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IPR2017-00350, Paper 29
IPR2017-00351, Paper 29
IPR2017-00352, Paper 29
IPR2017-00524, Paper 27
Entered: February 16, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FREDMAN BROS. FURNITURE COMPANY, INC.,
Petitioner,

v.

BEDGEAR, LLC,
Patent Owner.

Cases[1]
IPR2017-00350 (Patent 8,887,332 B2);
IPR2017-00351 (Patent 9,015,883 B2);
IPR2017-00352 (Patent 8,646,134 B1);
IPR2017-00524 (Patent 9,155,408 B2)

Before HYUN J. JUNG, BART A. GERSTENBLITH, and AMANDA F. WIEKER, *Administrative Patent Judges.*

JUNG, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

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[1] We exercise our discretion to issue one order to be entered in each case. The parties are not authorized to use a caption identifying multiple proceedings.

Patent Owner requested by email authorization to file a paper identifying portions of Petitioner's Replies in the above-captioned proceedings that Patent Owner believes raise new arguments or evidence.

According to our rules, "[a] reply may only respond to arguments raised in the corresponding . . . patent owner response." 37 C.F.R. § 42.23(b). Indeed, "[a] reply that raises a new issue or belatedly presents evidence will not be considered and may be returned." *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012). For example, our Trial Practice Guide explains that "[e]xamples of indications that a new issue has been raised in a reply include new evidence necessary to make out a prima facie case for the patentability or unpatentability of an original or proposed substitute claim, and new evidence that could have been presented in a prior filing." *Id.*

Also, a determination of which arguments may exceed the proper scope for a reply brief often requires consideration of the entire record. We are capable of making that determination, in most instances, without additional briefing by the parties. Nonetheless, it is helpful when the complaining party is given an opportunity to identify the precise arguments complained of and the opposing party is given an opportunity to respond.

Patent Owner may file, in each proceeding, a paper titled "Patent Owner's List of Improper Reply Arguments," which shall include a numbered list of citations to those passages of the reply that Patent Owner

believes exceed the scope of a proper reply.[2] This list must include page and line numbers, and may include a brief explanation (akin to that in a motion for observation). Then, Petitioner may file, in each proceeding, a paper titled "Petitioner's Response to Patent Owner's List of Improper Reply Arguments," responding to each item in Patent Owner's list and citing to where the reply argument is supported by a theory of unpatentability expressed in the Petition and/or is responsive to an argument raised in the Patent Owner Response. Again, this response must include page and line numbers, and may include a brief explanation (again, akin to that in a motion for observation). To the extent the panel determines that any item identified by Patent Owner warrants additional briefing, an order will be issued, providing such instruction to the parties.

The parties may, if desired, devote a portion of their argument time during the upcoming hearing to a discussion of this issue. The propriety or impropriety of the identified portions of the reply will be addressed, to the extent necessary, in our Final Written Decision. Should we determine that portions of Petitioner's Reply exceed the proper scope for a reply brief, we

[2] For purposes of this Order, an improper argument is an argument made by Petitioner in its Reply where (1) it is beyond the scope of a reply under 37 C.F.R. § 42.23(b) or (2) if we were to rely on it in finding the challenged claims unpatentable, Patent Owner would not have had sufficient notice and opportunity to respond (*see, e.g.*, *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015)). Because arguments are supported by evidence, and evidence not argued is not considered, we purposely omit a separate class of "improper evidence."

will explain any such determination in our Final Written Decision and identify the arguments and evidence we consider improper for a reply.[3]

Accordingly, it is:

ORDERED that Patent Owner is authorized to file, in each captioned proceeding, a List of Improper Reply Arguments, as outlined above, within one week of the date of entry of this Order;

FURTHER ORDERED that Petitioner is authorized to file, in each captioned proceeding, a Response, as outlined above, within two weeks of the entry date of this Order; and

FURTHER ORDERED that neither paper is to be more than two (2) pages, excluding the cover page, signature block, and certificate of service.

[3] To the extent Patent Owner seeks to exclude evidence offered in conjunction with the alleged improper arguments raised in Petitioner's Reply, Patent Owner may do so in a motion to exclude, to the extent Patent Owner has preserved an objection thereto. We will address any motion to exclude, to the extent necessary, in our Final Written Decision.

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IPR2017-00352 (Patent 8,646,134 B1)
IPR2017-00524 (Patent 9,155,408 B2)

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