

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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**ARKEMA FRANCE,**  
*Petitioner*

**v.**

**HONEYWELL INTERNATIONAL INC.**  
*Patent Owner*

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**Case IPR2015-00916**  
**U.S. Patent No. 8,710,282**

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

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## **I. INTRODUCTION**

Honeywell International, Inc. (“Honeywell” or “Patent Owner”) has properly authenticated Exhibits 2007, 2009, 2014, 2017, 2020, 2023, 2025, 2027, and 2028. To authenticate these exhibits, Honeywell does not rely *solely* on the testimony of any single declarant. Rather, Honeywell relies on testimony from multiple witnesses *combined with* the appearance, contents, and substance of each exhibit. This combination is sufficient to meet the low, threshold standard of authentication.

In its Motion to Exclude, Arkema France (“Arkema” or “Petitioner”) misapplied both the Federal Rules of Evidence (FRE) and the authority upon which it relies. Authentication is not a rigid, rule-based inquiry; it is a flexible determination of fact that favors admissibility. This means there is no *per se* rule prohibiting an inventor from *further* authenticating a document that in and of itself corroborates testimony of earlier conception. Under the appropriate standards, Exhibits 2007, 2009, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 are sufficiently authenticated and, thus, admissible.

## **II. RELEVANT FACTS**

The PTAB instituted trial on October 21, 2015. (Paper 16, at 1). Honeywell submitted the testimony of Dr. Harry S. Tung, a named inventor of U.S. Patent No. 8,710,282 (“the ’282 Patent”), to establish earlier conception and diligence toward

reduction to practice. Among others, Honeywell submitted Exhibits 2007, 2009, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 to corroborate Dr. Tung's testimony.

***Exhibits 2007, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 all contain identifying information.*** Exhibit 2007 is an e-mail dated March 26, 2008 from Mr. Haluk Kopkalli to Dr. Tung, among others. The e-mail contains a date ("March 26, 2008"), lists multiple e-mail recipients, and indicates two attachments. Exhibit 2009 is a Project Permit Change Form. The Form is dated "May 16, 2008" in multiple locations, and it includes the names and signatures of Dr. Tung, Dr. Selma Bektesevic (another named inventor), and Angela Mazurkiewicz (a non-inventor lab technician). Exhibits 2014, 2017, 2020, 2023, 2025, and 2027 are Monthly Technology Reports, each containing a date and the attribution: "By Harry Tung." Finally, Exhibit 2028 is dated "May 13, 2008" and contains experimental information like inputs (*e.g.*, "25% KOH used") and agitation speeds ("~600rpm").

***All exhibits were also authenticated with testimony.*** Honeywell offered the testimony of Dr. Tung to further-authenticate Exhibits 2007, 2014, 2017, 2020, 2023, 2025, 2027, and 2028. Honeywell also offered the testimony of Angela Goodie (née Mazurkiewicz) and Diana Overton to further-authenticate Exhibit 2009.

On June 13, 2016, Petitioner challenged submitted Exhibits 2007, 2009, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 for insufficient authentication. *See* IPR2015-00916, Paper 46.

### III. ARGUMENT

#### A. Petitioner has not applied the correct standard for authenticating a document that is used to corroborate earlier conception and reduction to practice.

“To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” FRE 901. A proponent can authenticate with the testimony of a witness with knowledge, FRE 901(b)(1), *or* with the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” FRE 901(b)(4). “[T]he burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of *reasonable likelihood*. *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994) (citations omitted) (emphasis added).

The threshold requirement of authentication is *low*. *See United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001) (citation and internal marks omitted) (“Rule 901 does not erect a particularly high hurdle . . . .”); *Day v. Cty. of Contra Costa*, 2008 WL 4858472, at \*19 (N.D. Cal. 2008); *Bazak Int’l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 391 (S.D.N.Y. 2005). This low bar favors admissibility so that fact-finders can evaluate the *weight* of the evidence. *See S.E.C.*

*v. Badian*, 822 F. Supp. 2d 352, 364 (S.D.N.Y. 2011) (citation and internal marks omitted) (“[The] standard [for authentication] is not a particularly high hurdle and favors the admission of evidence that it may be evaluated by the jury.”); *Mueller v. Aufer*, 2010 WL 2265867, at \*11 (D. Idaho 2010) (citations and internal marks omitted) (“The proponent of the evidence need only make a prima facie showing of authenticity . . . . At this point, any doubts as to the authenticity of the evidence go to its weight and not to its admissibility.”).

In addition, courts view FRE 901 as being “flexible . . . about what serves to authenticate a document.” *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000); *see also Reyes v. United States*, 2007 WL 2973591, at \*8 (E.D.N.Y. 2007) (describing FRE 901 as a “flexible standard for authentication”); *United States v. Stephens*, 202 F. Supp. 2d 1361, 1367 (N.D. Ga. 2002) (citations omitted) (viewing the Eleventh and Fifth Circuits as having adopted a “a flexible inquiry” for authentication).

Consistent with this flexible inquiry, “[a] document may be authenticated by personal knowledge ‘by a witness who wrote it, signed it, used it, or saw others do so.’” *Randazza v. Cox*, 2014 WL 1407378, at \*3 (D. Nev. 2014) (citation and footnotes omitted). But a document can also be authenticated with circumstantial evidence within the document itself. *See id.*; *see also McQueeney v. Wilmington*



*Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985) (“[W]e hold that circumstantial evidence may, in principle, suffice to authenticate a document.”).

Petitioner suggests that recent PTAB decisions have established a *per se* authentication rule: “The proponent of corroborating evidence offered to show conception must provide sufficient proof of date and identity of the submitted evidence. *Inventor testimony is not sufficient to authenticate* a document offered to corroborate the inventor’s testimony.” IPR2015-00916, Paper 46, at 4 (emphasis added) (citing *Price v. Symsek*, 988 F. 2d 1187, 1194–95 (Fed. Cir. 1993); *Microsoft Corp. v. SurfCast, Inc.*, IPR2013-00292, Paper 93, at 16–17 (PTAB October 14, 2014); *Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52, at 4 (PTAB March 12, 2015)).<sup>1</sup> “As explained in [*Microsoft*],” Petitioner continues, “the corroborating document is meant to independently confirm the testimony of the inventor. Thus if the corroborating document is authenticated by the inventor, the corroboration is not sufficiently independent.” IPR2015-00916, Paper 46, at 4–5

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<sup>1</sup> *Price v. Symsek* was actually a corroboration case. *Price*, 988 F. 2d at 1194–95.

Once exhibits have been authenticated and admitted, the *sufficiency of the corroboration*—that is, whether the corroborating exhibits adequately corroborate the inventor’s testimony of earlier conception—is evaluated under a rule-of-reason analysis. See *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1577 (Fed. Cir. 1996).

(citing *Microsoft*, IPR2013-00292, Paper 93, at 16–17). In this argument Petitioner has assumed that authentication comes *only* from an inventor. But this ignores FRE 901(b)(4), which explains that authentication can also come from the “appearance, contents, [or] substance . . . of the item, taken together with all the circumstances.”

In this light, it is evident why the PTAB excluded evidence in *Microsoft*. There, the patent owner relied in part on e-mails to corroborate earlier conception, but the patent owner redacted<sup>2</sup> the dates on the e-mails. IPR2013-00292, Paper 93, at 5. Rather than preserve the original appearance, contents and substance of the email, the patent owner sought to authenticate the missing dates *solely* with inventor testimony. *Id.* at 16. The PTAB excluded the e-mails, explaining that a “document *authenticated by only an inventor* does not [prevent fraud] because it is not sufficiently independent.” *Id.* at 16–17 (emphasis added). So *Microsoft* does *not*, as Petitioner suggests, stand for a *per se* rule that an inventor can *never* authenticate an exhibit that *itself* corroborates earlier conception. It stands for the proposition that inventor testimony *alone* is insufficient to authenticate such documents.

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<sup>2</sup> The patent owner in *Microsoft* took the position that “for conception, the specific dates are irrelevant, other than that they are established to be before the date of the reference.” IPR2013-00292, Paper 81, at 5.

This is consistent with another decision relied on by Petitioner: *Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52. There, REG sought to establish earlier conception and reduction to practice with the testimony of Ramin Abhari, the sole inventor. IPR2013-00578, Ex. 2001, at 2–3. REG provided at least three corroborating exhibits (Exhibits 2002, 2003, and 2006) and authenticated them with Mr. Abhari’s testimony. IPR2013-00578, Paper 52, at 3. Exhibit 2002 was an unsigned, undated laboratory notebook page that Mr. Abhari testified he prepared “on or near” February 20, 2008. Exhibit 2003 was an undated report that Mr. Abhari testified was prepared by Vladimir Gruver, but the report bore “no indication that it was prepared by Mr. Gruver.” And Exhibit 2006 was a dated spreadsheet that Mr. Abhari testified as containing testing data, but “there [was] no indication on the face of the document regarding its source or what the spreadsheet data reports.” *Id.* Thus, the “appearance, contents, [or] substance” (*see* FRE 901(b)(4)) of each exhibit could not support a finding that the exhibit was what Mr. Abhari claimed it to be. REG was left with Mr. Abhari’s testimony alone, which the PTAB concluded was not sufficient to authenticate. *Id.* at 5.

At bottom, then, Petitioner misapplied FRE 901, *Microsoft*, and *Neste Oil*. There is no *per se* rule prohibiting an inventor from *further* authenticating a document that itself corroborates testimony of earlier conception. The *Microsoft* and *Neste* decisions stand for the proposition that an inventor cannot be the *sole*

source of authentication for information otherwise missing from corroborating documentation. Indeed, the facts of both *Neste* and *Microsoft* ultimately presented an *absence* of independent corroborating evidence, which in turn resulted in a failure of authentication.

**B. Exhibits 2007, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 were sufficiently authenticated.**

Petitioner has challenged Exhibits 2007, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 as insufficiently authenticated. This argument is premised on the false assumption that these documents were authenticated *solely* by the testimony of Dr. Tung. But the “appearance, contents, [or] substance” (*see* FRE 901(b)(4)) of the Exhibits *combined with* the testimony of Dr. Tung is sufficient to authenticate. With respect to each exhibit identified in Petitioner’s motion, the document itself provides the relevant factual information that is further corroborated by witness testimony. There simply is not information missing from the documents that is only provided by witness testimony, and as such there is ample evidence to establish at least a “reasonable likelihood” that each Exhibit is what Honeywell claims it is.

***Exhibit 2007*** – Dr. Tung testified from his personal knowledge that Exhibit 2007 is a true and accurate copy of an e-mail he received on March 26, 2008 from Mr. Haluk Kopkalli. The e-mail includes an attachment titled “Apollo HHP + KOH BFD-080318.pdf,” which is a document illustrating a potential commercial process including the steps of hydrogenation of HFP, dehydrofluorination with KOH, and

regeneration and recycling of spent KOH. Ex. 2006, at 5. Dr. Tung also testified that Haluk.Kopkalli@Honeywell.com was the email address of Haluk Kopkalli; that Dr. Tung and Mr. Kopkalli were in regular communication; that Honeywell has a policy of saving emails on its servers; and that Dr. Tung and Mr. Kopkalli met with others regularly to brainstorm, among other things, new manufacturing processes for 1234yf. Tung Supplemental Declaration, at 2–3. Dr. Tung’s testimony confirms that Exhibit 2007 contains the Kopkalli e-mail because the “From:” line lists “Kopkalli, Haluk” and the “To:” line lists “Tung, Harry S.” Ex. 2007, at 1. The body of the email also indicates an ongoing professional relationship between all of the recipients. Dr. Tung’s testimony further confirms that pages 3–4 of Exhibit 2007 represent the attachment titled “Apollo HHP + KOH BFD-080318.pdf.” Page 3 is a flow diagram indicating “HFP” (left side) having “H<sub>2</sub>” (hydrogen) being added with arrows. Ex. 2007, at 3. Page 4 is a flow diagram indicating “25% KOH” (on the left side of the diagram) and the words “regenerable” (top) and “recycle” (bottom left). Ex. 2007, at 4. Thus, there is at least a reasonable likelihood that Exhibit 2007 contains the Kopkalli e-mail.

***Exhibit 2014*** – Dr. Tung testified from his personal knowledge that Exhibit 2014 is a true and accurate copy of his Monthly Highlights for August 2008, which incorporated Dr. Bektesevic’s monthly technology reports for July and August 2008. Ex. 2006, at 14. Dr. Tung’s testimony confirms that Exhibit 2014 contains the

Monthly Highlights he prepared for August 2008 because the Exhibit is dated “August 26, 2008,” its title is “August Monthly Highlights,” and it says “By Harry Tung.” Ex. 2014, at 1. Thus, there is at least a reasonable likelihood that Exhibit 2014 contains the Monthly Highlights for August 2008.

***Exhibit 2017*** – Dr. Tung testified from his personal knowledge that Exhibit 2017 is a true and accurate copy of his Monthly Highlights for September 2008, dated September 27, 2008, which incorporated Dr. Bektesevic’s monthly technology reports for September 2008. Ex. 2006, at 16. Dr. Tung’s testimony confirms that Exhibit 2017 contains the Monthly Highlights he prepared for September 2008 because the Exhibit is dated “September 27, 2008,” its title is “September Monthly Highlights,” and it says “By Harry Tung.” Ex. 2017, at 1. The Exhibit also describes events that occurred on different dates in September. Ex. 2017, at 2–3. Thus, there is at least a reasonable likelihood that Exhibit 2017 contains the Monthly Highlights for September 2008.

***Exhibit 2020*** – Dr. Tung testified from his personal knowledge that Exhibit 2020 is a true and accurate copy of his Monthly Highlights for November 2008, which incorporated Dr. Bektesevic’s monthly technology reports for November 2008. Ex. 2006, at 18. Dr. Tung’s testimony confirms that Exhibit 2020 contains the Monthly Highlights he prepared for November 2008 because the Exhibit is dated “November 30, 2008,” its title is “November Monthly Highlights,” and it says “By

Harry Tung.” Ex. 2020, at 1. Thus, there is at least a reasonable likelihood that Exhibit 2020 contains the Monthly Highlights for November 2008.

***Exhibit 2023*** – Dr. Tung testified from his personal knowledge that Exhibit 2023 is a true and accurate copy of his Monthly Highlights for January 2009, which incorporated Dr. Bektesevic’s monthly technology reports for January 2009. Ex. 2006, at 20. Dr. Tung’s testimony confirms that Exhibit 2023 contains the Monthly Highlights he prepared for January 2009 because the Exhibit is dated “January 30, 2009,” its title is “January Monthly Highlights,” and it says “By Harry Tung.” Ex. 2023, at 1. Thus, there is at least a reasonable likelihood that Exhibit 2023 contains the Monthly Highlights for January 2009.

***Exhibit 2025*** – Dr. Tung testified from his personal knowledge that Exhibit 2025 is a true and accurate copy of his Monthly Highlights for February 2009, which incorporated Dr. Bektesevic’s monthly technology reports for February 2009. Ex. 2006, at 21. Dr. Tung’s testimony confirms that Exhibit 2025 contains the Monthly Highlights he prepared for February 2009 because the Exhibit is dated “February 28, 2009,” its title is “February Monthly Highlights,” and it says “By Harry Tung.” Ex. 2025, at 1. Thus, there is at least a reasonable likelihood that Exhibit 2025 contains the Monthly Highlights for February 2009.

***Exhibit 2027*** – Dr. Tung testified from his personal knowledge that Exhibit 2027 is a true and accurate copy of his Monthly Highlights for March 2009, which

incorporated Dr. Bektesevic's monthly technology reports for March 2009. Ex. 2006, at 21–22. Dr. Tung's testimony confirms that Exhibit 2027 contains the Monthly Highlights he prepared for March 2009 because the Exhibit is dated "March 29, 2009," its title is "March Monthly Highlights," and it says "By Harry Tung." Ex. 2027, at 1. Thus, there is at least a reasonable likelihood that Exhibit 2027 contains the Monthly Highlights for March 2009.

***Exhibit 2028*** – Dr. Tung testified from his personal knowledge that Exhibit 2028 is a true and accurate copy of a presentation related to the caustic dehydrofluorination experiments given by Dr. Bektesevic at a meeting on May 13, 2009. Ex. 2006, at 22. Dr. Tung's testimony confirms that Exhibit 2028 contains the presentation because the Exhibit is dated "May 13, 2009" and its title is "Apollo Technology Review Dehydrofluorination." Ex. 2028, at 1. Furthermore, Dr. Tung testified that Dr. Bektesevic "discussed the kinetics of the reactions, agitator speeds, temperatures, activation energy, conversion, reaction times, and possible solutions for addressing unreacted KOH in the plans for commercial scale-up." Ex. 2006, at 22. This confirms the contents of the slides, which list experimental parameters (*e.g.*, "25% KOH used," "Maximum Agitation (~ 600 rpm)," Ex. 2028, at 1), results (*e.g.*, "Conversion = 50%," Ex. 2028, at 5), and possible solutions (*e.g.*, "Possible solutions-recycle KOH," Ex. 2028, at 5). Thus, there is at least a reasonable likelihood that Exhibit 2028 contains Dr. Bektesevic's May 13, 2009 presentation.



**C. Exhibit 2009 was sufficiently authenticated.**

There is sufficient evidence to authenticate Exhibit 2009 as the Project Permit Change form of May 16, 2008. First, Ms. Goodie testified from her personal knowledge that as a lab technician for Honeywell she performed experiments in 2008 related to caustic dehydrofluorination experiments utilizing KOH, and at that time her name was Angela Mazurkiewicz. Ex. 2037, at 2. This confirms the name (“Angela Mazurkiewicz”) and date (“5-16-08”) in a table in Exhibit 2009. Ex. 2009, at 2. Second, Ms. Goodie also testified from her personal knowledge that Dr. Bektesevic prepared and provided Ms. Goodie with detailed instructions on or near July 16, 2008 so Ms. Goodie could perform caustic dehydrofluorination experiments utilizing KOH. Ex. 2037, at 2. This testimony confirms Dr. Bektesevic’s name on the “Sender” and “Project Responsibility” lines of Exhibit 2009, at 1, as well as the lab setup diagram appended to the form. Ex. 2009, at 6. Added together, then, Ms. Goodie’s testimony *and* the “appearance, contents, [or] substance” of Exhibit 2009 demonstrate at least a “reasonable likelihood” that Exhibit 2009 contains the Project Permit Change Form received by Angela Goodie on or near July 16, 2008.

Petitioner complains that “Ms. Goodie never states that Exhibit 2009 is a *true and accurate copy* of the original Project Permit Change Form dated May 16, 2008.” IPR2015-00916, Paper 46, at 6 (emphasis added). But the authenticity of a document is “not in serious dispute” just because the proponent failed to use these

“magic words.” *See Cordova v. Convergys Corp.*, 2011 WL 1753846, at \*3 n.1 (N.D. Cal. 2011); *also see Broughton v. Livingston Indep. Sch. Dist.*, 2010 WL 4453763, at \*5 (E.D. Tex. 2010) (citing *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529–30 (5th Cir. 2005)) (“While an affiant’s personal knowledge is required for [authentication], no ‘magic words’ are needed . . . .”). As explained earlier, Ms. Goodie testified from her own personal knowledge, and her testimony confirms the “appearance, contents, [or] substance” of Exhibit 2009. This exhibit is thus authenticated and admissible.

Diana Overton’s testimony lends further support. To authenticate a document, a proponent can offer “[e]vidence describing a process or system and showing that it produces an accurate result.” FRE 901(b)(9). Ms. Overton testified that at the time the Project Permit Change Form in Exhibit 2009 was created, there was a policy that the document would be scanned so that Honeywell could create and maintain an electronic file. Ex. 2040, at 3. Petitioner tries to make hay of Ms. Overton’s lack of personal knowledge of how the electronic file was created. *See* IPR2015-00916, Paper 46, at 7.<sup>3</sup> But Ms. Overton testified only to her personal

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<sup>3</sup> Petitioner relies primarily on *Kolmes v. World Fibers Corp.*, 107 F.3d 1534, 1542–43 (Fed. Cir. 1997) to support the argument that Ms. Overton was required to provide “specific information regarding how she knows what procedures were

knowledge as a record-keeper of the process for keeping records in the past. *See U-Haul Int’l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1045 (9th Cir. 2009) (internal marks and citations omitted) (“[Documents] may be authenticated by one who has knowledge of the particular record system.”). In fact, her testimony confirms and explains the scanned appearance of Exhibit 2009. Thus, Ms. Overton’s personal knowledge makes it more likely that Exhibit 2009 contains the Project Permit Change Form dated May 16, 2008.

#### **IV. CONCLUSION**

Honeywell has presented enough evidence to establish at least a “reasonable likelihood” that Exhibits 2007, 2009, 2014, 2017, 2020, 2023, 2025, 2027, and 2028 are authentic. Accordingly, these documents are admissible and Petitioner’s Motion to Exclude must be denied in whole.

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used at the time that Exhibit 2009 was created.” But it is unclear how Petitioner derives this conclusion from *Kolmes*. There, the relevant documents were excluded on hearsay—*not* authentication—grounds because the authenticating declarant failed to qualify as a custodian or other qualified witness within the meaning of FRE 803(6). *Kolmes*, 107 F.3d at 1542–43.

Dated: June 27, 2016

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. § 42.6(e), the undersigned hereby certifies that, on June 27, 2016, a true copy of the foregoing **Patent Owner's Opposition to Petitioner's Motion to Exclude Evidence**, was served by electronic mail on:

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