

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SALVACION USA, INC.,
Petitioner,

v.

TRUTEK CORP.,
Patent Owner

U.S. Patent No. 8,163,802
Issued: April 24, 2012

Title: ELECTROSTATICALLY CHARGED MULTI-ACTING NASAL
APPLICATION, PRODUCT, AND METHOD

Inter Partes Review No. IPR2024-00711

**PETITIONERS' MOTION TO STRIKE
EVIDENCE SUBMITTED WITH
PATENT OWNER'S SUR-REPLY**

Pursuant to 37 C.F.R. § 42.23(b), and as authorized by the Board's email dated July 23, 2025, Petitioner, Salvacion USA, Inc., hereby moves to strike Exhibits 2003-2007 filed by Patent Owner, Trutek Corp., accompanying Patent Owner's Sur-Reply to Petitioner's Reply.

I. STATEMENT OF FACTS

After the instant *Inter Partes* Review was instituted on December 6, 2024 (Paper 7), Patent Owner filed its Response to the Petition on March 4, 2025 (Paper 9). Although the Response, as well as Patent Owner's earlier Preliminary Response (Paper 3), addressed the topic of commercial success (*see* Paper 3 at 22-24, Paper 7 at 21-22), Patent Owner did not file any evidence relevant to this topic with its Preliminary Response or its Response. Indeed, Patent Owner did not file any evidence whatsoever with its Response, including a declaration from an expert, or a transcript of any deposition of Petitioner's expert Dr. Park (as Patent Owner never sought to depose him).

Instead, only after Petitioner pointed out in its Reply (Paper 12) that Patent Owner had failed to file evidence to support its contentions regarding commercial success, did Patent Owner submit evidence with its Sur-Reply (Paper 13). In its Sur-Reply, Patent Owner has submitted the following new exhibits:

- Exhibit 2003, which is presented as a Declaration of Ashok Wahi.
- Exhibit 2004, which is presented as Representative NasalGuard Products.

- Exhibit 2005, which is presented as How to Use NasalGuard.
- Exhibit 2006, which is presented as a Clinical Study.
- Exhibit 2007, which is presented as a listing of website where products allegedly embodying U.S. Patent No. 8,163,802 can be bought.

Nowhere in its Sur-Reply does Patent Owner contend that it was somehow unable to file any of this evidence previously, or that introduction of this late evidence is justified by any new arguments raised in Petitioner's Reply.

II. ARGUMENT

Under the current rules governing PTAB trials, evidence is not to be submitted with a sur-reply: "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) (emphasis added). One reason for the rule prohibiting new arguments or evidence with a sur-reply is simple: that "Petitioner lacks an opportunity to respond to new evidence submitted with a sur-reply." *Intel Corp. v. ParkerVision, Inc.*, IPR2020-01265, Paper 44, at 74 (Jan. 21, 2022) (granting motion to exclude evidence submitted with sur-reply), *aff'd by ParkerVision v. Vidal*, 88 F.4th 969 (Fed. Cir. 2023).

Here, Patent Owner submitted new Exhibits 2003-2007 in its Sur-Reply. This is in direct contravention of 37 C.F.R. § 42.23(b). Patent Owner has made no assertion that it was somehow prevented from submitting this evidence earlier, or

that the evidence is somehow responsive to new arguments made in Petitioner's Reply. In short, Patent Owner has made no attempt to justify its blatant flouting of the rule of Section 42.23(b). As Patent Owner's new exhibits violate Section 42.23(b), Petitioner requests that the exhibits be stricken from the record.

Not infrequently, when the Board is presented with motions to exclude or strike new arguments or evidence as part of a sur-reply, the Board will defer a decision on such motions until issuing its Final Written Decision, where the motions can be dismissed as moot if the evidence or arguments in question are found not to be improper or otherwise do not influence the Board's substantive decision regarding the patentability of the claims. *See, e.g., NetSkope, Inc. v. Bitglass, Inc.*, IPR2021-01045, Paper 30, at 47 (Dec. 9, 2022). Petitioner respectfully suggests that such an approach would not best serve the efficiency of the proceedings in this matter. Patent Owner's violation of the rule in this instance is glaring, and unless the improper evidence is stricken prior to oral argument, Petitioner will be prejudiced by having to devote portions of its argument time to addressing this evidence, which it will not have had the opportunity to rebut, such as by seeking the deposition of Patent Owner's declarant Mr. Wahi.

Whether or not the Board strikes these exhibits prior to oral argument, Petitioner will also file a motion to exclude them on various evidentiary grounds pursuant to the objections that it has timely filed. For example, absent the

opportunity for Petitioner to depose Mr. Wahi, his declaration (Ex. 2003) is inadmissible hearsay. The other exhibits submitted with the sur-reply (Exs. 2004-2007) are not referenced in Mr. Wahi's declaration and have thus not been authenticated. Thus, even if these exhibits had not been submitted in clear violation of Section 42.23(b), it is not clear that there is any theory under which they could be properly admitted. Accordingly, as noted above, the better course in this instance would be for the Board to strike the exhibits prior to oral argument, so that the argument may proceed with reliance on only properly submitted and admissible evidence. The Board may then dismiss the forthcoming motion to exclude as moot.

III. CONCLUSION

For the foregoing reasons, the Board should strike Patent Owner's Exhibits 2003-2007 in Patent Owner's Sur-Reply from the record.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

Dated: July 30, 2025

/s/William H. Oldach III

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CERTIFICATION OF SERVICE

The undersigned hereby certifies that the above-captioned “Petitioner’s Motion to Strike Evidence Submitted with Patent Owner’s Sur-Reply” was served on July 30, 2025, upon the following via email:

uspto@patentsgroup.com
shk@shk-dplc.com

As well as a courtesy copy to the Patent Owner’s litigation counsel, by email:

keithaltman@kaltmanlaw.com
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VORYS, SATER, SEYMOUR AND PEASE LLP

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