

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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**EXOCAD GMBH AND EXOCAD AMERICA, INC.**  
Petitioners,

v.

**3SHAPE A/S,**  
Patent Owner.

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Patent No. 9.336,336  
Issue Date: May 10, 2016  
Title: 2D IMAGE ARRANGEMENT

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*Inter Partes* Review No. IPR2018-00788

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**PETITIONERS' OPPOSITION TO MOTION TO EXCLUDE**

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## **I. INTRODUCTION**

Patent Owner's motion to exclude evidence is improper because it addresses evidence that Patent Owner believes is beyond the scope of Petitioners' Reply. Patent Owner's arguments are only pertinent to a motion to strike, which Patent Owner has already filed, and Patent Owner merely repeats the same arguments from its motion to strike. For this reason, the motion to exclude should be denied.

Even if the motion is considered substantively, it should be denied for the same reasons set forth in Petitioners' opposition to Patent Owner's motion to strike. Section VI.C of the Second Declaration of Dr. Mundy (Exhibit 1023) is plainly relevant to address obviousness based on Wiedmann combined with Sachdeva – which is a Ground included in the Petition – and to address an issue explicitly set forth in the Board's Institution Decision.

## **II. ARGUMENT**

### **A. The Motion to Exclude Is Improper**

Patent Owner's motion to exclude should be denied because it is improper. The Trial Practice Guide Update provides that “a motion to exclude [should not] address arguments or evidence that a party believes exceeds the proper scope of reply or sur-reply.” Trial Practice Guide Update, 83 Fed. Reg. 39989 (Aug. 13, 2018) at 16; *see also, e.g., Google Inc. v. Visual Real Estate, Inc.*, IPR2014-01339, 2016 WL 308801, \*17 (PTAB Jan. 25, 2016) (“a motion to exclude is not the proper mechanism to raise the issue of testimony in a rebuttal declaration

exceeding the permissible scope of reply testimony”); *Vibrant Media, Inc. v. General Electric Co.*, IPR2013-00170, 2014 WL 2965703, \*19 (PTAB June 26, 2014) (“A motion to exclude is not a mechanism to argue that a reply contains new arguments or relies on evidence necessary to make out a prima facie case.”). That is precisely what Patent Owner seeks to address with its motion to exclude, and thus the motion should be denied.

**B. Even if the Motion is Substantively Addressed, It Should Be Denied for the Same Reasons Patent Owner’s Motion to Strike Should Be Denied; Section VI.C of Dr. Mundy’s Second Declaration Is Relevant**

The issue set forth in Patent Owner’s motion to exclude has already been briefed by the parties with respect to Patent Owner’s motion to strike. *See* Paper 30 and 33. Consequently, to the extent the Board is inclined to substantively address this issue again here, in the context of an (improper) motion to exclude, Petitioners refer back to its Opposition to the Motion to Strike. For all the reasons set forth in that Opposition, Patent Owner’s motion to exclude should also be denied. *See* Paper 33.

Furthermore, to briefly reiterate those arguments, Petitioners here again briefly explain why Patent Owner’s arguments are incorrect. The opinion set forth by Dr. Mundy in Section VI.C of his second declaration is permissible and relevant to the obviousness issues in the proceeding.

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