

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DBR FINANCE, INC.,
Petitioner,

v.

RUGGED CROSS HUNTING BLINDS, LLC,
Patent Owner.

IPR2024-00291
Patent 11,399,535 B2

Before KEVIN W. CHERRY, CYNTHIA L. MURPHY, and
JASON W. MELVIN, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

I. INTRODUCTION AND BACKGROUND

Petitioner requested a conference call with the panel to address disputes relating to Patent Owner's Sur-Reply (Paper 30, "Sur-Reply") and supplemental declarations filed in support thereof (Exs. 2036, 2037). The substance of the disputes is set forth in Exhibits 3001–3011. A brief summary of the disputes follows.

Petitioner filed its Reply to Patent Owner's Response on December 13, 2024 (Paper 28, "Reply"). To respond to arguments Petitioner raised in its Reply, Patent Owner requested permission to file a motion for leave to submit supplemental declarations from Dr. Kimberly Cameron and Mr. Robert Ransom with its Sur-Reply. Exs. 3001, 3011. Petitioner opposed Patent Owner's request. Ex. 3010. We denied Patent Owner's request via an email from the Board on January 7, 2025 (Ex. 3002) and issued an order providing our reasoning for the denial on January 29, 2025 (Paper 32). Patent Owner filed its Sur-Reply and supplemental declarations from Dr. Cameron and Mr. Ransom on January 24, 2025. Paper 30; Exs. 2036, 2037.

On January 27, 2025, Petitioner contacted the Board regarding Patent Owner's Sur-Reply and submission of the supplemental declarations from Dr. Cameron and Mr. Ransom. Ex. 3006. Petitioner sought leave to file (1) a motion to strike Patent Owner's Sur-Reply (Paper 30) and the supplemental declarations of Dr. Cameron and Mr. Ransom (Exs. 2036, 2037); and (2) a motion for sanctions based on Patent Owner's failure to comply with the Board's email denying authorization to submit the supplemental declarations of Dr. Cameron and Mr. Ransom. *Id.* Patent Owner opposed Petitioner's request. Ex. 3005. We granted Petitioner's

request to file a motion to strike the supplemental declarations of Dr. Cameron and Mr. Ransom on January 28, 2025. Ex. 3003.

We held a teleconference with the parties to discuss Petitioner's requests on January 30, 2025. Judge Cherry, Judge Murphy, and Judge Melvin attended the call. No court reporter was present. This Order is the official record of the teleconference.

II. DISCUSSION

During the call, we reiterated the rule that “[a] sur-reply may only respond to arguments raised in the corresponding reply and may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.” 37 C.F.R. § 42.23(b). We also provided Patent Owner with an opportunity to explain why we should deny Petitioner's request to file a motion to strike and a motion for sanctions, in light of the fact that Patent Owner did not comply with Rule 42.23(b) or our instruction denying Patent Owner's request to file the supplemental declarations of Dr. Cameron and Mr. Ransom.

In response, Patent Owner argued that Petitioner's request should be denied because the supplemental declarations were submitted to respond to arguments Petitioner improperly raised in the Reply. Patent Owner admitted they received the Board's email denying the request to file the supplemental declarations, but submitted the supplemental declarations in spite of the Board's email. Patent Owner represented that they submitted the supplemental declarations in order to preserve and protect Patent Owner's interests because we did not issue an order denying the request before Patent Owner's Sur-Reply was due. Patent Owner admitted further that they did not reach out to the Board to request an extension of the Sur-Reply deadline,

or to request issuance of the order denying Patent Owner's request to file the supplemental declarations before the Sur-Reply deadline.

In Petitioner's view, the parties' disputes are purely procedural. Petitioner argued that Patent Owner's supplemental declarations and Sur-Reply are improper because the Board's rules unambiguously provide that new evidence is not permitted in a Sur-Reply, and the Board's email denied Patent Owner's request to submit the supplemental declarations. Petitioner contended further that the Board's email stated that an order was forthcoming, and argued there was no reason to believe the Board's order would change course to allow Patent Owner to submit the supplemental declarations. Petitioner indicated they are willing to forego filing a motion to strike and a motion for sanctions if Patent Owner withdraws the supplemental declarations and the portions of the Sur-Reply that rely on the supplemental declarations. During the call, Patent Owner could not agree to withdraw the supplemental declarations and the portions of the Sur-Reply that rely on the supplemental declarations because it needed time to consider Petitioner's offer.

We have considered the parties' respective positions and request that the parties meet and confer to discuss the possibility of Patent Owner withdrawing the supplemental declarations and the portions of the Sur-Reply that rely on the supplemental declarations in order to resolve the disputes discussed above.

As discussed above, we granted Petitioner's request to file a motion to strike the supplemental declarations of Dr. Cameron and Mr. Ransom. Ex. 3003. Accordingly, Petitioner is permitted to file such a motion. We note that the Patent Trial and Appeal Board Consolidated Trial Practice

Guide (84 Fed. Reg. 64,280 (Nov. 21, 2019)) (“CTPG”)¹ permits us to disregard improper arguments or evidence in rendering a decision. The CTPG provides that “[i]n most cases, the Board is capable of identifying new issues or belatedly presented evidence when weighing the evidence at the close of trial, and disregarding any new issues or belatedly presented evidence that exceeds the proper scope of reply or sur-reply” such that “striking the entirety or a portion of a party’s brief is an exceptional remedy that the Board expects will be granted rarely.” *See* CTPG 80.

The parties are reminded of their responsibility to comply with the rules of practice before the Board, and are cautioned that the Board may impose sanctions for failure to do so. *See* 37 C.F.R. §§ 42.11, 42.12. Because the parties appear to be working together to resolve the disputes discussed above, we *deny* without prejudice Petitioner’s request to file a motion for sanctions. If the parties are unable to reach an agreement regarding withdrawal of Patent Owner’s supplemental declarations and the portions of the Sur-Reply that rely on the supplemental declarations, Petitioner may renew its request to file a motion for sanctions.

III. CONCLUSION

For the above reasons, we *deny* without prejudice Petitioner’s request to file motions for sanctions.

IV. ORDER

It is

ORDERED that the parties meet and confer to discuss the possibility of Patent Owner withdrawing the supplemental declarations of Dr. Cameron

¹ *Available at* <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

and Mr. Ransom (Exs. 2036, 2037) and the portions of Patent Owner's Sur-Reply (Paper 30) that rely on the supplemental declarations;

FURTHER ORDERED that if Petitioner chooses to file a motion to strike the supplemental declarations of Dr. Cameron and Mr. Ransom as authorized in Exhibit 3003, such a motion shall contain no more than 15 pages and be filed by February 12, 2025;

FURTHER ORDERED that if Petitioner chooses to file a motion to strike the supplemental declarations of Dr. Cameron and Mr. Ransom, Patent Owner may file an opposition to Petitioner's motion of no more than 15 pages by February 19, 2025; and

FURTHER ORDERED that Petitioner's request to file a motion for sanctions is *denied* without prejudice.

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