UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVATION MEDICAL, INC.,

Petitioner,

v.

EMKINETICS, INC.,

Patent Owner

Review No. PGR2024-00043
U.S. Patent No. 11,844,943

PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE

Pursuant to 37 C.F.R. §§ 42.64, 42.223, and the Board's Scheduling Order (Paper 9 at 11-12), Patent Owner EMKinetics, Inc. ("Patent Owner") submits this Motion to Exclude (Paper 22) Exhibits 1085-90. Petitioner Avation Medical, Inc. ("Petitioner") filed Exhibits 1085-90 on July 16, 2025, without Board authorization along with its Reply (Paper 12). Petitioner relied on Exhibits 1085-90 in its Reply, in its own words, as "additional evidence in response to the arguments in [Patent Owner] EMK's Response that corroborates [Petitioner] Avation's record evidence" (Paper 12 at 16). 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 1085-90 are inadmissible.

Patent Owner timely objected to Exhibits 1085-90 on July 23, 2025. (Paper 14); *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 1085-90 were not themselves submitted in response to any evidentiary objection filed by Patent Owner. *See id*. Therefore, Exhibits 1085-90 constitute "supplemental information" within the meaning of 37 C.F.R. § 42.223.

Moreover, Exhibits 1085-90 constitute "late" supplemental information within the meaning of 37 C.F.R. § 42.223(b). In this case, the Board instituted trial on January 9, 2025. (Paper 8). Exhibits 1085-90 were submitted on July 16, 2025,

which is 188 days after the Board instituted trial. Because anything submitted 30 days after institution of trial is considered "late," Exhibits 1085-90 are late by Rule. 37 C.F.R. § 42.223(b). Although Section 42.223 sets forth processes for submitting supplemental information, including late supplemental information (Section 42.223(b) as well as irrelevant information (Section 42.223(c)), Petitioner did not follow these processes when submitting Exhibits 1085-90. For example, Petitioner did not request authorization to file a motion to submit Exhibits 1085-90. By way of further example, Petitioner did not file such a motion.

Petitioner did not attempt, not even in Reply (Paper 12), to show that its late submission of Exs. 1085-90 satisfied the standard set forth in Section 42.223(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 1085-90 as untimely and unauthorized under 37 C.F.R. § 42.223(b).

1. Patent Owner's Motion to Exclude Ex. 1085

Patent Owner asks that the Board exclude Petitioner's Exhibit 1085 because the filing of Exhibit 1085 with Petitioner's Reply constitutes the unauthorized late

submission of supplemental information, contrary to the requirements of 37 C.F.R. § 42.223(b). Exhibit 1085 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 1085 on July 23, 2025, five business days after Exhibits 1085-90 were filed with the Board, on at least the same grounds by filing such objections with the Board and serving them by email on Petitioner's counsel the same day. (Paper 14 at 2).

Because the submission of Exhibit 1085 was untimely and unauthorized, Exhibit 1085 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon. (Paper 12 at 16-17 (asserting that Exhibit 1085 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 obtain here: Exhibit 1085 should be excluded and Petitioner's reliance on Exhibit 1085 (at Paper 12 at 16-17) 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. 1086

Patent Owner requests that the Board exclude Petitioner's Exhibit 1086 for the same reasons as Exhibit 1085, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 3-5) as is fully set forth herein.

As with Exhibit 1085, Patent Owner originally and timely objected to Exhibit 1086 on July 23, 2025, on the same grounds as set forth in this Motion. (Paper 14 at 2). Petitioner relies on Exhibit 1086 only in Reply. (*See* Paper 12 at

16-17 (asserting that Exhibit 1086 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1086 was untimely and unauthorized, Exhibit 1086 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon (Paper 12 at 16-17).

3. Patent Owner's Motion to Exclude Ex. 1087

Patent Owner requests that the Board exclude Petitioner's Exhibit 1087 for the same reasons as Exhibit 1085, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 3-5) as is fully set forth herein.

As with Exhibit 1085, Patent Owner originally and timely objected to Exhibit 1087 on July 23, 2025, on the same grounds as set forth in this Motion. (Paper 14 at 2). Petitioner relies on Exhibit 1087 only in Reply. (*See* Paper 12 at 16-17 (asserting that Exhibit 1087 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1087 was untimely and unauthorized, Exhibit 1087 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon (Paper 12 at 16-17).

4. Patent Owner's Motion to Exclude Ex. 1088

Patent Owner requests that the Board exclude Petitioner's Exhibit 1088 for the same reasons as Exhibit 1085, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 3-5) as is fully set forth herein.

As with Exhibit 1085, Patent Owner originally and timely objected to Exhibit 1088 on July 23, 2025, on the same grounds as set forth in this Motion. (Paper 14 at 2). Petitioner relies on Exhibit 1088 only in Reply. (*See* Paper 12 at 16-17 (asserting that Exhibit 1088 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1088 was untimely and unauthorized, Exhibit 1088 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon (Paper 12 at 16-17).

5. Patent Owner's Motion to Exclude Ex. 1089

Patent Owner requests that the Board exclude Petitioner's Exhibit 1089 for the same reasons as Exhibit 1085, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 3-5) as is fully set forth herein.

As with Exhibit 1085, Patent Owner originally and timely objected to Exhibit 1089 on July 23, 2025, on the same grounds as set forth in this Motion. (Paper 14 at 2). Petitioner relies on Exhibit 1089 only in Reply. (*See* Paper 12 at 17 (asserting that Exhibit 1089 corroborates evidence submitted with the Petition)).

Because the submission of Exhibit 1089 was untimely and unauthorized, Exhibit 1089 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon (Paper 12 at 17).

6. Patent Owner's Motion to Exclude Ex. 1090

Patent Owner requests that the Board exclude Petitioner's Exhibit 1090 for the same reasons as Exhibit 1085, and Patent Owner hereby incorporates by reference Part 1 of this Motion (Pages 3-5) as is fully set forth herein.

As with Exhibit 1085, Patent Owner originally and timely objected to Exhibit 1090 on July 23, 2025, on the same grounds as set forth in this Motion. (Paper 14 at 2). Petitioner relies on Exhibit 1090 only in Reply by relying on Exhibits 1085-89, which are attached to Exhibit 1090. (*See* Paper 12 at 16-17 (asserting that Exhibits 1085-89, attached to Exhibit 1090, corroborate evidence submitted with the Petition)).

Because the submission of Exhibit 1090 was untimely and unauthorized, Exhibit 1090 should be excluded pursuant to 37 C.F.R. § 42.223(b). So should any reliance thereon (Paper 12 at 16-17).

* * *

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. 1085	Paper 12 at 16-17	37 C.F.R. § 42.223(a)-(c)
Ex. 1086	Paper 12 at 16-17	37 C.F.R. § 42.223(a)-(c)
Ex. 1087	Paper 12 at 16-17	37 C.F.R. § 42.223(a)-(c)
Ex. 1088	Paper 12 at 16-17	37 C.F.R. § 42.223(a)-(c)
Ex. 1089	Paper 12 at 17	37 C.F.R. § 42.223(a)-(c)
Ex. 1090	Paper 12 at 16-17	37 C.F.R. § 42.223(a)-(c)

Respectfully submitted,

Date: October 8, 2025

/David Gerasimow/

David Gerasimow, Reg. No. 57,512
The Law Offices of
David A. Gerasimow, P.C.
153 W. Ohio St., Ste. 407
Chicago, IL 60654
T: 312-919-4254
E: dave@gerasimowlaw.com

Eran Steinberg, Reg. No. 53,637
137 Granville Way
San Francisco, CA 94127
T: 415-902-7026
E: venture@eransteinberg.com

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(4), the undersigned certifies that on October 8, 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
Kyle T. Deighan, Reg. No. 75,525
Brynna M. W. Wasserman, Reg. No. 76,700
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
ttucker@calfee.com
kdeighan@calfee.com
bwasserman@calfee.com

Date: October 8, 2025

/David Gerasimow/
David Gerasimow, Reg. No. 57,512
The Law Offices of
David A. Gerasimow, P.C.
153 W. Ohio St., Ste. 407
Chicago, IL 60654
T: 312-919-4254
E: dave@gerasimowlaw.com