UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WAVETAMER GYROS, LLC,
Petitioner

v.

SEAKEEPER, INC.,
Patent Owner

Case IPR2017-01931 and IPR2017-01996[1]
Patent 8,117,930 B2 and 7,546,782 B2

Before LORA M. GREEN, MICHAEL W. KIM, and PATRICK R. SCANLON, *Administrative Patent Judges*

GREEN, *Administrative Patent Judge*.

PATENT OWNER'S OPPOSITION TO MOTION TO DISMISS THE PETITIONS AND AUTHORIZE FILING OF CORRECTED PETITIONS

[1] The word-for-word identical paper is filed in each proceeding identified in the heading. Unless otherwise indicated, references to exhibits or papers refer to Exhibits and Papers in IPR2017-01931.

Pursuant to the Board's December 11, 2017 Order (Paper 8), Patent Owner Seakeeper, Inc. ("Seakeeper") submits this Opposition to Petitioner's Motion To Dismiss The Petitions And Authorize Filing Of Corrected Petitions (Paper 9). Petitioner Wavetamer Gyros, LLC ("Wavetamer") has not met its burden of showing it is entitled to the requested relief. First, Wavetamer does not explain why *dismissal* under 37 C.F.R. § 42.71(a) is appropriate. Second, Wavetamer did not receive permission from the Board to seek "authoriz[ation]" to file "corrected petitions."

Now that Wavetamer has seen Seakeeper's preliminary response ("POPR") and recognizes its petitions are fatally deficient, Wavetamer brazenly seeks a second bite at the apple, even though the PTAB has now issued its precedential decision in *General Plastic,* which prevents this exact form of harassment. But the Board should not penalize a patent owner for filing a POPR, nor establish a route to allow a petitioner not liking its chances—especially after seeing a patent owner's arguments—to simply reload to avoid an adverse Board ruling and start over.

Wavetamer, which has touted its legal expertise before the PTAB and has conceded that it has been preparing these Petitions for two years, now admits it only became aware of a significant legal error in both petitions after reading Seakeeper's POPR. *See, e.g.*, Paper 9 at 2-3; Paper 10 ¶¶ 2, 7. It would be unjust to allow Wavetamer to escape the consequences of its flawed petitions, especially when those flaws have been identified to the Board by Seakeeper's legal work. Although

Wavetamer seeks to characterize these flaws as mere oversights, the record demonstrates that Wavetamer committed a significant legal error by failing to establish correctly the legal status of a critical document it relies on as "prior art." The PTAB has confronted many such cases—for example, when petitioners have failed to establish that non-patent literature was publicly accessible, or that the publication should get a priority date of a provisional filing.[2] In other words, there is nothing special about Wavetamer's situation. Wavetamer simply filed petitions that, at least in significant part, are legally deficient and will fail. It would set a dangerous precedent to allow a petitioner to get an early dismissal for the sole purpose of using its earlier failures as a roadmap to file follow-on petitions.

Accordingly, Seakeeper urges the Board to deny Petitioner's motion.

I. BACKGROUND

On May 25, 2017, Petitioner sent Seakeeper's investors a letter and a draft IPR petition for U.S. Patent No. 7,546,782 ("'782 patent"), to which the challenged '930 patent claims priority. *See* Ex. 2001. Petitioner stated that his legal team was preparing to file the enclosed IPR petition, that "settling later won't help

[2] *See, e.g.*, *GoPro, Inc. v. Contour IP Holding LLC*, IPR2015-01078, Paper No. 59 (P.T.A.B. Feb. 16, 2017) (Petitioner failed to meet burden of proving reference was prior art); *ServiceNow, Inc., v. Hewlett-Packard Co.*, IPR2015-00716, Paper No. 13 (P.T.A.B. Aug. 26, 2015) (same).

you much," since "[i]t won't put [the IPR] back in the bottle," but that, "[o]n the other hand, it's unlikely this material will get discovered if buried now……." *Id.* at 1. Petitioner added that "[o]ur 4-member team gives this about a 95% chance of prevailing," and that his expert "says it's 100%." *Id.* "Our team," he added, "has done 5 IPR's thus far. They won them all.'" *Id.* at 2.

Seakeeper did not accede to Wavetamer's threatening suggestion that it settle and "bury" the petition. In August, 2017, Wavetamer filed its Petitions in IPR2017-01931 ('930 patent) and IPR2017-01996 ('782 patent). Paper 1; IPR2017-01996, Paper 1. The Petitions rely on the same references, same expert, and many of the same arguments. *See*, *e.g.*, Paper 1; IPR2017-01996, Paper 1. Wavetamer's primary reference for all grounds in the '930 Petition is U.S. Patent No. 6,973,847 ("Adams patent"). *See* Ex. 1006. In the '782 Petition, Wavetamer relied on the Adams patent as what it calls "the primary reference for the strongest grounds." Paper 9 at 1-2.

On November 17, 2017, Seakeeper filed a POPR in IPR2017-01931. *See* Paper 7. Seakeeper argued in part that the Petition: (1) is "fatally deficient" because the Adams patent is not prior art; (2) fails because secondary considerations—which Petitioner failed even to mention—demonstrate that the '930 patent is not obvious; and (3) violates the 14,000-word limit in 37 C.F.R. § 42.24(a)(1)(i). *See id.* at 1-5.

After reviewing Seakeeper's POPR, Petitioner conceded that Seakeeper was correct, that "the Adams patent is not prior art," and that—in light of Seakeeper's

arguments—*both* petitions are "potentially devastat[ed]." *See*, *e.g.*, Paper 9 at 1-2. After reviewing the POPR, Wavetamer sought permission from the Board to file a motion to dismiss. *See* Paper 8 at 2. The Board authorized Petitioner to file "a motion to dismiss in each proceeding, explaining . . . why dismissal is appropriate." *Id.* at 5. The Board also pointed the parties to *Gen. Plastic Indus. Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2017) (hereinafter "*Gen. Plastic*"), and noted that "Petitioner should consider addressing those factors when it refiles its petitions." Paper 8 at 3. Finally, the Board noted that Wavetamer had "asked for guidance" regarding whether its claim charts in the petitions should be included in the petition word count, and the Board confirmed that it "cannot rely" on information in the claim charts not included in the word count. *Id.* at 3-4.

II. WAVETAMER IS NOT ENTITLED TO DISMISSAL

Wavetamer fails to carry its burden under 37 C.F.R. § 42.20(c) of establishing it is entitled to dismissal of the petitions under 37 C.F.R. § 42.71(a). Indeed, while Wavetamer makes a series of unconvincing arguments as to why it should be permitted to file "corrected" follow-on petitions, Wavetamer makes no real arguments for why *dismissal* here is appropriate and why it would otherwise be prejudiced. The arguments that it does make are unavailing.

For example, Wavetamer suggests incorrectly that dismissal is appropriate as a "just, speedy, and inexpensive resolution" of this proceeding. Paper 9 at 3 (citing

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