

Filed on behalf of VF Outdoor, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF OUTDOOR, LLC,
Petitioner,

v.

COCONA, INC.,
Patent Owner.

Case No.: IPR2018-00190
Patent No.: 8,945,287

PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE

Pursuant to 37 C.F.R. § 42.23(a), Petitioner VF Outdoor, LLC (“VF”) hereby opposes Patent Owner’s (“Cocona”) Motion to Exclude.

I. INTRODUCTION

Cocona’s motion to exclude should be denied. VF replied to arguments raised in Cocona’s Response with admissible and properly presented evidence.

II. ARGUMENT

A. Exhibit 1044 is Based on Authenticated Exhibits

Cocona’s motion to exclude paragraphs of the Second Declaration of Abigail Oelker, Ph.D. in Support of Petitioner’s Reply to The Patent Owner Response (“Dr. Oelker’s Reply”) on grounds of authenticity, (Paper 42, 2), should be denied. The exhibits at issue are authentic. Section II.E.1, *infra*.

B. VF Properly Replied to Cocona’s Arguments and Evidence

Cocona argues that VF improperly presented new evidence and/or arguments. (Paper 42, 2 & 9-11.) Cocona does not properly support its motion under 37 C.F.R. § 42.22(a)(2) and 42.64(c). Cocona simply attaches a copy of its objections, and concludes, with no support or analysis, that certain paragraphs of Dr. Oelker’s Reply and Exhibits 1049-1059 are “improper new evidence.” These grounds should be denied as conclusory and unsupported. (*Securus Techs., Inc. v. Global Tel*Link Corp.*, IPR2015-00153, Paper 12, at 8 (P.T.A.B. May 1, 2015) (quoting *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999) (“A brief must

make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.”).)

Moreover, the challenged paragraphs and exhibits properly reply to arguments and evidence raised in Cocona’s Response. New evidence is permissible “as long as the opposing party is given notice of the evidence and an opportunity to respond to it.” (*Anacor Pharmaceuticals., Inc. v. Iancu*, 899 F.3d 1372, 1380 (Fed. Cir. 2017).) That is the case here. Cocona received notice of Dr. Oelker’s Reply and all of the exhibits at issue, noticed but then withdrew Dr. Oelker’s deposition (Papers 32, 36), and filed a sur-reply. (Paper 40.) Further, Exhibits 1049-1057 were introduced as exhibits during the depositions of Cocona’s experts (Daniels, Callan) and employees (Bowman, Haggquist). (Ex. 1044, 6.) Thus, Cocona had pre-Reply notice of these exhibits and an opportunity to conduct re-direct examination of its own witnesses and cross-examine Dr. Oelker on the documents. Cocona chose not to do so.

Additionally, Petitioner “may introduce new evidence after the petition stage if the evidence is a legitimate reply to evidence introduced by the patent owner or if it is used ‘to document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness.’” (*Anacor*, 899 F.3d at 1380-81 (emphasis added).) That is also the case here. VF’s *prima facie* case of unpatentability relies solely upon *Dutta, Halley and Haggquist* (see e.g., Paper 1,

21-32, 50-56), and none of the challenged paragraphs or Exhibits 1049-1059 are required to make out a prima facie case or to “gap-fill” a claim element not disclosed in that prior art. Instead, the challenged paragraphs of Dr. Oelker’s Reply and Exhibits 1049-1059 “show the state of the art at the time of the invention” and “document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness.” (*Genzyme Therapeutics Prods. Ltd. v. Biomarin Pharm. Inc.*, 825 F. 3d 1360, 1369 (Fed. Cir. 2016) *quoting Ariosa*, 805 F. 3d at 1365.) Contrary to Cocona’s contentions, Petitioner does not present previously unidentified pieces of prior art in order to make a meaningfully distinct contention or “entirely new rationale” for unpatentability, but only uses its Reply exhibits to expand upon the same arguments made in the Petition. (*Ericsson Inc. v. Intellectual Ventures I LLC*, No. 17-1521, at 12-13 (Fed. Cir. 2018).)

The Board instituted trial based on *Dutta*, *Halley*, and *Haggquist*. (Paper 14, 28.) *Dutta* discloses the active particle Sephadex. (Paper 1, 22-23, 34; Paper 33, 10.) *Halley* discloses the active particle Black Pearls 2000 (a carbon), along with the admittedly active particles titanium dioxide, zinc oxide, aluminum oxide, and silica. (Paper 1, 51, 53-54, 59, 63; Ex. 1005, ¶203, Paper 33, 18.) *Haggquist* discloses admittedly active particles. (Paper 1, 23, 38-39, 60; Paper 33, 16-17.) The Board construed “active particle” as “particles that have the capacity to cause

chemical reactions at the surface or physical reactions, such as, adsorb or trap substances.” (Paper 14, 10.)

To support its Petition, VF and its expert cited *Sherma*, which states that Sephadex adsorbs water, and which the Board cited in its institution decision. (Paper 1, 34 (*citing* Ex. 1005, ¶¶121-122), 43; Paper 14, 17.) VF also cited *Wang*, which states that Black Pearls 2000 adsorbs water, which the Board likewise cited. (Paper 1, 57 (*citing* Ex. 1005, ¶¶202-203); Paper 14, 24.) In response, Cocona did not address *Sherma* or *Wang*, but submitted lengthy expert declarations arguing that Sephadex and Black Pearls 2000 absorbed, but did not adsorb water. (Ex. 2006, ¶¶83-85, 98-99, 102; Ex. 2005, ¶¶61, 74, 88-90.) Cocona also disagreed with the Board’s construction, suggesting that “active particles” means “particles that adsorb or trap substances on their surface.” (Paper 20, 6-7.) Thereafter, VF and its expert, Dr. Oelker, properly replied to these arguments by *inter alia* citing references that, like *Sherma* and *Wang*, described the state of the art and a POSITA’s knowledge of the prior art, i.e., that a POSITA would understand that the prior art discloses Sephadex and Black Pearls 2000 as adsorbing or trapping substances. (Paper 33, 11-12, 18-19; Ex. 1044, ¶42-45.) The references relied upon by Dr. Oelker also demonstrate that Sephadex and Black Pearls 2000 are “particles that adsorb or trap substances on their surface” under Cocona’s narrow construction. (*Id.* (emphasis added).)

Indeed, *Texter*, *Pavia*, and *Marenco* (Exs. 1049, 1050, 1054-55) disclose that Sephadex adsorbs water, (Ex. 1044, ¶¶42-43), and therefore reply to Cocona’s argument regarding the Sephadex particles of Dutta, e.g., expert testimony that “hydrophilic absorptive materials ... are completely different from a particle adsorbing water into its pores and surface topology.” (Paper 33, 11-12 *citing* Ex. 2006, ¶¶84-85.) *Marenco* also discloses that Sephadex traps water on its surface (Ex. 1044, ¶¶44, 49), and therefore demonstrates that Sephadex meets Cocona’s narrow construction raised in its Response.

Another *Wang* article (Ex. 1051) states that Black Pearls 2000 adsorbs water, (Ex. 1044, ¶71), and thus replies to Cocona’s argument regarding the Black Pearls 2000 particles of *Halley*, including expert testimony that “Halley requires the use of ‘solely absorptive particles’.” (Paper 33, 18 *citing* Ex. 2006, ¶84.) *Jurassic* (Ex. 1053) shows that activated carbon can adsorb or trap water beyond its interior edge, (Ex. 1044, ¶44), which is consistent with Dr. Daniels’ testimony that water adheres to the exterior and interior of Sephadex. (*Id.*) Furthermore, Asbury SDS (Ex. 1056) states that activated carbon is inert, responding to Cocona’s argument that inert particles cannot be active (Ex. 1044, ¶¶61); and *Remington’s* (Ex. 1057) discloses that the claimed active particle cinoxate absorbs light, responding to Cocona’s argument that active particles are only adsorbent. (Ex. 1044, ¶13, FN1 *citing* Ex. 1057, 1290.)

Finally, the challenged paragraphs from Dr. Oelker's Reply demonstrate that the arguments and evidence cited therein are in proper reply to arguments raised by Cocona. Objected paragraphs 9-13, 15 and 17 reply to Cocona's arguments on "active particles" (*see e.g.*, Ex. 1044, ¶¶9-10, 16); objected paragraphs 19-29 reply to Cocona's arguments on "first thickness" (*see id.* at ¶¶18-19, 24, 27-29); objected paragraphs 30-37 reply to Cocona's arguments on "second thickness" (*see id.* at ¶¶30, 32, 33, 35, 37-29); objected paragraphs 38-44, 46-47, 49-50, and 52-58 reply to Cocona's arguments on Ground 1 (*see id.* at ¶¶38-40, 46-48, 50-51, 53-57); objected paragraphs 59 and 61-65 reply to Cocona's arguments on Ground 2 (*see id.* at ¶¶59-61, 63-64); objected paragraphs 66-71 and 73-75 reply to Cocona's arguments on Ground 3 (*see id.* at ¶¶66-67, 69, 72-74); and objected paragraphs 76-79 reply to Cocona's arguments on Ground 4 (*see id.* at ¶¶76-79).

And Cocona's interrogatory responses (Ex. 1052) were used to reply to secondary considerations Cocona raised in its Response. (Paper 33, 26 *citing* Ex. 1052, 21-22 (supporting that "neither PO nor its licensees practice the claims of the '287 patent.").)

C. VF Did Not Improperly Incorporate by Reference

Cocona's motion to exclude paragraphs of Dr. Oelker's Reply on grounds of improper incorporation by reference (Paper 42, 4), should be denied, at least because Cocona has not identified what specifically constitutes the improper

incorporations by reference. (*Securus Techs., Inc.* Paper 12, at 8.) Dr. Oelker's Reply properly cites to the institution decision and the evidence of record, including prior testimony of the experts, and it explains the relevance of these citations in the paragraphs themselves. (See e.g., Ex. 1044, ¶¶11, 20, 41, 55 (citing to the First Oelker Declaration with proper explanation).) VF does not fail to develop arguments and evidence in its Reply, in violation of Rule 42.6(a)(3). The Reply properly explains the significance of Dr. Oelker's Reply arguments throughout the document. Ironically, Cocona's own Response relied upon five separate witness declarations spanning ~125 pages and citing 25 new exhibits.

D. Dr. Oelker's Reply is Well Supported

Cocona's motion to exclude paragraphs of Dr. Oelker's Reply for "fail[ing] to substantiate her opinions with any factual basis or well-reasoned explanation" (Paper 42, 6), should be denied for failure, in large part, to identify the reasons why these paragraphs specifically constitute an unsubstantiated opinion. (*Securus Techs., Inc.*, Paper 12, at 8.) Regarding Cocona's one specific argument, the reasons to combine *Dutta* and *Haggquist* and reasonable expectation of success were properly addressed in the Petition and in the First Oelker Declaration. (Paper 1, 42-49; Ex. 1005, ¶¶147-188.) These documents also explain how the combination of references would have provided an MVTR within the claimed range with a reasonable expectation of success. (Paper 1, 41-42; Ex. 1005, ¶¶156-

158, 172-172.) There is no requirement that Dr. Oelker prove the requisite expectation of success through testing. (*Soft Gel Technologies, Inc. v. Jarrow Formulas, Inc.*, 864 F.3d 1334, 1342 (Fed. Cir. 2017) (“absolute predictability” is not the standard for “reasonable expectation of success.”); *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1364 (Fed. Cir. 2007).)

E. Exhibits 1049-1059 are Admissible

1. Exhibits 1049-1051, 1053-1057 are properly authenticated under FRE 901 and/or are self-authenticating under FRE 902

VF provided sufficient evidence and a declaration (Ex. 1059) establishing that Exhibits 1049-1051 and 1053-1057 are what VF claims them to be. (FRE 901(a); *see Motorola Mobility, LLC v. Intellectual Venture I, LLC*, CBM2015-0004, Paper 33, at 15, 17 (PTAB March 21, 2016).) Moreover, each of Exhibits 1049-1051 and 1053-1057 is self-authenticating under FRE 902:

a) Journal Articles – Exs. 1049 and 1051

Texer (Ex. 1049) and *Wang* (Ex. 1051) are published scientific journal articles and are thus self-authenticating “periodicals” or materials “purporting to be a ... periodical” that require “no extrinsic evidence of authenticity in order to be admitted” pursuant to FRE 902(6). (*Liberty Mutual Insurance Co. v. Progressive Casualty insurance company*, IPR2013-00002, Paper 59, at 39-40 (PTAB February 24, 2014); *TCL Corporation v. Telefonaktiebolaget LM Ericsson*, IPR2015-01584, Paper 75, at 21-22 (PTAB Jan. 24, 2017).) *Texer* was published in Volume 41 of

Carbohydrate Research in 1975, and *Wang* was published in Volume 51 of *Electrochimica Acta* in 2006. (Ex. 1049, 191; Ex. 1051, 4909; Ex. 1059, ¶¶6, 8.)

Texter and *Wang* also have the “appearance, contents, substance, internal patterns and other distinctive characteristics” to evince their authenticity - e.g., the content pages have formatting, layout, headers, font type and publisher information to establish that they were published in scientific journals and have not been altered. The Board has found such indicia establishes authenticity under FRE 901(b)(4). (*Intri-Plex Techs., Inc v. Saint-Gobain Performance Plastics Rencol Ltd.*, IPR2014-00309, Paper 83, at 17 (PTAB Mar 23, 2014); *QSC Audio Prods., LLC v. Crest Audio, Inc.*, IPR2014-00127, Paper 43, at 9-12 (PTAB Apr. 29, 2015).) Moreover, the Ott Declaration (Ex. 1059) contains testimony indicating that *Texter* and *Wang* are what they are claimed to be under FRE 901(b)(1) (including, for example, the title, author and publication volume and year). (Ex. 1059, ¶¶6, 8.) *Texter* also qualifies as an ancient document under FRE 901(b)(8), because it is approximately 44 years old, is in a condition that creates no suspicion about its authenticity, and was found in the journal *Carbohydrate Research* where it would likely be. (*Liberty Mutual Insurance*, Paper 59, at 39-40.)

b) Textbook Excerpts – Exs. 1050 and 1057

Pavia (Ex. 1050) and *Remington’s* (Ex. 1057) are textbook excerpts including a publisher’s label affixed in the course of business indicating origin,

ownership and control, and are thus self-authenticating under FRE 902(7). (Ex. 1050, 2; Ex. 1057, 1-2.) Each document includes the title pages and copyright page of the textbooks from which the relevant evidence was taken, and each of the content pages has formatting, layout, headers and font type which indicate that they are unaltered. (FRE 901(b)(4); *Intri-Plex Techs*, Paper 83, at 17; *QSC Audio Prods.*, Paper 43, at 9-12.) VF also provides sufficient testimony under FRE 901(b)(1) to establish that *Pavia* and *Remington's* are what VF claims them to be. (Ex. 1059, ¶¶7, 14.) *Pavia* also qualifies as an ancient document under FRE 901(b)(8), because it is approximately 30 years old based on its Library of Congress Catalog Card No. 89-10336 (Ex. 1050, 3) (https://catalog.loc.gov/vwebv/ui/en_US/htdocs/help/numbers.html), and is in a condition that creates no suspicion about its authenticity. (*Liberty Mutual Insurance*, Paper 59 at 39-40.) VF further served supplemental evidence on Cocona (Ex. 1057A) to establish that Remington's is the 21st edition of the textbook, which published in 2005. (Ex. 1057A, 5.)

c) Government Publications – Exs. 1054 and 1055

Marenco (Ex. 1055) and its abstract (Ex. 1054) are “official publication[s] purporting to be issued by a public authority” - i.e., Defence R&D Canada - and are thus self-authenticating under FRE 902(5). (Ex. 1054, 1; Ex. 1055, 1-2; *see also* Ex. 1054 footer (establishing access of the *Marenco* abstract at the Canadian

website <http://pubs.drdc-rddc.gc.ca>); *Chicago Mercantile Exchange, Inc. v. 5th Market, Inc.*, CBM2014-00114, Paper 35 at 54 (PTAB Aug. 18, 2015).) *Marengo* further contains a label for “Canada” and “Defence R&D Canada,” indicating origin, ownership and control, and is also self-authenticating under FRE 902(7). Each of the content pages of the *Marengo* documents also has a formatting, layout, footers and font type, which indicate that they are unaltered. (FRE 901(b)(4); *Intri-Plex Techs*, Paper 83 at 17; *QSC Audio Prods.*, Paper 43 at 9-12.) The *Marengo* Abstract is further authenticated based on its distinctive characteristics under FRE 901(b)(4), as an abstract published at the Canadian government website <http://pubs.drdc-rddc.gc.ca>. (Ex. 1054, footer.) VF provides sufficient testimony under FRE 901(b)(1) to establish that the *Marengo* documents are what they are claimed to be, including the websites on which the documents are hosted and the time accessed. (Ex. 1059, ¶¶11-12.)

d) Corporate Documents – Exs. 1053 and 1056

Jurassic (Ex. 1053) and *Asbury* (Ex. 1056) each contain a corporate label affixed in the course of business indicating origin, ownership and control, and are self-authenticating under FRE 902(7). (Ex. 1053, 1 (Jurassic logo at top left); Ex. 1056, 1 (Asbury logos at top left and in footer).) Each of the content pages of *Jurassic* and *Asbury* also has a formatting, layout, footer and font type which indicate that they are unaltered, including corporate logo footers (Ex. 1056) and

corporate website footers (Ex. 1053) on every page. (FRE 901(b)(4); *Intri-Plex Techs*, Paper 83 at 17; *QSC Audio Prods.*, Paper 43 at 9-12.) Asbury contains further distinctive characteristics in the form of corporate addresses and contact information for the Asbury company. (*Motorola Mobility*, Paper 33 at 17.) VF also provides sufficient testimony under FRE 901(b)(1) to establish that *Jurassic* and *Asbury* are what they are claimed to be, including the websites on which the documents are hosted and the time accessed.

2. Exhibits 1049-1051, 1053-1057 are not hearsay

Cocona argues that Exhibits 1049-1051 and 1053-1057 should also be excluded as inadmissible hearsay, but does not identify specifically the textual portions of the exhibits that allegedly are “out-of-court statements that would only be relevant if Petitioner offered them to prove the truth of those statements.” (Paper 42, 11.) The Board should disregard Cocona’s motion for hearsay exclusion, at least because it lacks the specificity required to support the relief requested. (*Securus Techs.*, Paper 12, at 8.)

Moreover, exhibits 1049-1051 and 1053-1057 are being offered as relevant for what they describe and teach to a person of ordinary skill in the art (POSITA), and not for the truth of any statements in the documents. (*EMC Corporation*, Paper 66, at 32 *citing Joy Techs., Inc. v. Manbeck*, 751 F. Supp. 225, 233 n.2 (D.D.C 1990); Fed. R. Evid. 801(c) 1997 Adv. Comm. Note (“If the significance of an

offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.) The documents are therefore not inadmissible as hearsay under FRE 801(c)

For example, VF relies upon *Texter* (Ex. 1049), *Pavia* (Ex. 1050) and *Marenco* (Ex. 1055) to evince what a POSITA would have understood about the Sephadex particles disclosed in *Dutta* (Ex. 1003). (Reply, Paper 33, 11-12.) (*Nuevolution A/S v. Chemgene Holdings APS*, IPR2017-01598, Paper 47 at 69-70 (PTAB Jan. 9, 2019) citing *Yeda Research v. Mylan Pharm. Inc.*, 906 F.3d 1031, 1041 (Fed. Cir. 2018) (noting evidence of what was known “can be relied on for their proper supporting roles,” including “how one with ordinary skill in the art would have understood a prior art disclosure.”).) *Wang* (Ex. 1051) is relevant for teaching a POSITA about the properties of Black Pearls 2000 particles, as described in *Halley* (Ex. 1003). (Paper 33, 18.) *Remington’s* (Ex. 1057) is relevant to explain why the claim term “‘active particles’ has a broader meaning” than Cocona advocates. (Paper 22, 2-3 citing Ex. 1044, ¶13.) *Jurassic* and *Asbury* are used in similar capacities. (See Paper 22, 12 citing Ex. 1053, 2 and Ex. 1044, ¶61.) The *Marenco* abstract (Ex. 1054) is only offered to establish the publication date for *Marenco* (Ex. 1055) as March 1, 2004. (Ex. 1054, 2.)

Even if *arguendo* Exhibits 1049-1051 and 1053-1057 were being offered for the truth of their statements (which is not the case), the statements in at least

Exhibits 1049-1051, and 1057 are excepted from the rule against hearsay under FRE 803(18), since each qualifies as reliable authority - either as a learned treatise (*Pavia* and *Remington's* are textbooks) or a periodical (*Texter* and *Wang* are journal articles) - and their relevant statements were relied upon by Dr. Oelker on direct examination. (See e.g., Ex. 1044, ¶¶13, 42-44, 71, and FN1; *Liberty Mutual*, Paper 59 at 38 (holding that documents of the type that experts reasonably would rely on to form their opinions need not be admissible for the expert testimony to be admissible).))

As explained in Sections II.E.1.a-b, *Texter* and *Pavia* (Exs. 1049-1050) are also authenticated ancient documents prepared before January 1, 1998, and any statements contained therein are excepted from the rule against hearsay under FRE 803(16). VF further submits that *Asbury* (Ex. 1056) is excepted under 803(17), because it is a commercial publication on an activated carbon product marketed by Asbury Carbons, which persons in the industry would generally rely upon to assess the safety data contained therein. (Ex. 1056, 1-3 (see e.g., Section 2: Hazards Identification, Section 4 – First Aid Measures, Section 11: Toxicological Information).))

3. Exhibits 1056-1057 are cited to and explained in Dr. Oelker's Reply

Cocona contends that VF's Reply fails to cite or explain Exhibits 1056-1057, and that there is no reference to any of these exhibits in the Reply. (Paper 42,

11.) This is not correct. The Reply cites to paragraphs in Dr. Oelker's Reply which, in turn, cite to and further explain the relevance of these exhibits. (Paper 33, 2 (*citing* Ex. 1044, ¶13 and FN1), 16 (*citing* Ex. 1044, ¶63).) VF respectfully submits that a failure to expressly cite Exhibits 1056-1057 in its Reply raises form over substance and does not "militate in favor of an order excluding these exhibits from the Board's consideration," as Cocona suggests. (Paper 42, 12.)

III. CONCLUSION

There is a "strong public policy for making all information filed in a quasi-judicial proceeding available to the public, especially in an *inter partes* review, which determines the patentability of a claim in an issued patent," and the Board is perfectly capable of assigning the appropriate weight to be accorded to VF's Reply evidence. (*EMC Corporation v. PersonalWeb Technologies LLC*, IPR2013-00086, Paper 66 at 28-29 (PTAB May 15, 2014).) Accordingly, based upon the arguments herein, each of Exhibits 1044 and 1049-1059 is admissible and should not be excluded.

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CERTIFICATE OF SERVICE ON PATENT OWNER

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on February 8, 2019, a complete and entire copy of this **PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE** was served on the following counsel for Patent Owner:

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