

Filed on behalf of Seymour Levine

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THE BOEING COMPANY.
Petitioner,

v.

SEYMOUR LEVINE
Patent Owner

Case IPR2015-01341
U.S. Patent No. RE39,618

**PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO
SUBMIT SUPPLEMENTAL INFORMATION**

In accordance with the Board's Order dated January 20, 2016 (Paper 20), Patent Owner Seymour Levine ("Levine" or "Patent Owner") hereby opposes The Boeing Company's ("Boeing" or "Petitioner") Motion to Submit Supplemental Information.

I. BOEING SEEKS ONLY TO BOLSTER THE EVIDENCE IN ITS PETITION IN DIRECT RESPONSE TO PATENT OWNER'S PRELIMINARY RESPONSE

The Board should deny Boeing's motion to submit supplemental information because it seeks only to bolster the evidence submitted in the Petition in response to deficiencies identified by Patent Owner in its Preliminary Response. Allowing such a practice only encourages "the filing of petitions which are partially inadequate." *ZTE Corp. v. ContentGuard Holdings, Inc.*, Case IPR2013-00454, slip op. at 5–6 (PTAB Sept. 25, 2013) (Paper 12)(informative).

Boeing's motion seeks to add to this IPR the additional evidence it submitted with its second petition (IPR2016-0023), which it admitted was intended specifically "to address purported deficiencies raised in the PO Preliminary

Response in IPR2015-01341.” IPR2016-0023, Paper 1 at 1.¹ Boeing has not explained why this information could not have been submitted with its Petition.

The Board often denies motions to submit supplemental information when that information “effectively changes the evidence originally relied upon in a petition.” *Mitsubishi Plastics, Inc., v. Celgard, LLC*, Case IPR2014-00524, slip op. at 5-6 (PTAB Nov. 28, 2014) (Paper 30). In that case the Board denied a request to add expert declarations used in other cases against the same patent to support similar grounds, citing Petitioner’s admission that the additional evidence was intended “to bolster the evidence originally submitted in support of the Petition in this proceeding.” *Id.* at 6. This is especially true when the additional information was, as here, in petitioner’s possession at the time it filed the petition. *ZTE Corp. v. ContentGuard Holdings, Inc.* Case IPR2013-00139, slip op. at 2-3 (PTAB Jul 30, 2013) (Paper 27) (denying request to file a motion for supplemental information to add two references “that were in the petitioner’s possession at the time of filing of the petition” and were being submitted to “bolster” petitioner’s position in light of the Board’s claim construction.); *Rackspace US, Inc. v.*

¹ Levine has filed its Preliminary Response to Boeing’s second Petition asking the Board to deny the Petition under 35 U.S.C. § 325(d). IPR2016-0023, Paper 6.

PersonalWeb Technologies, LLC, Case IPR2014-00057, slip op. at 4-8 (PTAB Apr. 30, 2014) (Paper 16) (same).

The supplemental Helfrick Declaration “changes the evidence originally relied on” by, for the first time, providing evidence on the “portable”/“positionable” requirement of the claimed transmitter. Under the guise of ensuring a “full record” (Mot at 1), Boeing seeks to bolster its case against the ’618 patent with information that should have been submitted with the Petition but which is being submitted here only in response to Levine’s Preliminary Response. *See, Vitaulic Co. v. The Viking Corp.*, Case IPR2015-00423, slip op. at 4 (PTAB Aug 4, 2015) (Paper 16) (granting motion to submit supplemental information in part because “the additional information from [the expert] was *not* created to address deficiencies with the Petition raised by Patent Owner.”(emphasis added)).

The single decision relied on by Boeing is in accord, cautioning that “the provision for submitting supplemental information is not intended to offer a petitioner a routine avenue for bolstering deficiencies in a petition raised by a patent owner in a Preliminary Response. To that end, a petitioner should not expect § 42.123 to present a ‘wait-and-see’ opportunity to supplement a petition after initial comments or arguments have been laid out by a patent owner.” *Pacific Market International v. Ignite USA, LLC*, IPR2014-00561, slip op. at 3 (PTAB Dec. 2, 2014) (Paper 23). In that case, the Board approved submission of

additional evidence directed only at the expert's opinion as to why certain references should be combined, but not to "change the type of evidence initially presented in the Petition to support those grounds of unpatentability." *Id.* at 3-4. Here, by contrast, Boeing seeks to *change* the evidence relied on. In its Petition, Boeing provided *no evidence* as to whether the alleged transmitters were "portable" or "positionable." Dr. Helfrick's new declaration purports to provide such evidence for the first time, thus changing the evidence Boeing relies on in its challenge to the '618 patent.

II. CONCLUSION

For the foregoing reasons, the Board should deny Boeing's motion.

Date: February 3, 2016

Respectfully submitted,

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