

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K-40 ELECTRONICS, LLC
Petitioner

v.

ESCORT, INC.
Patent Owner

Case IPR2013-00203
Patent 7,999,721

Before GLENN J. PERRY, THOMAS L. GIANNETTI, and
TRENTON A. WARD, *Administrative Patent Judges*.

GIANNETTI, *Administrative Patent Judge*.

ORDER
Request for Rehearing
37 C.F.R. § 42.71(d)

Petitioner, K-40 Electronics, LLC, seeks rehearing of the Board's decision to permit live testimony from Steve Orr at the final hearing scheduled for June 17, 2014. Paper 35 ("Reh. Req."). For the reasons that follow, the request is granted in part.

BACKGROUND

Patent Owner, Escort, Inc., moved to present live testimony from its named inventor, Steven K. "Steve" Orr, at the final hearing in this case on June 17, 2014. Paper 28 ("Motion"). Petitioner, K-40 Electronics, LLC, opposed. Paper 29 ("Opposition").

The Board granted the Motion, subject to certain restrictions, including that the testimony be limited to 30 minutes of cross-examination by Petitioner's counsel, followed by 30 minutes of redirect by Patent Owner's counsel. Paper 31 ("Order"). The Board's Order provided for no live direct testimony from Mr. Orr, relying instead on his declaration as his direct examination.

Petitioner's rehearing request asserts that the Board misapprehended or overlooked two matters. First, Petitioner now asserts that it has "[n]o [f]urther [q]uestions" for Mr. Orr. Reh. Req. 6 (emphasis removed). This is a new argument not presented in Petitioner's Opposition. Second, Petitioner asserts that the Board overlooked the availability of a video recording of Mr. Orr's deposition that would provide a record of his demeanor. *Id.* at 3.

DISCUSSION

A request for rehearing of a decision granting a motion must specifically identify all matters the party believes the Board misapprehended or overlooked in the decision. 37 C.F.R § 42.71(d). Moreover, the request must identify the place in the opposition where each matter was previously addressed. *Id.*

The first matter, namely, Petitioner's representation that it has "[n]o [f]urther [q]uestions" for Mr. Orr, could not have been misapprehended or overlooked because it was first presented in Petitioner's rehearing request. *See* Reh. Req. 2-3.

Petitioner suggests that by allowing live testimony, the Board is ordering their counsel to cross-examine Mr. Orr, when they desire "to pass on further cross-examination of Mr. Orr." Reh. Req. 3, 6. This is not accurate. The Board determined to authorize live testimony of Mr. Orr to permit the Board to observe his demeanor in a live setting. The Board is not ordering Petitioner to cross-examine Mr. Orr. The Board simply gave Petitioner the opportunity to question Mr. Orr first, if it chose to do so.

Because Petitioner's counsel have now informed the Board that they have no further questions for Mr. Orr, Patent Owner will be given the first opportunity to examine Mr. Orr. Petitioner may then, if it desires, cross-examine Mr. Orr at the hearing. In lieu of or in addition to cross-examining Mr. Orr at the hearing, Petitioner may rely also on his deposition testimony.

As to the second matter, the Board did not overlook the existence of a video record of Mr. Orr's deposition testimony. In fact, the existence of the video record was discussed during the April 25, 2014, telephone conference call authorizing the Motion and in Petitioner's opposition to the Motion. Opposition 2-3. The Board was aware of the video record when it concluded that this case presents special circumstances warranting the presentation of live testimony. Order 2-3. The Board determined that notwithstanding the existence of the video record, there was good cause to grant the Motion.

Although Petitioner's representation that it has "[n]o [f]urther [q]uestions" for Mr. Orr was first presented in Petitioner's rehearing request, the Board has reconsidered its decision to the extent that its Order did not authorize Petitioner to

use the video record. Therefore, in addition to the transcript of the Orr deposition, Petitioner will be permitted to submit and rely on portions of the video record of the deposition to the extent specified below.

ORDER

In view of the foregoing, it is, therefore,

ORDERED that Patent Owner's request for rehearing of the Board's decision on Patent Owner's Motion to present live testimony of Steve Orr is granted in part;

FURTHER ORDERED that the Board's Order of May 21, 2014, is modified, in that live testimony of Mr. Orr at the final hearing on June 17, 2014, will be limited to up to 30 minutes of direct testimony by Patent Owner's counsel, followed by up to 30 minutes of cross-examination by Petitioner's counsel, and any redirect examination will be at the discretion of the Board;

FURTHER ORDERED that Petitioner may submit up to 30 minutes of video recording of Mr. Orr's deposition testimony, no later than five business days after the final hearing;

FURTHER ORDERED that live cross-examination of Mr. Orr by Petitioner's counsel is optional; Petitioner may, if it wishes, rely on Mr. Orr's deposition transcript, or the video record of that deposition, in lieu of or in addition to live cross-examination of Mr. Orr at the hearing; and

FURTHER ORDERED that the scope of Mr. Orr's direct examination will strictly be limited to his declaration testimony in this proceeding and the scope of his cross-examination will strictly be limited to the scope of direct examination.

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For PETITIONER:

Greg Gardella

Scott McKeown

OLBON SPIVAK

cpdocketgardella@oblon.com

cpdocketmckeown@oblon.com

For PATENT OWNER:

Thomas W. Humphrey

John Paul Davis

WOOD HERRON & EVANS, LLP

thumphrey@whe-law.com

jdavis@whe-law.com