

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM ENTERPRISES, LLC,
Petitioner,

v.

ELAINE AND REINHOLD W. VIETH,
Patent Owners.

Case IPR2023-00726
Patent 9,066,958

**PETITIONER'S REPLY TO PATENT OWNERS'
PRELIMINARY RESPONSE**

LIST OF EXHIBITS

Exhibit	Description
MOM-1001	U.S. Patent No. 9,066,958 (the “958 Patent”)
MOM-1002	U.S. Patent No. 9,066,958 File History
MOM-1003	Complaint, Ddrops Company, Reinhold Vieth, and Elaine Vieth v. MOM Enterprises, LLC, d/b/a Mommy’s Bliss, 1:22-cv-00332-GBW, District of Delaware
MOM-1004	Declaration and Curriculum Vitae of Dr. Robert Williams
MOM-1005	Declaration and Curriculum Vitae of Librarian June Munford
MOM-1006	Section 15.9 of Wochenbettbetreuung in der Klinik und zu Hause, Hippokrates Verlag by Ulrike Harder (2003) (“Harder”)
MOM-1007	Translation of Harder by Amy Tinworth (“Harder Tr.”)
MOM-1008	Aktuelle Therapie: Rachitisprophylaxe beim Säugling by H. Wolf, Volume 95/no.9 Deutsche Medizinische Wochenschrift at 1530 (1970) (“Wolf”)
MOM-1009	Translation of Wolf by Simon Chun Hsieh (“Wolf Tr.”)
MOM-1010	Excerpts from European Pharmacopoeia Supplement 4.3 (2003) (“European Pharmacopoeia Supplement 4.3”)
MOM-1011	Suckling- and Sucrose-Induced Analgesia in Human Newborns by Elliott M. Blass & Lisa B. Watt, 83 Pain 611, (1999) (“Blass”)
MOM-1012	Prevention of Rickets and Vitamin D Deficiency: New Guideline for Vitamin D Intake” by Lawrence M. Gartner, Volume 111/no. 4 of Pediatrics at 908 (2003) (“Gartner”)
MOM-1013	Introduction of Oral Vitamin D Supplementation and the Rise of the Allergy Pandemic by Matthias Wjst, Volume 5/no. 8 of Allergy, Asthma & Clinical Immunology (2009) (“Wjst”)
MOM-1014	The Case Against Ergocalciferol (Vitamin D2) as a Vitamin Supplement” by Reinhold Vieth, Volume 84/no.4 of The American Journal of Clinical Nutrition (2006) (“Vieth”)
MOM-1015	Effect of Vitamin D Replacement on Musculoskeletal Parameters in School Children: A Randomized Controlled Trial by Vieth, Volume 91/no. 2 of the Journal of Clinical Endocrinology & Metabolism (2006) (“Vieth II”)
MOM-1016	Public Health Practices in Germany by W. W. Bauer, Volume 40/no. 9 of American Journal of Public Health and The

	Nation's Health ("Bauer")
MOM-1017	Canadian Patent Application No. 2,558,202
MOM-1018	Stipulation Letter by Petitioner

On August 4, 2023, the Board granted Petitioner's request to file this reply addressing Patent Owners' discussion of the sufficiency of the declarations filed at Exhibits 1005, 1007, and 1009. (Paper 7.) On their face, these declarations comply with the rules and support the Petition's grounds for institution.

A. The Translator Declarations Satisfy 37 C.F.R. § 42.63(b)

Patent Owners contend Sherman's declaration is insufficient because it purportedly does not attest to the accuracy of the translation and suggests the translation was not accurate (or "manipulated"). *See* POPR 24-25. Patent Owners further contend Liu's declaration "does not profess to have knowledge of the German language or proficiency in translation services." POPR at 26.

Patent Owners submitted no rule or other authority that these criticisms render the declarations invalid. Their reliance on *Shenzhen* is inapposite because that case involved machine translations, but Petitioner's declarations here were performed by human translators. The rules simply require Petitioner to submit "a translation of the document into English and an affidavit attesting to the accuracy of the translation must be filed with the document." 37 C.F.R. § 42(b). Both Sherman's and Liu's declarations, on their face, comply with this rule.¹

¹ Patent Owners' reliance on Section (1)(F)(1)(c) of the Trial Practice Guide is misplaced. This section pertains to "documents produced in discovery" and other matters after institution. Regardless, Petitioner has complied with the requirements of Section (I)(F)(1)(c).

Sherman is the United Kingdom Head of Translation Operations at RWS IP Services and supervises its translators, such as Ms. Tinworth, who performed the initial translation of Harder. (MOM-1007, ¶¶ 1-2.) Sherman testified he “reviewed [Tinworth’s] translation and confirm[s] that the addition of ‘to be licked off’ (for the German ‘zum Ablecken’) . . . makes *the translation a more accurate reflection of the German text.*” MOM-1007, ¶ 3 (emphasis added). This is because the word “ablecken” in the German document (MOM-1006) means “to lick off” in English. Sherman’s testimony that “the translation” is “a more accurate reflection of the German text” is a statement “attesting to the accuracy” of the translation required by the rule. 37 C.F.R. § 42(b). He swore to this under penalty of perjury. (MOM-1007, ¶ 4.) The rule requires no specific form or other magic words, and Patent Owners submitted no evidence that this translation is incorrect.

Liu’s declaration is also sufficient. Liu declares under the penalty of perjury “[t]he attached translation is, to the best of my knowledge, a true, full and accurate translation of the attached German document.” (MOM-1009, ¶ 2.) Although Liu is a native English speaker whose proficiency in German was obtained from years working in Germany at a biotechnology company, and since then, work as a translator for RWS since 2010 translating biology and chemistry patents, Petitioner was not required to provide that level of detail. His statement is sufficient to attest to the accuracy of the translation; no competency showing is required. *See* 37

C.F.R. 42.63(b); *see also Intel Corp. v. VLSI Tech. LLC*, IPR2018-01040, Paper 15 at 36-37 (PTAB Feb. 13, 2019) (declaration complied with § 42.63(b) when on its face, declarant certified under the penalty of perjury that translation was to the best of his knowledge and belief, a true and accurate translation). Patent Owners submitted no evidence that this translation is incorrect or his qualifications lacking.

The proper stage for Patent Owners to challenge admissibility is after institution, such as through the procedures of § 42.64. *Id.* at 37. Petitioner can also move to submit supplemental information after institution to address any challenges by Patent Owners. *See* 37 C.F.R. § 42.123. But on the record, at this institution stage, the Board should decline Patent Owners' requests to disregard Harder and Wolf. Patent Owners presented no credible challenge to the accuracy of these translations such that Petitioner is not likely to prevail at trial. If Patent Owners genuinely believed these translations were inaccurate or not credible, they could have submitted their own translations. They did not.

B. The Munford Declaration Demonstrates Public Accessibility

Patent Owners' contention that Harder was not publicly accessible lacks merit. Harder is a textbook with a copyright page, printed by a major German scientific publisher (Thieme), that was cataloged and indexed in a major library (the National Library of Medicine) in 2003—years before the claimed priority date of the '958 Patent. The law does not put unreasonable demands on a Petitioner to

show public accessibility for this kind of document. *See VidStream LLC v. Twitter, Inc.* 981 F.3d 1060, 1065 (Fed. Cir. 2020) (“When there is an established publisher there is a presumption of public accessibility as of the publication date.”).

Whether a document is a “printed publication” under 35 U.S.C. § 102 involves a case-by-case inquiry. “While cataloging and indexing have played a significant role in [] cases involving library references, [] neither cataloging nor indexing is a necessary condition for a reference to be publicly accessible.” *Hulu v. Soundview Innovations, LLC*, IPR2018-01039, Paper 29 at 10 (PTAB Dec. 20, 2019). A reference “is ‘publicly accessible’ upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons [] exercising reasonable diligence, can locate it.” *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008). Petitioner’s burden at institution is lower than the preponderance of evidence standard applied in a final written decision. *See Hulu*, IPR2018-01039, Paper 29 at 13-14.

The entirety of the record shows that Petitioner met its burden. Harder is a textbook that bears conventional markers of publication, such as a printing (“Printed in Germany 2003”), a copyright date (“© 2003”), a major German scientific commercial publisher (“Hippokrates Verlag”—a subsidiary of “Thieme Verlagsgruppe”), and an ISBN number (“3-8304-5216-0”). *See* MOM-1006 at 1-3; *see also Hulu*, IPR2018-01039, Paper 29 at 17-18 (“the indicia on the face of a

reference, such as printed dates and stamps, are considered as part of the totality of the evidence”).

Munford testified that Harder was publicly accessible at the National Library of Medicine in 2003 shortly after it was acquired based on her review of the MARC record. (MOM-1005 at ¶ 8). *See Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019) (“When a reference is uploaded to a website or deposited in a library, the fact that the reference is indexed or cataloged in some way can indicate that it is publicly accessible.”). The MARC record and library catalog matches the indicia of publication on the face of Harder. (MOM-1005 at 35-37.) The MARC record also shows the category terms an interested researcher could use: “postnatal care methods” and “postpartum care.” (See MOM-1005 at 35.) These categories match the field of the ’958 Patent, which includes the use of vitamin D compositions for breast-feeding infants. (MOM-1001, 1:10-12).

Patent Owners’ reliance on *Microsoft* is misplaced. That case concerned a dissertation—not a textbook of a major publisher. *Hulu* did not indicate books like Harder are held to a more stringent standard like dissertations. *See Microsoft Corp. v. Throughputer, Inc.*, IPR2022-01566, Paper 13 at 9-10 (PTAB May 31, 2023).

Based on a totality of the evidence, Petitioner has shown that it can prove Harder was publicly accessible before the critical date, and thus qualifies as a “printed publication.” Patent Owners’ request to exclude Harder should be denied.

Date: August 11, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR § 42.6(e)(4), the undersigned certifies that on August 11, 2023, a complete and entire copy of this Petitioner's Reply to Patent Owners' Preliminary Response and its supporting exhibits, were provided via email, to the Patent Owners by serving the email correspondence addresses of record as follows:

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