

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COLLEGE PRODUCTS, INC.,

Petitioner,

v.

INTIRION CORPORATION,

Patent Owner.

Case No. PGR2024-00003

Patent No. 11,674,745

**PATENT OWNER'S REPLY TO MOTION TO EXCLUDE EVIDENCE
UNDER 37 C.F.R. § 42.64**

I. Ex. 1002

The Board should exclude paragraphs¹ of Dr. Horenstein's prior declaration from a separate proceeding that rely extensively on documents not submitted here. Ex. 1002 contains opinions regarding the '206 patent (which is not an exhibit to this proceeding) and its alleged obviousness. As an example of why that becomes an issue, ¶¶ 101-103 are directed to a "Ueda" reference. Ex. 1002, ¶¶ 101-03. The Ueda reference is not submitted as an exhibit here—but these paragraphs *are* incorporated into Horenstein's new declaration, Ex. 1023. Ex. 1023, ¶ 1. These paragraphs are inadmissible for several reasons: 1) they relate to opinions not formed regarding the '745 patent and thus are not relevant; 2) they are not based on sufficient facts or data; 3) they do not disclose underlying facts or data; 4) they rely on documents and exhibits not before the Patent Trial and Appeal Board; 5) they do not sufficiently explain the test or data in accordance with 37 CFR § 42.65(b); and 6) they are not the product of reliable scientific principles and methods.

Additionally, Ex. 1002's discussion of the availability of the ISDU reference should be excluded. Petitioner attempts to reframe Dr. Horenstein's testimony ("Dr. Horenstein and argues Dr. Horenstein did not offer any expert opinions about

¹ Specifically, paragraphs 1-4, 17-18, 23, 27, 43, 48-56, 57-72, 73-76, 77-82, 83-88, 89-92, 93-95, 96-100, 101-103, 117, 118-126, 128, 129-131, 132-133, 136, 140, 141-142, 143-145, 150-153, 154-164, 168-170, 174-175, 176-179, 186-188, 189-191, 192, 207-214, 215-219, 220, 224-226, 227-231, 232-242, 243, 244, 245-246, 247-249, 250-251, 252-253, 255, 259, 260, 261, 262, 264-271, 272, 273, 274-275, 276-277, 278-281, 282, 283, 284-285, 286-287, 288, 289, 290, 291, 295, 296, 298-304, 305-311, 312-320.

ISDU's publication date...." Paper 40 at 3-4). However, Dr. Horenstein *did* offer an opinion regarding public availability, which included opinions on publication:

[96]. ISDU: Integrated Smoke Detector Unit for Commercial Microwave Ovens, Cory Lloyd et al, Northeastern University **which was published on April 17, 2007** ("ISDU"). ISDU indicates its date of publication as April 17, 2007 and indicates on its face that it was published on "Rris." [...] Importantly, the IRis Brochure states the following about the university's open-access journal available at the time on IRis: "NU's flagship open-access journal has been operating in IRis since 2006!" *Id.*, pg. 2, (emphasis added). **This date (2006) precedes the publication date of ISDU (2007). This excerpt from the IRis Brochure also confirms that ISDU was published in open access format -- that is, publicly available.**

[...]

[98]. "Given all of the above, **it is my opinion that ISDU was a printed publication or was otherwise available to the public before the Effective Filing Date of April 25, 2014 and is thus prior art to the Challenged Patents.**

Ex. 1002 at ¶¶96, 98 (emphasis in bold added). Dr. Horensteins' opinions as to the public availability of ISDU should also be excluded. Fed. R. Evid. 602, 701, 702, 03, and 802.

II. Ex. 1004

Petitioner argues Ex. 1004 should also be considered and suggests it provides context to the Board. Paper 40 at 4. Yet the "procedural history" of a complaint that did not include the '745 patent is irrelevant. Indeed, Ex. 1004 has not been cited or discussed in any submission to the Board (other than this motion to exclude). Ex. 1004 should be excluded. FRE 106, 402, and 403.

III. Ex. 1009

Ex. 1009 is a claim chart for the '876 patent that Petitioner submits to apparently (now) argue some new indefiniteness theory based on the “level of smoke” and “amount of smoke” terms. Petitioner also argues it shows Intirion’s view of the “level of smoke” and “amount of smoke” terms, and that Intirion does not disagree “with Petitioner’s understanding of that evidence.” This is a misrepresentation. *Compare* Pet. at 13 (“Patent Owner interprets ‘level of smoke’ and ‘amount of smoke’ as merely detecting smoke.”) *with* Paper 40 at 5, n.2. Regardless, neither “level of smoke” nor “amount of smoke” was presented to the Board for construction. Thus, Ex. 1009 has no purpose and should be excluded. FRE 106, FRE 402 and 403.

IV. Ex. 1012

Without a showing that Ex. 1012 was publicly available pre-critical date, Ex. 1012 is irrelevant to the Petition. Public availability is a crucial aspect of the foundation for the admissibility of Ex. 1012. Petitioner’s failure to show public availability bars its admissibility.

V. Ex. 1023

Dr. Horenstein’s new declaration is an exercise in cross-referencing to his old one, Ex. 1002. Petitioner cites no rule or caselaw supporting its contention, but

asserts that 37 C.F.R. § 42.6(a)(3) somehow does not apply here. All paragraphs² that improperly are based on cross-referencing to prior opinions should be excluded.

Paragraph 131, relying on non-submitted Appendices F-H should be excluded. Intirion identified that these were missing. Petitioner chose not to take any action in response to Intirion's objections. Their public availability does not move the needle—"[a]ll evidence must be filed in the form of an exhibit." 37 C.F.R. § 42.63(a).

The paragraphs addressing the mysterious Figaro 816 should also be excluded. Contrary to Petitioner's assertions, Petitioner *is* attempting to utilize Figaro 816 as prior art to supplement Smith. Indeed, Figaro 816 is used by Petitioner to meet claim elements. *See* Ex. 1023 ¶ 205 (arguing Smith meets the "smoke sensor" requirement through reference to the Figaro "typographical error"). Intirion does not ask for credibility weighing; it asks the Board to properly exclude an opinion that reads in a typographical error based on nothing more than pure speculation. *See K/S Himpp v. Hear-Wear Techs., LLC*, 751 F.3d 1362, 1365 (Fed. Cir. 2014); Trial Practice Guide at 36.

² Specifically, 1, 4, 6, 7, 8, 10, 15, 19, 37, 38, 39, 48, 53, 58, 62, 65, 66, 72, 74-75, 80, 81, 94, 95, 105, 120, 124, 127, 131, 136, 156-157, 167, 174, 191-196, 199, 202-209, 214-215, 217-219, 223, 225-227, 230-231, 248-249, 251, 253-256.

Finally, Dr. Horenstein's opinions regarding ISDU and its public availability should be excluded for the same reasons as for Ex. 1012: they are irrelevant here where there is no showing it is prior art.

VI. Ex. 1024

Ex. 1024 is an email chain that should be excluded as irrelevant, based on hearsay, lacking personal knowledge, incomplete, unable to be supported by a declaration, and improper expert testimony. Petitioner apparently agrees Ex.1024's only purpose was to seek leave to take third party discovery. Paper 40 at 15. Ex. 1024 plainly has no relevance and lacks trustworthiness. The Board should exclude Ex 1024. *See* Fed. R. Evid. 402, 403, 601, 801.

Dated: December 31, 2024

/R. Scott Johnson/

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*Counsel for Patent Owner Intirion
Corporation*

CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(a)(1)(i), the undersigned hereby certifies that the foregoing Patent Owner's Reply to Motion to Exclude Evidence Under 37 C.F.R. § 42.64 contains 1,090 words and under 5 pages, excluding parts of this Patent Owner's Reply to Motion to Exclude Evidence Under 37 C.F.R. § 42.64 exempted under § 42.24(a), as measured by the word-processing system used to prepare this paper.

Dated: December 31, 2024

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CERTIFICATE OF SERVICE

Per agreement of the parties and pursuant to 37 C.F.R. ¶ 42.105(b), the undersigned certifies that a copy of this Patent Owner's Reply to Motion to Exclude Evidence Under 37 C.F.R. § 42.64 was served on December 31, 2024, by email on the following:

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