

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

PATENT OWNER THINK PRODUCTS, INC.'S
REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE

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Attorneys for Patent Owner
Think Products, Inc.

I. Patent Owner Think Products' Has Properly Moved to Exclude the Declaration and Supplemental Declaration of Petitioners ACCO Brands' Expert Because These Documents Were the Opinions of Counsel, Rather Than ACCO Brands' Expert

Petitioners ACCO Brands Corporation and ACCO Brands USA LLC (collectively "ACCO Brands") cannot quite bring themselves to forthrightly state that Ryan White drafted and understood his own Declaration (Exhibit 1021) and Supplemental Declaration (Exhibit 1024) and that these documents, which the Board materially relied upon in its Decision to institute this *Inter Partes* proceeding, are the product or the opinion of ACCO Brands' expert, because they're not! Rather, ACCO Brands' spins (at 7) that their expert's declarations were "prepared in 'working sessions' with counsel in which counsel assisted in putting [Ryan White's] opinions into writing," yet, when pressed for a straight answer, as quoted by ACCO Brands (at 8), Mr. White concedes that he did not prepare his Declaration and Supplemental Declarations, and was unable to even estimate the number of hours he spent working as ACCO Brands' expert. (White Deposition Tr. (Exhibit 1507) at Page 13, line 20 – Page 14, line 6)

Unable to credibly argue that Ryan White authored and understood ACCO Brands' written expert testimony, ACCO Brands' opposition devolves into meritless procedural argument seeking to have the Board accept and credit the "false" declarations of their expert. ACCO Brands

argues (at 2) that the objection of Patent Owner Think Products, Inc. (“Think Products”) should have been “filed and served within ten business days of institution of the IPR,” yet it could not have been known to Think Products (nor would the suspicion have been reasonable) until Mr. White’s deposition that ACCO Brands’ expert did not author nor understand the written expert testimony filed with the Board. In *Factual Inc. v. Locata LBS LLC*, No. IPR2015-00224, Paper 21(PTAB, 11/18/2015), cited to by ACCO Brands (at 3), the expert’s declaration was challenged because it was “not based on sufficient facts or data, are not the product of reliable principles and method,” which the Board held “should be addressed within the context of the weight given the testimony in view of Patent Owner’s cross-examination.” There was no apparent dispute in *Factual Inc.* that the expert authored the declaration submitted with the petition, but only that the findings and opinion were essentially worthless. The Board held likewise in *Seoul Semiconductor Co. v. Enplas Corp.*, IPR2014-00605, Paper 56 at 16 (PTAB, 9/15/2015), that the “perceived deficiencies” should be considered in the context of the weight to be given the expert declaration; the decision does not explain the nature of the deficiencies, while finding that the delayed objection to the expert declaration was prejudicial “because Petitioner could have responded with supplemental evidence to cure alleged deficiencies.”

The Board held in Parrot S.A. v. Drone Techs., Inc., IPR2014-00730, Paper 27 at 27 (PTAB, 10/20/2015), that a timely objection may have allowed the petitioner to “cure alleged deficiencies,” yet, while neither Parrot S.A. nor Seoul Semiconductor enunciated the “deficiencies” in the petitioners’ expert declarations, it is reasonable to surmise that neither case concerned an expert declaration that was not written nor understood by the expert, nor is it at all clear a petitioner submitting such a “false” expert declaration should be permitted to “cure” such a “deficiency” where the Board materially relied upon the “false” declaration to grant the petition that it would not have granted “but for” the deceptive declaration. *See, e.g., Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276, 1292 (Fed. Cir. 2011) (en banc) (“When the patentee has engaged in affirmative acts of egregious misconduct, such as the filing of an unmistakably false affidavit, the misconduct is material.”); *citing Rohm & Haas Co. v. Crystal Chem. Co.*, 722 F.2d 1556, 1571 (Fed. Cir. 1983) (“there is no room to argue that submission of false affidavits is not material”). And if a patent owner is required to object to the falsity of an expert’s declaration within ten business days after institution of trial, then counsel will be “compelled” to challenge every expert’s declaration “on the slenderest grounds, to represent their client’s interests adequately.” Burlington Industries, Inc. v. Dayco Corp., 849 F.2d 1418, 1422 (Fed. Cir. 1988).

Think Products does not challenge Ryan White's qualifications to provide expert testimony, as ACCO Brands suggests (at 6), but that the declarations filed are not Mr. White's testimony, but that of ACCO Brands' counsel "packaged" in Ryan White's qualifications. ACCO Brands' reliance upon *Pevarello v. Lan*, 85 USPQ2d 1771, 1779 (BPAI 2007), quoted out-of-context, is misplaced: *Pevarello* holds that inquiry into the counsel's work product and how an expert arrived at his "carefully, considered opinion" is not discoverable "absent a compelling reason," a qualification ACCO Brands neglected to include in its quotation from this case and is supportive of Think Products' legal position. Think Products insists that Ryan White never provided his "carefully considered opinion," ACCO Brands did.

ACCO Brands writes (at 9) that "[o]n redirect examination, Mr. White testified that his cross-examination testimony that he had not *construed* claim terms 'wasn't correct,' and that [he] had been confused by the use of the term 'construe' rather than 'interpret,'" thereby establishing the utility of the 38-minute intensive coaching session administered by ACCO Brands' counsel (White Deposition Tr. (Exhibit 1507) at Page 169, line 6 – Page 170, line 5), but not the credibility of ACCO Brands or its expert. And if ACCO Brands wished to raise an objection (at 9) to the "proper scope of the cross-examination," then it was required to preserve any such objection in its

motion to exclude, 37 C.F.R. §41.157(e)(8), which has not been done.

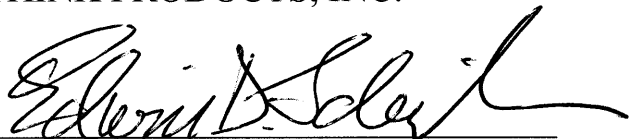
II. Think Products is Seeking Exclusion of Ryan White's Declarations and Portions of ACCO Brands' Petition and Reply Reliant Thereon, But Not Ryan White's Deposition Testimony

ACCO Brands (at 3-5) argues that Think Products has not received authorization to move to strike portions of its Petition and Reply, however it follows that if Ryan White's written expert testimony is excluded because the evidence is neither his work product nor opinion, then ACCO Brands' reliance on that "evidence" must be stricken. Think Products is not seeking exclusion of Mr. White's deposition from evidence, in which Ryan White testified as a person skilled in the art and qualified to provide his own expert opinion. Think Products is asking the Board to draw inferences against ACCO Brands in the multitude of instances its counsel coached Mr. White via improper objections, *Pevarello v. Lan*, *supra*, 85 USPQ2d at 1775 ("It is up to the witness, not opposing counsel to ask for a clarification."), which ACCO Brands' concedes (at 10) were contrary to the Board's guidelines.

Accordingly, Think Products' Motion to Exclusion should be granted.

Respectfully submitted,

THINK PRODUCTS, INC.

By 

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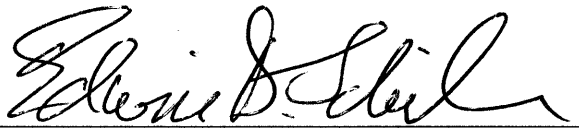
Dated: June 13, 2016
Huntington, New York

CERTIFICATE OF SERVICE

I, EDWIN D. SCHINDLER, hereby certify that I served a true and complete copy the *PATENT OWNER THINK PRODUCTS, INC. 'S REPLY IN SUPPORT OF ITS 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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