

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BOWMAR ARCHERY LLC Petitioner,

v.

VETERAN'S INNOVATIVE PRODUCTS, LLC Patent Owner.

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Patent No. 8,043,177

Filing Date: July 7, 2008

Issue Date: October 25, 2011

Title: **ARROWHEAD HAVING COLLAPSIBLE AND OUTWARDLY  
BIASED BLADES**

*Inter Partes* Review No.: IPR2024-00401

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**PATENT OWNER MOTION TO EXCLUDE CERTAIN PORTIONS OF  
PETITIONER'S EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(b)(1)**

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner Veteran's Innovative Products, LLC hereby moves to exclude certain evidence submitted by Petitioner Bowmar Archery LLC in conjunction with its Reply filed on December 17, 2024. The evidence should be excluded as it presents 1) new evidence/argument in the reply and should have been presented in the Petition and 2) evidence without the underlying facts or data necessary.

## **I. BACKGROUND**

Petitioner filed its Petition for *Inter Partes* Review accompanied with 21 exhibits on January 8, 2024 challenging the '177 Patent. Paper 1; Exs. 1001–21. One of those exhibits included a 197-page declaration from Todd Kuhn. Ex. 1019. After the proceeding was instituted, Paper 7, Dr. Kuhn was deposed on September 6. Paper 10. Patent Owner filed a response on September 25 accompanied by an expert declaration from Wayne Willkomm. Paper 12, Ex. 2008. Petitioner objected to numerous aspects of Mr. Willkomm's declaration but he was ultimately deposed on November 19. Papers 9, 16. During Mr. Willkomm's deposition, Petitioner showed him five exhibits that were generated specifically for this IPR that were not included in the Petition or produced prior to Mr. Willkomm's deposition. Exs. 1022–26; Ex. 1034 at 26:9–42:21; 69:1–3 (identifying objections to exhibits 1022–26).

On December 17, Petitioner filed a Reply *accompanied by 29 new exhibits* that were not included with the Petition. Paper 17; Exs. 1022–50. The new exhibits included a supplemental declaration by Dr. Kuhn and a new declaration from Robert

Mizek. Exs. 1046, 1047. Moreover, Petitioner included eight exhibits, including the five used at Mr. Willkomm's deposition, that comprised manipulated drawings and videos of certain prior art references. Exs. 1022–26; 1035–37. Patent Owner timely objected to 25 of those exhibits on various grounds under 37 C.F.R. § 42.64(b)(1). Paper 18. Patent Owner deposed Mr. Mizek on January 16, 2025. Paper 21. Patent Owner timely filed its Sur-Reply on January 28. Paper 22.

## **II. LEGAL STANDARD**

“A reply may only respond to arguments raised in the corresponding opposition, patent owner preliminary response, patent owner response, or decision on institution.” 37 C.F.R. § 42.23(b). “Petitioner may not submit new evidence or argument in reply that it could have presented earlier, e.g. to make out a prima facie case of unpatentability.” *Juniper Networks, Inc. v. Swarm Technology LLC*, IPR2021-01445, Paper 62 at 28 (P.T.A.B. Feb. 7, 2023) (quoting Consolidated Trial Practice Guide (Nov. 2019) at 73).

“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.” 37 C.F.R. § 42.23(b).

## **III. ARGUMENT**

### **A. Exhibits 1022–26; 1035–37 along with portions of Dr. Kuhn's declaration, should be excluded as new evidence and without proper underlying facts giving rise to the drawings.**

The new exhibits concerning the Liechty II prior art reference should be excluded as Dr. Kuhn has now changed his position from the Petition thus further

creating “new evidence” in contradiction to 37 C.F.R. § 42.23(b). *Juniper Networks, Inc. v. Swarm Technology LLC*, IPR2021-01445, Paper 62 at 28 (P.T.A.B. Feb. 7, 2023). In the Petition and his original declaration, Dr. Kuhn created a manipulated drawing that showed the blades of Liechty II in a 90-degree angle and acknowledged that was “exaggerated.” Ex. 2010 at 121:13-122:11; 122:12-14. Now in his Reply Declaration, Dr. Kuhn states the biasing member of Liechty II is capable of biasing the blade of Liechty II from a “fully open position back to a fully closed position” and generated a series of manipulated drawings showing the blades of Liechty II in positions that are 1) not shown in the prior art reference and 2) not shown in Dr. Kuhn’s initial declaration submitted with the Petition. Exs. 1022–25, 1035; Ex. 1046 at ¶ 11. As such, Dr. Kuhn has offered new evidence, Exs. 1022–25; 1035; 1046; that Petitioner now relies on its invalidity grounds and should be excluded under 37 C.F.R. § 42.23(b).

More generally, all the newly created manipulated drawings and videos submitted with the Reply should be excluded. Petitioner’s expert, Dr. Kuhn, as discussed in his supplemental declaration, created the drawings and videos displayed in Exhibits 1022–26 and 1035–37. Ex. 1046 at ¶¶ 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59, 77. These drawings are manipulations of drawings disclosed in the Liechty II, Vandewater, and Lint prior art references—references Petitioner relies on in its invalidity grounds. The drawings are Dr. Kuhn’s *interpretations* but those modified drawings are not disclosed in the references nor are they taught despite Petitioner’s

attempt to use the manipulated drawings to support its invalidity grounds. *Compare* Exs. 1022–26; 1035–37 *with* Exs. 1002, 1003, and 1012. “Petitioner may not submit new evidence or argument in reply that it could have presented earlier.” *Juniper Networks, Inc. v. Swarm Technology LLC*, IPR2021-01445, Paper 62 at 28 (P.T.A.B. Feb. 7, 2023) (quoting Consolidated Trial Practice Guide (Nov. 2019) at 73). There is no reason as to why Petitioner included these exhibits in the Reply when it could have presented them in the Petition; thus they are new evidence and should be excluded.

Furthermore, and in contradiction to 37 C.F.R. § 42.65(a), Dr. Kuhn fails to “disclose the underlying facts or data information” used to generate these manipulated drawings. In other words, Dr. Kuhn fails to explain how he arrived at the modified drawings or why the modifications are proper in view of the disclosure within the prior art reference. Thus, Exhibits 1022–26; 1035–37 and the related portions of Dr. Kuhn’s declaration, Ex. 1046 ¶¶ 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59, 77, should be excluded as unreliable under 37 C.F.R. § 42.65(a), and Fed. R. Evid. 401, 703.

**B. Petitioner’s “new evidence” concerning the definition of a blade should have been presented in the Petition and is now too late.**

In the Petition, Petitioner relies on Dr. Kuhn’s declaration for the assertion that the barb of Lint may also qualify as a blade as required by the ’177 Patent. *See e.g.*, Paper 1 at 21–26. Patent Owner addressed the issue in its response and relied on its expert Mr. Willkomm to rebut. Paper 12 at 37-42. Importantly, it is Petitioner’s burden to prove the “barb” element taught by the Lint prior art satisfies the “blade” claim

element of the '177 Patent. Realizing its Petition inadequately satisfied that burden, Petitioner introduces 12 new exhibits, a supplemental declaration from Dr. Kuhn, and a new declaration from Robert Mizek in its Reply brief to improperly “bolster” its blade versus barb argument in the Petition. Paper 17 at 26–33; Exs. 1028–31; 1038–39; 1042–45; 1047–49. Petitioner is certainly allowed to present arguments in its reply to address Patent Owner’s position, but Petitioner is not allowed to produce new evidence that it should have, and could have, brought forward at the Petition stage. Petitioner doesn’t get two bites at the apple. These exhibits, along with certain portions of Dr. Kuhn’s supplemental declaration Ex. 1046 ¶¶ 98, a, b, 102, 104, 105, 123, are “new evidence” and new “arguments” that “could have presented earlier.” *Juniper Networks, Inc. v. Swarm Technology LLC*, IPR2021-01445, Paper 62 at 28 (P.T.A.B. Feb. 7, 2023) (quoting Consolidated Trial Practice Guide (Nov. 2019) at 73). As a result, Exs. 1028–31; 1038–39; 1042–45; Ex. 1046 at ¶¶ 98, a, b, 102, 104, 105, 123; 1047–49 should be excluded.

#### **IV. CONCLUSION**

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude Exs. 1022–26; 1028–31; 1035–39; 1042–45; Ex. 1046 at ¶¶ 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59, 77, 98, a, b, 102, 104, 105, 123; and 1047–49.

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing Patent Owner Motion to Exclude Certain Portions of Petitioner's Evidence Pursuant to 37 C.F.R. § 42.64(b)(1) is being served on counsel of record by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS), with a copy served via electronic mail to the following email address, as authorized in the Petition:

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