

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FLEX LOGIX TECHNOLOGIES, INC.
Petitioner

v.

KONDA TECHNOLOGIES INC.
Patent Owner

Case PGR2019-00037
Patent 10,003,553

**OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE**

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I. INTRODUCTION

Patent Owner's admissibility challenge to the Declaration of Dr. R. Jacob Baker (Ex. 1002) and Dr. Baker's CV (Ex. 1003) is procedurally improper and lacks merit. Patent Owner failed to timely object to the evidence it references in its Motion to Exclude (Paper 27, "Motion"), which is titled "Patent Owner's Objections to Evidence Pursuant to 37 C.F.R. § 42.64" and deprived Petitioner of the ability to address Patent Owner's challenges with, for example, supplemental evidence. The Motion also fails on the merits because it is directed to the sufficiency of the evidence as opposed to its admissibility, as it relates to Dr. Baker's credibility. In any event, the motion overlooks Dr. Baker's relevant qualifications and experience. It should be summarily denied.¹

II. ARGUMENT

The Board should deny the Motion for three independent reasons. ***First***, the Motion is procedurally improper because Patent Owner failed to timely object to the evidence within the timeframe mandated by the Board's rules. ***Second***, the Motion is directed to the sufficiency of the evidence, which cannot be addressed with a

¹ Petitioner raised the impropriety of the motion on a conference call with the Board on May, 27, 2020. The Board indicated that Petitioner should just address the motion through its opposition. *See* Ex. 1043 at 27:25-28:11.

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motion to exclude. Finally, even if the Board considers the merits of Patent Owner's attacks, Dr. Baker's qualifications and experience demonstrate that he is more than qualified to provide opinions in this proceeding from the perspective of a person having ordinary skill in the art ("PHOSITA").

A. Patent Owner Failed to Timely Object to Dr. Baker's Declaration Within the Timeframe Allowed by the Board's Rules

Patent Owner's Motion should be denied because Patent Owner failed to timely object to Dr. Baker's Declaration within the timeframe allowed by the Board's rules.² *See* 37 C.F.R. § 42.64(b)(1) (requiring that "[a]ny objection to evidence submitted during a preliminary proceeding must be filed **within ten business days of the institution** of the trial.") (emphasis added). Indeed, in order to preserve a non-moving party's right to serve supplemental evidence, the Board requires parties to strictly comply with the timeliness requirement under § 42.64(b)(1). *See, e.g., Apple Inc. v. Achates Reference Publ'g, Inc.*, IPR2013-

² Patent Owner's Motion also references Exhibit 1003, Dr. Baker's CV, but does not explain why the CV is inadmissible. *See generally* Motion. Thus, any attempt to exclude Exhibit 1003 should be rejected. Moreover, Petitioner's arguments herein regarding Dr. Baker's Declaration (Ex. 1002) are equally applicable to the CV (Ex. 1003), as there was no timely objection to the CV, and the Motion relates to the evidence's sufficiency.

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00080, Paper 90 at 48-49 (PTAB June 2, 2014) (denying patent owner's motion to exclude expert testimony because patent owner failed to object to evidence sought to be excluded within ten business days of the institution of trial under § 42.64(b)(1)).

Here, Dr. Baker's Declaration was served with the petition on March 18, 2019. The Board, after considering the petition and Patent Owner's preliminary response, instituted trial on September 19, 2019. Paper 13. Under 37 C.F.R. § 42.64(b)(1), Patent Owner was required to file its objections to the evidence by October 3, 2019, i.e., "within ten business days of the institution of the trial." Patent Owner never did so.³

During a conference call with the Board, Patent Owner admitted that it "wasn't aware" of the objection deadlines under the Board's rules and was "learning this," Ex. 1043 at 12-13, but ignorance of the Board's rules is no excuse. And the Board's rules require that the Motion itself "must identify the objections in the record in order and must explain the objections." *See* 37 C.F.R. § 42.64(c). Having

³ Patent Owner's failure to timely object to the evidence also deprived Petitioner any opportunity to supplement the evidence (to the extent Petitioner deemed doing so an appropriate course of action). *See* 37 C.F.R. § 42.64(b)(2).

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never previously objected to the evidence, the Motion could not have and does not identify the objections in the record, let alone explain them. Motion at 3-5.

Therefore, the Motion is procedurally improper under the plain language of §§ 42.64(b)(1) and 42.64(c), as there was no timely objection to the evidence and the Motion does not (as it could not) identify the objections in the record. Accordingly, Patent Owner's belated attempt to exclude evidence, more than six months after the objections were due, should be rejected. The motion should be denied for this reason alone.

**B. The Motion Is Directed to the Sufficiency
of the Evidence and Not to Its Admissibility**

The Motion should be denied also because the Motion is directed to the sufficiency of evidence and not to the admissibility of evidence. During post-grant proceedings, “[a] motion to exclude . . . may not be used to challenge the sufficiency of the evidence to prove a particular fact” and “is not a vehicle for addressing the weight to be given evidence.” *See* Patent Trial and Appeal Board Consolidated Trial Practice Guide (November 2019) (“TPG”) at 79; *see also Laird Techs., Inc. v. GrafTech*, IPR2014-00025, Paper 45 at 42 (PTAB March 25, 2015) (denying a motion to exclude because “[a] motion to exclude . . . is not an appropriate mechanism for challenging the sufficiency of evidence or the proper weight that should be afforded an argument.”). Indeed, the Board routinely denies motions to

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exclude challenging an expert testimony based on the theory that the expert is not qualified because such motions “address the weight to be given the testimony, as opposed to its admissibility.” *See MindGeek, s.a.r.l. v. Skky Inc.*, IPR2014-01236, Paper 45 at 23 (PTAB January 29, 2016) (denying motion to exclude expert testimony on the basis of the expert’s qualification and instead “assign[ing] the weight to which [the Board] believe [the testimony of the expert] is entitled”); *see also AVX Corp. v. Greatbatch, Ltd.*, IPR2014-00697, Paper 57 at 26 (PTAB October 21, 2015) (similar), *CaptionCall, LLC v. Ultratec, Inc.*, IPR2013-00550, Paper 57 at 11-12 (PTAB March 3, 2015) (similar).

Here, Patent Owner attempts to exclude Dr. Baker’s Declaration alleging that Dr. Baker is unqualified as an expert. *See* Motion at 4; *see also* Ex. 1043 at 10-11. Such a challenge is directed to the sufficiency of the challenged evidence, as opposed to its admissibility because it essentially addresses the credibility of Dr. Baker’s testimony (i.e., the weight to be given to the testimony by the Board). *See MindGeek*, Paper 45 at 23. In *MindGeek*, the moving party similarly made an argument that Dr. Almeroth only had expertise in computer science and therefore is not qualified in wireless device hardware and architecture. *MindGeek*, Paper 35 at 2-4 (PTAB August 12, 2015). However, the Board rejected this argument and denied the motion, finding that “[m]ost of [p]etitioner’s arguments . . . appear to address the weight to be given the testimony, as opposed to its admissibility.”

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MindGeek, Paper 45 at 23. The Board should similarly deny the Motion here.⁴

**C. Dr. Baker Is More Than Qualified to Provide
Opinions from the Perspective of a PHOSITA Here**

Finally, even if the Board considers the merits of the motion, it should be denied for another independent reason. Patent Owner essentially attacks Dr. Baker's qualifications. Motion at 3-4; *see also* Ex. 1043 at 10-11. In doing so, Patent Owner identifies only one paragraph of Dr. Baker's declaration and mischaracterizes that paragraph as being the sole statement of Dr. Baker regarding his experience. Motion at 3-4. Patent Owner ignores other parts of the Declaration which describe, for example, Dr. Baker's education in Electrical Engineering and experience in "circuit designs for networks and communications" and "communications systems, and fiber optics." *See e.g.*, Ex. 1002 at ¶¶ 7-9. Indeed, Dr. Baker has considerable experience and knowledge in field programmable gate array ("FPGA") technology as well as

⁴ Additionally, Patent Owner could have, but did not, cross-examine Dr. Baker regarding his credentials and experience. Ex. 1043 at 17:4-20 (J. Boucher inquiring Patent Owner "why are these not issues directed more to the sufficiency of Dr. Baker's testimony and its persuasiveness that you could explore on cross-examination?"); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (noting that "[v]igorous cross-examination," amongst other things, is an appropriate means for challenging expert testimony).

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interconnected networks. *See* Ex. 1002 at ¶¶ 7, 9, 14; *see generally* Ex. 1003. For instance, Dr. Baker authored and coauthored numerous papers in the area of FPGAs (Ex. 1002 at ¶9; Ex. 1003 at 17) and has industrial experience with memory modules and controllers implemented with FPGAs and application specific integrated circuits (“ASICs”) (Ex. 1003 at 3).

Based on his extensive education and experience, Dr. Baker is more than qualified to testify from a perspective of PHOSITA, who was defined in the petition as someone having “a master’s degree in electrical engineering or a similar field, and at least two to three years of experience with integrated circuits and networks.” Pet. at 6 (citing Ex. 1002, ¶18.) The petition further noted that more education can supplement practical experience and vice versa. *Id.* In instituting trial, the Board adopted this level of skill and noted that it was unopposed. Patent Owner has not challenged this skill level in this proceeding.

In any event, even if Patent Owner identifies the skill level differently at this stage, which it should not be allowed to do, the law does not require “a complete overlap between the witness’s technical qualifications and the problem confronting the inventor or the field of endeavor for a witness to qualify as an expert.” *CaptionCall* at 11; *see also* TPG at 34. Dr. Baker is at least “qualified in the pertinent art” even if it is defined somewhat differently from how Petitioner defined it in the petition (Ex. 1002 at ¶¶2, 7-9). *See CaptionCall* at 11-12 (PTAB Mar. 3, 2015)

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(citing *SEB S.A. v. Montgomery Ward & Co.*, 594 F.3d 1360, 1372-73 (Fed. Cir. 2010)). For this additional reason, the Board should deny the Motion.

III. CONCLUSION

Petitioner respectfully requests that the Board deny Patent Owner's Motion.

Respectfully submitted,

Dated: July 30, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, I caused a true and correct copy of the foregoing Petitioner's Opposition to Patent Owner's Motion to Exclude Evidence to be served via electronic mail to:

Venkat Konda (venkat@kondatech.com)

Respectfully submitted,

Dated: July 30, 2020

By: /Naveen Modi/
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