

IPR2013-00509

Petitioner's Response to Patent Owner's Motion to Exclude

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CONOPCO, INC. dba UNILEVER  
Petitioner

v.

THE PROCTOR & GAMBLE COMPANY  
Patent Owner

Patent No. 6,451,300  
Case No. IPR2013-00509

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**PETITIONER'S RESPONSE TO PATENT OWNER'S MOTION TO  
EXCLUDE EVIDENCE**

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## I. Introduction

The objections presented by Patent Owner, the Proctor & Gamble Company (“P&G”), in its motion to exclude, were not properly identified, were not properly preserved, and/or are not appropriate for a motion to exclude. As an initial matter, P&G has failed to identify in its motion where in the record the objections were made. *See Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48767 (Aug. 14, 2012). One of the exhibits to which P&G objects (Exhibit 1040) was presented during a deposition, and P&G has not identified where in the deposition transcript it lodged the specific evidentiary objections it advances herein. *See* 37 C.F.R. § 42.64(a).

Respecting the other challenged exhibits, Unilever notes that P&G *filed* a document entitled Patent Owner's Objections to Evidence Pursuant to 37 C.F.R. § 42.64 (Paper 48)—even though the rules require that type of document to be served, not filed (*id.* § 42.64(b)(1)). Yet, in violation of the Rules, P&G's document failed to “identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.” *Id.* For example, P&G made blanket objections to Exhibit 1034—the Second Declaration of Arun Nandagiri (“Second Declaration” or “Mr. Nandagiri's declaration”), a 30-page long document consisting of 57 numbered paragraphs—under FRE 402, 403, 602, 702, 703, 801, 802, 901 and several PTAB rules without providing any

identification of which specific paragraphs corresponded to which objection(s) and without any explanation or reasoning for the objections. *See* Paper 48 at 2. Mere citation of the rule of evidence, as P&G has done, does not satisfy § 42.64's requirement. P&G's failure to identify what particular evidentiary grounds apply to what specific parts of the document (e.g., it is impossible to know which of the 57 paragraphs of Mr. Nandagiri's declaration P&G's objects to on hearsay grounds) constitutes a failure to preserve its objections. Paper 48 at 2. P&G's written objections to each of Exhibits 1034, 1036-1037, 1040, 1045-1047, 1051-1055, and 1060-1061 consist of nothing more than a citation to a PTAB rule or rule of evidence, and therefore all of P&G's objections to these exhibits have not been properly preserved.

Many of P&G's other objections, identified in the paragraphs below where appropriate, are simply not proper for a motion to exclude, which is limited to challenges relating to the admissibility of evidence, not the sufficiency of evidence to prove a particular fact. 77 Fed. Reg. at 48767.

**II. Exhibits 1034, 1040, 1045, 1047, 1052-1055, and 1061 should not be excluded**

**A. Exhibits 1034, 1045, 1047, 1052, 1054, 1055 are not based on improper incorporation by reference**

Exhibits 1034, 1045, 1047, 1052, 1054 and 1055 do not constitute impermissible incorporation by reference and should not be excluded. The Reply

directly discusses and cites to subject matter in Mr. Nandagiri's Second Declaration, in which he opines on the level of skill in the art and supports his opinions with citations to these documents.

Notwithstanding P&G's protests to the contrary, the level of skill of a person of ordinary skill in the art ("POSA") is an over-arching issue raised by its Response; paragraphs 8-24 of the Second Nandagiri declaration address this issue. As noted in Section II of Unilever's Reply, P&G depicts a POSA as "unable to understand the connected disclosures within Kanebo or Evans, unaware of art-recognized equivalents for cationic polymers and pearl luster/suspending gents, and unable to routinely optimize shampoos to use such interchangeable components. Resp. at 16-22, 24-27." Reply at 1. Unilever's Reply then discusses each of these points in the appropriate section with references back to the Second Nandagiri Declaration showing the level of skill in the art.

For example, in the discussion of the interchangeability of claimed shampoo ingredients, at pages 5 and 6 of the Reply, Unilever cites several times to paragraph 35 of the Second Nandagiri Declaration for support regarding the level of skill in the art. Specifically, the Reply notes that a POSA would have been aware of the basic functional properties of an AD conditioning shampoo, namely cleansing, conditioning, and controlling or preventing dandruff. Reply at 5. Mr. Nandagiri makes this exact point at paragraph 35 of his Second Declaration and

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