

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FUSION ORTHOPEDICS, LLC,
Petitioner,

v.

EXTREMITY MEDICAL, LLC,
Patent Owner.

Case IPR2023-00894
U.S. Patent No. 11,298,166

**PATENT OWNER'S OBJECTIONS
PURSUANT TO 37 C.F.R. § 42.64(b)(1)**

Pursuant to 37 C.F.R. § 42.64(b)(1) and the Federal Rules of Evidence (“FRE”), Patent Owner Extremity Medical, LLC hereby objects to the following documents submitted on May 3, 2024 by Petitioner Fusion Orthopedics, LLC.

Nothing in this paper should be construed as an admission that any rights of Patent Owner would have been waived or forfeited had this paper or any objection herein not been filed, or that 37 C.F.R. § 42.64(b)(1) applies to any of the objections herein if 37 C.F.R. § 42.64(b)(1) would not otherwise apply. The objections herein are premised upon 37 C.F.R. § 42.64(b)(1) potentially being determined to apply to the documents in question, and are submitted solely to preserve the rights of Patent Owner should 37 C.F.R. § 42.64(b)(1) be determined to apply.

1. Petitioner’s Reply (Paper 28)

Patent Owner objects to Petitioner’s Reply (Paper 28) for the below reasons.

Under Section II(I) of the Board’s Consolidated Trial Practice Guide (November 2019), the Reply’s arguments are untimely because they are provided in an attempt to establish a case-in-chief and could have been submitted with the Petition. The Reply includes improper arguments that assume facts not in evidence, including for example, but not limited to, the arguments in Section I(A)(2), pages 1-2; Section I(A)(3), pages 3-5; Section I(A)(4), pages 5-7; Section

I(A)(5), pages 7-10; Section I(B)(2), pages 10-14; Section II(A)(1), pages 18-21; and Section III(A)(2), pages 28-30.

Patent Owner also objects to the evidence cited in the above sections of the Reply, including all the Exhibits below, as untimely under Section II(I) of the Board's Consolidated Trial Practice Guide (November 2019) because it is cited in an attempt to establish a case-in-chief and could have been submitted with the Petition.

2. Exhibit 1018

Patent Owner objects to the statements made and the evidence cited in paragraphs [009]-[015], [018]-[029], [033]-[043], and [054] of Exhibit 1018 as untimely under Section II(I) of the Board's Consolidated Trial Practice Guide (November 2019) because they were provided in an attempt to establish a case-in-chief and could have been submitted with the Petition.

3. Exhibits 1019-1032 and 1039-1044

Patent Owner objects to Exhibits 1019-1032 and 1039-1044 as follows:

Patent Owner objects to Exhibits 1019-1032 and 1039-1044 as untimely under Section II(I) of the Board's Consolidated Trial Practice Guide (November 2019) because they were submitted in an attempt to establish a case-in-chief and could have been submitted with the Petition.

Patent Owner objects to Exhibits 1019-1032 and 1039-1044 under FRE 401/402/403 because they are inadmissible as irrelevant, because, among other reasons, they do not form a basis of the instituted grounds, and their probative value (to the extent there is any) is outweighed by other considerations including prejudice, confusion, and waste of time.

Patent Owner further objects to Exhibits 1022 and 1024 under FRE 401/402/403 because they are inadmissible as irrelevant, because they post-date the earliest effective filing date of the '166 Patent.

Patent Owner further objects to Exhibit 1023 under FRE 801/802 because this document constitutes and contains inadmissible hearsay; Patent Owner also objects to Exhibit 1023 as inadmissible under FRE 901 because it has not been shown to be authenticated.

4. Exhibits 1034-1038 and 1045-1050

Patent Owner objects to Exhibits 1034-1038 and 1045-1050 as follows:

Patent Owner objects to Exhibits 1034-1038 and 1045-1050 under FRE 401/402/403 because they are inadmissible as irrelevant, because, among other reasons, Figures 9 and 18 of the '166 Patent speak for themselves and anything not in these figures that might be part of the 3D models set forth in these Exhibits is not part of the '166 Patent and therefore irrelevant to any issue in the proceedings,

and their probative value (to the extent there is any) is outweighed by other considerations including prejudice, confusion, and waste of time.

Patent Owner objects to Exhibits 1034-1038 and 1045-1050 as inadmissible under FRE 901 because they have not been shown to be authenticated.

Respectfully submitted,

Dated: May 10, 2024

By: /Vincent M. Ferraro/
Vincent M. Ferraro (Reg. No. 79,197)
Michael J. Zinna (admitted *Pro Hac Vice*)
KELLEY DRYE & WARREN LLP
One Jefferson Road
Parsippany, NJ 07054
Telephone: (212) 808-7800
Facsimile: (212) 808-7897
E-mail: vferraro@kelleydrye.com
E-mail: mzinna@kelleydrye.com

Attorneys for Patent Owner
Extremity Medical, LLC

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(4), I hereby certify that on May 10, 2024, I caused a copy of the foregoing document to be served via electronic mail to the following addresses for counsel for Petitioner as indicated in Petitioner's Revised Mandatory Notices (Paper 18):

Jennifer Brinkerhoff	Jen@FusionOrthopedics.com
Scott E. Kamholz	sek@toolpat.com
Corby Vowell	corby@vowelllawfirm.com
Ross Culpepper	ross@allianceip.com
Samuel Rocereta	sam@fusionorthopedics.com

By: /Vincent M. Ferraro/
Vincent M. Ferraro, Reg. No. 79,197