UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARKEMA AND ARKEMA FRANCE
Petitioner,
v.

HONEYWELL INTERNATIONAL INC.,
Patent Owner.

Case No.: PGR2016-00011
Patent No.: 9,157,017

PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(C)

Honeywell submits this reply in support of its motion to exclude Petitioner's Exhibit 1163 as hearsay.

I. INTRODUCTION

Recognizing the hearsay nature of Exhibit 1163, Arkema tries to salvage its exhibit by claiming that it is "used for the non-hearsay purpose of impeaching Dr. Bivens." Opp. at 3. But Exhibit 1163 cannot be used for impeachment evidence because it is not a prior statement ***by Dr. Bivens***, but instead, an earlier declaration of someone unrelated in any way to Dr. Bivens. As explained in Honeywell's motion to exclude, Arkema is transparently attempting to use Exhibit 1163 as substantive rebuttal evidence and offering it for its truth, despite its plainly hearsay nature. Further supporting Honeywell's motion, Arkema admits that Exhibit 1163 is not something it is even relying on as necessary to support its contentions regarding the alleged desirability of a low-GWP refrigerant during the time period leading up to Honeywell's invention. Accordingly, because Exhibit 1163 is undisputedly hearsay, is being offered for its truth, and is admittedly of little to no relevance to Arkema's contentions, it should be excluded.

II. ARGUMENT

A. Exhibit 1163 Is Hearsay

Arkema attempts to avoid the clear case for exclusion by arguing that it is not relying on Exhibit 1163 for its truth, but rather for "impeaching Dr. Bivens." Opp. at 1, 4. Arkema does not cite any support for its proposition that using a

document that the witness did not write, had never seen, and disagrees with is proper "impeachment." *See* Ex. 1177 at 30:4-18; 32:18-21. And for good reason: because that is neither proper impeachment nor an end-run around Honeywell's valid hearsay objection. *See Fisher v. United States*, 78 Fed. Cl. 710, 712–13 (2007) (improper to impeach expert with statements "not made by the witness himself"). Under Arkema's theory, every piece of evidence could conceivably come in as "impeachment" evidence if it in any way is offered by a party in response to an opposing expert's opinion. The rules of evidence, and basic fairness, say otherwise.

Traditionally, impeachment "involves evidence that calls into question the witness's veracity. It deals with 'matters like the bias or interest of a witness, his or her capacity to observe an event in issue, or a prior statement of the witness inconsistent with his or her current testimony.'" *United States v. Harris*, 557 F.3d 938, 942 (8th Cir. 2009) (citation omitted). Arkema does not use Exhibit 1163 for any of those impeachment purposes, or for any impeachment purpose in the Federal Rules. *See* Fed. R. Evid. 801(d)(1) (advisory committee notes) ("Prior inconsistent statements traditionally have been admissible to impeach…."); Fed. R. Evid. 609 (governing impeachment by evidence of a criminal conviction); Fed. R. Evid. 613 (governing use of prior inconsistent statements by a witness); Fed. R. Evid. 607 (equating impeachment with "attack[ing] the witness's credibility").

Arkema instead attempts to use Exhibit 1163 to substantively ***rebut***, rather than impeach, Dr. Bivens' assertion that "[t]he *only logical conclusion* from this is that Inagaki, like all others skilled in the art at that time, presumed that all of the compounds covered by its formula would share the same toxicity and other concerns." Opp. at 3 (citing Ex. 2126 ¶ 91) (emphasis Arkema's). Arkema points to two things as "impeaching" Dr. Bivens' above assertion: (1) his "failure to consider Dr. Shibanuma's declaration"; and (2) his "admission that he, in fact, did not know why Daikin did not pursue Inagaki." Opp. at 4.

Dr. Shibanuma's declaration in no way supports those points. Dr. Shibanuma's declaration says nothing about Dr. Bivens' consideration of it in this proceeding. How could it? The declaration was authored in 2014, and this proceeding began in 2016.

Nor does Dr. Shibanuma's declaration say anything about Dr. Bivens' knowledge about why Daikin did not pursue Inagaki. Why would it? What reason would Dr. Shibanuma have to talk about Dr. Bivens' knowledge in his declaration? Indeed it does no such thing.

Rather, Arkema cites only portions of Dr. Bivens' deposition transcript to support its two above points. Opp. at 4 (citing Ex. 1177). By Arkema's own admission then, Exhibit 1163 is not even impeachment evidence.

To the contrary, Arkema has plainly been called out for trying to use Exhibit 1163—a declaration from a different proceeding by someone Arkema did not offer as a declarant here—to prove the truth of the matter asserted therein. By submitting it as an exhibit, Arkema intends the Board to weigh Exhibit 1163 against Dr. Bivens' conclusions. Opp. at 4 (asserting Ex. 1163 is relevant to showing the "baseless[ness]" of Dr. Bivens' assertion). Yet implicit in that weighing is the assumption that the Board will consider the statements in Exhibit 1163 for their truth. If not offered for their truth, statements by someone other than Dr. Bivens cannot possibly "impeach" Dr. Bivens' conclusions. The whole purpose of Arkema's reliance on Exhibit 1163 is to allegedly provide evidence to the Board as to why Daikin abandoned the Inagaki reference—i.e. for the truth of Arkema's assertion.

B. Honeywell's Motion Did Not Include Improper Substantive Arguments

Arkema also argues that Honeywell's motion includes improper substantive arguments. To the contrary, Honeywell properly set forth evidentiary bases for excluding Exhibit 1163, namely: (1) it does not support Arkema's propositions, and should therefore be excluded on that basis as irrelevant, and (2) does not carry any guarantees of trustworthiness to somehow qualify under the residual hearsay exception despite its facially hearsay nature. *See* Motion at 5, 7.

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