

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

H&S MANUFACTURING COMPANY, INC.

Petitioner,

v.

OXBO INTERNATIONAL CORPORATION

Patent Owner.

Case No.: IPR2016-00950

U.S. Patent No. 8,166,739

OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

UNDER 37 C.F.R. §42.64

Table of Contents

I. INTRODUCTION 1

II. THE MOTION FAILS TO COMPLY WITH GUIDANCE 1

III. THE EVIDENCE IS NOT EXCLUDABLE 2

 A. *Ex.1023 - Carr Article* 2

 B. *Ex.1008 - Undersander Declaration*..... 3

 C. *Ex.1024 - Chaplin Declaration* 3

 D. *Ex.1010 - Beougher* 4

 E. *Ex.1025 - Tri-Flex Manual*..... 4

 F. *Ex.1026 - AE-50 Entry Form* 5

IV. CONCLUSION..... 5

I. INTRODUCTION

Patentee's Motion to Exclude all or portions of Exhibits 1023, 1008, 1024, 1010, 1025, and 1026 should be denied. The Motion fails to comply with the requirements in the Guidance for such motions and advances arguments that go to the merits of the challenged evidence, not its admissibility. The challenged evidence is admissible under the Federal Rules of Evidence ("FRE"), and the Board can evaluate the appropriate weight to be accorded the evidence.

As the moving party, Patentee has the burden of establishing that the challenged evidence is inadmissible. 37 C.F.R. § 42.20(c); *Flir Sys., Inc. v. Leak Surveys, Inc.*, Case IPR2014-00411, Paper 113, at 5 (PTAB Sept. 3, 2015). Patentee's Motion should be denied because it has not met that burden.

II. THE MOTION FAILS TO COMPLY WITH GUIDANCE

A motion to exclude evidence must:

- (a) Identify where in the record the objection originally was made;
- (b) Identify where in the record the evidence sought to be excluded was relied upon by an opponent;
- (c) Address objections to exhibits in numerical order; and
- (d) Explain each objection.

Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012)

The Motion fails to comply with requirements (a), (b), and (c) set forth in

the *Practice Guide*. In addition, the explanation for many of the objections goes beyond explaining why the evidence is not admissible. A motion “may not be used to challenge the sufficiency of the evidence to prove a particular fact.” *Id.*

III. THE EVIDENCE IS NOT EXCLUDABLE

A. *Ex.1023 - Carr Article*

The Motion argues that cross-examination of Patentee’s expert based on this exhibit is irrelevant, hearsay, and outside the scope of direct. (Motion, pp.1-2).

These arguments go to the merits of the cross-examination and should have been presented as observations on cross-examination, not as a motion to exclude. The Carr article is within the scope of direct as it goes to the issue whether “material” would be understood by a person skilled in the art as being limited to cut crops or cut hay as testified by Patent Owner’s expert. (*See*, Reply, Section II.B, pp.7-9).

“[T]he law is well established that the Board will not exclude evidence that is proffered to show what a person of ordinary skill in the art would have known about the relevant field of art.” *Apple Inc. v. DSS Tech. Mgmt., Inc.*, Case IPR2015-00369, slip op. at 35-36 (PTAB June 17, 2016) (Paper 40). Under the balancing test used by the Board for both relevance and hearsay objections, the use of the Carr article to challenge the Patentee’s expert testimony on the understanding of a person skilled in the art should not be excluded. *Id.*

B. Ex.1008 - Undersander Declaration

The Motion argues that five paragraphs of the Undersander declaration should be excluded because they cite to references identified in the bibliography but not expressly submitted as exhibits in this proceeding. (Motion, pp.2-4). The Motion argues that the failure to submit such references as exhibits violates 37 C.F.R. §42.104(b)(5). This argument is baseless as neither of the references cited in these five paragraphs form the basis of a ground of unpatentability that was asserted in the Petition. The consideration of these five paragraph which address the market forces influencing the development of farm machinery are evidence of what is within the kin of one skilled in the art. Like the Carr article, the two references are relevant to the knowledge and understanding of one skilled in the art and Petitioner's expert's testimony in this regard should not be excluded. *Id.* Moreover, Patentee was free to cross-examine Undersander about these paragraphs and art during his deposition. To the extent Patentee did not, that provides no justification for the requested motion.

C. Ex.1024 - Chaplin Declaration

The Motion argues that certain portions of the Chaplin declaration should be excluded as beyond the scope of direct. (Motion, pp.4-5). Each of these portions are within the scope of direct as each goes to the issue whether "material" would

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.