

Paper No. ____
Date Filed: July 15, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

3M Company, Merck & Co., Inc., and Merck Sharp & Dohme Corp.

Petitioners,

v .

AptarFrance S.A.S.,

Patent Owner.

Case IPR2018-01055
Patent No. 9,370,631

PETITIONERS' MOTION TO EXCLUDE

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I. INTRODUCTION

With its Corrected Patent Owner Response (“Response”) (Paper 27), Aptar submitted and relied on Exhibit 2020 — a video from “TheKidShouldSeeThis.com,” which is a website aimed at teaching science to young children. As described below, every statement Aptar attempts to introduce Exhibit 2020 violates the prohibition on hearsay pursuant to Federal Rule of Evidence 802. For at least the reasons discussed below, the Board should exclude Aptar’s Exhibit 2020 from the present IPR as inadmissible under the Federal Rules of Evidence.¹

II. ARGUMENT

Ground 3 of the Petition relies on the Rhoades patent (Ex. 1009), a prior art reference disclosing a mechanical pen having a simple mechanism for converting linear to rotational motion. In its attempt to respond to Rhoades, Aptar relied on several out of court statements from Exhibit 2020 for the truth of the matter asserted: (1) statements that the video accurately describes the complete functionality of Rhoades (Ex. 2020 at 1:08-2:24; Resp. at 43 n.11) and (2) the statement that “it took

¹ Petitioners previously objected to Exhibit 2020 in their timely filed Objections to Evidence, filed on February 21, 2019. Paper 24 at 2-3. Aptar’s supplemental evidence addressed a separate objection to the authenticity of Exhibit 2020, but it did not address the hearsay objection.

a team of sixty-six people to design this pen” (Ex. 2020 at 3:44-3:47; Resp. at 43 n.11). The Board should exclude Exhibit 2020 as inadmissible hearsay because all of the statements cited by Aptar therein are hearsay to which no valid exception applies.

A. The statement that Exhibit 2020 accurately describes the complete functionality of Rhoades is inadmissible hearsay

Aptar and its expert rely on Exhibit 2020 as accurately describing the complete functionality of Rhoades (Ex. 1009). Ex. 2020 at 1:08-2:24; Resp. at 43 n.11; Ex. 2021 at ¶ 69. These statements are hearsay as they were not made while testifying for the current proceeding and are being offered for the truth of the matter asserted therein. FRE 801.

As an initial matter, Petitioners dispute that Exhibit 2020 states that it accurately describes the complete functionality of Rhoades (Ex. 1009). Although the video (Ex. 2020) that Aptar relies on mentions the Rhoades patent (Ex. 2020 at 1:08), there is no evidence in the record that this 4-minute video aimed at teaching science to children is an accurate depiction of the relevant aspects of the Rhoades (Ex. 1009) disclosure. To the contrary, Aptar's expert, Mr. Clemens, testified that the pen disclosed in the video is *different* from the pen disclosed in the Rhoades reference. Clemens Tr., Ex. 1057 at 77:23-78:14 (Q. “. . . is that horizontal line in

the video the line you were drawing on Exhibit 1054² we were talking about earlier? A. With the proviso that *these are two different, you know, designs being shown here . . .*”) (emphasis added). Regardless, to the extent that Aptar and its expert allege that Exhibit 2020 accurately describes the complete functionality of Rhoades (Ex. 1009), all such statements are hearsay.

Further, these statements do not fall under any proper hearsay exception, and Aptar has made no argument that any exception applies that would render the statements admissible. *See* FRE 803. It also has not shown that the residual exception under FRE 807 applies. And, Aptar cannot credibly argue that the statements in Exhibit 2020 allegedly relating to the functionality of Rhoades have equivalent circumstantial guarantees of trustworthiness as that of testimony from these same declarants if Petitioners had an opportunity for vigorous cross examination of the producers of the video. As discussed above, Mr. Clemens’s testimony directly contradicted any suggestion that the video (Ex. 2020) accurately describes the complete functionality of Rhoades (Ex. 1009). Clemens Tr., Ex. 1057 at 77:23-78:14. Aptar also has not shown that this is an “exceptional case” under FRE 807. *See, e.g., Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir.

² The “line” that Mr. Clemens drew refers to Mr. Clemens’s annotation of Figure 9 of the Rhoades reference. Clemens Tr., Ex. 1057 at 57:9-58:25.

1996) (“The two residual hearsay exceptions . . . were meant to be reserved for exceptional cases.”). Thus, the residual exception of FRE 807 does not apply.

Accordingly, for at least these reasons, the Board should exclude these statements from Exhibit 2020 cited and quoted in the Response and in Mr. Clemens’s declaration (Ex. 2021) as inadmissible hearsay.

B. The statement that “it took a team of sixty-six people to design this pen” is inadmissible hearsay

Aptar and its expert additionally rely on the statement in the video (Ex. 2020) that “it took a team of sixty-six people to design this pen.” *Id.* at 3:44-3:47; Resp. at 43 n.11; Ex. 2021 at ¶ 69. They rely on this statement as evidence that pens are “highly optimized systems [that] are unique for their purpose (requiring 60 [sic] people to create) and are not easily modified or interchanged for other purposes.” Resp. at 43 n.11; Ex. 2021 at ¶ 69. The cited statement in Exhibit 2020 is hearsay as it was not made while testifying for the current proceeding and it is being offered for the truth of the matter asserted therein.

Further, this statement does not fall under any proper hearsay exception, and Aptar has made no argument that any exception applies that would render the statements admissible. *See* FRE 803. It also has not shown that the residual exception under FRE 807 applies. And, Aptar cannot credibly argue that the statement in Exhibit 2020 has equivalent circumstantial guarantees of

trustworthiness as that of testimony from these same declarants if Petitioners had an opportunity for vigorous cross examination of the producers of the video. In fact, the record calls into question the reliability of the statement in Exhibit 2020. Mr. Clemens does not personally know the speaker in the video, Mr. Hammack, nor does he know much about him. Clemens Tr., Ex. 1057 at 148:23-149:18. Mr. Clemens also has never spoken with Mr. Hammack. *Id.* at 149:11-12. And there is no evidence in the record that Mr. Clemens knew any of the alleged individuals who worked on the design of the pen in the 1950s. *Id.* at 166:15-23. Further, the Rhoades patent that Aptar alleges is accurately depicted in the video lists just a single inventor, not sixty-six. Ex. 1009 at cover. Cross-examination may have revealed that Mr. Hammack broadly defined “designer” to include tasks unrelated to the engineering of the pen, such as: product packaging, branding, ink colors and more. In fact, Mr. Hammack himself may not know the roles played by the alleged sixty-six designers. Nothing in the video suggests that Mr. Hammack was personally involved in the design of the pen in the early 1950s.³ Thus, to the extent that Mr. Hammack was relying on a statement that was relayed to him by another individual, the statement would be even more suspect, as hearsay within hearsay. Aptar also

³ According to Wikipedia, Mr. Hammack was born in 1961. WIKIPEDIA, https://en.wikipedia.org/wiki/William_S._Hammack (last visited July 11, 2019).

has not shown that this is an “exceptional case” under FRE 807. *See, e.g., Conoco*, 99 F.3d at 392 (“The two residual hearsay exceptions . . . were meant to be reserved for exceptional cases.”). Thus, the residual exception of FRE 807 does not apply.

Accordingly, for at least these reasons, the Board should exclude this statement from Exhibit 2020 cited and quoted in the Response and in Mr. Clemens’s declaration (Ex. 2021) as inadmissible hearsay.

III. CONCLUSION

Every statement Aptar relied on from Exhibit 2020 is inadmissible hearsay and Exhibit 2020 should be excluded from the present proceeding as inadmissible hearsay under the Federal Rules of Evidence.

Respectfully submitted,

Dated: July 15, 2019

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies service of a complete and entire copy of this Petitioners' Motion to Exclude, on the counsel of record for the Patent Owner by filing this document through the End-to-End System as well as delivering a copy via electronic mail to the following address:

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