

IPR2023-00342

Petitioner's Sur-reply to Motion to Amend

Filed on behalf of Intuit Inc.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTUIT INC.,
Petitioner

v.

SAMESURF, INC.,
Patent Owner.

Inter Partes Review No. IPR2023-00342
Patent 8,527,591 B2

**PETITIONER'S SUR-REPLY TO REPLY TO
OPPOSITION TO CONTINGENT MOTION TO AMEND**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PO DID NOT REFUTE THE CONTENTION THAT ITS ANALYSIS IS UNSUPPORTED BY EVIDENCE	1
III. PATENT OWNER’S LACK OF WRITTEN DESCRIPTION SUPPORT IS FATAL TO ITS MOTION TO AMEND.....	2
IV. THE AMENDED CLAIMS ARE OBVIOUS OVER THE ASSERTED REFERENCES	7
A. Each of Lebrun, Prajapat, and Birnbaum Disclose the “Operating a Browser” Limitation	7
B. PO’s Challenges to the Art Combinations Fail	10
V. PO’S ARGUMENTS MISCHARACTERIZE THE LAW	11
VI. CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ariad Pharm., Inc. v. Eli Lilly & Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010)	6
<i>Hunting Titan, Inc. v. DynaEnergetics Eur. GmbH</i> , 28 F.4th 1371 (Fed. Cir. 2022)	12
<i>In re Magnum Oil Tools Int'l, Ltd.</i> , 829 F.3d 1364 (Fed. Cir. 2016)	1
<i>In re Schulze</i> , 346 F.2d 600 (CCPA 1965)	1, 9
<i>Juno Therapeutics, Inc. v. Kite Pharma, Inc.</i> , 10. F.4th 1330, 1341 (Fed. Cir. 2021)	3
<i>Lectrosonics, Inc. v. Zaxcom, Inc.</i> , IPR2018-01129, -01130, Paper 15 at 3-4 (P.T.A.B. Feb. 25, 2019)	12
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc)	4
<i>Unified Patents Inc., v. KCG Technologies LLC</i> , IPR2019-01536, Paper 28 (FWD) (P.T.A.B. Feb. 10, 2021)	12
<i>Veeam Software Corp. v. Veritas Techs., LLC</i> , IPR2014-00090, Paper 48 (P.T.A.B. July 17, 2017)	7
OTHER AUTHORITIES	
37 C.F.R. § 42.121(b)(1)	2
37 C.F.R. § 42.121(d)(2)	11

EXHIBIT LIST (37 C.F.R. § 42.63(e))

Exhibit	Description
1001	U.S. Patent No. 8,527,591
1002	File History of U.S. Patent No. 8,527,591
1003	Declaration of Henry Lieberman
1004	Curriculum Vitae of Henry Lieberman
1005	International Patent Pub. No. WO 00/48110 to Lebrun et al. ("Lebrun")
1006	U.S. Patent Pub. No. 2005/0033656 to Wang et al. ("Wang")
1007	U.S. Patent Pub. No. 2005/0021626 to Prajapat et al. ("Prajapat")
1008	"NCSA Mosaic, Project Profile," University of Illinois, National Center for Supercomputing Applications (available at: https://www.ncsa.illinois.edu/research/project-highlights/ncsa-mosaic/)
1009	"Netscape Communications Corp.," Henry R. Norr, August 28, 2017, Encyclopedia Britannica, Inc. (available at: https://www.britannica.com/topic/Netscape-Communications-Corp)
1010	"50 Years of Email," cloudHQ, April 6, 2021 (available at: https://www.prnewswire.com/news-releases/50-years-of-email-301262676.html)
1011	"The History of Email: Major Milestones from 50 Years," Kasey Steinbrinck, January 28, 2021, Email on Acid Ina Fried, (available at: https://www.emailonacid.com/blog/article/email-marketing/history-of-email/)
1012	"10 Instant Messaging Services that Used to Be Popular," Elise Moreau, May 3, 2021, Lifewire Tech for Humans (available at: https://www.lifewire.com/once-popular-old-instant-messaging-services-3486135)

Exhibit	Description
1013	"Timeline of Social Media," Wikipedia (available at: https://en.wikipedia.org/wiki/Timeline_of_social_media)
1014	"Hyperlink," Wikipedia (available at: https://en.wikipedia.org/wiki/Hyperlink)
1015	U.S. Patent No. 5,708,780 to Levergood, et al.
1016	"Session Identification URI," W3C Working Draft WD-session-id-960221, w3 Org (available at: https://www.w3.org/TR/WD-session-id.html)
1017	"Giving Web a Memory Cost Its Users Privacy," John Schartz, September 4, 2001, New York Times (available at: https://www.nytimes.com/2001/09/04/business/giving-web-a-memory-cost-its-users-privacy.html)
1018	"GroupWeb: A WWW Browser as Real Time Groupware," Saul Greenberg and Mark Roseman, CHI '96 ACM Conference on Human Factors in Computing Systems, April 13-18, 1996 (available at: https://dl.acm.org/doi/pdf/10.1145/257089.257317)
1019	"Let's Browse: A Collaborative Web Browsing Agent," IUI '99: ACM Proceedings of the 4th International Conference on Intelligent User Interfaces, December 1998 (available at: https://dl.acm.org/doi/10.1145/291080.291092)
1020	"Letizia: An Agent that Assists Web Browsing," Henry Lieberman, <i>International Joint Conference on Artificial Intelligence</i> , 1995 (available at: https://web.media.mit.edu/~lieber/Lieberary/Letizia/Letizia-AAAI/Letizia.html)
1021	U.S. Patent No. 6,353,822 to Lieberman
1022	"Google Docs," Wikipedia (available at: https://en.wikipedia.org/wiki/Google_Docs)

Exhibit	Description
1023	"Google Announces Google Docs & Spreadsheets," October 11, 2006, Google Press Release, (available at: http://googlepress.blogspot.com/2006/10/google-announces-google-docs_11.html)
1024	"The History of JavaScript: Everything You Need to Know," T.J. DeGroat, August 19, 2019, Springboard (available at: https://www.springboard.com/blog/data-science/history-of-javascript/)
1025	"Adobe Flash," Wikipedia (available at: https://en.wikipedia.org/wiki/Adobe_Flash)
1026	"What Does AJAX Even Stand For?," Jay Hoffman, March 4, 2019, The History of The Web (available at: https://thehistoryoftheweb.com/what-does-ajax-even-stand-for/)
1027	RESERVED
1028	Declaration of Michael J. Sacksteder in Support of Petitioner's Motion for Pro Hac Vice Admission of Michael J. Sacksteder Pursuant to 37 C.F.R. § 42.10(c)
1029	Declaration of Geoffrey R. Miller in Support of Petitioner's Motion for Pro Hac Vice Admission of Geoffrey R. Miller Pursuant to 37 C.F.R. § 42.10(c)
1030	Declaration of Daniel Ledesma in Support of Petitioner's Motion for Pro Hac Vice Admission of Daniel Ledesma Pursuant to 37 C.F.R. § 42.10(c)
1031	"Microsoft Computer Dictionary 5th Edition," May 01, 2002, Microsoft Press
1032	Claim 1 from each patent (as relied on during Friedman deposition)
1033	Transcript of Deposition of Stacy Friedman, taken November 15, 2023
1034	Declaration of Henry Lieberman in Support of Petitioner's Reply to Patent Owner's Response

Exhibit	Description
1035	U.S. Patent Publication No. 2002/0143878 to Birnbaum et al. ("Birnbaum")
1036	Declaration of Henry Lieberman in Support of Petitioner's Opposition to Patent Owner's Motion to Amend

Intuit Inc. ("Petitioner") submits this Sur-reply in response to Patent Owner's Reply to Opposition to Contingent Motion to Amend ("MTA Reply").

I. INTRODUCTION

Patent Owner's ("PO") MTA Reply does nothing to remedy the failure of the Contingent Motion to Amend ("Motion") to provide adequate written description support for the amended claims or to refute Petitioner's obviousness evidence. PO's arguments are not supported by substantial evidence and thus must fail. PO never explains why it disagrees with the Board's preliminary conclusion that each of Petitioner's obviousness contentions is sufficiently persuasive. Finally, PO's argument that Petitioner's Opposition is incomplete misrepresents the law.

II. PO DID NOT REFUTE THE CONTENTION THAT ITS ANALYSIS IS UNSUPPORTED BY EVIDENCE

Neither PO's Motion nor its MTA Reply are supported by an expert declaration. PO chose not to submit a declaration supporting its Motion and MTA Reply, and opted not to cross-examine the declaration testimony of Petitioner's expert. Mere conclusory statements in the form of attorney argument cannot take the place of evidence in the record. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016); *see also In re Schulze*, 346 F.2d 600, 602 (CCPA 1965). To the extent that PO's arguments are contrary to those supported by Dr. Lieberman's testimony, there is no substantial evidence to support them, and they must fail.

III. PATENT OWNER'S LACK OF WRITTEN DESCRIPTION SUPPORT IS FATAL TO ITS MOTION TO AMEND

The MTA Reply does not remedy the Motion's failure to establish written description support for "second data" and the "operating a browser" step, as the Board preliminarily found. Guidance, 6.

As a preliminary matter, PO did not set forth in the MTA Reply where its alleged support could be found *in the original disclosure* of the patent. *See* MTA Reply, 1-3 (citing only Ex. 1001, not to the '743 Application as filed). "A motion to amend claims must ... set forth: (1) The support in the original disclosure of the patent for each claim that is added or amended." 37 C.F.R. § 42.121(b)(1). In particular, the MTA Reply includes *eight* new citations to Ex. 1001 that do not correspond to any of the portions of the application as filed that were relied upon in the Motion. MTA Reply, 1-3¹ PO also did not provide in the MTA Reply "support in the original disclosure" for these new citations, as required. *Id.* Thus, even if PO's new citations provided written description support for the amended claims – which they do not – they do not meet PO's statutory burden and cannot remedy the lack of written description support the Board identified in the Motion. Guidance, 6-7.

¹ The citations with no corresponding '743 Application citation in the Motion span Ex. 1001, 7:32-62, 16:51-63. MTA Reply, 2-3.

Nor do PO's new citations provide written description support for the amended claims, which specifically require that the first data comprises a second data subset "indicating at least one direct host device *interaction with the content of the website* performed by the host device" and that the "operating a browser" step to independently replicate that action is performed "based on at least the second data." Motion, Appendix A, 1 (claim 19) (emphasis added); *see also id.*, 4 (claim 28). The alleged support from the specification fails to disclose a corresponding specificity, as necessary to demonstrate that "the inventors possessed the entire scope of the claimed invention." *Juno Therapeutics, Inc. v. Kite Pharma, Inc.*, 10. F.4th 1330, 1341 (Fed. Cir. 2021).

The disclosure upon which PO relies does not reflect what the claims recite. Specifically, PO relies on disclosure of data sent from the host device to the synchronization server via communication message 61 and then relayed to the guest device via communication message 64; that data is then used by the guest device to formulate website request 65. MTA Reply, 2-3; *see also* Ex. 1001, 16:51-62. Messages 61, 64, and 65 are cumulatively described as relaying "the URL address of website server 12, cookie information, form data, java script, or other user inputted information, or attached files" (Ex. 1001, 16:4-7 (61); *see also* 16:34-40 (64, same list)) and "URL, ...cookies, or other data" (Ex. 1001, 19:12-16 (65)). But this generic disclosure of the complete set of data relayed *does not provide* the

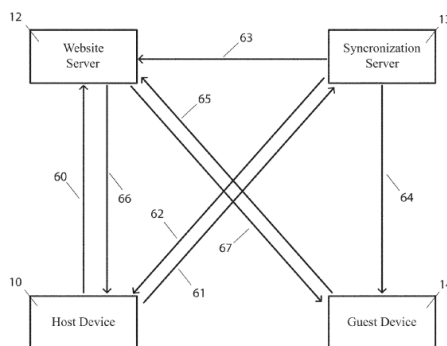
specificity required by the amended claims of a *second data subset* of the first data indicating a host device *interaction with the content of the website*, nor operating a browser based such second data since the relayed data does not indicate an interaction with website content.

PO also misapplies the doctrine of claim differentiation in an attempt to impose a false distinction between the second data and the first data, contending that “[t]he ‘second data’ is distinct from URL or cookie data *by dint of claim differentiation*” MTA Reply, 1 (emphasis added); *see also id.*, 11 (“A URL or cookie is not ‘the second data’ due to claim differentiation.”). But the doctrine of claim differentiation requires only that “the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc). Claim differentiation does not apply to the first and second data as both are recited in the *same independent claim*. It appears that PO is attempting to argue that second data cannot be URL or cookie data. However, this argument suffers from the problem discussed *supra*: the generic disclosure of the specification *does not support* the specificity required by the amended claims. The specification makes no distinction among the list of data relayed to the guest device from which a POSITA could reasonably conclude what constitutes the “first” data as opposed to the “second” data.

PO still fails to explicitly state in the MTA Reply what disclosure in the specification allegedly supports the terms “second data” and “operating a browser” based on the second data. Rather, PO discusses a singular “non-limiting example” of the “second data” as “form data” “inputted by a user in pre-defined fields” that can be part of the “other user inputted information” sent from the host device to the synch server and passed to the guest device. MTA Reply, 1-3. PO never explains, however how the disclosed technique singles out “form data” from the list of data relayed as the “second data” or how the form data “indicat[es] at least one direct host device *interaction with the content of the website.*”

The specification does not disclose the form data as indicating an *interaction with the content of the website* by host device 10 that is independently replicated by guest device 14 in the operating a browser step using the relayed form data. Specifically, using the reference numerals from FIG. 5(a) below, the specification describes website request 60 from host device 10 to website server 12 including *form data* (Ex. 1001, 16:65-66), communication message 61 from host device 10 to synch server 13 including *the same form data* (*id.*, 17:6-9), communication message 64 transmitting *the form data* from synch server 13 to guest device 14 (*id.*, 19:14-16), guest device 14 using message 64 to formulate and send website request 65 with *the form data* to website server 12 (*id.*, 19:12-14), where website content reply 67 to guest device 14 is “similar or identical” to website content

reply 66 to host device 10 assuming similar requests (60, 65) (*id.*, 17:27-30). The specification gives examples of form data for a travel website query as location, number of nights, number of guests. *Id.*, 16:66-17:4. The specification defines form data as “**information** inputted by a user in pre-defined fields on a webpage that may be transmitted to a website server.” *Id.*, 16:63-65. Even if PO argued that the original “input” of this information into the form is the host device **interaction with the content of the website** – which it did not – the guest device does not “independently replicate” that interaction, since the form data as entered is received by the guest device and is included in the website request 65 **before** any “content” is received by the guest device (67) that it could possibly “interact” with. Ex. 1001, 19:12-16; *see also* Opp., 4-5 (no specification support for single message including both first data and second data).



Since PO's citations do not provide written description support for the amended claims, a POSITA could not reasonably conclude that the inventor had possession of the invention **as claimed** on the filing date. *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1352 (Fed. Cir. 2010). Possession of an invention

“extends only to those things actually described as being the invention”; “it is not shown by exposition of what would be obvious to a person of ordinary skill in the art in view of the disclosure.” *Veeam Software Corp. v. Veritas Techs., LLC*, IPR2014-00090, Paper 48 at 17 (P.T.A.B. July 17, 2017).

IV. THE AMENDED CLAIMS ARE OBVIOUS OVER THE ASSERTED REFERENCES

PO has done nothing to refute the Board's preliminary findings that Petitioner's obviousness contentions were sufficiently persuasive. Guidance, 11. Indeed, PO never explains why it disagrees with the Board's obviousness analysis in the Guidance, failing to cite to the obviousness section of the Guidance even once. *See* MTA Reply, 7-12 (no cites to Guidance at 11-16).

A. Each of Lebrun, Prajapat, and Birnbaum Disclose the “Operating a Browser” Limitation

Only the “operating a browser” limitation is in dispute in this case. PO did not challenge Petitioner's Opposition arguments regarding the “first data received” limitation, nor did it refute the Board's preliminary finding that the asserted references show the “first data received” limitation. Guidance, 11-14; *see* MTA Reply, 7-12. It is thus undisputed that the asserted references disclose the “first data received” limitation. In addition, PO did not address any limitations that it does not seek to amend. PO argues only that Petitioner did not repeat its arguments from the Petition as to the identical limitations, in an effort to misrepresent Petitioner's arguments as incomplete. *See* Section V., *infra*. Petitioner thus addresses only the

“operating a browser” limitation in this section.²

Far from refuting the Board's obviousness analysis in the Guidance, PO's arguments largely disregard it. *See* MTA Reply, 7-12. For the “operating a browser” limitation as disclosed in Lebrun, the Board relied primarily on Ex. 1005 at 43:20-22, which discusses the guest device accessing a URL as “independent replication” of a host device interaction of accessing the same URL. Guidance, 12. PO spends just one paragraph discussing this portion of Lebrun, rehashing meritless arguments that have been previously rejected by the Board. MTA Reply, 9-10. First, PO repeats its “only” pointers argument. MTA Reply, 9; *see* Reply, 10 (“read in context, it is clear that “only” pointer/URLs being received does not mean that URLs are received to the exclusion of any other information – PO has manufactured that reading of this sentence”); *see also* Decision, 25-26 (discussing same language). Next PO reiterates its argument against combining Lebrun's embodiments, despite the Board's explicit statement in the Guidance that “Lebrun contemplates combining embodiments.” Guidance, 12; *see* MTA Reply, 9-10 (“apparently relying on generally combining arguments”). Finally, PO attempts to read an unrecited requirement for “form data” into the amended claims. MTA Reply, 9-10.

² Petitioner stands on its briefing directed to the “first data received” limitation in the Opposition. Opp., 11-13, 15-17; *see also* Guidance, 11-14 (accord).

The Board's analysis of Prajapat primarily relied upon ¶¶31 and 43, which describe keeping "web page form content" in sync and requesting it using a URL, respectively. Guidance, 14. PO again does not address these disclosures head on and relies on previously rejected positions and unsubstantiated attorney argument. PO repeats its reliance on its failed argument that Prajapat's various embodiments cannot be read in combination, which the Board unequivocally rejected. MTA Reply, 11; *see* Guidance 14. PO next attempts to refute Petitioner's evidence – in the form of expert testimony – supporting its interpretation of the term "other suitable information" with attorney argument. *See* MTA Reply, 11; *contrast* Opp., 17-18, citing Ex. 1003, ¶¶232-233, Ex. 1036, ¶19. But mere attorney argument cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602 (CCPA 1965). Further, PO does not address ¶43 or the Board's reliance on requesting web content using a URL at all. MTA Reply, 10-12.

With respect to Birnbaum, PO does not refute – or even address – the Board's preliminary findings. MTA Reply, 7-11 (no mention of Birnbaum in discussion of the art as applied to "second data"); *see* Guidance, 15-16 (concluding Birnbaum discloses the newly added limitations). Rather, PO addresses only combining Birnbaum with Lebrun and/or Prajapat, which is addressed in Section IV.B., *infra*. PO never disputes the substance of Petitioner's arguments as to why Birnbaum discloses the amended limitations, nor the Board's preliminary agreement that

Birnbaum discloses those limitations. *See* Opp., 19-23; Guidance, 15-16.

B. PO's Challenges to the Art Combinations Fail

PO's attack on the combination of the asserted art is unfounded. PO did not challenge the Board's preliminary finding that a POSITA would have combined Lebrun or Prajapat with Wang, and Petitioner's evidence demonstrates that the amended claims are obvious over Birnbaum in combination with Lebrun and/or Prajapat and Wang. Furthermore, PO is incorrect that the Opposition relies on incorporation by reference for the combinations of art.

As an initial matter, PO did not challenge combining Lebrun or Prajapat with Wang, either in its Motion or the MTA Reply, nor did it address the Board's preliminary finding that a POSITA would have combined the references. *See* Motion, 15-23; MTA Reply, 7-12; Decision, 28, 41. It cannot do so now.

Petitioner's evidence shows why the amended claims are obvious over Birnbaum alone or in combination. Opp., 24. Petitioner shows in detail that Birnbaum discloses the newly added limitations, which PO did not dispute. Opp., 19-23; *see* Section IV.A., *supra*. The Birnbaum ***combinations*** only rely upon the other references for showing that the remaining, unamended claim limitations are obvious over those combinations. PO's position that it did not have notice of the combinations with Birnbaum sufficient to refute them strains credulity. The Opposition specifically spelled out Petitioner's position that "***Birnbaum ... discloses***

the newly added limitations, and Birnbaum in view of Wang and Lebrun or Wang and Prajapat also render claims 19 and 28 obvious.” Opp., 19.

PO is wrong that the Opposition relies on incorporation by reference for the art combinations. MTA Reply, 6. Although the Opposition did *cite to* the Petition, it also provided a rationale *both* for combining the references in general and, as acknowledged by the Board, “motivation specific to the amended claim limitations.” Guidance 16; *see* Opp., 24. Petitioner also supported its position with direct cites to each of the references, as well as substantial expert testimony, both from the original declaration supporting the Petition (Ex. 1003) and the new declaration supporting the Opposition (Ex. 1036). *See* Opp. 24 (citing Ex. 1005 (Lebrun), 4:1-4, 39:4-10; Ex. 1006 (Wang), [0009]-[0010], [0013]; Ex. 1007 (Prajapat), [0005], [0030]-[0031] Fig. 2; Ex. 1035 (Birnbaum), [0012], [0080], FIG. 4; Ex. 1003 (Declaration ISO Petition), ¶¶138-146; Ex. 1036 (Declaration ISO Opposition), ¶¶29-30; Pet., 18-20). When determining the patentability of the amended claims, the Board may consider the entire record, as discussed in Section V., *infra*.

V. PO'S ARGUMENTS MISCHARACTERIZE THE LAW

PO misrepresents the statutes it cites to support its flawed arguments that Petitioner's Opposition was incomplete. MTA Reply, 3-5. Although 37 C.F.R. § 42.121(d)(2) places the burden on Petitioner to show the proposed claims as amended are unpatentable, nothing in that statute or the others cited requires

Petitioner to repeat arguments from the Petition about the asserted art as it applies to the unamended claim limitations.

In the MTA Reply, PO provided “reasons why the prior art does not teach or suggest at least the subject matter **added by amendment**.” Motion, 13 (emphasis added). The Trial Practice Guide advises that “Petitioners may respond to **new issues** arising from proposed substitute claims and may include evidence responsive to the amendment.” TPG, 71 (emphasis added). PO points to no requirement that Petitioner must repeat arguments from the Petition about the asserted art as it applies to the unamended claim limitations. The Board commonly grants Motions to Amend based on Petitioners’ addressing only the amended limitations . *See, e.g., Unified Patents Inc., v. KCG Technologies LLC*, IPR2019-01536, Paper 28 (FWD) at 42 (P.T.A.B. Feb. 10, 2021); *id.*, Paper 16 at 7-23 (P.T.A.B. July 31, 2020) (Opposition addressed only added elements). The Board determines whether substitute claims are unpatentable “based on **the entirety of the record**, including any opposition made by the petitioner.” TPG, 68 (emphasis added), citing *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129, -01130, Paper 15 at 3-4 (P.T.A.B. Feb. 25, 2019) (precedential); *see also Hunting Titan, Inc. v. DynaEnergetics Eur. GmbH*, 28 F.4th 1371, 1381-1382 (Fed. Cir. 2022) (“based on consideration of the entire record”).

VI. CONCLUSION

For the reasons reiterated above, the Board should deny PO's Motion to Amend.

IPR2023-00342

Petitioner's Sur-reply to Motion to Amend

Dated: March 6, 2024

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CERTIFICATION OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on March 6, 2024, I caused a true and correct copy of the foregoing PETITIONER'S **SUR-REPLY TO REPLY TO OPPOSITION TO CONTINGENT MOTION TO AMEND** to be electronically served on Petitioner's lead and backup counsel at the following addresses:

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