

Case IPR2013-00020; Petitioner's Motion to Exclude Evidence

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION
Petitioner

v.

Patent of CLEARLAMP, LLC
Patent Owner

Case No. IPR2013-00020
Patent 7,297,364

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. Introduction

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, Petitioner LKQ Corp. ("Petitioner" or "LKQ") moves to exclude portions of Exhs. 2004, 2009, 2012 to 2014 and 2016 to 2017.

II. Exh. 2004 - Declaration of A. Harvey Bell, IV

LKQ objected to Exh. 2004 in its Objections filed on July 9, 2013 (Paper 39). Patent Owner Clearlamp, LLC ("PO" or "Clearlamp") relied on Exh. 2004 in its Response filed July 1, 2013 (Paper 33), and in its Reply filed September 30, 2013 (Paper 55). Paragraphs 6, 17, 22, 25 to 30, 41 to 43, 51 to 56, 58, 75, 77 to 79, and 87 of Exh. 2004 should be excluded for the following reasons.

A. "Federal Standards" and "Consumer Retail Market" Testimony

Mr. Bell's testimony about federal vehicle safety requirements is irrelevant to the '364 Patent. Neither the specification nor the claims of the '364 Patent mention federal vehicle safety requirements. And the document itself is irrelevant to this proceeding, as described in detail below with regard to Exh. 2107. Therefore, paragraphs 17, 25, 30, 77 and 87 of Exh. 2004 should be excluded.

Mr. Bell opines that the prior art is directed to creating a lamp acceptable to the consumer retail market (*see, e.g.*, Exh. 2004, ¶¶ 6 and 29) while the '364 Patent is directed to creating lamps acceptable to the OEM replacement parts market (*see, e.g.*, ¶ 22). This distinction is not described or claimed in the '364 Patent, and

lacks foundation in Mr. Bell's testimony. Neither the prior art nor the '364 Patent describes any intended "market." PO has not established that Mr. Bell has any experience with these markets; indeed, Mr. Bell conceded he has no experience with polycarbonate headlamps at all, much less specific markets for such lamps. (Exh. 1018, 41:22-42:6). Paragraphs 6, 22, 25 to 29, 41 to 43, 56, 58, 75, 78 and 79 of Exh. 2004 should thus be excluded.

B. PO's Experiments Should be Excluded

Mr. Bell "requested that Clearlamp conduct" experiments described in paragraphs 54 and 55 of his declaration. However, as explained below, PO's testing fails to meet the requirements of 37 C.F.R. § 42.65(b)(1)-(5), and PO has not provided an affidavit that it does. These paragraphs are therefore inadmissible "technical test[s] or data" under 37 C.F.R. § 42.65(b), and are also improper expert testimony under 37 C.F.R. § 42.65(a). Paragraphs 54 and 55 of Exh. 2004 (and paragraphs 51, 52, and 53, which rely on the experiments) should be excluded.

1. Mr. Bell Lacks Any Knowledge About the Experiments

37 C.F.R. § 42.65(a) requires an expert to "disclose the underlying facts or data on which the opinion is based." Mr. Bell not only failed to disclose these facts--he did not even know those facts.

For the three experiments PO performed in this case, Mr. Bell does not know if the lamps being sanded were brand new or used. (Exh. 1034, 16:13-15). He was

not present while the experiments were performed, and does not know who performed them. (*Id.* at 7:20-8:1). He did not inspect the lamps before or after the experiments. (*Id.* at 16:1-8). He does not know what clear coat was being removed in the paragraph 54 experiment, or whether the removed clear coat was original or a previously reapplied clear coat. (*Id.* at 8:2-5; 16:21-24). Mr. Bell also did not know if the lamps were braced in a jig. (*Id.* at 8:6-9). He did not know whether the same headlamp was used in the two experiments described in paragraph 55. (*Id.* at 18:14-19:3). He admitted that the effectiveness of the sandpaper depends on the amount of pressure applied, yet does not know the pressure that was applied during the test. (*Id.* at 20:5-24).

Accordingly, Mr. Bell did not know any of the pertinent details needed to satisfy 37 C.F.R. § 42.65(a), so paragraphs 54 and 55 should be excluded.

2. The Underlying Data for PO's Tests is Not in Evidence

Despite LKQ's timely objections, PO failed to provide any additional underlying data in evidence that would satisfy either 37 C.F.R. § 42.65(a) or (b) for the experiments referenced in paragraphs 54 and 55 of Mr. Bell's declaration.

Other than the data contained in paragraphs 54 and 55, there is no other evidence that pertains to the tests PO performed in this case. Although Mr. Bell believes he was emailed information regarding the experiments, that email and the underlying data and results from the experiments are not in evidence. (Exh. 1034

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