

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JIAWEI TECHNOLOGY (HK) LTD., JIAWEI TECHNOLOGY (USA) LTD.,
SHENZHEN JIAWEI PHOTOVOLTAIC LIGHTING CO., LTD., ATICO
INTERNATIONAL (ASIA) LTD., ATICO INTERNATIONAL USA, INC.,
CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN FLORIDA),
CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN CHINA),
COLEMAN CABLE, LLC, NATURE'S MARK, RITE AID CORP., SMART
SOLAR, INC., AND TEST RITE PRODUCTS CORP.

Petitioner,

v.

SIMON NICHOLAS RICHMOND

Patent Owner.

U.S. Patent No. 7,429,827

IPR Case No.: IPR2014-00938

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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Cases

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FRCP 32	1
FRE 401	2, 5, 6
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Regulations

37 C.F.R. § 42.23	2, 4
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I. SUMMARY OF ARGUMENT

The Board should exclude inadmissible evidence filed with Petitioner's Reply.

Belated evidence (i.e., new testimony, exhibits) that could have been, but was not, presented in an earlier filing is barred from consideration by the Patent Trials and Appeals Board's Trial Practice Guide. Petitioner relies on new testimony and exhibits to morph their arguments, once confronted with Patent Owner's response. Such new testimony by its expert, Dr. Peter W. Shackle ("Shackle") and the additional definitions and third party website information was equally available to Petitioner in June 2014, when Petitioner filed its petition in this matter, as it is now, and Petitioner has not alleged otherwise. Further, many of Petitioner's new Reply exhibits fail to satisfy the requirements of the Federal Rules of Evidence. Patent Owner timely objected to this evidence pursuant to 37 C.F.R. § 42.64. Therefore, the Board should exclude the objected to exhibits and objected to portions of Dr. Shackle's new declaration testimony.

Further, the form of a question asked on cross-examination must be sufficiently clear and specific. FRCP 32(d)(3); 77 Fed. Reg. 48,756, 48,772, App. D. However, many of Petitioner's Counsel's questions during the deposition of Patent Owner's expert, Dr. Alfred A. Ducharme, were not. Patent Owner's counsel

timely objected, and the Board should exclude responses to the questions on cross-examination where the question was not sufficiently clear.

II. PETITIONER'S REPLY EXHIBITS ARE BELATED

The Trial Practice Guide succinctly and clearly provides that “[a] reply may only respond to arguments raised in the corresponding opposition. § 42.23...a new issue or belatedly present[ed] evidence will not be considered and may be returned... Examples of indications that a new issue has been raised in a reply include...new evidence that could have been presented in a prior filing.” 77 Fed. Reg. 48,756, 48,767 ¶ I.

Despite this strict prohibition, Petitioner elected to introduce new testimony and present new exhibits that could reasonably have been, but were not, included in an earlier filing, i.e., the Original/Revised Petition(s) or Dr. Shackle’s first declaration. The list of Petitioner’s Belated Exhibits includes: Exhibit 1047, ¶¶ 26-27, 35-38, 50 and 69 (Dr. Peter W. Shackle’s Declaration relying on other belated Exhibits and/or offering new belated testimony); Exhibit 1048 (George Mueller’s LinkedIn profile); Exhibit 1049 (Alfred Ducharme's LinkedIn profile); Exhibit 1050 (Ihor Lys' LinkedIn profile); Exhibit 1051 (Kevin Dowling’s LinkedIn profile); Exhibit 1052 (Frederick M. Morgan's Equilar Atlas profile); Exhibit 1053 (Mike Blackwell's LinkedIn profile); Exhibit 1054 (Alex Chliwnyj's LinkedIn profile); Exhibit 1055 (Steven Watts’ LinkedIn profile); Exhibit 1056

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