

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**

**Case IPR 2024-00291
Patent 11,399,535
Issue Date: August 2, 2022**

Title: CAMOUFLAGE MATERIAL, FOR A HUNTING BLIND

**PATENT OWNER, RUGGED CROSS HUNTING BLINDS, LLC'S
MOTION TO EXCLUDE**

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Patent Owner, Rugged Cross Hunting Blinds, LLC, (“PO”), pursuant to 37 CFR §42.64(c) and this Board’s Scheduling Order (Paper 14), hereby files this Motion to Exclude Petitioner’s Exhibits 2032-E, 2032-F, 1014, 1012, and 1013; and paragraphs 28-38, 39-48 and 62-63 of Exhibit 1025 (Reply Declaration). This Motion to Exclude is timely filed as February 21, 2025.

I. Patent Owner’s Objection to Petitioner’s reliance on Ex. 2032-E and Ex. 2032-F as Prior Art.

Exhibits 2032-E and 2032-F (also referred to as the “articles”) are articles attached as exhibits to the Seaton Declaration (Ex. 2032). Patent Owner cited each article as evidence of industry praise relative to its Austin hunting blind displayed in 2016. Petitioner, in the Reply, cites each article as evidence that it was known to employ a black lining on a mesh material within a blind (a mesh with a camouflage pattern on one side and a dark color on the other side). Paper 28; 18-19. Petitioner then argues a nexus does not exist between PO’s secondary considerations and the claimed invention as the claimed mesh material was known in the art, citing *Yita LLC v. MacNeil IP LLC* in support. *Id.* at 19.

In addition, Petitioner further cites these articles as evidence of general knowledge of a PHOSITA as of the date of invention to support Petitioner’s combination of Whybrew (Ex. 1002) and Strength (Ex. 1003). (Paper 28; p. 27-28). More specifically, Petitioner argues it was known to a PHOSITA that hunting blinds

incorporated a mesh material with a camouflage pattern on an outside surface of the mesh material and a dark color on an inside surface of the mesh material.

PO raised objections to Petitioner's submission of these two articles in emails to the Board with respect to PO's request to file supplemental declarations with its Sur-Reply (Exs. 3001, 3003-3005) and in response to Petitioner's request to file a motion to strike (Ex. 3005).

The Federal Circuit has determined that a motion to exclude is a proper mechanism for the Board to determine if it should consider new evidence introduced in a reply. *See, Genzyme Therapeutic Prods L.P. v. Biomarin Pharm Inc.*, 825 F.3d 1360, 1367(citing 37 C.F.R. 42.64(c)); *Belden v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). To that end, the Federal Circuit has found that the Board may consider reply arguments that "involve[] the same 'legal ground' based on '**the same prior art reference[s]**'." *Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1385 (Fed. Cir. 2023) (quoting *Apple Inc. v. Andrea Electronics Corp.*, 949 F.3d 697, 706 (Fed. Cir. 2020)). However, Petitioner is not relying on the same prior art that was cited in the Petition. Instead, Petitioner is relying on new prior art which the Federal Circuit has prohibited. While Petitioner may rely on the prior art cited in the Petition to expand a legal theory or argument presented in the petition, it cannot cite this new prior art to back-fill its combination of Whybrew and Strength in

response to Patent Owner's arguments against combining these references. See, *Rembrandt Diagnostics*, 76 F.4th at 1383.

To that end, the Federal Circuit has held that a petitioner may not in reply rely on new prior art to teach a claim limitation. See, *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016). (holding a reply brief and declaration exceeded the proper scope for a reply because they cited "a number of non-patent literature references which were not relied upon to support unpatentability in the Petition). In this case, Petitioner relies on Exhibits 2032-E and 2032-F as teaching the claim limitation of "...mesh material... comprising: a first side with a camouflage pattern; and a second side with a dark color coating, said second side opposite to the first side." Paper 28; 18, 28. Because Petitioner is introducing this new prior art in its reply as teaching this claim limitation, these documents must be excluded. *Id.*

In its attempt to introduce these articles as prior art, Petitioner argued for the first time in the reply that PO is not entitled to the priority date of February 29, 2016, and the effective filing date of the '535 Patent is February 28, 2017. In particular, Petitioner argued that the provisional application fails to meet the written description requirement under 35 U.S.C. §112(a)

PO expects that Petitioner will argue, and has argued, that this new prior art was introduced in response to the PO's arguments and evidence of secondary considerations. However, the Board has specifically stated the issue of priority:

“... first has to be raised by Petitioner in its petition, by identifying, specifically, the features, claims, and ancestral applications allegedly lacking § 112, first paragraph, written description and enabling disclosure support for the claims based on the identified features. Then, the Patent Owner has to make a sufficient showing of entitlement to earlier filing date or dates, in a manner that is commensurate in scope with the specific points and contentions raised by Petitioner.” (emphasis added). *Polaris Wireless Inc. v. Trueposition Inc.*, IPR2013-0023; Paper 9; 29.

The only reference to the priority date in the Petition is a general statement that the provisional application “does not provide support under 35 U.S.C. § 112(a) for the claimed subject matter.” Paper 1;12. Thereafter, Petitioner provides a statement that it reserves the right to challenge the priority date of the ‘535 Patent. *Id.*

The Petition does not specifically identify features and claims that are allegedly lacking Section 112 written description or enabling disclosure support. In fact, this general statement doesn't even distinguish between the written description and enablement requirements, which, while related, are recognized as distinct concepts. *See, Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1345 (Fed. Cir. 2010).

Despite this lack of specificity, the Board found that Patent Owner had ample notice and opportunity to submit evidence and arguments regarding the effective filing date of the challenged patent. Paper 32. The Board's statement in this regard appears to be directly contrary to the Board's position on the timing of a priority challenge as set forth in the *Polaris Wireless* case. As suggested above, PO did not notice that if Petitioner was challenging priority based on either lack of written description or enablement, or both, and had no idea which claims or claims elements were not supported by the specification of the provisional application. Instead, PO was left to guess which parts of the specification of the provisional application were somehow or someway lacking under Section 112.

The requirements of *Polaris Wireless* are consistent with the requirements of the Administrative Procedures Act. "The indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker." *Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed.Cir.2013). A patent owner in [an IPR] is undoubtedly entitled to notice of and a fair opportunity to meet the grounds of rejection," based on due process and *Administrative Procedure Act (APA)* guarantees. See, *Qualcomm Inc. v. Intel Corp.*, 6 F.4th 1256, 12021 (Fed. Cir. 2021)(citing *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). For IPRs, "the APA imposes particular requirements on the PTO. The agency must 'timely inform[]' the patent owner of 'the matters of fact and law asserted,' 5 U.S.C.

§ 554(b)(3), must provide 'all interested parties opportunity for the submission and consideration of facts [and] arguments . . . [and] hearing and decision on notice,' *id.* § 554(c), and must allow 'a party . . . **to submit rebuttal evidence** . . . as may be required for a full and true disclosure of the facts,' *id.* §556(d)." *Id.* (citing *Dell Inc. v. Accelaron, LLC*, 818 F.3d 1293, 1301 (Fed. Cir. 2016)).

To that end, the consideration of these articles (Exs. 2032-E and 2032-F) as prior art may be a violation of the American Procedures Act. As outlined above, the Petition did not provide adequate notice of the legal and factual basis of the priority challenge. In addition, the PO was not given an opportunity to be heard on this issue as the PO was not allowed to submit any rebuttal evidence.

In this case, the PO was not given an opportunity to submit rebuttal evidence in the form of the declarations of Mr. Ransom and Dr. Cameron with respect to the issue of priority. The Petitioner relied on the testimony of its expert Dr. Ellison (Paper 28, p. 15-17) as evidence to challenge priority. While PO had the opportunity to cross-examine Dr. Ellison, PO did not have an opportunity to submit any rebuttal testimony, which is critical on this issue as the PO bears the burden of proving priority if so challenged.

Furthermore, Petitioner's general challenge under 35 U.S.C. § 112(a) would fail even under the court system's lenient practice of notice pleading, much less the heightened pleading requirements for an IPR petition. *See* 37 CFR 42.104; 37 CFR

42.22. Notice pleading is a fundamental floor to preserving due process. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (the policy of notice pleading is to "give the defendant fair notice of what the... claim is and the grounds upon which it rests...") A complaint fails to put the defendant on notice "if it tenders naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). A defendant is not put on proper notice "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." *Ashcroft*, 556 U.S. at 679.

Considering that Petitioner's entire allegation for lack of written support is the conclusory statement "Provisional App. No. 62/301,007 does not provide support under 35 U.S.C. § 112(a) for the claimed subject matter," Patent Owner fails to see how it could have been put on notice, even under the notice pleading standard because the allegation in the petition is a "naked" assertion "devoid of further factual enhancement." Petitioner's one-sentence allegation certainly does not explain "How the construed claim is unpatentable under the statutory grounds," nor does the petition "specify where each element of the claim is found in the prior art patents or printed publications relied upon." 37 CFR §42.104(b)(4). Because the general challenge under 35 U.S.C. § 112(a) does not satisfy the requirements of 37 CFR

§42.104 or even the lenient notice pleading standard, Petitioner was not put on notice as to the priority date challenge, effectively denying Petitioner due process.

Because Petitioner did not challenge priority with specificity in the Petition as required by the Board in *Polaris Wireless*, Petitioner should not be able to challenge priority in its Reply as an “end-around” to introduce new prior art that was not cited in the Petition. Considering this evidence in light of the record would be a violation of the APA.

Moreover, Petitioner had actual knowledge of Ex. 2032-E approximately six (6) months prior to filing the Petition. Petitioner was named as a defendant in the patent infringement case styled, *Rugged Cross Hunting Blinds, LLC v. FeraDyne Outdoors, LLC et al*, Case No.: 3:22-690. Patent Owner filed its Second Amended Complaint Ex. 2028 (the Complaint) on June 28, 2023, naming the Petitioner as a Defendant. Petitioner filed a motion to dismiss on August 28, 2023.

In the Complaint, PO included allegations of industry praise and commercial success of the PO’s Austin blind and the licensed SurroundView blind. Ex. 2028, p. 5-8. Attached as Exhibit B to the Complaint is the very Ex. 2032-E Petitioner has attempted to introduce as evidence of prior art. *See*, Ex. 2028, pp 32-33. However, for this article (Ex. 2032-E) to be considered prior art, the effective filing date of the ‘535 Patent must be February 28, 2017, and not the priority date of February 29, 2016, for the ‘535 Patent. Therefore, Petitioner argued, for the first time in its Reply,

that the specification of the provisional application does not meet the written description requirement of Section 112, and therefore the '535 Patent is not entitled to its priority date of February 29, 2016.

So, Petitioner not only knew PO would be relying upon secondary considerations in this IPR, by virtue of the allegations in the Complaint, Petitioner had actual knowledge of the Ex. 2032-E almost six (6) months before filing the Petition. Despite having knowledge of Ex. 2032-E at such an early time, Petitioner failed to raise priority as an issue in the Petition and shouldn't be allowed to do so for the first time in the Reply.

Accordingly, PO respectfully requests the Board to exclude Exhibits 2032-E and 2032-F. Inasmuch as the Petitioner did not present its position on the issue of priority in sufficient detail in the petition, as required by *Polaris Wireless*, the effective filing dates of the '535 Patent is February 29, 2016. Accordingly, Exhibits 2032-E and 2032-F are not relevant because those articles are not prior art under 35 U.S.C. §102.

II. Patent Owner's Objection to Petitioner's reliance on Ex. 1014 as Prior Art.

Ex. 1014 is a five-page instruction manual for the Penthouse (produced by Ameristep) pop-up style hunting blind that includes a black lining on the interior sides of the walls and a shoot through mesh material at the windows. *See*, Ex. 1014,

p. 5). In addition, this document discloses a clear cellophane scent barrier at a window along an interior side of the mesh material. *Id.*

Petitioner introduced this document for the first time in the Reply (Paper 28), and it was not cited as prior art in the Petition. Inasmuch as this document was purportedly published in 2005, Petitioner did not rely on its argument relative to priority to identify this document as prior art.

Petitioner relies on Ex. 1014 for the same reasons as Exhibits 2032-E and 2032-F. More specifically, Petitioner cites this document as evidence that it was known to employ a black lining on a mesh material within a blind (a mesh with a camouflage pattern on one side and a dark color on the other side). Paper 28; 18-19, 25. Petitioner then argues a nexus does not exist between PO's secondary considerations and the claimed invention as the claimed mesh material was known in the art. Paper 28; 18-19).

In addition, Petitioner further cites this document as evidence of the general knowledge of a PHOSITA as of the date of invention to support Petitioner's combination of Exhibits 1002 (Whybrew) and 1003 (Strength). Paper 28; 27.

PO raised objections to Petitioner's submission of this document in emails to the Board with respect to PO's request to file supplemental declarations with its Sur-Reply (Ex. 3001, 3003, 3004, 3011) and in response to Petitioner's request to file a motion to strike (Exs. 3003-3005).

As noted above, the Federal Circuit has made it clear that while a Petitioner may expand on its arguments and legal theories of invalidity or unpatentability set forth in the petition, the Petitioner cannot rely on new prior art in the reply to present its case-in-chief. *See Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1383 (Fed. Cir. 2023); *see also Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1383 (Fed. Cir. 2023); *see also Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1367 (Fed. Cir. 2015)

Moreover, Petitioner relies on this new prior art as disclosing certain claim limitations related to the claimed mesh material, which the Federal Circuit has stated is prohibited. *See, Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016). Petitioner has taken the position that Exhibit 1014 discloses a mesh material of a pop-up hunting blind having a camouflage pattern on a first side and a dark color coating on a second side, Petitioner was required to introduce this evidence as part of the Petition and cannot do so in the Reply.

Accordingly, PO respectfully requests the Board to exclude Exhibit 1014 from consideration.

III. Patent Owner's Objection to Petitioner's reliance on Ex. 1012 and 1013 as Prior Art.

Exhibit 1012 includes pages from a book entitled "Formation of Synthetic Fibers"; and, Exhibit 1013 is an article entitled "An overview of polymer latex film

formation and properties.” Petitioner cites both of these documents for the proposition that a PHOSITA would understand that holes will form in a film that has a molecular weight below a certain threshold. Paper 28;10.

PO argued that Strength did not disclose a mesh material as claimed in the ‘535 Patent because the material did not have holes, according to the claim construction proposed by the Petitioner. Paper 17;17-19. More specifically, PO argued to the extent that woven fabric of Strength had holes, those holes were covered by the 3 mil thick polymer film applied to the fabric. *Id.*

PO raised objections to Petitioner’s submission of these references in emails to the Board with respect to PO’s request to file supplemental declarations with its Sur-Reply (Ex. 3001, 3003, 3011) and in response to Petitioner’s request to file a motion to strike (Ex. 3005).

As noted above, the Federal Circuit has made it clear that while a Petitioner may expand on its arguments and legal theories of invalidity or unpatentability set forth in the petition, the Petitioner cannot rely on new prior art in the reply to present its case-in-chief. *See Axonics*, 75 F.4th at 1383; *see also Rembrandt*, 76 F.4th at 1383; *Ariosa*, 805 F.3d at 1367. To that end, the Federal Circuit has held that a petitioner may not in reply rely on new prior art to teach a claim limitation. *See Intelligent Bio Sys.*, 821 F.3d at 1369

Petitioner cites these new prior art documents to establish that a PHOSITA would understand that Strength discloses a material that has holes, when the film is applied under certain conditions. (Paper 28, p. 10). More specifically, Petitioner relies on these documents as teaching a claim limitation i.e., the claimed mesh material, which Petitioner has defined as including holes. *See*, Paper; 25). Reliance on these new prior art references for this purpose in a reply has been prohibited by the Federal Circuit.

IV. Patent Owners Objection to Exhibit 1025 (Ellison's Declaration), ¶¶ 25-38, 40-47, 62-63, and 55.

Petitioner also submitted the declaration (Ex. 1025) of its expert Dr. Ellison who referenced Exhibits 2032-E and 2032-F in paragraphs 39-48. On pages 13, 19, and 28-30, the Reply cites the declaration with respect to these exhibits and the declaration paragraphs.

Exhibit 1025 also references Exhibit 1014 in paragraphs and 62-63. The Reply refers to these paragraphs on pages 19 and 30.

With respect to Exhibits 1012 and 1013, Exhibit 1025 refers to these documents in paragraphs 54-56 thereof; and the Reply cites the Exhibit 1025 with respect to these paragraphs on page 10.

PO's objections to the testimony of the Reply Declaration (Ex. 1025) are set forth in Exhibits 3001 and 3003.

In as much as the Petitioner relies on the testimony of Dr. Ellison with respect to each of these exhibits, PO respectfully requests exclusion of paragraphs 40-47, 62-63 and 55 that refer to the Exhibits 2032-E, 2032-F, 1014, 1012 and 1013, for the above set forth reasons.

In addition, paragraphs 25-38 of Exhibit 1025 include testimony relative to the issue of priority and lack of written description. The Reply refers to these paragraphs in pages 14-17 thereof.

PO's objections to this testimony of Exhibit 1025 are set forth in Exhibits 3001 and 3003.

In as much as this testimony relates to and is provided to directly support Petitioner's argument regarding priority, PO respectfully requests this testimony be excluded for the reasons set forth. More specifically, the Petitioner did not timely submit its challenge priority in the Petition contrary to the procedural requirements outlined in the *Polaris Wireless* case. In addition, consideration and application of this testimony may be a violation of the APA.

V. Conclusion

For the above-stated reasons, Patent Owner respectfully requests the Board to not admit into evidence Exhibits 2032-E, 2032-F, 1014, 1012, 1013, and paragraphs 25-38, 40-47, 62-63 and 55.

DATED this 21st day of February, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Patent Owner, Rugged Cross Hunting Blinds, LLC's Motion to Exclude was served via electronic mail to: Thomas G. Eschweiler, Esq. (teschweiler@epiplaw.com), Eschweiler & Potashnik, LLC, 195 S. Main St., Ste 400, Akron, OH 44308 and Dennis J. Abdelnour, Esq. (dabdelnour@honigman.com), Honigman LLP, 155 N. Wacker Drive, Ste 3100, Chicago, IL 60606, this 21st day of February, 2025.

/s/ Robert L. Wolter
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