

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVATION MEDICAL, INC.,

Petitioner,

v.

EMKINETICS, INC.,

Patent Owner

Review No. IPR2024-01375

U.S. Patent No. 11,224,742

**PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE**

Pursuant to 37 C.F.R. §§ 42.64, 42.123, and the Board’s Scheduling Order (Paper 8 at 11-12), Patent Owner EMKinetics, Inc. (“Patent Owner”) submits this Motion to Exclude (Paper 20) Exhibits 1091-1095, 1099-1100. Petitioner Avation Medical, Inc. (“Petitioner”) filed Exhibits 1091-1095, 1099-1100 on September 26, 2025, without Board authorization along with its Reply (Paper 15). Petitioner relied on Exhibits 1091-1095, 1099-1100 in its Reply, in its own words, as “additional evidence responsive to [Patent Owner] EMK’s arguments that corroborates [Petitioner] Avation’s record evidence.” (Paper 15 at 14). The Rules allow for the belated submission of supplemental evidence to corroborate evidence submitted with a petition only in certain circumstances and only after certain processes are followed. Neither were present here, and Exhibits 1091-1095, 1099-1100 are inadmissible.

Patent Owner timely objected to Exhibits 1091-1095, 1099-1100 on October 3, 2025. (Paper 16); *see* 37 C.F.R. § 42.64(b)(1). Petitioner did not submit any supplemental evidence in response to Patent Owner’s objections. *See* 37 C.F.R. § 42.64(b)(2). Exhibits 1091-1095, 1099-1100 were not themselves submitted in response to any evidentiary objection filed by Patent Owner. *See id.* Therefore, Exhibits 1091-1095, 1099-1100 constitute “supplemental information” within the meaning of 37 C.F.R. § 42.123.

Moreover, Exhibits 1091-1095, 1099-1100 constitute “late” supplemental information within the meaning of 37 C.F.R. § 42.123(b). In this case, the Board instituted trial on March 18, 2025. (Paper 7). Exhibits 1091-1095, 1099-1100 were submitted on September 26, 2025, which is 192 days after the Board instituted trial. Because anything submitted 30 days after institution of trial is considered “late,” Exhibits 1091-1095, 1099-1100 are late by Rule. 37 C.F.R. § 42.123(b). Although Section 42.123 sets forth processes for submitting supplemental information, including late supplemental information (Section 42.123(b) as well as other information (Section 42.123(c)), Petitioner did not follow these processes when submitting Exhibits 1091-1095, 1099-1100. For example, Petitioner did not request authorization to file a motion to submit Exhibits 1091-1095, 1099-1100 and did not file such a motion.

Petitioner did not attempt, not even in Reply (Paper 15), to show that its late submission of Exs. 1091-1095, 1099-1100 satisfied the standard set forth in Section 42.123(b). There is no rule allowing Petitioner to do so now, and a brief in opposition to a Motion to Exclude would be an inappropriate place to do so because it would, at a minimum, inappropriately shift the burden from Petitioner to Patent Owner. 37 C.F.R. § 42.20(c).

For the reasons explained below, Patent Owner respectfully requests that the Board exclude Exhibits 1091-1095, 1099-1100 as untimely and unauthorized under 37 C.F.R. § 42.123(b).

1. Patent Owner’s Motion to Exclude Ex. 1091

Patent Owner asks that the Board exclude Petitioner’s Exhibit 1091 because the filing of Exhibit 1091 with Petitioner’s Reply constitutes the unauthorized late submission of supplemental information, contrary to the requirements of 37 C.F.R. § 42.123(b). Exhibit 1091 was submitted “more than one month after the date the trial [wa]s instituted.” *Id.* However, Petitioner did not “request authorization to file a motion to submit the information.” *Id.* Nor did Petitioner file such a motion. And, Petitioner has not “show[n] 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.” *Id.* Consideration of such issues at this untimely juncture would prejudice Patent Owner at a minimum by denying Patent Owner ordered discussion and briefing on the issue as required by Rule. *Id.* Had Petitioner filed a Motion, it would have borne the burden of proving the circumstances then-present met the standard for the late submission of supplemental information. 37 C.F.R. § 42.20(c).

Patent Owner originally and timely objected to Exhibit 1091 on October 3, 2025, five business days after Exhibit 1091 was filed with the Board, on at least the

same grounds as set forth in this Motion by filing such objections with the Board and serving them by email on Petitioner's counsel the same day. (Paper 16 at 2).

Because the submission of Exhibit 1091 was untimely and unauthorized, Exhibit 1091 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon. (Paper 15 at 15 (asserting that Exhibit 1091 corroborates evidence submitted with the Petition)). The board in *Toshiba Corporation v. Optical Devices*, IPR2014–01446, Paper 31 at 32-33 (Mar. 9, 2016) excluded evidence in similar circumstances, stating:

[O]ur Rules expressly provide procedures for introducing supplemental evidence or supplemental information.... See 37 C.F.R. §§ 42.64(b)(2) (supplemental evidence), 42.123(a)—(c) (supplemental information). Petitioner was aware of Patent Owner's challenge to the public accessibility ... by ... the filing date of the Preliminary Response ... and certainly by no later than ... the service date ... noting objections Although Petitioner was aware early on of the possible need for such supplemental evidence or information in this proceeding, Petitioner made no apparent effort to take advantage of available procedures.... Petitioner has not provided any other persuasive explanation for the undue delay in submitting [the] Exhibits ..., other than that it believed it simply could wait until it filed its final substantive paper.... Accordingly, we *grant* Patent Owner's Motion to Exclude....

Patent Owner asks that the same result be obtained here: Exhibit 1091 should be excluded and Petitioner's reliance on Exhibit 1091 (at Paper 15 at 15) should be excluded, too, because Petitioner was aware of the need, made no effort, and provided no other explanation for its delay.

2. Patent Owner's Motion to Exclude Ex. 1092

Patent Owner requests that the Board exclude Petitioner's Exhibit 1092 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1092 on October 3, 2025, on the same grounds as set forth in this Motion. (Paper 16 at 2). Petitioner relies on Exhibit 1092 only in Reply. (*See* Paper 15 at 15-16 (asserting that Exhibit 1092 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1092 was untimely and unauthorized, Exhibit 1092 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 15-16).

3. Patent Owner's Motion to Exclude Ex. 1093

Patent Owner requests that the Board exclude Petitioner's Exhibit 1093 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1093 on October 3, 2025, on the same grounds as set forth in this Motion. (Paper 16 at 2). Petitioner relies on Exhibit 1093 only in Reply. (*See* Paper 15 at 15 (asserting that Exhibit 1093 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1093 was untimely and unauthorized, Exhibit 1093 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 15).

4. Patent Owner's Motion to Exclude Ex. 1094

Patent Owner requests that the Board exclude Petitioner's Exhibit 1094 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1094 on October 3, 2025, on the same grounds as set forth in this Motion. (Paper 16 at 2). Petitioner relies on Exhibit 1094 only in Reply. (*See* Paper 15 at 15 (asserting that Exhibit 1094 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1094 was untimely and unauthorized, Exhibit 1094 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 15).

5. Patent Owner's Motion to Exclude Ex. 1095

Patent Owner requests that the Board exclude Petitioner's Exhibit 1095 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1095 on October 3, 2025, on the same grounds as set forth in this Motion.

(Paper 16 at 2). Petitioner relies on Exhibit 1095 only in Reply. (*See* Paper 15 at 15-16 (asserting that Exhibit 1095 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1095 was untimely and unauthorized, Exhibit 1095 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 15-16).

6. Patent Owner's Motion to Exclude Ex. 1099

Patent Owner requests that the Board exclude Petitioner's Exhibit 1099 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1099 on October 3, 2025, on the same grounds as set forth in this Motion. (Paper 16 at 2). Petitioner relies on Exhibit 1099 only in Reply. (*See* Paper 15 at 16 (asserting that Exhibit 1099 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1099 was untimely and unauthorized, Exhibit 1099 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 16).

7. Patent Owner's Motion to Exclude Ex. 1100

Patent Owner requests that the Board exclude Petitioner's Exhibit 1100 for the same reasons as Exhibit 1091, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 4-5) as is fully set forth herein.

As with Exhibit 1091, Patent Owner originally and timely objected to Exhibit 1100 on October 3, 2025, on the same grounds as set forth in this Motion. (Paper 16 at 2). Petitioner relies on Exhibit 1100 only in Reply. (*See* Paper 15 at 16 (asserting that Exhibit 1100 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1100 was untimely and unauthorized, Exhibit 1100 should be excluded pursuant to 37 C.F.R. § 42.123(b). So should any reliance thereon (Paper 15 at 16).

* * *

For the foregoing reasons, Patent Owner respectfully requests that the Board exclude the following exhibits and arguments based on such exhibits, as set forth below:

Exhibit	Reliance	Grounds
Ex. 1091	Paper 15 at 15	37 C.F.R. § 42.123(a)-(c)
Ex. 1092	Paper 15 at 15-16	37 C.F.R. § 42.123(a)-(c)
Ex. 1093	Paper 15 at 15	37 C.F.R. § 42.123(a)-(c)
Ex. 1094	Paper 15 at 15	37 C.F.R. § 42.123(a)-(c)

Ex. 1095	Paper 15 at 15-16	37 C.F.R. § 42.123(a)-(c)
Ex. 1099	Paper 15 at 16	37 C.F.R. § 42.123(a)-(c)
Ex. 1100	Paper 15 at 16	37 C.F.R. § 42.123(a)-(c)

Respectfully submitted,

Date: November 25, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(4), the undersigned certifies that on November 25, 2025, a complete and entire copy of this Patent Owner's Motion to Exclude Evidence was provided via email to the Petitioner by serving the email correspondence addresses of record as follows:

Todd R. Tucker, Reg. No. 40,850
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