UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF Outdoor, LLC
Petitioner

v.

Cocona, Inc.
Patent Owner

Patent No. 8,945,287
Inter Partes Review No. IPR2018-00190

PATENT OWNER'S MOTION TO EXCLUDE

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(a), Patent Owner Cocona, Inc. ("Patent Owner") hereby moves to exclude Exhibits 1044, 1049-1059, including any and all references to those exhibits in the deposition transcripts submitted as Exhibits 1045-1048. On January 18, 2019, Patent Owner timely[1] served objections (Ex. 2032) to Exhibits 1044-1059. Exhibits 1044-1059 were submitted by Petitioner in support of Petitioner's Reply (Paper 33).

Petitioner's Exhibit 1044 should be excluded on the following grounds: improper incorporation by reference of other exhibits (37 C.F.R. § 42.6(a)(3)), improper new evidence that could have been presented in a prior filing (37 C.F.R. § 42.23(b)), improper supplemental information (37 C.F.R. § 42.123(b)), lack of authentication (Fed. R. Evid. ("FRE") 901, 902), inadmissible hearsay (FRE 801, 802), improper legal conclusions, improper evidence not directly responsive to Patent Owner's evidence (Revised Trial Practice Guide ("RTPG"), p. 14-15), and improper speculative and conclusory expert opinions (FRE 702, 703) and lacking foundation. Exhibits 1049-1058 should be excluded on the following grounds: improper new evidence that could have been presented in a prior filing (37 C.F.R. § 42.23(b)), improper supplemental information (37 C.F.R. § 42.123(b)), lacking

[1] Objections were served within five (5) business days of evidence proffered with Petitioner's Reply, dated January 18, 2019. *See* 37 C.F.R. 42.64(b)(1).

authentication (FRE 901, 902), inadmissible hearsay (FRE 801, 802), improper evidence not directly responsive to Patent Owner's evidence (RTPG, p. 14-15), irrelevant (FRE 403). Exhibit 1059 should be excluded, since the declarant lacks personal knowledge (FRE 602) and lacks foundation as required to sufficiently authenticate the referenced documents under FRE 901, 902. The declarant also offers improper legal conclusions on the issue of authentication.

II. NEARLY ALL OF EXHIBIT 1044 SHOULD BE EXCLUDED

A. Statements Relying on Unauthenticated, Inadmissible Documents Should Be Excluded

As set forth below fully, Petitioner fails to sufficiently authenticate Exhibits 1049-1051, 1053-1057 as required by FRE 901. None of the proffered documents are self-authenticating (FRE 902), and Petitioner's vague, conclusory statements lack personal knowledge and foundation (Exhibit 1059), and do not satisfy the authentication requirements of FRE 901. Accordingly, all statements offered in Exhibit 1044 that rely on or reference the aforementioned inadmissible, unauthenticated documents should be properly excluded under FRE 901 and the rules governing these proceedings. Specifically, the following paragraphs of Exhibit 1044 should be excluded on this basis: ¶7, ¶14, ¶¶42-49, ¶52, ¶61, ¶71, ¶77.

B. Improper New Evidence and/or Arguments Should Be Excluded

New evidence and/or arguments that could have been presented in a prior filing (i.e., the petition) are properly excludable under applicable rules. TPG at 48,767; 37 C.F.R. §§ 42.23(b), 42.123(b). New evidence, including expert

declarations, should be excluded. *See The Scotts Co. v. Encap, LLC*, IPR2013-00110 (PTAB June 24, 2014) (Paper 79). Further, on reply, a petitioner is narrowly limited to submitting *directly responsive* rebuttal evidence to evidence presented in a patent owner response. RTPG, p. 14. Exhibit 1044 is replete with improper new evidence and arguments presented on reply that could have been presented in a prior filing subject to the Board's exclusionary rules. Most of the statements in Exhibit 1044 simply raise new issues or arguments, and/or are not directly responsive rebuttal evidence to evidence presented in Patent Owner's Response. The Board should exclude all such statements.

Patent Owner respectfully requests that the Board specifically exclude the following statements as improper new evidence presented on reply by Petitioner: ¶7, ¶¶9-13, ¶15, ¶¶17-44, ¶¶46-47, ¶¶49-50, ¶¶52-59, ¶¶61-71, ¶¶73-79. Petitioner could have presented that evidence in its original petition, yet inexplicably failed to include such evidence—from the *same* expert declarant. Petitioner's counsel avers familiarity with the Board's rules, yet failed to seek authorization to submit supplemental information for the plethora of new evidence presented alongside its Reply. *See* 37 C.F.R. § 42.123. Petitioner's improper and untimely attempt to introduce new evidence constitutes inappropriate gap-filling expressly prohibited by the rules of these proceedings, and further constitutes a tacit admission that the

grounds and evidence set forth in support of the original petition lack merit and fail to set forth a prima facie case of purported unpatentability.

C. Statements With Improper Incorporation By Reference Should Be Excluded

37 C.F.R. § 42.6(a)(3) outlines the prohibition against improper incorporation by reference, stating:

> Arguments must not be incorporated by reference from one document into another document. Combined motions, oppositions, replies, or other combined documents are not permitted.

The following paragraphs of Exhibit 1044 should be excluded due to improper incorporation by reference: ¶¶2-3, ¶¶5-6, ¶8, ¶11, ¶¶14-15, ¶20, ¶¶30-31, ¶33, ¶38, ¶¶41-42, ¶¶55-57, ¶60, ¶62, ¶66, ¶68, ¶¶70-71, ¶73, ¶¶78-79, ¶103. Moreover, Petitioner abuses reference to Exhibit 1044 in an improper attempt to circumvent the word limit. *See Cisco Sys., Inc. v. C-Cation Techs., LLC*, IPR2014-00454 (PTAB Aug. 29, 2014) (Paper 12) (informative). Petitioner fails to develop arguments and evidence in its reply, which should preclude said reply from consideration by the Board. *Id*. The fact that Petitioner references a 68-page expert declaration with over 100 discrete statements without adequately developing or presenting those arguments stands as a clear violation of the rules governing these proceedings. Indeed, attempting submit such a voluminous (and improper) new declaration on *reply*—and subject to a 5,600 word limit—all but guaranteed that Petitioner would run afoul of this rule of fundamental fairness as recognized by the Board. To the

extent the Board deems is proper, various statements from Exhibit 1044 that are not developed and presented by Petitioner—and stand as a clear attempt to circumvent word limits—should be excluded on this further basis.

D. Conclusory Expert Opinions and Improper Legal Conclusions in Exhibit 1044 Should Be Excluded

Speculative and/or conclusory expert opinions lacking foundation, factual support, and sufficient reasoning are properly excludable. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); FRE 702, 703. The court's "gatekeeping" role in determining admissibility of expert testimony under FRE 702 and *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) applies to all expert testimony. In all cases where expert testimony is offered, the court must find that the testimony is "properly grounded, well-reasoned and not speculative before it can be admitted." *See* FRE 702, Adv. Comm. Notes (2000) (emphasis added). Thus, where expert testimony is speculative, unduly conclusory, or lacking in sufficient reasoning, exclusion is the appropriate result pursuant to the court's "gatekeeping" role for the *admissibility* of expert testimony. *See Summit 6, LLC v. Samsung Elec. Co., Ltd.*, 802 F.3d 1283, 1295-1299 (Fed. Cir. 2015) (court may exclude evidence that is based upon unreliable principles or methods, legally insufficient facts and data, or where the reasoning or methodology is not sufficiently tied to the facts of the case).

Conclusory expert opinions lacking a supporting factual basis should be stricken or excluded. *See Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 711 F.3d 1348, 1373-1374 (Fed. Cir. 2013) (appellate court finding that lower court abused its discretion in admitting unreliable, conclusory expert testimony). Moreover, conclusory legal opinions offered by experts should also be excluded. *See Hebert v. Lisle Corp.*, 99 F.3d 1109, 1117 (Fed. Cir. 1996) ("We encourage exercise of the trial court's gatekeeper authority when parties proffer, through purported experts, not only unproven science, but markedly incorrect law. Incorrect statements of law are no more admissible through 'experts' than are falsifiable scientific theories.") All of these evidentiary precepts concern the admissibility of expert testimony, *not* the weight or credibility of such expert testimony after being properly admitted. Thus, appropriate treatment of such expert testimony is addressed by the Board on a motion to exclude.

The following statements from Exhibit 1044 should be excluded pursuant to the Board's "gatekeeping" role in excluding inadmissible expert testimony: ¶¶9-10, ¶14, ¶¶16-20, ¶¶22-39, ¶¶41-47, ¶¶49-50, ¶¶52-80, ¶82, ¶¶85-103. For each of the statements in Exhibit 1044 identified, the declarant fails to substantiate her opinions with any factual basis or well-reasoned explanation. By way of example, in Paragraphs 51-65, the declarant fails to provide any explanation or rationale for how the "active particles" of the Haggquist reference could be substituted with the

absorbent particles of Dutta, nor does she provide any articulation of why a POSITA would be motivated to combine the asserted references. The declarant fails to offer any experiments, literature, or other admissible evidence to show that the super-hydrophilic absorbent particles of Dutta could have been replaced with the adsorbent, active particles of Haggquist. There is nothing to show that even if the substitution was made, that the resulting combination would result in the same MVTR as the Challenged Claims, or even the tables in Dutta. Petitioner does not and cannot know what those ranges would be if the references were combined. As a further example of the declarant's speculative, conclusory, foundationless statements, she purports to criticize the testing methodology of Patent Owner's expert, yet provides no factual basis or sufficient reasoning for the statements contained in Paragraphs 85-103. She provides no foundation or explanation for what she believes appropriate testing should accomplish; she can only muster contrarian conclusions without factual support. These types of statements typify the improper opinions and testimony offered by the declarant that should be excluded under applicable case law and evidentiary rules cited herein.

At best, the declarant offers some statements based on unauthenticated documents subject to exclusion, improper new evidence, and improper incorporation of other materials by reference. Much of her purported rebuttal statements amount to nothing more than conclusory, contrarian assertions unsupported by any factual

basis and lacking in sufficient reasoning. Moreover, many of the statements of the declarant are bald legal conclusions. The Board should exercise its "gatekeeping" role with respect the admissibility of expert testimony, and exclude the above-identified statements from consideration in these proceedings.

III. EXHIBITS 1049-1059 SHOULD BE EXCLUDED

A. Failure to Authenticate New Documentary Evidence Warrants Exclusion of Exhibits 1049-1051, 1053-1057

FRE 901 articulates the authentication requirement for evidence. Failure to properly authenticate an item of evidence supports its exclusion. *See Linear Technology Corp. v. Micrel, Inc.*, 275 F.3d 1040, 1055-1056 (Fed. Cir. 2001). FRE 901(b) provides for a wide variety of methods of authenticating items of evidence. Despite the myriad of methods of authentication, Petitioner fails in its attempts to authenticate Exhibits 1049-1051, 1053-1057. The Declaration of Kathleen Ott (Exhibit 1059) exemplifies Petitioner's evidentiary shortcomings. Petitioner does not provide any testimony or statements from witnesses with knowledge who can properly authenticate these exhibits. Ott—counsel of record for Petitioner—lacks personal knowledge under FRE 602 and 901(b) to independently authenticate any of these exhibits. Where a declarant attempts—and fails—to demonstrate a foundational basis for authenticating proffered evidence, such proffered evidence should be properly excluded. *See Homeland Housewares, LLC v. Sorensen Research*, 581 Fed.Appx. 869, 873 (Fed. Cir. 2014).

Petitioner has failed to provide sufficient evidence to support a finding that the documents are what Petitioner claims they are—thus, Exhibits 1049-1051, 1053-1057 are inadmissible. By extension, any reference to those exhibits in other documents (i.e., Exhibits 1044-1048) should correspondingly be excluded due to this failure of authentication.

B. Presenting New Evidence on Reply Warrants Exclusion

"Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g., to make out a prima facie case of unpatentability." RTPG, p. 14. Likewise, "[i]t is also improper to present in reply new evidence (including new expert testimony) that could have been presented in a prior filing, for example newly cited prior art references intended to "gap-fill" by teaching a claim element that was not present in the prior art presented with the petition. *See Genzyme Therapeutic Prods. Ltd. v. Biomarin Pharm. Inc.*, 825 F.3d 1360, 1365–69 (Fed. Cir. 2016)." RTPG, p. 15.

Each of Exhibits 1049-1059 constitute improper new evidence submitted by Petitioner in its reply that it could have presented earlier. Exhibit 1052 is a collection of interrogatory responses in the related district court proceedings that were served on Petitioner on *April 19, 2017*—information that was plainly available to Petitioner at the time of filing the original petition. Without admitting to the actual creation, publishing, or availability of any of Exhibits 1049-1051, 1053-1057, each of those

exhibits bear dates that indicate that they predate the filing of the petition and could have been presented earlier, but were not. Moreover, should Petitioner have desired to include that new evidence for the Board's consideration as part of these proceedings, Petitioner should have sought authorization to file a motion to submit supplemental information, in accordance with applicable rules. In all likelihood, Petitioner avoided complying with the Board's rules because Petitioner had no reason that this new evidence could not have been obtained earlier, nor would the inclusion of that information been in the interests of justice. 37 C.F.R. § 42.123(b). In fact, that must be the conclusion drawn by the Board based on Petitioner's conduct.

By deluging the Board and Patent Owner with new exhibits, Petitioner tacitly acknowledges glaring deficiencies in its original petition and evidence, implicitly admits that it had no reason the information could not have been presented earlier, and now inappropriately attempts to circumvent the Board's rules regarding new evidence. This can be seen in the fact that Petitioner blind-sided various witnesses with these very same brand-new exhibits during depositions of Patent Owner's declarants. Exs. 1045-1048. Now, fully appreciating the fundamental deficiencies in the petition and with the hearing looming, Petitioner ignores the rules of these proceedings and inappropriately attempts to gap-fill via this improper new evidence. The petition and that original evidence frames these proceedings, and Petitioner is

limited to that evidence in presenting its case to the Board. *See Standard Innovation Corp. v. LELO, Inc.*, IPR2014-00148 (PTAB Apr. 23, 2015) (Paper 41). To allow such evidence to be admitted would be tantamount to rewarding Petitioner's improper conduct and violations of the rules of these proceedings, and would set a dangerous precedent for future proceedings before the Board.

C. Exhibits 1049-1051, 1053-1057 Should Be Excluded as Inadmissible Hearsay

FRE 801, 802 provide for the exclusion of hearsay—that is, a statement other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Each of Exhibits 1049-1051, 1053-1057 constitute out-of-court statements that would only be relevant if Petitioner offered them to prove the truth of those statements. This is precisely the type of inadmissible hearsay evidence that courts routinely exclude. *See Acceleration Bay LLC v. Activision Blizzard Inc.*, 2018 WL 5045186, *3 (D. Del. Oct. 17, 2018). Exhibits 1049-1051, 1053-1057 should be excluded on this further basis.

D. Failure to Cite To Exhibits 1054, 1056-1057 Justifies Exclusion

Petitioner's Reply fails to cite to or explain Exhibits 1054, 1056-1057. There is no reference to any of these exhibits in the Reply. Arguments and evidence that are not developed and presented in Petitioner's paper are not entitled to consideration by the Board. *See Cisco Sys., Inc. v. C-Cation Techs., LLC,* IPR2014-00454 (PTAB

Aug. 29, 2014) (Paper 12) (informative). Exhibits 1054, 1056-1057 are simply not cited, referenced, explained, or presented as the basis for any argument in Petitioner's Reply. Accordingly, rules governing these proceedings militate in favor of an order excluding these exhibits from the Board's consideration.

IV. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude Petitioner's exhibits as outlined herein.

Dated: January 31, 2019

Respectfully submitted,
By: /Jason S. Jackson/
Jason S. Jackson
Reg. No. 56,733
Lead Counsel for Patent Owner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel for Petitioner:

Peter A. Gergely
PGergely@merchantgould.com

Kathleen Ott
kott@merchantgould.com

Date: January 31, 2019

/Jason S. Jackson/
Jason S. Jackson