

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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WEATHERFORD INTERNATIONAL, LLC; WEATHERFORD/LAMB,  
INC.; WEATHERFORD US, LP; and WEATHERFORD ARTIFICIAL  
LIFT SYSTEMS, LLC,  
Petitioners

v.

PACKERS PLUS ENERGY SERVICES INC.,  
Patent Owner

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Case IPR2016-01509  
Patent 7,861,774

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**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 dozens of exhibits by merely referring to a portion of the exhibit and stating a rule of evidence. Moreover, with regard to several objections, including to the testimony from Mr. McGowen, Dr. Daneshy, and representatives of Baker Hughes and Packers Plus, Petitioners fail to recognize the applicable procedures and evidentiary rules for submitting this type of evidence in IPRs. In short, Weatherford has failed to meet its burden, and its arguments relate at most to weight not admissibility.

### **Objections to McGowen Testimony**

Petitioners sole basis for objecting to Mr. McGowen’s testimony is that it is based on undisclosed information controlled by Baker Hughes. This objection is untimely as it was raised for the first time well after Rapid Completions served exhibits 2051 and 2081. *See* Paper 40. Regardless, unlike in district court, this objection goes only to weight not admissibility. Moreover, even if Weatherford had raised a timely, legally cognizable objection, the only portion of Mr. McGowen’s testimony that is actually based on confidential Baker Hughes

information is a specific calculation of Baker Hughes' revenue from sales of its FracPoint service. This calculation is redacted in Exhibit 2051 and it is not even included in Exhibit 2081. Thus, Petitioners' objection is moot.

### **Factual Background**

In response to Baker Hughes' first set of IPRs, Mr. McGowen compiled a database of FracPoint jobs performed by Baker Hughes in the United States. He used that database to estimate the amount of revenue that Baker Hughes had earned from practicing the claimed invention during the limited damages window at issue in litigation. This database contained confidential information produced by Baker Hughes in the parties' underlying litigation. Ex. 2051 at 46. Baker Hughes consented to use of the information in its IPRs, but it did not authorize Rapid Completions to share that information with Weatherford. Ex. 2081 at 25. Thus, Rapid Completions redacted that calculation when it filed the McGowen declaration in the present proceeding. The remainder of the declaration is based on publicly available information to which Weatherford has not objected.

Because commercial success is relevant to the present proceeding, and Baker Hughes has refused to allow Rapid Completions to share its confidential information with Weatherford, Mr. McGowen prepared a separate revenue calculation for this proceeding—he estimated Baker Hughes' revenue based only on publicly available information. Ex. 2081 at 27. Respondent relied on that

testimony in this proceeding to provide the Board with the relevant information regarding commercial success without the need for motion practice before the Board or before the district court to seek relief from the protective order. As it turned out though, after Rapid Completions served its patent owner response, Weatherford did not object to Mr. McGowen's public revenue calculation in exhibit 2081, or the fact that his confidential calculation was redacted from exhibit 2051. Paper 34. Thus, the issue appeared to be moot.

Over a month later, during the deposition of Mr. McGowen, Weatherford asked Mr. McGowen about facts he was aware of. He answered truthfully that he was also aware of confidential Baker Hughes data. Ex. 1038 at 161:15-163:25. Of course, it is not as if Weatherford learned that Mr. McGowen had access to this information for the first time in his deposition. Exhibit 2051 contains a redaction for this very reason, and exhibit 2081 states: "In my original declaration, I also analyzed the success of Baker Hughes's FracPoint system. Because this analysis was based in part on confidential Baker Hughes information, I understand that Baker Hughes has objected to sharing that information with Weatherford. Nonetheless, public information provides a good indication of the success of Baker Hughes's system." Ex. 2081 at 25.

Even if Weatherford had learned of this issue for the first time in the deposition, it expressly chose not to raise an objection during the deposition as

required by 37 CFR 42.64(a) (“An objection to the admissibility of deposition evidence must be made during the deposition.”).<sup>1</sup> *See* Ex. 1038 at 164:1-3 (Weatherford counsel: “Okay. So, I mean, we can take this up later, but here an expert is relying on information that we can't cross-examine him on.”). Even after the deposition ended, Weatherford provided no indication that it intended to raise an objection on this basis until the day after it served its reply—months after it was served with Mr. McGowen’s declaration, and weeks after it took his deposition. This is too late. *Cf.* 37 CFR 42.64(b) (“Once a trial has been instituted, any objection must be filed within five business days of service of evidence to which the objection is directed.”).

Once Weatherford finally did provide an objection, Rapid Completions emailed litigation and IPR counsel for Baker Hughes and Weatherford to remind them that the litigation protective order states:

DESIGNATED MATERIAL produced by one defendant shall not be disclosed to counsel for any other defendant without written consent of the producing party. Defendants will not object to the admission of evidence based on the grounds that Plaintiffs could not share the documents with a Defendant or Defendants’ witness, although all other objections to admissibility and/or relevance are reserved. Nothing in this section shall relieve Plaintiff from timely disclosing and/or producing evidence on which they intend to rely. **The Defendants will**

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<sup>1</sup> 37 CFR 42.64(a) is not strictly applicable because Weatherford is only objecting to Mr. McGowen’s declaration. Weatherford submitted Mr. McGowen’s deposition testimony into evidence without objection.

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