UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

Before the Honorable Doris Johnson Hines
Administrative Law Judge

In the Matter of **CERTAIN BIO-LAYER INTERFEROMETERS AND COMPONENTS THEREOF**	**Inv. No. 337-TA-1344**

RESPONDENT GATOR BIO, INC.'S OPPOSITION TO COMPLAINANT SARTORIUS BIOANALYTICAL INSTRUMENTS, INC.'S MOTION *IN LIMINE* NO. 3

Respondent Gator Bio opposes Sartorius's Motion *in Limine* No. 3 ("Motion") (Motion No. 1344-017). The Motion was presented during the parties' meet and confer efforts as a "motion to preclude Dr. Vander Veen from offering legal opinions," but now purports to be a motion "to exclude unreliable and immaterial testimony." The Motion is premised on Sartorius's conclusion that Dr. Vander Veen's testimony is "based on his erroneous, irrelevant, and misleading interpretation of Commission precedent." Motion at 2. The Motion goes to weight and is premised on Sartorius's own erroneous conclusions of law. Sartorius cannot effectively move for summary determination by striking the bulk of Dr. Vander Veen's testimony at the pre-hearing stage. Notably, Sartorius seeks to "preclude Dr. Vander Veen from testifying about whether or not certain investments relied upon by Dr. Schwartz are 'cognizable' for the purposes of establishing a domestic industry" while at the same time allowing Dr. Schwartz to presume that those investments are cognizable. *See* Ex. 1, Schwartz Dep. Tr. at 53:4-24 ("My understanding and the understanding that I had for purposes of my report is that the sorts of investments and expenditures that I describe in my report are all cognizable under Commission practice. That is an understanding that I have." Sartorius cannot insulate its case by permitting its expert to do the very thing it attacks.

I. ARGUMENT

Sartorius's request that the ALJ strike section V.C from Dr. Vander Veen's rebuttal report and preclude Dr. Vander Veen from testifying to the opinions therein should be denied for multiple reasons. First, Dr. Vander Veen is not presenting legal opinions or legal argument. Second, Dr. Vander Veen's opinions are proper and material to assist the trier of fact. Sartorius cannot in the pre-hearing stage seek a determination that its domestic industry expenditures are proper and sufficient and its attacks go to weight, not admissibility. Finally, and most egregiously, Sartorius's characterizations of Dr. Vander Veen's testimony and prior cases are misleading.

A. Dr. Vander Veen Will Not Present Legal Argument

As an initial matter, Dr. Vander Veen will not present legal argument or purport to tell the ALJ or the Commission what is or is not cognizable. That role is exclusively for the ALJ and the Commission. This is clear from Dr. Vander Veen's deposition testimony:

Q. To the extent you're wrong about whether certain categories of investments are or are not cognizable under the law, that portion of your criticism no longer applies to Dr. Schwartz's analysis, right?
A. Well, I don't know that I can say that if I'm wrong, I don't think I've made a statement about what expenses are or are not cognizable.
What I've done is I've articulated categories of expenses that the Commission has raised in the past as either not being cognizable or ones they have given less weight to.
So I don't think I presented an opinion about what is or is not cognizable.
Q. You're not providing an ultimate opinion in this case with respect to those investments that you say are not cognizable, you're just raising the issue

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of the criticism of Dr. Schwartz's analysis?
A. Well, I would say what I'm doing here is I'm providing information to the Commission about categories of expenses and the categories of expenses that I'm highlighting here in this section are ones that the Commission in the past has given more scrutiny to.

Motion Ex. 2C, Vander Veen Dep. Tr. at 49-50 (emphases added); *see also id.* at 84:25-85:14 ("Again, consistent with everything in this section, I'm not making a legal opinion as to what is cognizable or not, but I'm identifying categories of expenditures that, from my understanding and in my experience, are the type that the Commission has either not considered or has given less weight to or has given more scrutiny to and so forth."). Even Sartorius acknowledges that Dr. Vander Veen testified the "categories of investments the Commission relies upon is ultimately their decision." Motion at 6. Thus, to the extent Sartorius seeks to suggest Dr. Vander Veen will offer legal conclusions or purport to testify on what is or is not cognizable, it is incorrect.

B. Dr. Vander Veen's Testimony Is Relevant, Material, Reliable, and of the Type Routinely Permitted of Economic Experts

Expert testimony is admissible to the extent that it may assist the trier of fact. *Certain Mobile Devices with Multifunction Emulators*, Inv. No. 337-TA-1170, Order 23 (July 29, 2020). Even the portions of Dr. Vander Veen's report quoted in the Motion (Motion at 6) make clear he is not opining on what the law is, but is highlighting where Dr. Schwartz included investments "of the type" that may need to be further scrutinized. It is then up to the ALJ and Commission to determine the import of these highlighted concerns. It would be impossible for either Dr. Vander Veen or Dr. Schwartz to testify regarding economic domestic industry and public interest *without* making reference to the relevant legal standards.[1] That does not make testimony impermissible. *See Certain Raised Garden Beds and Components Thereof*, Inv. No. 337-TA-1134, Order No. 25 at 6-7 (May 19, 2023) ("To the extent there are mixed questions of law and fact relevant to the trade secret issues, Mr. Phillips may testify. . . I will not attempt to separate factual issues from legal conclusions in Mr. Phillips's testimony at this time. I will make legal conclusions based on

[1] Indeed, Dr. Schwarz himself includes three pages in his report of the legal framework and cites to caselaw no less than 35 times. Ex. 2, Schwarz Expert Report at 24-27 and *ibid*.

the relevant law, not Mr. Phillips's opinions."); *Certain Smart Thermostats, Load Control Switches, & Components Thereof*, Inv. No. 337-TA-1277, Order No. 21 (June 24, 2022) ("Rather than attempting to separate factual evidence from legal conclusions in Mr. Taylor's testimony at this stage, I will receive the evidence and make legal conclusions in the investigation based on the relevant law, not based on Mr. Taylor's opinions.").

Dr. Vander Veen identifies the types of investments, which Dr. Schwarz glosses over, and, as described in Section C below, this testimony is helpful to identifying the "nature of the alleged activities," which is the first step in a domestic industry analysis. *See Certain Foodservice Equipment and Components Thereof* (*"Foodservice*"), Inv. No. 337-TA-1166, Comm'n Op. at 6 (Oct. 29, 2021) ("In assessing the existence of a domestic industry, the Commission first considers the nature of the alleged activities in the United States to determine whether they "are of the nature of activities that contribute to an 'industry in the United States'"). While Dr. Vander Veen does not purport to conclude definitively which investments are or are not cognizable, Sartorius's expert certainly does. In including the investments at all, Dr. Schwartz presumes they are cognizable, and he does so not on his own expertise or independent analysis, but on the say-so of Sartorius's self-serving conclusions:

> My understanding and the understanding that I had for purposes of my report is that the sorts of investments and expenditures that I describe in my report are all cognizable under Commission practice. That is an understanding that I have.

Ex. 1, Schwartz Dep. Tr. at 53; *see also id.* at 54 ("If you're asking me whether I think the warehousing expenses that I've considered here are cognizable in the manner that I recognize them, I think as I understand – based on my understanding of what the Commission would consider, they would be. But again, that's not an independent opinion that I have."). If Dr. Vander Veen's testimony is improper, Dr. Schwartz's is even more so. Worse still, Dr. Schwartz points to investments but makes it impossible to break out which investments relate to potentially non-

qualifying investments. *See* Motion Ex. 1 at ¶ 33 (noting Dr. Schwartz's calculations include unknown portions that relate to sales, marketing, distribution, and logistics activities).

Sartorius's attacks go to the weight of the evidence, not its admissibility. "In general, the harm from expert testimony that does not assist the trier of fact, or otherwise contains impermissible legal opinions, is greatly diminished in the absence of a jury—as in the present investigation." *Certain Mobile Devices with Multifunction Emulators*, Inv. No. 337-TA-1170, Order 23 (July 29, 2020) (denying motion *in limine* and stating if expert "testimony fails to assist me in determining the salient facts, I will give it no weight. The same is true if his testimony wanders into legal opinion."); *Certain Multi-Stage Fuel Vapor Canister Systems and Activated Carbon Components Thereof*, Inv. No. 337-TA-1140, Order No. 35 ("Another option, however—one available in administrative hearings but not, say, jury trials—is for the adjudicator to simply place no weight on the answer on the basis that the witness is not competent to provide it, or to construe it such that it does not constitute a legal conclusion."). In effect, Sartorius seeks summary determination of domestic industry by insulating its proposed investments from scrutiny, but this is improper. *See Certain Mobile Devices with Multifunction Emulators*, Inv. No. 337-TA-1170, Order No. 23 at 2 (July 29, 2020) ("The motion is denied. Dynamics' MIL 1 is essentially a motion for summary determination styled as a motion *in limine*."); *Certain Wireless Consumer Elecs. Devices & Components Thereof*, Inv. No. 337-TA-853, Order No. 59 (May 29, 2013) ("Nintendo is improperly seeking summary determination on this issue through its motion *in limine*."); *Certain Digital Video Receivers, Broadband Gateways, and Related Hardware and Software Components*, Inv. No. 337-TA-1158, Order No. 26 (Dec. 18, 2019) (motions *in limine* are not suitable vehicles as substitutes for motions for summary determination or to attempt to strike or restrict what is clearly admissible testimony.).

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