (2) a Febreze label on a roll; and (3) a factory production Febreze label. The first images showing a container should be excluded, along with any parts of the Petition, Reply, and supporting declarations (EX1013, EX1014) relying on them.

Petitioner relies on the first images of EX1003 and EX1004 ostensibly to show that the labels are recyclable with a PET container. Yet, beyond Dr. Bushman's say-so, there is no evidence that these images of the Gatorade and Febreze labels affixed to the bottles are authentic images of the alleged prior art labels publicly available on a container prior to the priority date of the '422 patent. *See, e.g.*, EX1013 ¶¶ 53–58, 61–64. Nothing in these images indicates: (1) who took the images, (2) when the images were taken, (3) that the photographed articles (bottles and labels together)

were available prior to the priority date of the '422 patent, or (4) that the containers are PET. Moreover, the containers are not identified in the Petition as prior art and were not provided to either Dr. Deible or to PO.

Moreover, the depicted Gatorade label affixed to the container in EX1003 should be excluded *even if* Dr. Bushman properly authenticated it. The images do not even show the same Gatorade label that Petitioner relies on in the rest of the Petition: EX1003 shows an Orange-flavored Gatorade label, whereas Petitioner's Grounds 1–3 rely on Gatorade labels for Passion Fruit Maracuya and Glacier Freeze. *Compare* EX1003 at 1 *with* EX1032 at 11, 19. This inconsistency renders Dr. Bushman's authentication irrelevant and the image of the Orange-flavored Gatorade label should therefore be excluded.

For similar reasons, these images should be excluded as inadmissible hearsay. Petitioner offers them for the truth of the matter that the Gatorade and Febreze labels were available as affixed to the containers and that the containers were PET before the priority date of the '422 patent. Even if there were any such indication in the images (there is not), such out-of-court statements offered as truth are inadmissible.

IV. CONCLUSION

For the foregoing reasons, PO respectfully requests the Board grant the Motion to Exclude.

Dated: July 8, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Patent Owner's Motion to Exclude was served on the 8th day of July, 2026, via electronic mail directed to counsel of record for the Petitioner:

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CERTIFICATE OF COMPLIANCE

This Patent Owner's Motion to Exclude complies with the type-volume limitations as mandated in 37 C.F.R. § 42.24. According to the word processing system used to prepare this document, the motion contains 15 pages (15 page limit).

/s/ W. Todd Baker

W. Todd Baker