

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CEVA SANTÉ ANIMALE S.A.,
EGG-CHICK AUTOMATED TECHNOLOGIES S.A.S, and
CEVA ANIMAL HEALTH, LLC

Petitioners,

v.

TARGAN, INC.,

Patent Owner.

Case No. IPR2024-00595
U.S. Patent No. 10,806,124

PATENT OWNER'S MOTION TO STRIKE

TABLE OF CONTENTS

	<u>Page</u>
I. PETITIONERS' NEW EXPERT DECLARATION AND REPLY ARGUMENTS THAT DEPEND ON IT SHOULD BE STRUCK	2
A. Petitioners And Their Expert Improperly Offer On Reply Entirely New Interpretations Of The Prior Art	3
B. Petitioners Belatedly Offer Expert Evidence On RES	6
II. CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases

<i>Hulu v. Innovations</i> , No. IPR2018-00582, 2019 WL 6790791 (P.T.A.B. Aug. 5, 2019)	3, 6
<i>Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.</i> , 821 F.3d 1359 (Fed. Cir. 2016)	6
<i>In re Magnum Oil Tools Int'l, Ltd.</i> , 829 F.3d 1364 (Fed. Cir. 2016)	6, 7

Statutes

35 U.S.C. § 312(a)(3)(B)	5
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Table of Abbreviations

Abbreviation	Meaning
Guide	Consolidated Trial Practice Guide
PO	Patent Owner Targan, Inc.
Petitioners	Petitioners Ceva Santé Animale S.A., Egg-Chick Automated Technologies S.A.S, and Ceva Animal Health, LLC's
Petition	Petitioners' Petition (Paper 1)
POR	Patent Owner Response (Paper 16)
Reply	Petitioners' Reply (Paper 19)
POSA	Person Of Ordinary Skill In The Art at the time of the invention
RES	Reasonable Expectation of Success

*All emphases in this brief are supplied unless otherwise noted.

Pursuant to authorization from the Board on February 25, 2025, PO moves to strike Petitioners' expert declaration of Mr. Shawn LeCroy (Ex. 1008) and all arguments in Petitioners' Reply (Paper 19) that rely thereon. Petitioners did not submit an expert declaration with their Petition (Paper 1) and submitted one only with their Reply. The expert declaration is replete with new interpretations of the prior art and theories for how certain claim limitations are met that were *not* included in the Petition and are nonresponsive to PO's Response. The Board's rules do not permit this type of sandbagging, and the Board should therefore grant PO's motion to strike.

The Petition relied solely on attorney argument to attempt to make out a *prima facie* obviousness case, but it failed to do so. For example, the Petition failed to show that Gershman met the limitation of a "moving platform to support an unrestrained chick" because nowhere did the Petition identify a platform that is both *in motion* and *supporting* a chick. Paper 1 at 21-22, 36-37, 39-40, 46-47. All the Petition stated in conclusory form was that Gershman disclosed a "moving plate [that] is pushed downwards" as allegedly satisfying the limitation. *Id.* at 9-10, 21-22, 36-37, 39-40, 46-47, 69. The problem for Petitioners was that because the downward drop happens faster than gravitational acceleration, the chick is not "supported" by the dropping plate. That was a fatal flaw in making their *prima facie* case.

Realizing this fatal flaw, Petitioners came up in Reply with entirely new arguments for why the limitation is met that were not disclosed in the Petition. For example, they argue that it is during an alleged *upward* motion of the plate that the chick is both moving and supported by the platform. This new theory is the ***opposite*** of the theory in the Petition. And it rests on a new expert opinion interpreting the mention of “springs” in Gershman to suggest to a POA that the springs are used to bring the chick back up. PO’s expert never had a chance to address this new (incorrect) interpretation of Gershman. And allowing these new opinions into evidence would be *high prejudicial* to PO because PO is not allowed to respond with an expert declaration on Sur-Reply.

Allowing Petitioners’ conduct here would only incentivize patent challengers to withhold expert testimony setting forth new positions on the prior art until the Reply, knowing that patent owners cannot submit a rebuttal expert declaration on Sur-Reply.

The new expert declaration and portions of the Reply that rely on it should be struck.

I. PETITIONERS’ NEW EXPERT DECLARATION AND REPLY ARGUMENTS THAT DEPEND ON IT SHOULD BE STRUCK

Petitioners’ new expert declaration and arguments should be struck because “[i]t is [] improper for a reply to present new evidence (including new expert testimony) *that could have been presented in a prior filing.*” Guide, 74.

A. Petitioners And Their Expert Improperly Offer On Reply Entirely New Interpretations Of The Prior Art

The Guide instructs that a “Petitioner *may not submit new evidence* or argument in reply that *it could have presented earlier*, e.g., to make out a prima facie case of unpatentability.” Guide at 73. And the Board has instructed that it is improper for a Reply to posit a new rationale about a POSA’s perspective that was not disclosed in the Petition. *Hulu v. Innovations*, No. IPR2018-00582, 2019 WL 6790791, at *11 (P.T.A.B. Aug. 5, 2019). But this is exactly what Mr. LeCroy does and, indeed, he offers arguments on the prior art that are not only new but that are in some cases the *opposite* of the Petition arguments. Ex. 1008, ¶¶ 3, 18-21, 23-30, 37.

For example, the Petition failed to show that the Gershman reference disclosed a “moving platform to support an unrestrained chick.” Petitioners set forth a bare-bones attorney assertion that this limitation was met by “a moving plate with a surface upon which a chick is placed” that “is pushed **downwards** via a mechanical activator.” Paper 1 at 10, 21-22, 36-37, 39-40, 46-47, 69. And the only citation the Petition provides regarding movement of the Gershman plate is to where Gershman says “Chickens were placed on plate manually and was pushed **down**....” *Id.* at 10, 69; Ex. 1003 (Gershman) at 5. But, this falling plate does not meet the limitation because Gershman

describes the downward motion as being faster than the rate of gravity, such that the plate does not *support* the chick when moving.

All but admitting the Petition's arguments failed, Petitioners on Reply switched horses and posited two new theories for how Gershman meets the "moving platform to support an unrestrained chick" limitation. *First*, Petitioners and their expert newly argue that Gershman's plate meets the limitation because after the plate drops it will allegedly move back up and at that point during the alleged **upward** movement the plate is both moving and supporting the chick. Paper 19 at 10; Ex. 1008, ¶¶ 33-37. But, **nowhere** does the Petition assert that there is any upward movement of the plate at all, much less that the moving/supporting platform limitation is met during this upward movement. This argument is not only new but indeed it is the **opposite** of the argument made in the Petition that the plate moves **downward**.

To be clear, Gershman does not disclose any upward movement of the platform. Petitioners attempt to read this into Gershman via the untimely testimony of Mr. LeCroy. Specifically, he opines that a POSA would interpret Gershman's mention of "springs" as suggesting that the springs would move the Gershman platform upward after the downward drop that is actually disclosed in the reference, thus meeting the moving/supporting platform limitation. Ex. 1008, ¶ 34 (Gershman "suggests to me that Gershman also

considered that [] *springs would raise the plate and the chick* (i.e., *be a moving platform supporting and lifting the chick*) back up to its original level”). But, nowhere in the Petition was there any argument that the “springs” working with the platform could meet the moving/supporting platform limitation of Claim 1. Rather, the Petition cites the springs as relevant only to dependent claim 5, arguing the springs “facilitate removing the chick into an appropriate bin.” Paper 1 at 46. This theory could have been in the Petition, and it is manifestly unfair to allow this new interpretation now where the PO is not allowed to submit rebuttal testimony.

Second, Mr. LeCroy opines that a POSA would expect the “shock absorbers” mentioned in Gershman to support and slowly decelerate the chick. Ex. 1008, ¶¶ 26-28. But, the Petition did not argue that a POSA would interpret the shock absorbers this way (rather than, *e.g.*, stopping only the plate while the chick is in free fall). Indeed, the Petition does not mention “shock absorbers” at all, much less in relation to the moving/supporting limitation.

These are new interpretations of the prior art that, if Petitioners were going to assert, should have been in the Petition. *See* 35 U.S.C. § 312(a)(3)(B) (a petition must identify “the evidence that supports the grounds for the challenge to each claim, including...***declarations of supporting evidence and opinions***, if the petitioner relies on expert opinions”).

Under the law, Mr. LeCroy cannot now supply missing disclosures in the prior art based on what he would “understand” from it.¹ A petitioner, realizing too late that its prior art has a gap, cannot then submit the needed evidence in its reply to “gap-fill.” Guide at 74-75. The Board has refused to consider such new arguments in other cases. *See, e.g., Hulu*, 2019 WL 6790791, at *11; *see also Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369–70 (Fed. Cir. 2016). It should strike them here.

B. Petitioners Belatedly Offer Expert Evidence On RES

Mr. LeCroy also offers new opinions concerning RES, all of which Petitioners bore the burden to show in setting forth their *prima facie* case. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016). For example, the Petition offered attorney argument that it would be obvious to integrate Gershman’s experimental system into industrial systems, failing to address any of the problems a POSA would immediately grasp. Paper 1 at 24 (conclusory statement that “[i]t would have been obvious to a POSA to [combine features of both prior art references] with a reasonable expectation of success.”); *see also id.* at 28-29, 31, 34, 48, 53, 59-61 (similar). That is, the Petition just says the words “reasonable expectation of success” with no

¹ Mr. LeCroy admits counsel asked him for the first time on Reply to offer opinions on how a POSA would understand the prior art. Ex. 1008, ¶ 3.

analysis at all, never addressing issues such as the unacceptable bottlenecks the Gershman system would create in the industrial context. *Id.*

On Reply, Mr. LeCroy offers an entirely new argument that the POSA would ***add new elements to the Gershman system*** such that there would be a RES that it would work in an industrial setting. Specifically he opines that “I would have expected that a system built around Gershman’s moving plate design would have ***controlled the speed of the conveyor supplying chicks to the plate.***” Ex. 1008, ¶ 30. But nowhere does the Petition—nor Gershman—mention controlling the speed of a conveyor to supply chicks to the movable plate. This is an entirely new RES argument.

Failure to strike in this case would be highly prejudicial to PO because PO cannot rebut this new evidence with its own. The Guide prohibits PO from submitting additional evidence with its sur-reply. Guide at 73.

II. CONCLUSION

PO respectfully requests that the Board strike the new declaration and the portions of the Reply relying thereon (on pages 5, 9-10, 16, 17, 21, 22, 25). In the alternative, Patent Owner respectfully requests authorization to submit a supplemental declaration with its Sur-Reply. To the extent the Board denies this Motion to Strike, PO may seek leave for additional words in its Sur-Reply and the opportunity to submit a supplemental expert declaration.

Date: March 5, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned hereby certify that the foregoing Patent Owner Response was served on March 5, 2025 by e-mailing copies to:

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