

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ZTE (USA) INC.,  
Petitioner,

v.

FUNDAMENTAL INNOVATION SYSTEMS INTERNATIONAL LLC,  
Patent Owner.

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Case IPR2018-00425  
Patent 7,893,655 B2

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Before LYNNE E. PETTIGREW and PAUL J. KORNICZKY, *Administrative Patent Judges*.

KORNICZKY, *Administrative Patent Judge*.

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

In an email dated March 20, 2019, Petitioner requested permission to file (1) a motion to exclude evidence, and (2) a motion to strike portions of Patent Owner's sur-reply that rely on the disputed evidence.

According to the email, Petitioner seeks to exclude certain cross-examination testimony of Mr. Geier (Exhibit 2030) that Petitioner contends exceeded the scope of the direct testimony and a related exhibit (Exhibit 2031) that was generated during this cross-examination. We understand that Petitioner does not object to the admissibility of the evidence on evidentiary grounds. Patent Owner opposes the motion to exclude but does not oppose Petitioner's request to file the motion out of time.

Petitioner also seeks to strike portions of Patent Owner's sur-reply that rely on the disputed evidence. Patent Owner opposes Petitioner's request to file the motion to strike and the motion to strike itself.

A motion to exclude challenges the admissibility of evidence on evidentiary grounds. *See* Office Trial Practice Guide Update referenced at 83 Fed. Reg. 39,989 ("Trial Practice Guide Update") (Aug. 13, 2018), at 16-18 (available at <https://go.usa.gov/xU7GP>). A motion to strike challenges allegedly new or late-filed issues, evidence, and arguments. *Id.* In most cases, the Board is capable of identifying new issues or belatedly presented evidence when weighing the evidence at the close of trial, and disregarding any new issues or belatedly presented evidence that exceeds the proper scope of reply or sur-reply. *Id.* As such, striking the entirety or a portion of a party's brief is an exceptional remedy that the Board expects will be granted rarely. *Id.*

Based on Petitioner's explanation, it appears that a motion to strike is the proper vehicle for Petitioner to challenge the allegedly new/untimely evidence and arguments. Accordingly, Petitioner is authorized to file a motion to strike portions

IPR2018-00425  
Patent 7,893,655 B2

of Mr. Geier's cross-examination testimony (Exhibit 2030), Exhibit 2031, and portions of Patent Owner's sur-reply. Petitioner shall file its motion on or before March 27, 2019; Patent Owner shall file its opposition to the motion, if any, on or before April 3, 2019; and Petitioner shall file its reply, if any, on or before April 8, 2019. The parties' briefs are limited to five pages.

In view of the foregoing, it is

ORDERED that Petitioner may file a motion to strike certain evidence/arguments, limited to five pages, on or before March 27, 2019;

FURTHER ORDERED that Patent Owner may file an opposition to Petitioner's motion, limited to five pages, on or before April 3, 2019; and

FURTHER ORDERED that Petitioner may file a reply, limited to five pages, on or before April 8, 2019.

IPR2018-00425  
Patent 7,893,655 B2

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