

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PERMIAN GLOBAL INC., AND
MANTICORE FUELS, LLC
Petitioners,

v.

FUEL AUTOMATION STATION, LLC,
Patent Owner.

Case IPR2023-01237

Patent No. 9,586,805

**PATENT OWNER'S REPLY TO PETITIONERS'
OPPOSITION TO MOTION TO EXCLUDE**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

TABLE OF EXHIBITS iv

I. Introduction.....1

II. Argument1

 A. Focal Therapeutics Does Not Insulate All Communications Before
 Redirect Examination.....1

 B. The Timing and Substance of Breaks Demonstrate Improper Witness
 Coaching.2

 C. The Redirect Testimony Reflects Coached Revisions, Not Genuine
 Clarifications.4

 D. Petitioners’ Interpretation of Precedent Ignores Evidentiary Standards.....4

III. Conclusion5

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|----------------|
| <i>Focal Therapeutics, Inc. v. Senorx, Inc.</i> , IPR2014-00116 (P.T.A.B. July 21, 2014) | 1, 2, 4 |
| Rules | Page(s) |
| FRE 403 | 1, 2, 4 |

TABLE OF EXHIBITS

| Exhibit | Description |
|----------------|---|
| Ex. 2004 | Expert Report of John Roberts |
| Ex. 2005 | FAS Virtual Marking page (https://fluidautomationstation.com/patents/) |
| Ex. 2006 | US Patent 2,603,312 |
| Ex. 2007 | US Patent 1,829,173 |
| Ex. 2008 | US Patent 3,196,982 |
| Ex. 2009 | US Patent 3,430,730 |
| Ex. 2010 | US Patent 3,216,527 |
| Ex. 2011 | US Patent 2,425,848 |
| Ex. 2012 | Transcript of Deposition of Robert Durham |
| Ex. 2013 | ASTM D975 Standard Specification for Diesel Fuel Oils |
| Ex. 2014 | Intentionally Omitted |
| Ex. 2015 | AFLAS TM Reg Serial 73310396 |
| Ex. 2016 | Rubber Technology, “TFE/P (Aflas®)/FEPM rubber quality” (https://web.archive.org/web/20160404102358/http://rubbertechnology.info:80/en/-rubber-compounds/tfep-aflasr--fepm-rubber-quality/) |
| Ex. 2017 | AFLAS technical brochure (http://web.archive.org/web/20161221181920/http://agcchem.com/component/jdownloads/finish/9-aflas-fluoroelastomers/7-aflas-fluoroelastomers-technical-brochure?Itemid=0) |
| Ex. 2018 | Intentionally Omitted |
| Ex. 2019 | Brent Oil/Fuel Hose 3106 (http://web.archive.org/web/20160713193942/http://www.desihose.com/viewproduct.aspx?pid=192) |

| | |
|----------|--|
| Ex. 2020 | Atlas Oil's Rick Shock Named "Industry Leader" At Texas Oil and Gas Awards |
| Ex. 2021 | <i>FAS v. Comanche Gas Solutions</i> Complaint |
| Ex. 2022 | <i>FAS v. Permian Global, et al.</i> Complaint |
| Ex. 2023 | Ortoleva Declaration |
| Ex. 2024 | Rodger's CV |
| Ex. 2025 | Intelligencer article (digital print The Intelligencer, January 31, 2020) |
| Ex. 2026 | Intentionally Omitted |
| Ex. 2027 | Intentionally Omitted |
| Ex. 2028 | Waterman, "Better Safe Than Sorry" |
| Ex. 2012 | Information Disclosure Statement |
| Ex. 2030 | Transcript of Supplemental Deposition of Robert Durham |

I. Introduction

Petitioners' opposition to the Patent Owner's motion to exclude relies on an overly broad interpretation of *Focal Therapeutics* to justify counsel's conduct in conferring with Dr. Durham during breaks. However, *Focal Therapeutics* merely holds that counsel may confer with a witness after cross-examination concludes—it does not insulate all communications during these conferences from scrutiny under Federal Rules of Evidence (FRE) 403. When such conferences give rise to testimony that is improperly influenced, the Board has the discretion to exclude that testimony, particularly when it compromises the integrity of the proceedings.

Petitioners' interpretation of *Focal Therapeutics* disregards the clear limits set by the Trial Practice Guide, which strictly prohibits witness coaching at any stage of testimony. As detailed below, the strategically timed breaks requested by Petitioners' counsel, the content of those discussions, and the observable shifts in Dr. Durham's testimony all indicate improper coaching rather than simple consultation. The Board should therefore exclude Dr. Durham's redirect testimony because its probative value is substantially outweighed by its prejudicial impact, per FRE 403.

II. Argument

A. Focal Therapeutics Does Not Insulate All Communications Before Redirect Examination.

Petitioners heavily rely on *Focal Therapeutics* to justify their conduct, asserting that it permits any communications between counsel and a witness after cross-examination. This interpretation is flawed. While *Focal Therapeutics* holds that counsel is “permitted to confer with the witness before redirect examination begins,” it does not authorize all types of communications during such conferences. Nor does it preclude the exclusion of redirect testimony under FRE 403 if such communications compromise the integrity of the testimony. Further, *Focal Therapeutics* does not provide an exception to the Trial Practice Guide’s prohibition against coaching. FRE 403 remains fully applicable, and the Board has discretion to exclude evidence where, as here, its prejudicial impact outweighs any probative value.

B. The Timing and Substance of Breaks Demonstrate Improper Witness Coaching.

Dr. Durham admitted that substantive discussions occurred during breaks requested by Petitioners’ counsel immediately following cross-examinations. The record establishes that these discussions directly pertained to issues raised during redirect. (Ex. 2012 at 135:16-136:25; Ex. 2030 at 96:22-97:23).

Here, Petitioners’ counsel’s strategically timed breaks, minutes after prior recesses, and the substantive nature of the discussions strongly suggest improper coaching rather than permissible consultation.

Notably, as to timing, these breaks were not necessitated by any questions asked immediately preceding them. For example, Dr. Durham admitted to speaking to counsel during the September 25 strategic break about the Coxreels reference and was asked questions about and testified about the same on redirect. However, PO's counsel did not ask Dr. Durham any questions about Coxreels between the strategic break and the prior break. (Ex. 2030, 90:1-90:21). The break was therefore not for counsel to analyze and prepare questions about the immediately preceding testimony. The break was instead for counsel to coach the witness on much earlier testimony regarding Coxreels.

Petitioners cite to *Cisco* as attempted support, noting that petitioner's counsel in *Cisco* instructed the witness not to answer patent owner's questions related to the substance of the discussions that occurred during the recess. *Cisco* is easily distinguishable from the present circumstances though. Here, we do know about the discussions that occurred during the break, and the substance of those discussions was the same as the substance of the redirect testimony. Dr. Durham explicitly admitted that the substance of the break discussions matched the substance of the redirect testimony. Moreover, the Board in *Cisco* agreed to acknowledge the dispute when weighing the expert's testimony, and PO asks the Board to, at a minimum, do the same here.

PO further notes that the strategic break in the September 25 deposition came *one minute* after the prior break, not 10 minutes. (Ex. 2030, 89:23-90:23; Response at pages 4, 6).

C. The Redirect Testimony Reflects Coached Revisions, Not Genuine Clarifications.

Petitioners argue that Dr. Durham's redirect testimony merely clarified earlier statements. However, the record demonstrates clear contradictions between his cross-examination and redirect. For instance, Dr. Durham shifted from testifying that he relied on the general teachings of the Coxreels reference to asserting that specific models could be incorporated into Van Vliet's system (Ex. 2012 at 35:5-23; 95:14-20). The private discussions during breaks influenced this change.

D. Petitioners' Interpretation of Precedent Ignores Evidentiary Standards

Petitioners misapply *Focal Therapeutics* and related cases to argue that any post-cross-examination consultation is permissible. However, those rulings do not preclude exclusion where the facts demonstrate coaching. FRE 403 requires exclusion of evidence whose prejudicial impact outweighs its probative value. Here, the integrity of Dr. Durham's testimony is fundamentally compromised, and its inclusion would unfairly prejudice Patent Owner.

III. Conclusion

The Board should grant the motion to exclude the redirect portions of Dr. Durham's May 9, 2024, and September 25, 2024, depositions. The probative value of this testimony is substantially outweighed by the prejudice stemming from improper coaching, which undermines the fairness of these proceedings.

Respectfully submitted,

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Dated: November 19, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 19, 2024, a true and correct copy of the foregoing document was served electronically via e-mail in its entirety on counsel identified below by Petitioner for service at

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