

Case No. IPR2018-01055

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.

Aptar France S.A.S.,
Patent Owner

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

Patent Owner's Opposition to Petitioners' Motion to Exclude Evidence

I. INTRODUCTION

Aptar France SAS and AptarGroup, Inc. (collectively, “Patent Owner”) opposes the Motion to Exclude (“Motion”) submitted by 3M Company, Merck & Co., Inc., and Merck Sharp & Dohme Corp. (collectively, “Petitioners”) requesting that the Board exclude Aptar’s Exhibit 2020. As explained below, Petitioners’ arguments should be rejected because experts are permitted to rely on otherwise inadmissible evidence. Moreover, Petitioners’ criticisms of Exhibit 2020 go to its weight, not its admissibility. As such, Petitioners’ motion should be denied.

II. ARGUMENT

A. Mr. Clemens may properly rely on Exhibit 2020.

Petitioners object to Exhibit 2020 as hearsay under F.R.E. 801 and seek its exclusion on that basis. Paper 37 at 1-2. However, Petitioners’ objections to Exhibit 2020 are inapposite.

As a preliminary matter, Petitioners misrepresent the scope of Aptar’s reliance on Exhibit 2020. Petitioners assert that Aptar relied on “statements that the video accurately describes the complete functionality of Rhoades.” Paper 37 at 1. Not so. None of the passages cited by the Petitioners contain or otherwise rely on statements from Exhibit 2020 “describ[ing] the complete functionality of Rhoades.” *Id.* Neither Aptar nor Mr. Clemens made any representation that the video describes the “complete functionality” of Rhoades. *Id.* And, as described below, even if Exhibit 2020 was hearsay, Mr. Clemens was entitled to rely upon it.

Under Federal Rule of Evidence 703, an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. F.R.E. 703. Thus, “[t]he fact that an exhibit is not admissible under some rule of evidence does not preclude an expert from relying on the exhibit in forming an opinion.” *Laird Techs. v. Graftech. Int’l Holdings*, No. IPR2014-00023, 2015 WL 1385390, at *21 (P.T.A.B. Mar. 25, 2015). Here, Mr. Clemens reasonably relied on a graphical representation of Rhoades’s technology, and he had the expertise to independently verify that the portions of the video he relied upon were accurate. As a result, it is irrelevant whether the video, itself, is hearsay. *See First Quality Baby Prod., LLC v. Kimberly-Clark Worldwide, Inc.*, No. IPR2014-01021, 2015 WL 8659891 (P.T.A.B. Dec. 10, 2015) (“An expert witness may rely on otherwise inadmissible evidence in forming his opinions.”).¹

¹ To the extent the Board disagrees, it should find that Mr. Clemens’s use of such modified images as demonstratives to help summarize and explain components found in Rhoades is proper. *See, e.g., Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1470 (Fed. Cir. 1997) (“demonstrative exhibit that allowed the experts to summarize and explain the components found in each prior art reference” properly admitted); *Polygroup Limited (MCO) v. Willis Electric Co., Ltd.*, IPR2016-01610, Paper 192 at 8 (PTAB Feb. 26, 2018) (“We disagree that we should exclude Mr. Brown’s testimony relying on a video and pictures depicting

Petitioners also argue that Aptar relies on the statement in Ex. 2020 that “it took a team of sixty-six people to design this pen” for the truth of the matter asserted. *See* Paper 37 at 1-2. However, as Petitioners’ implicitly acknowledge, Exhibit 2020 is not offered to prove the truth of the matter asserted—that sixty-six people designed Rhoades—but rather as evidence of the common perception that mechanisms such as those disclosed in Rhoades are highly optimized for their purpose. *See* Paper 27 at 43, fn. 11.

B. Petitioners’ arguments go to the weight that should be afforded to Exhibit 2020, not to its admissibility.

Regardless, Petitioners’ assertion that Exhibit 2020 does not “accurately describe the complete functionality of Rhoades,” ultimately goes to the weight that should be afforded to Exhibit 2020, not admissibility. Specifically, Petitioners challenge the weight and sufficiency of Exhibit 2020 by asserting that:

[T]here 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 disclosure. To the contrary, Aptar’s expert, Mr. Clemens, testified that the pen disclosed in the video is *different* from the pen disclosed in Rhoades reference.

the assembly of Miller- and Otto-style trees. The video and pictures serve as useful demonstratives to illustrate how a person of ordinary skill in the art would understand the disclosures of Miller and Otto.”) (citations omitted).

Paper 37 at 2-3 (citations omitted).²

“A Motion to Exclude after lodging a proper objection is an appropriate mechanism for challenging the admissibility of evidence, but is not an appropriate mechanism for challenging the sufficiency of evidence or the proper weight that should be afforded an argument.” *Techs. v. Holdings*, No. IPR2014-00023, 2015 WL 1385390, at *19 (P.T.A.B. Mar. 25, 2015); *see also* Office Patent Trial Practice Guide, August 2018 Update, 83 Fed. Reg. 39989 at 16 (August 13, 2018) (available at <https://go.usa.gov/xU7GP>) (“A motion to exclude is not a vehicle for addressing the weight to be given evidence”). Even if Petitioners’ criticisms had merit, however, Exhibit 2020 does not warrant exclusion, as it is within the Board’s discretion to assign weight to contested evidence and expert testimony. *See Denso Corporation v. Collision Avoidance Technologies Inc.*, 2019 WL 299567, at *13 (Patent Tr. & App. Bd., 2019) (“[S]imilar to a district court in a bench trial, the Board, sitting as a non-jury tribunal with administrative expertise,

² Petitioners also assert that if “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 the same declarants if Petitioners had an opportunity for vigorous cross examination of the producers of the video.” Paper 37 at 3. However, Petitioners could have sought testimony from these individuals, including Mr. Hammock, but chose not to do so.

is well-positioned to determine and assign appropriate weight to evidence presented.”). In this regard, the PTAB has repeatedly explained that “[i]n an inter partes review, we regard it as the better course to have a complete record of the evidence to facilitate public access, as well as appellate review.” *Sony Computer Entm’t Am. LLC v. Game Controller Tech. LLC*, IPR2013-00634, Paper 32 at 31 (PTAB Apr. 14, 2015); *see also Gnosis S.p.A. v. S. Alabama Med. Sci. Found.*, IPR2013-00118, Paper 64 at 43 (PTAB June 20, 2014) (citing *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941) (“If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.”)).³

Accordingly, because Petitioners’ criticisms ultimately go to weight rather than admissibility, and because “there is a strong public policy for making all

³ In addition, despite Petitioners’ assertion to the contrary, Exhibit 2020 also likely satisfies the residual hearsay exception under F.R.E. 807. *See e.g., Apple Inc. v. VirnetX Inc.*, 2017 WL 2705025, at *20 (Patent Tr. & App. Bd., 2017) (admitting into evidence under FRE 807 articles that had “circumstantial guarantees of trustworthiness as [being] written prior to litigation by disinterested parties”).

information filed in an administrative proceeding available to the public,” Exhibit 2020 should be included. *Liberty Mut. Ins. Co. v. Progressive Cas. Ins. Co.*, CBM2012-00010, Paper 59 at 40 (PTAB February 24, 2014).

III. CONCLUSION

Petitioners have failed to prove that Exhibit 2020 is inadmissible under the Federal Rules of Evidence, and so the Motion should be denied. *See* 37 C.F.R. §§ 42.20(c), 42.62(a).

Respectfully submitted,

Dated: July 22, 2019

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CERTIFICATE OF SERVICE

A copy of the **Patent Owner's Opposition to Petitioners' Motion to Exclude** has been served on Petitioner via electronic mail at the following correspondence address:

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