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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD
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J SQUARED INC. d/b/a UNIVERSITY LOFT
COMPANY,

Petitioner,

vs.

SAUDER MANUFACTURING COMPANY,

Patent Owner.

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CASE: IPR2015-00774

CASE: IPR2015-00958

Patent 8,585,136

ADMINISTRATIVE PATENT JUDGES:

Linda E. Horner

Josiah C. Cocks

James A. Worth

TELEPHONIC MEETING
Friday, April 1, 2016
3:00 P.M.

Reported by: Goldy Gold, CSR, RPR

Job No. 105768

Page 2

1
2 A P P E A R A N C E S:
3
4 OBLON MCCLELLAND MAIER & NEUSTADT
Attorneys for Petitioner
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Alexandria, Virginia 22314
5 BY: SCOTT MCKEOWN, ESQ.
6
7
8 YOUNG BASILE HANLON & MACFARLANE
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9 Troy, Michigan 48084
10 BY: THOMAS YOUNG, ESQ.
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1 PROCEEDINGS
2 waste the Court's and the parties'
3 time. That, I believe, works in our
4 favor because if a picture is worth a
5 thousand words, an actual article may
6 be worth 10,000 words. And these will
7 be very, very helpful, I believe, to
8 the Board in achieving an even deeper
9 understanding of the exact same chairs
10 that are illustrated and described in
11 the various exhibits that have been
12 submitted by patent owner, along with
13 the declarations, particularly the
14 declaration of Mr. Bontrager; lots and
15 lots of pictures of these same
16 articles.
17 Whether or not they would cause
18 confusion, I believe, again, the
19 argument goes in our favor. They
20 would avoid confusion, mistake, or
21 lack of information. They don't add
22 anything that's not in the materials
23 already submitted, but they certainly
24 bring it to light.
25 The third and last matter I

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1 PROCEEDINGS
2 ADMINISTRATIVE JUDGE HORNER: It
3 looks like we have two items to
4 discuss. The first is the notice in
5 the patent owner's request for oral
6 hearing that you wish to bring in
7 physical exhibits of two commercial
8 products, one made by the patent owner
9 and the other made by the petitioner.
10 Is that correct?
11 MR. YOUNG: That is correct.
12 And I would be happy to support or
13 advocate in favor of my proposal
14 whenever Your Honors are ready.
15 ADMINISTRATIVE JUDGE HORNER:
16 Please go ahead.
17 MR. YOUNG: Okay. I have looked
18 at two of the rules of Federal Rules
19 of Evidence, 403 and 1006, regarding
20 demonstrative exhibits. And it seems
21 to me that there are three factors
22 that -- three or four factors that are
23 involved.
24 One is whether or not these
25 chairs would be a waste of time, would

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1 PROCEEDINGS
2 believe that should be addressed is
3 the question of authenticity.
4 I can tell you with respect to
5 the commercial product of the
6 petitioner, the chair that we have and
7 propose to bring, was furnished to us
8 as a response to our discovery request
9 by litigation counsel for petitioner.
10 That was not Mr. McKeown. It was
11 Mr. Bahret and another gentleman who
12 are litigation counsel in the pending
13 civil action. So that chair comes
14 directly from the petitioner.
15 And as far as the patent owner's
16 chair is concerned, again, it would
17 take about ten seconds to see that it
18 is a perfectly faithful physical
19 representation of what is shown in our
20 various exhibits.
21 And I will also inform you that
22 it is our plan to have Mr. Bontrager,
23 who is one of the three declarants for
24 patent owner, attend the hearing.
25 And I would like to add as a

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1 PROCEEDINGS
 2 third issue the question of whether
 3 there is any problem with that, of
 4 having him come. Is that something I
 5 need to clear with you folks in
 6 advance, and if so, I'd like to do
 7 that today.
 8 But in any event, if Mr. McKeown
 9 had any question about the
 10 authenticity of either one of these
 11 articles, depending on the time when
 12 the oral argument is set by the Board,
 13 I'd be happy to make them available to
 14 him at his office a couple of hours in
 15 advance or whatever, and he can take a
 16 look at them or, of course, he can
 17 look at them immediately in advance of
 18 the hearing. I don't think there is
 19 going to be any question regarding the
 20 authenticity.
 21 So, in summary, it appears that
 22 the traditional considerations pretty
 23 much work in the patent owner's favor,
 24 and I would suggest that the Board
 25 will be pleased to have these articles

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1 PROCEEDINGS
 2 So in our reply, we've pointed
 3 out that there is nothing in the
 4 record right now that compares the
 5 patent owner's claim construction and
 6 claims to the petitioner's chairs.
 7 So asking to bring those in
 8 three weeks prior to the oral hearing,
 9 it is supplemental information. It's
 10 entirely new evidence.
 11 We're preparing for the hearing.
 12 And at this late date, aside from the
 13 fact that it attempts to remedy a
 14 deficiency in the record, it's just
 15 highly prejudicial.
 16 As far as the pictures that are
 17 in the record, this is not a design
 18 patent case. It is a utility patent.
 19 So we also pointed that out in our
 20 reply, that the pictures don't get you
 21 there. If you're trying to prove
 22 copying, you need to compare your
 23 claims to the product. And this is
 24 just an attempt to end around, as I
 25 said, a deficiency in the record to

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1 PROCEEDINGS
 2 available to see them in person and
 3 how they're constructed and how they
 4 work.
 5 ADMINISTRATIVE JUDGE HORNER:
 6 Thank you, Mr. Young.
 7 Mr. McKeown, would you like to
 8 respond?
 9 MR. MCKEWON: Sure.
 10 This is not an issue about the
 11 Federal Rules of Evidence. This is an
 12 issue about the Board's trial practice
 13 rules.
 14 The record is closed. This is
 15 supplemental information. There's no
 16 physical evidence in the record. This
 17 would be highly prejudicial to the
 18 petitioner for the reason that in our
 19 reply we've pointed out that there's
 20 been no comparison of the petitioner's
 21 product to the claims in this case,
 22 because what we're talking about here
 23 is not an infringement trial. The
 24 only relevance this has is the
 25 secondary consideration.

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1 PROCEEDINGS
 2 bring the chairs to the hearing and
 3 basically, in essence, supplement what
 4 is, like I said, a hole in the record.
 5 As to the patent owner's chairs,
 6 there's claim charged in the record
 7 that maps the claim allegedly to these
 8 chairs for approving commercial
 9 success. We're not talking about a
 10 copying indicia here; we're talking
 11 about commercial success.
 12 And I'll also point out there's
 13 an extraordinary remedy already in the
 14 record that there is video in the
 15 record of the same chair. So if the
 16 pictures are worth a thousand words,
 17 the video's got to be worth a lot more
 18 than that. And I don't know that
 19 bringing the physical evidence to the
 20 hearing will do anything more than
 21 complicate the hearing and complicate
 22 our preparation at a time when the
 23 record is closed.
 24 And as I've said, we've already
 25 briefed these deficiencies, and it is

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1 PROCEEDINGS
 2 just an attempt to supplement.
 3 So if the Board is inclined to
 4 grant Mr. Young's request, I would
 5 suggest that we would have to brief
 6 the issue as an item of supplemental
 7 information. It's not a Federal Rule
 8 of Evidence issue.
 9 And given that the oral hearing
 10 is only a couple of weeks away, I
 11 think we would have to push off the
 12 oral hearing. So I would oppose
 13 introduction of any of this new
 14 evidence at this late date for the
 15 reasons I've expressed.
 16 ADMINISTRATIVE JUDGE HORNER:
 17 All right. Thank you, Mr. McKeown.
 18 Give me just a moment. I will
 19 confer with the Panel, and we may be
 20 able to get you an answer right away
 21 on this one.
 22 MR. YOUNG: May I just make one
 23 comment, Judge?
 24 ADMINISTRATIVE JUDGE HORNER:
 25 Yes, please.

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1 PROCEEDINGS
 2 matter than Mr. McKeown is trying to
 3 make it.
 4 MR. MCKEWON: And I'll just add
 5 before the Panel breaks that, as I
 6 said, video is an extraordinary
 7 accommodation that's rarely present in
 8 these cases. If physical evidence
 9 were desired, rather than asking for
 10 the video, the time to have asked for
 11 physical evidence would have been
 12 earlier.
 13 We're just three weeks away from
 14 the oral hearing here, and that's what
 15 we're talking about here is just the
 16 time to prepare.
 17 And I'll just finally add that
 18 this is only relevant for secondary
 19 considerations, and we have a 102
 20 ground in this case, so I think it's
 21 just unnecessary complication and
 22 expense for the petitioner to prepare
 23 for this at this late date.
 24 ADMINISTRATIVE JUDGE HORNER:
 25 Okay. Mr. Young, anything further?

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1 PROCEEDINGS
 2 MR. YOUNG: If I understood
 3 Mr. McKeown correctly, he was saying
 4 that the patent owner's chair would
 5 not be present to fill a hole in the
 6 record. But because the record, and
 7 particularly Mr. Bontrager's
 8 declaration, is quite complete in
 9 taking the chair through a very
 10 exhaustive analysis of the patent
 11 claims, so what he's really saying is
 12 that it would be duplicative. And I
 13 guess I would have to sort of agree
 14 with him there.
 15 But, again, I think having the
 16 real-life physical article, as opposed
 17 to having the Board having to go back
 18 and look at a video and recall
 19 elements and aspects of the physical
 20 article from that, is still the most
 21 efficient way to go. And I can't
 22 imagine that bringing this article is
 23 going to result in pushing out the
 24 oral argument date.
 25 This is much, much more simple a

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1 PROCEEDINGS
 2 MR. YOUNG: No. I think we've
 3 exhausted the subject, Judge.
 4 ADMINISTRATIVE JUDGE HORNER:
 5 Very good. Please hold for one
 6 moment, and I'll be right back with
 7 you.
 8 (Whereupon, a recess was taken.)
 9 ADMINISTRATIVE JUDGE HORNER:
 10 All right. We're back. That didn't
 11 take long.
 12 The Panel has conferred.
 13 We agree with Mr. McKeown that
 14 this would be supplemental
 15 information; that it's unusual to
 16 first interview physical exhibits not
 17 of record at the oral arguments.
 18 We do have the videos of the
 19 patent owner's chairs to view and
 20 consider in the record, and we have
 21 the pictures in the record of the
 22 petitioner's chair.
 23 We're going to proceed on the
 24 record as it stands now. So we will
 25 not allow those physical exhibits of

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1 PROCEEDINGS
2 chairs to be brought in for inspection
3 by the Panel during the oral hearing.
4 MR. MCKEWON: Thank you, Your
5 Honor.
6 MR. YOUNG: Well understood.
7 Thank you.
8 ADMINISTRATIVE JUDGE HORNER: We
9 will move on to item number 2, which
10 was the issue of patent owner's
11 request to file a paper of some sort,
12 either motions for observations on
13 cross-examination or another paper in
14 another form, to note areas of
15 testimony referenced in the reply
16 brief.
17 Mr. Young, maybe you can explain
18 exactly what you're seeking here.
19 MR. YOUNG: As you know, looking
20 back on the order of events, after the
21 patent owner filed its trial book and
22 the declarations of the three
23 witnesses along with two deposition
24 transcripts that Mr. McKeown came here
25 to Michigan and deposed each of the

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1 PROCEEDINGS
2 to dispose of that issue in a rather
3 expeditious way.
4 My mistake, and I'm upfront
5 about recognizing it, was not
6 following, correctly following
7 specific procedure in calling the
8 Board to ask for permission to file my
9 motions for observation. And I
10 apologize for that and would request
11 only that I be able to do it now for
12 then.
13 The content, I think, was still
14 valuable in expediting the approach to
15 what will become -- I believe can
16 become a rather tedious matter at oral
17 argument of going through this
18 testimony witness by witness and line
19 by line in the various deposition
20 transcripts, when it can easily be
21 done on paper in advance with no
22 prejudice to anybody.
23 So that was our purpose in
24 submitting the motions for observation
25 that we submitted.

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1 PROCEEDINGS
2 declarants, I cross-examined two of
3 the declarants, and the entire
4 transcripts of all three depositions
5 were submitted by Mr. McKeown in his
6 reply.
7 Now, looking at some previous
8 decisions of the Board and looking at
9 the thorough register, what jumped out
10 at me was, I had no opportunity and
11 would have no opportunity to submit
12 anything in writing prior to oral
13 argument to refute in particular the
14 allegation by Mr. McKeown that the
15 testimony -- the deposition of the
16 testimony of the three witnesses
17 constituted a -- and I will quote --
18 "a jumble of inconsistent testimony,"
19 end quote, particularly regarding a
20 claim construction, when my own review
21 of the transcripts indicated to me
22 that that was simply not the case.
23 And I felt it was a simple matter of
24 referring the specific testimony and
25 to bring this to the Board's attention

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1 PROCEEDINGS
2 We drew on the language of a
3 previous decision by a previous Board,
4 recognizing that while it was unusual
5 to permit observations from counsel
6 for patent owner, that it made sense
7 in this particular case for two
8 reasons: One, it was patent owner's
9 first opportunity to reply to a new
10 issue that the petitioner had raised
11 in his written reply. And, second,
12 that it was an expeditious way to do
13 things, that it just didn't make sense
14 to defer it for oral arguments. And
15 so that's what was motivating us.
16 Now, after Mr. McKeown objected
17 to it, seemingly on a procedural
18 basis, our latest proposal to the
19 Board -- and we're open to suggestion
20 on this -- we're trying to help the
21 Board, not hinder matters and not slow
22 things down, but rather to make life
23 as easy and straightforward as
24 possible for all concerned.
25 We would propose to submit as a

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