

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 PGR2015-00019
Patent 8,876,991 B2

**PETITIONER'S REPLY IN SUPPORT OF ITS MOTION
TO EXCLUDE EVIDENCE UNDER 37 C.F.R. § 42.64(C)**

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I. EXHIBIT 2034

A. Patent Owner's Untimely Citation of Alleged Relevant Evidence

In its response to this motion, Patent Owner cites pages 372-405 of Exhibit 2034 for the first time in this proceeding. The Board should disregard such untimely identified "evidence."

B. Lack of Authentication

To the extent Patent Owner argues that 37 C.F.R. § 42.61(b) obviates the need for its evidence to comply with FRE 902, it is incorrect. Since Patent Owner seeks to rely on a declaration from Luebke and accompanying report from KMT included in Exhibit 2034 for the truth of the matters asserted therein, it should have submitted declarations from Luebke, BodyCote, and KMT. *See Gnosis S.p.A. v. S. Ala. Med. Sci. Found.*, IPR2013-00118, Paper 64, at *21, n.12 (P.T.A.B. June 20, 2014) ("The patent [cited by Dr. Gregory] is admissible, however, only as evidence of what it describes. 37 C.F.R. § 42.61(c). To the extent the '381 patent includes data upon which SAMSF relies to prove the truth of the data, Dr. Gregory's declaration is insufficient to authenticate the data. . . ."). The fact that such hearsay-containing documents were submitted during the prosecution of a later-filed application does not transform them into admissible evidence.

Patent Owner did not submit a declaration from BodyCote regarding: (1) the identity of the samples, *i.e.*, brand and model, it allegedly obtained and heated; (2)

whether such samples were in sealed, packaged containers, indicating that they had not been previously handled; (3) whether it heated the samples at 300°C for 24 hours; and (4) to whom it sent the samples after heating.

Patent Owner also did not submit a declaration from KMT regarding: (1) whether the report contained in Exhibit A to Luebke's declaration is a true and correct copy of a declaration allegedly prepared by it; (2) the identity of the samples, i.e., brand and model, it allegedly obtained and bend-tested; (3) whether it received the samples directly from BodyCote; and (4) whether the samples it allegedly bend-tested were ones that BodyCote heated at 300°C for 24 hours.

Patent Owner argues that Exhibit A is self-authenticating under FRE 902(7), but cites two cases that are inapposite. In *Alexander*, the Sixth Circuit affirmed the district court's refusal to consider unauthenticated documents submitted by appellant Alexander, except for one document on appellee CareSource's letterhead, which was found to be self-authenticating. *Alexander v. CareSource*, 576 F.3d 551, 561 (6th Cir. 2009). In other words, where one party submitted a document generated on the letterhead of the *opposing* party, the court found it to be self-authenticating. Similarly, in *Reitz v. Mt. Juliet*, the court declined to consider unauthenticated documents, but made an exception with respect to documents attached by plaintiff Reitz that were on the letterhead of defendant City of Mt. Juliet. *Reitz v. Mt. Juliet*, No. 3:08-cv-0728, 2009 WL 5170200, at *5 n.7 (M.D.

Tenn. Dec. 18, 2009). In such cases, there is less of a concern of forgery or falsification. In contrast, the KMT document on which Patent Owner seeks to rely neither was produced by Petitioner nor is on Petitioner's letterhead.

C. Inadmissible Hearsay

Patent Owner appears to concede that the objected-to portions of Exhibit 2034 contain hearsay. Patent Owner is incorrect that “there are circumstantial guarantees of trustworthiness associated with submitting a declaration with the PTO.” Luebke has a substantial financial stake in this outcome of these proceedings. *See* Paper 31, p. 8. His potential to “receive millions of dollars more” in royalties calls into question his self-serving statements. *Id.* at 9. Patent Owner's argument that Exhibit 2034 is more probative “than any other evidence” is belied by the fact that it makes no representation of having made “reasonable efforts”—as required by FRE 807—to submit declarations from Luebke, BodyCote, or KMT.

II. EXHIBIT 2035

As set forth above, the *Alexander* and *Reitz* cases upon which Patent Owner relies do not support its argument regarding self-authentication. Patent Owner also appears to concede that Exhibit 2035 contains hearsay. Patent Owner's argument that Exhibit 2035 is more probative “than any other evidence” is belied by the fact that it makes no representation of having made “reasonable efforts”—as required by FRE 807—to submit declarations from Kowalski or Jason Nolan. Further,

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