

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAKER HUGHES INCORPORATED and
BAKER HUGHES OILFIELD OPERATIONS, INC.,
Petitioners

v.

PACKERS PLUS ENERGY SERVICES INC.,
Patent Owner

Case IPR2016-00598
Patent 7,861,774

**EXCLUSIVE LICENSEE RAPID COMPLETIONS LLC'S
RESPONSE TO PETITIONERS' MOTION TO EXCLUDE**

Mail Stop "PATENT BOARD"
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Exhibit 2021—Rystad Energy Report

Petitioners admit that they produced this exhibit in litigation. “[D]ocuments provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic.” *See, e.g., Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 552 (D. Md. 2007). Thus, this exhibit is presumed authentic, and Petitioners do not even attempt to rebut that presumption. Moreover, the document contains distinctive characteristics such as the marking that the document is owned by Rystad Energy and repeated references to Rystad Energy analysis. Petitioners offer no evidence that Baker Hughes fabricated a Rystad Energy report or that it would have a reason to retain a fabricated Rystad Energy report. Thus, they have failed to meet their burden.

With regard to Petitioners’ hearsay objection to page 10, Petitioners object to the portion of this document that corroborates the market share estimates provided in the unobjected to Ghiselin report (exhibit 2011). However, these estimates fall under hearsay exceptions (17) and (18). They are contained in a market report relied upon by an expert in the field—Mr. McGowen. At any rate, even if the market share estimates do not fall under those exceptions, this page of the exhibit is still admissible for a purpose other than proving the truth of the

matter asserted. Namely, that persons in the field expected the patented technology to have had a significant market share. Even if the actual market share for this technology differed from the reported amount, the fact that practitioners expected the technology to be increasingly competitive against traditional plug and perf demonstrates that the technology has received praise and success.

Moreover, even if the Board deems this exhibit inadmissible for any reason, it may still be considered under Rule 703. *See, e.g., SK Innovation Co. v. Celgard LLC*, IPR2014-00680, Paper 57 at 28 (PTAB Sept. 25, 2015) (admitting evidence of commercial success under Rule 703). Respondent's expert Mr. McGowen testified:

Rystad Energy noted that demand for open-hole ball drop systems had grown from less than \$100 million per year in 2008 to nearly \$500 million per year in 2012. It also explained that the technology accounted for 70% of the completions installed in the Bakken formation and it projected significant growth in other plays. This report also credits Packers Plus with developing open-hole ball drop technology in 2001. BH00364675.

Ex. 2034 at 49. Petitioners have not moved to exclude this testimony, and thus the substantive information contained on page 14 of Exhibit 2021 has already been admitted. Under Rule 703, any otherwise inadmissible evidence underlying Mr. McGowen's testimony is also admissible "if [its] probative value in helping the

jury evaluate the opinion substantially outweighs [its] prejudicial effect.” Here, Exhibit 2021 is probative of commercial success as it corroborates the testimony of Mr. McGowen and the other evidence relied upon by Mr. McGowen. Petitioners identify no prejudicial effect from admitting these statements, and it is difficult to imagine how this type of market report could be prejudicial at all, especially since it is being presented to the Board rather than a jury. *See SK Innovation Co.*, IPR2014-00680, Paper 57 at 28. Indeed, Petitioners do not even raise a Rule 403 objection, which sets a much lower bar for establishing prejudicial effect.

Exhibit 2022—Article Regarding Schlumberger

With regard to Petitioners’ authenticity objection, Petitioners mistakenly assert that Respondent “has not proven authenticity.” But Petitioners bear the burden of demonstrating that this exhibit is inadmissible. *Sipnet EU S.R.O. v. Straight Path IP Group, Inc.*, IPR2013-00246, Paper No. 63 at 2 (PTAB Oct. 9, 2014) (citing 37 C.F.R. §§ 42.20(c), 42.62(a)).

To establish authenticity, Rule 901 requires that “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Here, Respondent claims that exhibit 2022 is an online Rigzone article. The exhibit itself contains distinctive marks such as the URL for the article and the layout of a Rigzone article. Accordingly, it is authentic under Rule 901(b)(4) and it is self-authenticating as a periodical under Rule 903(6). *See, e.g.*,

Ciampi v. City of Palo Alto, 790 F. Supp. 2d 1077, 1091 (N.D. Cal. 2011) (admitting Internet printouts that “contain sufficient indicia of authenticity, including distinctive newspaper and website designs, dates of publication, page numbers, and web addresses”). The testimony of Mr. Delaney also confirms that the exhibit is a Rigzone article. Fed. R. Ev. 901(1); Ex. 2045. Although Petitioners question the basis for this testimony, they have not moved to exclude it or even asserted that it is inaccurate. Thus, they have not met their burden.

With regard to Petitioners’ hearsay objection, this exhibit falls under exception (18) for the same reasons as exhibit 2021 discussed above—it is a periodical relied upon by Mr. McGowen. *See* Ex. 2034 at 50.

Moreover, even if the Board deems this exhibit inadmissible for any reason, it may still be considered under Rule 703. Mr. McGowen testified:

Some of the best evidence of the commercial and technological significance of the 774 Patent/Invention is that Schlumberger, a technology leader itself and one of the world’s largest oil and gas service companies, purchased a stake in Packers Plus and negotiated exclusive rights to deploy and market Packer Plus technology worldwide, excluding North America.

Ex. 2034 at 50. Again, Petitioners have not moved to exclude this testimony. As with Exhibit 2021, the evidence underlying this testimony is probative of

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.