

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 OPPOSITION TO  
MOTION TO EXCLUDE EVIDENCE**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	1
III.	LEGAL AUTHORITY .....	2
IV.	PATENT OWNER’S MOTION TO EXCLUDE SHOULD BE DENIED ....	2
	A.    Patent Owner Did Not Object to the Declarations .....	2
	B.    Patent Owner Did Not Receive Authorization to Move to Strike Portions of the Petition or Reply .....	3
	C.    The Motion Fails to Identify the Precise Relief Requested .....	4
	D.    There Is No Basis to Exclude Any Part of Mr. White’s Declarations or Deposition Testimony .....	5
	1.    Mr. White is Fully Qualified As an Expert.....	5
	2.    There Was No “Coaching” of Mr. White During His Deposition .....	10
V.	CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Cases

<i>Factual Inc. v. Locata LBS LLC</i> , Case IPR2015-00224 (PTAB Nov. 18, 2015) .....	3
<i>Parrot S.A. v. Drone Techs., Inc.</i> , Case IPR2014-00730 (PTAB Oct. 20, 2015) .....	3
<i>Pevarello v. Lan</i> , 85 USPQ2d 1771, 2007 WL 594728 (BPAI Jan. 12, 2007) .....	7
<i>Seoul Semiconductor Co. v. Enplas Corp.</i> , Case IPR2014-00605 (PTAB Sept. 15, 2015) .....	3

### Rules

37 C.F.R. § 42.20 .....	2, 3
37 C.F.R. § 42.22 .....	2, 6
37 C.F.R. § 42.64 .....	2

## **I. INTRODUCTION**

Petitioner ACCO Brands Corporation and ACCO Brands USA LLC (“ACCO”) opposes the Motion to Exclude Evidence filed by the Patent Owner Think Products, Inc. on May 23, 2016.<sup>1</sup>

## **II. STATEMENT OF FACTS**

1. On May 7, 2015, the Petitioner filed and served the Declaration of Ryan White, Ex. 1021, with its Petition for inter partes review.

2. On October 21, 2015, the Board issued a Decision granting the petition and instituting review. Paper 13.

3. On April 1, 2016, the Petitioner filed and served a Supplemental Declaration of Ryan White, Ex. 1024, with its Reply.

4. The Patent Owner did not file or serve any objections to either declaration, Ex. 1021 or Ex. 1024.

5. The Patent Owner did not cross-examine Mr. White in connection with Ex. 1021, White Decl.

6. The Patent Owner cross-examined Mr. White in connection with Ex. 1024, White Suppl. Decl., on April 27, 2016. *See* Ex. 1507, White Dep. Tr.

7. The Patent Owner did not seek authorization from the Board to file a motion to strike portions of the Petition or Reply.

---

<sup>1</sup> Identical oppositions are being filed in IPR2015-01167 and IPR2015-01168.

8. Exhibit 1026, prepared by the Petitioner, is an annotated copy of Ex. 1507, White Dep. Tr., in which the portions of the transcript cited on pages 11-12 of the motion are highlighted in yellow.

### **III. LEGAL AUTHORITY**

Motions generally require prior authorization from the Board, although motions to exclude evidence may be filed without prior authorization. 37 C.F.R. §§ 42.20(b), 42.64(c). A motion to exclude evidence must identify the objections to the evidence in the IPR record. 37 C.F.R. § 42.64(c). A motion to exclude evidence (or any motion) must also include a “statement of the precise relief requested.” 37 C.F.R. § 42.22(a)(1).

Objections to evidence served with an IPR petition must be filed and served within ten business days of institution of the IPR, and objections to evidence served after institution must be filed and served within five business days of service of the evidence. 37 C.F.R. § 42.64(b)(1).

### **IV. PATENT OWNER’S MOTION TO EXCLUDE SHOULD BE DENIED**

#### **A. Patent Owner Did Not Object to the Declarations**

To the extent the motion seeks to exclude Mr. White’s declarations (Ex. 1021 and Ex. 1024), the motion should be dismissed or denied because the Patent Owner failed to make a timely objection (or any objection) to either declaration, as required before filing a motion to exclude. 37 C.F.R. § 42.64(c); Material Fact 4. *See, e.g., Parrot S.A. v. Drone Techs., Inc.*, Case IPR2014-00730, slip op. at 27–28

(PTAB Oct. 20, 2015) (Paper 27) (dismissing motion to exclude declaration supporting IPR petition because Patent Owner did not serve timely objections); *Seoul Semiconductor Co. v. Enplas Corp.*, Case IPR2014-00605, slip op. at 15–16 (PTAB Sept. 15, 2015) (Paper 56) (same); *see also Factual Inc. v. Locata LBS LLC*, Case IPR2015-00224, slip op. at 2–3 (PTAB Nov. 18, 2015) (Paper 21) (striking from the record a belated objection to declaration testimony made after the declarant’s cross-examination).

**B. Patent Owner Did Not Receive Authorization to Move to Strike Portions of the Petition or Reply**

The Board should dismiss the motion to the extent it seeks to “exclude from evidence . . . portions of ACCO Brands’ Petition . . . [and] Reply Brief.” Motion at 1. The Petition and Reply are not evidence and cannot be “excluded.” If the Board interprets this portion of the motion as moving to strike portions of the Petition and Reply, the motion should be dismissed because of the Patent Owner’s failure to obtain the Board’s prior authorization to file such a motion, as required under the rules. 37 C.F.R. § 42.20(b). Even if the Patent Owner had sought the Board’s authorization, the motion should be denied because the Petition and Reply cite declaration testimony to which the Patent Owner did not object, and as shown below there is no proper basis to exclude any of the cited testimony.

### **C. The Motion Fails to Identify the Precise Relief Requested**

The motion to exclude should be denied because the motion fails to include a statement of the precise relief requested. With respect to Mr. White's deposition testimony, the Patent Owner moves to exclude portions of Mr. White's testimony because, according to the Patent Owner, Mr. White was "coached" by "'strategic' objections (most notably objections on the ground of vagueness)" made by Petitioner's counsel. Motion at 1. At pages 11-12, the motion includes a long list of citations to allegedly-improper objections, and these cited sections, shown by highlighting in Ex. 1026, Annotated White Dep. Tr., also include questions asked by Patent Owner's counsel and portions of the witness's testimony, in addition to objections raised by Petitioner's counsel. Material Fact 8.

With respect to the deposition testimony, the motion fails to identify the precise relief requested because it does not clearly identify the portions of the cross-examination testimony it seeks to exclude.<sup>2</sup> For example, the citations at pages 11-12 of the motion refer to some passages that include the question and the

---

<sup>2</sup> The motion nowhere requests exclusion of any of Mr. White's *redirect* testimony, Ex. 1507, White Dep. Tr. at 169:6-188:25, although counsel for the Patent Owner contacted the Board during the deposition concerning the redirect examination. *See* Ex. 1507, White Dep. Tr. at 165:14-169:4. Accordingly, any objections to the redirect testimony are waived. 37 C.F.R. § 42.64(c).

objection, but not the witness's answer to the question. *See* Ex. 1507/1026 at 74:16-18, 122:5-9, 133:12-18, 161:17-162:1. The citations also refer to some passages that include a question and corresponding answer, but no objection. *See* Ex. 1026 at 123:20-124:2, 133:12-18. In addition, there is substantial overlap between the citations at pages 11-12 of the motion, and citations to the witness's testimony in the Patent Owner's Motion for Observations, in particular, Ex. 1507/1026 at 37:10-19; 38:5-14; 42:16-18; 42:23-43:6; 43:20-44:6; 44:20-25; 56:23-57:10; 58:14-16; 67:10-12; 76:5-14; 77:4-8; 83:19-84:2; 85:1-17; 121:23-122:4; 122:5-9; 123:20-124:2; 129:13-21; 129:24-130:7; 133:12-18; and 135:23-136:5. The Patent Owner is thus asking the Board to exclude *and* rely on some of the same evidence.

The motion also fails to identify the precise relief requested, as required by the rules, to the extent that it asks the Board to "draw inferences against ACCO Brands," "find a negative inference against ACCO Brands," or "draw all appropriate inferences against ACCO Brands," because the motion fails to identify what inferences it requests the Board to make. Motion at 2, 14, 15; 37 C.F.R. § 42.22(a)(1).

**D. There Is No Basis to Exclude Any Part of Mr. White's  
Declarations or Deposition Testimony**

**1. Mr. White is Fully Qualified As an Expert**



There is no basis to exclude any of Mr. White's testimony. The Patent Owner does not dispute that Mr. White is an expert in the relevant field, and his opinions are properly drawn from the perspective of one of ordinary skill in the art. *See* Institution Decision, Paper 13 at n.1 (responding to Patent Owner's argument that Mr. White's testimony is not relevant because he is an "actual," not "hypothetical" person). Mr. White prepared his declaration, with assistance of counsel, per typical practice for declarations submitted in PTAB proceedings. *See generally, Pevarello v. Lan*, 85 USPQ2d 1771, 2007 WL 594728 at \*10-12 (BPAI Jan. 12, 2007) (expanded panel) (discussing typical process for preparing an expert's declaration, and stating that "we counsel against any attempt to inquire on cross-examination into how direct testimony declarations came to be prepared").

At pages 4-9 of the motion, the Patent Owner argues that Mr. White did not prepare his declaration or apply independent analysis because his cross-examination testimony indicates that he did not understand terms such as "construe" or "claim limitation," and because, at the time of his cross-examination, he was not sufficiently familiar with his declarations. The response is that, as discussed below, Mr. White's testimony credibly describes how he prepared his declarations, with assistance of counsel, and also indicates that he "interpreted" claim language as needed, despite his confusion during his cross-examination concerning the meaning of the word "construe."

Early during his cross-examination, Mr. White testified that the declaration testimony was prepared in “working sessions” with counsel in which counsel assisted in putting his opinions into writing:

Q. Did you write this supplemental declaration?

A. This is built off of working sessions with counsel where I would give the input my view, how I would look at something, how I would read through something, and counsel aided in making sure that the structure and construction of it was in line with expectations at a legal level.

Ex. 1507, White Dep. Tr. at 36:8-15.

Apparently not satisfied with Mr. White’s response, Patent Owner’s counsel repeatedly asked Mr. White the same question, trying to limit the witness’s response to one word. Furthermore, the Patent Owner’s counsel attempted to cut off Mr. White from explaining that he prepared the declarations although he did not physically “type” them. Mr. White, however, consistently testified about how he prepared the declarations:

Q. Did you write this?

A. This is from conversations with counsel.

Ex. 1507, White Dep. Tr. at 37:10-11.

Q. Did you write this, Ryan?

MR. WEINER: Objection, asked and answered.

MR. VODOPIA: Would you read back his answer.

(Whereupon, the record was read as follows: Answer: "This is from conversations with counsel.")

Q. Ryan, I'd like you to answer my question. Did you write this?

A. I did not type it.

Q. Good, that's what I meant.

A. Okay.

Q. Yeah. So you didn't prepare the document?

MR. WEINER: Objection, misstates the witness' testimony.

Q. Did you prepare this document? Did you prepare this section, Claim Construction?

A. This is -- this is from the work that we did with counsel. This is --

Q. Did you prepare this section? I was looking for a yes-or-no answer.

A. No.

Ex. 1507, White Dep. Tr. at 37:17-38:14.

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.

A. I did not physically type it. This is from the meetings that I had with ACCO's counsel and then I had several revisions and work sessions to make sure that it captures my viewpoint of this.

Ex. 1507, White Dep. Tr. at 83:19-84:2.

Q. Did you write this?

MR. WEINER: Objection, asked and answered.

Q. No, right?

A. I did not type this, no.

Q. Okay.

A. But this is discussions with counsel.

Ex. 1507, White Dep. Tr. at 119:3-8.

During the deposition, Mr. White testified that he did not understand the word “construe,” and that he did not construe the claims. However, Mr. White also testified that he “interpreted the claim language,” and that he made an assessment of the claim terms. Ex. 1507, White Dep. Tr. at 42:5-7, 42:23-43:6. On redirect examination, Mr. White testified that his cross-examination testimony that he had not *construed* claim terms “wasn’t correct,” and that had been confused by the use of the term “construe” rather than “interpret.” Ex. 1507, White Dep. Tr. at 172:18-175:21.

Mr. White may also have been somewhat confused during the cross-examination because a substantial portion of the questioning focused on his initial declaration, Ex. 1021—outside the proper scope of the cross-examination to which Patent Owner was entitled—instead of the supplemental declaration, Ex. 1024. *See, e.g.*, Ex. 1507 at 29:9-14, 41:18-21 (objections); Material Fact 5.

Considering all of Mr. White's deposition testimony, in particular his redirect testimony that the Patent Owner does not move to exclude, along with his declaration testimony, the testimony as a whole demonstrates that Mr. White is an expert in the relevant field, and does not provide any basis for excluding the testimony.

## **2. There Was No "Coaching" of Mr. White During His Deposition**

Although numerous objections were made during Mr. White's deposition, the objections were made concisely and did not amount to improper "coaching" of the witness at any time. Some of the objections may have exceeded the minimum number of words for an objection under Board's trial practice guide; none, however, was improper.

For example, as noted in section, IV.D.1 above, Patent Owner's counsel repeatedly asked Mr. White whether he prepared his declarations. Petitioner's counsel objected "asked and answered" to some of these questions, and permitted the Mr. White to answer the question each time, which the Mr. White did. In connection with this testimony Petitioner's counsel also objected that Patent Owner's counsel misstated Mr. White's testimony, by stating "you didn't prepare the document" in response to Mr. White's testimony that he did not "type" the document. In some situations, longer objections were necessary, such as in response to questions based on copies of exhibits that had been modified from the

form in which they were filed (to remove highlighting). *See* Ex. 1507, White Dep. Tr. at 114:1-117:2.

Petitioner's counsel also objected to questions that were "vague" on a number of occasions, or that "called for speculation" on some occasions, although perhaps objection to "form" would have been appropriate. In no instance, however, were objections made to interfere with the Mr. White's testimony, and in all instances, Mr. White answered (or attempted to answer) every question.<sup>3</sup> Accordingly, there is no proper basis to exclude any of Mr. White's testimony.

## **V. CONCLUSION**

For the foregoing reasons, the motion to exclude should be dismissed or denied.

---

<sup>3</sup> In contrast, Patent Owner's counsel made extensive comments on the record while defending the deposition of the Patent Owner's witness, Mr. Mahaffey. *See* Ex. 1023, Mahaffey Dep. Tr. at 19:6-9, 24:10-14, 27:11-18, 28:14, 29:1-3, 49:15-17, 60:10-12, 67:2-10, 66:7-8, 13-15, 21-23, 72:24-73:3, 90:2-3, 109:2-6, 118:13-14.

June 6, 2016

Respectfully submitted,

/Michael R. Weiner/

---

Michael R. Weiner (Reg. No. 38,359)

[mweiner@marshallip.com](mailto:mweiner@marshallip.com)

Lead Counsel for Petitioner

Sandip H. Patel (Reg. No. 43,848)

[spatel@marshallip.com](mailto:spatel@marshallip.com)

Back-up Counsel for Petitioner

MARSHALL, GERSTEIN & BORUN LLP

6300 Willis Tower

233 South Wacker Drive

Chicago, Illinois 60606-6357

Telephone: (312) 474-6300

[Docket@marshallip.com](mailto:Docket@marshallip.com)

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 6, 2016, pursuant to 37 CFR § 42.6(b)(1) and (e), a copy of the foregoing PETITIONERS' OPPOSITION TO MOTION TO EXCLUDE EVIDENCE, is being electronically filed via the Patent Review Processing System (PRPS), and is being served via electronic mail on the Patent Owner as follows:

Edwin D. Schindler  
4 High Oaks Court  
P.O. Box 4259  
Huntington, NY 11743-0777  
E: EDSchindler@att.net  
E: EDSchindler@optonline.com

John F. Vodopia  
191 New York Avenue  
Huntington, NY 11743  
E: [jvodopia@gmail.com](mailto:jvodopia@gmail.com)

/Michael R. Weiner/

---

Michael R. Weiner

MARSHALL, GERSTEIN & BORUN LLP