

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

J SQUARED, INC. d/b/a UNIVERSITY LOFT COMPANY,
Petitioner,

v.

SAUDER MANUFACTURING COMPANY,
Patent Owner.

Cases¹

IPR2015-00774 (Patent 8,585,136 B2)

IPR2015-00958 (Patent 8,585,136 B2)

Before LINDA E. HORNER, JOSIAH C. COCKS, and
JAMES A. WORTH, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

ORDER

Conduct of the Proceedings and Trial Hearing
37 C.F.R. §§ 42.5, 42.70

¹ This order addresses issues raised in both cases. We exercise our discretion to issue one order to be filed in each case. The parties, however, are not authorized to use this style heading in subsequent papers.

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I. INTRODUCTION

A conference call was held on the afternoon of April 1, 2016, at 3:00 p.m. The participants of the call were respective counsel for the parties and Judges Horner, Cocks, and Worth. Counsel for Patent Owner, Sauder Manufacturing Company (“Patent Owner”) initiated the call to seek authorization to file a motion for observations on cross examination testimony of its own witnesses and to bring physical specimens of Patent Owner’s commercial product and of Petitioner’s commercial product to the oral argument. Details of the oral argument were also discussed on the call.

The Petitioner provided a court report for the conference call, and agreed to provide a copy of the transcript of the call to the Board.

The Board heard arguments presented by Patent Owner and Petitioner concerning Patent Owner’s requests. The main points are summarized below in sections II and III. A copy of the transcript of the conference call will be entered into the record when it has been received by the Board.

The Board also provides, in this Order, details on, and guidance for, the oral argument in section IV.

II. REQUEST TO FILE MOTION FOR OBSERVATIONS

Patent Owner requested authorization to file motions for observations on its own witnesses because the cross-examination of Patent Owner’s witnesses took place after Patent Owner filed its last substantive paper, such that Patent Owner had no way to bring relevant testimony of its own witnesses to the Board’s attention. In the alternative, Patent Owner requested authorization to file a non-argumentative listing of the portions of the deposition testimony that provide context for the characterizations of the testimony made by Petitioner in its Reply. The Board denied both requests.

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As noted in our recent Order expunging Patent Owner's unauthorized motions for observations (Paper 29), "it is the party taking the cross-examination that typically files observations." Paper 29, at 3. In this instance, the deposition transcripts of Patent Owner's witnesses are not lengthy. The Board can review the direct testimony of Patent Owner's witnesses memorialized in the witnesses' declarations and the cross-examination and any redirect examination and re-cross examination of the witnesses memorialized in the deposition transcripts in order to assess the characterizations of the deposition testimony made by Petitioner in its Reply.

III. PHYSICAL EXHIBITS

Patent Owner requested to bring physical specimens of Patent Owner's commercial product and of Petitioner's commercial product to the oral argument for inspection by the Board. Petitioner objected because these physical specimens were not made part of the Record and constitute unauthorized and belated supplemental information. The Board denied Patent Owner's request.

A trial before the Board is conducted on paper. By the time the proceeding reaches final oral argument, nothing new can be presented, no new evidence, no new arguments. *Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48768 (Aug. 14, 2012). At that stage, the trial is already completed, and the final oral argument is not an opportunity to add anything to a party's case. Whatever a party desires to present, for whatever reason, should have already been presented in the party's petition, response, opposition, motion, reply, declarations, observations on cross-examination, or other exhibits presented at an appropriate time during the trial. It is from that perspective that we read the prohibition in the Board's Patent Trial Practice Guide

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against presenting new evidence or new arguments in the demonstrative exhibits at final oral argument.

Patent Owner has submitted with its Patent Owner Response videos of its commercial product demonstrating how a user can remove and reattach the seat from the base portion of the chair and photos of Petitioner's commercial product. The Board sees no need to supplement these videos and photos with physical specimens of the chairs at the oral argument.

Further, in light of the fact that Patent Owner has not requested introduction of the physical commercial chairs into the record, such introduction at this stage of the proceeding would need to be approved through a motion for supplemental information. Patent Owner has not filed such a motion. We do not, by this order, provide authorization for Patent Owner to file a motion to submit this supplemental information, because Patent Owner was clearly in possession of these physical samples at the time it filed its Patent Owner Response, and thus, Patent Owner likely cannot now show why the supplemental information reasonably could not have been obtained earlier, as required by 37 C.F.R. § 42.123(b). As such, the Board exercised discretion to not allow presentation of any physical specimens of commercial chairs at the oral argument.

IV. ORAL ARGUMENT

As set forth in the Scheduling Order in both proceedings (Paper 8), an oral argument, if requested, was set for April 21, 2016. Both Petitioner and Patent Owner have requested oral argument in these proceedings pursuant to 37 C.F.R. § 42.70. *See* Papers 23, 24. We *grant* these requests.

Oral argument in these proceedings will commence at 2:00 PM on April 21, 2016 on the ninth floor of Madison Building East, 600 Dulany

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Street, Alexandria, Virginia. The Board will provide a court reporter for the oral argument, and the reporter's transcript will constitute the official record of the hearing.

Because the proceedings involve the same patent and overlapping issues of claim interpretation, we will hear the proceedings together. Each party will have 60 minutes of total argument time for both proceedings. Petitioner bears the ultimate burden of proof that the claims at issue in these reviews are unpatentable. Therefore, Petitioner will proceed first to present its case with regard to the challenged claims on which basis we instituted trial. Thereafter, Patent Owner will respond to Petitioner's case. After that, Petitioner will make use of the rest of its time responding to Patent Owner. There are no motions to be addressed at the oral argument, and no rebuttal time will be allotted to Patent Owner.

There is a strong public policy interest in making all information presented in these proceedings public, as the review determines the patentability of claims in an issued patent and thus affects the rights of the public. This policy is reflected in part, for example, in 35 U.S.C. § 316(a)(1) and 35 U.S. C. § 326(a)(1), which provide that the file of any *inter partes* review or post grant review be made available to the public, except that any petition or document filed with the intent that it be sealed shall, if accompanied by a motion to seal, be treated as sealed pending the outcome of the ruling on the motion. *The oral argument will be open to the public for in-person attendance.* In-person attendance will be accommodated on a first-come, first-served basis.

Under 37 C.F.R. § 42.70(b), demonstrative exhibits must be served five business days before the oral argument. The parties are directed to CBS

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