UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAKER HUGHES INCORPORATED and
BAKER HUGHES OILFIELD OPERATIONS LLC,
Petitioners

v.

PACKERS PLUS ENERGY SERVICES INC.,
Patent Owner

Case IPR2016-01506
Patent 7,861,774

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

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“The party moving to exclude evidence bears the burden of proving that it is entitled to the relief requested—namely, that the material sought to be excluded is inadmissible under the Federal Rules of Evidence.” *Petroleum Geo-Services Inc. v. Ion Geophysical Corp.*, IPR2014-00688, Paper 101 at 53 (PTAB Dec. 15, 2015) (citing 37 C.F.R. §§ 42.20(c), 42.62(a)). Petitioners’ motion appears to disregard this requirement as it seeks exclusion of several exhibits by merely referring to a portion of the exhibit and stating a rule of evidence with minimal explanation. In short, Baker Hughes has failed to meet its burden, and its arguments relate at most to weight not admissibility.

Exhibit 2039—Weatherford Presentation

Michael Delaney authenticated this exhibit (Ex. 2082 at ¶ 8) and counsel for Weatherford has no objection to the authenticity of this document (Ex. 2103). Moreover, the document has distinctive characteristics such as the Weatherford logos and product marks. *See* Fed. R. Evid. 901(4),(7); s*ee also Generico, LLC v. Dr. Falk Pharma GMBH*, IPR2016-00297, Paper 55 at (PTAB May 19, 2017) (admitting website printouts based on appearance of the documents).

To the extent Respondent relied on this document to demonstrate that Weatherford offers an open hole multi-stage fracturing system for sale, this use is not hearsay. Baker Hughes fails to identify a statement asserted for the truth of the matter. Rather, the fact that Weatherford has creating marketing documents for an

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open hole ball drop system is itself evidence that it sells such a system. *Liberty Mutual Ins. Co.*, CBM2012-00010, Paper 59 at 37 (overruling hearsay objection to industry publications because "[w]e have considered the statements therein not for the truth of the matter asserted, but for the fact that such statements were made at all."); *EMC Corp. v. Personal Web Technologies, LLC*, IPR2013-00085, Paper 73 at 66 (PTAB May 15, 2014).

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 offered testimony based on this exhibit by using it as evidence that Weatherford has practiced the claims at issue. *See* Ex. 2081 at 33-51. Under Rule 703, the evidence underlying that testimony is also admissible subject only to concerns related to jury trials that are inapplicable in IPRs.[1]

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[1] In district court, Rule 703, requires a proponent to show that any otherwise inadmissible evidence underlying an expert's testimony has "probative value in helping the jury evaluate the opinion [that] substantially outweighs [its] prejudicial effect." This provision is inapplicable in IPRs. 37 C.F.R. § 42.62(b) (portions of the Federal Rules of Evidence relating to juries do not apply). Even if it were applicable, "because the Board is not a lay jury, and has significant experience in evaluating expert testimony, the danger of prejudice in this proceeding is considerably lower than in a conventional district court trial." *SK Innovation Co.*, IPR2014-00680, Paper 57 at 50.

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Exhibit 2044—Vikram Rao Deposition

As an expert hired to opine on the obviousness of the very claims at issue in this proceeding, Dr. Rao's testimony meets the minimum threshold for relevance. To the extent his testimony is inconsistent with assertions made by Baker Hughes—despite having an incentive to testify favorably for Baker Hughes—his testimony is highly relevant.

Moreover, sworn deposition testimony is not hearsay in an IPR. *Petroleum Geo-Services Inc. v. WesternGeco LLC*, IPR2014-01475, Paper 71 at 61 (PTAB July 11, 2016) (ruling prior deposition and trial testimony admissible for IPR purposes). In an *inter partes* review, direct testimony is typically provided via affidavit, with cross examination taken via deposition. 37 C.F.R. § 42.53(a). In this respect, testimony via affidavit is considered in court testimony before the Board, in contrast to affidavit testimony in district court cases where it is considered out of court testimony. *See Polaris Wireless, Inc. v. TruePosition, Inc.*, Case IPR2013-00323, slip op. at 41 (PTAB Nov. 3, 2014) (Paper 62). Testimony submitted via deposition or trial transcript is no different from testimony submitted in a written affidavit. *Petroleum Geo-Services Inc.*, IPR2014-01475, Paper 71 at 61. Petitioners had an opportunity to cross examine Dr. Rao by seeking to depose him in this proceeding. The fact that they chose not to do so does not render the testimony inadmissible. *Id.*

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Even if this were a district court proceeding, this testimony would be admissible as testimony from an unavailable witness given that Dr. Rao is located more than 100 miles from Washington DC and because the Board typically does not allow live testimony. Fed. R. Ev. 804(b)(1); Fed. R. Civ. Proc. 32(a)(4)(B),(E). This testimony is also admissible under Rule 807. It is already admitted in the IPRs filed by Weatherford. Thus, it is trustworthy and evidence of material facts. Moreover, given that Dr. Rao incentivized to give testimony favorable to Weatherford, the fact that they did no do so is more probative than any other evidence Rapid Completions could reasonably obtain. Finally, admitting this exhibit serves the interests of justice by preventing inconsistent rulings on the same patents being challenged by joint defense partners.

Exhibit 2047—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 offer no evidence 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

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