

From: [Williams, Eliot D.](#)
To: [Trials](#)
Cc: [gianni.minutoli@dlapiper.com](#); [matthew.middleton@us.dlapiper.com](#); [steven.kellner@dlapiper.com](#); [DLA Colossus DCTDE@us.dlapiper.com](#); [DL Draft Kings v Diogenes](#); [Guy, Hop](#); [Lynn, Jamie](#); [Martin, Tommy](#); [Wilson, Andrew](#)
Subject: IPR2023-00268 (Delegated Rehearing Panel) Request To Submit Supplemental Information
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Dear Honorable Delegated Rehearing Panel,

Petitioner in the above-captioned matter (the “268 IPR”) requests permission to file a motion to submit supplemental information. Specifically, Petitioner seeks permission to submit recent testimony of Patent Owner’s expert in this case, Dr. Vancura, from depositions conducted in case nos. IPR2023-00262 and 00267 (the “Related Cases”). The new testimony addresses the meaning of the term “continuously” in the context of substitute claims at issue in the Related Cases with claim limitations that are substantially similar to claim limitations subject to the DRP’s review here.

As to good cause, Petitioner would show that after providing direct testimony in the Related Cases adopting the Majority’s construction of the term “continuously” from this case, Dr. Vancura testified during cross-examination that receiving data for just one second in a three-hour football game would constitute “continuously” receiving data. Dr. Vancura also testified that executing an evaluation function just two times in a row (i.e., in a “loop”) would constitute “continuously” evaluating wager information as claimed. These positions are inconsistent with the Majority’s construction of the term “continuously” in the ‘268 IPR, which credited Patent Owner’s argument and Dr. Vancura’s written testimony that “‘continuously’ means ‘ongoing at all times.’” Paper 9 (Decision Denying Institution) at 13 (citing POPR at 16 and Vancura Declaration at para. 89). In light of this clear inconsistency, Dr. Vancura’s testimony is highly relevant to the present rehearing and the construction of “continuously.”

It is Petitioner’s position that this request is timely and appropriate under the Delegation Order, which anticipates “additional briefing” on issues germane to institution (Paper 10 at 2) because this testimony could not be obtained earlier and confirms it is reasonably likely that the challenged claims in the 268 IPR will be found invalid. *See Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1273-1275 (Fed. Cir. 2017) (finding PTAB decision to deny entry of inconsistent expert testimony from parallel district court litigation was abuse of discretion and explaining that “no reasonable fact finder would refuse to consider evidence of inconsistent sworn testimony.”); *see also* Consolidated Trial Practice Guide at 48 (Nov. 2019) (“The Board, in its claim construction determinations, will consider statements regarding claim construction made by patent owners and by a petitioner filed in other proceedings, if the statements are timely made of record.”)

Counsel for Petitioner and Patent Owner conferred by email prior to Petitioner submitting this request and counsel for Patent Owner indicated that it opposes this request.

Respectfully Submitted,

Eliot D. Williams

BAKER BOTTS LLP 

+1 202 639-1334 (Direct Dial)

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