

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FLYWHEEL SPORTS, INC.,
Petitioner,

v.

PELOTON INTERACTIVE, INC.,
Patent Owner.

IPR2019-00564
Patent 9,861,855 B2

Before SCOTT A. DANIELS, RICHARD H. MARSCHALL, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

FINAMORE, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request on Rehearing of
Order Granting Motion to Strike
37 C.F.R. §§ 42.71(d)

I. INTRODUCTION

On July 29, 2019, Patent Owner filed Additional Objections to Petitioner's Pre-Trial Evidence ("Additional Objections"), whereby Patent Owner objects to Exhibit 1031 as hearsay. Paper 26. With our authorization, Petitioner filed a Motion to Strike Patent Owner's Additional Objections (Paper 27), and Patent Owner filed an Opposition thereto (Paper 28). On August 23, 2019, we issued an Order granting Petitioner's Motion to Strike. Paper 30 ("Order"). On September 6, 2019, Patent Owner filed a Request for Rehearing of this Order, whereby Patent Owner requests that the Board rehear its Order granting the Motion to Strike and that the Director should reconsider the Order via a Precedential Opinion Panel ("POP") review. Paper 37 ("Req. Reh'g").

II. ANALYSIS

A. *Rehearing by the Board*

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters we misapprehended or overlooked, and the place where each matter was previously addressed. *Id.*

Patent Owner argues we overlooked the lack of prejudice to Petitioner resulting from the lateness of Patent Owner's Additional Objections and thereby abused our discretion in granting the Motion. Req. Reh'g 8–12. Patent Owner further asserts the Board improperly articulated *sua sponte* a prejudice to Petitioner. *Id.* at 8–10. Patent Owner also asserts the Board's proffered prejudice is not well grounded because it is based on the

Additional Objections, not on the tardiness associated therewith. *Id.* at 10–12.

Additionally, Patent Owner contends we overlooked the prejudice to Patent Owner that would result from the Additional Objections not being entered. *Id.* at 13–14. Patent Owner similarly contends we did not make any comparison of the parties’ prejudices, thereby committing legal error and abusing our discretion. *Id.* at 13. Patent Owner also maintains a comparison of the parties’ prejudices would make clear that the Board’s decision to grant the Motion to Strike is a clear error of judgment and an abuse of discretion. *Id.* at 14.

After considering Patent Owner’s arguments on rehearing, Patent Owner has not persuaded us that we should modify the decision in the Order granting Petitioner’s Motion to Strike the Additional Objections. We begin with the procedural posture of the Order. On July 30, 2019, Petitioner contacted the Board via e-mail seeking authorization to file its Motion to Strike, and, on August 2, 2019, Judges Daniels, Marschall, and Finamore held a conference call with the parties to discuss Petitioner’s request for authorization. As revealed during the conference call, there is no dispute Patent Owner’s Additional Objections are late, as Patent Owner filed them over a month and a half after the Decision to Institute. 37 C.F.R. § 42.64(b)(1) (“Any objection to evidence submitted during a preliminary proceeding must be filed within ten business days of the institution of trial.”). There also is no dispute that Patent Owner’s Additional Objections are an unauthorized filing, as Patent Owner filed its Additional Objections without any request to excuse the late submission. 37 C.F.R. § 42.5(c)(3) (“A late action will be excused on a showing of good cause or upon a Board

decision that consideration on the merits would be in the interests of justice.”). We, therefore, authorized Petitioner’s Motion to Strike and also authorized Patent Owner to file an opposition thereto, which may seek to excuse the late the filing of the Additional Objections. Order 2.

Consequently, the Order decides both Petitioner’s Motion to Strike, as well as Patent Owner’s request to excuse the lateness of its Additional Objections, whereby Patent Owner has the burden of showing that good cause exists for the tardiness or that consideration of the Additional Objections would be in the interests of justice.

Turning to Patent Owner’s request to excuse the lateness, Patent Owner does not allege any good cause for the lateness, and instead contends permitting its Additional Objections would be in the interests of justice. Order 5; Req. Reh’g 5 (“The so-called “late action” rule of 37 C.F.R. § 42.5(c)(3) permits late action for **either** (1) good cause **or** (2) the interests of justice. This case involves the latter.”). Contrary to Patent Owner’s arguments on rehearing, we did not overlook the prejudices to the parties in determining Patent Owner did not persuasively demonstrate the interests of justice warrant entry of its untimely Additional Objections. Rather, we disagreed with Patent Owner that allowing its tardy Additional Objections would not prejudice Petitioner, as the entry being over a month late would disrupt the trial schedule, as well as effectively give Patent Owner an additional month to consider evidentiary objections. Order 5–6; *Cf. Schlumberger Tech. Corp. v. Integrated Drive Sys. LLC*, IPR2018-00603, Paper 28 (PTAB Apr. 25, 2019) (excusing lateness of objections to evidence served two days late); *Valve Corp. v. Ironburg Inventions Ltd.*, IPR2017-00858, Paper 68 at 39–40 (PTAB Feb. 28, 2019) (excusing

lateness of objections to evidence filed one business day late). Moreover, we acknowledged Patent Owner would be prejudiced by not having the opportunity to have the admissibility of Exhibit 1031 considered. *Id.* at 5. We, however, determined that this prejudice is discounted by Patent Owner's admission that it may or may not pursue the exclusion of this exhibit. *Id.* Patent Owner's prejudice is further undercut by Patent Owner's failure to pursue entry of its Additional Objections until after Petitioner brought the tardiness thereof to the Board's attention. *Id.* at 5–6. In considering the prejudices to both parties, Patent Owner did not persuade us that the interests of justice warrant acceptance of its late Additional Objections. Being unpersuaded on the facts and circumstances in this case that we should excuse the late Additional Objections, we determined the Additional Objections are untimely and unauthorized, and granted Petitioner's Motion to Strike the Additional Objections.

In view of the foregoing, Patent Owner has not persuaded us that we overlooked the prejudices to the parties in deciding the interests of justice do not warrant entry of the late Additional Objections, or that our judgment based on the facts of this case was erroneous or unwarranted. We thus decline to modify our decision denying Patent Owner's request to excuse the late submission of the Additional Objections and granting Petitioner's Motion to Strike the Additional Objections.

B. POP Review

Patent Owner argues the POP should review the decision in the Order because it is an outlier diverging from prior Board decisions that consider the prejudices to the parties in deciding whether to excuse the lateness of an

objection to evidence. Req. Reh'g 14–15. The POP has declined to review the Order. Paper 46.

III. CONCLUSION

Patent Owner has not met the burden of showing that the Order granting Petitioner's Motion to Strike should be modified. We deny Patent Owner's Request for Rehearing.

IV. ORDER

It is ORDERED that Patent Owner's Request for Rehearing of the Order granting Petitioner's Motion to Strike is *denied*.

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