

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EMBODY, INC. AND ZIMMER BIOMET HOLDINGS, INC.,
Petitioners

v.

LIFENET HEALTH,
Patent-Owner.

IPR2025-00248 (Patent 10,137,223 B2)
IPR2025-00249 (Patent 11,318,227 B2)

**PETITIONERS' IDENTIFICATION OF
IMPROPER SUR-REPLY ARGUMENT AND EVIDENCE**

Filed on behalf of Petitioners

I. INTRODUCTION

On April 13, 2026, the Board authorized Petitioners “to file a non-argumentative 2-page paper identifying allegedly improper arguments and evidence in Patent Owner’s Sur-reply.” Petitioners submit this paper identifying arguments and evidence in Patent-Owner’s Sur-reply that exceed the proper scope. *See* Trial Practice Guide § II.I (“[A] sur-reply may only respond to arguments raised in the preceding brief. . . . ‘Respond,’ in the context of 37 C.F.R. § 42.23(b), does not mean proceed in a new direction with a new approach”)

II. IMPROPER SUR-REPLY IN IPR2025-00248 AND IPR2025-00249

Patent-Owner’s Response stated that “the claim should be construed as ‘adjacent major peaks with about 180° apart from each other where each major peak has a height higher than the average height of the peaks in the result.’” (IPR2025-00248, Paper 24 at 9; IPR2025-00249, Paper 23 at 9 (underlining in original).) Petitioners responded that this construction was not raised before institution and “contradicts the specification’s express teachings and the prosecution history.” (IPR2025-00248, Paper 27 at 3, 5-10; IPR2025-00249, Paper 26 at 2-9.) In its Sur-reply, Patent-Owner now proposes a new claim construction that requires each major peak to have a height higher than the average height of the peaks in the result **and** also present “***statistical significance*** apart from ***measurement/reporting error.***” (IPR2025-00248, Paper 30 at 4-5; IPR2025-

00249, Paper 29 at 5 (emphasis added); *see also* IPR2025-00248, Paper 30 at 4; IPR2025-00249, Paper 29 at 4 (“where no peaks exceed the average height (***within conventional bounds of experimental error***)” (emphasis added)).) Because this new claim construction was first raised in Patent-Owner’s Sur-replies, Petitioners have not had the ability to address it in their Reply briefs or submit responsive expert evidence. Patent-Owner introduced this new claim construction in its Sur-replies in both IPR2025-00248 and IPR2025-00249, so the issue is present in both proceedings.

III. CONCLUSION

Petitioners submit that Patent-Owner’s new claim construction raised in its Sur-reply briefs in both proceedings is improper.

Respectfully submitted,

Dated: April 16, 2026

By: /Howard W. Levine/
Howard W. Levine (Reg. No. 41,453)

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2026, I caused a true and correct copy of the forgoing Reply to Patent-Owner's Response to be served via electronic upon to the Patent-Owner's counsel of record at the following addresses:

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