

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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FLEX LOGIX TECHNOLOGIES, INC.  
Petitioner

v.

KONDA TECHNOLOGIES INC.  
Patent Owner

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Case PGR2019-00037  
Patent 10,003,553

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**OPPOSITION TO PATENT OWNER'S  
MOTION TO EXCLUDE EVIDENCE**

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## I. INTRODUCTION

Patent Owner's admissibility challenge to the Declaration of Dr. R. Jacob Baker (Ex. 1002) and Dr. Baker's CV (Ex. 1003) is procedurally improper and lacks merit. Patent Owner failed to timely object to the evidence it references in its Motion to Exclude (Paper 27, "Motion"), which is titled "Patent Owner's Objections to Evidence Pursuant to 37 C.F.R. § 42.64" and deprived Petitioner of the ability to address Patent Owner's challenges with, for example, supplemental evidence. The Motion also fails on the merits because it is directed to the sufficiency of the evidence as opposed to its admissibility, as it relates to Dr. Baker's credibility. In any event, the motion overlooks Dr. Baker's relevant qualifications and experience. It should be summarily denied.<sup>1</sup>

## II. ARGUMENT

The Board should deny the Motion for three independent reasons. *First*, the Motion is procedurally improper because Patent Owner failed to timely object to the evidence within the timeframe mandated by the Board's rules. *Second*, the Motion is directed to the sufficiency of the evidence, which cannot be addressed with a

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<sup>1</sup> Petitioner raised the impropriety of the motion on a conference call with the Board on May, 27, 2020. The Board indicated that Petitioner should just address the motion through its opposition. *See* Ex. 1043 at 27:25-28:11.

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motion to exclude. Finally, even if the Board considers the merits of Patent Owner's attacks, Dr. Baker's qualifications and experience demonstrate that he is more than qualified to provide opinions in this proceeding from the perspective of a person having ordinary skill in the art ("PHOSITA").

**A. Patent Owner Failed to Timely Object to Dr. Baker's Declaration Within the Timeframe Allowed by the Board's Rules**

Patent Owner's Motion should be denied because Patent Owner failed to timely object to Dr. Baker's Declaration within the timeframe allowed by the Board's rules.<sup>2</sup> *See* 37 C.F.R. § 42.64(b)(1) (requiring that "[a]ny objection to evidence submitted during a preliminary proceeding must be filed **within ten business days of the institution** of the trial.") (emphasis added). Indeed, in order to preserve a non-moving party's right to serve supplemental evidence, the Board requires parties to strictly comply with the timeliness requirement under § 42.64(b)(1). *See, e.g., Apple Inc. v. Achates Reference Publ'g, Inc.*, IPR2013-

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<sup>2</sup> Patent Owner's Motion also references Exhibit 1003, Dr. Baker's CV, but does not explain why the CV is inadmissible. *See generally* Motion. Thus, any attempt to exclude Exhibit 1003 should be rejected. Moreover, Petitioner's arguments herein regarding Dr. Baker's Declaration (Ex. 1002) are equally applicable to the CV (Ex. 1003), as there was no timely objection to the CV, and the Motion relates to the evidence's sufficiency.

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00080, Paper 90 at 48-49 (PTAB June 2, 2014) (denying patent owner's motion to exclude expert testimony because patent owner failed to object to evidence sought to be excluded within ten business days of the institution of trial under § 42.64(b)(1)).

Here, Dr. Baker's Declaration was served with the petition on March 18, 2019. The Board, after considering the petition and Patent Owner's preliminary response, instituted trial on September 19, 2019. Paper 13. Under 37 C.F.R. § 42.64(b)(1), Patent Owner was required to file its objections to the evidence by October 3, 2019, i.e., "within ten business days of the institution of the trial." Patent Owner never did so.<sup>3</sup>

During a conference call with the Board, Patent Owner admitted that it "wasn't aware" of the objection deadlines under the Board's rules and was "learning this," Ex. 1043 at 12-13, but ignorance of the Board's rules is no excuse. And the Board's rules require that the Motion itself "must identify the objections in the record in order and must explain the objections." *See* 37 C.F.R. § 42.64(c). Having

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<sup>3</sup> Patent Owner's failure to timely object to the evidence also deprived Petitioner any opportunity to supplement the evidence (to the extent Petitioner deemed doing so an appropriate course of action). *See* 37 C.F.R. § 42.64(b)(2).

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