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 RESPONSE TO PETITIONER'S MOTION TO EXCLUDE CERTAIN EVIDENCE OF RECORD

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Patent Owner opposes Petitioner's motion to exclude certain evidence of record for the reasons detailed below, and consists of mere argument regarding the weight of the evidence rather than its admissibility.

I. Introduction

Petitioner's motion to exclude (Paper 56, "Mot. Exclude") relies in most cases on late noticed or improperly preserved objections, and in all cases is without merit.

II. The Motion to Exclude Exhibits 2042, 2050, 2052, 2054, and 2062 is Moot

On August 21, 2015 at Paper 57, the Board denied Patent Owner's motion to terminate (Paper 37), which was the only paper (along with Patent Owner's reply related to the motion, Paper 47) that cited Exs. 2042, 2050, 2052, 2054, and 2062. The admission of these exhibits and Petitioner's objection to such admission are therefore moot issues. Patent Owner reserves its right to appeal the decision of the Board and address the Petitioner's objections and any apparent lack of consideration of such exhibits by the Board in making its decision.

III. The Testimony Regarding the Claim Term "Varying" Should not Be Excluded

Petitioner asserts that Patent Owner drew inaccurate and misleading conclusions "that Dr. Shackle agreed with Patent Owner's claim construction for "varying color" in Patent Owner's Response (Paper 34, the "Response"), which

was filed on June 24, 2015. Mot. Exclude, 4 – 5. Petitioner's objection regarding deposition testimony of Shackle (Exs. 2022 and 2023, cited as “Shackle Dep.”) as it was cited in Patent Owner's response, however, is late, and any objection is not properly preserved. Petitioner does not address any objection made during the deposition that relates to its present motion to exclude, and, therefore, waives those objections, if any.

"Once a trial has been instituted, any objection must be served within five business days of service of evidence to which the objection is directed. The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence." 37 CFR 42.64. Petitioner filed its motion to exclude on August 19, 2015, which is more than five business days since Patent Owner filed his Response, and, in any event, the motion to exclude is not a notice of objection, but rather the objection itself, which is procedurally improper.

Furthermore, as Petitioner acknowledges the Board in its Decision chose its own construction of varying color (see Paper 20 at 6 - 9), which for purposes of the IPR proceeding neither party contested (see the Response at 18 - 9 and Petitioner's Reply (Paper 50) at 9 - 10). Furthermore, at the time of its Response (June 24, 2015), Patent Owner did not know that Petitioner would withdraw reliance on its own construction (Paper 50 filed on August 11, 2015) and adopt the Board's

construction. Petitioner cannot now complain that Patent Owner's argument regarding the construction of varying color in his Response, which included citation to Dr. Shackle's testimony was irrelevant, when it was Petitioner who put that construction at issue when it filed the Petition (see, e.g. Paper 13, pg. 17). In any event, Petitioner's objection is untimely and not preserved, and is further moot in the light of the Board's construction, and the lack of a dispute between the parties about that construction for purposes of this proceeding.

IV. The Testimony Regarding "Exposed Switch" Should Not Be Excluded

Again, Petitioner uses a shot-gun approach to present its objections seeking to exclude Dr. Shackle's testimony (Exs. 2022, 2023) related to "exposed" and "hidden switches." Mot. Exclude, 5 – 6. Petitioner, however, fails to explain any of its form objections, individually, except the objection at Shackle Dep., 100:15-20 and thus waives them. *See* Fed. Reg. Vol. 77, No. 157 at 48767 (A motion to exclude must: "Explain each objection."). Furthermore, Petitioner failed to object to the relevancy of the cited testimony, or the Patent Owner's Response (Paper 34) and Dr. Ducharme's declaration (Ex. 2021) which purportedly rely on that testimony. *See* 37 CFR 42.64 ("An objection to the admissibility of deposition evidence must be made ***during the deposition***.") (emphasis added); Office Patent Trial Practice Guide, 37 CFR Part 42, 48772 ("Examples of objections that would be properly stated are: "Objection, form", "Objection, hearsay"; "Objection,

relevance"; and "Objection, foundation."). The objections, therefore, are not timely or properly preserved.

Even if the objections were timely or properly preserved, which they are not, Petitioner explains only one objection--the one at Shackle Dep., 100: 15- 20 (which relates to objections stated at 99:10, 100:3, 7, and 12). *See* Mot. Exclude, 5 - 6. This objection has no merit, because immediately following these objections, Patent Owner's counsel qualifies his questions about the significance of a switch that is exposed in as a consideration in design as "depending on the consumer product" (Shackle Dep., 100:22- 25) and in "some consumer products" (*id*. at 101: 2, 101: 6) and in "the context of solar garden lights." Dr. Shackle responds to each question, without any further objection from counsel. It is clear from the record that any purported confusion or incompleteness in the hypothetical presented by Patent Owner's counsel is alleviated by Patent Owner's subsequent questions, and are relevant to show the proper construction and scope of the claims, including the term "accessible." *See*, *e.g.*, Response, 20 - 30. Furthermore, such questions are clear and relevant to at least Patent Owner's assertion discussed at the Response, pg. 22 – 24, that switch placement is a design consideration for a person ordinarily skilled in the art.

The other objections (cited at Mot. Exclude, 5, as Shackle Dep.at 99:1 - 100:20, 106:16, 108:22, 109:9, 110:1, 110:12, 111:20, and 114:19) do not relate to

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