

Paper No. \_\_\_\_  
Date Filed: July 29, 2019

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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

Petitioners,

v .

AptarFrance S.A.S.,

Patent Owner.

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

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**PETITIONERS' REPLY IN SUPPORT OF  
MOTION TO EXCLUDE**

Petitioners' Reply in Support of Motion to Exclude  
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**I. INTRODUCTION**

Aptar's Opposition to Petitioners' Motion to Exclude ("Opposition") (Paper 42) fails to rebut Petitioners' showing that the statements from a children's video (Ex. 2020) upon which Aptar relies are inadmissible hearsay. Aptar does not dispute that the statements made on "TheKidShouldSeeThis.com" were made out-of-court. And Aptar's arguments in its Opposition again demonstrate that Aptar relies on these statements for the truth of the matter asserted.

Aptar contends that experts are permitted to rely on hearsay. But Federal Rule of Evidence 703 permits an expert to base an opinion on hearsay *only* "if experts in the particular field would reasonably rely on those kinds of facts or data." Fed. R. Evid. 703. Aptar does not even attempt to argue, nor could it, that experts in this field would reasonably rely on a children's video from "TheKidShouldSeeThis.com" to understand the mechanical components and functionality disclosed in a prior art patent.

The Board should exclude Aptar's Exhibit 2020 from the present IPR as inadmissible hearsay.

**II. APTAR RELIES ON THE IDENTIFIED OUT-OF-COURT STATEMENTS FOR THE TRUTH OF THE MATTER ASSERTED**

As set forth in Petitioners Motion to Exclude, Aptar relies on several out-of-court statements from Exhibit 2020: (1) statements that the video accurately describes the relevant functionality of Rhoades (Ex. 2020 at 1:08-2:24; Corrected

Patent Owner Response (“Response”) (Paper 27) at 43 n.11) and (2) the statement that “it took a team of sixty-six people to design this pen” (Ex. 2020 at 3:44-3:47; Resp. at 43 n.11). Aptar does not deny that all of the statements are out-of-court statements. And Aptar’s Opposition reinforces that Aptar relies on these statements for the truth of the matter asserted. That confirms the statements are inadmissible hearsay.

**A. The statements that Exhibit 2020 accurately describes the relevant functionality of Rhoades**

Aptar’s Opposition again demonstrates that Aptar and its expert rely on the statements that Exhibit 2020 accurately describes the relevant functionality of Rhoades for the truth of the matter asserted. In fact, Aptar expressly admits that it relies on the children’s video as accurately describing Rhoades: “the portions of the video that [Mr. Clemens] relied upon were *accurate*.”<sup>1</sup> Opposition at 2 (emphasis added).

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<sup>1</sup> As explained in Petitioners’ Motion to Exclude, Aptar’s suggestion that Mr. Clemens believed that Exhibit 2020 accurately described Rhoades is directly contradicted by Mr. Clemens’s testimony that Exhibit 2020 and Rhoades disclose “two *different*, you know, *designs*.” Petitioners’ Motion to Exclude (Paper 37) at 2-3 *citing* Clemens Tr., Ex. 1057 at 77:23-78:14 (emphasis added). Aptar fails to address this in its Opposition.

Aptar only offers these statements to establish the truth of the matter asserted — i.e., that “TheKidShouldSeeThis.com” accurately describes the relevant functionality of Rhoades. Aptar also does not deny that these are out-of-court statements and that no hearsay exception applies. Therefore, the Board should exclude these statements from Exhibit 2020 cited and quoted in Aptar’s Corrected Patent Owner Response (“Response”) (Paper 27) 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”**

Aptar’s Opposition again demonstrates that Aptar and its expert rely on the statement that “it took a team of sixty-six people to design this pen” for the truth of the matter asserted. Aptar argues that it only relies on this statement as “evidence of the common perception that mechanisms such as those disclosed in Rhoades are highly optimized.”<sup>2</sup> Opposition at 3. But Aptar’s only basis for drawing that conclusion is its reliance on the statement that “it took a team of sixty-six people to design this pen” as true. That is inadmissible hearsay.

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<sup>2</sup> Aptar has never before alleged, nor is there any evidence to support Aptar’s suggestion that there is a “common perception” that the Rhoades mechanism is highly optimized.

Aptar does not deny that this statement, upon which it relies for the truth of the matter asserted, is an out-of-court statement. And Aptar does not allege that any hearsay exception applies. Therefore, the Board should exclude this statement from Exhibit 2020 cited and quoted in Aptar's Response and in Mr. Clemens's declaration (Ex. 2021) as inadmissible hearsay.

### **III. EXHIBIT 2020 IS NOT THE TYPE OF EVIDENCE REASONABLY RELIED UPON BY EXPERTS**

Aptar argues that an expert is permitted to rely on inadmissible hearsay under FRE 703. Opposition at 2. But Aptar ignores that Federal Rule of Evidence 703 permits an expert to base an opinion on hearsay only "if experts in the particular field *would reasonably rely on those kinds of facts* or data." FRE 703 (emphasis added); *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 711 F.3d 1348, 1373 (Fed. Cir. 2013). Aptar does not even attempt to argue, nor could it, that experts in this field, having extensive experience in mechanical engineering, would reasonably rely on a children's video to understand the mechanical mechanism of a prior art patent.<sup>3</sup> Therefore, no exception applies that would allow Mr. Clemens to rely on Exhibit 2020.

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<sup>3</sup> Aptar argues that if no exception applies the Board should allow Aptar to rely on the children's video as a demonstrative to help summarize and explain Rhoades. Opposition at 3 n.1. But the cases Aptar cites for this proposition are not on point.

#### IV. 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 29, 2019

/Steven D. Maslowski/

Steven D. Maslowski, Reg. No. 46,905

Ruben H. Munoz, Reg. No. 66,998

Jason Weil, Reg. No. 73,123

Caitlin E. Olwell, Reg. No. 74,084

AKIN GUMP STRAUSS HAUER & FELD  
LLP

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In *Motorola, Inc. v. Interdigital Tech. Corp.*, the document at issue was a trial demonstrative, not an exhibit filed and relied on as evidence. 121 F.3d 1461, 1470 (Fed. Cir. 1997). In *Polygroup Ltd. v. Willis Electric Co., Ltd.*, the objecting party did not lodge a hearsay objection. IPR2016-01610, Paper 187 at 8-9 (PTAB Feb. 26, 2018). Further, the petitioner in *Polygroup* “[did] not explain how the video and pictures are inaccurate,” while the expert “explained how the trees in the demonstrative are fair and accurate samples.” *Id.* Here, the opposite is true: Petitioners explained how the video is inaccurate (Petitioners’ Motion to Exclude (Paper 37) at 2-3) and Aptar’s expert agreed that the two disclosures are different. *Id.* at 4 *citing* Clemens Tr., Ex. 1057 at 77:23-78:14.

Two Commerce Square  
2001 Market St., Suite 4100  
Philadelphia, PA 19103-7013  
Telephone: (215) 965-1200  
Facsimile: (215) 965-1210

Gregory A. Morris, Ph.D., Reg. No. 53,349  
Ron N. Sklar (admitted *pro hac vice*)  
HONIGMAN LLP  
155 North Upper Wacker Drive, Suite 3100  
Chicago, IL 60606-1734  
Telephone: (312) 701-9300  
Facsimile: (312) 701-9335

*Counsel for Petitioners 3M Company,  
Merck & Co., Inc., and Merck Sharp &  
Dohme Corp.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Petitioners' Reply in Support of Motion to Exclude was served on counsel of record on July 29, 2019, by filing this document through the End-to-End System, as well as delivering a copy via electronic mail to the counsel of record for Patent Owner at the following address:

Ashely N. Moore - amoore@mckoolsmith.com  
Robert M. Manley - rmanley@mckoolsmith.com  
Ryan Hargrave - rhargrave@mckoolsmith.com  
Benjamin G. Murray - bmurry@mckoolsmith.com

Date: July 29, 2019

Respectfully submitted,

/Steven D. Maslowski/

Steven D. Maslowski, Reg. No. 46,905  
Ruben H. Munoz, Reg. No. 66,998  
Jason Weil, Reg. No. 73,123  
Caitlin E. Olwell, Reg. No. 74,084  
AKIN GUMP STRAUSS HAUER & FELD  
LLP  
Two Commerce Square  
2001 Market St., Suite 4100  
Philadelphia, PA 19103-7013  
Telephone: (215) 965-1200  
Facsimile: (215) 965-1210

Gregory A. Morris, Ph.D., Reg. No. 53,349  
Ron N. Sklar (admitted *pro hac vice*)  
HONIGMAN LLP  
155 North Upper Wacker Drive, Suite 3100  
Chicago, IL 60606-1734  
Telephone: (312) 701-9300

*Counsel for Petitioners 3M Company,  
Merck & Co., Inc., and Merck Sharp &  
Dohme Corp.*