

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.

Patent 11,399,535
Filing Date: June 11, 2021
Issue Date: August 2, 2022
Title: CAMOUFLAGE MATERIAL, FOR A HUNTING BLIND

Inter Partes Review No.: IPR2024-00291

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE**

Petitioner hereby files this Opposition to Patent Owner's Motion to Exclude (Paper 38). Initially, the movant, Patent Owner, has the burden of proof to establish that it is entitled to the requested relief, namely, exclusion of the following evidence: Exhibits 2032-E, 2032-F, 1014, 1012, 1013, and portions of Ex. 1025. 37 C.F.R. § 42.20(c). As will be appreciated below, Patent Owner fails both procedurally and substantively, by failing to satisfy its burden of proof.

Petitioner's opposition is based on four (4) grounds: (1) Patent Owner waived the right to file its motion by failing to object to the evidence at issue in a timely manner in accordance with 37 C.F.R. §§ 42.64(b)(1) and 42.64(c); (2) Patent Owner's tardy objection to evidence does not satisfy the particularity requirement of 37 C.F.R. § 42.64(b)(1); (3) this Board's Order (Paper 32), already held that Petitioner's evidence is associated with proper responses to Patent Owner Response (POR) under 37 C.F.R. § 42.23, and (4) Exhibits 2032-E and 2032-F are incorrectly stated to be Petitioner's exhibits by Patent Owner when, in fact, Patent Owner filed such evidence for consideration with respect to secondary considerations in this proceeding, and satisfy all requirements under the Federal Rules of Evidence (FRE).

(1) Patent Owner waived it right to file the Motion to Exclude

Petitioner filed Exs. 1012, 1013, 1014 and 1025, *inter alia*, on December 13, 2024, in conjunction with its Petitioner's Reply to the Patent Owner Response (PRPOR), and served them on opposing counsel on the same day. Paper 28, at 34. According to 37 C.F.R. § 42.64(b)(1), once a trial has been instituted, as in this matter, an objection to evidence must be filed *within five business days of service of the evidence to which the objection is directed*. *Id.* See also *ZTE USA Inc. et al. v. Cywee Group Ltd.*, IPR2019-00143, Paper 87, at 100 (PTAB Feb. 17, 2021). Further, such objection must identify the grounds of the objection with sufficient particularity to allow correction in the form of supplemental evidence. *Id.* Patent Owner made no such objection upon the service of Exs. 1012, 1013, 1014 and 1025 within the five deadline objection deadline. Patent Owner avers that its email to the Board sufficed as an objection to at least Ex. 1014. Paper 38, at 11 (citing Exs. 3001, 3003, 3004 and 3011), but the earliest email is dated December 27, 2024, more than five days after the December 13, 2024 date of service of such evidence. For this reason alone, Patent Owner's Motion to Exclude fails, and the highlighted evidence should be considered and accorded full weight.

**(2) Patent Owner's tardy objection to evidence does not satisfy the
particularity requirement of 37 C.F.R. § 42.64(b)(1)**

A motion to exclude evidence must identify where in the record the objection originally was made. *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, CBM2012-00002, Paper 66, at 61 (PTAB Jan. 23, 2014). In addition, the objection, in addition to being timely, must identify the grounds for the objection *with sufficient particularity to allow correction in the form of supplemental evidence*. 37 C.F.R. § 42.64(b)(1).

Patent Owner asserts that its untimely email of December 27, 2024 to the Board constitutes an objection to at least Exs. 1012-1014 (Paper 38, at 11, 13), but such email only states its reasoning for requesting leave to file supplementary declarations with its sur-reply, and *contains no objection to the evidence* filed on December 13, 2024. Ex. 3001. More particularly, the rationale for why Patent Owner believes supplemental declarations are warranted does not amount to a formal objection containing the specific particularity requirement of 37 C.F.R. § 42.64(b)(1). Thus, Patent Owner's Motion to Exclude fails for this additional reason, and the highlighted evidence should be considered and accorded full weight.

(3) This Board's Order (Paper 32) held that Petitioner's evidence was a proper response under 37 C.F.R. § 42.23

Patent Owner argued during the Conference call discussing sanctions that Ex. 1025 (Petitioner's expert report) raised new issues that required their expert to address via a supplemental declaration. Ex. 3001. Petitioner responded that the PRPOR and evidence submitted therewith was responsive to the POR. Ex. 3002. In this Board's Order denying Patent Owner's request to submit further declarations, the Board held that Petitioner's discussion of Ex. 1014 was in response to Patent Owner's argument that Ground One could not include knowledge of a PHOSITA, and thus was a proper response to an argument raised in Patent Owner's Response (POR) according to 37 C.F.R. § 42.23. Paper 32, at 1-2.

Patent Owner also argued that the written description issue and evidence associated therewith was raised for the first time in the PRPOR. Ex. 3001, Paper 38, at 4-5. The Board, however, already held in its Order that the written description issue was raised with sufficient particularity in the original Petition to give Patent Owner ample notice and opportunity to address in the POR. Paper 32, at 3. Consequently, the submission of Ex. 1025 and arguments relating to written description requirement were proper.

Further, Patent Owner argues that Exs. 1012 and 1013 are improper as being new prior art submitted to teach a claim limitation. Paper 38, at 13-14. Yet, the Board already addressed this issue directly in its Order, holding that such evidence and arguments associated therewith constitute a proper response to arguments provided in the POR (i.e, a rebuttal to PO's expert testimony that Strength teaches no holes). Paper 32, at 2.

Lastly, the Patent Owner asserts that paragraphs 25-38, 54-56 and 62-63 of Ex. 1025 are improper for different reasons. Paper 38, at 14. More specifically, paragraphs 62-63 are improper as being directed to alleged improper evidence Ex. 1014, paragraphs 54-56 being directed to alleged improper evidence Exs. 1012 and 1013 and paragraphs 25-38 being directed to new arguments relating to written description. *Id.* at 14-15.

Regarding paragraphs 62-63 and 54-56 associated with Exs. 1014 and 1012-1013, respectively, the Board specifically stated such evidence was properly in response to arguments set forth in the POR. Paper 32, at 2. With regard to paragraphs 25-38 of Ex. 1025 directed to the written description issue, the Order stated that such evidence was not associated with a new issue (i.e., the written description issue had been properly raised in the original Petition) and was properly submitted in response to arguments set forth in the POR. Paper 32, at 3.

Therefore Patent Owner's Motion to Exclude merely rehashes the same arguments that the Board has already addressed. Petitioner's evidence submission was proper and should not be excluded.

(4) Patent Owner requests exclusion of their own evidence Exhibits 2032-E and 2032-F they submitted in support of their secondary considerations arguments

Patent Owner incorrectly states in its Motion to Exclude that Exhibits 2032-E and 2032-F are Petitioner exhibits. Paper 38, at 2. This is clearly incorrect, as several sentences later the Motion concedes that Patent Owner submitted Ex. 2032 containing Exs. 2032-E and 2032-F as Appendices in support of their argument that secondary considerations are relevant to the obviousness inquiry. *Id.*

Therefore it is unclear what relief Patent Owner is seeking. It appears as though Patent Owner wants this Panel to rely on Exs. 2032-E and 2032-F to the extent the content of such exhibits provides support for secondary considerations, but concurrently wants the Board to prohibit Petitioner's reliance on the same evidence as an admission that Patent Owner's "secret sauce" (i.e., the one-way mesh) is, in fact, prior art (thereby undermining fatally Patent Owner's secondary considerations arguments).

Petitioner concedes that evidence may be excluded for one use, but not another depending on its purpose and compliance with the Federal Rules of

Evidence (FRE) (*see Ericsson Inc. v. Intellectual Ventures II LLC*, IPR2014-00915, Paper 37, at 6-8 (PTAB Dec. 7, 2015)). PO's motion, however, makes no showing that use of Exs. 2032-E and 2032-F fails to satisfy the standards set forth in FRE, but instead argues that the Petition did not set forth the written description issue relating to priority to Patent Owner's satisfaction. Paper 38, at 5-6. As highlighted *supra*, this Board has already held that the original Petition provided the requisite specificity to put Patent Owner on notice. Paper 32, at 3. Thus, Patent Owner is using its Motion to Exclude to repeat arguments it already provided that have been adjudicated by this Panel. A motion to exclude is not the proper mechanism to (i) challenge the sufficiency or persuasiveness of the evidence produced by the opposing party, (ii) argue that a reply contains new arguments or relies on new evidence necessary to make out a *prima facie* case. *Liberty Mutual Ins. Co.*, Paper 66, at 62. To the extent the Board feels the need to consider the merits of these arguments from Patent Owner, Petitioner submits that such arguments fail for the same reasons as set forth in this Board's previous order, Paper 32.

Therefore Patent Owner's Motion to Exclude fails and Exs. 2032-E and 2032-F should be considered for all such evidence contains.

This Opposition to the Motion to Exclude is timely filed as on or before
February 27, 2025.

Respectfully submitted,

February 27, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.105, I hereby certify that I caused a true and correct copy of the **PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE** in connection with U.S. Patent No. 11,399,535 to be served via electronic mail on February 27, 2025 to the following email addresses:

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Respectfully submitted,

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