

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAZOOKA-FARMSTAR, LLC,
Petitioner,

v.

NUHN INDUSTRIES LTD.,
Patent Owner.

IPR2023-01161
Patent 11,358,425 C1

Before MEREDITH C. PETRAVICK, MATTHEW S. MEYERS and
BRENT M. DOUGAL *Administrative Patent Judges*.

DOUGAL, *Administrative Patent Judge*.

ORDER DENYING REQUEST TO SUBMIT MOTION FOR LATE
SUBMISSION OF SUPPLEMENTAL INFORMATION
37 C.F.R. § 42.123(b)

Petitioner seeks authorization to file a motion to submit late supplemental information pursuant to 37 C.F.R. § 42.123(b). The supplemental information is a declaration from Mr. Eckhard Funck, whom Petitioner states is a German resident, a former employee of UD-Umwelt-Dienste, and the individual shown operating the SenwaTec vehicle in Exhibits 1026–1028. Patent Owner opposes Petitioner’s request. A call with the parties was held on April 4, 2024 to discuss the request. *See* Paper 25 (Transcript of the call).

The late submission of supplemental information is governed by 37 C.F.R. § 42.123 (b) which states:

A party seeking to submit supplemental information more than one month after the date the trial is instituted, must request authorization to file a motion to submit the information. The motion to submit supplemental information must show why the supplemental information reasonably could not have been obtained earlier, and that consideration of the supplemental information would be in the interests-of-justice.

Petitioner’s request was made on March 19, 2024; over 2 months after trial was instituted and two weeks before the Patent Owner Response was due. Thus, in accordance with the rule, Petitioner correctly requested authorization to file the motion.

As background on the status of the proceeding, unless modified by stipulation, both Petitioner’s reply to the Patent Owner Response and Opposition to the Motion to Amend are due on June 25, 2024. Paper 13, 11. Petitioner acknowledged that they “plan to use this evidence in our reply and in our response to the motion to amend.” Paper 25, 12:18–24. In response to questioning concerning why the evidence needs to be submitted as late supplemental information, instead of with the noted papers, Petitioner stated

“out of fairness, we wanted to give it to them as soon as we could, to give everyone the amount of time they need to evaluate it and make their arguments accordingly.” *Id.* We are also informed that Petitioner has provided Patent Owner with a copy of the Funck Declaration. *Id.* at 5:5–6.

Thus, independent of this request, Patent Owner is already on notice of content of the Funck Declaration, but will not be informed of the full extent of Petitioner’s positions relevant to the present case concerning the Funck Declaration until the filing of Petitioner’s reply to Patent Owner Response and/or Opposition to Motion to Amend. These considerations lessen the impact of the request with respect to the interests-of-justice, as Petitioner has other avenues, in accordance with standard procedures, to attempt to enter this evidence.

Also relevant to the interests of justice inquiry, is whether Mr. Funck will be available for cross-examination by Patent Owner. On our questioning, Petitioner did not know whether Mr. Funck would be available. Paper 25, 5:16–24. Patent Owner stated that it “would . . . push to have his deposition taken in the United States” and argued that “Petitioner’s inability at this point to tell whether the declarant would be even available for a deposition . . . is another reason why this should not be admitted at this point.” *Id.* at 19:9–18. Petitioner responded by arguing that Patent Owner has not requested any depositions up to this point. *Id.* at 22:13–23:4. Petitioner then acknowledged that they do not control Mr. Funck, and could not compel his testimony, but argued that he did provide a sworn statement. *Id.* at 23:5–9.

In view of the arguments of the parties, we determine that Petitioner has not shown that it is in the interest of justice to submit late supplemental

information in the form of the Declaration of Mr. Funck at this time. As noted above, Petitioner cannot say whether Mr. Funck would be available for cross-examination by Patent Owner. As also discussed, Petitioner has not shown that entering this evidence is appropriate, when they have other avenues within the normal procedures of the proceeding to attempt to enter the noted evidence.

As Petitioner has not satisfied the interest of justice prong, it is unnecessary for us to address whether the supplemental information reasonably could have been obtained earlier.

For all of these reasons, Petitioner's request is *denied*.

ORDER

It is:

ORDERED that Petitioner's request to submit a motion for late submission of information is *denied*.

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