

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MULTI-COLOR CORPORATION,
Petitioner,

v.

BROOK & WHITTLE LIMITED,
Patent Owner.

Case PGR2025-00025
U.S. Patent No. 11,961,422

**PETITIONER'S RESPONSE TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE**

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LISTING OF EXHIBITS

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Exhibit 1001:	U.S. Patent No. 11,961,422
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Exhibit 1003:	Petitioner's Gatorade Label
Exhibit 1004:	Petitioner's Febreze Label
Exhibit 1005:	PET-CG-02 – Critical Guidance protocol for clear PET articles with labels and closures
Exhibit 1006:	PET Standard Laboratory Processing Practices
Exhibit 1007:	PET-S-04 – PET Package Materials Balance Test
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Exhibit 1012:	RD-TM-210-4
Exhibit 1013:	Declaration of Mr. Craig Bushman
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Exhibit 1015:	ASTM D2732
Exhibit 1016:	SKC inc. EL62 Product Description

Exhibit 1017:	Brook+Whittle webpage print, retrieved from https://brookandwhittle.com/recyclable-light-blocking-shrink-sleeves/
Exhibit 1018:	Association of Plastic Recyclers recognition correspondence
Exhibit 1019:	Watson Standard Technical Data Sheet
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Exhibit 1021:	Second Declaration of Mr. Craig Bushman
Exhibit 1022:	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, D.I. 63 (Defendant's Motion to Stay Pending Resolution of Related Declaratory Judgment Action)
Exhibit 1023:	<i>Brook + Whittle LTD v. Nestle USA, Inc. et al.</i> , 2:24-cv-00735-JRG-RSP, D.I. 18 (Defendant Nestlé USA, Inc.'s Motion to Dismiss for Improper Venue)
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Exhibit 1026:	U.S. Appln. No.: 18/667,677, "Recyclable heat shrink film for recyclable container," (Prosecution History)
Exhibit 1027:	PET-CG-02, Critical Guidance protocol for clear PET articles with labels and closures, Revision Date 04.11.2019
Exhibit 1028:	PET-P-00, PET Standard Laboratory Processing Practices, Revision Date 09.17.2019
Exhibit 1029:	PET-S-04, PET Package Materials Balance Test, Revision Date 11.16.2018

Exhibit 1030:	PET-S-01, Labels for PET - Wash Water Test, Revision Date 11.16.2018
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Exhibit 1050:	S.P. Morell & Co., <i>Metallic Pigments – The Science of Optics</i> (retrieved from https://www.spmorell.com/newsletters/metallic_pigments/metallic_pigments.html (last visited June 17, 2026))
Exhibit 1051:	Schlenk Metallic Pigments GmbH, <i>World of Metallics Pigments: Pigments for Printing Inks</i> (Mar. 2011) (retrieved from https://www.schlenk.com/fileadmin/editorsCMS/Medien/04_Aktuelles_und_Highlights/Mediacenter/Catalogue_Pigments_for_Printing_Inks.pdf (last visited June 17, 2026))
Exhibit 1052:	US Patent Application No. 18/667,677 June 11, 2026, Non-Final Rejection

I. INTRODUCTION

Patent Owner's ("PO's") Motion to Exclude (Paper 59, "Motion") should be denied in its entirety. Although styled as an evidentiary motion under 37 C.F.R. §42.64(c), the Motion is a merits brief in disguise. Every argument PO advances attacks the weight, credibility, or sufficiency of Petitioner's evidence, not its admissibility. PO contends that the testimony of Dr. Deible and Dr. Bushman is unreliable, inconsistent, biased, unqualified, or insufficiently supported. Those arguments belong in PO's merits papers, not in a motion to exclude. *See* Consolidated Trial Practice Guide ("TPG"), 79.

PO's specific requests fare no better. Dr. Deible made no false statement, and the substance of Dr. Bushman's declaration was conveyed to Dr. Deible by counsel, as he testified. EX2011, 162:4-24. Separately, Dr. Deible has since confirmed that his review of Mitchell leaves his opinions unchanged. EX1046 ¶135. Dr. Bushman testified as a qualified expert from his first declaration onward, and there was no "role switching." Rather, Dr. Bushman was an (expert) employee of Petitioner at the time of his first declaration and due to company restructuring was no longer an employee at the time of his second declaration. Dr. Bushman's alleged bias, like every credibility attack in the Motion, is the proper subject of cross-examination and goes to weight.

Petitioner's reliance on prior art in Grounds 1–3 and indefiniteness in Ground 4 is classic (and proper) alternative argument, not a contradiction warranting exclusion. And the challenged exhibits (EX1003, EX1004, EX1016, EX1018, EX1019) are authenticated through Dr. Bushman's personal knowledge and are not offered as inadmissible hearsay. PO's Motion should be denied.

II. The Motion Improperly Uses the Rules of Evidence to Attack the Weight and Sufficiency of Petitioner's Evidence

A motion to exclude “must explain why the evidence is not admissible (e.g., relevance or hearsay) but may not be used to challenge the sufficiency of the evidence to prove a particular fact,” and it “is not a vehicle for addressing the weight to be given evidence,” and “arguments regarding weight should appear only in the merits documents.” TPG, 79.

The Motion violates these principles from start to finish. PO contends the experts made false statements, contradicted themselves, applied the wrong legal standard, are biased, and lack adequate foundation. Motion, 2-12. Each contention asks the Board to decide how persuasive the testimony is in view of the full record. That is a weight and credibility inquiry committed to the Board as factfinder. The proper remedies are cross-examination and merits argument. And where the Board finds that “[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based,” the remedy is that such testimony “is entitled to little

or no weight” under 37 C.F.R. § 42.65(a), and not exclusion. TPG, 35. These mechanisms exist precisely because the Board is an expert tribunal fully capable of weighing evidence on its merits. The Motion should be denied for this reason alone.

III. PO’s Request to Exclude Petitioner’s Briefing Is Improper, and PO’s Undeveloped Objections Are Waived

First, PO asks the Board to exclude “any parts of the Petition” and “Reply” that rely on the challenged exhibits. Motion, 14. A motion to exclude under 37 C.F.R. §42.64(c) is directed to evidence. Briefing is not evidence, and a motion to exclude is not a substitute for a motion to strike. TPG, 79–80. PO’s request to exclude portions of Petitioner’s briefing should be rejected.

Second, although PO’s Statement of Relief invokes FRE 402, 403, 701, and 703 across multiple exhibits, the Motion develops no particularized argument under several of those rules. For example, the Motion offers no distinct FRE 402 analysis for Dr. Deible’s Mitchell opinions in §III.B and no FRE 703 analysis independent of its FRE 702 arguments. A movant must explain, with particularity, why the challenged evidence is inadmissible under each rule invoked. 37 C.F.R. §42.64(c); TPG, 79. Those undeveloped objections are waived, and any belated attempt to develop them in reply should be disregarded. 37 C.F.R. §42.23(b).

Third, and most fundamentally, a motion to exclude may rest only on an objection that was both timely and specifically raised when the challenged evidence was served. A ground advanced for the first time in the motion itself is forfeited. 37 C.F.R. §42.64(b). PO's central request, to strike Dr. Deible's "in their entirety" (Motion, 1), conflicts with that rule as to at least Dr. Deible's first declaration, EX1014. PO cites Paper 16 §H as preserving the request (Motion, 2), but Paper 16 §H says nothing about the two grounds PO now presses. Instead, Paper 16 §H raises only authentication, personal-knowledge, hearsay, relevance, and FRE 403 objections, plus improper incorporation of Dr. Bushman's opinions (FRE 901, 602, 801–803, 401, 403, 701–702). Nowhere does Paper 16 §H object that Dr. Deible is unqualified to opine as a POSITA, or that his declaration contained false statements rendering his opinions unreliable under FRE 702 or 703. Those are the only two theories PO offers for wholesale exclusion of EX1014, and neither was ever timely lodged as an objection.

That omission is tantamount. Both theories are built entirely on Dr. Deible's deposition testimony (EX2011), which occurred well after the deadline for objecting to EX1014 had passed. An objection cannot be "timely" as to a concern that did not yet exist when objections were due, and PO cannot cure the gap by raising it for the first time in a motion to exclude. The proper vehicle for concerns surfaced at a deposition is cross-examination and merits argument directed to

weight, not exclusion on grounds never presented as an objection. The request to strike EX1014 in its entirety should therefore be denied.

Several of the Motion's remaining grounds fail for similar reasons. First, PO's fallback request to exclude Dr. Deible's Mitchell opinions under FRE 402 and 403 (Motion, 5-6) is unpreserved as to EX1046. Paper 55 §A objected to ¶135 under FRE 702 and 801-803, not FRE 402 or 403. Second, PO's "contradiction" theory (Motion, 6-8) is unpreserved as to EX1013. Paper 16 §G predates EX1047 and did not object to EX1013 on inconsistency grounds, and PO's timely objection (Paper 55 §B) is directed to EX1047. Third, PO did not preserve its derivative attacks on EX1046, namely that Dr. Deible's opinions are "poisoned" by Dr. Bushman (Motion, 11-12) and that Dr. Deible relies on EX1016, EX1018, and EX1019 (Motion, 14). Paper 16 predates EX1046, and Paper 55 §A does not re-raise either the incorporation or the exhibit-reliance objection as to Dr. Deible's second declaration (EX1046). Fourth, the Motion repeatedly invokes FRE 703 against Dr. Deible (Motion, 2, 6-8), yet neither Paper 16 §H nor Paper 55 §A objects to Dr. Deible under FRE 703 at all. Only PO's objection to Dr. Bushman (Paper 55 §B) cites that rule. Each ground is waived to that extent, and should therefore be denied.

IV. ARGUMENT

A. Dr. Deible's Opinions Should Not Be Excluded (EX1014 and EX1046)

PO's request to exclude EX1014 in its entirety is not preserved, as neither the POSITA ground nor the false-statement ground appears in Paper 16 §H. *See supra* §III. In any event, both grounds fail on the merits.

PO's "false statement" theory (Motion, 2-5) amounts to a challenge to the credibility and reliability of Dr. Deible's testimony. PO's reliance on *Mitchell v. Holt*, Patent Interference No. 105,746, Paper 352 (BPAI Apr. 27, 2012), is misplaced. That non-precedential interference involved extraordinary circumstances in which the Board found that the expert had repeatedly lied under oath, concluded his testimony was unreliable under FRE 702, and excluded it in its entirety. This case presents nothing comparable. At most, PO identifies an alleged inconsistency between Dr. Deible's declaration and deposition testimony, which goes to the weight of his testimony rather than providing a basis for exclusion. *Mitchell* therefore does not support the relief PO seeks.

In any event, Dr. Deible made no materially false statement. As to Dr. Bushman's declaration, the portions of that declaration on which Dr. Deible relied were conveyed to him by counsel, as Dr. Deible testified. EX2011, 162:4-24. FRE 703 expressly permits an expert to base opinions on facts or data the expert "has been made aware of," not only on materials the expert reviewed firsthand. His

statement that he “considered and relied upon” Dr. Bushman’s declaration (EX1014 ¶25) is thus consistent with his deposition testimony and the fact that what he considered and relied upon was conveyed to him by counsel. Any perceived tension is ordinary cross-examination material going to weight.

As to Mitchell, PO ignores that Mitchell is part of the intrinsic record of the ’422 patent itself. The Examiner cited Mitchell (US 2017/0223879) during prosecution and made express findings regarding its teachings, concluding that the claimed layer arrangement, with metallization positioned between the printing and the light-blocking layer, would have been obvious. EX1002, 239. Dr. Deible reviewed the Examiner’s comments regarding Mitchell before rendering his original opinions, and he has since reviewed Mitchell itself and confirmed that his opinions are unchanged. EX1046 ¶135. An expert may opine reliably on a reference whose substance, here including the Examiner’s own obviousness analysis, was squarely before him. PO’s quarrel with the depth of Dr. Deible’s pre-declaration familiarity with Mitchell is an argument about how much weight his Ground 2 opinions deserve, not about whether they are admissible.

PO’s POSITA argument fails for the same reason. Dr. Deible holds a Ph.D. in Physical Chemistry and has at least five years of experience in material identification and characterization and the analytical methods used to analyze and classify materials. EX1014 ¶¶5-9. Dr. Deible satisfies Petitioner's proposed

POSITA definition. Petition, 12. PO's insistence that a POSITA must also possess "recycling experience" simply assumes PO's own disputed POSITA definition. That disagreement goes to which POSITA definition the Board should adopt and the weight to be accorded Dr. Deible's opinions, not to whether he is qualified to offer expert testimony under FRE 702.

B. Dr. Deible's Opinions Regarding Mitchell Should Not Be Excluded (EX1014 and EX1046)

This ground is unpreserved as to EX1046, which PO objected to under FRE 702 and 801-803, not FRE 402 or 403. *See supra* §III. Regardless, the ground fails on the merits.

PO's fallback request to excise Dr. Deible's Mitchell opinions under FRE 402 and 403 (Motion, 5-6) fails at the threshold. Mitchell is the secondary reference in Ground 2. Dr. Deible's opinions concerning Mitchell's teachings, a POSITA's motivation to combine, and a POSITA's reasonable expectation of success, are plainly relevant to the issues the Board must decide. FRE 401-402. PO identifies no legitimate basis for excluding those opinions under Rules 402 or 403.

Nor is there any basis for exclusion under FRE 403. Dr. Deible's second declaration, including his confirmation that his review of Mitchell does not alter his previously expressed opinions (EX1046 ¶135), constitutes proper rebuttal. It responds directly to criticism PO first raised in its Patent Owner Response and introduces no new theory of unpatentability or new obviousness rationale. The

Ground 2 obviousness challenge has been part of this case since the Petition.

Responding to arguments first raised in the Patent Owner Response without changing the asserted ground or the underlying analysis is precisely the purpose of rebuttal testimony. Moreover, as explained above, the Examiner's discussion of Mitchell had already been considered by Dr. Deible when he formulated his original opinions. *Supra* § IV.A.

PO's claimed prejudice stems from the timing and scope of Petitioner's rebuttal evidence, not from any cognizable evidentiary defect. PO will have had a full opportunity to challenge Dr. Deible's supplemental declaration through cross-examination and merits briefing, including its to-be-filed Sur-Reply. There is therefore no unfair prejudice, and Rule 403's concern with misleading or confusing a jury carries little force in this Board proceeding, as set forth above. Any issue regarding the timing of Dr. Deible's confirmatory review goes to the weight, not the admissibility, of his Ground 2 opinions. The Board, sitting as factfinder, is fully capable of according those opinions whatever weight it deems appropriate. TPG, 35, 79. That is the proper vehicle for PO's arguments.

C. Petitioner's Alternative Prior-Art and Indefiniteness Grounds Are Proper, and the Alleged "Contradictions" Go to Weight, Not Admissibility

To the extent PO's theory is directed to EX1013, it is waived because PO never preserved that objection. Paper 16 § G predates EX1047 and does not object

to EX1013 on the basis of any alleged inconsistency. *See supra* § III. In any event, the argument fails on the merits.

PO’s “contradiction” theory (Motion, 6-8) rests on a faulty premise. Petitioner’s obviousness challenges under Grounds 1-3 and its indefiniteness challenge under Ground 4 are alternative legal theories expressly permitted in a PGR. The fact that a prior-art reference may be analyzed under a disputed claim term does not resolve the separate question whether the patent informs a POSITA, with reasonable certainty, of the scope of that term. *Sonix Tech. Co. v. Publ’ns Int’l, Ltd.*, 844 F.3d 1370, 1380-81 (Fed. Cir. 2017) (“Neither does the fact that an expert has applied a contested claim term without difficulty render a claim immune from an indefiniteness challenge.”).

There is no actual contradiction in the experts’ testimony. Relying on APR recognition as evidence that the Gatorade label met an industry benchmark (Grounds 1-3) is not inconsistent with opining that the APR guidelines’ panel-based recognition process does not supply the reasonable certainty *Nautilus* requires of the claim term itself (Ground 4). EX1013 ¶¶56–57; EX1047 ¶¶32, 39. Evidence that a particular product satisfied an industry protocol is distinct from whether the claim language itself delineates the scope of the claimed invention with reasonable certainty. *Sonix*, 844 F.3d at 1380-81. Likewise, Dr. Deible’s second declaration did not “disavow” his caustic-wash testing. Rather, Dr. Deible’s

testing was not intended to establish recyclability in the first instance, as PO suggests, and was instead performed to confirm that the Gatorade Label behaved consistently with what would be expected of an APR-recognized recyclable label system. EX1046 ¶46.

Even if the Board were to perceive some tension between Dr. Deible's declarations, that would not warrant exclusion. Any such inconsistency bears, at most, on the weight to be accorded his opinions, not their admissibility. FRE 702 and 703 address the reliability of an expert's qualifications, methodology, and factual bases, they do not require perfect consistency across declarations or foreclose clarifications made in proper rebuttal. PO's own authority proves the point. *Interactive Commc'ns Int'l v. Blackhawk Network, Inc.*, IPR2024-00465, Paper 40 (PTAB Oct. 9, 2025) (Director Review), addressed whether the Board properly relied on allegedly contradictory expert testimony in its Final Written Decision, not whether the testimony was admissible under FRE 702 or 703.

D. Dr. Bushman's Opinions Are Proper, and Dr. Deible's Opinions Are Not "Poisoned" by Them (EX1013, EX1047, EX1014, EX1046)

There was no "role switching." Dr. Bushman offered expert testimony from a POSITA's perspective in his very first declaration. In paragraph 12, he states that "[c]ounsel has informed me that I should consider these materials through the lens of a person of ordinary skill in the art ('POSITA') ... and I have done so." EX1013

¶12. Dr. Bushman likewise confirmed that his “analysis and conclusions ... are based on the perspective of a POSITA” and that he “meet[s] the qualifications of a POSITA.” EX1013 ¶25. That Dr. Bushman also has personal, first-hand knowledge of the Gatorade and Febreze labels (EX1013 ¶¶2, 25) makes his testimony more probative, not less.

By the time Dr. Bushman signed his second declaration (EX1047) he was no longer an employee of Petitioner. EX1047, cover page, ¶4. A witness’s change in employment does not change his role as a testifying expert, and it does not render his testimony unfairly prejudicial under FRE 403.

PO’s bias arguments (former employment, equity, bonus) go to weight, not admissibility. The proper remedy is cross-examination, not exclusion. An interested witness is not an inadmissible witness. PO’s corroboration cases confirm the point. *Finnigan Corp. v. ITC*, 180 F.3d 1354, 1367-68 (Fed. Cir. 1999), and *Intellectual Ventures I, LLC v. Motorola Mobility, LLC*, 13 F. Supp. 3d 369, 411 (D. Del. 2014), address the sufficiency of uncorroborated interested testimony, not its admissibility.

PO’s “wrong legal standard” argument is attorney argument about how Dr. Bushman articulated his opinion. The Board applies *Nautilus* itself, and testimony that the claim language has multiple irreconcilable meanings such that a POSITA cannot determine a definitive scope (EX1047 ¶16) is fully consonant with the

reasonable-certainty inquiry. Disagreement with an expert's phrasing is a merits point going to weight, not an FRE 702 defect.

Finally, 37 C.F.R. §42.65(a) supplies its own remedy. Expert testimony that fails to disclose underlying facts or data "is entitled to little or no weight," not exclusion. TPG, 35–36. In any event, Dr. Bushman disclosed the bases for his APR-panel testimony. He identified the panel-based recognition process, his own service on such a panel, and how differing panel composition affects whether recognition issues in a given case. EX1047 ¶¶39. Indeed, Dr. Bushman's opinions are admissible, and the substance of his analysis was conveyed to Dr. Deible by counsel as FRE 703 permits (EX2011, 162:4–24).

E. EX1016, EX1018, and EX1019 Are Authenticated and Are Not Inadmissible Hearsay

Authentication requires only "evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). Dr. Bushman, Petitioner's former Vice President of R&D, had personal, first-hand knowledge of the Gatorade label system, including its EL62 substrate and washable ink system, and authenticated the exhibits on that basis. EX1013 ¶¶56-57; EX2010 at 112:11-15 ("the Gatorade label uses EL62 as the substrate"); FRE 901(b)(1). Patent Owner does not contend that EX1016 is not SKC's EL62 product description, that EX1019 is not the Watson Standard technical data sheet, or that EX1018 is not APR recognition correspondence.

PO's hearsay objection fails as well. The challenged exhibits (EX1016, EX1018, and EX1019) contain facts and data of the type experts in the packaging and recycling fields reasonably rely upon. Accordingly, FRE 703 permits Dr. Bushman and Dr. Deible to rely on those materials in forming their opinions even if the underlying documents are not themselves independently admissible. EX1018, the APR recognition correspondence, is also offered to establish the fact that APR recognition was granted, an operative fact with independent industry significance, rather than for the truth of any statements contained in the correspondence.

F. The Gatorade and Febreze Labels (EX1003, EX1004) Are Authenticated, Are Not Hearsay, and Are Proper Prior Art

Dr. Bushman authenticated EX1003 and EX1004 through personal knowledge. He was personally involved in the design, manufacture, and commercialization of the Gatorade and Febreze labels. EX1013 ¶¶25, 53-58, 61-64. That is sufficient under FRE 901(b)(1). A photograph may be authenticated by testimony from a witness with knowledge that it fairly and accurately depicts the subject matter shown. PO's questions about who took the photographs and when they were taken go, at most, to the weight of the evidence, not its authenticity. PO's remaining arguments, that the photographs do not themselves establish public availability before the priority date, that the containers are not shown to be PET, and that EX1003 depicts an Orange-flavored label while Grounds 1-3 rely on other

flavors, all concern what the evidence proves, not whether it is authentic. Those are merits arguments regarding the sufficiency and weight of the evidence and provide no basis for exclusion. TPG, 79.

The hearsay objection likewise fails. The labels, and the photographs depicting them, are not “statements” of a declarant offered for the truth of any asserted matter. Rather, they are the alleged prior-art articles themselves (and accurate depictions thereof), offered as physical evidence of their design and characteristics. *See* FRE 801(a)–(c). As such, they are not hearsay. PO’s request to exclude “any parts of the Petition, Reply, and supporting declarations” relying on these exhibits is improper for the reasons already stated. Briefing is not evidence, and reliance on properly authenticated, admissible exhibits provides no basis for exclusion. *See supra* § III.

V. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board deny Patent Owner’s Motion to Exclude in its entirety.

Dated: July 15, 2026

Respectfully submitted,

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CERTIFICATION UNDER 37 C.F.R. § 42.24

The undersigned hereby certifies that the foregoing Petitioner's Response to Patent Owner's Motion to Exclude complies with the type-volume limitations as mandated in 37 C.F.R. § 42.24.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been served via electronic mail upon the following on July 15, 2026:

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