

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MAKO SURGICAL CORP.,  
Petitioner,

v.

BLUE BELT TECHNOLOGIES, INC.,  
Patent Owner.

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IPR2015-00629  
U.S. Patent No. 6,757,582

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**PATENT OWNER'S REPLY TO OPPOSITION TO MOTION TO  
EXCLUDE EVIDENCE**

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U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

## I. Introduction.

Patent Owner Blue Belt Technologies, Inc. moved to exclude Dr. Cleary's answers to the following Petitioner's questions:

- “In general in robot-assisted surgery, redundant systems for safety are important, aren't they?” (Cleary Dep.<sup>1</sup> at 65:22–24) (“Question 1”); and
- “And using a tracker could be one way to ensure that the bone -- that you would detect any motion of the bone, wouldn't it?” (*id.* at 66:21–23) (“Question 2”).

Motion to Exclude, Paper No. 17 (Mar. 9, 2016) (“Mot.”). In its Opposition, Paper No. 18 (Mar. 16, 2016) (“Opp.”), Petitioner All-of-Innovation GbmH asserts that Questions 1 and 2 are clear because Dr. Cleary did ask for clarification and that Dr. Cleary's Declaration opened the door for the hypothetical concepts of Questions 1 and 2. As described below, Petitioner is incorrect because a witness is not required to ask for clarification and the relevant portions of Dr. Cleary's Declaration are limited to teachings of the alleged anticipatory reference, Taylor.<sup>2</sup>

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<sup>1</sup> Transcript of Deposition of Dr. Kevin Cleary, Ex. 1016.

<sup>2</sup> Russell H. Taylor et al., *An Image-Directed Robotic System for Precise Orthopaedic Surgery*, IEEE Transactions On Robotics And Automation, Vol. 10, No. 3, June 1994, Ex. 1008.

## II. Dr. Cleary’s Answers to Questions 1 and 2 Should Be Excluded under Fed. R. Evid. 403.

Petitioner argues that Dr. Cleary “did not find [Questions 1 and 2] confusing or ambiguous” because he did not “ask Petitioner to clarify or rephrase the questions.” Opp. at 3. But Petitioner provides no basis for asserting that a question is only unclear if the witness explicitly notes the question’s shortcomings. Patent Owner objected to the form of Questions 1 and 2 and timely moved to exclude; nothing more is required to preserve the objection. 37 C.F.R. § 42.53(f)(8).

As Patent Owner explained and Petitioner does not dispute, Question 1 provides no context in terms of timeframe, type of surgery, the type of system, and “importance.” See Mot. at 2. Yet, Petitioner conclusorily argues that “[t]here is nothing ambiguous in [Question 1] or the response.” Opp. at 3. Petitioner is incorrect because the answer to Question 1 may change depending on the context, rendering Question 1 ambiguous.

Question 2 is unclear because it provides no context for “tracker”— *e.g.*, for how, if at all, this term relates to the “tracker,” the “at least one first marker,” and the “at least one second marker” recited in independent claim 1 of U.S. Patent No. 6,757,582, Ex. 1001. Mot. at 3. Dr. Cleary’s answer illustrated confusion as it referenced a “marker” instead of a “tracker.” See *id.* Petitioner responds that Dr. Cleary’s answer to Question 2 is “consistent with his use of ‘tracker’ as

demonstrated by his other responses during the deposition.” Opp. at 3 (citing Cleary Dep. at 28:7–15). But Petitioner does not explain how Dr. Cleary “use[d]” “tracker” in the cited portion of his deposition or how such a use would indicate that Question 2 was clear. Nor does the cited portion of Dr. Cleary’s deposition shed light on Dr. Cleary’s alleged “use of ‘tracker,’” as neither Petitioner nor Dr. Cleary use the term “tracker.” Cleary Dep. at 28:7–15.

Accordingly, Dr. Cleary’s answers to Questions 1 and 2 should be excluded under Fed. R. Evid. 403 as confusing and ambiguous because Questions 1 and 2 lack critical context.

### **III. Dr. Cleary’s Answers to Questions 1 and 2 Should Be Excluded as Outside the Scope under 37 C.F.R. § 42.53(d)(5)(ii).**

Petitioner argues that Questions 1 and 2 are within the scope of ¶¶ 40, 45, 111, and 112 of Dr. Cleary’s Declaration, Ex. 2004. But these paragraphs are limited to Taylor’s system, which utilizes bone fixation. The cited portion of ¶ 40 quotes page 273 of Taylor, describing specific alternative tracking systems. The cited portion of ¶ 45 specifically references systems, like Taylor’s, that utilize bone fixation. And the cited portions of ¶¶ 111–112 describe the implications of Taylor’s bone fixation system to a person of ordinary skill.

Questions 1 and 2, on the other hand, relate to hypothetical concepts detached from Taylor’s system and bearing minimal relevance to the topics that Dr. Cleary was asked to opine on. For example, Question 1 is not related to

Taylor’s system, or even to systems that rely on bone fixation, but rather refers to “robot-assisted surgery” “[i]n general.” Question 2 similarly departs from Taylor’s explicit disclosure as it asks Dr. Cleary to comment on whether a “tracker” *could* be one way to detect motion of the bone. Accordingly, Dr. Cleary’s answers to Questions 1 and 2 should be excluded as outside the scope.

#### **IV. Patent Owner’s Motion to Exclude Is Proper.**

Petitioner asserts that Patent Owner’s Motion to Exclude is “essentially an improper sur-reply in which Patent Owner attempts to characterize its own expert’s testimony and reply to Petitioner’s arguments.” Opp. at 1, 2. Petitioner argues that the following statement is “not an evidentiary argument,” but rather an allegedly improper “interpretation of testimony”: “Dr. Cleary’s answer provides no indication whether he meant for his answer to be applied in that *context*.” Opp. at 2 (citing Mot. at 2–3) (emphasis added). But Patent Owner’s evidentiary argument is rooted in a *lack* of context, and Patent Owner cited the specific context in which Petitioner cited Dr. Cleary’s answer to illustrate the ambiguity in Question 1. Indeed, evidentiary issues often turn on the purpose for which the evidence is proffered, particularly for objections under Rule 403, which calls for a balancing of the probative and harmful value of the proffered evidence. *See* 28 Charles Alan Wright *et al.*, *Fed. Prac. & Proc. Evid.* § 5214 (2nd ed. 2012) (describing

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