

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
Patent 11,298,166

**PETITIONER OPPOSITION
TO PATENT OWNER’S MOTION TO EXCLUDE EVIDENCE**

The Board should deny or dismiss the Motion to Exclude because the objected-to evidence is amenable to being appropriately weighted without risk of prejudice.

The Zhang model illustrated in Exhibit 1054, and the '166 patent models illustrated in Figures 1034–1038, 1045–1050, and 1064 were presented as interpretive aids to show how a POSA would have understood them. The objected-to paragraphs of Exhibit 1018 (¶¶ 71–79) and Exhibit 1054 (¶¶ 2, 8, and 22–24)

provide expert testimony as to what the POSA's interpretations would have been. Because the POSA's interpretation of the prior art upon which a challenge is based is central to the evaluation of patentability, the evidence is relevant to this proceeding.

The issue, then, is the weight to be accorded this evidence. The Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to evidence presented without substantial concern for prejudice. *See, e.g., Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1941) ("One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received"). Thus, in this *inter partes* review, the better course is to have a complete record of the evidence to facilitate public access as well as appellate review. *See id.* ("If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.")

As to the '166 patent models, only Exhibits 1045 and 1064 among those objected to remain pertinent to the Revised Motion to Amend, because Patent Owner has abandoned the proposed amendment that necessitated the other exhibits.

The Board should dismiss the Motion to Exclude as to Exhibits 1034–1038 and 1046–1050 because it is unlikely that the Board will rely on these exhibits in its final disposition of the case. The Board should dismiss the Motion as to paragraphs 71–79 of Exhibit 1018 for similar reasons.

Concerning the Zhang model in Exhibit 1045, Patent Owner does not dispute that the model is entirely consistent with Zhang’s Figure. Consequently, Patent Owner offers no cogent basis to assert that the model lacks relevance. Patent Owner instead misuses its Motion to Exclude to present substantive argument comparing Petitioner’s Zhang model to Patent Owner’s alternative models. Patent Owner could have, but chose not to, discuss these alternative models in its Reply in support of its Revised Motion to Amend.* In any event, the Board is perfectly capable of assigning appropriate weight to the objected-to evidence without the need to protect a jury or other factfinder lacking administrative expertise from prejudice. For these reasons, the Board should deny or at least dismiss the Motion

* Even so, Patent Owner does not explain how its alternative interpretations of the Zhang model would have any substantive effect on its arguments. Notably, Patent Owner’s alternative interpretations show a flat top surface distinct from the side surface, just as in Petitioner’s Zhang model. Patent Owner’s argument therefore amounts to a distinction without a difference.

as to this exhibit and as to paragraphs 2, 22, and 23 of Exhibit 1054.

As to Exhibit 1064, this exhibit was presented expressly for the purpose of showing the shape of Patent Owner's purported first aperture more clearly and not for any other reason. Patent Owner does not dispute that the exhibit accurately depicts the purported first aperture. To the extent this exhibit aids the Board in its interpretation of the Revised Motion to Amend, it is relevant to the proceeding and can be accorded the appropriate weight. For these reasons, the Board should deny or at least dismiss the Motion as to this Exhibit, its predicate exhibit 1045, and paragraphs 8, 23, and 24 of Exhibit 1054.

Respectfully submitted,
Fusion Orthopedics, LLC

By:

Dated: September 3, 2024 /Jennifer R. Brinkerhoff/
Jennifer R. Brinkerhoff, Reg. No. 78,696
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, I certify that on the date listed below, a copy of this paper was served on Abhishek Bapna (abapna@kelleydrye.com), Vincent M. Ferraro (vferraro@kelleydrye.com), and Michael Zinna (mzinna@kelleydrye.com).

Dated: September 3, 2024 /Jennifer R. Brinkerhoff/
Jennifer R. Brinkerhoff, Reg. No. 78,696