

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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EBAY ENTERPRISE INC. AND EBAY, INC.  
Petitioner

v.

LAWRENCE B. LOCKWOOD

Patent Owner

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Case CBM2014-00025  
U.S. Patent No. 7,010,508

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**LOCKWOOD'S REPLY BRIEF TO EBAY'S SUPPLEMENTAL  
BRIEF ALLEGING ELIGIBILITY TO FILE CBMS**

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Patent Trial and Appeal Board  
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Alexandria, VA 22313-1450

eBay’s primary argument is that it only had to “certify” whether it had standing to file its CBM petitions. But that is wrong: Rule 302(a) requires a CBM petition to “demonstrate,” not merely certify, standing. If the Board agrees with Lockwood on this point, it need not consider eBay’s remaining arguments, because eBay will have failed to satisfy its burden as petitioner, leaving a denial of the petitions as the only appropriate action by the Board.

The Board should also not enter the untimely Sherman declaration into these cases. First, the rules do not allow eBay to enter evidence at this stage of the cases or to otherwise supplement its petitions. Second, eBay fails to explain why the Sherman declaration could not have been filed with its petitions. Third, the substance of the Sherman declaration is mere attorney argument—he does not provide any evidence about the terms of the alleged indemnification agreement between eBay and iRobot.<sup>1</sup>

Finally, following well established declaratory-judgment precedent, the dismissal with prejudice of the iRobot law suit and Lockwood’s grant of a covenant not to sue iRobot divested the Board of its jurisdiction to consider the CBM petitions. So the Board should deny institution for lack of standing.

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<sup>1</sup> The appropriate process for eBay to fill evidentiary gaps is filing new CBM petitions after the Board dismisses the present petitions.

## Argument

### I. eBay provided no evidence of standing and wrongly argues mere certification of standing is sufficient.

eBay asserts that the law only requires that it *certify* it has standing. eBay is wrong. Rule 304 states: “The petitioner must **demonstrate**... that the petitioner meets the eligibility requirements of §42.302 [who may petition]” (emphasis added).<sup>2</sup> eBay’s brief ignores this basic point, as it must, because its petitions lack any evidence demonstrating standing.

eBay, as petitioner, must meet its burden of production (*i.e.*, provide admissible evidence) when it files its petitions and as the CBMs proceed—notice pleading does not suffice. 37 C.F.R. § 42.20(c). The Board has explained the burden stating “[a]rguments of counsel cannot take the place of factually supported objective evidence.” 77 Fed. Reg. 48702. And contrary to eBay’s position that a Rule 11 basis for attorney allegations is enough in a petition (’026 Paper 21, pp. 2-4), denials of petitions for lacking sufficient evidence are now commonplace.<sup>3</sup>

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<sup>2</sup> eBay incorrectly cites Rule 204 for its assertion that a certification is enough because Rule 204 applies to PGRs, not CBMs.

<sup>3</sup> *See, e.g.*, CBM2014-00010 (Paper 20, p. 9) (“Petitioner’s conclusory language in the petition ...without more, is not sufficient to demonstrate that the claimed subject matter is not a technical invention.”); IPR2013-00101 (Paper 14, p. 10)

Despite Rule 302's clear requirement that petitioners provide evidence of standing, eBay's brief does not point to any evidence in the petitions that supports its assertion that it has standing. Instead, eBay seeks to add the Sherman declaration ('026 Paper 21, pp. 2-3). But the Sherman declaration suffers the same problem as eBay's petitions: it is merely a signed attorney statement that an alleged agreement to indemnify exists. The Sherman declaration does not provide a single term from this alleged indemnification agreement. The records of these CBMs still lack any evidence of the scope or amount of any alleged indemnification. In short, eBay asks the Board to trust it that there is an indemnity agreement, and eBay deprives Lockwood of any ability to test whether any alleged indemnity agreement in fact gives rise to a declaratory judgment standing. For this reason alone, institution of the Petitions should be denied.

**II. eBay should not be allowed to correct its petitions or enter supplemental information.**

Although eBay has alleged 37 C.F.R. § 42.11 allows it to plead without providing evidence, eBay still asks the Board for a mulligan to either correct the standing argument in its petitions (37 C.F.R. § 42.104(c) for correcting petitions) and/or to supplement the petitions with information allegedly showing standing in

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("the Petition lacks sufficient evidence, for example, in the form of testimony or other probative evidence...").

the proceeding (37 C.F.R. §42.123 for entering supplemental evidence). But Rule 104 does not allow correcting their petitions without an authorized motion, which the Board denied in the Order ('026 Paper 20), and Rule 123 does not allow the submission of supplemental information before institution. So the Sherman declaration should be excluded.

eBay's sole basis for why it should be allowed to "clarify" the standing argument here is the ruling of another Board panel in the '055 CBM. But eBay conveniently fails to explain the substantial differences between the facts and procedural posture of the '055 CBM and the Lockwood CBMs. First, the patent owner in the '055 CBM consented to the petitioner submitting a declaration. So, the '055 CBM provides no guidance on how to resolve this issue when there is not consent. Second, GSI acted more promptly in the '055 CBM (two months before decision) than eBay does here (weeks before decision). eBay knew in January 2014, before Lockwood filed its POPRs, that the same evidentiary gaps existed in the Lockwood CBMs as in the '055 CBM. But eBay waited four months to act on this knowledge in the Lockwood CBMs. Entry<sup>4</sup> of new counsel does not toll eBay's timeliness to act.

Even if there were no differences between the proceedings, eBay fails to explain why the Sherman declaration was not filed with the petition, why it was

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<sup>4</sup> It is not clear from the Brief when eBay hired new counsel.

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