

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NESTE OIL OYJ,
Petitioner,

v.

REG SYNTHETIC FUELS, LLC,
Patent Owner.

Case IPR2013-00578
Patent No. 8,231,804

Before RAMA G. ELLURU, SHERIDAN K. SNEDDEN, and
CHRISTOPHER L. CRUMBLEY, *Administrative Patent Judges*.

CRUMBLEY, *Administrative Patent Judge*.

DECISION
Patent Owner's Motion to Exclude Evidence
37 C.F.R. § 42.64(c)

Patent Owner, REG Synthetic Fuels, LLC ("REG") moves to exclude from evidence certain exhibits filed by Petitioner Neste Oil Oyj ("Neste") (Paper 38, "Mot."). Neste filed an Opposition to the Motion (Paper 45, "Opp.") and REG filed a Reply (Paper 49, "Reply"). For the following reasons, REG's motion is *granted-in-part* and *denied-in-part*.

Pursuant to our Rules, a motion to exclude evidence must be filed to preserve any previously-made objections to evidence. 37 C.F.R. § 42.64(c). The motion must identify where in the record the objections were made, and must explain the objections. *Id.* REG's Motion seeks to exclude the following exhibits for the following reasons:

Exhibit	Description from Exhibit List (Paper 47)	Grounds
1070	Internet Archive Wayback Machine result	Hearsay/Authentication
1088	Declaration of Maureen D. Queler	Prejudicial
1098	SKC - Souborný katalog Ceske republiky (CASLIN)	Hearsay/Authentication
1099	SKC- Full View of Record for ISBN 978-80-02-01891-3	Hearsay/Authentication
1100	Local Record for ISBN 978-80-02-01891-3 at Technical University of Ostrava	Hearsay/Authentication
1101	VSB - Technical University of Ostrava Central Library, catalogue entry for Holding 3174164556	Hearsay/Authentication
1102	Certified translation of Exhibit 1101	Hearsay/Authentication
1107	Email from knihovna@vsb.cz to Maureen Queler 6/11/2014	Hearsay
1109	Email from knihovna@vsb.cz to Maureen Queler 6/12/2014	Hearsay
1110	Attachment 1 to Exhibit 1109 sent in Email	Hearsay
1111	Attachment 2 to Exhibit 1109 sent in Email	Hearsay
1112	Certified translation of Exhibit 1110	Hearsay
1113	Certified translation of Exhibit 1111	Hearsay
1125	Attachment to Exhibit 1124, file titled SCAN_20140717_145320828.pdf	Hearsay/Authentication
1126	Certified translation of Exhibit 1125	Hearsay/Authentication
1129	Wayback Machine capture of http://www.petroleum.cz/clanky.aspx	Hearsay/Authentication
1130	Certified translation of Exhibit 1070	Hearsay/Authentication

1132	Copy of Aprochem 2007 Proceedings from Olomouc Research Library	Hearsay/Authentication
1133	Certified Translation of Exhibit 1132	Hearsay/Authentication

REG identifies where in the record it previously served objections to Neste's exhibits. Mot. 2 (citing Ex. 2072). The Motion to Exclude is, therefore, procedurally proper. As moving party, REG bears the burden of proof to establish that it is entitled to the requested relief: the exclusion of evidence as inadmissible under the Federal Rules of Evidence ("FRE"). *See* 37 C.F.R. §§ 42.20(c), 42.62(a).

I. Objections to Authentication

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a). The Rule provides several examples of evidence that may satisfy the requirement, including the testimony of a witness with knowledge that the item is what it is claimed to be. FRE 901(b)(1). Neste provides the testimony of Maureen D. Queler as a witness with knowledge of the exhibits. Opp. 4–5; Ex. 1088.

Website Printouts (Exs. 1101, 1102, 1070, 1129, 1130)

Ms. Queler testifies that Exhibit 1101 is a printout of the catalogue results for the Technical University of Ostrava Central Library for ISBN 978-80-02-01893-3, which she accessed via the Internet. Ex. 1088 ¶ 7. Similarly, Exhibits 1070 and 1129 are said to be printouts of webpages retrieved from the Internet Archive's "Wayback Machine," which show archived versions of other websites. *Id.* ¶¶ 22. Exhibits 1102 and 1130 are said to be translations of these printouts. Neste contends that Ms. Queler's

testimony relies on her personal knowledge of the retrieval each exhibit, and thus authenticates them.

Ms. Queler's testimony may establish that the exhibits are true and correct printouts of the identified webpages, but this is beside the point. Neste wishes to rely on the dates reflected in the printouts to establish that the Kubíčka reference was publicly available prior to December 10, 2007. Paper 24, 15. When offering a printout of a webpage into evidence to prove the website's contents, the proponent of the evidence must authenticate the information from the website itself, not merely the printout. *See Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007), *as amended* (Nov. 20, 2007) (citing *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000)). For this reason, the Board has required that "[t]o authenticate printouts from a website, the party proffering the evidence must produce some statement or affidavit from someone with knowledge of the website . . . for example a web master or someone else with personal knowledge would be sufficient." *EMC Corp. v. Personalweb Techs., LLC*, Case IPR2013-00084, slip op. 45 (PTAB May 15, 2014) (Paper 64) (quoting *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242, at *2 (M.D. Fla. May 12, 2006)).

Neste has not provided the testimony of any witness with personal knowledge of the websites depicted in the printouts; nor do we have any other basis for concluding that the contents of the website are authentic. For this reason, Exhibits 1101, 1070, and 1129 lack authentication and are inadmissible. Consequently, the translations of the printouts, Exhibits 1102 and 1130, are similarly inadmissible.

Search Records (Exs. 1098, 1099, 1100)

Ms. Queler testifies that Exhibits 1098, 1099, and 1100 are printouts of websites she accessed that led her from the website depicted in Exhibit 1089 to the website depicted in Exhibit 1101. Ex. 1088 ¶¶ 4–6. Offered for this purpose, which does not rely on the content of the website itself, Ms. Queler’s testimony provides sufficient support that the document is what Neste purports it to be. We, therefore, conclude that Exhibits 1098–1100 have been properly authenticated.

II. Objections to Hearsay

If an exception does not apply, the rule against hearsay operates to prohibit out-of-court statements from being offered to prove the truth of the matter asserted. FRE 801–803. As we have already determined that Exhibits 1101, 1102, 1070, 1129, 1130 are not authenticated and therefore inadmissible, we need not address REG’s hearsay objections to these documents.

Search Records (Exs. 1098, 1099, 1100)

We determined above that these exhibits, showing the websites accessed by Ms. Queler to reach Exhibit 1101, were properly authenticated. We also find that they are not hearsay, as Neste does not offer them for the truth of their contents, but rather as evidence of the set of links that led to retrieval of Exhibit 1101. Opp. 8.

“Date Stamped” Copies of Kubička (Exs. 1125, 1126, 1132, 1133)

Ms. Queler testifies that Exhibit 1125 is a copy of certain pages of the APROCHEM 2007 Compendium which contains the Kubička reference, and notes that “a stamp appears on page 2 with the date 2007.” Ex. 1088 ¶ 19. Similarly, Exhibit 1132 is said to be a copy of the APROCHEM 2007

proceedings obtained from the Olomouc Research Library, “stamped with the number 1-166-951 and the date 2007.” *Id.* ¶ 23. Exhibits 1126 and 1133 are purported to be translations of these documents. Neste offers these documents as evidence of the date of public availability of the APROCHEM 2007 papers. Paper 24, 15.

We note that the alleged “stamps” of Exhibits 1125 and 1132 are actually handwritten dates, added to the documents by an unknown person at an unknown time. REG argues that the stamps are hearsay, as they are out-of-court statements offered to prove the truth of the matter asserted: that the documents were available as of the handwritten dates. Mot. 9.

Neste contends that the exhibits are not being offered for the truth of the disclosures of the Kubíčka paper, but rather “as further evidence of the public availability of Kubíčka in 2007.” Opp. 9. This argument, however, misses the point of REG’s objection entirely. REG does not object to the contents of Kubíčka as hearsay, but rather to the dates written on the conference proceedings compendium. It is exactly these handwritten dates that Neste relies upon “as further evidence of the public availability of Kubíčka in 2007.” Neste’s argument that it is not relying on the objected-to evidence for the truth of the matter asserted lacks merit.

Nor do we find persuasive the cases Neste cites as permitting the use of date stamps as proof of public availability. Opp. 9 (citing *Straussler v. U.S.*, 339 F.2d 670 (Ct. Cl. 1964) and *Pronova Biopharma Norge AS v. Teva Pharms. USA, Inc.*, 867 F. Supp. 2d 502, 522 n.14 (D. Del. 2012)). Neither case addresses the issue presented here, as no party to those cases appears to have objected to the date stamps on the basis of hearsay.

We determine that the “date stamps” on Exhibits 1125 and 1132, and their translations Exhibits 1126 and 1133, are inadmissible hearsay under FRE 802. As the dates on the documents are the sole reason Neste offers the exhibits into evidence, there is no reason to maintain them in the record for a non-hearsay purpose. We exclude Exhibits 1125, 1126, 1132, and 1133 as improper hearsay.

Email Correspondence (Exs. 1107 and 1109)

Exhibits 1107 and 1109 are purported to be emails from Vendula Nemcova of the Loan Department of the Technical University of Ostrava Central Library to Ms. Queler. Ex. 1088 ¶¶ 11, 13. REG contends that these emails are hearsay, as they are Ms. Nemcova’s out-of-court statements offered for the truth of the matters asserted within. Mot. 7–8. Specifically, REG points out that the emails contain a statement that the APROCHEM 2007 proceedings were added to the catalog on May 22, 2007. *Id.*

Neste argues that it is not seeking to introduce the emails for the truth of the matters asserted therein, but rather “to show the chain of emails that led personnel from the University of Ostrava to forward Exhibits 1110-1111, and because the dates reported in these exhibits match the dates in Exhibits 1101, 1102, and 1110 and 1111.” Opp. 8. We agree that this first asserted purpose is not the truth of the matter asserted in the emails, and if offered for this purpose the exhibits are not hearsay. The second purpose, however, is dependent on the truth of the date in the emails. Though Neste frames the issue as one of “matching dates,” the dates in the emails can corroborate the dates in the other documents only if they are true. Neste has not provided us with any exception to the hearsay rule that would permit admission of out-

of-court statements merely because they “match” other evidence in the record.

We will permit Exhibits 1107 and 1109 to remain in the record, but will rely on them only for purpose of proving the chain of emails that led to Ms. Queler obtaining Exhibits 1110 and 1111, and not for the contents of the emails themselves.

Catalog Entries (Exs. 1110, 1111, 1112, 1113)

Ms. Queler asserts that Exhibits 1110 and 1111 were attached to Exhibit 1108, the email she received from Ms. Nemcova at the Technical University of Ostrava Central Library, and are screenshots of the same library catalog webpages submitted as Exhibit 1101. Ex. 1088 ¶ 13. Exhibits 1112 and 1113 are translations of these documents. *Id.* REG objects to these documents as hearsay, claiming that the dates contained in the catalog listing are out-of-court statements offered to prove the truth of the matter asserted; namely that the cataloged paper was publicly available as of that date. Mot. 7.

Neste argues that exception 17 to the rule against hearsay, pertaining to “commercial lists,” permits the catalog entries to be admitted into evidence. Opp. 2. This exception, entitled “Market Reports and Similar Commercial Publications,” pertains to “Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.” FRE 803(17). According to Neste, “[t]he library catalogue of the University of Ostrava is a compilation that is available to the public,” and the library “would be motivated to be accurate to foster reliance on the catalogues.” Opp. 3.

Neste's argument does not persuade us that the library catalog entry should be admitted under the "commercial list" exception. First, Neste does not cite, nor are we aware of, any case that has applied the "commercial list" exception to a library catalog. *See Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1996), *as amended on reh'g in part* (Jan. 2, 1997) (listing "market reports, telephone directories, weather reports, mortality tables, or like documents that come within the ambit of Rule 803(17)"). The reason the exception is called the "commercial list" exception is that businesses have a pecuniary interest in maintaining accuracy of their lists; no similar motivation applies to a library, which does not derive income from its catalog.

Second, we note that the commercial list exception is grounded in the fact that the public's reliance on such lists provides a motivation for accuracy. But such a motivation only ensures accuracy of the information *the public typically relies upon*. In other words, while members of the public may use the University of Ostrava catalog to locate books and other materials in the library's collection, this only provides a motivation to ensure that the catalog *is accurate for locating books*. Neste has provided no argument that the public typically relies on the University of Ostrava library catalog to establish public availability dates; therefore, there is no reason to believe the library would be motivated to ensure the accuracy of these dates.

The dates in the University of Ostrava catalog entries are hearsay to which no exception applies. We, therefore, exclude Exhibits 1101–1113 as inadmissible hearsay.

Applicability of the Residual Exception

FRE 807 provides a “residual exception” to the hearsay rule, which may apply even if no specific exception of FRE 803 applies. To fall under this exception, the statement must: 1) have equivalent circumstantial guarantees of trustworthiness; 2) be offered as evidence of a material fact; 3) be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and 4) be in the interests of justice to admit. FRE 807. Neste argues that, even if we determine that Exhibits 1101, 1102 and 1110–1113 are hearsay that does not fall within any other exception, the residual exception should apply. We disagree. The residual exception to the hearsay rule is to be reserved for “exceptional cases,” and is not “a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.” *See Conoco*, 99 F.3d at 392 (internal quotations omitted). Based on our review of Neste’s arguments, we do not consider this case to be an exceptional one that would merit application of the residual exception.

III. Objection to Exhibit 1088 as Prejudicial

Finally, REG objects to portions of Exhibit 1088, the testimony of Ms. Queler, as “highly prejudicial” under FRE 403. Mot. 13–14. Specifically, REG’s objection is that portions of Ms. Queler’s testimony rely on evidence that is itself inadmissible, based on the objections analyzed above.

We decline to exclude the objected-to portions of Exhibit 1088. Proceedings before the Board are not jury trials; in the absence of a jury, the risk of unfair prejudice against which Rule 403 guards is diminished, if not eliminated entirely. *See, e.g., Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (“in the context of a bench trial, evidence should not be excluded

under 403 on the ground that it is unfairly prejudicial”); *see also Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981). The Board is capable of hearing relevant evidence and weighing its probative value, taking into account facts such as whether Ms. Queler’s testimony relies on evidence that has been excluded pursuant to this Motion.

In light of the foregoing, it is:

ORDERED that Patent Owner’s Motion to Exclude Evidence is *granted-in-part* with respect to Exhibits 1070, 1101, 1102, 1110–1113, 1125, 1126, 1129, 1130, 1132, and 1133, and otherwise is *denied-in-part*.

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