

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 REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64**

Extremity Medical (“Patent Owner”) submits this Reply in support of its Motion to Exclude (“Motion”) Fusion Orthopedics’ (“Petitioner”) evidence.

I. THE PORTIONS OF EXHIBIT 1054 THAT RELY ON THE ZHANG INTERPRETATION MODEL SHOULD BE EXCLUDED

Petitioner argues that the Zhang Interpretation Model is relevant as an interpretive aid to show how a POSA would have understood and interpreted Zhang’s figure. *See* Opp., pp. 1-2. But this does not go to the test for relevance: whether the model “has any tendency to make a fact more or less probable than it would be without the evidence.” Fed. R. Evid. (“FRE”) 401. The “fact” at issue is whether the “nail tail region” of Zhang’s assembly has an aperture that is on both a first (*e.g.*, top) and a second (*e.g.*, side) exterior surface of the nail, as required by substitute claims 16-30. Petitioner does not explain how or why the model—whether used as an “interpretive aid” or otherwise—has any tendency to make this fact more probable than it would be in the absence of the model.

As explained in the Motion, under FRE 401 and 402, the Zhang Interpretation Model actually does *not* help the Board determine what the Zhang reference discloses because the model adds a significant amount of speculative detail *not* provided in the Zhang reference itself, in at least *three* ways. *See* Motion, pp. 2-3. Petitioner does not dispute that the model does this.

As also explained in the Motion, under FRE 403, the Zhang Interpretation Model’s probative value (if any) is far outweighed by the dangers of unfair

prejudice and confusing the issues. *See* Motion, pp. 3-4. Petitioner also does not dispute that the model is not a substitute for the Zhang figure itself. And, while Petitioner argues that the Board is well-positioned to determine and assign appropriate weight to evidence, Petitioner does not dispute that these dangers exist. If there is any probative value to the Zhang Interpretation Model at all, it is very low compared to these substantial dangers.

Petitioner also argues that the Zhang Interpretation Model is consistent with Zhang's figure. *See* Opp., p. 3. This is wrong, but even if it was not, it has nothing to do with the test for relevance set forth in FRE 401. Even if a piece of evidence is consistent with a fact at issue, it does not follow that such evidence necessarily has "any tendency to make [that] fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. Petitioner fails to explain how mere *consistency* between the model and Zhang's figure (assuming that consistency even exists, which it does not) establishes *relevance*. This failure is particularly problematic for Petitioner given that it could also be argued that Patent Owner's alternative models are consistent with Zhang's figure, yet they do not make the "fact" at issue here—whether the "nail tail region" of Zhang's assembly has an aperture that is on both a first (*e.g.*, top) and a second (*e.g.*, side) exterior surface of the nail—more or less probable.

Petitioner also inexplicably accuses Patent Owner of misusing the Motion to

present substantive argument comparing the Zhang Interpretation Model to Patent Owner's alternative models, asserting that Patent Owner could have discussed the alternative models in its Reply in support of its Motion to Amend.¹ See Opp., p. 3. As an initial matter, this is a baseless accusation as there has been no misuse by Patent Owner whatsoever. Patent Owner relies on alternative models in the Motion to show that admitting the Zhang Interpretation Model into evidence would create dangers of unfair prejudice and confusing the issues. It would have been inappropriate for Patent Owner to argue this evidentiary issue in its Revised Motion to Amend as Petitioner asserts. In any event, Petitioner's accusation is a red herring as it does not go to the merits of the Motion.

Accordingly, paragraphs [002] and [022]-[024] of Exhibit 1054, which refer to the Zhang Interpretation Model, should be excluded.

II. EXHIBITS 1034-1038, 1045-1050, 1064 AND THE PORTIONS OF EXHIBIT 1054 THAT RELY ON THEM SHOULD BE EXCLUDED

First, Petitioner admits that Exhibits 1034-1038 and 1046-1050 are no

¹ It is actually Petitioner who has raised a substantive argument, asserting that Patent Owner's alternative models do not have a substantive effect on a determination of *patentability*. See Opp., p. 3, fn. Because it is inappropriate to discuss this issue in this Motion, Patent Owner merely notes here its disagreement with the argument.

longer relevant to any issue remaining in the proceeding, yet argues that the Board should dismiss the Motion to Exclude as to these exhibits. *See Opp.*, pp. 2-3.

Given that both parties agree these exhibits are not relevant to any issue remaining in the proceeding, the exhibits must be excluded under FRE 402, which provides that “[i]rrelevant evidence is not admissible.”

Second, as to Exhibits 1045 and 1064, as it did with respect to the Zhang Interpretation Model, Petitioner argues that the ’166 Patent Interpretation Models are relevant as an interpretive aid to show how a POSA would have understood and interpreted the ’166 Patent’s figures. *See Opp.*, pp. 1-2. Again, this argument does not go to the test for relevance set forth in FRE 401. Petitioner does not argue how or why the models have any tendency to make a fact more probable than it would be in the absence of the models.

As explained in the Motion, under FRE 401 and 402, the ’166 Patent Interpretation Models actually do *not* help the Board determine what the ’166 Patent teaches because the models add a significant amount of speculative detail *not* provided in the ’166 Patent itself. Motion, pp. 7-8. Petitioner does not dispute that the models do this.

As also explained in the Motion, under FRE 403, the ’166 Patent Interpretation Models’ probative value (if any) is far outweighed by dangers of unfair prejudice and confusing the issues. *See Motion*, pp. 8-9. Petitioner does not

dispute that the models are not substitutes for the '166 Patent's figures themselves. And, while Petitioner argues that the Board is well-positioned to determine and assign appropriate weight to evidence, Petitioner does not dispute that these dangers exist. If there is any probative value to the '166 Patent Interpretation Models at all, it is very low compared to these substantial dangers.

Accordingly, Exhibits 1034-1038, 1045-1050, and 1064 and at least paragraphs [008], [023], and [024] of Exhibit 1054 should be excluded.

III. PORTIONS OF EXHIBIT 1018 THAT RELY ON EXHIBITS 1049-1050 SHOULD BE EXCLUDED

Petitioner admits that Exhibits 1049-1050 and paragraphs [071]-[079] of Exhibit 1018 are no longer relevant to any issue remaining in the proceeding, yet argues that the Board should dismiss the Motion to Exclude as to these exhibits. *See Opp.*, pp. 2-3. But dismissing the Motion as to those exhibits would keep the irrelevant exhibits in the record, which is the wrong result. This evidence must be excluded under FRE 402.

Accordingly, paragraphs [071]-[079] of Exhibit 1018 should be excluded.

IV. CONCLUSION

The Board should exclude the above-identified evidence.

Respectfully submitted,

Dated: September 10, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2024, a copy of the foregoing document was served via electronic mail to the following addresses for counsel for Petitioner as indicated in Petitioner's Revised Mandatory Notices (Paper 18):

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