UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

_____

Case CBM2013-00009
Patent 8,140,358

_____

PATENT OWNER'S OPPOSITION TO LIBERTY'S
MOTION TO EXCLUDE EVIDENCE

Patent Owner Progressive Casualty Ins. Co. ("Progressive") hereby opposes the motion to exclude filed by Liberty Mutual Insurance Co. ("Liberty"). (Paper No. 40.)

I.   SUMMARY OF ARGUMENT

Liberty has failed to demonstrate good cause to exclude evidence introduced by Progressive. Liberty bases its motion on a misunderstanding of the facts and a misapprehension of the law. The attacks lodged by Liberty in its motion go to the sufficiency of the Progressive evidence in question, *not* to its admissibility, and Liberty's motion to exclude should therefore be denied.

II.   LEGAL STANDARD

A.   <u>Not Proper To Argue Weight Of Evidence In Motion To Exclude</u>

"A motion to exclude must explain why the evidence is not admissible (*e.g.,* relevance or hearsay)[.]" 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012). However, the Office Patent Trial Practice Guide makes clear that such a motion to exclude "may **not** be used to challenge the sufficiency of the evidence to prove a particular fact." *Id*. (emphasis added). Indeed, as set forth in the caselaw cited by Liberty, the "sufficiency of evidence relates *not* to admissibility but to the *weight* of the evidence and is a matter for the trier of fact to resolve." *SEC v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005) (emphasis added).

B.   Liberty Argues That Progressive's Evidence Should Be *Admitted*

Notwithstanding that Liberty is moving to exclude evidence, it spends several pages of its ten-page motion, setting forth caselaw for the proposition that the Board should *not* exclude evidence. (Motion at 1-3.) Indeed, Liberty claims that there is *no* "need for formal exclusion," and it is "better for the Board" to admit evidence "than to exclude particular pieces." (Motion at 1, 2.) Progressive does not concede or agree that Liberty's characterization of the law applies in all instances, such as where new evidence is improperly submitted with a reply brief or cross-examination of a witness indicates that his or her prior testimony was unreliable. Nevertheless, since Liberty has not argued that, in evaluating Progressive's evidence, there is any reason to depart from the general principles favoring the admission of evidence, its motion should be denied under the very caselaw it cites.

III.   ARGUMENT

A.   Liberty Fails To Show Good Cause As To Expert Dr. Ehsani

Liberty has failed to satisfy its burden of showing good cause that portions of Progressive's expert Dr. Mark Ehsani's declaration (Exhibit 2015) should be excluded. As demonstrated below, Liberty's argument is based on its erroneous speculation as to Dr. Ehsani's qualifications, which is the result of its decision *not* to depose him.

Liberty claims erroneously that Dr. Ehsani "*does not*" have "at least one…year[] of experience with *telematics* systems[.]" (Motion at 7, emphasis in original.) This allegation is unsupported in the record. Indeed, Liberty cites ¶ 11 from Dr. Ehsani's expert report, in which he states: "*I have **more than 20 years of experience in** designing, researching and developing vehicle **telematics systems**.*" (Ex. 2015 at ¶ 11, emphasis added.)

Liberty also mischaracterizes ¶ 11, claiming that Dr. Esani "assert[s] experience only with data 'acquisition' and 'processing.'" (Motion at 7.) To the contrary, Dr. Ehsani does not so limit his "more than 20 years of experience." (Ex. 2015 at ¶ 11.) Indeed, he states in ¶ 11 that "telematics *includes* the acquisition of automotive onboard vehicle data and its processing" and that he has "extensively performed real-time vehicle data acquisition, logging, and analysis for driver-specific drive cycle analysis." (*Id.*, emphasis added.)

Liberty further cites Dr. Ehsani's CV as support for its mistaken claim that he does not have "at least one" year of experience with telematics systems. (Motion at 7.) Yet, even a cursory review of Dr. Ehsani's CV undercuts this claim. Dr. Ehsani's CV details his nearly 40 years of continuous professional experience, including as a Professor of Electrical Engineering and the Founding Director of the Advanced Vehicle Systems Research Program and the Power Electronics and Motor Drives Laboratory at Texas A&M University, where he has taught for 32

years. (Ex. 2016 at 1-3.) Prior to that, he worked as a research engineer at the

Fusion Research Center at the University of Texas and as a resident research

associate at the Argonne National Laboratory in Argonne, Illinois. (*Id*. at 1, 3.)

He received his PhD from the University of Wisconsin-Madison in 1981 in

electrical engineering. (*Id*. at 1, 4.) And since 1981, he has received grants of over

$16,000,000 in support of his research. (Ex. 2015 at 2.)

Dr. Ehsani's CV also catalogs his numerous accolades and career

achievements. (Ex. 2016 at 1, 42-50.) For example, in 2005, he was elected as a

Fellow of the Society of Automotive Engineers (SAE). (*Id*. at 1, 48.) He received

the Prize Paper Awards in Static Power Converters and Motor Drives at the IEEE

Industry Applications Society in 1985, 1987, and 1992 Annual Meetings. (*Id*. at 1,

42-43.) He was selected for the IEEE Vehicular Society 2001 Avant Garde Award

for "Contributions to the Theory and Design of Hybrid Electric Vehicles." (*Id*. at

1, 47.) In 2004, he was elected to the Robert M. Kennedy endowed Chair in

Electrical Engineering at Texas A&M University. (*Id*. at 1, 48.) Dr. Ehsani is also

the founder of the IEEE Vehicle Power and Propulsion Conference, the founding

chairman of the IEEE Vehicular Technology Society Vehicle Power and

Propulsion Committee, and chairman of Convergence Fellowship Committees.

(*Id*. at 2.) In 2002, he was elected to the Board of Governors of the IEEE

Vehicular Technology Society. (*Id*.) He also serves on the editorial board of

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