

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VIGLINK, INC.,
and
SKIMLINKS, INC. and SKIMBIT, LTD.,
Petitioner,

v.

LINKGINE, INC.,
Patent Owner.

Cases:¹ CBM2014-00184 (Patent 7,818,214 B2)²
CBM2014-00185 (Patent 8,027,883 B2)³

Before KEVIN F. TURNER, PHILLIP J. KAUFFMAN, and
KRISTINA M. KALAN, *Administrative Patent Judges*.

KALAN, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

¹ This Order addresses issues common to these related cases; we therefore exercise our discretion to issue a single order, to be entered in each case. The parties are not authorized to use this case caption, or to file consolidated papers.

² Case CBM2015-00086 has been joined with this proceeding.

³ Case CBM2015-00087 has been joined with this proceeding.

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On July 31, 2015, the Board issued an order authorizing Patent Owner to file a motion in support of its request to file a Corrected Response and Exhibits. Paper 23, 4.⁴ Petitioner was authorized to file a response. *Id.* On August 6, 2015, Patent Owner filed a Motion for Leave to Expunge and File Corrected Patent Owner's Response and Accompanying Exhibit ("Mot."). Paper 24. The Motion was accompanied by a Corrected Patent Owner Response ("Corrected Response") (Paper 25) and an Amended Exhibit 2003. On August 12, 2015, Petitioner filed an Opposition to the Motion ("Opp."). Paper 26.

Patent Owner's Response in each case was filed on June 30, 2015. CBM2014-00184, Paper 21; CBM2014-00185, Paper 19. Each Response was accompanied by a distinct Declaration of Mr. Sam Harrelson ("Declaration"). CBM2014-00184, Ex. 2003; CBM2014-00185, Ex. 2003. Petitioner filed objections to Patent Owner's Responses on July 8, 2015. CBM2014-00184, Paper 22; CBM2014-00185, Paper 20. In its objections, Petitioner noted, *inter alia*, that Patent Owner's Response contained no citations to the Declaration. CBM2014-00184, Paper 22, 2; CBM2014-00185, Paper 20, 2. The parties informed the Board that Patent Owner's supplemental evidence was served on Petitioner pursuant to 37 C.F.R. § 42.64(b)(2). Paper 23, 4.

(i) *Declaration*

In the Motion, Patent Owner asks to have the original Declaration (Exhibit 2003) expunged, and requests leave to file Amended Exhibit 2003,

⁴ Our citations in this Order, unless otherwise indicated, are to the papers filed in CBM2014-00184 in relation to this matter, which are substantially the same as the papers filed in CBM2014-00185.

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which elaborates on Mr. Harrelson's relevant experience, as a corrected declaration to replace Exhibit 2003. Mot. 1.

Petitioner requests that the original Declaration be expunged, because the Response does not explain the significance of the Declaration. Opp. 2–3. Petitioner objected to the Declaration under FRE 702 “because Mr. Harrelson lacks the requisite qualifications to be an expert on the subject matter of this proceeding” (Paper 22, 2) but Petitioner has not made a motion to exclude the Declaration. *See* 37 C.F.R. § 42.64(c). Petitioner also argues that Amended Exhibit 2003 is improper supplemental witness testimony, filed without justification. Opp. 3.

In our proceedings, “[e]vidence consists of affidavits,⁵ transcripts of depositions, documents, and things. All evidence must be filed in the form of an exhibit.” 37 C.F.R. § 42.63(a). An exhibit “must be filed with the first document in which it is cited.” 37 C.F.R. § 42.6(c). The Response, as filed, references the Declaration in its List of Exhibits. Paper 21, iv. Exhibit 2003 was filed along with the Response. We find the reference to the Declaration adequate to support the “cited” requirement in 37 C.F.R. § 42.6(c). Thus, Exhibit 2003 is not an unauthorized or inadmissible filing and we shall not expunge it as such.

Patent Owner's arguments supporting its request to expunge Exhibit 2003 and replace it with Amended Exhibit 2003 are not persuasive. Exhibit 2003 is in the record and has been objected to by Petitioner, and should remain in the record. Paper 22. Regarding Amended Exhibit 2003, Patent

⁵ “*Affidavit* means affidavit or declaration under § 1.68 of this chapter. A transcript of an *ex parte* deposition or a declaration under 28 U.S.C. 1746 may be used as an affidavit.” 37 C.F.R. § 42.2.

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Owner represented that, in response to Petitioner's objections under 37 C.F.R. § 42.64(b)(1), Patent Owner, pursuant to 37 C.F.R. § 42.64(b)(2), prepared and forwarded supplemental evidence that fully addressed every objection that Petitioners raised. Specifically, Patent Owner indicated that it had prepared and forwarded (i) a Corrected Response, corrected only (1) to add citations to Sam Harrelson's Declarations, and (2) to correct the electronic signatures, and (ii) corrected Exhibits, i.e., Sam Harrelson's Declarations corrected only (3) to add further description of his relevant experience and (4) to correct the 37 C.F.R. § 1.68 signature, and Sam Harrelson's CV, corrected (5) to delete information Petitioner objected to as purported hearsay. Paper 23, 3. This supplemental evidence should not be part of the file, nor considered on the merits, unless a motion to submit it as supplemental information is authorized and granted, or unless it is addressed successfully in a motion to exclude. *See* 37 C.F.R. § 42.223, 37 C.F.R. § 42.64(c). We note that if Petitioner makes a motion to exclude Exhibit 2003, relevant supplemental evidence that was properly served by Patent Owner on Petitioner could be considered for purposes of that motion. For the foregoing reasons, Amended Exhibit 2003 shall be expunged in each case. *See* 37 C.F.R. § 42.7(a).

(ii) *Corrected Response*

Patent Owner also requests "that the Board expunge Patent Owner's Response (Paper 21)" and "file in [its] place the Corrected Response." Mot. 3. Patent Owner believes that "the most efficient and speedy resolution is to file the Corrected Response that provides citations to the declaration." *Id.* at 2–3. Patent Owner represents that "[n]o new evidence is added and all of Petitioner's objections are addressed." *Id.* at 3. Patent Owner reasons

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that the “requested corrections to the Response avoid all prejudice to the Petitioner while rendering the record more complete.” *Id.*

Petitioner objects, stating that there is “no cause, much less good cause, to excuse Linkgine’s actions.” Opp. 1. Petitioner observes that “Linkgine does not allege that its original response was filed in error, much less identify and explain any such errors. Linkgine also does not even allege, much less establish, that it could not have included the citations in its original response.” *Id.*

Patent Owner has failed to explain the reason it filed its Response without specific citations to the Declaration. *See generally* Mot. Although Petitioner stated that Patent Owner initially represented that the Response filed was an incorrect or earlier version of the document meant to be filed, Patent Owner has made no clarifying statements in this regard. Paper 23, 3. We do not find any citation to rules or precedent, or any other reasoning in the Motion, to support Patent Owner’s requested relief of expunging the existing Response and filing a Corrected Response. At most, Patent Owner suggests this relief would result in an efficient and speedy resolution, but Patent Owner does not explain why it should be entitled to this benefit, except to say that striking the declaration would “provide an unfair advantage to Petitioners.” Mot. 2. Patent Owner has not made any case as to why, either under a good cause standard or an interests-of-justice standard, it should be allowed to effectively amend its Response at this stage in the proceeding. Accordingly, we deny Patent Owner’s request. We note that Patent Owner preemptively filed its Corrected Response. The Corrected Response shall be expunged from the record in each case.

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Accordingly, it is

ORDERED that Patent Owner's request to expunge the Response and Exhibit 2003 is *denied*;

FURTHER ORDERED that Patent Owner's request to file a Corrected Response and Amended Exhibit 2003 is *denied*;

FURTHER ORDERED that Petitioner's request to expunge Exhibit 2003 is *denied*; and

FURTHER ORDERED that the Corrected Response (CBM2014-00184, Paper 25; CBM2014-00185, Paper 23) and Amended Exhibit 2003 (CBM2014-00184, Amended Ex. 2003; CBM2014-00185, Amended Ex. 2003) be *expunged*.

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