

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AROMA360, LLC,
PETITIONER,

v.

AIR ESSSENTIALS, INC.
PATENT OWNER.

Case IPR2025-00705
Patent 9,527,094

PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE

I. INTRODUCTION

Patent Owner seeks to exclude deposition testimony of its own expert, Dr. Micklow, for being “outside the scope of Dr. Micklow’s disclosed opinions.” PO Mot. to Exclude at 1 and 6. The fact that Patent Owner seeks to exclude its own expert’s testimony rather than trying to address this testimony on the merits merely illustrates the damning nature of this testimony.

For instance, Dr. Micklow testified that he applied his own understanding of the claims instead of the constructions proposed by the parties. In view of this, Petitioner has rightly asserted that the Board give Dr. Micklow’s testimony little to no weight since he did not consider the claims under the same interpretation as the parties. *See* Petition Reply. As another example, Dr. Micklow acknowledged that modifying the prior art to reduce noise would be well within the capabilities of his students, which confirms that a more experienced POSITA would also be able to do so. *See* Ex. 1046, 184:9-13.

Patent Owner’s arguments that this testimony should be excluded for being outside the scope of direct are facially flawed. Fundamentally, in several instances, Patent Owner failed to make the necessary “scope” objections during the deposition. Even where the objection was made, the objected-to testimony concerns the very issues which Dr. Micklow opined on in his declaration, namely his opinions that the prior art references did not teach certain claim limitations. Certainly, Dr. Micklow’s

understanding of the meaning of those claim limitations, the teachings of the prior art, and a POSITA's ability to modify such prior art is within the scope of his declaration.

However, Patent Owner takes the untenable view that an expert should be insulated from cross-examination on issues that undercut their opinion if an expert did not pre-emptively address those issues in their declaration. Notably, Patent Owner does not cite to a single case in its motion that supports that novel proposition. Rather, the long-standing purpose of cross-examination is for the opposing party to explore "the facts and assumption underlying the testimony of an expert witness." *Symbol Technologies, Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575–76 (Fed. Cir. 1991) (quoting *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980), cert. denied, 450 U.S. 918, 101 S. Ct. 1363, 67 L. Ed. 2d 344 (1981)). That is precisely what happened here and Patent Owner's displeasure with its expert's answers during cross-examination is not a basis to exclude his testimony.

As such, the Board should deny Patent Owner's Motion to Exclude portions of Dr. Micklow's deposition transcript and Petitioner's Reply citing those portions of the transcript.

II. MAJORITY OF CHALLENGED TESTIMONY DID NOT RECEIVE A "SCOPE" OBJECTION

Patent Owner's motion to exclude is premised on a theory that the questions exceeded the scope of direct and provides a table listing six portions of challenged testimony that purportedly were objected to. PO Mot. to Exclude at 3. There are at

least two problems with Patent Owner's objections. First, an objection to "form" is materially different than an objection to "scope" and the former does not preserve the latter. Second, Patent Owner improperly includes questions/answers that were not objected to based on their proximity to a question/answer that was objected to. Either results in a failure to establish that a proper objection was made for a motion to exclude based on improper scope of questioning.

The only two portions of challenged testimony with a proper "scope" objection are found at 183:21-184:8 and 243:8-14 of Dr. Micklow's deposition. *See* Ex. 1046; PO Mot. to Exclude at 3. All of the other portions of challenged testimony have no "scope" objection and cannot be relied on in Patent Owner's motion.

A. Objections to "form" are not objections to "scope"

Patent Owner acknowledges that it objected to "form" in five of the six listed objections in its table. PO Mot. to Exclude at 3. Patent Owner tries to explain that away by arguing that its "form" objection should be treated as a "scope" objection in light of a statement by Petitioner's counsel that "the proper objections are just for form." PO Mot. to Exclude at 4 (citing Ex. 1046 at 85:1-4). Patent Owner contends that at this point its counsel "ceased using the phrasing 'Objection, scope'" during the deposition. *Id.* However, the record of the deposition reflects a very different reality.

In fact, Patent Owner's counsel, Mr. Eagan, objected to "scope" fifty-six times after this point in the deposition when it alleges it "ceased" doing so. *See, e.g.,* Ex.

1046 at 85:25, 104:22, 137:1, 138:24, 140:3, 141:7, 142:22, 152:22, 153:10, 154:10 (showing ten of the fifty-six instances of objecting to “scope”). Perhaps more important is that many of Patent Owner’s counsel’s later objections to scope included an objection to form, while others did not, confirming that Patent Owner’s counsel viewed objections to “form” and “scope” as separate bases for objections. *Compare* Ex. 1046 at 138:24 (“MR. EAGAN: Objection. Scope. Form.”) *with* 140:3 (“MR. EAGAN: Objection. Scope.”), 147:10 (“MR. EAGAN: Objection. Form.”). The record is replete with similar examples demonstrating that Patent Owner’s counsel was aware of the difference between an objection to scope and an objection to form even after the exchange with Petitioner’s counsel. Thus, the transcript confirms that Patent Owner’s counsel did not use “form” as a substitute for “scope” since counsel continued to make form-only objections, scope-only objections, and combined “form and scope” objections.

B. Patent Owner includes testimony that was not objected to at all

Patent Owner’s table includes questions and answers that were not objected to at all. PO Mot. to Exclude at 3. The portions of testimony that were not objected to but are still listed in Patent Owner’s motion, apparently due to nearby objections, are as follows:

- 117:11-15 – Patent Owner objected “form” to whether Dr. Micklow applied the term’s plain meaning, Ex. 1046, 117:4-9, but did not object when Petitioner asked, “What is your understanding of a mixing

chamber?” or when Dr. Micklow supplied the substantive definition. *Id.* at 117:11-15.

- 180:8-11 and 181:16-24 – No objection was made when Petitioner asked Dr. Micklow whether Sevy’s plate with multiple holes would act as a baffle, and Dr. Micklow answered that most baffles he had seen had multiple holes and “[t]he more, the better.” Ex. 1046, 180:8-11. Nor was there an objection to the follow-up question at 181:16-24, where Dr. Micklow identified dimensions, temperature, fluid, and pressure as relevant conditions.

- 184:9-13 – Patent Owner objected to the POSITA question at 183:21-24, but not to the question “Would you be able to?” Dr. Micklow answered, “yes. I definitely could. And my students definitely know this when they come out.” *Id.* at 184:9-13.

- 243:4-7 – Patent Owner did not object to the question and answer at 243:4-7 that the patented baffle would dampen sound “[i]f it’s designed properly.” The later “scope” objection was to a different question concerning whether Patent Owner’s patented structure was designed properly. *Id.* at 243:8-14.

Patent Owner cannot obtain exclusion of this unobjected-to testimony by grouping it with neighboring questions that drew a different objection.

III. ALL CHALLENGED TESTIMONY WAS RELEVANT AND WITHIN THE SCOPE OF DR. MICKLOW’S DECLARATION

Cross-examination extends to the subject matter of direct testimony and matters affecting credibility. 37 C.F.R. § 42.53(d)(5)(ii); FRE 611(b). Patent Owner argues

that Dr. Micklow's cross-examination went over the line because he was asked about claim construction, how the structures in the patent are designed, and whether prior art could be modified without undue experimentation. PO Mot. to Exclude at 4-5. Yet, these are all topics specifically related to the question of patentability raised by Dr. Micklow's declaration.

Dr. Micklow's declarations set out his understandings including "that certain issues in an IPR, such as claim construction and whether a claim is invalid as obvious, are assessed from the view of a [POSITA]." Ex. 2002 at ¶14. Dr. Micklow's testimony then relies on his understanding of how a POSITA would view the '094 Patent, including specific claim limitations in dispute like baffle, fluid dispersion, and silencer assembly. *See, e.g., Id.* at ¶28 (opining that certain prior art structures "would not function as a baffle" and that if prior art teaches "a non-uniform spray. It will not meet the limitation of 'fluid dispersion.'"), ¶34 (opining that prior art is "materially different from the fluid-flow-based atomization described and claimed in the '094 Patent.") and ¶36 ("The silencer assembly of the '094 Patent, as claimed and described, is a..."). Dr. Micklow also testified as to his opinion on why the prior art did not teach certain limitations of the '094 Patent. *Id.* Petitioner questioned Dr. Micklow on how he understood those limitations so that Petitioner could understand the basis for Dr. Micklow's opinion that the prior art failed to teach these limitations, which is the core purpose of cross-examination in an IPR proceeding that is limited to questions of

patentability.

Patent Owner also nominally cites to FRE 401-403 and FRE 702-703, but never attempts to explain why these rules require exclusion. FRE 401-403 have little to no applicability in IPR proceedings and Patent Owner failed to explain why any alleged prejudice outweighs the probative value of the testimony. Patent Owner's citation to FRE 702-703 is even more perplexing because it apparently asserts Dr. Micklow is not qualified to testify on these issues, which, if true, would only reinforce that his declaration should be given no weight.

A discussion of each of the portions of testimony Patent Owner challenged is provided below demonstrating that all of the questions asked were within the scope of cross-examination.

A. Patent Owner Fails to Explain How FRE 401-403 or FRE 702-703 are Applicable to the Underlying Facts

Patent Owner cites to FRE 401-403 yet never once explains why these rules are applicable. *See* PO Mot. to Exclude at 5, 7, 8, 10 and 13. For example, Patent Owner never explains why the challenged testimony is not relevant under FRE 401/402 or results in unfair prejudice that is “substantially outweighed” by the probative value of the testimony under FRE 403. *See Captioncall LLC v. Ultratec, Inc.*, IPR2014-00780, Paper No. 35 at 8 (PTAB Dec. 1, 2015) (denying motion to exclude where “Patent Owner fails to address the ‘substantially outweighed’ aspect of the Rule [FRE 403]”).

Here the challenged testimony is not unfairly prejudicial since Patent Owner

had an opportunity at the deposition to re-direct Dr. Micklow to address his testimony but chose not to. Indeed, the risk of “unfair prejudice” is either eliminated or diminished in IPR trials since the fact finder is the Board and not a jury. *Neste Oil Oyj v. Reg Synthetic Fuels, LLC*, IPR2013-00578, Paper No. 53 at 10 (PTAB Mar. 12, 2015) (“Proceedings before the Board are not jury trials; in the absence of a jury, the risk of unfair prejudice against which Rule 403 guards is diminished, if not eliminated entirely.”); *Trend Micro Inc. v. Cupp Computing AS*, IPR2019-00764, Paper No. 32 at 5 (PTAB Aug. 25, 2020). Moreover, the challenged testimony is highly relevant and probative to the ultimate issues of patentability as it demonstrates the underlying errors in Dr. Micklow’s testimony regarding his analysis of whether the prior art teaches the claim limitations.

Similarly, Patent Owner cites to FRE 702 and 703 but fails to address how they apply. See PO Mot. to Exclude at 5 and 12. Ironically, Patent Owner is asking for its own expert’s opinion to be excluded on the basis of FRE 702 and 703, which is a tacit admission that Dr. Micklow’s direct testimony is unreliable and should be given little weight. If Dr. Micklow is not qualified to provide cross-examination testimony on the subject matter of whether the prior art teaches certain claim limitations, then he is not qualified to provide direct testimony on those issues either. Patent Owner’s theory, if upheld, would shield an expert from having to defend their opinions, which is an untenable result and Patent Owner provides no basis for the Board to adopt this

approach.

B. Ex. 1046 at 115:15-18 – Regarding Dr. Micklow’s Failure to Apply the Parties’ Claim Constructions

Patent Owner frames this issue as eliciting “testimony outside the scope of Dr. Miclow’s discloses opinions” (PO Mot. to Exclude at 6). However, considering the parties’ claim constructions (and the Board’s or Court’s constructions, if available) is a fundamental part of an expert’s analysis to credibly opine on whether the prior art fails to teach the limitations of a claim. Dr. Micklow’s failure to use the constructions set out by the parties goes directly to the credibility and weight of the statements in his declaration that the prior art failed to teach certain limitations.

Indeed, the Federal Circuit has made clear that expert testimony which does not apply the correct claim construction should not be considered. *See, e.g., Trudell Med. Int’l Inc. v. D R Burton Healthcare, LLC*, 127 F.4th 1340, 1349-50 (Fed. Cir. 2025) (quoting FRE 702 and finding that the district court abused its discretion in allowing an expert to offer testimony “untethered from the district court’s claim constructions,” which resulted in a “methodological[ly] unsound[]” opinion); *Liquid Dynamics Corp. v. Vaughn Co., Inc.*, 449 F.3d 1209, 1224 n.2 (Fed. Cir. 2006) (affirming the striking of “expert opinion evidence as irrelevant because it was based on an impermissible claim construction”).

Perhaps most telling is that Dr. Micklow testified that “claim construction is important” and even acknowledged that the parties had “agreed to constructions of

certain terms” yet Dr. Micklow did not actually consider those constructions despite acknowledging their importance. *Id.* at 110:21-111:25 and 114:20-115:9. Dr. Micklow’s failure to consider the parties’ claim constructions is not excused by him “interpret[ing] the claims as would be normally interpreted by an engineer.” *Id.* at 116:2-4. If anything, this statement highlights the problem because, as discussed in the following sections, Dr. Micklow’s declaration relies on an interpretation of claim scope that is materially different than the parties’ constructions.

As uncovered in the deposition, Dr. Micklow’s opinions are not based on the same understanding of the claim scope that the parties have agreed to or asserted, and thus his opinions are entitled to little or no weight as Petitioner argued in its Reply.

The challenged testimony is within the scope of the direct testimony since it goes to the credibility of Dr. Micklow’s direct testimony and to understanding the claim scope that Dr. Micklow used in opining that the prior art does not teach certain limitations.

C. Ex. 1046 at 117:4-15 – Regarding Dr. Micklow’s Improper Construction of “Mixing Chamber”

The limitation of “mixing chamber” has been expressly disputed by the parties. Ex. 1018, Ex. B. Dr. Micklow’s understanding of the term “mixing chamber” is relevant to the analytical framework he used in preparing the opinions in his declarations and the credibility of his opinions.

The testimony is also straightforward. After an objection to whether he applied

the plain meaning, Dr. Micklow stated that he applied his own understanding. Ex. 1046, 117:4-9. Petitioner then asked the unobjected-to question, “What is your understanding of a mixing chamber?” and received the answer quoted in the Reply. *Id.* at 117:11-15; Pet. Reply 4. Whether that engineering description matches either party’s proposed construction is an evidentiary-weight issue. It is not a basis to exclude the answer.

D. Ex. 1046 at 125:24-127:3 – Regarding Dr. Micklow’s Improper Construction of “Baffle”

The limitation of “baffle” has been disputed and its construction has been agreed to by the parties. Ex. 1018, Ex. A. Dr. Micklow’s understanding of the term “baffle” is relevant to the analytical framework he used in preparing the opinions in his declarations and the credibility of his opinions. This testimony is particularly relevant as Dr. Micklow opines that multiple prior art references do not teach a baffle as claimed in the ’094 Patent. *See* Ex. 2002 at ¶28 and ¶¶36-37 (opining that Gao and Goubet do not teach the claimed baffle).

Notably, the parties’ agreed-upon construction does not refer to any acoustic characteristics of the baffle, yet Dr. Micklow’s analysis is based on the prior art not teaching “a baffle in the acoustic sense required by the ’094 patent.” *Id.* at ¶37. Thus, Dr. Micklow’s analysis should be given no weight as explained in the Reply.

E. Ex. 1046 at 179:13-181:24 – Regarding Dr. Micklow’s Admission that Sevy’s Baffle Structure Could Reduce Noise

Dr. Micklow’s admission that the holes in Sevy’s baffle, labeled as 98, could

reduce noise is relevant to whether Sevy teaches a silencer assembly comprising a baffle. Moreover, it directly undercuts Dr. Micklow's declaration testimony that Sevy's baffle structure would not dampen noise. See Ex. 2002 at ¶¶22-23. Thus, this testimony is relevant and squarely within the scope of Dr. Micklow's direct testimony.

Patent Owner's argument that Dr. Micklow's admission that Sevy's structure could reduce noise depends on other operating conditions such as dimensions, temperature, and pressure is of no moment. PO Mot. to Exclude at 10-12. At most, this simply goes to the weight of the testimony and not to whether it should be excluded. In addition, as revealed in Dr. Micklow's follow-up testimony, discussed below, Dr. Micklow acknowledged that a POSITA "definitely could" modify Sevy to achieve these operating conditions to dampen noise, confirming the obviousness of the claims.

Lastly, Patent Owner's argument that this testimony should be excluded under FRE 702-703 because Dr. Micklow's opinion is not fully developed makes little sense. PO Mot. to Exclude at 12. Assuming the challenged testimony is within the scope of direct, as discussed above, then Patent Owner's motion is quixotically suggesting that its own expert is not qualified and lacks a basis to answer questions concerning his direct testimony. If that is true, then it merely confirms that Dr. Micklow's direct testimony on these issues should be given no weight as he is not qualified to explain the opinions he provided, including his opinion that Sevy's baffle structure would not

dampen noise.

F. Ex. 1046 at 183:21-184:13 – Regarding Dr. Micklow’s Admission that a POSITA Could Modify Sevy Without Undue Experimentation

Dr. Micklow was asked whether a POSITA could modify hole size and location to make Sevy less noisy and he responded that the ability to do so would depend on the individual’s talent and training. Ex. 1046, 183:21-184:7. He then answered an unobjected-to question that he and his students “definitely could” perform that modification. *Id.* at 184:9-13. This is relevant because it supports Petitioner’s argument that a POSITA would have a reasonable expectation of success in performing the same modification.

This testimony is within the scope of Dr. Micklow’s direct testimony that a POSITA would view Sevy as increasing noise rather than dampening it and that a POSITA would not rely on the teachings of Sevy to dampen noise when combined with Zeng. Ex. 2002 at ¶¶22-23 and ¶¶26-27. While the parties dispute whether the structure shown in Sevy’s exemplary embodiment dampens noise, Dr. Micklow’s testimony shows that there is no dispute that Sevy’s disclosure as a whole would provide sufficient teaching to a POSITA to dampen noise without undue experimentation.

G. Ex. 1046 at 243:4-1 – Regarding Dr. Micklow’s Admission that Prior Art Teaches the Same Baffle Structure as the ’094 Patent

During his deposition, Dr. Micklow disagreed with the proposition that a restriction causes noise dampening in the ’094 Patent. Ex. 1046 at 243:16-24. Yet,

after reviewing claim 7 of the '094 Patent, he acknowledged that claim 7 states the baffle partially restricts movement “thereby dampening sound waves.” *Id.* at 244:3-245:7. This testimony is relevant as it confirms that Dr. Micklow’s analysis in his declaration is premised on an understanding of baffle that is contradictory to the claims of the '094 Patent.

This testimony is particularly relevant as Dr. Micklow opines that multiple prior art references do not teach a baffle as claimed in the '094 Patent. *See* Ex. 2002 at ¶28 and ¶¶36-37 (opining that Gao and Goubet do not teach the claimed baffle).

IV. CONCLUSION

Patent Owner’s Motion to Exclude should be denied in its entirety.

Date: July 16, 2026

Respectfully submitted,

/James P. Murphy/

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CERTIFICATE OF SERVICE UNDER 37 CFR § 42.6(e)(4)

The undersigned hereby certifies that a copy of the accompanying Petitioner's Opposition to the Motion to Exclude is being served on June 16, 2026, via electronic mail directed to the following counsel of record for the Patent Owner:

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