

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MPL BRANDS NV, INC.,
Petitioner

v.

BUZZBALLZ, LLC,
Patent Owner

PGR2024-00035
U.S. Patent 11,932,441

PATENT OWNER'S SUR-REPLY

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PATENT OWNER'S EXHIBIT LIST
July 16, 2025

EX2001	Declaration of Richard D. Kirkpatrick
EX2002	Prosecution History of U.S. Patent Application No. 16/800,195 (“195 Application”)
EX2003	Jack Lo et al., “How to Make Your Own Patent Drawings,” Nolo (2019) (“Lo”)
EX2004	J. W. Jack Koller, “How to Make Your Own Patent Drawings and Save Thousands,” Atlantic Publishing Group (2011) (“Koller”)
EX2005	U.S. Patent No. 5,723,202 to Mueller et al. (“Mueller”)
EX2006	U.S. Patent No. 6,559,902 to Kusuda et al. (“Kusuda”)
EX2007	U.S. Patent No. 5,880,476 to Suzuki (“Suzuki”)
EX2008	U.S. Patent No. 3,597,400 to Kashiro et al. (“Kashiro”)
EX2009	U.S. Patent Publication No. 2002/0179888 to Montanari et al. (“Montanari”)
EX2010	U.S. Patent Publication No. 2009/0119823 to Lee (“Lee”)
EX2011	U.S. Patent No. 5,463,013 to Tokuda et al. (“Tokuda”)
EX2012	U.S. Patent Publication No. 2009/0279082 to Till et al. (“Till”)
EX2013	U.S. Patent Publication No. 2009/0272015 to Schnuckle (“Schnuckle”)
EX2014	Transcript of Deposition of Joseph T. Norris, February 20, 2025
EX2015	Transcript of Deposition of Nathan J. Delson, Ph.D., February 26, 2025
EX2016	U.S. Patent No. 6,131,761 to Cheng et al. (“Cheng”)
EX2017	U.S. Patent No. 5,154,295 to Stoner (“Stoner”)
EX2018	Huang et al., “Conformational changes and molecular motion of poly(ethylene terephthalate) annealed above glass transition temperature,” Polymer 41 (2000) 1741-1748, (“Huang”)
EX2019	Curriculum Vitae of Folkers Eduardo Rojas Ph.D.

EX2020	Academic Press Dictionary of Science and Technology
EX2021	Reserved
EX2022	Serope Kalpakjian et al., "Manufacturing Engineering and Technology" Fifth Edition, Pearson (2006) ("Kalpakjian")
EX2023	Materials Data Book, Cambridge University Engineering Department (2003)
EX2024	Materials Data Book, Cambridge University Engineering Department (2011)
EX2025	MatWeb, Overview of materials for Polyethylene Terephthalate (PET), Unreinforced
EX2026	Han et al., "Application of structure optimization technique to aluminum beverage bottle design," Springer-Verlag (2005), ("Han")
EX2027	Kannan et al., "Heat transfer analysis of canned food sterilization in a still retort," Journal of Food Engineering (2008), ("Kannan")
EX2028	Declaration of Folkers Eduardo Rojas Ph.D.
EX2029	Declaration of Folkers Eduardo Rojas Ph.D. in support of Patent Owner's Response to Petitioner's Objections to Evidence
EX2030	Declaration of Michael Hill in support of Patent Owner's Response to Petitioner's Objections to Evidence
EX2031	Declaration of Adam Erickson in support of Patent Owner's Response to Petitioner's Objections to Evidence
EX2032	Historical Publication Cadence of the journal "Structural and Multidisciplinary Optimization" by Springer (https://link.springer.com/journal/158/volumes-and-issues)
EX2033	Historical Publication Cadence of the "Journal of Food Engineering" by Elsevier (https://www.sciencedirect.com/journal/journal-of-food-engineering/issues)
EX2034 (NEW)	Transcript of Second Deposition of Nathan J. Delson, Ph.D., July 9, 2025

I. INTRODUCTION

Although the Board instituted this PGR, “there is a significant difference between a petitioner’s burden to establish a ‘reasonable likelihood of success’ at institution, and actually proving invalidity by a preponderance of the evidence at trial.” *TriVascular, Inc. v. Samuels*, 812 F.3d 1056, 1068 (Fed. Cir. 2016). Petitioner has failed to carry this heightened burden.

To show the ’441 patent is PGR-eligible, Petitioner attempts to break the pre-AIA priority claim by showing that Figure 2 of the ’813 Application lacks support in one of the earlier filed applications. But in the Petition, Petitioner did not produce *any* evidence addressing the controlling standard for whether a design patent figure has written description support, i.e., whether prior applications “***reasonably convey[] to those skilled in the art*** that the inventor ***had possession of the claimed subject matter as of the filing date.***” *In re Owens*, 710 F.3d 1362, 1366 (Fed. Cir. 2013) (quoting *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010)). Petitioner’s Reply doubles down on originally presented arguments and provides significant improper new reply evidence, yet still falls short of meeting Petitioner’s burden. Reply, 1-17. “A reply cannot be used to introduce new evidence to fill gaps in the Petition or bolster arguments that were inadequately supported in the Petition.” *Western Digital Technologies, Inc. v. Longitude Licensing Ltd.*, IPR2023-01230, Paper 31 at 51 (Jan. 21, 2025).

Petitioner has also failed to meet its burden for all Grounds presented in the Petition. The Board should hold that Petitioner has not met its burden to show that any claims of the '441 Patent are unpatentable.

II. THE '441 PATENT IS NOT ELIGIBLE FOR PGR

Petitioner bears “the ultimate burden” to show that a patent is PGR-eligible. *Mylan Pharms. Inc. v. Yeda Res. & Dev. Co.*, PGR2016-00010, Paper 9 at 10 (Aug. 15, 2016); *One World Tech., Inc. v. Chervon (HK) Ltd.*, PGR2020-00061, Paper 19 at 3-4 (Feb. 23, 2021). Petitioner presented two theories in the Petition: (1) claims 9, 10, 15, and 16 lacked support “in any prior filed applications;” and (2) Fig. 2 of the '813 Application¹ was not supported by the '195 Application². Pet., 5-8. Petitioner has abandoned the first theory. For the second, Petitioner still fails to address the relevant standard, never presenting evidence that a POSITA would find the '813 or '195 Applications lack support in the original pre-AIA '934 Application³. Petitioner has not met its burden to show the '441 patent is PGR-eligible.

¹ U.S. Application No. 29/824,813. *See* Pet., 5.

² U.S. Application No. 16/800,195. *See* Pet., 5.

³ U.S. Application No. 12/762,934. *See* Pet., 5.

A. Petitioner has abandoned its AIA §3(n)(1)(A) arguments.

Petitioner originally argued that “[c]laims 9, 10, and 15-16 do not have written description support” because the prior applications do not describe transparent walls or liquids. *See* Pet., 7-8. Patent Owner established how the written description provides support for claims 9, 10, 15, and 16 and why Petitioner’s own witnesses contradict Petitioner’s position. *See* POR, 11-13 (citing EX1005, ¶11 (Mr. Norris testifying that PET was “clear”), EX1002, ¶109 (Dr. Delson describing “see-through properties” of PET), EX1001, 1:25-27, EX2028, ¶63, EX2012, [0024], EX2013, [0008] (“beer and soda” can be transparent or translucent)).

Petitioner has not responded to these arguments and appears to have abandoned its position.

B. Petitioner has not met its burden to show that the ’441 patent is PGR-eligible under AIA §3(n)(1)(B) because Petitioner still does not address the controlling standard.

AIA §3(n)(1)(B) states that the AIA applies to a patent claiming priority “to any patent or application that contains or contained at any time” “a claim to a claimed invention that has an effective filing date...that is after” March 16, 2023. AIA §3(n)(1)(A)-(B); Pet., 5-7; POR, 3-9.

In its Reply, Petitioner presents a host of its own standards hoping the Board will apply one of them in determining whether a design patent figure has support. Reply, 1-6. In doing so, Petitioner fails to address the controlling standard from the

Federal Circuit: “whether the disclosure of the application relied upon *reasonably conveys to those skilled in the art* that the inventor *had possession of the claimed subject matter as of the filing date*.” *In re Owens*, 710 F.3d at 1366 (quoting *Ariad*, 598 F.3d at 1351).

When Petitioner finally addresses the perspective of a POSITA for the first time in its Reply (improperly incorporating by reference new declaration evidence from Dr. Delson), Petitioner still only focuses on “differences” in figures, never addressing whether the disclosure “reasonably conveys” to a POSITA “that the inventor *had possession of the claimed subject matter as of the filing date*.” *Id.* For this fundamental reason, Petitioner necessarily has not met its burden.

1. Petitioner presents several arguments that are irrelevant to the proper standard because they do not address the perspective of a POSITA.

Though not the party bearing the burden on this issue, Patent Owner presented ample evidence demonstrating what the content of the '195 Application would reasonably convey to a POSITA. POR, 3-9. Mr. Kirkpatrick—a patent illustrator with 32 years of experience—provided perspective on the '195 Application in light of patent drawing rules and drawing conventions. *See* EX2001; POR, 8. While Petitioner argues that Mr. Kirkpatrick is “not a POSITA,” Reply, 7, he is the most qualified witness in this case on issues of patent drawing interpretation, and his testimony informs the opinion of expert witnesses who do qualify as POSITAs. Mr.

Kirkpatrick concluded that the figures were “striking[ly] similar[,]” and recognized the differences as “choices in drafting strategy of the respective illustrators.” EX2001, ¶¶20-21. There was “*nothing* to indicate that the drafter of Figure 2 of the ’813 Application *illustrated a different product or design*.” EX2001, ¶21. Dr. Rojas agreed with Mr. Kirkpatrick: “[a] POSITA...would *immediately recognize* that the design as a whole...was *the same design*.” EX2028, ¶50. The testimony of Dr. Rojas regarding the perspective of a POSITA, considering the testimony of Mr. Kirkpatrick regarding drawing rules and convention, shows that a POSITA would have recognized that the inventor “had possession of the claimed subject matter.” *In re Owens*, 710 F.3d at 1366.

By contrast, Petitioner does not address what the content of the ’195 Application would convey to a POSITA. Instead, Petitioner addresses its own oversimplified standard, only arguing that the designs shown in the figures of the ’195 Application and ’813 Application were “different.” Reply, 1-6. But whether the figures are “different” is not the ultimate question. Petitioner must provide evidence that those alleged “differences” would *convey to a POSITA* that the inventor was *not in possession of the claimed subject matter*. Petitioner has entirely failed to do so.

First, Petitioner suggests that its evidentiary burden may be carried with just a presentation of “the application figures themselves,” or by showing “differences [that] can be seen by *an ordinary observer*.” Reply, 1-2.

Next, Petitioner replaces the perspective of a POSITA with an examiner's. Reply, 2. But an examiner's designation is not dispositive, particularly where the examiner also applied the wrong standard. *See Anascape, Ltd. v. Nintendo of Am. Inc.*, 601 F.3d 1333, 1338 (Fed. Cir. 2010) (“designation given to a derivative application does not determine its legal status.”); EX1003, 107 (Examiner commenting that design of Figure 2 “*could not have been recognizable*” due to contour line difference).

Finally, Petitioner argues that perhaps “no expert testimony is needed” for allegedly “non-complex technology.” Reply, 2-3. But Petitioner's own expert refutes this argument: “[t]he selection of the contour lines and the contour height involves *a relatively sophisticated analysis*.” EX2034, 42:1-6; EX1019, ¶17.

2. Petitioner's new argument addressing the perspective of a POSITA improperly incorporates by reference, relies on improper new reply evidence, and is still insufficient.

Petitioner addresses the perspective of a POSITA with a single sentence: “Dr. Delson explains that a POSITA would recognize that the two figures depict different lid designs.” Reply, 3. This sentence cites 13 paragraphs of Dr. Delson's Reply Declaration without any analysis. This is improper incorporation by reference. *See*

37 C.F.R. §42.6(a)(3); *Envirotainer AB v. DoubleDay Acquisitions LLC*, IPR2022-00851, Paper 70 at 34 n.20 (Feb. 15, 2024) (PTAB “decline[s] to consider substantive alternative arguments that ***only appear in reply declarations***, and not in any of the briefing”).

Dr. Delson's new declaration should also be disregarded because it is improper new reply evidence. A “[p]etitioner may not submit new evidence or argument in reply ***that it could have presented earlier***, e.g., ***to make out a prima facie case of unpatentability***.” Consolidated Trial Practice Guide (“TPG”), 73; *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (petitioners have obligation of “***utmost importance***” “***to make their case in their petition***”). “A reply cannot be used to introduce new evidence to fill gaps in the Petition or bolster arguments that were inadequately supported in the Petition.” *Western Digital*, IPR2023-01230, Paper 31 at 51.

The standard for written description support requires the perspective of a POSITA. *In re Owens*, 710 F.3d at 1366. Yet, for the Petition, Petitioner did not have its expert address the issue at all. Dr. Delson confirmed that he “was not asked to give an opinion on whether a POSITA would understand if there was undisclosed new matter.” EX2015, 24:19-21. Petitioner should have asked Dr. Delson to weigh in on this issue with the Petition but chose not to. Without Dr. Delson's new testimony, the only evidence addressing the perspective of a POSITA is the

testimony of Dr. Rojas and Mr. Kirkpatrick showing the inventor was in possession of the design. *See* POR, 5-9.

3. Dr. Delson's improper new testimony does not address what the disclosure of the '195 Application conveys to a POSITA—focusing only on “differences” in figures.

Even if Dr. Delson's new testimony is considered—it should not be—Dr. Delson still does not address the relevant standard. First, Dr. Delson criticizes the testimonies of Dr. Rojas and Mr. Kirkpatrick because they did not compare the figures to other “actual can lids”—lids with no identifiable connection to this case. EX1019, ¶¶7, 11. Once again, this argument does not address the correct standard. Dr. Delson then repeats the arguments from the Reply, merely saying there are “differences” between the figures but never explaining whether they would have conveyed to a POSITA that the inventor had possession of the claimed subject matter or not. Dr. Delson said “the two figures...reflect different lid designs with different physical structures” and “[a] comparison of those two figures show that they depict different lid designs.” EX1019, ¶¶10, 12. He concluded that “a POSITA would recognize that the two figures depict different lid designs.” EX1019, ¶17. Critically, Dr. Delson does not provide any evidence or testimony arguing that the '195 Application does not convey to a POSITA that the inventor was in possession of the subject matter. As a result, the only evidence of record regarding a POSITA's

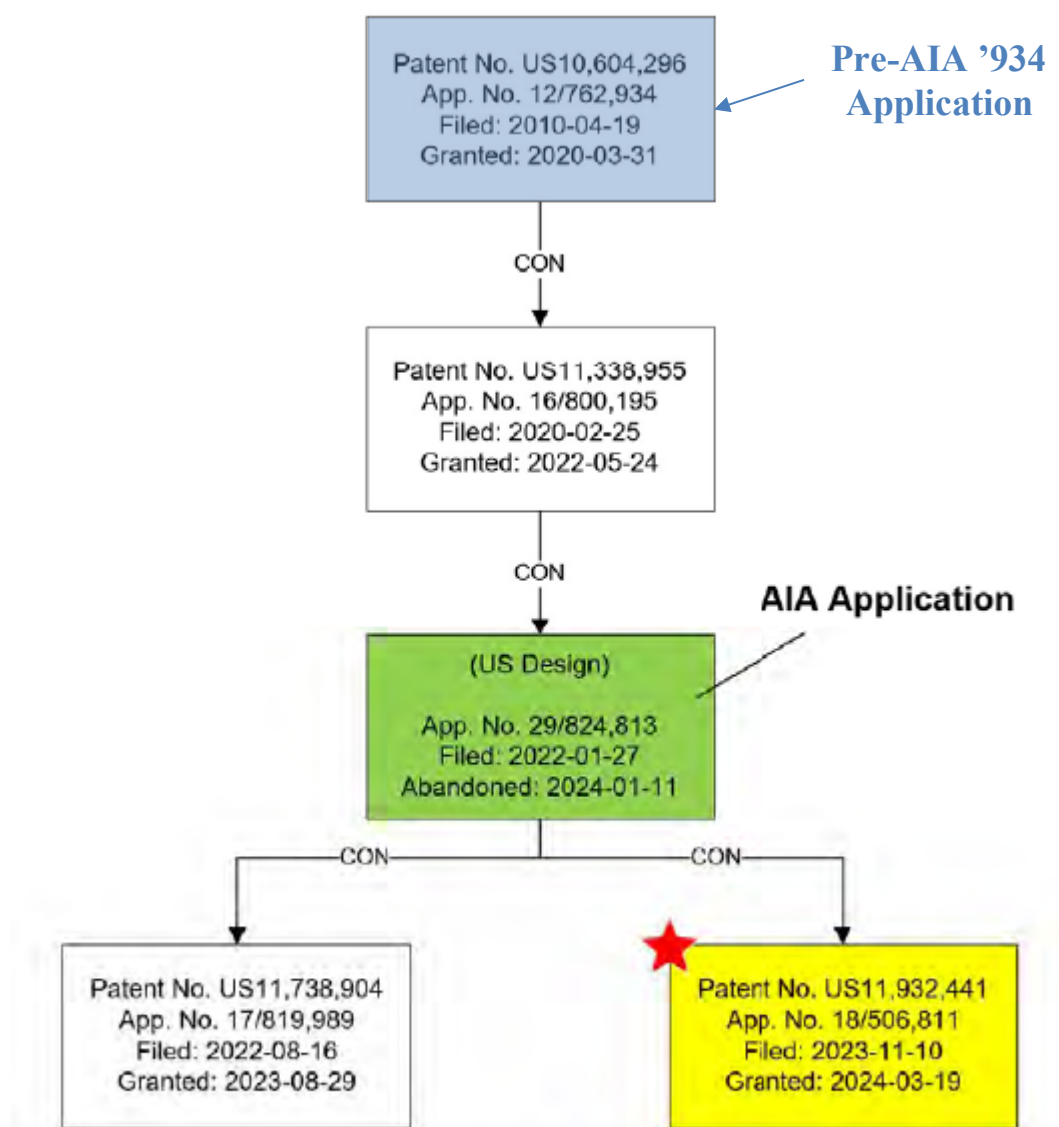
understanding establishes that the inventor was in possession of the subject matter.

EX2028, ¶¶40-54; EX2001, ¶¶10-32.

Petitioner's argument essentially applies the design patent equivalent of the improper *in haec verba* support test. "[T]o satisfy the written description requirement, the disclosure as originally filed **does not have to provide *in haec verba* support.**" *Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320, 1323 (Fed. Cir. 2000). Yet Petitioner contends that if *any* difference can be noticed between two figures without magnification, there cannot be written description support. Reply, 7-8. This is an overly rigid standard akin to requiring word-for-word written support and is incorrect. *See Skechers U.S.A., Inc. v. Nike, Inc.*, IPR2016-00871, Paper 8 at 20 (PTAB Sept. 29, 2016); *David's Bridal, Inc. v. Jenny Yoo Collection, Inc.*, PGR2016-00041, Paper 9 at 15 (Feb. 22, 2017); POR, 6; POPR, 17-22.

**4. Petitioner has failed to address written description support
"as of the filing date."**

Notably, Petitioner has never addressed whether the disclosure of the original, pre-AIA '934 Application "reasonably conveys" to a POSITA "that the inventor had possession of the claimed subject matter *as of the filing date.*" *In re Owens*, 710 F.3d at 1366. The '934 Application is shown in Petitioner's version of a family tree below:



Petition, 5 (Patent Owner annotations in blue)

In all its briefing, Petitioner has *not addressed the '934 Application in any way*. Without Petitioner addressing the issue, the only evidence regarding the perspective of a POSITA is that Figure 2 of the '813 Application is supported by the original '934 Application.

Dr. Rojas testified that the '934 Application, taken as a whole, would convey to a POSITA that the inventor was in possession of the design. *See* EX1022, 58:19-59:1 (“Q. Is it your opinion that Figure 6 of the '934 application would support a claim in a design patent for Figure 2 of the '813 application?” A: “In the context of reading *the whole patent of the '934, it does support it.*”); 31:12-19 (“adequate written description support” is shown if “the inventor *had possession* of what he’s claiming”).

By contrast, Dr. Delson, has never addressed the '934 Application. He appeared to be unaware of the '934 Application, or at best, was unsure if he reviewed it. *See* EX2034, 47:14-48:15 (viewing the '934 Application, “I do not recollect if this document I reviewed specifically”). While Dr. Delson compared the '813 and '195 figures and other cans, he confirmed that he did not consider and was not providing testimony on the issue of continuity. *See* EX2034, 46:12-13 (“*I have relied on counsel to address issues such as continuity.*”).

* * *

Petitioner has failed in every respect to address the proper standard for evaluating whether a design patent figure has support in the originally claimed application. Petitioner failed to provide *any* evidence regarding the perspective of a POSITA until its Reply. And regardless of whether Petitioner’s improper new reply evidence is considered—it should not be—Petitioner has not met its burden to show

that the '441 patent is PGR-eligible because even Petitioner's new Reply evidence does not address the controlling standard.

III. PETITIONER'S GROUNDS 1 AND 2 FAIL BECAUSE PETITIONER HAS NOT AUTHENTICATED THE EVIDENCE RELIED UPON

A. Petitioner has not authenticated the PCAN.

Grounds 1 and 2 rely on a Sprite Can, referred to herein as the "PCAN." Pet., 15-96; EX1005, ¶10.

In its Response, Patent Owner demonstrated that there was no way to verify that Mr. Norris authenticated the PCAN for several reasons. Mr. Norris never inspected Petitioner's cans in person, and the images Mr. Norris reviewed did not show the four authenticating features he testified were indicative of an authentic can. *See* POR, 15-22. Mr. Norris's account of the authenticating features has been so inconsistent as to be unreliable. *See* POR, 22-25; *compare* EX1005, ¶¶16, 33-36 (original Declaration identifying four authenticating features); *with* EX1020, ¶¶8, 13 (Reply Declaration denouncing four authenticating features and admitting errors). In the Reply, Petitioner changed positions but still failed to meet its burden.

1. Mr. Norris's belated authentication evidence should have been presented with the Petition.

A "[p]etitioner may not submit new evidence or argument in reply *that it could have presented earlier*, e.g., *to make out a prima facie case of unpatentability*." TPG, 73; *Intelligent Bio-Sys.*, 821 F.3d at 1369.

With its Petition, Petitioner bore the burden to provide sufficient evidence to authenticate the PCAN. Petitioner provided Mr. Norris's declaration, listing features that allegedly indicated an authentic PCAN. But the features Mr. Norris identified were incorrect, Mr. Norris never actually handled the cans in person, and the photographs Mr. Norris reviewed did not show all the allegedly authenticating features, making it impossible to verify Mr. Norris's statements. POR, 19-25; EX2014, 21:9-12.

Petitioner now uses its Reply to back-fill these evidentiary holes. Mr. Norris changed the list of authenticating features. EX1020, ¶8. He waved off the mistakes in his original authenticating features as typos. EX1020, ¶13. He physically inspected Petitioner's cans for the first time. EX1020, ¶10. And, also for the first time, he provided full photographs of the cans. EX1020, ¶11.⁴ This evidence is relied upon in an effort to "make out a prima facie case of unpatentability" and could have been presented with the Petition. TPG, 73. Showing the features that allegedly authenticate the PCAN should have been the *bare minimum* evidence presented by

⁴ Notably, Petitioner and Mr. Norris still have not provided a photo comparison of Petitioner's cans with Mr. Norris's cans to show that they are the same. This would provide a simple, base-line confirmation of Mr. Norris's testimony, but no photographs of Mr. Norris's cans have ever been presented.

Petitioner to prove authenticity, but it was not included with the Petition. This omission left Patent Owner with ***no*** way of verifying the truth of Mr. Norris's statements and is prejudicial to Patent Owner.

To the extent Petitioner argues that this new evidence was responsive to Patent Owner's arguments, this is incorrect. While true Patent Owner's identifying of the evidentiary gaps in the Petition prompted Petitioner to fill them, there is an important difference between responding to arguments and providing evidence that Petitioner should have been aware of and "***could have presented earlier.***" TPG, 73. "A reply cannot be used to introduce new evidence to fill gaps in the Petition or bolster arguments that were inadequately supported in the Petition. The introduction of such evidence constitutes an improper attempt to remedy deficiencies in the Petition, which should have initially contained necessary evidence and arguments to support" the grounds. *Western Digital*, IPR2023-01230, Paper 31 at 51.

Petitioner's use of the Reply to back-fill evidence that should have been presented with the Petition is the textbook definition of improper new reply evidence. At the very least, the supplemental evidence presented by Mr. Norris and the corresponding Reply arguments should be disregarded as improper. But "[t]he Board is not required...to sort proper from improper portions of the reply," and so may disregard the Reply in its entirety. TPG, 80.

2. Mr. Norris's new authentication evidence demonstrates the unreliability of his testimony.

In his original declaration, Mr. Norris provided four markings: (1) a Canning Label ("CANNED UNDER THE AUTHORITY..."); (2) a recycling label ("CONSUMER/RECYCLING INFORMATION..."); (3) "a bar code;" and (4) a Petainer Mark ("a mark...that identified Petainer S.A. as the manufacturer"). EX1005, ¶¶33-34.

When Patent Owner pointed out that these markings were not shown in the images Mr. Norris reviewed, he then disavowed these authenticating markings, saying that *Patent Owner* had demanded these marks be shown: "I understand that *Patent Owner* asserts that four specific markings must be observed on the cans in order to authenticate them." EX1020, ¶8. To be clear, these four markings were presented *by Mr. Norris* in his original declaration as being indicative of an authentic can. See EX1005, ¶¶33-34. Mr. Norris said Petitioner's cans were authentic based on "the same shape **and markings that I describe above.**" EX1005, ¶36. Mr. Norris now pivots away from his prior testimony: "I did not say that all four markings must be observed before a can could be identified as authentic" and emphasizes that "the shape of the cans" was also an authenticating feature. *Id.*

Put simply, this changing testimony from Mr. Norris creates more questions than it answers. If the "four markings" Mr. Norris originally identified do not need to be shown to authenticate a PCAN, as Mr. Norris now states, *what does*

authenticate a PCAN? EX1020, ¶8. Petitioner's Reply provides a new watered-down version of authenticating features, including (1) "[t]he shape of the cans," (2) "the labels in the images," without specifying which labels, and (3) "the markings on the bottom of the cans." Reply, 12.

As to (1), Mr. Norris originally testified that the shape of the PCAN "*mimic[ed] the design and shape of Coca-Cola's 12oz aluminum cans.*" EX1005, ¶11. He does not explain how the shape of the can is distinguishing if it is essentially the same as standard aluminum cans.

As to (2), neither Mr. Norris nor Petitioner explain what exactly "the labels in the images" are, if not the Canning Label or Recycling Label Mr. Norris originally identified, and which Patent Owner showed were not correct or even shown in the images Mr. Norris originally reviewed. POR, 16-36.

As to (3), Petitioner simply insists that the original images of the bottom of the PCAN were clear enough. Reply, 12.

If Mr. Norris has sufficiently accurate memory of the 40-year-old facts he recounts (to say nothing of providing actual evidence supporting that memory) he should, at a minimum, be able to provide *some consistent* reasoning as to what features indicate an authentic PCAN, and that reasoning should be verifiable by others. Yet he has not. There is no way of confirming whether Petitioner's PCANs include any authenticating features because Mr. Norris will not commit to what those

authenticating features are. The authenticating features have changed with each declaration Mr. Norris provides.

With no way of verifying Mr. Norris's story, Petitioner asks the Board and Patent Owner to blindly trust Mr. Norris when he says he can spot an authentic PCAN. Never mind that he cannot say exactly how it is done. It is Petitioner's burden to provide *evidence* showing that the PCAN was publicly available in 1985, and is thus prior art. Petitioner has not done so.

3. The evidence Petitioner provides to authenticate the PCAN falls well below the evidence accepted in similar cases.

In its Response, Patent Owner listed cases with evidence sufficiently authenticating product prior art. *See* POR, 25-28. This evidence is summarized on the left in the table below. For comparison, the evidence provided by Petitioner in this case is on the right.

Evidence sufficiently authenticating product prior art	Evidence allegedly authenticating PCAN
<ul style="list-style-type: none"> • Testimony from employee of product manufacturer regarding events 3 years earlier; • “sales invoice pre-dating the priority date”; and • “lab reports” for the product “pre-dating the priority date.” <p>Evidence was “<i>sparse</i>” but “sufficient.”</p> <p><i>AQ Textiles, LLC v. Arun Agarwal</i>, PGR2017-00042, Paper 10 at 13-15 (PTAB Feb. 7, 2018).</p>	<ul style="list-style-type: none"> • Inconsistent testimony from employee regarding events 40 years ago; • News articles from uninvolved parties saying product “will begin” to be “test[ed];” and • Brochure describing product with a 1985 copyright date, but no indication of public distribution.
<ul style="list-style-type: none"> • Testimony of two employees of product manufacturer regarding events 10 years earlier; and • Photograph of product with “sticker” providing self-authenticating information: <ul style="list-style-type: none"> ○ “part number,” ○ “description” of the product, and ○ expiration date predating the priority date. <p><i>Pelican Biothermal, LLC v. Va-Q-Teq AG</i>, PGR2021-00085, Paper 9 at 61-63 (December 17, 2021).</p>	

The Board in *AQ Textiles* found that (1) witness testimony regarding events 3 years earlier, (2) a sales invoice, and (3) lab reports both pre-dating the priority date was “*sparse*” but “sufficient” to show a “‘reasonable likelihood of success’ *at institution*,” a “significant difference” compared to the preponderance standard “at

trial.” *AQ Textiles*, PGR2017-00042, Paper 10 at 13; *TriVascular*, 812 F.3d 1056, 1068 (Fed. Cir. 2016). The evidence presented by Petitioner in this case falls short of the “sparse” evidence in *AQ Textiles*.

In *Pelican Biothermal*, the Board rejected other product prior art for lack of corroborating evidence, below:

Evidence found to <u>not</u> sufficiently authenticate product prior art	Evidence allegedly authenticating PCAN
<ul style="list-style-type: none"> • Testimony of two employees regarding events 10 years earlier • Photograph of product with no self-authenticating information • “sales records...bearing the part number” <p><i>Pelican Biothermal, LLC v. Va-Q-Teq AG</i>, PGR2021-00085, Paper 9 at 61-63 (December 17, 2021).</p>	<ul style="list-style-type: none"> • Inconsistent testimony from employee regarding events 40 years ago; • News articles from uninvolved parties saying product “will begin” to be “test[ed];” and • Brochure describing product with a 1985 copyright date, but no indication of public distribution.

In *Pelican*, the testimony of two witnesses and a sales record were not sufficient even for the lower institution standard. Petitioner’s evidence falls short of this insufficient evidence as well.

Mr. Norris was “project manager of the PCAN,” “visited and worked with” foreign manufacturers, and “overs[aw] completion of the finished product.” EX1005, ¶¶11, 18-19. If anyone could provide the corroborating evidence deemed sufficient in other cases (sales receipts, lab reports, predating photographs, part numbers, expiration dates), Mr. Norris can. But he has not. Petitioner’s attempts to distinguish the cases above do not explain away the lack of corroborating evidence

blatantly missing in this case. Petitioner has fallen well short of its burden to prove public availability of the PCAN.

B. Patent Owner did not waive any authenticity arguments.

Petitioner sidesteps the lack of evidence with a procedural complaint, arguing that “PO waived such an authenticity argument.” Reply, 9. This accusation is incorrect. Patent Owner’s challenge to the PCAN relates to the “sufficiency of the evidence” including issues of public availability and prior art status, falling outside objections filed under 37 C.F.R. §42.64(b) and better addressed in the briefs. *See Grunenthal GMBH v. Antecip Bioventures II LLC*, PGR2019-00003, Paper 22 at 15-18 (May 5, 2020).

IV. PETITIONER HAS NOT DEMONSTRATED A MOTIVATION TO COMBINE THE PCAN WITH PROTAIS

A. Petitioner has not identified an adequate motivation to combine the PCAN with Protais’s base.

Petitioner now contends that Protais’s bottom provides sufficient space for the pull tab and the diameter could be adjusted to nest within the PCAN lid. Reply, 17-19. Petitioner has never provided any illustration of its proposed PCAN-Protais combination. Instead, Petitioner relies on expert testimony to fill the gap, arguing that “a POSITA could have adjusted the size and angle of Protais’s bottom” as needed. Reply, 18. What exactly those modifications would be, it does not say, far from providing any motivation to make the unstated modifications.

Further, Petitioner's argument that dome shape strength only applies to aluminum and not PET is unsupported. As explained in the Response, a POSITA would not be motivated to replace the PCAN's existing bottom with Protais's, where the PCAN's bottom is already designed to nest within the top and utilizes the ideal dome shape. *See* POR, 36-45 (citing EX2028, ¶¶74-81).

B. The Petition fails to provide any analysis for how the combination of the PCAN with Protais renders obvious limitations [15.E]-[15.J] and [15.L]-[15.M].

Petitioner's arguments regarding its cross-references in Ground 2 make no sense. Reply, 19-24. Ground 2 relies on "a container that has the body and lid of the Coca-Cola PCAN, *and Protais' bottom*." Pet., 69. For Ground 2 limitations describing that bottom—*Protais' bottom*—the Petition cross-references claim 1. Petitioner's Reply says "Petitioner cross referenced the invalidity bases for claim 1 *under Ground 1*." Reply, 20. That explanation is not in the Petition. But, more importantly, Ground 1 does not address Protais. For example, limitation [15.F] recites "*wherein the base portion comprises a bottom and a first depression*." Pet., 83. The [15.F] analysis says "*See* [1.F]." *Id.* The analysis for limitation [1.F] "under Ground 1" shows *the PCAN's bottom*—not Protais'. *See* Pet., 21-22. On its face, the Petition does not provide *any analysis* for how the combination of the PCAN and Protais' bottom renders obvious limitations [15.E]-[15.J] and [15.L]-[15.M], reciting features of the can bottom.

The figures the Reply identifies as mapping limitations [15.E]-[15.J] and [15.L]-[15.M] to Protais do not come from claim 1 or Ground 1. They come from various portions of *claims 9 and 11 in Ground 2*. See Pet., 73-74, 75, 77-78, 80. These sections were never cited at limitations [15.E]-[15.J] and [15.L]-[15.M].

For this reason, Petitioner has failed to establish with sufficient particularity how claims 15-20 are rendered obvious by its proposed combination at Ground 2.

V. THE COMBINATION OF METZGER, PROTAIS, AND KAMINSKI DOES NOT RENDER THE CLAIMS OBVIOUS

A. Metzger does not disclose a container body...made out of a resin, as required by limitation [1.C].

For Ground 3, Petitioner improperly fill gaps with expert testimony.

In his Reply Declaration and deposition, Dr. Delson admitted that “not all plastics are resins.” EX1019, ¶31; EX2034, 49:14-50:1. Yet, when asked where Metzger disclosed a resin, he could only point to Metzger’s disclosure of “various plastics.” See EX2034, 51:10-15. Relying on this unsupported testimony, Petitioner waves off the admitted gap between a plastic and a resin as “obvious.” Reply, 24.

The PTAB and Federal Circuit have repeatedly held that a petitioner’s attempt to sweep gaps in the prior art under the obviousness rug is a thinly veiled argument for inherency, even if petitioners may not explicitly use the term “inherency.” This case law was presented in the Response, see POR, 49-50, but Petitioner did not address it. Petitioner just repeats that it never explicitly mentioned “inherency,”

hoping the missing limitations are obvious without any prior art support. *See* Reply, 24; EX1019, ¶33.

Even if considered, Petitioner's argument is wrong. Dr. Delson believes a can made of PET was obvious because "the use of PET to make food and beverage containers was so widely known." EX1019, ¶33. But Petitioner has not identified any can made of a resin or PET besides the PCAN. The PCAN was "a secret project for Coca-Cola," allegedly distributed in a limited geographical area "for around six months," 40 years ago. EX1005, ¶¶27, 30. That is hardly common, and shows that a PET can was not obvious.

Petitioner's gap filling for Ground 3 should be rejected because it invokes inherency without meeting inherency requirements and does not show the limitation was obvious.

B. Petitioner's dismissal regarding Metzger's thermal retort process is unsupported attorney argument.

Dr. Rojas explained that a POSITA would not select PET as one of Metzger's "various plastics" because Metzger's containers undergo a "thermal retort process" that would melt PET. *See* POR, 52-55; EX2028, ¶¶96-105. Dr. Delson did not address Dr. Rojas's analysis and Petitioner's counsel barely mentioned it, only arguing that it was just one embodiment. EX1019; Reply, 27. Attorney argument is not evidence and does not rebut the only evidence presented by Dr. Rojas.

Petitioner is also incorrect. Like most patents, Metzger describes multiple uses for its invention, but Metzger makes clear that its intent is to “provide a vacuumized container with protective features that is suitable for use with *hot fill and/or thermal processes*.” EX1010, 2:29-31. These hot fill and thermal retort processes are described in detail. EX1010, 10:56-11:63. That Metzger mentions that its container may also be used without the thermal retort process does not detract from Metzger's stated intent. EX2028, ¶33 (quoting EX1010, 2:19-22) (“Metzger's container was specifically designed to address ‘the temperature rigors of [a] thermal retort process’”). Just as a mug designed for hot beverages may also hold cold beverages does not change the fact that the mug was designed to hold hot beverages and should, at a minimum, perform that function. Metzger's container is designed to withstand a thermal retort process and a POSITA would have recognized that PET was an inappropriate material for such a container—although the container could, of course, have other uses.

C. The first depression of Protais's base, identified by the Petitioner, does not partially define[] a first outline, as required by limitation [1.G].

Petitioner was capable of identifying depressions in container bottoms that partially defined outlines. Petitioner did so for the bottom of the PCAN in Ground 1 and Pedmo in Ground 3. *See* POR, 57-59. Yet, for Protais' bottom in Grounds 2 and 3, Petitioner's mapping left a gap between the first depression (a “reinforcing

groove[]”) and the first outline such that the depression is not defined by the first outline. *See* POR, 60-61.

Confronted with this gap, Petitioner shifted its mapping of the prior art to now argue the first depression is the **combination** of (1) Protais’ “reinforcing groove[]” with (2) **the very gap identified by Patent Owner**, simply renaming it to become the groove’s “**side walls**” (a term not found in Protais, but the ’441 patent). *See* Reply, 27-33. This is an entirely new argument not found anywhere in the Petition. *Compare* Pet., 113-114; *with* Reply, 28 (identifying “depression/groove sidewall”).

Petitioner was free to make this mapping in the Petition, but chose not to. Petitioner’s attempt to shift positions in the Reply is an impermissible new argument, and should be rejected. *See* TPG, 73; *Intelligent Bio-Sys.*, 821 F.3d at 1369. Since Petitioner’s new position is improper, Ground 3 still fails for the reasons set forth in the Patent Owner Response. *See* POR, 55-61.

VI. THE COMBINATION OF GARDINER, PEDMO, AND BROWN DOES NOT RENDER THE CLAIMS OBVIOUS

A. Gardiner does not disclose a container body...made out of a resin, as required by limitation [1.C].

Ground 4 of the Petition is insufficient for the same reasons described at Section V.A. above. Like Metzger, Gardiner does not disclose a “container body...made out of a resin” and Petitioner improperly uses its expert to fill gaps in the prior art.

As explained above, Dr. Delson acknowledges that “not all plastics are resins.” EX1019, ¶31; EX2034, 49:14-50:1. Gardiner container “can be made of any suitable material. Aluminum, aluminum alloy, steel and plastic are examples of suitable materials.” EX1012, 2:22-24. As for Ground 3, Petitioner’s mapping improperly relies on expert testimony to fill admitted gaps in the prior art. In addition, Petitioner’s argument that prior art disclosure of a *plastic* is sufficient to disclose a *resin* invokes inherency. As explained above, the prior art presented by Petitioner demonstrates that it was not obvious to select a resin—PET—to make the container body of the can. The only can with a PET container body that Petitioner was able to identify is a 40-year-old test product distributed in an extremely limited geographical area “for around six months.” EX1005, ¶¶27, 30. A PET container can was not common or obvious.

B. Gardiner does not disclose a circular neck, as required by limitation [1.N], or a lip as required by limitation [1.P].

As explained in the Response, Gardiner does not disclose a circular neck or lip required by the claims. POR, 65-69. Petitioner attempts to use *the cap* to illustrate features of *the container body* that are not disclosed by Gardiner. *See* Reply, 35-36; POR, 65-69. For this additional reason, the combination of Ground 4 does not render each limitation of the claims obvious.

VII. CONCLUSION

The Board should find the challenged claims patentable for the reasons presented above.

Respectfully submitted,

Dated: July 16, 2025
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VIII. CERTIFICATE OF WORD COUNT

Under 37 C.F.R. § 42.24(b)(1), the undersigned attorney for the Patent Owner declares that the argument section of this Sur-Reply (Sections I-VII) has 5,572 words, according to the word count tool in Microsoft Word™.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BuzzBallz, LLC,
Patent Owner

§ Patent Owner's Sur-reply
§
§ U.S. Patent No. 11,932,441
§

CERTIFICATE OF SERVICE

The undersigned certifies, under 37 C.F.R. §§ 42.105 and 42.6, that service was made on Petitioners' counsel as detailed below.

Date of service July 16, 2025

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