



UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

RICHARD E. **PEREGO**, STEFANOS SIDIROPOULOS
and ELY TSERN
Junior Party
(Patent 6,502,161),

v.

ROBERT ALLEN **DREHMEL**, KENT HAROLD HASELHORST,
RUSSELL DEAN HOOVER and JAMES ANTHONY MARCELLA
Senior Party
(Application 11/203,652).
Patent Interference No. 105,467 (SCM)
(Technology Center 2100)

Order - Miscellaneous - Bd.R. 104(a)

1 **A. Conference call**

2 A telephone conference call was held on 8 March 2007 at approximately
3 11:00 a.m., involving:

- 4 1. Ms. McCurdy, counsel for Perego,
5 2. Mr. Sharrott, counsel for Drehmel, and
6 3. Sally Medley, Administrative Patent Judge.¹

¹ Also present with counsel for Perego was Mr. Modi. Present with Mr. Sharrott was Mr. Fisher. A court reporter was present.

1 **B. Relevant discussion during conference call**

2 Counsel for Perego requested the call to discuss a Drehmel exhibit that was
3 served 6 March 2007. Apparently, Perego objected to some of Drehmel’s exhibits
4 per SO ¶ 155.1. In response, Drehmel made an attempt to overcome the objections
5 by resubmitting certain amended exhibits per SO ¶ 155.1.3. Counsel for Perego
6 explained that one of the amended exhibits, the declaration of Desi Rhoden
7 (Exhibit 1002), added “new arguments” not previously raised and that the amended
8 exhibit was confusing since it was difficult to ascertain what was new and what
9 was original. For these reasons, Counsel for Perego requested that the exhibit be
10 excluded.

11 Counsel for Drehmel explained that the substitute Exhibit 1002 was different
12 from the original Exhibit 1002 only to the extent necessary to overcome Perego’s
13 original objections. Counsel for Drehmel also indicated that Perego was provided
14 a comparison of the two documents, so that Perego could readily ascertain the
15 differences between the old exhibit and the new one.

16 Perego’s assertion that the substitute Exhibit 1002 contains new arguments
17 is not well understood. Exhibit 1002 is a declaration in support of Drehmel’s
18 opposition briefs. Briefs contain arguments. Evidence should not contain
19 arguments. To the extent that Drehmel’s Exhibit 1002 contains new factual points
20 not previously presented, Perego failed to articulate why any of the alleged new

1 facts necessitate striking the exhibit from the record. Any new facts were
2 presumably made in order to overcome the objections made by Perego. Presenting
3 new facts in order to overcome an objection is not per se improper. If a party
4 objects to evidence, then the opponent may properly respond and present
5 supplemental evidence in order to overcome the objection. As a result, new facts
6 will likely be presented.

7 Drehmel does not seek to amend, change, or add new arguments to its
8 already filed oppositions. Moreover, Perego has not cross examined Desi Rhoden.
9 Perego will have opportunity to cross examine Desi Rhoden based on the amended
10 declaration. For these reasons, Perego's request to strike Exhibit 1002 on the basis
11 that the exhibit presents new "arguments" is denied. Perego may of course move
12 to strike Exhibit 1002 at the appropriate time (Time Period 5) on the basis that the
13 supplemental exhibit fails to overcome the original objections.

14 During the call it became apparent that the parties have not labeled their
15 supplemental evidence (exhibits) in the same way. Apparently Drehmel has
16 labeled its supplemental exhibits with the same exhibit number as its original
17 exhibit, while Perego has labeled its supplemental evidence with a new number.
18 Drehmel's approach is the correct one. A supplemental exhibit should be given the
19 same exhibit number as the original exhibit. The supplemental exhibit then

- 1 replaces the original exhibit. In this way, the briefs already filed need not be
- 2 amended to refer to any new exhibit numbers.

/Sally C. Medley/
Administrative Patent Judge

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