

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIBERTY MUTUAL INSURANCE CO.

Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.

Patent Owner

Case CBM2012-00002

Patent 6,064,970

Before the Honorable JAMESON LEE, JONI Y. CHANG, and MICHAEL R. ZECHER, *Administrative Patent Judges*.

**PETITIONER LIBERTY MUTUAL INSURANCE CO.'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT
TO 37 C.F.R. § 42.64(C)**

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In response to Patent Owner's Motion to Exclude ("Mot.", Paper 51), Petitioner¹ respectfully submits that the 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. *See, e.g., S.E.C. v. Guentbner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005); *Builders Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950) (vacating Tax Court decision for exclusion of competent, material evidence); *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1942) (finding NLRB's refusal to receive testimonial evidence was denial of due process). *See also, e.g., Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945) ("Even in criminal trials to a jury it is better, nine times out of ten, to admit, than exclude evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence"). Even under the strict application of the Rules of Evidence and arguments regarding the proper scope of rebuttal that Progressive urges here, however, *cf.* 77 Fed. Reg. 48,612, 48,616 (Aug. 14, 2012, Rules of Practice) ("42.5(a) and (b) permit administrative patent judges wide latitude in administering the proceedings to balance the ideal of precise rules against the need for flexibility to achieve reasonably fast, inexpensive and fair proceedings"), Petition-

¹ All emphases are added and abbreviations are as in Petitioner's Reply (Paper 33).

er's evidence is entirely proper, while Progressive's objections are baseless.

Despite the Board's institution of trial based on its determination that Petitioner had made a *prima facie* case of invalidity based on the evidence submitted with the Petition (*see* Institution Decision ("ID", Paper 10) at 2), Progressive now argues that Petitioner's *rebuttal* experts and documents should be excluded as "new evidence" that should have been submitted with the Petition to make out that same *prima facie* case. This contradicts both common sense and the Board's Institution Decision, which found there were no "holes" to "plug," as Progressive now imagines. (Mot. 1.) Despite Progressive's attempt to poke such holes and avoid this trial with a raft of arguments in its Preliminary Response, the Board found Petitioner's submitted evidence addressed each limitation of the challenged claims. Petitioner's later rebuttal evidence, in contrast, responded to Progressive's efforts in its Opposition ("Opp.", Paper 27) to attack Petitioner's *prima facie* case. While Petitioner's Reply continued to urge invalidity on the same grounds instituted by the Board (as any reply will do), this was entirely proper—it certainly did not transform Petitioner's rebuttal evidence into part of a *prima facie* case, or otherwise make that rebuttal evidence untimely or improper. Indeed, Progressive's unsupported arguments to the contrary would make *all* replies and reply evidence a nullity, and would deprive Petitioner and others using these PTO trial mechanisms of their rights to present a case, confront the Patent Owner's attacks on that case (*see* F.R.E. 611), and carry their burden of proof with the protections of basic fairness and due process.

I. Ms. O’Neil’s and Mr. Andrews’ Testimony Responding to Progressive’s Attacks on Kosaka Is Proper Rebuttal

The September 16, 2012 Petition demonstrated that the disclosures of Kosaka (EX1004)—combined with other references for certain claims—render every claim of the ‘970 Patent invalid. In instituting trial, the Board concluded Petitioner had made out a *prima facie* case of invalidity for *every asserted ground*—*i.e.*, that it had “demonstrate[d] that it is more likely than not that the challenged claims are unpatentable.”

ID 2. Progressive, relying on “expert” declarations, then attempted to attack this *prima facie* case, arguing in its Opposition that Kosaka’s fuzzy logic “approach would have been beyond the level of a POSITA” and that Kosaka’s disclosure would not have enabled a POSITA to “understand” or “use” it. *See e.g.*, Opp. 32-33; EX2016 ¶¶ 28-32.

Petitioner’s experts, Mr. Andrews and Ms. O’Neil, properly responded to Progressive’s arguments by explaining that the POSITA defined in Petitioner’s initial submissions (*see* EX1012 ¶¶ 17-18) would in fact understand Kosaka’s approach and know how to use it.² *See* RX1019 ¶¶ 5-8; RX1022 ¶¶ 24, 26, 28, 31. In particular, Petitioner’s experts countered Progressive’s Opposition arguments that a POSITA in

² Contrary to Progressive’s suggestion (Mot. 5), there was no need, in defining a POSITA, to catalog particular experience with fuzzy logic, just as there was no need to call out particular experience with memory, software, processors or other known aspects of the field.

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