

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZHONGSHAN BROAD OCEAN MOTOR CO., LTD.;
BROAD OCEAN MOTOR LLC; and
BROAD OCEAN TECHNOLOGIES, LLC

Petitioners

v.

NIDEC MOTOR CORPORATION

Patent Owner

U.S. Patent No. 7,626,349
Case No. IPR2014-01121

**PETITIONERS' RESPONSE TO PATENT OWNER'S MOTION FOR
OBSERVATION REGARDING CROSS-EXAMINATION OF REPLY
WITNESS ALAN KESSLER**

Pursuant to the Board’s January 21, 2015 Scheduling Order (Paper 21), Petitioners Zhongshan Broad Ocean Motor Co., Ltd. Broad Ocean Motor LLC, and Broad Ocean Technologies, LLC (collectively, “Broad Ocean” or “Petitioners”) provide the following Response to Patent Owner’s Motion for Observation Regarding Cross-Examination of Reply Witness Alan Kessler.

As the Board stated in this action, the purpose of observations is to “draw the Board’s attention to relevant cross-examination testimony of a reply witness, since no further substantive paper is permitted after the reply.” Paper 21 at p. 6. Patent Owner, however, improperly uses the observations as a vehicle to supplement the arguments in its Patent Owner’s Response. Broad Ocean objects to this misuse of the observations. See PTAB Trial Practice Guide, 77 Fed. Reg. 48756, 48768 (“An observation (or response) is not an opportunity to raise new issues, re-argue issues, or pursue objections.”)

Further, as discussed in the individual responses below, Patent Owner’s observations either are redundant in view of Mr. Kessler’s Declaration and others, or reach unwarranted inferences from the cited testimony of Alan Kessler in view of other testimony of Mr. Kessler herein that has either been omitted or ignored by Patent Owner.

1. Response to Observations 1 through 4 – The testimony cited by Patent Owner is redundant to testimony in Kessler’s Declaration. See Ex. 1028, Kessler Decl. at ¶¶ 1-7, 12.

2. Response to Observations 5-7 – Patent Owner incorrectly asserts that this testimony demonstrates that PSC motors and ECM motors operate in separate submarkets, and that ECM motors are more quiet and efficient. First, the fact that a PSC motor lacks certain features of an ECM motor does not necessarily mean that the motors do not compete in the same market. Both Mr. Kessler and other witnesses have clearly and unequivocally testified that the motors compete and should be considered when defining the proper market. See Ex. 1028, Kessler Decl. at ¶¶ 12-15, 31.

Significantly, Patent Owner never asked Kessler whether these motors operate in separate submarkets. Instead, Patent Owner now wants the Board to infer “evidence” that it failed to elicit from the witness when it had the opportunity. Patent Owner is improperly attempting to use this observation as a vehicle to supplement arguments it could have raised in its Patent Owner Response or could have asked the witness to provide. Broad Ocean objects to this misuse of the observation. See PTAB Trial Practice Guide, 77 Fed. Reg. 48756, 48768. Specifically, Nidec could have argued that there exists this submarket for these motors in its Response and that one should only consider ECM motors and the

reasons behind that position at that time. Patent Owner did not do so, and it is too late to do so by way of Patent Owner Observations. Thus, Nidec should not now be allowed to shore-up its Response with points it could have raised then. See PTAB Trial Practice Guide, 77 Fed. Reg. 48756, 48768 (“An observation (or response) is not an opportunity to raise new issues, re-argue issues, or pursue objections.”).

3. Response to Observations 8-15 – Patent Owner claims that this testimony demonstrates that PSC motors and ECM motors operate in separate submarkets. The fact that an OEM specifically requires that an ECM motor be used does not necessarily mean that ECM motors do not compete with other motors. Both Mr. Kessler and other witnesses have clearly and unequivocally testified that ECM and PSC motors compete. See Ex. 1028, Kessler Decl. at ¶¶ 12-15, 31. Patent Owner failed to ask Kessler whether ECM motors, as opposed to other blower motors, operate in separate submarkets. Instead, Patent Owner now wants the Board to draw inferences that are nowhere supported in the record.

In addition, Patent Owner is improperly attempting to use this observation as a vehicle to supplement arguments it could have raised in its Patent Owner Response. Broad Ocean objects to this misuse of the observation. See PTAB Trial Practice Guide, 77 Fed. Reg. 48756, 48768. Nidec could have argued that there exists a submarket for ECM motors and could have supported that position with

timely elicited evidence. Patent Owner failed to do so and it cannot now be allowed to add new arguments to its Response, especially arguments based on evidence it failed to even elicit from the witness. Because Nidec failed to ask in how many instances Rheem required an ECM motor, Patent Owner's strained observation regarding Rheem's testimony should be discounted.

4. Response to Observations 16 and 17 – Petitioners do not dispute that Rheem and other OEMs promote that their systems are quiet. But of course, that does not equate their ECM-only systems as being the quietest systems. Nor does that fact necessitate that PSC systems are not as quiet.

5. Response to Observation 18 – Kessler does not dispute that Nidec claimed it could detect a 2dB sound difference. But that is not the issue, as Kessler has pointed out in his declaration. In the context of blower motor operation, the fact is that a 2dB noise decrease is of no consequence to users of such systems. Ex. 1028, Kessler Decl. at ¶ 24.

6. Response to Observation 19 – This observation is an overstatement by Patent Owner. In essence, all it demonstrates is that Kessler believes that one should not apply the same rate across the board. Of course, Nidec failed to ask Mr. Kessler whether a lower rate or a higher rate should be applied, or how one would go about calculating a more precise set of numbers. Moreover, Mr. Hofmann testified that he used the most reliable independent basis for performing his

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