

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WALMART INC.; Z-SHADE CO., LTD.;
COSTCO WHOLESALE CORPORATION;
LOWE'S HOME CENTERS, LLC; and
SHELTERLOGIC CORP.,
Petitioner,

v.

CARAVAN CANOPY INTERNATIONAL, INC.,
Patent Owner.

Case IPR2020-01026
Patent No. 5,944,040

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

I. INTRODUCTION

Patent Owner fails to meet its burden of proof to establish that it is entitled to the requested relief. *See* 37 C.F.R. § 42.20(c). Patent Owner’s motion provides no basis on which to exclude any of Petitioner’s evidence. Patent Owner instead improperly seeks to argue the merits of various evidence that have been offered. Patent Owner also asserts contradictions based on selective and out-of-context quotes that are clear upon a complete reading of the record. And, Patent Owner continues to make arguments to limit the scope of the challenged claims that are unsupported by the ’040 Patent itself. Patent Owner’s motion should be denied, and the Board should weigh Petitioner’s invalidity grounds on the merits.

II. PETITIONER’S EVIDENCE IS ADMISSIBLE

A. Ex. 1003, ¶72

As an initial matter, Patent Owner’s boilerplate objections to Exhibit 1003 (Paper 14, at 1-2) failed to provide any explanation for the objection, much less “sufficient particularity to allow correction in the form of supplemental evidence” as required by 37 C.F.R. § 42.64(b)(1). This deprived Petitioner and Dr. Klopp of any opportunity to provide supplemental evidence, and Patent Owner’s motion should be denied for this reason alone.

Even if Patent Owner’s objection was sufficient, Patent Owner’s motion should be denied as moot. Patent Owner complains about a minor inconsistency

between a parenthetical in paragraph 72 of Dr. Klopp’s declaration regarding “facilitating easier entry and exhibit by users,” and his deposition testimony. But that parenthetical is not a basis for any argument made in the Petition or Reply. The Petition and Reply do not argue that facilitating ease of entry or exit from the tent is a motivation to combine the prior art. Thus, “there is no substantive argument pertaining to that [assertion] that can be considered.” *Microsoft Corp. v. FG SRC LLC*, IPR2018-01605, Paper 72 at 13 (PTAB Apr. 9, 2020) (“[I]n evaluating Petitioner’s asserted grounds of unpatentability, we only consider substantive arguments made by the parties in their papers during trial (i.e., the Petitions, Response, Reply, and Sur-Reply).”).

Further, alleged inconsistent testimony is not a proper basis for exclusion. The Board is capable of properly weighing the merits of Dr. Klopp’s declaration and deposition testimony. *See Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, CBM2012-00002, Paper 66 at 67-68 (PTAB Jan. 23, 2014) (finding that any inconsistency between experts reply declaration and cross examination testimony would affect the weight not admissibility of evidence). Indeed, Patent Owner’s cited cases do not support exclusion as the proper remedy for contradictory testimony but instead support that the Board should be able to weigh the evidence appropriately. In *Ralston v. Smith & Nephew Richards, Inc.*, the district court considered but disregarded contradictory testimony, but did not

exclude it under FRE 702, as it did other expert testimony. 275 F.3d 965, 968 (10th Cir. 2001). Further, *Chartier v. Brabender Technologie, Inc.* involves the question of “whether summary judgment can be defeated based on statements in the expert report that are contradicted by the same expert’s subsequent deposition testimony.” No. CIV.A. 08-40237-FDS, 2011 WL 4732940, at *7 (D. Mass. Oct. 5, 2011). The court struck the experts report based on the disclosure requirements of Federal Rule of Civil Procedure 26(a)(2), which are not applicable in an IPR. *Id.* at 7-8. Patent Owner provides no authority for excluding testimony based on an alleged inconsistency.

Finally, even if the parenthetical in paragraph 72 were somehow inadmissible, Patent Owner cannot leverage alleged inadmissibility as to the parenthetical to exclude *other testimony* that is undisputedly consistent with Dr. Klopp’s deposition. At most, Patent Owner’s argument would exclude the parenthetical “(facilitating easier entry and exit by users)” — a parenthetical not relied upon in the record — not Dr. Klopp’s common sense opinion that including the center pole would have increased headroom inside the tent, which is well-supported by Dr. Klopp’s consistent testimony. *E.g.*, Ex. 1025, ¶¶112-29. That testimony supports a finding of obviousness of the challenged claims.

In sum, the Board should deny Patent Owner's motion as to Ex. 1003, ¶72 as insufficiently preserved and/or moot, and should weigh the merits of Petitioner's invalidity grounds.

B. Ex. 1025, ¶¶ 31-35

Again Patent Owner's boilerplate objections (Paper 28, at 1-2) failed to provide any explanation for the objection, much less "sufficient particularity to allow correction in the form of supplemental evidence" as required by 37 C.F.R. § 42.64(b)(1). This deprived Petitioner and Dr. Klopp of any opportunity to provide supplemental evidence, and Patent Owner's motion should be denied for this reason alone

Patent Owner challenges out-of-context statements in Dr. Klopp's declaration and misrepresents Dr. Klopp's opinion. Dr. Klopp's opinion is that the plain and ordinary meaning of "stretch" as used within the '040 Patent "carries a general meaning of at least 'spreading out or extending during the pitching of the tent.'" Ex. 1025, ¶35. His opinion is consistent with the plain and ordinary meaning and the intrinsic record, and his opinion does not contradict the District Court's claim construction. Indeed, the District Court *declined to construe the term*. Ex. 1018, at 10-11. As Dr. Klopp explains, when pitching the tent, "the tent frame elements . . . push up the center pole and heighten the roof (as well as spreading out the roof material to a more fully deployed state . . .)." Ex. 1025, ¶35.

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