

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BOWMAR ARCHERY LLC,
Petitioner,

v.

MATTHEW FUTTERE,
Patent Owner.

IPR2024-00401
Patent 8,043,177 B2

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

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EXHIBITS

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Exhibit	Description
1001	U.S. Patent No. 8,043,177
1002	U.S. Patent No. 3,168,313
1003	U.S. Patent No. 8,016,704
1004	U.S. Provisional Application No. 61/038,286
1005	U.S. Patent No. 2,806,317
1006	U.S. Patent No. 2,212,345
1007	U.S. Patent No. 6,918,848
1008	U.S. Patent No. 7,771,297
1009	Prosecution File History for U.S. Patent No. 8,043,177
1010	U.S. Patent No. 4,210,330
1011	U.S. Patent No. 6,270,435
1012	U.S. Patent No. 6,287,224
1013	U.S. Patent No 3,600,835
1014	Ancient Arrowheads, depicted at https://www.wweek.com/news/schools/2022/12/29/oregon-state-university-archeologists-found-north-americas-oldest-stone-points-in-idaho/
1015	U.S. Patent No. 3,036,395
1016	U.S. Patent No. 4,166,619
1017	U.S. Patent No. 3,036,396
1018	U.S. Patent No. 6,830,523
1019	Declaration of Todd A. Kuhn, Ph.D.
1020	U.S. Patent No. 4,932,671
1021	Comparison of Drawings from Flanagan to Prior Art
1022	Figures of Liechty broadhead
1023	Figures of Liechty broadhead
1024	Figures of Liechty broadhead
1025	Figures of Liechty broadhead
1026	Figures of Vandewater broadhead
1027	U.S. Patent No. 5,570,530
1028	U.S. Patent No. 4,819,360
1029	U.S. Patent No. 7,485,056
1030	U.S. Patent Application Publication No. 2023/0366662
1031	Muzzy Arrowhead/Bowfishing Broadheads/Ancient Broadheads

Exhibit	Description
1032	U.S. Patent No. 2,373,216
1033	U.S. Patent No. 7,311,622
1034	Transcript of 11/19/2024 Deposition of Wayne Willkomm
1035	Video of Liechty broadhead
1036	Video of Vandewater broadhead
1037	Video of Lint broadhead
1038	U.S. Patent No. 6,174,252
1039	U.S. Patent No. 4,405,133
1040	Transcript of 09/06/2024 Deposition of Todd Kuhn
1041	Matthew Futterre video
1042	U.S. Patent No. 2,909,372
1043	U.S. Patent No. 7,314,419
1044	U.S. Patent No. 2,373,216
1045	U.S. Patent No. 2,816,766
1046	Reply Declaration of Dr. Todd Kuhn
1047	Declaration of Robert Mizek
1048	U.S. Patent No. 3,022,077
1049	Arrowheads – Characteristics and different uses
1050	Bowsite.com public forum
1051	Marked-up version of corrected Reply identifying all changes

I. INTRODUCTION

Patent Owner (“PO”)’s Motion seeks to exclude two groups of evidence:

- Dr. Kuhn’s testimony in paragraphs 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59 and 77 of Dr. Kuhn’s Reply Declaration (EX1046) and EX1022-1026 and EX1035-1037 cited in Dr. Kuhn’s Reply Declaration; and
- Dr. Kuhn’s testimony in paragraphs 98a, 98b, 102, 104, 105, 123 of his Reply Declaration, Mr. Mizek’s Declaration (EX1047), and EX1028-1031, EX1038-39, EX1042-1045 and EX1048-1049 cited in one or more of these declarations.

PO’s contentions that such evidence should be excluded ignores the strong public policy in administrative proceedings (such as IPR proceedings) of admitting relevant evidence (absent blatant rule violation) and letting the Board consider the appropriate weight to give such evidence.

Further, if PO believed that Petitioner’s Reply and the exhibits cited therein raised “new arguments,” the regulations governing IPRs and the Board’s Consolidated Trial Practice Guide require that PO challenge issues relating to the scope of the Reply by filing a motion to strike after obtaining permission from the Board. PO, however, did not follow the requisite procedure. Thus, PO may not implicitly and belatedly raise this issue by moving to exclude the supporting

evidence cited in Petitioner's Reply.

In addition, and as confirmed by recent Federal Circuit case law, a petitioner may introduce evidence that responds to arguments in PO's response or expands on arguments in a petition. Here, in its Response, PO contends that under its proposed claim construction, the Lint, Leichty II, and Vandewater references did not show the invalidity of the claims of the '177 Patent. Petitioner properly responded by providing evidence that: (1) directly rebuts PO's contentions; and (2) expands on arguments in the Petition to which PO had notice of and a full opportunity to respond. Petitioner was not required to predict what arguments PO or its expert, Mr. Willkomm, would make in the Response and address them in advance. The simple fact that Petitioner's Reply and Dr. Kuhn's and Dr. Mizek's accompanying testimony cite to exhibits that were not previously discussed is insufficient to establish the impropriety of such evidence, let alone make it inadmissible under the Federal Rules of Evidence. *Microsoft Corp. v. SurfCast, Inc.*, IPR2013-00292, Paper 93, at *54 (PTAB Oct. 14, 2014). "The very nature of a reply is to respond to the opposition, which in this case is the Patent Owner Response." *Id.* The reliance on evidence not previously discussed may not exist until a certain point has been raised in the opposition. *Id.* As such, nearly all of PO's arguments in its Motion go to the merits or the weight to be given certain exhibits, not admissibility.

Accordingly, none of PO's objections have any merit and the Board should

deny PO's Motion.

II. PO'S MOTION IS MERITLESS

As a general rule, “there is a strong public policy for making all information filed in an administrative proceeding available to the public.” *Medtronic Vascular, Inc. v. TMT Sys., Inc.*, IPR2021-01532, Paper 56, at *46-47 (PTAB. Mar. 7, 2023) (quotation omitted). Thus, in “an *inter partes* review, [the Board] regard[s] it as the better course to have a complete record of the evidence to facilitate public access, as well as appellate review.” *Sony Comput. Entm't Am. LLC v. Game Controller Tech. LLC*, IPR2013-00634, Paper 32, at *32 (PTAB. Apr. 14, 2015); *see also Gnosis S.p.A. v. S. Alabama Med. Sci. Found.*, IPR2013-00118, Paper 64, at *43 (PTAB. June 20, 2014) (*citing Donnelly Garment Co. v. N.L.R.B.*, 123 F.2d 215, 224 (8th Cir. 1941) (“If the record ... contains ... all evidence of [even] doubtful admissibility, the court which is called upon to review the case can usually make an end of it ... [and] a new trial or rehearing [can be]... avoided.”)). While the preference for admissibility has exceptions such as for blatant rule violations, none of those exceptions apply here and all the evidence PO challenges is admissible and properly before the Board.

Further, and as outlined in *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00053, Paper 66, at *19 (PTAB May 1, 2014), the Board is well-positioned to determine and assign appropriate weight to evidence presented. *Id.* The Board has

the discretion to apply the appropriate weight to evidence, simply not rely on it, or give it little or no probative weight. *See, Liberty Mut. Ins. Co. v. Progressive Cas. Ins. Co.*, CBM2012-00002, Paper 66, at *70 (PTAB Feb. 24, 2014) (“[T]he Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to the evidence presented in this trial, without resorting to formal exclusion that might later be held reversible error.”). *Sony*, IPR2013-00634, Paper 32, at *31); *see also, Gnosis*, IPR2013-00118, Paper 64, at *43 (*citing Donnelly*, 123 F.2d at 224).

A. EX1022-1026, EX1035-1037, and EX1046, ¶¶ 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59 and 77 Are Admissible, Proper Rebuttal Exhibits

PO contends that EX1022-1026, EX1035-37, and Dr. Kuhn’s testimony in paragraphs 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59 and 77 of his Reply Declaration (EX1046) are new evidence that should be excluded under 37 C.F.R. § 42.23(b). Mot., 3-4. These exhibits do not present new arguments contrary to 37 C.F.R. § 42.23(b). The exhibits properly respond to PO’s criticisms in PO’s Response, and merely provide illustrations of the figures and issues already addressed in words in the Petition (and the supporting documents thereof) about how the broadhead components of the Leichty, II (EX1012), Vandewater (EX1003), and Lint (EX1002) function during use.

PO seeks to exclude these exhibits, not because they are new, but rather

because their own expert, Mr. Willkomm, agrees with Dr. Kuhn that these supplemental exhibits correctly show how the broadhead components in these prior art references function and thus anticipate the claims of the '177 Patent. *See, e.g.*, Corrected Reply, 2-25 (describing how both Dr. Kuhn and Mr. Willkomm agree on Leichty, II's disclosure of all the elements of independent claims 1 and 11 of the '177 Patent and Vandewater's disclosure of all elements of independent claim 11 of the '177 Patent).

Furthermore, a party may submit rebuttal evidence in support of its reply. *See, Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1077-78 (Fed. Cir. 2015). Such reply evidence is not only allowed, but expected in IPR proceedings. *Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1384 (Fed. Cir. 2023). The Federal Circuit has explained that a reply is proper "if it is responsive and simply expands on previously raised arguments." *Id.*; *see also Chamberlain Grp. v. One World Techs.*, 944 F.3d 919, 925 (Fed. Cir. 2019) ("Parties are not barred from elaborating on their arguments on issues previously raised."); *Ericsson, Inc. v. Intellectual Ventures I LLC*, 901 F.3d 1374, 1381 (Fed. Cir. 2018) (vacating and remanding the Board's decision for not considering petitioner's reply that merely "expands the same argument made in its Petition."); *W. Dig. Techs. v. Viasat, Inc.*, IPR2022-01171, Paper 33, at *20-21, 25-26 (PTAB Dec. 13, 2023).

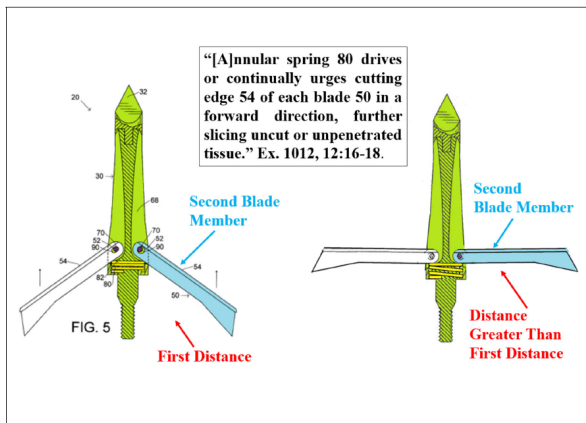
Where petitioner relies on "the same specific combinations of prior art (and

specific figures and language therefrom) that are presented in the Petition,” the new evidence merely expands on previous arguments. *TCL Indus. v. ParkerVision, Inc.*, IPR2021-00985, -00990, Paper 30, at *9-10 (PTAB July 26, 2022); *see also Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01601, Paper 42, at *20 (PTAB Apr. 14, 2022) (“Petitioner’s arguments in Reply, therefore, respond to Patent Owner’s arguments but do not introduce a new theory of unpatentability. Rather, Petitioner’s reply arguments explain that the obviousness position set forth in the Petition is correct[.]”).

So it is here. Petitioner (in the Petition) and Dr. Kuhn (in his first Declaration) identified Lint, Leichty, II and Vandewater and presented the same basis for their respective anticipation of the claims. Petition, pp. 20-48 and 73-86; EX1019, ¶¶ 64-107 and 188-212. PO’s reliance on *Juniper Networks* (Motion pp. 4-5) is misplaced. In *Juniper Networks*, the Board excluded a new theory of invalidity based on the “zone” teachings of an AppleTalkBook exhibit where that theory of invalidity based on the “zone” teachings was absent from the petition. *Juniper Networks, Inc. v. Swarm Tech.*, IPR2021-01445, Paper 62, at *29 (PTAB Feb. 7, 2023). There is no new theory of invalidity in the exhibits at issue, rather the exhibits evidence the same theory based on the same teachings of the same prior art references such as in the following example:

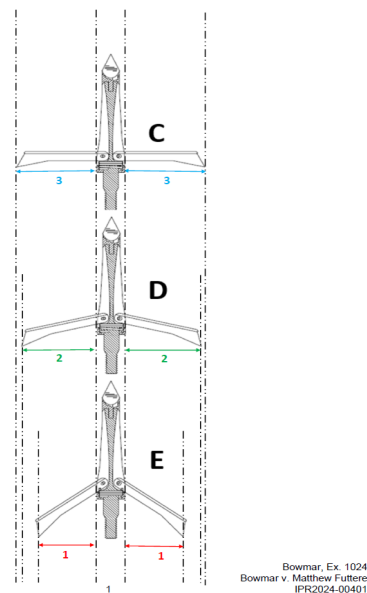
EX1019 (Declaration of Dr. Kuhn), ¶ 195

Figure 5 of Liechty, II illustrates how the space between the second blade member and the ferrule body would become greater when the second blade member is urged forward by the annular spring 80. Ex. 1002, Fig. 5. I include modified and annotated versions of Figure 5 below.



EX1046 (Reply Declaration of Dr. Kuhn), ¶ 21

Exhibit 1024 depicts the distances between the ends of the blades and the ferrule body as the blades move forward from a “retracted position” to an “extended position” as a result of the force of the annular spring. The figures in Exhibit 1024 are juxtaposed with Mr. Willkomm’s testimony on the following page.



PO is particularly concerned with EX1022-1026 and EX1035-1037 because they reflect in static and moving pictures the movement of the broadhead components in Lint, Leichty II and Vandewater that Dr. Kuhn explained in words in his first declaration. For example, in his first Declaration, Dr. Kuhn explained how the blades in Leichty II have a retracted position, an extended position and a biasing member that moves the blades from one position to the other. EX1019, ¶¶ 193-196. Similarly (and as agreed by PO’s expert Mr. Willkomm), EX1024 further expands

on and presents this previous position by showing in pictures how the biasing member moves the blades in Leichty II between retracted and extended positions in certain circumstances, such as when passing through an animal. EX1046, ¶¶ 44-45.

Similar to EX1024 discussed above, EX1022, EX1023, EX1025, EX1026, EX1035, EX1036, EX1037, and Dr. Kuhn's testimony in paragraphs 9-12, 21-25, 29-32, 36, 42, 46-48, 53, 55-59 and 77 of his Reply Declaration (EX1046) do not present new evidence because they merely elaborate on issues raised in the Petition and the supporting documents thereof (EX1002, EX1003, and EX1012). *See e.g.*, Petition, pp. 20-47, 73-86.

Even if the Board were to consider that evidence was not an elaboration of issues raised in the Petition, there is "no blanket prohibition against the introduction of new evidence ... as long as the opposing party is given notice of the evidence and an opportunity to respond to it." *Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1380 (Fed. Cir. 2018). PO does not and cannot dispute that it had full opportunity to: (1) depose Dr. Kuhn about his testimony in his Reply Declaration and related exhibits; (2) depose Mr. Mizek about his testimony in his Declaration; and (3) submit a sur-reply to respond to the now objected to evidence. PO, however, chose to not depose Dr. Kuhn about his testimony in his Reply Declaration and related exhibits and chose not to ask Mr. Mizek questions during his deposition regarding the majority of his opinions and many of the exhibits PO now seeks to exclude. Accordingly, PO's

argument under 37 C.F.R. § 42.23(b) fails.

1. PO's "Foundation" Arguments Are Contrary to Law and Fact

Without citation to any supporting case law, PO also seeks to exclude EX1022-1026, EX1035-37, and Dr. Kuhn's testimony in paragraphs 9-12, 21-25, 29-32, 36, 42, 44-48, 53, 55-59 and 77 of his Reply Declaration (EX1046) for lack of foundation under contrived arguments that Dr. Kuhn's expert opinions are allegedly conclusory and lack disclosure of the "underlying facts or data" pursuant to 37 C.F.R. § 42.65(a), Federal Rules of Evidence ("FRE") 401, and FRE 703. However, arguments about whether an "expert's opinions have been shown to be reliable or supported by underlying facts go to the weight of the evidence, not its admissibility." *Palo Alto Networks, Inc. v. Finjan, Inc.*, IPR2016-00151, Paper 51, at *24 (PTAB Mar. 15, 2017) (denying request to exclude petitioner's expert declarations and citing *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006)); Consolidated Trial Practice Guide (Nov. 2019), at *79 ("CTPG") ("A motion to exclude is not a vehicle for addressing the weight to be given evidence."). Even the plain text of the regulation cited by PO shows that it is not a basis for excluding evidence, but rather goes to the weight to accord the evidence. 37 C.F.R. § 42.65(a) ("Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.").

PO does not seriously dispute the relevance of the evidence it seeks to exclude

because, at minimum, they have a tendency to show the factual background that shows how the claims of the '177 Patent are anticipated by the teachings of the Lint, Leichty II, and Vandewater prior art references. FRE 401 ("Evidence is relevant if ... it has any tendency to make a fact more or less probable than it would be without the evidence."). Further, Dr. Kuhn is a testifying expert pursuant to FRE 703, and he may therefore rely on logic, judgment, and common sense as well as facts or data he has been made aware of or personally observed to render an opinion. there is no requirement to cite to an "underlying source" for every statement in an expert's report—especially in rebuttal identifying flaws in PO's positions. *See e.g., Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (internal citation omitted) ("Disputes as to ... lack of textual authority for [an expert's] opinion, go to the weight, not the admissibility, of his testimony."). Accordingly, PO's arguments to exclude under FRE 401 and 703 fail for the same reason. *See*, FRE 401 and 703. Thus, the PO's Motion to exclude based on FRE 401, 703, and 37 C.F.R. § 42.65(a) should be denied as a matter of law for at least this reason alone.

In addition to being incorrect as a matter of law, PO's arguments are incorrect as a matter of fact. For example, Dr. Kuhn's testimony in paragraphs 9-12 of his Reply Declaration and Ex 1022 expressly identifies Leichty, II Figs 2 and 5 as the bases for Dr. Kuhn's opinion regarding EX1024 on which PO's expert, Mr. Willkomm, concurs. Similarly, the bases for Dr. Kuhn's opinions in the additional

paragraphs and exhibits that PO seeks to exclude can be found in: (1) the surrounding paragraphs and pages of Dr. Kuhn’s Reply Declaration (EX1046); (2) the paragraphs of the exhibits themselves; or (3) are Dr. Kuhn’s first Declaration (EX1019). Dr. Kuhn’s disclosure of the underlying facts and data that serve as the bases for his opinions support admissibility of his opinions under FRE 703, and demonstrate that his testimony should be given its full weight under 37 C.F.R. § 42.65(a).

B. EX1046 (¶¶ 98a, 98b, 102, 104, 105, 123), EX1047, and EX1028-1031, 1038-39, 1042-1045 and 1048-1049 Cited Therein Are Proper Rebuttal Exhibits Addressed to PO’s New Claim Construction Arguments That Should Not Be Excluded

PO contends that these exhibits are cited as “new evidence” or “new arguments” to “‘bolster’ its blade versus barb argument in the Petition” that could have been cited earlier. Motion, p. 6. PO’s argument is improper. Whether evidence submitted with a reply should have been submitted earlier is a question of procedure, not admissibility, and thus cannot be addressed in a motion to exclude. *LivePerson, Inc. v. 24/7 Customer, Inc.*, IPR2017-00610, Paper 48, at *13 (PTAB July 16, 2018); *Liberty Mut.*, CBM2012-00002, Paper 66, at *62 (“[w]hile a motion to exclude may raise issues related to admissibility of evidence, it is not an opportunity to file a sur-reply, and also is not a mechanism to argue that a reply contains new arguments or relies on evidence necessary to make out a prima facie case.”); *Microsoft*, IPR2013-00292, Paper 93, at *53-54 (*citing* 37 C.F.R. § 42 *et seq.*); *see also Cisco Sys., Inc. v. TQ Delta, LLC*, IPR2016-01760, Paper 35, at *41-42 (PTAB Mar. 12, 2018)

(citing cases); *Google Inc. v. Visual Real Estate, Inc.*, IPR2014-01339, Paper 39, at *37 (PTAB Jan. 25, 2016) (“a motion to exclude is not the proper mechanism to raise the issue of testimony in a rebuttal declaration exceeding the permissible scope of reply testimony.”).

Even if the Board were to consider PO’s argument, the substance of that argument is demonstrably false because Dr. Kuhn’s testimony in paragraphs 98a, 98b, 102, 104, 105, and 123 of his Reply Declaration (EX1046), Mr. Mizek’s Declaration (EX1047), and the exhibits cited therein (*i.e.*, EX1028-1031, 1038-1039, 1042-1045, and 1048-1049) are proper rebuttal evidence to PO’s response and should not be excluded. *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1380 (Fed. Cir. 2023); *see also CTPG*, at *73 (“A party also may submit rebuttal evidence in support of its reply.”)

Moreover, neither the rules nor the Trial Practice Guide preclude using new witnesses, such as Mr. Mizek, in Reply. *See* 37 C.F.R. § 42.65; CTPG, at *73. Moreover, the record demonstrates that Dr. Kuhn’s and Mr. Mizek’s testimony are standard rebuttal evidence that directly respond to PO’s contentions and Mr. Willkomm’s opinions. Whereas here, PO proposes a claim construction in a response, a petitioner must be given the opportunity in its reply to argue and present evidence. *Axonics*, 75 F.4th at 1384 (reversing board decision not to consider new reply evidence where a patent owner in an IPR offers a new claim construction for

the first time in its response after the institution decision, a petitioner may introduce new arguments and evidence in reply under the newly proposed claim construction.); *See also Parkervision, Inc. v. Vidal*, 88 F.4th 969, 979-80 (Fed. Cir. 2023) (Because the Board’s institution decision did not contain an express claim construction, the APA required the Board to give Petitioner adequate notice and an opportunity to respond under the new construction first proposed in the patent owner response.); *Ericsson*, 901 F.3d at 1380 (reversing Board’s decision not to consider Reply argument that “expressly follow from ... contentions raised in the Petition” and were necessary to address new claim construction); *Ocular Therapeutix, Inc. v. Mati Therapeutics, Inc.*, IPR2019-00448, Paper 56, at *80 (PTAB, June 18, 2020) (holding that “Petitioner’s Reply address[ing] issues raised in Patent Owner’s Response, such as claim interpretations that would be required by Patent Owner’s arguments,” is properly responsive to the POR). PO’s reliance on *Juniper Networks* (Motion p. 6) is inapposite to the present situation as *Juniper Networks* did not discuss the propriety of new reply evidence in response to a new proposed construction of a claim limitation in PO’s Response.

Particularly, Dr. Kuhn’s testimony in paragraphs 98a, 98b of his Reply Declaration (EX1046), Mr. Mizek’s testimony in paragraphs 16-24 of his

Declaration (EX1047¹), and EX1038 and EX1039 cited by Dr. Kuhn and Mr. Mizek respond to PO's claim construction argument that the plain and ordinary meaning of "blade member" requires "a cutting edge or flat sharp part sharp." POR, p. 20. Likewise, Dr. Kuhn's testimony in paragraph 102 in his Reply Declaration (and EX1031 cited therein) merely responds to this same claim construction argument by highlighting Mr. Willkomm's own testimony that contradicts PO's claim construction. Similarly, Dr. Kuhn's testimony in paragraphs 104 and 105 of his Reply Declaration (EX1046), Mr. Mizek's testimony in paragraphs 25-28 of his Declaration (EX1047), and EX1028-1031, EX1042-1045, and EX1048-1049 cited therein respond to PO's unforeseen claim construction argument that a "blade" or "blade member" cannot include a "barb." *See, e.g.*, POR, p. 37. Accordingly, such testimony and exhibits are proper evidence for which there is no proper basis to exclude. *See, e.g., Ocular Therapeutix*, IPR2019-00448, Paper 56, at *80.

III. CONCLUSION

For the reasons explained above, Petitioner respectfully requests that the Board deny PO's motion to exclude in its entirety.

¹ This also inherently includes ¶¶ 1-15, 29 of EX1047 which describe Mr. Mizek's qualifications and understandings so as offer opinions as one of ordinary skill in the art.

Dated: March 18, 2025

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Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies service on the Petitioner, pursuant to 37 C.F.R. § 42.6(e), by electronic (e-mail) delivery of a true copy of the foregoing PETITIONER'S REPLY TO PATENT OWNER'S MOTION TO EXCLUDE, to lead and back-up counsel of record for Petitioner as follows:

Jason E. McKinnie
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Michael D. Paul
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Dated: March 18, 2025

By: /Carlos Goldie/

Carlos Goldie