

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MIANYANG BOE OPTOELECTRONICS TECHNOLOGY CO., LTD.; WUHAN
CHINA STAR OPTOELECTRONICS SEMICONDUCTOR DISPLAY
TECHNOLOGY CO., LTD.; TIANMA MICROELECTRONICS CO. LTD.; AND
VISIONOX TECHNOLOGY, INC.
Petitioner,

v.

SAMSUNG DISPLAY CO., LTD.
Patent Owner.

Case No. IPR2023-00941
U.S. Patent No. 7,414,599

**PETITIONER’S OPPOSITION TO PATENT OWNER’S
MOTION TO EXCLUDE TESTIMONY OF DR. DANIEL
FOTY DUE TO LACK OF QUALIFICATIONS (EXS. 1003
AND 1029)**

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LISTING OF EXHIBITS

Exhibit	Description
EX1001	U.S. Pat. 7,414,599 (Chung)
EX1002	U.S. Pat. Pub. 2003/0132931 (Kimura)
EX1003	Expert Declaration of Dr. Daniel Foty
EX1004	U.S. Pat. 6,362,798 (Kimura '798)
EX1005	File History for U.S. Pat. 7,414,599
EX1006	U.S. Pat. Pub. 2001/0022565
EX1007	U.S. Pat. Pub. 2003/0030603
EX1008	Excerpts from <i>Analog Integrated Circuit Design</i> , David A. Johns et al., John Wiley & Sons, Inc., 1997.
EX1009	<i>Modeling and Simulation of Insulated-Gate Field-Effect Transistor Switching Circuits</i> , Harold Shichman et al., IEEE Journal of Solid-State Circuits, Vol. SC-3, No. 3, September 1968.
EX1010	Excerpts from <i>Physics and Technology of Semiconductor Devices</i> , A. Grove, John Wiley & Sons, 1967.
EX1011	Excerpts from <i>CMOS Digital Integrated Circuits: Analysis and Design</i> , (third edition), S. Kang et al., McGraw-Hill, 2003.
EX1012	U.S. Pat. 6,229,506 ("Dawson")
EX1013	U.S. Pat. 5,666,046
EX1014	<i>TFT AMOLED Pixel Circuits and Driving Methods</i> , J. Stanford, SID 03 Digest, pp. 10-13 (2003))
EX1015	<i>A New Pixel Circuit for Active Matrix Organic Light Emitting Diodes</i> , J. Goh, IEEE Electron Device Letters vol. 23, pp. 544-546 (2002)

Exhibit	Description
EX1016	<i>A Novel Pixel Circuit for Active-Matrix Organic Light-Emitting Diodes</i> , J. Goh et al., SID 03 Digest, pp. 494-497 (2003)
EX1017	<i>Current-Writing Active-Matrix Circuit for Organic Light-Emitting Diode Display Using a-Si:H Thin-Film-Transistors</i> , R. Hattori et al., IEICE Transactions on Electronics vol. E83-C, pp. 779 – 782 (2000).
EX1018	Expunged, refiled as EX1035
EX1019	Supplemental Expert Declaration of Dr. Daniel Foty
EX1020	U.S. Pat. Pub. 2004/0056257 (Sakamoto)
EX1021	U.S. Pat. Pub. 2003/0067424 (Akimoto)
EX1022	<i>Certain Active Matrix Organic Light-Emitting Diode Display Panels & Modules for Mobile Devices</i> , ITC Inv. No. 337-TA-1351, Staff’s Prehearing Brief (Public Version) (Excerpt) (Jan. 12, 2024)
EX1023	LinkedIn Profile of Dr. Andrew Wolfe
EX1024	Profile of Dr. Andrew Wolfe on Santa Clara University website
EX1025	<i>Curriculum Vitae</i> of Dr. Andrew Wolfe on Santa Clara University website
EX1026	<i>CMOS Circuits for Peripheral Circuit Integrated Poly-Si TFT LCD Fabricated at Low Temperature Below 600C</i> , Masaru Takabatake et al., IEEE Transactions on Electron Devices, Vol. 38, No. 6, pp. 1303-1309, June 1991
EX1027	<i>Polysilicon TFT Circuit Design and Performance</i> , Alan G. Lewis et al., IEEE Journal of Solid-State Circuits, Vol. 27, No. 12, pp. 1833-1842, December 1992
EX1028	Deposition Transcript of Dr. Andrew Wolfe (May 17, 2024)
EX1029	Supplemental Expert Declaration of Dr. Daniel Foty

Exhibit	Description
EX1030	Google patent search results
EX1031	<i>Current Copier Cells</i> , S.J. Daubert et al., Electronics Letters, Vol. 24, No. 25, December 8, 1988
EX1032	<i>Characteristics of Field-Induced-Drain (FID) Poly-Si TFTs with High On/Off Current Ratio</i> , K. Tanaka et al., IEEE Transactions on Electron Devices, Vol. 39, No. 4, pp. 916 – 920, April 1992
EX1033	<i>A Self-Aligned Offset Polysilicon Thin-Film Transistor Using Photoresist Reflow</i> , J. Han and C. Han, IEEE Electron Device Letters, Vol. 20, No. 9, pp. 476 – 477, September 1999
EX1034	Declaration of Johannes Hsu
EX1035	Declaration of Thomas L. Credelle
EX1036	Transmittal Letter for Petitioner’s Supplemental Evidence, dated January 12, 2024

I. INTRODUCTION

Lacking bona fide substantive arguments, Patent Owner (“PO”) hopes to accomplish through an evidentiary/procedural challenge what it cannot do on the merits. But PO’s evidentiary challenge to Dr. Foty fails for numerous reasons: (1) the Board has not decided the level of skill in the art and there is no dispute Dr. Foty qualifies under Petitioner’s definition; (2) Petitioner and PO’s definitions are substantially similar, and Dr. Foty qualifies as a POSITA under both; (3) PO’s reliance on *Kyocera* is misplaced ; (4) the ALJ decision is irrelevant, incorrect, and not controlling; and (5) PO’s challenge goes to the weight, not admissibility, of Dr. Foty’s testimony. PO has failed to carry its burden to exclude Dr. Foty’s declarations and the Board should deny Petitioner’s motion.

II. LEGAL STANDARD

As the moving party, PO bears the burden of proving that it is entitled to the relief requested, namely, that the material sought to be excluded is inadmissible under the Federal Rules of Evidence. *See* 37 C.F.R. §§42.20(c), 42.62(a).

III. ARGUMENT

A. The Board has NOT Decided the Level of Skill in the Art and PO Raises No Objection Under Petitioner’s Definition

To begin, PO’s entire motion is premised on the correctness of its purported POSITA definition, a definition on which its own expert equivocated. When asked point-blank, Dr. Wolfe (PO’s expert) testified: “Q. Is it your testimony that a

POSITA has to have two to three years of experience designing Active Matrix Displays? A. No.” EX1028, 19 (Tr., 71:8-11). This is contrary to, and undermines, PO’s definition. See Mot. (Paper 58), 3 (quoting POR (Paper 33) at 7); see *infra* §III.B. Dr. Wolfe had to say this to avoid boxing himself out of being a POSITA.¹

In any event, at this point in the proceeding, the Board has not made a final determination regarding the level of skill in the art. See ID (Paper 12), 12. And it cannot be presumed PO’s definition (modified by its own expert) is correct. Especially where the Board’s only finding—albeit preliminary—is that Petitioner’s definition “appears consistent with what is reflected by the content of the applied prior art references.” ID, 12; see *also id.* (“At this preliminary stage and on this record, we adopt Petitioner’s statement of the level of ordinary skill in the art.”).

If the Board maintains its preliminary finding—as it should for the reasons discussed below—PO does not even contest the Dr. Foty qualifies as a POSITA and

¹ Dr. Wolfe’s CV (EX2048), LinkedIn profile (EX1023), and university bio (EX1023) show expertise in computer architecture, not active-matrix displays or circuit design. EX1028, 15 (Tr., 54:1-55:4, 56:9-12). Dr. Wolfe never designed an active-matrix display or pixel circuit, nor published on the subject (*id.*, 18 (Tr, 67:12-68:17)), and his purported active-matrix experience was “lumped [in] with video research” and “multimedia” (*id.*, 16-17 (Tr. 60:5, 61:8-13)).

the Board should deny PO's motion.

B. Petitioner's and Patent Owner's Level of Skill in the Art are Substantially Similar, and Dr. Foty Qualifies Under Both

PO is sure to point out in Reply that, at the Institution phase, PO had not disputed the level of skill in the art. POPR (Paper 9), 21 ("For purposes of this Preliminary Response, however, Patent Owner does not believe it necessary to dispute the level of ordinary skill in the art."). Fair enough. The Board should consider the entirety of the record. But that fully-developed record includes important evidence that PO entirely ignores, including evidence from the only person who has actually made a career of designing active-matrix displays. See EX1035² (Declaration of Mr. Thomas L. Credelle).

Petitioner timely provided Mr. Credelle's declaration as supplemental evidence in response to PO's objections. See EX1036 (transmittal). Among other things, Mr. Credelle was "in charge of all active-matrix LCD research" at RCA from 1970-1986. EX1035, ¶8. He also was the "Manager of TFT LCD Research and Development at the GE Research and Development Center" from 1986-1991. *Id.*,

² Petitioner filed Mr. Credelle's declaration as EX1018, instead of serving it. Accordingly, EX1018 was expunged, but the same declaration was subsequently filed as EX1035 with Petitioner's Reply, and is of record in the proceeding.

¶9. He was the “Manager of Display Engineering” at Apple from 1991-1994 *Id.*,
¶10. From 1996 to 1999, Mr. Credelle was the “Director of Product Marketing for
Motorola’s Flat Panel Display Division.” *Id.*, ¶12. And from 2001-2007, Mr.
Credelle was “heavily involved with the design of the active-matrix array and the
LCD/OLED pixel circuit and driving circuitry” at Clairvoyante, Inc. *Id.*, ¶14. There
can be no dispute that Mr. Credelle was a POSITA, and an expert in active-matrix
displays at the relevant time.

As the expert in the proceeding that has, by far, the most active-matrix display
experience, Mr. Credelle unequivocally endorsed Petitioner’s definition of a
POSITA, and explained why. *Id.*, ¶¶25, 30-37. Mr. Credelle testified that:

Experience in active-matrix display design is not necessary to
understanding the ’599 patent. While set in the context of OLED
displays, the ’599 patent and the relevant prior art are directed to
transistor circuits, which were quite simple and well-known at the
priority date of the ’599 patent. ... In my experience managing the R&D
of various active-matrix displays, I would assign the design of pixel
circuits to good circuit designers, regardless of their experience with
displays, rather than an engineer with experience in display
technologies but little experience of transistor circuits. I would provide
such circuit designers a short overview of the display architecture in,
e.g., a 1-2 hour meeting, so they understand the context of what they
are designing, which was more than sufficient for them to do their work.
36. By 2003, I had taken on various R&D activities and senior

management positions, including Vice President of Engineering, working on flat panel displays. I would have considered an electrical engineer with 2–3 years of circuit design/analysis experience to be qualified to work on the subject matters of the '599 patent and would have hired such a person to work on them. I would have preferred such an engineer over another who has active-matrix display experience but little understanding of or experience with transistor circuit design.

Id., ¶¶31-36. PO entirely ignores Mr. Credelle's testimony.

This stands in stark contrast to PO's attorney argument, on which its own expert backtracked at deposition. As noted previously, Dr. Wolfe unequivocally testified a POSITA need **NOT** have "two to three years of experience designing active matrix displays." EX1028, 19 (Tr., 71:8-11); *see also id.* (Tr. 70:3-9). And when pressed further on PO's "active matrix display design" requirement, Dr. Wolfe testified as follows:

Q. How much active-matrix design experience must a POSITA have?

A. I don't know that they necessarily need design experience, but they need a combination of design/analysis experience. So studying other people's designs, analyzing circuits, studying circuits that have been designed, I think that would be acceptable, as long as that study and analysis was specific to the technologies that are at issue in this patent and not just to circuits in general.

Q. How much active-matrix design/analysis experience must a POSITA have? A. Two to three years, unless there's some other combination of work experience or other learning experience that is

equivalent.

Id., 20 (Tr., 73:8-74:1). In short, PO's expert disclaimed the requirement of active-matrix "design" experience (saying "analysis" was enough), could not articulate any specific amount of active-matrix experience that was necessary, and said "some other combination of work experience or other learning experience that is equivalent" sufficed *Id.* Thus, even under PO's definition (as modified by its expert), Dr. Foty plainly qualifies as a POSITA.

Even if Dr. Wolfe did meaningfully disagree with Petitioner's framing of a POSITA, he is on much weaker footing to do so given his own dearth of active-matrix experience. *See supra* fn.1.

Moreover, as Petitioner's Reply explains, Samsung manufactures a POSITA dispute where one does not (or should not) exist. Reply (Paper 41), 2-3. The experts agree a POSITA would have had a Bachelor's degree in electrical engineering or similar field. EX1003, ¶31; EX2008, ¶46. And that 2-3 years is the appropriate length of work experience. EX1003, ¶31; EX1028, 20 (Tr. 73:19-74:1).

PO asserts that "Petitioner's proposal entails only '2-3 years of circuit design/analysis experience,' [] which would allow **any** circuit design/analysis experience to suffice without knowledge, experience, or understanding of active-matrix display design or electroluminescence." Mot., 4 (emphasis in original). But this is a straw-man argument. Dr. Foty expressly stated the '599 patent "pertains

generally to the field of OLED displays, and more particularly to the circuitry used to drive and control the pixels that comprise the light-generating elements of the display,” and a POSITA would thus have “2-3 years of circuit design/analysis experience.” EX1003, ¶31. Plainly, this refers to circuit design/analysis experience relevant to the type of circuitry (e.g., mixed-signal analog/digital circuits) used in OLED displays. See EX1029, ¶¶11-17; Reply, 2.

As further evidence that PO is creating an artificial distinction, Petitioner and PO’s expert agree on numerous things a POSITA would know, regardless of whether the definition is framed in terms of “circuit design/analysis” experience or “active-matrix” experience.³ A number of these are outlined in Dr. Foty’s Reply Declaration. See EX1029, ¶14. This includes “the operation of the driving transistor, threshold-voltage compensation and its relationship to image quality, the impact of shared signal lines on aperture ratio, and the initialization, e.g., discharging a capacitor, of a pixel circuit.”⁴ *Id.*

³ PO’s (and Dr. Wolfe’s) original proposal omits “circuit design and/or analysis” from the work-experience requirement. POR at 7; EX2008, ¶46. In effect, they used “active-matrix” experience is a proxy for circuit design/analysis experience.

⁴ PO cites Dr. Wolfe for the proposition that an “[i]mportant aspect[] ... of the ’599 Patent’s pixel circuit design [] unique to active-matrix display design and

The single example PO offers where the parties disagree relates to “erasure.” Mot., 7. But this is plainly a substantive dispute over the merits of the prior art, not a definitional POSITA issue. Neither PO nor its expert cite any evidence whatsoever (*e.g.*, not a single textbook, article, treatise, etc.) that “erasure” has the purportedly well-known meaning to a POSITA that they ascribe. *See, e.g.*, POR, 27; EX2008, ¶¶79-96. Rather, the dispute is entirely about the merits of Kimura (*see id.*), and Dr. Foty’s disagreement with Dr. Wolfe on substance does not make him not a POSITA.

Moreover, the dispute can be resolved by resort to Kimura itself (which discusses reset, initialization, and erase in numerous location), and by admissions PO’s expert made during deposition about the erasure transistors. *See, e.g.*, EX1028, 57 (Tr. 221:11-16) (“erasure TFT ... discharge[s] the capacitor”); *see also* Reply, 21 (“Dr. Wolfe admitted the capacitor discharges through TFT 3612, which is the ‘erase

electroluminescent displays” is “the operation of the driving transistor in the pixel circuit.” Mot., 4 (citing EX2008, ¶48). While Petitioner agrees with the substance of this statement, it is ironic that PO cites to Dr. Wolfe because he could not even correctly identify the “driving transistor” in the ’599 patent during his deposition. EX1028, 54 (Tr. 210:3-211:5). The ’599 patent itself clearly (and repeatedly) identifies T31—not T36—as the driving transistor. *See, e.g.*, EX1001, 6:27-57; 7:34-35; 7:45-46; 8:13-21.

transistor.’ EX1028, 216:6-16, 189:14-22. And Kimura expressly teaches ‘the erasure TFT can be placed in any location, provided that it is a location at which electric current supplied to the [LED] can be cut off at an arbitrary timing.’ EX1002, [0658].”). This disagreement is simply not a basis to exclude any portion of Dr. Foty’s declarations, let alone in their entirety.

C. PO’s Reliance on *Kyocera* is Misplaced

Like a broken record, PO cites *Kyocera* over and over. Mot., *passim*. In doing so, PO ignores the more relevant, subsequent authorities that address *Kyocera*. For example, PO fails to cite *Certain Outdoor & Semi-Outdoor Elec. Displays*, Inv. No. 337-TA-1331, USITC Order No. 17, 2023 WL 4145878 (June 9, 2023). There (as in the related ITC action here), the complainant moved to preclude a technical expert from testifying because the expert allegedly did not meet the ALJ’s *Markman* POSITA standard, which recited “experience in working with electronic displays including thermal management associated with electronic displays.” *Id.* at *1- 2. The ALJ denied the motion and “clarifie[d]” the POSITA standard only required “experience with electronic displays including ***an understanding of*** thermal management associated with electronic displays.” *Id.* at *3 (emphasis original).

The Board could easily resolve the issue by clarifying a POSITA would have “an understanding of” active-matrix display design and electroluminescence as Dr. Foty plainly meets that standard. See EX2053, 8 (Foty Tr. 26:1-28:1) (explaining

differences between active- and passive-matrix displays), EX2050, 39-41 (Foty Tr. 38:6-40:18), 95-96 (Tr. 94:19-95:14), 98-99 (Tr. 97:10-99:21), 116-117 (Tr. 115:8-116:6) (explaining engineering considerations of active-matrix display design).

GeigTech East Bay LLC v. Lutron Elecs. Co., Inc., 2023 WL 6614486, (S.D.N.Y. Sept. 20, 2023) is also instructive. There, the plaintiff argued the witness was not a POSITA “because he lacks the minimum level of experience in designing electro-mechanical consumer products or interior architecture.” 2023 WL 6614486, at *31-32. However, the *GeigTech* court understood that because “the invention of the asserted patent is a bracket—a bracket configured to obscure electrical wiring for a consumer A/V system, but a bracket, nonetheless”—it is experience with brackets that matters. *Id.* Accordingly, the Judge found that despite the expert’s “lack of specific experience” with certain applications for brackets, “there is a sufficient relationship between [the expert’s] significant relevant technical expertise and the technology of the claimed bracket for him to offer his opinions as a POSITA.” *Id.* Thus, even were PO correct that Dr. Foty lacked specific active-matrix display experience, that is merely one application for the claimed pixel circuitry and Dr. Foty’s undisputed experience with transistor and circuit technology qualifies him to offer his opinions.

PO also cites *Sundance* (Mot., 1), but that case is a far cry from the facts here. In *Sundance*, the Fed. Cir. held it was error to allow a **patent law expert** to offer

infringement and validity opinions on technical matters at trial. *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1362-64 (Fed. Cir. 2008)).” *Id.* Nothing even remotely close to that fact pattern is at issue here.

D. PO’s Reliance on the ALJ’s Ruling is Misplaced

Rather than address the POSITA standard on its own merits, PO invites to the Board to rotely rely on an ALJ determination from the ITC. Mot., *passim*. To do so would be error. To begin, the ALJ made a POSITA determination at the *Markman* stage (with a limited record), where the issue was not really in dispute, spent only three short paragraphs on the issue, and expressly bootstrapped it to an unrelated patent. See EX2005, 13 (stating “Respondents [*viz.*, Petitioner] did not propose a level of ordinary skill in the art in their briefs” and adopting a definition “for the same reasons as set forth above with respect to the ’593 patent”).

When the ALJ made his determination, he lacked the same record before the Board. For example, the ALJ did not have Mr. Credelle’s declaration (discussed *supra* §III.B). And it is well-established that a different record can produce a different outcome. See, e.g., *Novartis AG v. Noven Pharms., Inc.*, 853 F.3d 1289, 1293-94 (Fed. Cir. 2017) (“It is unsurprising that different records may lead to different findings and conclusions.”). That should be the case here.

If PO argues the ALJ **had** a declaration from Mr. Credelle when it excluded Dr. Foty’s testimony, that is irrelevant because (at that point) the ALJ **had already**

decided the definition and refused to revisit it on procedural grounds, which are not at issue here. EX2054, 2 (“I previously defined the level of skill in the art for those two patents in the order construing certain claim terms”); *id.*, 5 (declining to revisit POSITA definition from *Markman* on timeliness grounds). For this reason alone, the ITC ruling (which makes no mention of Mr. Credelle) that excluded Dr. Foty is irrelevant. Notably, while the Board is free to disagree with the ITC, it need not do so here to deny PO’s motion because of the different records in the two forums.

Moreover, the ALJ’s POSITA definition (adopted at the *Markman* phase with practically no analysis) did not allow for “equivalent” experience, or the substitution of education for work experience. EX2054, 5. Thus, the ALJ stated that “[t]o allow [Dr. Foty’s] testimony ... would essentially require me to rewrite the definition of a person of ordinary skill in the art to include the language ‘or equivalent experience.’” ITC, 5. But here, ***PO’s own expert*** has expressly testified that “[a] ***lack of work experience can be remedied by additional education and vice versa***” (EX1028, 19 (Tr. 72:1-2) (emphasis added), *see also id.*, 69:22-70:9), and that “***some other combination of work experience or other learning experience that is equivalent***” suffices for active-matrix experience (*id.*, 20 (Tr. 73:19-74:1) (emphasis added)). This is another reason the ITC decision is distinguishable and does not control here.

At bottom, the Board should exercise its independent judgment on the definition of a POSITA, and whether Dr. Foty qualifies under the Board’s definition.

This is so even if it means reaching a different conclusion than the ALJ. But that poses no problem for two reasons. First, because of the different factual records, a different conclusion need not be inconsistent with the ITC. And second, the Board has long held that it is not bound by district court (or ITC) decisions, and will exercise its own independent judgment. *See, e.g., Noven Pharm., Inc., et al., v. Novartis AG et al.*, IPR2014-00550, Paper No. 69 at 4 (PTAB Sept. 28, 2015) (“Although [] the District Court considered the same prior art presented in this [IPR], the District Court’s opinion is not binding in this proceeding. We have independently analyzed the prior art in view of the record evidence as a whole, including the knowledge of a person of ordinary skill in the art.”). Notably, in *Noven*, the Board explained that its “findings and conclusions differ[ed] from the District Court in that we have accorded persuasive weight to the testimony of Petitioner’s declarants.” *Id.*

E. At Most, PO’s Argument Goes to Weight, not Admissibility, of Dr. Foty’s Testimony.

At most, PO’s arguments in its Motion go to the weight, not the admissibility, of Dr. Foty’s testimony. That alone should be dispositive of PO’s Motion since it seeks to *exclude Dr. Foty’s testimony in its entirety*. Mot., 8 (“Patent Owner respectfully requests that the Board exclude Dr. Foty’s validity opinion testimony, as set forth in Exhibits 1003 and 1029.”); *see also* PTAB Consolidated Trial Practice Guide, 35 (Nov. 2019) (“The Board has broad discretion to assign weight to be

accorded expert testimony.”).

The Board’s decision in *Forte* is instructive. *Forte Biosciences, Inc., v. Univ. of Mass.*, PGR2023-00014, Paper No. 45 at 37-39 (PTAB June 24, 2024). In *Forte*, the petitioner moved to exclude an expert declaration, contending that “[the declarant] was not a person of ordinary skill in the art at the critical time, so his testimony is irrelevant and unreliable.” *Id.*, 38. After considering PO’s rebuttal as to why the declarant did qualify as a POSITA, the Board concluded that “Petitioner’s position amounts to a disagreement with [the declarant’s] reliability and goes to the weight that should be accorded his testimony and not the admissibility of that testimony.” *Id.*, 39. Accordingly, the Board denied the motion to exclude. *Id.*

The Board provided multiple reasons for its conclusion, including that “we do not require a perfect match between an expert’s experience and the relevant field. See Patent Trial & Appeal Board Consolidated Trial Practice Guide November 2019 at 34 (citing *SEB S.A. v. Montgomery Ward & Co.*, 594 F.3d 1360, 1373 (Fed. Cir. 2010)).” *Id.* The same result in *Forte* should inure here.

The Board’s decision in *Avail* (cited by PO, Mot., 7) actually favors Petitioner, as it emphasizes the Board’s flexibility in assessing expert testimony. See *Avail Medsystems, Inc. v. Teladoc Health, Inc.*, IPR2022-00444, Paper No. 10 at 25-27 (PTAB July 21, 2022). Unlike here (where PO is moving to exclude Dr. Foty’s testimony), the issue in *Avail* concerned the weight (not admissibility) of expert

testimony. *Id.*, 25. While the Board ultimately determined to afford little (or no) weight to specific statements from an expert, the Board “still [] consider[ed] his opinions on the issues for which he is qualified to offer testimony, compare his opinions to the disclosures of the prior art references and the challenged patent, and the entirety of the evidence of record to weigh each part of his relative opinion testimony separately.” *Id.*, 26 (citing *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1358 (Fed. Cir. 2018) (“The [PTAB] [i]s entitled to weigh the credibility of the witnesses.”). The Board also noted that “the PTAB is permitted to weigh expert testimony and other record evidence and, in so doing, rely on certain portions of an expert’s declaration while disregarding others.” *Id.*, 26-27 (citing *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1041 (Fed. Cir. 2017).

The Board already preliminarily found that Dr. Foty’s testimony was “not merely conclusory,” and it should evaluate the weight to be given that testimony on the merits. *Id.*, 28-29 (“Patent Owner asserts that Dr. Foty’s testimony in paragraphs 57 and 154 of his Declaration should be entitled to little or no weight because it is conclusory. Prelim. Resp. 32. Based on the preliminary record, we disagree. ... The above-quoted testimony of Dr. Foty is not merely conclusory. Rather, it relies on the disclosures of [several references].”).

IV. CONCLUSION

Petitioner respectfully requests that the Board deny PO’s motion to exclude.

Respectfully submitted,

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Dated: August 30, 2024

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 30, 2024, the foregoing paper was served in its entirety via electronic mail, upon the following attorneys of record for the Patent Owner:

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/Victor Santos/
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