

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION
Petitioner

v.

CLEARLAMP, LLC
Patent OWNER

Case IPR2013-00020
Patent 7,297,364

Before SALLY C. MEDLEY, KEVIN F. TURNER, and
JOSIAH C. COCKS, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

DECISION
Objection to Evidence
37 C.F.R. § 42.64

Introduction

LKQ Corporation (LKQ) filed a petition to institute *inter partes* reviews of U.S. Patent 7,297,364 (“the ‘364 patent”). Paper 1; “Pet.” The Patent Owner of the ‘364 patent, Clearlamp, LLC (Clearlamp), filed a preliminary response. Paper

14; “Prelim. Resp.” Clearlamp makes several arguments. This decision addresses Clearlamp’s request to exclude Exhibits 1004, 1005 and 1007 submitted in support of the petition. The request is treated as a motion to exclude Exhibits 1004, 1005 and 1007.¹ The motion is DISMISSED.

Background and Findings of Fact

As part of its petition submission, LKQ relies on several exhibits. In its patent owner preliminary response, Clearlamp moves to exclude Exhibits 1004, 1005 and 1007 from consideration, *e.g.*, requests for us to exclude such evidence as inadmissible. A description of Exhibits 1004, 1005 and 1007 follows.

1) Exhibit 1004 (“Eastwood”) is a copy of the following web page:

<http://forum.eastwood.com/showthread.php?118-Plastic-headlight-resealing&s=d3d5c104c4068d77bcc48e2e5ad49222;>

2) Exhibit 1005 (“SHO”) is a copy of the following web page:

<http://www.shoforum.com/showthread.php?t=38051;>

3) Exhibit 1007 (“Autopia”) is a copy of the following web page:

[http://www.autopia.org/forum/car-detailing/56737-another-plastic-headlight-restoration.html.](http://www.autopia.org/forum/car-detailing/56737-another-plastic-headlight-restoration.html)

The above exhibits are copies of web pages from Internet forums, or message boards, with posted messages from forum participants. Pet. 11. The submitted web pages have dates associated with the posted messages. For example, the “Eastwood” exhibit shows a message post with the date of “2-18-

¹ Ordinarily, a party requesting relief must seek Board authorization to file a motion. 37 CFR § 42.20(b). Here, we exercise our discretion to decide Clearlamp’s request at pages 25-28 of its preliminary response and treat that request as a motion. 37 CFR § 42.1(b) and 37 CFR § 42.5 (b). This decision makes no other determinations regarding the petition or preliminary response.

2005.” Ex. 1004. LKQ relies on Eastwood, SHO and Autopia as “prior art consisting of ... printed publications” under 35 U.S.C. § 311(b) and explains in its petition why the exhibits qualify as printed publications. *Id.* 11-12.

The Request

Clearlamp argues that LKQ’s Exhibits 1004, 1005 and 1007 are not admissible since they have not been authenticated. Clearlamp additionally argues that since LKQ has not proved the dates asserted of the same exhibits, the exhibits are also inadmissible as hearsay. Prelim. Resp. 25-28. Clearlamp argues that since the exhibits are inadmissible, LKQ’s Grounds 2, 3, 5, 7, 8, 10 and 11 that rely on Exhibits 1004, 1005 and 1007, cannot succeed and therefore the request for *inter partes* review should be denied in its entirety. *Id.*

Analysis

With few exceptions, the Federal Rules of Evidence apply to *inter partes* proceedings. 37 CFR § 42.62. The rules governing *inter partes* review also set forth the proper procedure for objecting to, and moving to exclude, evidence when appropriate. When a party objects to evidence that was submitted during a preliminary proceeding, such an objection must be served within ten business days of the institution of trial. The objection to the evidence must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence. This process allows the party relying on the evidence to which an objection is timely served, the opportunity to correct, by serving supplemental evidence within so many days of the service of the objection. *See*, 37 CFR 42.64(b)(1) and (b)(2). If, upon receiving the supplemental evidence, the opposing party is still of the opinion that the evidence is inadmissible, the opposing party may file a motion to exclude such evidence. The time for filing a motion to

exclude is typically several months into a trial. *See, e.g.*, 77 Fed. Reg. 157 (August 14, 2012) 48765 regarding Scheduling Order and Appendix A – Due Date 4.

Clearlamp has not followed the proper procedures for objecting to and/or excluding evidence. Although Clearlamp recognizes that Exhibits 1004, 1005 and 1007 have dates associated with them, Clearlamp moves for us to exclude such evidence, because the associated dates are allegedly inadmissible hearsay and because the documents have not been authenticated. Such a request to exclude evidence is typically made by way of a motion to exclude. 37 CFR § 42.64(c). As stated above, motions to exclude are not authorized until much later during a trial, if a trial is instituted. Clearlamp’s “motion to exclude” is premature and also prevents LKQ from correcting as permitted by the rules. If a trial is instituted, Clearlamp will have full opportunity to object, serve, reconsider any supplemental evidence and finally file a motion to exclude evidence. To the extent that Clearlamp urges the Board to consider the evidentiary issues as part of our determination to institute a trial, Clearlamp has failed to explain, in any meaningful way, why we should deviate from the rules governing *inter partes* review.

For all of these reasons, Clearlamp’s “motion to exclude” is DISMISSED without prejudice for renewing under the proper procedures and circumstances.

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