

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIFECORE FITNESS, LLC d/b/a
ASSAULT FITNESS,

Petitioner,

v.

WOODWAY USA, INC.

Patent Owner.

IPR2024-00083
U.S. Patent No. 11,465,005

**PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE
EVIDENCE PURSUANT TO 37 C.F.R. §42.64(c)**

TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	Exhibit 1036 Should Be Excluded Under FRE 401-402, 602, 702-703 and 37 C.F.R. §42.23(b)	1
B.	Exhibits 1041-1044, 1046 Should Be Excluded Under FRE 901	5
C.	Exhibit 1053 Should Be Excluded Under FRE 801-802 and 901	6
	CERTIFICATE OF SERVICE	1

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Arendi S.A.R.L. v. Apple Inc.</i> , 832 F.3d 1355 (Fed. Cir. 2016).....	3
<i>B/E Aero., Inc. v. C&D Zodiac, Inc.</i> , 962 F.3d 1373 (Fed. Cir. 2020).....	2
<i>Belden Inc. v. Berk-Tek LLC</i> , 805 F.3d 1064 (Fed. Cir. 2015).....	5, 6
<i>In re Homestore.com, Inc. Sec. Litig.</i> , 347 F. Supp. 2d 769 (C.D. Cal. 2004)	8
<i>Intelligent Bio-Systems, Inc. v. Illumina Cambridge, Ltd.</i> , 821 F.3d 1359 (Fed. Cir. 2016).....	2, 5
<i>Kennedy v. Collagen Corp.</i> , 161 F.3d 1226 (9th Cir. 1998)	3
<i>Lorraine v. Markel Am. Ins. Co.</i> , 241 F.R.D. 534 (D. Md. 2007).....	8
<i>TQ Delta, LLC v. Cisco Sys., Inc.</i> , 942 F.3d 1352 (Fed. Cir. 2019).....	2
<i>Victaulic Co. v. Tieman</i> , 499 F.3d 227 (3d Cir. 2007).....	7

Regulations

37 C.F.R. §42.23(b)	1, 2, 5
---------------------------	---------

I. INTRODUCTION

Petitioner’s conclusory assertions in its Opposition to Patent Owner’s Motion to Exclude (Paper 44 (hereafter “Opposition”)) and its parroted arguments in Exhibit 1054 are not supported, and Petitioner fails to rebut that certain of its exhibits are not relied on for its substantive positions. Particularly egregious, with respect to Exhibit 1036, the Opposition further tries to backfill the Petition and Dr. Giachetti’s opinions with additional substantive arguments. This is improper. Patent Owner’s Motion to Exclude (Paper 43 (“Motion”)) should be granted.

A. **Exhibit 1036 Should Be Excluded Under FRE 401-402,¹ 602, 702-703 and 37 C.F.R. §42.23(b)**

Petitioner asserts that Dr. Giachetti may “rely on logic, judgment, and common sense as well as facts or data he has been made aware of or personally observed to render an opinion.” Opposition at 2. While experts may rely on such logic and common sense, it is a clear violation of Federal Circuit precedent for Petitioner to cite such “common sense” to fill the gaps in its obviousness analysis without providing sufficient factual and evidentiary support. *See* Paper 43 at 4-5 (citing 37 C.F.R. §42.23(b); *Intelligent Bio-Systems, Inc. v. Illumina Cambridge*,

¹ While the Motion to Exclude does not expressly detail Exhibit 1036’s lack of relevance under FRE 401-402, the irrelevance is plain. Petitioner’s provision of new arguments in Reply, which is not allowed, renders such arguments irrelevant.

Ltd., 821 F.3d 1359, 1369-70 (Fed. Cir. 2016); *TQ Delta, LLC v. Cisco Sys., Inc.*, 942 F.3d 1352, 1362-63 (Fed. Cir. 2019); *see also B/E Aero., Inc. v. C&D Zodiac, Inc.*, 962 F.3d 1373, 1380 (Fed. Cir. 2020) (quoting *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1362 (Fed. Cir. 2016) (“common sense cannot be used as a ‘wholesale substitute for reasoned analysis and evidentiary support....’”).² If Petitioner intended to rely on a person of ordinary skill in the art’s (“POSA’s”) purported common sense as a gap-filler for an alleged inherency where a reference was otherwise silent, then Dr. Giachetti’s declaration needed to provide factual evidence to support what a POSA would have purportedly known, and why common sense could fill the gaps in his obviousness analysis. Dr. Giachetti’s unsubstantiated deposition testimony, without any evidentiary support, does not suffice. *See* EX1036 at ¶¶65-66.

Petitioner makes conclusory remarks that Exhibit 1036 “merely elaborates on [Dr. Giachetti’s] initial analysis and responds to issues raised in PO’s Response.” Opposition, Paper 44 at 3; *see also id.* at 9. But such a conclusory statement does not resolve the issue that Exhibit 1036 presents new evidence and support about how and why a POSA’s alleged common sense would read an implicit teaching of certain claim limitations into the prior art references. And just because Patent Owner

² Petitioner’s citation to *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998), a non-patent case, does not affect the requirement that using “common sense” for obviousness must include reasoned analysis and evidentiary support.

identified Petitioner's deficiencies in meeting its evidentiary burden in the Petition that does not permit Petitioner's improper new arguments and evidence submitted in Reply. Adding arguments and evidence in the Reply that could (and should) have been made in the Petition is not simply responding to Patent Owner arguments, it is impermissibly broadening the scope of what was argued in the Petition to back-fill deficient conclusory arguments.

For example, Petitioner contends that the state of the art background section from Dr. Giachetti's first declaration provided sufficient evidentiary basis for Dr. Giachetti's unsupported conclusory statements that a POSA's common sense would fill gaps in the express disclosure of Tollkien. Petitioner is wrong. Exhibit 1036 only cites to paragraph 308 of the first declaration, *which provides no citation to any evidentiary support whatsoever*,³ let alone any citation or reference to the state of the art section of Dr. Giachetti's first declaration. Indeed, Petitioner's arguments are belied by the fact that Dr. Giachetti could have made the statements in his opening declaration but failed to do so.

Further, by example, the new annotated figure from Abelbeck was not in the first declaration. Patent Owner's whole point is that Dr. Giachetti was required to

³ Paragraph 308 from Exhibit 1003 reads in its entirety without any citation:

A POSA would have understood that the runners 14 are mounted and fixed to the frame and the bearings are mounted for rotation about the axels and relative to the frame to provide rolling engagement with the continuous belt 12.

make these assessments in the first declaration and related arguments needed to be included in the Petition to the extent Petitioner intended to rely on such evidence. 37 C.F.R. §42.23(b); *Intelligent Bio- Systems, Inc.*, 821 F.3d at 1369-70. His failure to do so precludes such backfilling opinions in Reply.

Petitioner's reliance on *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1078 (Fed. Cir. 2015) does not salvage its missteps. In *Belden*, the reply expert declaration fairly responded to the patent owner's expert declaration where "each of the points...responds to a statement" from the patent owner's expert declaration. By contrast, for example, Exhibit 1036 at ¶¶50-60 does not identify any specific statements made by Dr. Blair or Patent Owner to which Dr. Giachetti is "fairly responding" to—these paragraphs present new evidence that should have been made in the Petition and Dr. Giachetti's first declaration.

As for the new arguments about Tollkien's "fixed bumpers," again, Petitioner misses the point. It is the Petitioner's burden to show how the prior art renders the challenged claims obvious. Petitioner failed to show how or why a POSA would understand the figures and scant written detail in Tollkien to show that the "runners 14" were bearings or coupled to the frame. Patent Owner's demonstration of the Petition's failure of proof does not permit Petitioner to make new arguments or to present new evidence in Reply that could have been made in the Petition.

B. Exhibits 1041-1044, 1046 Should Be Excluded Under FRE 901

Petitioner does not refute the Motion which states that Petitioner does not substantively rely on Exhibits 1041-1044 and 1046. *Compare* Motion at 9 with Opposition at 10-11. Accordingly, Petitioner concedes that there is no risk of prejudice to Petitioner in excluding these Exhibits.

Nevertheless, there are additional reasons for exclusion. Petitioner's arguments under FRE 901(b) are faulty because Petitioner merely recites the language of rule, and says the documents are authentic. There is no other argument or description to demonstrate or support such a conclusory allegation.

Petitioner's citation to *EMC Corp. v. PersonalWeb Tech. LLC*, IPR2013-00084, Paper 64 at 50-51 (PTAB May 15, 2014) is misplaced. In that case, documents were self-authenticating based on being *periodicals* with tradename inscriptions, not screenshots of a party's website. And tradename use alone on a webpage does not satisfy the authentication requirement. *See Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007), as amended (Nov. 20, 2007) ("Anyone may purchase an internet address, and so, without proceeding to discovery or some other means of authentication, it is premature to assume that a webpage is owned by a company merely because its trade name appears in the uniform resource locator.").

Moreover, Petitioner's authenticity problem is of its own making, as it does not even attempt to "make a prima facie showing" that the documents are what

Petitioner claims them to be. *See, e.g., Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542 (D. Md. 2007) (“Ironically, however, counsel often fail to meet even this minimal showing [of authenticity] when attempting to introduce ESI, which underscores the need to pay careful attention to this requirement. Indeed, the inability to get evidence admitted because of a failure to authenticate it almost always is a self-inflicted injury which can be avoided by thoughtful advance preparation.”).

C. Exhibit 1053 Should Be Excluded Under FRE 801-802 and 901

Here again, Petitioner does not even attempt to “make a prima facie showing” that Exhibit 1053 is what Petitioner claims it to be. *See, e.g., Lorraine*, 241 F.R.D. at 542. Exhibit 1053 is a third-party website that is not self-authenticating. *See, e.g., In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 782 (C.D. Cal. 2004) (“Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents under Fed. R. Evid. 902.”).

Petitioner’s response to the hearsay arguments are equally unavailing. Petitioner and Dr. Giachetti do not solely rely on Exhibit 1053 to “show that certain images and text appeared on the website” but instead to prove the supposed truth that the Tru Grit Runner treadmill *was available*. *See* EX1036 at ¶¶110-112. This is clearly hearsay, and therefore, inadmissible. Exhibit 1053 should be excluded.

Case No.: IPR2024-00083

Patent No.: 11,465,005

Dated: February 11, 2025

Respectfully submitted,

/R.J. McKenna/

Richard J. McKenna

Registration No. 35,610

Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. §42.64(c)** was served on February 11, 2025, by email to Petitioner's counsel of record:

jhalan@brookskushman.com

aturner@brookskushman.com

rcantor@brookskushman.com

kkonz@brookskushman.com

resfahani@brookskushman.com

LCF0115IPR@brookskushman.com

Dated: February 11, 2025

/R.J. McKenna/

Richard J. McKenna

Registration No. 35,610

Counsel for Patent Owner