

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUNTER'S MANUFACTURING COMPANY, INC. d/b/a
TENPOINT CROSSBOW TECHNOLOGIES,
Petitioner,

v.

RAVIN CROSSBOWS, LLC,
Patent Owner.

IPR2023-00407
Patent 9,354,015 B2

Before KEN B. BARRETT, PATRICK R. SCANLON, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

SILVERMAN, *Administrative Patent Judge*.

ORDER
Conduct of the Proceedings
37 C.F.R. § 42.5

Pursuant to the Board's Order dated August 29, 2023 (Paper 21), Patent Owner moved to compel the balance of seven hours of deposition of Petitioner's expert witness. Dr. Batzer. Paper 22. Petitioner opposed. Paper 23.

Patent Owner represents:

On the morning of August 23, 2023 — less than 24 hours before the noticed deposition was scheduled to begin at a third-party location and after arrangements had been made for the attendance of a court reporter and videographer beginning at 9:00 a.m. — counsel for Petitioner emailed counsel for Patent Owner informing Patent Owner that Mr. Batzer “has a hard stop at 4:30 because he has a flight out at 6:00 p.m.” EX2026. Patent Owner responded that the Notice for Mr. Batzer's deposition was for 9:00 a.m., which was when the court reporter was arriving, and that counsel would “try our best to accommodate the witness[s] travel schedule.” *Id.* At no point did Patent Owner agree to conclude the deposition at 4:30 p.m. or otherwise stipulate to shorten the time permitted for Mr. Batzer's cross-examination.

Paper 22, 2. The Batzer deposition transcript indicates that the videography and transcription began at “approximately 9:04 a.m.” on August 24, 2023. Ex. 1030, 4, *see also* Ex. 2027, 2. Later that day, Dr. Batzer concluded a response, by stating: “And, ma'am, it is 4:30. I have to go now.” Ex. 1030, 231, *see also* Ex. 2027, 3. Patent Owner argues that allowing the completion of Dr. Batzer's deposition would be in the interests of justice, because

Petitioner has refused to meet its obligations for routine discovery, instead seeking to limit its purported expert's availability for deposition and prevent Patent Owner from fully vetting the veracity of Mr. Batzer's purported expert testimony.

Paper 22, 4.

Petitioner submits that Dr. Batzer’s deposition should not resume, for the balance of the allotted seven hours, because Petitioner’s counsel had suggested “start[ing] earlier than 9:30¹” (Ex. 2026, 1) in an electronic mail message sent on the day before the deposition, “*each* of the breaks [during the deposition] (with one exception to change the media by the Patent Owner’s requested videographer) was initiated by Patent Owner,” and “Patent Owner for the very first time raised the issue of continuing the deposition because it needed more time,” “[a]t approximately 4:15 p.m. — just 15 minutes to Dr. Batzer’s hard stop.” Paper 23, 2. Petitioner argues:

Patent Owner’s Motion should be denied because (a) it was caused by Patent Owner’s failure to follow the Board’s guidance on depositions, (b) it is merely a tactic to give Patent Owner an opportunity to conduct follow-up questioning after evaluating the initial questioning, and (c) it would impose an undue burden on Petitioner.

Id. Petitioner further contends that Patent Owner did not make efficient use of the period in which Dr. Batzer was present, arguing: “Had Patent Owner not wasted so much time on side issues, but instead focused on the merits, it easily would have had even more than an hour to spare.” *Id.* at 3. Thus, Petitioner contends, “Patent Owner deliberately decided to lie in wait, sandbagging its ultimate end-goal, only to spring it on Petitioner 15 minutes before the end, when it was too late to make any accommodations.” *Id.* at 4.

In trial practice before the Board, “[c]ross examination of affidavit testimony prepared for the proceeding” — such as the cross examination of an expert witness who has provided opinions in a declaration — “is

¹ The deposition had actually been noticed for a 9:00 a.m. start time. Ex. 2026, 1.

authorized within such time period as the Board may set.” 37 C.F.R. § 42.51(b)(1)(ii). “Unless stipulated by the parties or ordered by the Board,” such cross examination “shall be subject to” a durational limit of “[s]even hours.” 37 C.F.R. § 42.53(c)(2).

We discern no reason why the Patent Owner should not be permitted the full seven hours of cross-examination allotted under the rules. The Batzer deposition began at approximately the noticed time of 9:00 a.m. It was not unreasonable to maintain that starting time, in view of the various scheduling complexities — including arranging for a court reporter and a videographer. Also, we will not second guess Patent Owner’s strategy, as to how the allotted seven hours should be consumed.

Petitioner’s citations to *Pevarello v. Lan*, Interference No. 105,394, 2007 WL 594728 (BPAI Jan. 12, 2007), do not persuade us otherwise. *See* Paper 23, 2–3. Although *Pevarello*, 2007 WL 594728 at *11, remarks, in dicta, that certain deposition questions “generally are a waste of time,” *Pevarello* does not address any basis for reducing the time allotted for cross examination in a deposition. Moreover, *Pevarello* (which is not designated as either precedential or informative) pertains specifically to practice in an interference proceeding, not an AIA trial. The guidance applicable in this case is that contained in the Patent Trial and Appeal Board Consolidated Trial Practice Guide² (Nov. 2019). Appendix D of the Trial Practice Guide sets out testimony guidelines for AIA Trials.

During a telephone conference on September 27, 2023, the Board instructed the parties to coordinate in arranging the time and manner for

² Available at <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf>

completing Dr. Batzer's deposition. Further, in view of the resumption of the Batzer deposition, the Board instructed the parties to confer and to propose accommodations to the briefing schedule, in this matter. On September 29, 2023, the parties (via Patent Owner's counsel) provided a Joint Report to the Board, indicating that they had reached an agreement regarding the continued deposition and proposing adjustments to Due Dates 1–3 set forth in the Scheduling Order (Paper 15). The Board adopts the parties' proposed revisions. In light of the parties' agreement to continue the deposition, Patent Owner's motion is moot.

Accordingly, it is:

ORDERED that Patent Owner's Motion for Routine Discovery (Paper 22) is *denied* as moot; and

FURTHER ORDERED that the Scheduling Order (Paper 15) is modified, as follows:

Due Date 1 is changed from October 2, 2023 to
October 18, 2023;

Due Date 2 is changed from December 26, 2023 to
January 11, 2024; and

Due Date 3 is changed from February 6, 2024 to
February 22, 2024.

IPR2023-00407
Patent 9,354,015 B2

For PETITIONER:

John M. Skeriotis
Sergey Vernyuk
EMERSON, THOMSON & BENNETT, LLC
jms@etblaw.com
sv@etblaw.com

For PATENT OWNER:

Christopher M. King
Kadie M. Jelenchick
Michelle A. Moran
FOLEY & LARDNER LLP
cking@foley.com
kjelenchick@foley.com
mmoran@foley.com