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Paper 111
Entered: May 5, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CAMPBELL SOUP COMPANY, CAMPBELL SALES COMPANY, and TRINITY MANUFACTURING, LLC,
Petitioner,

v.

GAMON PLUS, INC.,
Patent Owner.

IPR2017-00091 (Patent D621,645 S)
IPR2017-00094 (Patent D612,646 S)[1]

Before GRACE KARAFFA OBERMANN, BART A. GERSTENBLITH, and ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION
Denying Motions to Exclude
37 C.F.R. §§ 42.64(c), 42.61(a)

[1] We exercise our discretion to issue one Order in each of these proceedings. The parties may not use this caption style.

I. BACKGROUND

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, LLC (collectively, "Petitioner") filed motions to exclude pursuant to 37 C.F.R. §§ 42.64(c) and 42.61(a) and the Federal Rules of Evidence ("Fed. R. Evi."). IPR2017-00091, Paper 104; IPR2017-00094, Paper 104. Gamon Plus, Inc. ("Patent Owner") filed an opposition. IPR2017-00091, Paper 106; IPR2017-00094, Paper 106. Petitioner filed a reply. IPR2017-00091, Paper 107; IPR2017-00094, Paper 107.

Patent Owner filed a motion to exclude in each proceeding pursuant to 37 C.F.R. § 42.64(c) and the Fed. R. Evi. IPR2017-00091, Paper 102; IPR2017-00094, Paper 102. Petitioner filed an opposition. IPR2017-00091, Paper 105; IPR2017-00094, Paper 105. Patent Owner filed a reply. IPR2017-00091, Paper 108; IPR2017-00094, Paper 108.

Because the motions, oppositions, and replies are nearly identical in each proceeding, we discuss and cite to the papers in IPR2017-00091. We address each motion in turn below.

II. PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Petitioner moves pursuant to Fed. R. Evi. 701 and 702 and 37 C.F.R. §§ 42.64(c) and 42.61(a) to exclude Patent Owner's annotated figures (the "Challenged Figures") offered in Patent Owner's Response. Paper 104, 1. Specifically, Petitioner timely objected (Paper 96) and later preserved these objections through its Motion to Exclude challenging seven annotated figures in Patent Owner's Response. *See* Paper 104, 2–3. According to Petitioner, the Challenged Figures are annotations made by Patent Owner's counsel on not-to-scale drawings in U.S. Patent No. D621,645 S ("the '645

patent") and various prior art references, and the drawings and annotations are relied upon "as evidentiary support for Patent Owner's arguments regarding purported specific dimensions and proportionality of the '645 patent's claimed design and various prior art designs." *Id.* at 1–2.

Petitioner argues that annotations accompanying the figures are improper expert testimony under Fed. R. Evi. 702. *Id.* at 2. For example, Petitioner contends "Patent Owner has offered the annotations as expert evidence regarding the largest article that can be loaded/dispensed" in Linz,[2] the reference asserted in these proceedings. *Id.* Similarly, Petitioner argues that Patent Owner has offered the annotations as expert evidence regarding location of an article within a dispenser. *Id.* Petitioner also contends the Challenged Figures offer improper expert testimony "regarding proportionality and spatial relationships/orientation," "exposed can surface," "label positioning," and "lateral inserts and exposed can surface." *Id.* at 2–3.

Petitioner contends separately that the annotations are speculative and should be excluded under Fed. R. Evi. "701 and 702 because Patent Owner relies on the comparative scaling of two separate figures, to reach qualitative conclusions regarding the 'largest possible diameter' of a can." *Id.* at 2. Similarly, Petitioner argues that "Patent Owner relies on the comparative scaling of two separate figures, to reach qualitative conclusions regarding the relative 'esthetic presentation.'" *Id.*

Patent Owner responds that "the diagrams that Petitioners seek to strike are not opinion testimony, but attorney argument and presentation of evidence of record." Paper 106, 1. Further Patent Owner contends that the

[2] U.S. Patent No. D405,622.

figures and annotations in its brief are based on deposition testimony of record and not "additional evidence, just a presentation of evidence already of record." *Id.* at 4.

In its Reply, Petitioner seems to agree with Patent Owner that the annotated figures are not evidence per se, but instead attorney argument. Paper 107, 1. Petitioner notes that

> Patent Owner now concedes that the Challenged Figures are mere attorney argument. (Paper 106, at 2, 10.) Patent Owner insists, however, that the Challenged Figures are attorney argument directed to underlying evidence. (*Id.* at 11.) They are not. Rather, the Challenged Figures are attorney argument directed only to underlying attorney argument.

Paper 107, 1. The disagreement between the parties seems to be whether the Challenged Figures represent improper attorney argument, or proper attorney argument based on cross-examination and the evidence of record. *See* Paper 106, 1–4.

Regardless of the answer to this issue, we do not believe a motion to exclude is the proper vehicle for deciding the answer. A motion to exclude typically is concerned with excluding evidence, not argument. Here, there seems to be no dispute that Petitioner is seeking to exclude attorney argument. We can weigh such attorney argument based on numerous factors, including whether it lacks adequate foundation, presents improper expert testimony, or is speculative. For example, based on the parties' arguments and the identified evidence of record, we can determine whether the Patent Owner's argument are based upon cross examination testimony of Petitioner's expert witness.

Additionally, we can determine whether the attorney argument accurately conveys a summary of admissible evidence already of record.

Notably, Petitioner admitted in its Petition that an ordinary observer would be capable of determining the dimensions and positioning of the hypothetical Linz can. *See* Pet. 27–29 (Paper 2); *see also Cook Grp. Inc. v. Boston Scientific Scimed, Inc.*, No. 2019-1370, slip op. at 17 (Fed. Cir. Apr. 30, 2020) (holding that "an admission in a preliminary patent owner response, just like an admission in any other context, is evidence appropriately considered by a factfinder"). Specifically, Petitioner admitted in its Petition that an ordinary observer, who is not an expert, would find the challenged design claim "is substantially identical to the design disclosed by Linz." Pet. 27–28. Petitioner admitted that an ordinary observer would be able to place "a cylindrical can (which is inherently disclosed by Linz)" into "Linz in its can receiving area below the access door / label area." *Id.* at 28. Petitioner, further, included the figure below as something an ordinary observer would be able to create or determine without expert involvement:

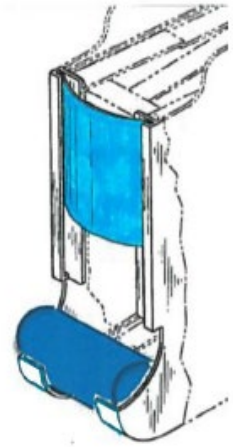

Fig. 1 of Linz a plus can

Petitioner's annotated Figure 1 of Linz (Pet. 28) adding a hypothetical blue can that Linz does not describe.

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