

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Avation Medical, Inc.,

Petitioner

v.

EMKinetics, Inc.,

Patent Owner

Case No. IPR2024-01375
U.S. Patent No. 11,224,742

AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST

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I. INTRODUCTION

Patent Owner EMKinetics, Inc.’s (“EMK”) Request for Director Review (“Request”) is a transparent attempt to relitigate arguments that the Board has already considered and rejected in this proceeding. EMK does not identify any abuses of discretion, errors of law or fact, or important policy issues warranting Director intervention. Instead, EMK repeats the same printed-publication arguments it pressed throughout the IPR, mischaracterizes the evidentiary record and the Board’s reasoning, and selectively reframes adverse merits determinations as supposed procedural failures. At bottom, EMK seeks reconsideration of fully litigated issues by recasting disagreement with the Board’s conclusions as a defect in the IPR process. That does not justify Director Review. EMK’s Request should therefore be denied.

EMK’s Request rests on three recurring themes related to EMK’s printed publication arguments, but none withstand scrutiny. **First**, EMK asserts that the Board substituted presumptions or “administrative notice” for evidence in concluding that various published journal articles qualify as printed publications. That assertion fundamentally mischaracterizes the record and the Final Written Decision (“FWD”). The Board evaluated the totality of the evidence regarding public accessibility for each challenged reference under the framework required by binding precedent, including facial indicia of publication, corroborating evidence,

and established publishers, and concluded the record contained ample evidence of public accessibility. EMK's disagreement with the Board's weighing of that evidence does not establish reversible error. **Second**, EMK contends that Petitioner Avation Medical, Inc.'s ("Avation") reliance on the "knowledge of a POSA" was improper. But an obviousness analysis must always consider the "knowledge of a POSA" and Avation provided ample evidence of public accessibility for all the challenged references. **Third**, EMK contends that the Board's consideration of rebuttal evidence submitted with Avation's Reply was improper. That narrative ignores both settled Board precedent and the procedural history of this case. Moreover, EMK's argument merely rehashes its motion to exclude, which the Board denied almost three months ago. Under the rules regarding Director Review, EMK's attempt to pursue Director Review of that decision here is untimely and should be rejected.

At bottom, EMK's Request identifies no issue warranting Director Review. It does not identify any error in the Board's FWD or reasoning, but rather dissatisfaction with an adverse decision. Accordingly, EMK's Request should be denied and the Board's FWD should be upheld.¹

¹ This Response was authorized via email on April 15, 2026. See Ex.3100.

II. BACKGROUND

EMK's Request retreads the arguments EMK has made throughout this IPR and that the Board has already rejected. Avation's Petition asserted that claims 1-13 of U.S. Patent 11,224,742 ("742 Patent") (Ex.1001) are unpatentable on two grounds: (1) obviousness over Svihra (Ex.1004), Mann (Ex.1084), Ponsford (Ex.1085), and the knowledge of a POSA; and (2) obviousness over Amarenco (Ex.1005), Mann, Ponsford, and the knowledge of a POSA. Paper 2 at 2-3. EMK's Preliminary Response ("POPR") argued Avation did not show Svihra qualifies as a printed publication. Paper 6 at 3-7. The Board disagreed and instituted trial, finding Avation "established a reasonable likelihood that Svihra was publicly accessible before the critical date of the '742 patent." Paper 7 at 2, 13. EMK did not file objections to any of the evidence submitted with Avation's Petition (including Svihra, Amarenco, or Ponsford), nor has EMK ever contended that any of the references are fabricated, counterfeit, or are **not** journal articles published on the date and in the journal on the face of the references themselves. *See* Paper 28 at 73.

In its Response, EMK doubled down, contending that Avation failed to prove that Svihra, Amarenco, and other non-patent references (Exs. 1008-17, 1024, 1027-28, 1030, 1035, 1037-39, 1041-43, 1085, 1088) (collectively, the "Journal Articles") are printed publications. Paper 12 at 4-8. Avation's Reply showed that Avation provided ample evidence in the Petition that the Journal Articles were

publicly accessible and provided additional corroborating evidence (Exs. 1091-95, 1099-1100) (collectively, “Reply Evidence”) for various references to eliminate any doubt that they qualify as printed publications. Paper 15 at 2-16. In its Sur-Reply, EMK once again repeated its printed publication argument and further contended Avation’s Reply Evidence was improper. Paper 17 at 3-14.

EMK then filed a motion to exclude, asserting Avation’s Reply Evidence was late supplemental information or evidence. Paper 20 at 2-3. On January 26, 2026, the Board denied EMK’s motion to exclude, determining that “[i]n view of *Hulu*, we conclude that, because the contested Exhibits were submitted with Petitioner’s Reply Brief in support of rebuttal arguments responsive to an argument raised by Patent Owner in its Response Brief, and not in an attempt to bolster o[r] ‘gap fill’ its principal cases that the challenged claims are obvious, ***the filing of the contested Exhibits was permissible as rebuttal evidence to an argument raised by Patent Owner in its Response Briefs.***” Paper 26 at 17-18.² Crucially, ***EMK did not move for reconsideration or request Director Review of the Board’s decision denying its motion to exclude.*** Thus, as explained below, EMK’s attempt to relitigate the Board’s consideration of Avation’s Reply Evidence in this Request is procedurally improper and unavailing. See 37 C.F.R. § 42.71(d); *infra*, §III.C.

² All emphasis added unless noted otherwise.

On March 16, 2026, the Board issued the Final Written Decision (“FWD”), which correctly found that Avation established by a preponderance of the evidence that claims 1-13 of the ‘742 Patent are unpatentable. Paper 28 at 2, 3-4, 52, 68-69. Considering the “**totality of the evidence**” consistent with precedent and fully supported by the record in this IPR, the Board found that “the preponderance of the evidence supports the conclusion that Petitioner has made a sufficient showing that Svihra and Amarenco (as well as the other identified non-patent references) were printed publications, and publicly accessible, prior to the ’742 patent’s priority date.” *Id.* at 71-73.

On April 15, 2026, EMK filed this Request on three grounds, all of which relate to the printed publication argument EMK has repeated throughout this IPR. Paper 29 at 1-2. None withstand scrutiny and all should be rejected.

III. ARGUMENT

A. The Board Properly Considered the “Totality of the Evidence” in Concluding the Journal Articles Are Printed Publications

The record in this proceeding fully supports the Board’s determination that the Journal Articles were publicly accessible and qualify as prior art printed publications. The PTAB’s precedential *Hulu* decision requires the Board to consider the “totality of the evidence” to determine if a reference qualifies as a prior art printed publication. *See Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 18-20 (PTAB December 20, 2019) (precedential)

(“*Hulu*”). Consistent with the PTAB’s binding precedent, the Board’s FWD here properly weighed the “totality of the evidence” and determined Avation met its burden to show the Journal Articles were publicly available printed publications. Paper 28 at 71-76. For example, the Board found Svihra “bears sufficient indicia of publication to conclude it was a printed publication and publicly accessible as of 2002” based on, for example, indicia of its face, citations in other references that corroborate Svihra’s availability to interested persons skilled in the art, and the fact Svihra has an established publisher. *Id.* at 73-74. Similarly, the Board determined Amarenco “bears sufficient indicia of publication to conclude it was a printed publication and publicly accessible as of 2003” based on, for example, indicia on its face, publication in a reputable publication, corroborating evidence including an identical copy of Amarenco, citations in other references (including a patent related to the ‘742 Patent) that corroborate Amarenco’s availability to interested persons skilled in the art, and the fact Amarenco has an established publisher. *Id.* at 74-75. The Board also considered the “totality of the evidence” regarding the other challenged Journal Articles and found each had publication indicia similar to Svihra and Amarenco. *Id.* at 75-76. The Board thus determined the other Journal Articles likewise qualify as printed publications for similar reasons. *Id.*

Despite this record and the Board’s thorough analysis, EMK nonetheless contends the Board erred by allegedly improperly filling “evidentiary gaps” in

Avation's Petition. Paper 29 at 1-2, 3-5. According to EMK, Avation's Petition provided no evidence of public accessibility and by considering additional public accessibility evidence beyond the Petition, the Board "saved" Avation's Petition. *See id.* EMK's contention is, however, nothing more than a reframed version of the printed publication argument EMK has made throughout this IPR. It should be rejected for the same reasons.

As an initial matter, EMK's argument severely mischaracterizes Avation's Petition and purposefully ignores the full record developed during this proceeding. Contrary to EMK's repeated refrain that Avation's Petition was "deficient" and provided "zero" evidence of public accessibility (*e.g., id.* at 1, 3-4, 5), the record clearly shows that the Petition provided substantial evidence that the Journal Articles were publicly available printed publications. *See* Paper 15 at 3-10 (summarizing evidence provided with Petition). The Board relied on this evidence in concluding that the Journal Articles qualify as printed publications, belying EMK's argument that none was provided. *See* Paper 28 at 73-76 (relying on, *inter alia*, "indicia of publication" in the references). Moreover, the Board's FWD is based on the full IPR trial record, not Avation's Petition. If EMK believed the Petition alone was deficient, it could have challenged the printed publication status of all the Journal Articles (rather than just Svihra) in its POPR or requested rehearing or Director Review of the Institution Decision. To the extent EMK

attempts to argue here that the Board erred by instituting IPR at all (*e.g.*, Paper 29 at 1-2 (identifying issues including “[w]hether the Board misapplied the ‘printed publication’ standard by instituting review”)), EMK’s argument is severely misplaced and over a year late. *See* 37 C.F.R. § 42.71(d).

Further, EMK’s contention that the Board gap-filled the Petition is inconsistent with Board precedent and rules. *See* Paper 29 at 4-5. The Board’s precedential *Hulu* decision not only requires the Board to consider the “totality of the evidence” in the record (not just evidence submitted with a Petition) regarding public accessibility, but expressly states that a Petitioner may submit new evidence of public accessibility following institution—including “***in a reply to the patent owner response.***” *Hulu*, IPR2018-01039, Paper 29 at 14-15; *see also* 37 C.F.R. § 42.23(b); Consolidated Trial Practice Guide (“CTPG”) at 73. That is precisely what happened here—after EMK’s Response challenged the printed publication status of the Journal Articles, Avation’s Reply identified public accessibility evidence already in the record and provided additional rebuttal evidence to corroborate public availability. *See* Paper 12 at 4-8; Paper 15 at 14-16. EMK’s suggestion that the Board somehow erred by considering this evidence under its “totality of the evidence” analysis misunderstands the IPR process.

Similarly, the Board’s application of the “established publisher” presumption of public availability and consideration of facts based on

“administrative notice” in its printed publication analysis was also proper. *See* Paper 29 at 4-5. For example, to the extent the Board recognized noncontroversial fact, such as when the *Bratislava Medical Journal* (*i.e.*, the journal in which Svihra was published) was established, that recognition was consistent with settled precedent and does not constitute improper extra-record factfinding. *See* 37 C.F.R. § 42.62; Fed. R. Ev. 201.

Moreover, the Federal Circuit’s *Vidstream* decision—binding here—held that “[w]hen there is an established publisher there is a presumption of public accessibility as of the publication date.” *Vidstream LLC v. Twitter, Inc.*, 981 F.3d 1060, 1065-66 (Fed. Cir. 2020). In affirming the Board’s decision that a reference qualified as a printed publication, the Court found that the evidence supported the Board’s finding, including that the reference’s “front matter” alone was sufficient indicia that it was published by an established publisher. *Id.* The Board here thus properly applied the “established publisher” presumption in its printed publication analysis and did not err by applying the presumption based on indicia in the references themselves. *See* Paper 29 at 4, 5.

EMK’s arguments regarding the other Journal Articles fare no better. EMK asserts the Board did not identify “established publishers” or “hallmarks” for various other Journal Articles. *Id.* at 4-6. While the Board did not painstakingly enumerate the indicia of publication for every reference, the FWD explained that

the Board considered the publication indicia and printed publication status of each Journal Article, found that the Journal Articles had similar publication indicia as Svihra and Amarenco, and each qualified as printed publications. *See* Paper 28 at 75-76. Nothing more was required. *See, e.g., Yeda Research & Dev. Co. v. Mylan Pharm., Inc.*, 906 F.3d 1031, 1046 (Fed. Cir. 2018) (“the Board is ‘not require[d]...to address every argument raised by a party or explain every possible reason supporting its conclusion’...failure to explicitly discuss every fleeting reference or minor argument does not alone establish that the Board did not consider it”) (internal citations omitted).

Finally, EMK improperly raises new arguments regarding Hasan (Ex.1030) and Boveja (Ex.1080) for the first time in the Request. *See* PTAB Director Review Process (*available at* <https://www.uspto.gov/patents/ptab/decisions/director-review-process>) at §3.E (“The Director will not consider new evidence or new arguments not part of the official record.”). EMK states that “Hasan is a webpage printed in 2023” (Paper 29 at 4), but EMK did not object to the authenticity of Hasan during this proceeding and any attempt by EMK to implicitly do so here is improper. In any event, EMK mischaracterizes the reference—it is not a “webpage” but rather is a printed copy of a peer-reviewed journal article bearing bibliographic information indicating the article’s publication in 1996. *See* Ex.1030 at 1. The later 2023 print date reflects only when a copy was generated, not the

article’s original publication date. EMK further contends no “hallmarks” were identified for Boveja (Ex.1080), but EMK never previously argued Boveja—which is a published patent application, not a non-patent reference—was *not* a printed publication in this IPR. See Paper 12 at 1-2; Paper 17 at 4. This argument is likewise new and therefore improper here.

In sum, EMK fails to identify any issues warranting review. The Board properly considered the “totality of the evidence” for each Journal Article and concluded they qualify as prior art printed publications. EMK’s dissatisfaction with the Board’s printed publication analysis does not warrant reversal of the Board’s thorough, well-reasoned FWD. EMK’s Request should be denied.

B. Avation’s Reliance on the “Knowledge of a POSA” Was Proper

EMK next argues Avation improperly relied on the “knowledge of a POSA” to “avoid its obligation to prove the prior art status of individual documents.” Paper 29 at 6-7. This is baseless. Avation relied on the “knowledge of a POSA” in its invalidity grounds because under *KSR*, the “knowledge of a POSA” is *always* considered as part of an obviousness analysis. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (obviousness analysis requires consideration of “the background knowledge possessed by a person having ordinary skill in the art”); see also, e.g., *New World Medical, Inc. v. Microsurgical Tech., Inc.*, IPR2020-01573, Paper 64 at 10 (PTAB March 11, 2022) (analyzing obviousness “is always from

the perspective of an ordinarily skilled artisan and one must consider knowledge generally available to one of ordinary skill in the art.”). Thus, Avation’s reliance on the knowledge of a POSA was consistent with precedent and the legal standards for obviousness. For this same reason, EMK’s contention that the invalidity grounds in the Board’s FWD were “not the same two grounds cited in the Petition” misses the mark. *See* Paper 29 at 2; Paper 2 at 2-3; Paper 28 at 4. Because obviousness ***always*** considers the knowledge of a POSA, there is no difference in the invalidity grounds recited in the Petition that explicitly list “Knowledge of POSA” and the invalidity grounds recited in the FWD that do not.

EMK’s Request further asserts that Avation’s reliance on the “knowledge of a POSA” effectively “shifted the burden to [EMK] to disprove” the printed publication status of the Journal Articles. *See* Paper 29 at 6-7. But EMK cites nothing in the record suggesting that the Board shifted the burden to EMK to “come forward with evidence negating publication.” *Id.* To the contrary, Avation provided evidence of public accessibility for every Journal Article and the Board credited that evidence in determining the references qualify as prior art printed publications. *See* Paper 28 at 71-76. The fact that the Board reached a different result on this issue than EMK desired does not mean the Board somehow improperly shifted the burden to EMK.

C. Avation’s Reply Evidence Was Proper Under Settled Board Rules and Precedent

Finally, EMK contends the Board legally erred by admitting Avation’s Reply Evidence. Paper 29 at 7-8. This argument too fails.

As an initial matter, EMK’s argument is untimely and improper in the present Request. According to the PTAB Director Review Process, “[a] request for Director Review must be filed within the time period set forth in 37 C.F.R. § 42.71(d).” *See* PTAB Director Review Process at §3.B. Under 37 C.F.R. § 42.71(d), a request must be filed within 14 days of a non-final decision or within 30 days of a final decision. *See* 37 C.F.R. § 42.71(d). EMK’s argument—that Avation’s Reply Evidence was untimely and improper on reply—simply rehashes the **exact** argument EMK made in its motion to exclude. *See* Paper 20 at 2-3. The Board denied EMK’s motion to exclude on January 26, 2026. *See* Paper 26. Any Request for Director Review or motion for rehearing of that decision ***should have been filed by EMK months ago***. EMK’s attempt to raise these exact same issues again here under the guise of a Request for Director Review of the FWD is improper and should be rejected.

Even setting aside the untimeliness of EMK’s argument, EMK’s contention that Avation’s Reply Evidence was improper on reply is premised on a fundamental misinterpretation of the PTAB’s rules and procedures. The PTAB’s CTPG is clear—a party “***may submit rebuttal evidence in support of its reply.***”

CTPG at 73 (emphasis added). Similarly, 37 C.F.R. § 42.23(b) indicates that a reply may be accompanied by new evidence, in contrast to a sur-reply, which may not. *See* 37 C.F.R. § 42.23(b). Moreover, Board precedent expressly permits petitioners to file evidence on reply under the exact scenario presented here. In the precedential *Hulu* decision, the Board explained that if a patent owner challenges a reference's status as a printed publication, the petitioner may submit additional evidence with its reply to support the reference's prior art status:

[S]ome limited opportunities exist for the petitioner to present new evidence later, including: (1) in a reply to a patent owner preliminary response; (2) ***in a reply to the patent owner response***; and (3) in a motion to file supplemental information. 37 C.F.R. §§ 42.108(c), 42.23, 42.123. As to the first two opportunities, the evidence must be responsive to the prior briefing. . . .

For example, if the patent owner challenges a reference's status as a printed publication, a petitioner may submit a supporting declaration with its reply to further support its argument that a reference qualifies as a printed publication. *See* 37 C.F.R. §§ 42.2 (affidavit), 42.23.

Hulu, IPR2018-01039, Paper 29 at 14-15. That is exactly what happened in this case. Avation filed the Reply Evidence with its Reply (Paper 15) to respond to arguments in EMK's Response (Paper 12), within the time allowed under the schedule in this proceeding and in accordance with Board procedure. As such, Avation's Reply Evidence constitutes proper rebuttal evidence under 37 C.F.R. § 42.23(b), the rules governing these proceedings, and Board precedent.

The Board in this IPR agreed—in denying EMK’s motion to exclude, the Board determined that “[i]n view of *Hulu*, we conclude that, because the contested Exhibits were submitted with Petitioner’s Reply Brief in support of rebuttal arguments responsive to an argument raised by Patent Owner in its Response Brief, and not in an attempt to bolster o[r] ‘gap fill’ its principal cases that the challenged claims are obvious, the filing of the contested Exhibits was permissible as rebuttal evidence to an argument raised by Patent Owner in its Response Briefs.” Paper 26 at 17-18. Nothing in EMK’s present Request requires reconsideration or reversal of the Board’s conclusion. As such, EMK’s argument should be rejected here for the exact same reasons.

IV. CONCLUSION

For foregoing reasons, EMK’s Request should respectfully be denied and the Board’s FWD should be upheld in its entirety.

Dated: April 22, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

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