PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACCO BRANDS CORPORATION and ACCO BRANDS USA LLC,	:	
	:	***Inter Partes* Review**
Petitioners,	:	**Proceedings No. IPR2015-01167**
v.	:	**U.S. Patent No. 8,717,758**
THINK PRODUCTS, INC.,	:	
Patent Owner.	:	

PATENT OWNER THINK PRODUCTS, INC.'S MOTION TO EXCLUDE EVIDENCE

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PATENT OWNER THINK PRODUCTS, INC.'S MOTION TO EXCLUDE EVIDENCE

I. Scope of Patent Owner Think Products' Motion to Exclude

Patent Owner, Think Products, Inc. ("Think Products") moves to exclude from evidence the Declaration (Exhibit 1021) and Supplemental Declaration (Exhibit 1024) of the expert, Ryan White, offered by Petitioners ACCO Brands Corporation and ACCO Brands USA LLC (collectively "ACCO Brands"), as well as those portions of ACCO Brands' Petition requesting the institution of this *Inter Partes Review* (Paper No. 1, filed May 6, 2015) and Petitioners' Reply Brief (Paper No. 20, filed April 1, 2016), which cite to, and rely upon, the written expert testimony of Ryan White, because the cross-examination deposition of Mr. White (Exhibit 1507), conducted by Think Products on April 27, 2016, makes clear that Mr. White did not author his written expert testimony and likely never understood it before being paid by ACCO Brands to sign it; Ryan White's written expert testimony simply "regurgitates" what ACCO Brands told him to say.

Think Products further moves to exclude, or have stricken, those responses given by Ryan White during his cross-examination deposition in which ACCO Brands' counsel, Michael R. Weiner, coached Mr. White via cues provided through "strategic" objections (most notably objections on the ground of vagueness) interposed by Mr. Weiner to inform Ryan White of

what ACCO Brands might deem a potentially desirable response. In such circumstances, Think Products asks that the Patent Trial and Appeal Board ("PTAB") draw inferences against ACCO Brands and favorable to Think Products because ACCO Brands' counsel improperly "influenced" the cross-examination testimony of ACCO Brands' expert witness, Ryan White.

II. The Declaration (Exhibit 1021) and Supplemental Declaration (Exhibit 1024) of ACCO Brands' Expert Witness, Ryan White, Should Be Stricken Because Ryan White Did Not Author His Written Testimony, But "Merely Regurgitates" ACCO Brands' Positions

A. PTAB's Gatekeeping Function under Fed.R.Evid. 702 and Daubert

Where "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . a witness who is qualified as an expert by knowledge, skill, experience, training, or education" may offer an opinion, if the proposed testimony "is based on sufficient facts or data; . . . is the product of reliable principles and methods; and . . . the expert has reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702. The PTAB has a "gatekeeping responsibility" to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (*Daubert* applies to all experts). "The party proffering the expert has the burden to demonstrate

that" *Daubert* is satisfied. *R.F.M.A.S., Inc. v. So*, 748 F. Supp.2d 244, 248-249 (S.D.N.Y. 2010). The expert's methodology must be a reliable way "to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.*" *Kumho Tire Co., Ltd. v. Carmichael*, *supra*, 526 U.S. at 154 (emphasis in original). Expert testimony that is unreliable or merely "subjective belief or unsupported speculation" is to be excluded. *Daubert v. Merrell Dow Pharm., Inc.*, *supra*, 509 U.S. at 590.

One thing is clear: "To warrant admissibility . . . it is critical that an expert's analysis be reliable at every step" and that his "conclusions [are] supported by good grounds for each step in the analysis." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (quotation omitted). Indeed, "*any* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *Id.* (quotation omitted; emphasis in original), citing, *inter alia*, *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) ("[T]he reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, *et alia*.").

Because "expert evidence can be both powerful and quite misleading," the court or PTAB, in weighing prejudice against probative force under [Fed.R.Evid.] 403, "exercises more control over experts than over lay

witnesses." *Daubert v. Merrell Dow Pharm., Inc.*, *supra*, 509 U.S. at 595; *see, also*, *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001) (Fed.R.Evid. 702 intended to ensure that a witness does not improperly come "before the jury cloaked with the mantle of an exper[t]"). "A decision to admit or exclude expert scientific testimony is not an abuse of discretion unless it is manifestly erroneous." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d at 265. The abuse of discretion standard "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion." *Kumho Tire Co., Ltd. v. Carmichael*, *supra*, 526 U.S. at 152.

B. The Written Expert Testimony of ACCO Brands' Expert Should Be Stricken Because Ryan White Exercised No Independent Analysis, Simply Acted as a "Conduit" for ACCO Brands' Views, and Clearly Did Not Author, and Likely nor Understood, His Written Testimony

"An expert who simply regurgitates what a party has told him provides no assistance to the trier of fact through the application of specialized knowledge." *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409, 434–35 (S.D.N.Y. 2009); *accord United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (expert may not "repeat[ ] hearsay evidence [to the fact finder] without applying any expertise whatsoever"). In *Arista Records*, the district court excluded expert testimony because it was "nothing more than information supplied to [the expert] by [his client]" and "merely a restate-

ment of [his client's] views and are not the product of independent analysis." Arista Records LLC v. Usenet.com, Inc., *supra*, 608 F.Supp.2d at 428, *citing*, Malletier v. Dooney & Bourke, Inc., 525 F.Supp.2d 558, 664 (S.D.N.Y. 2007) ("[T]he expert witness must in the end be giving his *own* opinion. He cannot simply be a conduit.")

Ryan White deposition testimony (Exhibit 1507) makes clear (at a minimum) at Page 31, lines 15-16; Page 35, lines 19-25; Page 36, line 25 – Page 38, line 14; Page 57, line 18 – Page 58, line 13; Page 82, line 21 – Page 83, line 23; Page 121, lines 3-13; and Page 147, lines 11-20, that ACCO Brands' expert did not understood what it meant to "construe" claims nor what is meant by a "claim limitation," notwithstanding that Mr. White's Declaration (Exhibit 1021) and Supplemental Declaration (Exhibit 1024) extensively discuss "claim construction" and the meaning of the "captive security rod" limitation in Think Products' patent claims. The totality of Ryan White's deposition testimony evidences a consistent and substantial void in Mr. White's knowledge concerning the content of his Declaration and Supplemental Declaration. Representative of Mr. White's unfamiliarity with his "own" written expert testimony are:

Page 31, lines 15-16:

"Q. Do you understand how to construe claims?

"A. No, I do not."

Page 35, lines 19-25:

"Q. Ryan, do you know what a claim limitation is?

"A. Specifically, no.

"Q. Ryan, did you construe the claims of the two patents at issue here, the '758 and the '144 patent?

"A. Can you define 'construe'?"

Page 82, line 21 – Page 83, line 23:

Q. "And indicated above was [sic] you construed the locking device?

"A. I did not construe the locking device.

"Q. What did you construe right here, to the left –

"A. I didn't construe anything.

"Q. Right. You assessed the locking device. You set it out in the claim construction. Sorry. Let me ask you some questions. Is 'D Claim Construction' a claim construction section?

"A. That's what it is titled, yes.

"Q. And is this at page 14 in the middle of the page, is that claim term construed in that box in this section?

"A. In the claim term or the construction box?

"Q. In the claim term -- in the whole row, including the construction box.

"A. Again, I am not going to say it's construed. In the claim term box, that's the term that I pulled from the claim and then my interpretation of the construction of it.

"Q. Ryan, is this your work product?

"A. I'm not sure what you're asking.

"Q. Did you write this?

"MR. WEINER: Objection, asked and answered."

Page 121, lines 3-13:

"Q. Yes. Take all the time you need. I want you to identify where Mr. Walker said that 'the captive security rod must be stored in the housing during non-use and between deployments.'

"A. I can't recall the document that this came from. I can't --

"Q. It's right here. This excerpt is from the document it came from, it's your writing.

"A. No. I'm not – I'm not sure how to answer this."

Page 146, line 23 – Page 147, line 20:

"Q. No. I want to know where you construed. There's a construction section. Did you construe it in your declaration [Exhibit 1021] from April

30th, 2015 regarding either the '144 or '758 patents?

"A. I wouldn't say that I included the word 'construed' in here.

"Q. Hold on a second. Ryan, it says --

"MR. WEINER: And I just want to remind the witness on the record to review the document before answering the question.

"Q. -- claim construction --

"MR. SCHINDLER: Objection. ACCO's attorney is coaching the witness.

"Q. Ryan, I mean, look at page 14?

"A. 14 of supplemental [Exhibit 1024]?

"Q. Yeah -- no, the declaration [Exhibit 1021].

"A. Yeah.

"Q. It says you construed the claims.

"A. I don't see where it says I construed the claims.

"Q. Now, is that because you didn't construe the claims?

"A. I don't know what you mean by 'construe.'"

It is abundantly clear that ACCO Brands' expert witness, Ryan White, "merely parrots" as a "mouthpiece" for the opinions of ACCO Brands' counsel in his Declaration (Exhibit 1021) and Supplemental Declaration

(Exhibit 1024) and understands little, if anything, about the content of "his" written expert testimony, does not understand claim construction and claim limitations, though the written expert testimony prepared by ACCO Brands' attorneys for signature by Ryan White extensively discusses "claim construction," doesn't understand what prosecution counsel for Think Products' wrote in the applicable file history, yet extensively discusses, and quotes to the application file wrapper, and is generally at a loss to explain what it is "he quotes" from the file history. The supposed written expert testimony of Ryan White was definitively not written by Mr. White, cannot be deemed his "expert opinion" and must be stricken, *see, e.g.*, *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002) (an expert, "however well credentialed he may be, is not permitted to be the mouth-piece" for another's opinion); *Eberli v. Cirrus Design Corp.*, 615 F.Supp.2d 1357, 1364 (S.D. Fla. 2009) (expert must "not merely regurgitate" another's opinions), as well as portions of ACCO Brands' Petition (Paper No. 1, filed May 6, 2015) requesting institution of this *Inter Partes Review* and ACCO Brands' Reply Brief (Paper No. 20, filed April 1, 2016), which extensively cite to, and rely upon, virtually verbatim, the "expert" opinions of Ryan White.

III. ACCO Brands' Counsel "Coached" Ryan White During Think Products' Deposition of ACCO Brands' Expert Witness Via "Strategic" Objections to Convey to Mr. White the Answer ACCO Brands Desired

An objection made during a deposition "must be stated concisely and in a nonargumentative and nonsuggestive manner." Fed.R.Civ.P. 30(c)(2). "Thus, 'speaking objections' that cue a witness how to answer (or avoid answering) a question are prohibited." *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, Civil Action No. 09-Civ.-3701-JPO-JCF, "Memorandum and Order" (Document 234) at 10-11 (S.D.N.Y., 12/9/2013) (collecting cases) (Exhibit 1508). In *Meyer Corp. U.S. v. Alfay Designs, Inc.*, Civil Action No. 10-Civ.-3647-CBA-MDG, "Order" at 8-9 (Document 89) (E.D.N.Y., 8/13/2012) (Exhibit 1509), the court "warned" attorneys when taking depositions that "they must refrain, when making an objection, from stating that a question is vague, ambiguous or calls for speculation" which would amount to coaching or influencing the deponent's testimony. *See, also* *Morales v. Zondo*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (granting sanctions where counsel's "private consultations with the witness, instructions not to answer, instructions how to answer, colloquies, interrupts, and ad hominem attacks disrupted the examination . . . and protracted the length of the deposition").

In no less than seven-dozen instances in a 202-page deposition transcript, ACCO Brands' counsel objected on grounds of vagueness, speculation, arguing the Think Products' counsel "misstated" the testimony of ACCO Brands' expert witness (who was perfectly capable of speaking for himself) and offering testimony in an effort to coach Mr. White or otherwise influence Ryan White's testimony to the liking of ACCO Brands: Page 24, line 23 – Page 25, line 7; Page 25, lines 18-22; Page 26, lines 4-14; Page 30, line 23 – Page 31, line 2; Page 32, lines 5-12; Page 37, lines 10-19; Page 38, lines 5-14; Page 42, lines 16-18, Page 42, line 23 – Page 43, line 6; Page 43, line 20 – Page 44, line 6; Page 44, lines 20-25; Page 45, lines 6-7; Page 45, lines 13-14; Page 54, lines 3-8; Page 54, line 25 – Page 55, line 4; Page 56, line 23 – Page 57, line 10; Page 58, lines 14-16; Page 58, line 18 – Page 59, line 1; Page 60, lines 5-24; Page 61, lines 5-9; Page 61, line 16 – Page 62, line 3; Page 63, lines 15-18; Page 64, lines 4-23; Page 65, lines 5-18; Page 66, lines 1-11; Page 66, lines 12-15; Page 66, lines 16-17; Page 67, lines 3-9; Page 67, lines 10-12; Page 68, line 23 – Page 69, line 3; Page 74, lines 16-18; Page 74, line 22 – Page 75, line 3; Page 76, lines 5-14; Page 77, lines 4-8; Page 78, line 25 – Page 79, line 3; Page 79, lines 6-11; Page 79, lines 13-19; Page 80, lines 16-25; Page 81, lines 1-11; Page 81, line 20 – Page 82, line 11; Page 83, line 19 – Page 84, line 2; Page 84, lines 3-8; Page 84, lines

23-25; Page 85, lines 1-17; Page 86, lines 17-25; Page 88, line 24 – Page 89, line 14; Page 93, lines 9-15; Page 100, line 25 – Page 101, line 11; Page 101, lines 13-23; Page 107, line 25 – Page 108, line 5; Page 108, line 22 – Page 109, line 5; Page 109, lines 6-9; Page 109, line 25 – Page 110, line 6; Page 110, lines 11-17; Page 119, lines 3-7; Page 119, lines 10-13; Page 121, line 23 – Page 122, line 4; Page 122, lines 5-9; Page 123, line 20 – Page 124, line 2; Page 127, line 8 – Page 128, line 1; Page 129, lines 13-21; Page 129, line 24 – Page 130, line 7; Page 133, lines 12-18; Page 135, line 23 – Page 136, line 5; Page 136, lines 6-15; Page 142, lines 10-17; Page 143, lines 17-23; Page 145, line 4 – Page 148, line 1; Page 148, lines 3-25; Page 149, lines 1-7; Page 153, lines 11-18; Page 155, line 22 – Page 156, line 1; Page 158, line 21 – Page 159, line 13; Page 161, line 17 – Page 162, line 1; Page 196, lines 3-8; Page 196, lines 10-17; Page 196, lines 21-25; Page 197, lines 8-16; Page 198, lines 5-18; Page 199, lines 14-18; Page 200, lines 15-20; and Page 202, lines 4-7, following which the parties concluded the deposition.

Exemplary of the efforts to coach and influence the testimony Ryan White gave during his deposition include, but are far from limited to:

Page 80, lines 9-25:

"Q. I'm focusing on the locking device. You didn't construe the captive security rod. I'm looking at the part of the claim chart where you

construed the locking device.

"MR. WEINER: Objection, misstates the witness' testimony, misstates the contents of the document. Term 1 includes the terms 'locking device' and captive security rod as a single term.

"MR. SCHINDLER: Objection. ACCO's attorney is testifying."

As an experienced patent attorney, ACCO Brands' counsel is, no doubt, aware of the substantive content of the PTAB's Testimony Guidelines No. 3, Federal Register, Vol. 77 (at page 48772), that:

> "An objection must be stated concisely in a non-argumentative and non-suggestive manner. Unnecessary objections, speaking objections and coaching of witnesses in proceedings before the board are strictly prohibited. The defending lawyer must not act as an intermediary, interpreting questions, deciding which questions the witness should answer and helping the witness formulate answers while testifying."

The PTAB's Testimony Guidelines No. 3 is consistent with Fed.R.Civ.P. 30(c)(2), *Gavrity v. City of New York*, Civil Action No. 12-Civ.-6004-KAM-VMS, "Memorandum and Order" at 15-17 (Document 63) (E.D.N.Y., 9/19/2014) (Exhibit 1510); ACCO Brands' counsel must either be unaware of the PTAB's foregoing testimony guidelines or, in all likelihood, chose to deliberately act in defiance of such guidelines.

"[S]ome courts have considered excessive objections to be deposition misconduct, but they have most commonly done so through a percentage-of-pages analysis. In other words, by noting that the attorney defending the deposition make[s] unjustified objections so frequently that his or her objections appear on a high percentage of the deposition transcript's pages." *Id.* at 16. *See, also* *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (applying percentage-of-page analysis); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293-94 (S.D.N.Y. 1984) (same). Excluding the 26 pages from the 202-page Ryan White deposition transcript in which the parties sought a PTAB ruling and Mr. Weiner's re-direct examination of Mr. White on behalf of ACCO Brands, Michael R. Weiner appears on 118 pages of the 176 pages (67%) comprising Thinks Products' counsel's cross- and re-cross examination of Ryan White, thereby seeking to significantly interfere with Ryan White's deposition by Think Products.

Fed.R.Civ.P 30(d)(2) provides that "[t]he court may impose an appropriate sanction . . . on a person who impedes, delays, or frustrates the fair examination of the deponent." While it is acknowledged that a monetary award is unavailable before the PTAB, Think Products' submits that the PTAB should find a negative inference against ACCO Brands in all instances where its counsel unjustifiably objected during the Ryan White

deposition in an effort to coach, testify or otherwise influence Mr. White's deposition testimony and seek to "contain the damage" to ACCO Brands.

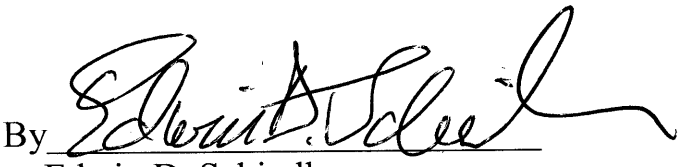
IV. Conclusion

Accordingly, Patent Owner Think Products, Inc.'s Motion to Exclude Evidence should be granted in its entirety by striking the Declaration and Supplemental Declarations of Ryan White (Exhibits 1021, 1024), the written expert testimony offered by Petitioners ACCO Brands (and those portions of ACCO Brands' Petition and Reply Brief which rely upon Ryan White's written expert testimony), because the deposition of Ryan White clearly indicates that Mr. White neither wrote nor understood the written testimony prepared for him by ACCO Brands' counsel, and that the PTAB should draw all appropriate inferences against ACCO Brands arising from the deposition misconduct of its counsel during Think Products' deposition of Ryan White.

Respectfully submitted,

THINK PRODUCTS, INC.

Dated: May 23, 2016
Huntington, New York

By 

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CERTIFICATE OF SERVICE

I, EDWIN D. SCHINDLER, hereby certify that I served a true and complete copy the *PATENT OWNER THINK PRODUCTS, INC.'S MOTION TO EXCLUDE EVIDENCE*, on the following counsel for Petitioners ACCO Brands Corporation and ACCO Brands USA LLC. via e-mail (as the parties have so agreed):

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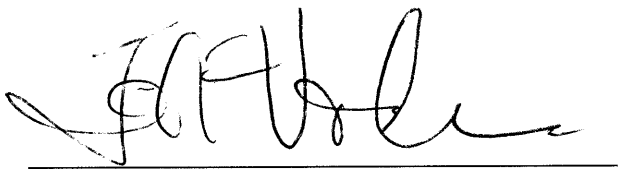

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