

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTEL CORPORATION,
Petitioner,

v.

PARKERVISION, INC.
Patent Owner.

Case No. IPR2020-01265
Patent No. 7,110,444

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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Pursuant to 37 C.F.R. § 42.64(c), Petitioner moves to exclude Exhibit 2022 as (1) untimely and improper pursuant to 37 C.F.R. § 42.23(b) and the Consolidated Trial Practice Guide (Nov. 2019) (“TPG”)¹ and (2) as unfairly prejudicial under Federal Rule of Evidence 403. *See* 37 C.F.R. § 42.62(a). Petitioner timely objected to Exhibit 2022 on September 17, 2021. (Paper 27.)

I. INTRODUCTION

For the first time in its Sur-Reply, Patent Owner (“PO”) introduced a 25-page exhibit (Ex. 2022) consisting of dozens of mathematically flawed calculations prepared by its attorneys to support a late-breaking theory of patentability based on the term “storage element” in Claim 3. The parties agree that patentability turns on whether the Tayloe prior art reference discloses the required “storage element.” The parties further agree that the “storage element” “stores non-negligible amounts of energy from an input electromagnetic signal.” PO first proposed a construction requiring the “stor[age] of non-negligible amounts of energy” in its POR (Petitioner had not previously proposed construing this term). Despite proposing a construction with this requirement, PO *never* argued in its POR that Tayloe lacks a

¹ In its Order dated September 27, 2021, the Board authorized Petitioner to address the untimeliness and impropriety of Patent Owner’s citation to Exhibit 2022 in its Sur-Reply. (Paper 31, 2.)

storage element that stores non-negligible amounts of energy. Instead, in its POR, PO hinged its theory of patentability on another part of its proposed “storage element” construction. For the first time in its Sur-Reply, however, PO argues that Tayloe’s capacitors do not store “non-negligible” amounts of energy and that Tayloe, therefore, does not disclose the required “storage element.” Specifically, PO advances an entirely new theory of patentability in its Sur-Reply—that to determine whether an element stores a non-negligible amount of energy requires calculating what percentage of the total available energy in an input signal is stored in the element. PO submitted Exhibit 2022—25 pages of attorney-prepared mathematical equations—to purportedly show that Tayloe does not meet this new test. Exhibit 2022 should be excluded for two reasons.

First, it is untimely and thus procedurally improper. PO first introduced Exhibit 2022 with its Sur-Reply (Paper 26) on September 14, 2021, in violation of 37 C.F.R. § 42.23(b) and the Board’s rules. *See* 37 C.F.R. § 42.23(b) (“A sur-reply ... may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.”); TPG at 73 (same). And PO’s tardy disclosure has resulted in significant prejudice to Petitioner. *See* FRE 403. PO raises the complicated calculations in Exhibit 2022 at a point when Petitioner cannot fully respond—after the time when Petitioner could respond with expert testimony or a written response. Forcing Petitioner to address these calculations

during an oral hearing without the benefit of briefing or expert testimony will significantly prejudice Petitioner.

Second, Exhibit 2022 should be excluded under FRE 403. Exhibit 2022 is an attorney-prepared document that, as Petitioner’s expert made clear at his deposition, is riddled with unsupported assumptions and calculation errors. Exhibit 2022 is thus not supported by any expert testimony and lacks the necessary factual foundation to make it relevant evidence. And any purported relevance of this unreliable document is substantially outweighed by the unfair prejudice and confusion that it creates, particularly given that Petitioner will not have an adequate opportunity to respond fully due to PO’s delinquent submission. *See* FRE 403. Accordingly, the Board should exclude Exhibit 2022.

II. BACKGROUND

The ’444 patent relates to a receiver for frequency down-converting a wireless input signal. Claim 3 requires two “frequency down-conversion modules” for down-converting the input signal, and each module comprises “a storage element.”

Petitioner did not propose construing “storage element” in its Petition, but PO did so in its POR, proposing to construe the term as “an element of an energy transfer system that stores nonnegligible amounts of energy from an input electromagnetic signal.” (POR, 4.) Despite its proposed construction, PO made no argument that the Tayloe reference fails to disclose “an element ... that stores nonnegligible amounts

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