

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KINDERFARMS LLC,
Petitioner,

v.

GENEXA INC.,
Patent Owner.

PGR2023-00051
Patent 11,617,795 B2

Before DEBORAH KATZ and SUSAN L. C. MITCHELL, *Administrative Patent Judges*.

KATZ, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

On September 20, 2024, Patent Owner contacted the Board requesting a conference call to obtain authorization for a motion to strike arguments in Petitioner's Reply. (See Ex. 3002.) Patent Owner asserted that Petitioner's Reply includes new and improper arguments regarding several issues, including arguments regarding whether a person of ordinary skill in the art would have

selected an agave syrup with appropriate viscosity and would have adjusted the water content to a final viscosity (citing Pet. Reply, Paper 25, 11:12–14, 19:14–18, 20:9–16, 21:6–9), arguments regarding a motivation to combine (citing *id.* at 2:16–20, 4:7–11), and arguments regarding prior art disclosures (citing *id.* at 17:1–4, 17:18–19). (*See* Ex. 3002.)

Patent Owner reported that Petitioner would oppose a motion to strike portions of its Reply Brief. (*See id.*)

The Trial Practice Guide Update discusses when a motion to strike is appropriate.

A motion to strike may be appropriate when a party believes the Board should disregard arguments or late-filed evidence in its entirety, whereas further briefing may be more appropriate when the party wishes to address the proper weight the Board should give to the arguments or evidence. In most cases, the Board is capable of identifying new issues or belatedly presented evidence when weighing the evidence at the close of trial, and disregarding any new issues or belatedly presented evidence that exceeds the proper scope of reply or sur-reply. As such, striking the entirety or a portion of a party's brief is an exceptional remedy that the Board expects will be granted rarely.

TRIAL PRACTICE GUIDE UPDATE, 83 Fed. Reg. 39,989 (announced);

https://www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf (full text) at 17–18 (last visited May 6, 2019).

We do not discern a reason why the Board would not be capable of determining whether Petitioner's Reply Brief includes new issues or cites to belatedly presented evidence from the citations Patent Owner presents. Thus, rather than a full briefing, we provide Patent Owner with an opportunity to identify any allegedly improper portions of the Reply Brief in a short notice.

Accordingly,

It is ORDERED that Patent Owner may file a notice identifying the allegedly improper portions of Petitioner's Reply Brief and a short explanation why the cited portions raise new issues, cite to belatedly presented evidence, or are otherwise improper;

It is further ORDERED that Patent Owner's notice is due October 2, 2024, and may not be more than three (3) pages;

It is further ORDERED that Petitioner may file a response if Patent Owner files a notice, indicating why the cited portions of Petitioner's Reply Brief do not raise new issues, do not cite to belatedly presented evidence, and/or are otherwise not improper;

It is further ORDERED that Petitioner's response is due October 9, 2024, and may not be more than three (3) pages;

It is further ORDERED that neither party may file new evidence with their papers;

It is further ORDERED that no other papers are authorized.

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