

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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**DBR FINANCE, INC.,  
Petitioner,**

**v.**

**RUGGED CROSS HUNTING BLINDS, LLC,  
Patent Owner**

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

**Title: CAMOUFLAGE MATERIAL, FOR A HUNTING BLIND**

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**PATENT OWNER, RUGGED CROSS HUNTING BLINDS, LLC'S  
REPLY TO PETITIONER'S OPPOSITION TO 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 Reply to Petitioner’s Response to 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) (together, the “Disputed Evidence”). This Reply is timely filed as March 7, 2025.

**I. The Timing of PO’S Objections is not Dispositive**

Petitioner argues in its Response (Paper 39) that PO’s Motion to Exclude should fail Because PO did not meet the procedural timing requirements in 37 C.F.R. § 42.64(b)(1), regardless of the merits of PO’s position. However, while PO recognizes that its objections to the Disputed Evidence were not raised within the five-day window provided by 37 C.F.R. § 42.64(b)(1), Petitioner overstates the finality of that procedural rule. 37 C.F.R. § 42.5 gives the Board discretion to control IPR proceedings, including discretion to “waive or suspend a requirement of parts 1, 41, and 42.” Furthermore, a late action will be excused if the board decides that “consideration on the merits would be in the interests of justice.” 37 C.F.R. § 42.5(c)(3).

In this case, the Board should suspend the five-day time frame because the interests of justice weigh in favor of considering the merits of PO’s Motion to Exclude. Allowing the Petitioner to “reserve the right to challenge the priority date”

simply by saying so would likely be a far-reaching decision. *See* Petition for IPR \*12-13 (Paper 1). PO understands that a petitioner in some circumstances may cite new prior art, however those circumstances do not involve changing the boundaries of the prior art universe in the reply. The scope of the prior art time boundary is to be presented in the petition to build the framework around which the IPR is built. *See* 35 U.S.C. § 312(a)(3); *see also Corephotonics, Ltd. v. Apple Inc.*, 84 F.4th 990, 1001-02 (Fed. Cir. 2023) (“As the Supreme Court has stated, in an IPR the petitioner's contentions, not the Director's discretion, define the scope of the litigation all the way from institution through to conclusion. The IPR petition, thus, must provide an understandable explanation of the element-by-element specifics of the patentability challenges, including the identification of particular portions of prior art on which the petitioner is relying.”); *see also Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify 'with particularity' the 'evidence that supports the grounds for the challenge to each claim’”) (quoting 35 U.S.C. § 312(a)(3)). The “expedited nature of IPRs bring with it an obligation for petitioners to make their case in their petition to institute.” *Intelligent Bio-Sys.*, 821 F.3d at 1369.

Therefore, the interests of justice weigh in favor of considering the merits of PO’s challenge to Petitioner’s evidence in support of its priority date argument.

## **II. PO's Objections were Sufficiently Particularized to Alert Petitioner to File Supplemental Evidence**

Petitioner also contends that PO did not submit particularized objections under 37 C.F.R. § 42.64(b)(1) such that Petitioner had notice supplement the disputed evidence. To satisfy 42.64(b)(1), the movant need only give specific objections enough to “identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.”

Here, PO provided particular objections to Exhibits 1003 and 1014 in the December 27<sup>th</sup> email. Furthermore, PO raised objections to Petitioner's submission of Exs. 2032 E & F (the “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). Therefore, PO objected with sufficient particularity to put Petitioner on notice to supply supplementary evidence.

## **III. Exs. 2032 E & F should be Excluded from Petitioner's Reply under FRE 403**

The Articles should be excluded from Petitioner's reply because the exhibits have little probative value and are unfairly prejudicial. Federal Rule of Evidence 403 permits the Court to exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice. Furthermore, “there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible

for another purpose is thereby rendered inadmissible; quite the contrary is the case.”

*United States v. Abel*, 469 U.S. 45, 56 (1984).

To the extent Petitioner argues that PO requests exclusion of its own exhibits, PO reasserts that it asks for exclusion of the Articles for the purpose which Petitioner offers the Articles, as is customary in evidentiary challenges. *See Abel*, 469 U.S. at 56.

Exhibits 2032 E & F should be excluded from Petitioner’s Reply because the prejudicial effect of allowing the evidence outweighs the evidence’s probative value for Petitioner’s argument. Petitioner offers the Articles for the purpose of showing 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). Petitioner uses the Articles to try to show 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.

The Articles have little probative value for this purpose. Ex. 2032 E merely identifies the Austin blind as “camo material” while touting the one-way viewing capabilities of the product. It says nothing about a mesh material or dark color on an inside surface of the mesh material. Similarly, Ex. 2032 F merely mentions a “high quality mesh material,” but it does not disclose 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 such that the feature would be known to a PHOSITA. Therefore, the Articles' probative value is low.

Allowing Petitioner to further its priority date argument with the Articles is unfairly prejudicial to PO because it allows Petitioner to progress a new theory of invalidity on reply. Considering that PO bears the burden of proof for the priority-date issue and that the Board has denied PO the opportunity to submit direct evidence, allowing Petitioner to submit evidence on the priority date issue on reply is unfairly prejudicial. *See Polaris Wireless Inc. v. Trueposition Inc.*, IPR2013-0023, Paper 9, at 29; *see also Qualcomm Inc. v. Intel Corp.*, 6 F.4th 1256, 1262 (Fed. Cir. 2021) (holding that the APA requires administrative agencies to allow parties to submit rebuttal evidence). Therefore, the Articles are unfairly prejudicial and should be excluded.

#### **IV. 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 7<sup>th</sup> day of March, 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 Reply in Response to Opposition to Motion to Exclude was served via electronic mail to: Thomas G. Eschweiler, Esq. ([teschweiler@epiplaw.com](mailto:teschweiler@epiplaw.com)), Eschweiler & Potashnik, LLC, 195 S. Main St., Ste 400, Akron, OH 44308 and Dennis J. Abdelnour, Esq. ([dabdelnour@honigman.com](mailto:dabdelnour@honigman.com)), Honigman LLP, 155 N. Wacker Drive, Ste 3100, Chicago, IL 60606, this 7<sup>th</sup> day of March, 2025.

/s/ Robert L. Wolter  
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