

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

US ENDODONTICS, LLC,
Petitioner,

v.

GOLD STANDARD INSTRUMENTS, LLC
Patent Owner.

Case IPR2015-00632
Patent 8,727,773 B2

**PETITIONER'S MOTION TO EXCLUDE
EVIDENCE UNDER 37 C.F.R. § 42.64(C)**

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Pursuant to 37 C.F.R. § 42.64(c) and the Scheduling Order (Paper 30), Petitioner US Endodontics, LLC (“Petitioner”) moves to exclude Patent Owner Gold Standard Instruments, LLC (“Patent Owner”)’s Exhibits 2006, 2040, 2043, 2044, and 2050-2052, certain paragraphs of declarations of Patent Owner’s witnesses, in Exhibits 2026-2028, and certain portions of the re-direct examination testimony elicited by Patent Owner from its witnesses, in Exhibits 1038 and 1040. Pursuant to 37 C.F.R. § 42.62, Petitioner’s objections apply the Federal Rules of Evidence (“FRE”).

I. EXHIBIT 2006 IS INADMISSIBLE UNDER FRE 802

Exhibit 2006 is described by Patent Owner as “*Dentsply Int’l Inc. and Tulsa Dental Prods. LLC d/b/a/ Tulsa Dental Specialties v. US Endodontics, LLC*, No. 2:14-196, Declaration of John Voskuil, filed July 9, 2014 (E.D. Tenn).” Petitioner timely objected to Exhibit 2006 as inadmissible hearsay under FRE 802. *See* Paper 31, pp. 1, 3-4.

Patent Owner offers an out-of-court statement by Mr. Voskuil in Paragraph 9 of Exhibit 2006 to prove the truth of the matter asserted therein, namely, that “Dentsply manufactures a heat-treated file known as the Vortex Blue file, which is

covered by the '773 patent.” See Paper 44, p. 58 (citing Ex. 2006, ¶ 9). See also Ex. 2027, ¶ 45 (citing Ex. 2006, ¶ 9).¹

Exhibit 2006 is a declaration from the pending district court litigation. Patent Owner did not submit a declaration from Mr. Voskuil in this proceeding.

Therefore, Exhibit 2006 is inadmissible, under FRE 802, as hearsay. *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 164 (3d Cir. 1995) (finding no exception against hearsay applied to a declarant’s “prior trial testimony”). No exceptions to the rule against hearsay are applicable to Mr. Voskuil’s out-of-court statement.

Further, Dr. Luebke, who relies on Mr. Voskuil’s statement, see Ex. 2027, ¶ 45, “may not simply transmit [such] hearsay” statement to the Board. *Triboro Quilt Mfg. Corp. v. Luve LLC*, 2014 WL 158606, at *7 (S.D.N.Y. Mar. 18, 2014) (quoting *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008)).

Accordingly, Exhibit 2006 should be excluded.

¹ Mr. Voskuil is not a technical expert, but the Vice President and General Manager for real party-in-interest Tulsa Dental Products, LLC, and his declaration from the district court action provides no support for his conclusory statement in Exhibit 2006 that “Dentsply’s Vortex Blue is manufactured using a process that falls within the scope of the claims of the '773 patent.”

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