

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 CBM2012-00003
Patent 8,140,358

PATENT OWNER'S NOTICE OF OBJECTIONS TO EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64

The undersigned, on behalf of Patent Owner Progressive Casualty Insurance Co. (“Patent Owner”), hereby provides Notice to the Board that the objections made on the record herewith were served on Liberty Mutual Insurance Co. pursuant to 37 C.F.R. § 42.64. *See also* 37 C.F.R. § 42, Office Patent Trial Practice Guide, part II, § I, 48767 (77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012)).

Respectfully submitted,

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August 22, 2013

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EVIDENCE PURSUANT TO 37 C.F.R. § 42.64

Pursuant to 37 C.F.R. § 42.64(b)(1), the undersigned, on behalf of Patent Owner Progressive Casualty Insurance Co. (“Patent Owner”), hereby submits the following objections to Exhibit 1032, Exhibit 1033, Exhibit 1034, Exhibit 1035, Exhibit 1036, Exhibit 1037, and Exhibit 1038 submitted with Liberty Mutual Insurance Co.’s (“Liberty” or “Petitioner”) Reply to Patent Owner’s Response (“Reply”). *See* CBM2012-00003, Paper 39 (and exhibits thereto). Pursuant to 37 C.F.R. § 42.62, Patent Owner’s objections below apply the Federal Rules of Evidence (“F.R.E.”).

I. OBJECTIONS TO EXHIBIT 1032 AND ANY REFERENCE TO/RELIANCE THEREON

Patent Owner hereby objects to Exhibit 1032, Rebuttal Declaration of Mary L. O’Neil, dated August 15, 2013 (“O’Neil Rebuttal Declaration”).

Grounds for objection: 37 C.F.R. § 42.61 (Admissibility of Evidence), F.R.E. 402 (Relevance), F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons), 37 C.F.R. § 42.223 (Filing of Supplemental Evidence), F.R.E. 702, 703, 705 (Witness Not Qualified to Provide Expert Testimony), 37 C.F.R. § 42.65 (Failure to Disclose Underlying Facts or Data), F.R.E. 801, 802 (Impermissible Hearsay), 37 C.F.R. §42.23(b) (Outside Scope of Response and Petition), and the O’Neil Rebuttal Declaration is unauthorized testimony.

Petitioner cites the O’Neil Rebuttal Declaration as allegedly rebutting certain arguments presented by Patent Owner in its Patent Owner Response. However, Petitioner’s Reply improperly mischaracterizes and misrepresents Patent Owner’s arguments in order to provide an artificial basis for its new declaration it calls a “Rebuttal Declaration.” Patent Owner advanced no position that provides a proper basis for the belated submission of new declarations (37 C.F.R. 42.23(b), 42.223; 37 C.F.R. 42, Office Patent Trial Practice Guide, part II, § I (77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012))). The statements in the O’Neil Rebuttal Declaration have no relevant bearing on any issue properly raised in this proceeding (F.R.E. 402, 403; 37 C.F.R. § 42.61). Rather, the O’Neil Rebuttal Declaration is used by Petitioner to raise new theories and invalidity arguments in an effort to make out a *prima facie* case of unpatentability of the claims, including disclosure by Nakagawa (Exhibit 1005)¹ and challenging the ’358’s priority date,² that could and

¹ Liberty argued as part of its *prima facie* invalidity case in its Petition that Nakagawa anticipated claim 1 of the ‘358 patent and that Nakagawa in combination with other references rendered obvious the other claims. (*See, e.g.*, Petition at 17-22). However, O’Neil offered *no* declaration in support of Liberty’s Petition. Yet she now opines as to Nakagawa in her Rebuttal Declaration at ¶¶ 26

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