

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SCOUT ENERGY MANAGEMENT, LLC, and
CHEVRON U.S.A. INC.
Petitioners

v.

PILOT INTELLECTUAL PROPERTY, LLC,
Patent Owner

IPR2024-00385
Patent No. 8,505,332

PETITIONERS' MOTION TO STRIKE

Pursuant to 37 C.F.R. §§ 42.7 and 42.20, and as authorized by the Board via e-mail on March 28, 2025, Petitioners move to: (i) strike Exhibits 2078-2085; and (ii) strike, or in the alternative, disregard, the portions of Patent Owner’s Sur-Reply (Paper 27) that rely on those exhibits because Exhibits 2078-2085 are either untimely filed evidence in violation of 37 C.F.R. § 42.23(b) or improper attorney argument circumventing the word limits imposed by 37 C.F.R. § 42.24(c).

I. ARGUMENT

A. Exhibits 2078-2085 should be struck under 37 C.F.R. § 42.23(b) as untimely

The rules are clear: a sur-reply “may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.” 37 C.F.R. § 42.23(b). Patent Owner offered eight new exhibits (Exhibits 2078-2085) into evidence as part of its sur-reply filing. Paper 28 at 8. Straightforward application of Rule 42.23(b) mandates the exclusion of these eight new exhibits. *See, e.g., Colgate-Palmolive Co. v. Noble Innovations NC L.L.C.*, IPR2023-01254, Paper 35 at 4 (PTAB Nov. 12, 2024) (striking new exhibits filed in support of a sur-reply); *Palo Alto Networks, Inc. v. BT Am. Inc.*, IPR2023-00889, Paper 26 at 6 (PTAB July 10, 2024) (same); *Samsung Elecs. Co., Ltd. c. Comm’n Techs., Inc.*, IPR2022-01221, Paper 85 at 6–8 (PTAB Sep. 14, 2023) (same).

Patent Owner indicated that it intends to argue that these exhibits are mere “summaries” of pre-existing exhibits. First, even assuming *arguendo* that these

exhibits were summaries of other information in the record, that does not make them permissible because they are still new evidence in a new form. Second, Patent Owner is incorrect that they are mere summaries of pre-existing exhibits.

With regards to Exhibits 2079-2083, Patent Owner's Sur-Reply alleges that these exhibits offer new "calculations" that reinterpret data found elsewhere in the record. *See* Paper 27 at 15–16 (alleging that the new exhibits contain calculations used to derive the C_{3+} concentration from raw data presented in previous exhibits). Exhibits 2079-2083 then take the results of these new calculations and compare them to the language of Claim 5. *See id.* at 16. Such analysis goes far beyond mere summary—it is a new analysis of data that can be found nowhere else in the record.

Exhibits 2084 and 2085 also contain new interpretations of data found in previously-submitted exhibits. Exhibit 2084 purports to contain a calculation of hydrocarbon concentrations found in certain embodiments of the '332 Patent, while Exhibit 2085 purports to contain a calculation of the amount of C_{3-8} "disregarded" by certain embodiments of the '332 Patent. *See* EX2084-2085. Exhibits 2084 and 2085 then compare the results of these calculations to the elements of Claims 4, 5, and 7. *Id.* None of the aforementioned analyses in Exhibits 2084 and 2085 can be

found elsewhere in the record, and thus Exhibits 2084 and 2085 contain new evidence.¹

Finally, Exhibit 2078 is a “summary” of Exhibits 2079-2083. Paper 27 at 15-16. Since Exhibits 2079-2083 contain new evidence, the summary of those exhibits also contains new evidence and should be struck.

Patent Owner’s Sur-Reply suggests that the Patent Owner is allowed to file additional exhibits in support of its sur-reply when it is responding to “new” argument. Paper 27 at 15. Patent Owner is wrong: “[a] party seeking to introduce evidence beyond that expressly permitted by our rules should raise the issue with the panel in advance as counseled by the CTPG.” *Colgate*, IPR2023-01254, Paper 35 at 4. Patent Owner did not do so, and the new evidence should be struck. *See id.*

But additionally, Petitioner’s argument was not “new.” Petitioner merely responded to Patent Owner’s argument that Claim 1 somehow requires disregarding the recovery of methane and ethane. Petitioner pointed out that it is instead unchallenged Claim 5 that recites disregarding the recovery of methane and ethane (*i.e.*, where “the purified carbon dioxide recycle stream comprises . . . at least 94 molar percent of the methane, and at least 93 molar percent of the ethane from the carbon dioxide recycle stream”). Paper 26 at 20; EX1001 at Claim 5. Such a directly

¹ Additionally, Exhibit 2084 does not appear to be cited anywhere in the papers.

responsive argument using only information already in the record cannot be reasonably characterized as “new.”

Since Exhibits 2078-2085 contain new evidence in violation of 37 C.F.R. § 42.23(b), the Board should strike those exhibits. The Board should also strike, or in the alternative, disregard, the associated argument found in Patent Owner’s Sur-Reply for the same reason. (Paper 27 at p. 11 (paragraph starting “Pilot for this Reply”); p. 15 (paragraph starting “In response to this”); and p. 16 (full page)).

B. Exhibits 2078-2085 should be struck as an attempt to circumvent 37 C.F.R. § 42.24(c)

To the extent the Board accepts Pilot’s suggestion that the exhibits contain arguments based on existing evidence, rather than new evidence, Exhibits 2078-2085 should be struck because they circumvent the Board’s rules on sur-reply length set forth in 37 C.F.R. § 42.24(c).

All eight exhibits were prepared by Patent Owner for the purpose of supporting its Sur-Reply. Paper 27 at 11 (explaining that “Pilot for this [Sur-]Reply did the same calculations . . . (EX2085)”); 15-16 (explaining that “Pilot” prepared Exhibits 2078-83 “[i]n response” to Petitioner’s arguments). None of the exhibits

purport to have been reviewed or prepared by an expert.² These documents thus consist largely of attorney argument—and it is well established that “[a]ttorney argument is not evidence.” *Icon Health and Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017). Patent Owner concealed its arguments within exhibits and improperly circumvented the strict word limits imposed on its Sur-Reply by 37 C.F.R. § 42.24(c). Accordingly, to the extent the Board accepts Pilot’s argument that Exhibits 2078-2085 are not new “evidence,” they should be struck as constituting additional attorney argument in violation of 37 C.F.R. § 42.24(c).

II. CONCLUSION

For the reasons set out above, Petitioners respectfully request the Board to strike:

- (i) Exhibits 2078-2085;
- (ii) the paragraph starting “Pilot for this Reply” on page 11 of Patent Owner’s Sur-Reply;

² And, if the exhibits were prepared by Patent Owner’s expert, this would even more strongly support Petitioner’s arguments that the exhibits should be struck as untimely new evidence under 37 C.F.R. § 42.23(b) as they would then represent unexaminable expert testimony.

- (iii) the paragraph starting “In response to this” on page 15 of Patent Owner’s Sur-Reply; and
- (iv) page 16 of Patent Owner’s Sur Reply.

Date: April 4, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6(e), the undersigned certifies that on the 4th day of April, 2025, a complete and entire copy of the foregoing **PETITIONERS' MOTION TO STRIKE** was served on Patent Owner via email to counsel of record for the Patent Owner at the following addresses:

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Date: April 4, 2025

Respectfully submitted,

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