

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.; INSTAGRAM, INC.; WHATSAPP LLC; META
PLATFORMS TECHNOLOGIES, LLC; AND GIPHY, INC.

Petitioners

v.

VL COLLECTIVE IP LLC

Patent Owner

Case IPR2023-00924
U.S. Patent 7,436,980

**PATENT OWNER'S OPPOSITION TO
PETITIONERS' MOTION TO SUBMIT SUPPLEMENTAL
INFORMATION PURSUANT TO 37 C.F.R. § 42.123(a)**

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I. INTRODUCTION

Petitioners' motion to submit supplemental information should be denied in full. To begin with, Petitioners don't even argue that all of the evidence they are seeking to submit satisfies the threshold relevance requirement for filing its motion. The Board should therefore deny Petitioners' motion out of hand as to such evidence. But all of Petitioners' requested supplemental evidence should be just as easily rejected because Petitioners seek to submit all of it for the purpose of attempting to cure deficiencies in the Petition that Patent Owner and the Board identified, which the Federal Circuit and numerous Board panels have recognized as an impermissible use of supplemental evidence under 37 C.F.R. § 42.123(a). Moreover, Petitioners conspicuously fail to explain why they did not obtain the proposed supplemental information earlier and submit it with their petition. Permitting Petitioners to do so now would condone Petitioners' attempt to introduce new public accessibility theories and change the evidence they are relying on in an attempt to cure the identified deficiencies of the petition. It would also effectively extend the length of the Petition by over 20 pages, which is inherently prejudicial, fundamentally unfair, inefficient, and opens the door to even more motion practice.

II. LEGAL STANDARD

In an *inter partes* review, the moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). "This is so, no matter

the requested relief—including a motion to submit supplemental information under Rule 42.123(a).” *Western Digital Corp. v. Spex Techs., Inc.*, IPR2018-00082, Paper 22 at 7 (PTAB Jul. 23, 2018); see *Redline Detection, LLC v. Star Envirotech, Inc.*, 811 F.3d 435, 444 (Fed. Cir. 2015).

“Once a trial has been instituted,” the Board may permit a party to “file a motion to submit supplemental information” under § 42.123(a) only if “(1) [a] request for the authorization to file a motion ... is made within one month of the date the trial is instituted,” and “(2) [t]he supplemental information [is] relevant to a claim for which the trial has been instituted.” 37 C.F.R. § 42.123(a). Satisfaction of the timeliness and relevance requirements, however, “does not, itself, guarantee that the motion will be granted.” *Redline*, 811 F.3d at 448 (quoting *Pac. Mkt. Int’l, LLC v. Ignite USA, LLC*, IPR2014-00561, Paper 23 at 3 (P.T.A.B. Dec. 2, 2014)). Rather, timeliness and relevance “provide additional requirements that must be construed within the overarching context of the PTAB’s regulations governing IPR and general trial proceedings.” *Redline*, 811 F.3d at 446. The Board should also consider “other general governing regulations,” *Redline*, 811 F.3d at 445, including the Board’s mandate to interpret its rules “to secure the just, speedy, and inexpensive resolution” of the proceeding, *Redline*, 811 F.3d at 443, 448; 37 C.F.R. §§ 42.100(a), 42.1(b).

In deciding a motion under § 42.123(a), the Board may therefore consider, among other principles, **(1)** whether the supplemental information reasonably could

not have been obtained earlier, and whether consideration of the supplemental information would be in the interests of justice, *Redline*, 811 F.3d at 444-45; and (2) that § 42.123 “does not offer ‘a routine avenue for bolstering deficiencies in a petition raised by a patent owner in a Preliminary response’” or a “wait-and-see opportunity to supplement a petition after initial comments or arguments have been laid out by a patent owner,” *id.* at 448.

The Board frequently denies motions to submit supplemental evidence in consideration of these principles, including when the evidence relates to a reference’s prior art status. *Duration Media LLC v. Rich Media Club LLC*, IPR2023-00953, Paper 21 at 4-6 (PTAB October 12, 2023) (prior art status); *Nanobebe US Inc. v. Mayborn (UK) Limited*, IPR2023-00465, Paper 21 at 4-6 (PTAB Aug. 17, 2023); *Am. Well Corp. v. Teledoc Health, Inc.*, IPR2021-00748, Paper 23 at 6, 13 (PTAB Feb. 28, 2022) (collecting cases); *Triller, Inc. v. Tiktok Pte. Ltd.*, IPR2022-00179, Paper 18 at 2-6 (PTAB Aug. 25, 2022); *Artesian Home Prods. v. Gutterglove, Inc.*, IPR2018-00031, Paper 24 at 2-6 (PTAB May 31, 2018) (prior art status).

III. ARGUMENT

Petitioners have not met their burden of demonstrating entitlement to submit exhibits 1049 and 1050 post-institution.¹ Petitioners do not even argue that some of its supplemental information satisfies the threshold relevance requirement of 37 C.F.R. § 123(a)(2). And all of Petitioners' supplemental evidence should be rejected based on the guiding principles discussed in *Redline*, *Hulu*², and other cases, which strongly favor denial of Petitioners' motion in full.

A. Petitioners' Do Not Argue that the Requested Supplemental Information Regarding Alleged Public Accessibility of TLP at a Library is Relevant

In Exhibit 1050, Dr. Hall-Ellis opines that TLP was publicly accessible “*on or shortly after* August 30, 2004, because by that date it had been received, cataloged, and indexed at the Linda Hall Library of Science, Engineering & Technology and made part of the OCLC bibliographic database.” Ex. 1050, ¶ 44 (emphasis added). Petitioners never argue that this particular information satisfies the relevance requirement of 37 C.F.R. § 42.123(a)(2). Paper 18 at 3-6; 37 C.F.R.

¹ Because Petitioners' motion should be denied (*see infra*), Exhibits 1049 and 1050 should be expunged from the record.

² *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019) (Precedential) (“*Hulu*”)

§ 42.123(a)(2). And it does not. As the Board held, “[t]he parties agree that the effective filing date of the ’980 patent is May 27, 2004.” Paper 11 at 48 (citing Pet. 5; Prelim. Resp. 16). Because the alleged publication date of TLP at the Linda Hall Library is over three months *after* May 27, 2004, paragraphs 10-22 and 40-44 of the Hall-Ellis declaration in Exhibit 1050 (and the information relied on therein) are irrelevant. Petitioners thus have failed to meet their burden as to this evidence.

B. Guiding Principles Discussed in *Redline*, *Hulu*, and other cases Strongly Favor Denial of Petitioners’ Motion.

1. Petitioners seek supplemental information to impermissibly bolster deficiencies in the Petition identified by Patent Owner and the Board.

Petitioners’ motion should be denied in full because the information Petitioners seek to submit aims to bolster deficiencies in the Petition that Patent Owner identified in its Preliminary Response, Paper 7 at 22-27, and that the Board identified in holding that “the Petition does not show a reasonable likelihood that TLP was published before May 27, 2004,” Paper 11 at 49. Petitioners made this intention clear in their email to the Board requesting permission to file their motion. Ex. 2003 (“Such Motions would be made to support the respective Petition and/or cure any deficiencies outlined in the Decisions Granting Institution”). It is also evident from the nature of the proposed supplemental evidence, as discussed below.

The Federal Circuit’s *Redline* decision makes clear that supplemental information under 37 C.F.R. 42.123(a) may not be used in the manner Petitioners

seek to use it here, *i.e.*, as a “routine avenue for bolstering deficiencies in a petition raised by a patent owner in a Preliminary response” or a “wait-and-see opportunity to supplement a petition after initial comments or arguments have been laid out by a patent owner.” *Redline*, 811 F.3d at 448; *see* Paper 18 at 3 (Petitioners arguing in support of its motion that “the Board *routinely* allows petitioners to submit supplemental information that addresses the public accessibility of a challenged reference” (emphasis added)). *Hulu* is consistent with those limitations, for example, in that it recognizes the possibility that a declaration in support of public accessibility arguments may be submitted under § 42.123 “if a patent owner does *not* challenge the reference’s status as a printed publication.” *Hulu* at 15 (emphasis added). That makes sense under *Redline* because if a patent owner *did not* challenge a reference’s public accessibility (unlike here, where Patent Owner *did* challenge the sufficiency of Petitioners’ public accessibility arguments and evidence), supplemental information would not be used to bolster deficiencies identified by the patent owner or to make impermissible “wait-and-see” arguments.

The Board consistently denies motions for supplemental information where the information would bolster or address deficiencies in the petition identified by the patent owner or the Board. *Nanobebe*, IPR2023-00465, Paper 21 at 3-4; *Am. Well Corp.*, IPR2021-00748, Paper 23 at 6-7 (collecting cases), 11-13; *Triller*, IPR2022-00179, Paper 18 at 3-4; *Artesian Home Prods.*, IPR2018-00031, Paper 24 at 3-4.

Artesian Home Products is instructive. There, the patent owner argued in its preliminary response, and the Board held in its institution decision, that the petitioner failed to demonstrate a reasonable likelihood of success as to one of the petitioned grounds because it failed to demonstrate that one of the asserted references qualified as prior art. *Id.* at 2. The Board held that the fact that it ultimately instituted review on the deficient ground “does not remedy the identified deficiency in that ground.” *Id.* at 4. The Board declined to permit the petitioner to cure the deficiency identified by the patent owner and the Board through supplemental information because, under those circumstances, it was not merely “additional evidence” but instead was “*necessary* to potentially remedy an identified deficiency.” *Id.* at 3-4.

Here, Patent Owner (in its Preliminary Response) and the Board (in the Institution Decision) identified deficiencies in the Petition as to whether Petitioners met their burden of demonstrating that TLP qualifies as prior art, and the Board determined that “the Petition does not show a reasonable likelihood that TLP was published before May 27, 2004.” Paper 18 (quoting Paper 11 at 49). Petitioners now seek to submit supplemental information for the sole and direct purpose of curing the deficiencies identified by Patent Owner and the Board. Ex. 2003; Paper 18 at 1-2, 7. As in *Artesian Home Products*, Petitioners’ supplemental information in this case is not merely “supplemental” but is “*necessary* to potentially remedy” the identified deficiencies. IPR2018-00031, Paper 24 at 3-4; *see* Paper 18 at 7 (“Until

Patent Owner challenged the public accessibility of TLP in its Preliminary Response, there was no apparent need for this supplemental information.”). Supplemental information should not be permitted under such circumstances. *See id.*

To be sure, *Hulu* also mentioned the possibility of submitting additional evidence *in a reply* “if the patent owner challenges a reference’s status as a printed publication,” *Hulu* at 15, but that is not the case here—Petitioners’ motion is under § 42.123(a), not § 42.23. But even if supplemental information could properly be submitted to support future, potential or hypothetical reply arguments (which Petitioners have not shown that it is), *Hulu* does not hold that petitioners should *always* be permitted to do so—statutory requirements, controlling precedent, and Board practices for proper responsiveness in replies must still be followed and satisfied. *Id.* (citing 37 C.F.R. 42.23; *Intelligent Bio-Sys., Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369-70 (Fed. Cir. 2016); and Patent Trial and Appeal Board Consolidated Trial Practice Guide (“CTPG”) at 74); *see also Corephotonics, Ltd. v. Apple Inc.*, 84 F.4th 990, 1008 (Fed. Cir. 2023); *Redline*, 811 F.3d at 447 n.6.

Petitioners have not shown that their supplemental evidence is properly responsive to Patent Owner’s arguments. And it is not. Patent Owner argued, without submitting rebuttal evidence, that Petitioners’ public accessibility arguments (which relied on Dr. Baja’s testimony about the CVPR peer review process and a conference

bill) were insufficient as a matter of law. Paper 7 at 25-27. Dr. Hall-Ellis’s argument that TLP was allegedly publicly accessible in a library after the 2004 CVPR conference is not responsive to Patent Owner’s argument, as it raises an entirely new theory of *prima facie* public accessibility based on different evidence. *See* Ex. 1050, ¶¶ 10-22, 40-44. *See Hulu* at 15 (citing *Intelligent Bio-Sys.*, 821 F.3d at 1369-70 and CTPG at 74); *Corephotonics*, 84 F.4th at 1008; *Redline*, 811 F.3d at 447 n.6.

Dr. Hall-Ellis’s additional argument that TLP “was published and/or publicly accessible at least by January 31, 2004” based on information from ResearchGate websites, Ex. 1050 ¶¶ 23-30, 45-48; Ex. 1049, is not properly responsive either because it is not responsive to any evidence introduced by Patent Owner—it merely attempts to fill the evidentiary void in the Petition identified by Patent Owner. *Corephotonics*, 84 F.4th at 1008 (citing *Anacor Pharms., Inc. v. Iancu*, 889 F.3d 1372, 1380-82 (Fed. Cir. 2018) (petitioner “may introduce new evidence after the petition stage if the evidence is a legitimate reply to evidence introduced by the patent owner”). It is also a new stand-alone theory of *prima facie* public accessibility based on new evidence (*i.e.*, that dates on ResearchGate websites correspond to dates of publication/public accessibility). *See Hulu* at 15; *Corephotonics*, 84 F.4th at 1008; *Redline*, 811 F.3d at 447 n.6.

2. Petitioners' supplemental information could have been obtained before filing their Petition.

Redline confirmed that it is appropriate for the Board, in deciding whether to permit a petitioner to submit supplemental information, to consider whether the supplemental information was reasonably available to the petitioner before filing the petition. *Redline*, 811 F.3d at 444-45. And numerous Board panels have found it appropriate to deny petitioner's motion for supplemental information under § 42.123(a) where the information was available to the petitioner before it filed the petition, because to permit otherwise would cut against the just, speedy, and inexpensive resolution of the proceeding. *Duration Media*, IPR2023-00953, Paper 21 at 6; *Merck Sharp & Dohme Corp. v. Microspherix LLC*, IPR2018-00393, Paper 21 at 4 (PTAB Sept. 10, 2018) (citing *Redline*, 811 F.3d at 443); *Artesian Home Prods.*, IPR2018-00031, Paper 24 at 4-5; *Ooma, Inc. v. Deep Green Wireless LLC*, IPR2017-01541, Paper 14 at 3 (PTAB Jan. 23, 2018).

Artesian Home Products is again instructive. There, the patent owner argued in its preliminary response, and the Board found in its institution decision, that an asserted reference did not qualify as prior art under the statutory provisions asserted in the petition. IPR2018-00031 at 2-3. After institution, the petitioners moved to submit an expert declaration and two supporting documents as supplemental information related to the issue of prior art status of the reference. *Id.* The Board

found that the petitioners did not meet their burden of proving entitlement to the requested relief because the petitioners “[did] not adequately explained why the requested supplemental information could not have been submitted with the Petition.” *Id.* at 4 (citing *B/E Aerospace, Inc. v. MAG Aerospace Indus., LLC*, IPR2014-01510, Paper 37 at 4 (PTAB May 26, 2015)). The Board found persuasive that the petitioners “[did] not assert that the requested supplemental information was unavailable at the time of filing the Petition” and that they “did not, for example, request a reply to the Patent Owner’s Preliminary Response to address the deficiency.” *Id.* at 4-5.

Here, Petitioners move to submit as supplemental information an expert declaration by Dr. Hall-Ellis containing her analysis of public library records and websites, and a printout of a website Dr. Hall-Ellis analyzed. Exs. 1049-1050. Petitioners provide no explanation as to why this information could not have been submitted with the Petition. Petitioners could have asked Dr. Hall-Ellis to provide the declaration before the Petition was filed, as they did in IPR2023-00923, which was filed in that proceeding on the same day as the Petition in this proceeding. IPR2023-00923, Exhibit 1010. Petitioners have not shown that the supplemental information it seeks was not available before the Petition was filed, nor did they seek to file a reply in response to Patent Owner’s Preliminary Response to address the identified deficiencies—which they knew how to do because they did so in IPR2023-

00923, Paper 14. Petitioners’ silence under these circumstances strongly favors finding that they have not demonstrated entitlement to the requested relief. *See Artesian Home Products*, IPR2018-00031, Paper 24 at 4-5.

C. The Factors Addressed by Petitioners Strongly Favor Denial of their Motion

1. Petitioners’ supplemental information changes the evidence relied on in the petition.

Petitioners’ supplemental evidence changes the evidence initially presented in the Petition to support the alleged public accessibility of TLP. The Petition cited two paragraphs of Dr. Bajaj’s declaration and a conference bill he relies on. Pet. 6 (citing EX1004, ¶¶65-66 and EX1010). Dr. Hall-Ellis’s opinions in Exhibit 1050 and the information she relies on (including that of shown in 1049) provide independent theories of *prima facie* public accessibility based on information that she analyzed about the Lina Hall Library (*i.e.*, that TLP was accessible at that library) and from ResearchGate websites (*i.e.*, that a date on a ResearchGate website corresponds to the date of publication/public accessibility of TLP). Ex. 1050, ¶¶ 10-30, 40-48. Dr. Hall-Ellis’s theories “supplant, not supplement” Dr. Bajaj’s theory, and therefore “seek[] to change, not supplement, the original arguments and evidence that Petitioner had the burden of identifying with particularity at the initial filing.” *Am. Well Corp.*, IPR2021-00748, Paper 23 at 10-11.

Petitioners’ case law is of no help to their motion. Unlike in *Palo Alto*, the

supplemental information Petitioners seek here does “change the evidence initially presented in the Petition,” as explained above. *See Palo Alto Networks, Inc v. Juniper Networks, Inc.*, IPR2013-00369, Paper 37 at 3-5 (PTAB Feb. 5, 2014). And unlike in *Apple*, Petitioners’ supplemental evidence here does raise new issues and theories of *prima facie* public accessibility and seeks to impermissibly bolster identified deficiencies in the Petition with new evidence, *see* § III.B., *supra*, thus it is not consistent with the evidence cited in the Petition. *See Apple, Inc. v. VirnetX, Inc.*, IPR2015-00810, Paper 21 at 6-8 (PTAB Nov. 2, 2015).

2. Permitting Petitioners to submit supplemental information under these circumstances would not promote the just, speeding, and inexpensive resolution of this proceeding.

Petitioners’ suggestion that they should be permitted to submit supplemental information comprising another 23 pages of expert opinion and 30 additional pages of substantive evidence—and that Patent Owner should address it all in its Patent Owner’s Response in addition to everything raised in their Petition—is extraordinarily unjust. Petitioners could not have cited, let alone meaningfully discussed, the contents of the Hall-Ellis declaration in the two words that Petitioners had to spare before exceeding the word count limit for petitions. *See* Paper 3 at 78. Requiring Patent Owner to also address Dr. Hall-Ellis’s 23 pages of new opinions would effectively extend the Petition by that amount, far in excess of the wordcount limit. It would also be unjust because it would permit Petitioners to attempt to cure

identified deficiencies in the Petition and make impermissible “wait-and-see” arguments that could have, and should have, been made in the Petition. *See* § III.B, *supra*. Nor would it be inexpensive or efficient to let the issue play out in principle briefing—Patent Owner has already had to expend significant resources opposing this motion, which, if granted, would require it to expend even more resources to move to strike Petitioners’ arguments that improperly rely on the supplemental evidence. *See Duration Media*, IPR2023-00953, Paper 21 at 6 (“Allowing Petitioner to add [supplemental information that was available to it before it filed its Petition] now post-institution would cut against the just, speedy, and inexpensive resolution of the proceeding” where “it is not clear how Petitioner intends to rely on the supplemental information, as Petitioner explicitly punts the issue to a later date.”).

3. Permitting Petitioners to submit supplemental information and expecting Patent Owner to address it in its Reply to the Petition would be prejudicial to Patent Owner.

As explained above, permitting Petitioners to submit their proposed supplemental information would effectively extend the length of the Petition by at least 23 pages, *see* § III.C.2, *supra*, which is inherently prejudicial and “fundamentally unfair” for Patent Owner to have to respond to at all, let alone in just 14,000 words. *See Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 910 (Fed. Cir. 2014) (allowing a party to exceed word count limits is fundamentally unfair).

Petitioners’ suggestion that Patent Owner’s arguments in its Preliminary

Response entitle Petitioners to submit new arguments and evidence in a post-institution expert declaration under the guise of supplemental evidence, Paper 18 at 7, is incorrect for all the reasons explained above. *See* § III.B., *supra*.

Petitioners' reliance on *Baker Hughes* is misplaced. As the portion of that case quoted by Petitioners indicates, the Board's decision in *Baker Hughes* was premised on the petitioner already "[h]aving submitted evidence of public accessibility sufficient to demonstrate a reasonable likelihood of prevailing." *Baker Hughes Inc. v. Packers Plus Energy Servs., Inc.*, IPR2016-00597, Paper 80 at 3 (PTAB Sept. 26, 2018). Here, the whole reason Petitioners filed their motion for supplemental evidence is because the Board held that Petitioners did *not* demonstrate a reasonable likelihood that TLP qualifies as prior art. Paper 11 at 49; Ex. 2003; Paper 18 at 1-2. *Baker Hughes* is therefore inapposite and does not support Petitioners' claim of no prejudice to Patent Owner.

IV. CONCLUSION

Patent Owner respectfully requests denial of Petitioners' motion and expungement of Petitioners' exhibits 1049 and 1050 from the record.

Case IPR2023-00924

Patent No. 7,436,980

Dated: February 13, 2024

By: / Christine E. Lehman /
Christine E. Lehman
PTO Reg. No. 38,535
Counsel for Patent Owner

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this **PATENT OWNER'S
OPPOSITION TO PETITIONERS' MOTION TO SUBMIT
SUPPLEMENTAL INFORMATION PURSUANT TO 37 C.F.R. § 42.123(a)**
complies with the type-volume limits of 37 C.F.R. § 42.24 and consists of no more
than 15 pages, excluding the table of contents, table of authorities, certificate of
service, and this certificate of compliance.

Dated: February 13, 2024

Respectfully submitted,

/Christine E. Lehman/

Christine E. Lehman

PTO Reg. No. 38,535

Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO SUBMIT SUPPLEMENTAL INFORMATION PURSUANT TO 37 C.F.R. § 42.123(a)** was served on February 13, 2024, via electronic mail to Meta_VideoLabs@kirkland.com, as agreed to by counsel for Petitioners, upon the following counsel:

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