UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACCO Brands Corporation and
ACCO Brands USA LLC,
Petitioner,

v.

Think Products, Inc.,
Patent Owner.

Case IPR2015-01167
Patent 8,717,758

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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TABLE OF AUTHORITIES

Rules

I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Petitioner ACCO moves under 37 C.F.R. § 42.64(c) to exclude Exhibit 2007, entitled "Simplified Explanation of Findings Provided in the IPR."[1] As of the filing of this motion, Ex. 2007 has not been filed. If the Patent Owner does not file Ex. 2007, then Ex. 2007 is not part of the IPR record and this motion will be moot.

II. STATEMENT OF MATERIAL FACTS

1. Exhibit 2007 was first brought to the Petitioner's attention during the deposition of the Patent Owner's witness Robert Mahaffey, which took place on March 21, 2016, more than two months after the Patent Owner's Response was filed, on January 15, 2016.

2. Mr. Mahaffey brought to his deposition a copy of what was later marked as Exhibit 2007, and during the deposition he referred to this document as his "notes" that he had prepared in preparation for the deposition. *See* Ex. 1023, Mahaffey Dep. Tr. 13:17-14:3.

3. During redirect examination of Mr. Mahaffey, counsel for the Patent Owner marked this document as Exhibit "A." *See* Ex. 1023, Mahaffey Dep. Tr. 114:7-115:9.

[1] Identical motions to exclude are being filed in IPR2015-01167 and IPR2015-01168.

4. Exhibit A is identical to what was later re-marked by the Patent Owner as Exhibit 2007. Accordingly, any references to Exhibit 2007 in this motion also refer to Exhibit A.

5. During redirect examination, Mr. Mahaffey testified that Exh. 2007 is a report that he compiled as a "simplification, so [sic] more lay terms to describe my declaration, how I came to my findings, my opinion in the declaration itself." Ex. 1023, Mahaffey Dep. Tr. 115:11-17.

6. Mr. Mahaffey further stated that Ex. 2007 "captures my method, my process, my analysis of the cited art in order for me to collect my thoughts and be able to present my expert witness testimony today." Ex. 1023, Mahaffey Dep. Tr. 115:18-24.

7. During the deposition of the Petitioner's witness Ryan White, which was taken concerning his supplemental declaration, Ex. 1024, counsel for the Patent Owner re-marked as Ex. 2007 what had earlier been marked as Ex. A. Ex. ___,[2] White Dep. Tr. 88:9-22.

[2] As of the filing of this motion, Mr. White's deposition transcript has not been filed. If the Patent Owner does not file Mr. White's deposition transcript, then Mr. White's deposition testimony will not be a part of the IPR record, and the Board may rule on this motion without consideration of that testimony.

8. During Mr. White's deposition, counsel for the Patent Owner asked Mr. White if he had ever seen Ex. 2007, and Mr. White responded that "he ha[d] not seen the PowerPoint." Ex. ___, White Dep. Tr. 89:4-6.

9. Mr. White further testified during his deposition that he had seen parts of Ex. 2007. Ex. ___, White Dep. Tr. 89:15-90:23.

10. On redirect, Mr. White testified that his earlier testimony (Material Facts 8 and 9) had been incorrect. He testified that although he recognized that Ex. 2007 contained some figures from the McDaid patent (Ex. 1008) that looked familiar, he had never actually seen Ex. 2007 prior to his deposition. Ex. ___, White Dep. Tr. 170:11-172:17.

11. Other than the testimony discussed in Material Facts 2 and 5-10 above, there is no other testimony in the record concerning Ex. 2007.

12. Other than the testimony discussed in Material Facts 2 and 5-10 above, Ex. 2007 is not cited or referenced in any paper in this IPR proceeding.

13. Ex. 2007 includes 23 pages, and appears to be the format of a PowerPoint document. The document includes a variety of information, including the following: (a) annotated copies of figures from McDaid (Ex. 1008) (page 5); (b) annotated copies of figures from Chen (Ex. 1009) (pages 6, 7); (c) purported dictionary definitions of various terms (pages 3, 4); (d) apparent arguments concerning obviousness (page 9); (e) statements and images apparently concerning

the term *captive security rod* (pages 11-15); (f) annotated portions of Mr. White's declaration (Ex. 1021) (page 17); (g) statements concerning Mr. Mahaffey's background, supported by citations to Wikipedia pages (19-23); and (h) various images such as fists and "thumbs-up" symbols (pages 4-6).

14. Mr. Mahaffey's testimony that Ex. 2007 is his "notes" that he prepared in preparation for his deposition, or a summary of his declaration testimony is not credible. Ex. 2007 does not include any citation or reference to Mr. Mahaffey's declaration, and Ex. 2007 does not summarize or refer to Mr. Mahaffey's declaration testimony.

15. Instead of including Mr. Mahaffey's deposition-preparation notes or a summary of his declaration, Ex. 2007 appears to relate to new arguments that were not made in his declaration, or additional supporting evidence that was not submitted with his declaration.

16. Other than Ex. 2007 itself, not a single page of Ex. 2007 is in the record of this IPR, although several pages of Ex. 2007 contain modified images of patent figures that in their un-modified form are part of the IPR record, and one page of Ex. 2007 contains portions of a table from Mr. White's declaration, Ex. 1021.

17. Counsel for the Petitioner made timely objections to Ex. 2007. Ex. 1023, Mahaffey Dep. Tr. 14:16-18, 15:1-3, 114:18-24; Ex. ___, White Dep. Tr.

88:19-22; and Ex. 1025, Petitioner's Objections to Evidence (served March 25, 2016). Grounds for objection were: hearsay; relevance; outside the scope of cross-examination of Mr. Mahaffey; outside the scope of Mr. White's declaration and supplemental declaration; lack of foundation; untimely; and supplemental information not submitted as required by 37 C.F.R. § 42.123.

III. LEGAL AUTHORITY

Admissibility of evidence in IPR proceedings is governed by the Federal Rules of Evidence and the USPTO Rules. *See* 37 C.F.R. §§ 42.62 ("Applicability of the Federal rules of evidence"); 42.61(a) (stating that "[e]vidence that is not taken, sought, or filed in accordance with this subpart is not admissible"). Accordingly, evidence may be excluded on the basis of relevance (Fed. R. Evid. 401) or hearsay (Fed. R. Evid. 801-807). In addition, evidence may be excluded if it was not submitted in a timely manner in compliance with the Board's Case Management and Scheduling Order (Paper 14), or according to the Board's rule for submitting supplemental information. 37 C.F.R. §§ 42.5, 42.123.

IV. EXHIBIT 2007 SHOULD BE EXCLUDED

A. Exhibit 2007 Consists of Inadmissible Hearsay and Irrelevant Information

Exhibit 2007 should be excluded from evidence because this document consists of information that is not relevant to the IPR and/or hearsay statements.

According to Mr. Mahaffey, Ex. 2007 contains his notes that he prepared in preparation for having his deposition taken. Material Fact 2; Ex. 1023, Mahaffey Dep. Tr. 13:17-14:3. Mr. Mahaffey also testified that this document is a summary of his declaration testimony. Material Facts 5, 6; Ex. 1023, Mahaffey Dep. Tr. 115:11-24. However, Mr. Mahaffey's testimony concerning Ex. 2007 is not credible. Material Fact 14. Contrary to Mr. Mahaffey's testimony, Ex. 2007 does not contain anything that appears to be Mr. Mahaffey's deposition-preparation notes or a summary of his declaration testimony. There is no citation in Ex. 2007 to Mr. Mahaffey's declaration, and Ex. 2007 does not summarize or refer to Mr. Mahaffey's declaration testimony, as one would expect to find in a document used for deposition preparation or that summarizes declaration testimony. Material Fact 15; Ex. 2007.

Instead, Ex. 2007 appears to relate to new arguments that were not made in his declaration, or additional supporting evidence that the Patent Owner did not submit with Mr. Mahaffey's declaration. In particular, Ex. 2007 includes the following: (a) annotated copies of figures from McDaid (Ex. 1008) (page 5); (b) annotated copies of figures from Chen (Ex. 1009) (pages 6, 7); (c) purported dictionary definitions of various terms (pages 3, 4); (d) apparent arguments concerning obviousness (page 9); (e) statements and images apparently concerning the term *captive security rod* (pages 11-15); (f) annotated portions of Mr. White's

declaration (Ex. 1021) (page 17); (g) statements concerning Mr. Mahaffey's background, supported by citations to Wikipedia pages (19-23); and (h) various images such as fists and "thumbs-up" symbols (pages 4-6). Material Fact 13; Ex. 2007.

Because Ex. 2007 has not yet been filed in this IPR, or cited or referenced in any document in the record of the IPR (except as discussed in Material Facts 2 and 5-10), the Petitioner does not know how the Patent Owner intends to use this document. To the extent the Patent Owner intends to rely on the truth of anything asserted in Ex. 2007, this document is inadmissible as hearsay, because the statements in the exhibit are not sworn testimony of any witness, and do not fall within any of the exceptions to the hearsay rule. *See* Fed. R. Evid. 801-807. If this document consists of Mr. Mahaffey's deposition-preparation notes and/or a summary of his testimony that he used, then the document is not relevant. *See* Fed. R. Evid. 401. Moreover, Ex. 2007 does not appear to be relevant for any other non-hearsay purposes. For these reasons, Ex. 2007 should be excluded as hearsay and/or not relevant.

B. Exhibit 2007 Was Not Filed in a Timely Manner

Exhibit 2007 should be excluded because the Patent Owner failed to file Exhibit 2007 in a timely manner, when its Response was filed on January 15, 2016. Instead, Ex. 2007 was first brought to the Petitioner's attention more than two

months later, during Mr. Mahaffey's deposition on March 21, 2016. Material Facts 1, 2; Ex. 1023, Mahaffey Dep. Tr. 13:17-14:3.

Although the applicable rules permit filing a motion to submit supplemental information during the trial, the Patent Owner has never filed or requested authorization to file such a motion. *See* 37 C.F.R. § 42.123. Consequently, Ex. 2007 should be excluded because it was not filed in a timely manner or submitted in accordance with the rules. *See* 37 C.F.R. § 42.62(a).

C. Petitioner Made Timely Objections to Exhibit 2007

Petitioner made timely objections to Exhibit 2007, putting the Patent Owner on notice as to each of the grounds of inadmissibility relied on in this motion. Material Fact 17; Ex. 1023, Mahaffey Dep. Tr. 14:16-18, 15:1-3, 114:18-24; Ex. ___, White Dep. Tr. 88:19-22; and Ex. 1025, Petitioner's Objections to Evidence. Accordingly, the Petitioner made timely objections as required before filing a motion to exclude. *See* 37 C.F.R. § 42.64.

V. CONCLUSION

Because Exhibit 2007 consists of hearsay and/or irrelevant information and was not filed in a timely manner, it should be excluded, and expunged from the IPR record.

Respectfully submitted,

May 23, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 23, 2016, pursuant to 37 CFR § 42.6(b)(1) and (e), a copy of the foregoing PETITIONER'S MOTION TO EXCLUDE EVIDENCE, is being electronically filed via the Patent Review Processing System (PRPS), and is being served via electronic mail on the Petitioner as follows:

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