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 REPLY RE MOTION TO EXCLUDE EVIDENCE

Petitioner ACCO's motion to exclude evidence should be granted because Exhibit 2007 is inadmissible hearsay or improper supplemental information under 37 C.F.R. § 42.123.[1]

The Patent Owner's opposition does not address Material Facts 1-17 as stated in the Petitioner's motion. Accordingly, each of these Material Facts should be "considered admitted" by the Patent Owner. 37 C.F.R. § 42.23(a).

At pages 1-4 of the Opposition, the Patent Owner argues that Exhibit 2007 is not inadmissible hearsay, and not untimely supplemental information, because it "constitutes a part of Mr. Mahaffey's cross-examination testimony." On the contrary, Ex. 2007 is not testimony, and a witness cannot supplement his declaration simply by bringing a document to his cross-examination.[2] During his deposition, aside from briefly responding to questions inquiring as to what document Mr. Mahaffey was looking at, Mr. Mahaffey was not questioned about, and did not testify about, the content of Exhibit 2007. *See* Ex. 1023, Mahaffey Dep. Tr. at 13:17-14:3, Material Facts 2, 5-10, 11.

Richardson v. Perales, cited in the Opposition, to the extent it is pertinent to this case, supports the *Petitioner's* position that Ex. 2007 is inadmissible hearsay,

[1] Identical reply briefs are being filed in IPR2015-01167 and IPR2015-01168.

[2] Ex. 2007 is 23 pages long, in contrast to Mr. Mahaffey's 16-page declaration. *See* Material Fact 13.

by acknowledging that a physician's written report is "hearsay." *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) (addressing the admissibility under the Social Security Act, in a disability benefits claim proceeding, of an examining physician's written report). Unlike in *Richardson*, Think Products has not, and cannot, provide any reason why Ex. 2007 satisfies one of the hearsay exceptions or should be admitted "despite its hearsay character." *Id*.

At page 2 of the Opposition, Think Products argues that the motion to exclude challenges "the credibility of Exhibit 2007." The motion presents no such challenge. Ex. 2007 is not testimony and, therefore, is not subject to evaluation with respect to a testifying witness's credibility. The motion states in Material Fact 14 and in Section IV(A) that *Mr. Mahaffey's testimony* concerning Ex. 2007 is not credible. Regardless of Mr. Mahaffey's credibility, this motion should be granted because Ex. 2007 constitutes inadmissible hearsay or untimely supplemental information.

For the foregoing reasons, in addition to the reasons expressed in the motion, the Petitioner's motion to exclude should be granted.

Respectfully submitted,

June 13, 2016

/ Michael R. Weiner/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 13, 2016, pursuant to 37 CFR § 42.6(b)(1) and (e), a copy of the foregoing PETITIONER'S REPLY RE MOTION TO EXCLUDE EVIDENCE, is being electronically filed via the Patent Review Processing System (PRPS), and is being served via email on the Patent Owner as follows:

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