

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE PATENT TRIAL AND APPEAL BOARD

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VF Outdoor, LLC  
Petitioner

v.

Cocona, Inc.  
Patent Owner

Patent No. 8,945,287  
*Inter Partes* Review No. IPR2018-00190

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**PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE**

## **I. INTRODUCTION**

Patent Owner Cocona, Inc. (“PO”) respectfully submits its Reply to Petitioner VF Outdoor, LLC’s (“VF”) Opposition (Paper 42, “Opposition”) to PO’s Motion to Exclude. For the reasons below, Cocona respectfully requests that VF’s new evidence (Exs. 1044, 1049-1059) be excluded.

## **II. ARGUMENT**

### **A. Exhibits 1049-1059 and Referenced Portions of Exhibit 1044 Should Be Excluded**

In essence, VF treats its Reply as a “do over” of the Petition and presents a 67-page expert declaration (Ex. 1044) with over 100 paragraphs and *eleven* new supporting documents (Exs. 1049-1059). This is improper for a number of reasons. First, the petitioner must identify in the petition, “with particularity,” all “evidence that supports the grounds for the challenge to each claim.” 35 U.S.C. § 312(a)(3). VF’s new evidence and arguments violate this foundational rule of IPR proceedings. All of the new evidence and corresponding testimony presented could have and should have been presented in the Petition.

Second, the nature and quantity of the evidence belies VF’s argument that their cache of new documents is proper reply evidence. It is not. VF by its own arguments is presenting new, foundational evidence on reply in an improper attempt to remedy critical deficiencies in the Petition. *See Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00052 (PTAB May 1, 2014) (Paper 88, at 11-16). “To reach consistent and fair outcomes ...” exclusion is proper. *Id.* at 16. For example, Oelker

originally opined that Sephadex particles are “hydrophilic absorbent particles.” Ex. 1005 at ¶123 (emphasis added). On reply, VF shifts to a new argument that Sephadex is adsorbent, and proceeds to rely on new documents in an improper attempt to gap-fill and remedy deficiencies in the Petition. *See, e.g.*, Exs. 1049, 1050, 1055. Oelker similarly relies almost exclusively on new evidence to support VF’s new arguments. *See, e.g.*, Ex. 1044 at ¶¶41-44, 46-47, 49, 52. The dearth of citations to the original record is telling. This is belated, foundational evidence offered to rehabilitate the Petition, *not* proper reply evidence.

The bulk of the new evidence has the same tenor and is being offered to allegedly establish that absorptive particles relied on in the Petition are now, on reply, also adsorptive. Exs. 1049-1051, 1053-1057. Assuming *arguendo* Petitioner’s characterizations of the new evidence as true, *e.g.* that the particles relied on in the Petition for an absorptive theory of invalidity are now, on reply, adsorptive, the new evidence is *necessarily* foundational evidence. It is improper to raise foundational evidence on reply. *Corning, Inc.* at 16. Again, the dearth of citations to the original record is instructive. The Reply is essentially a standalone replacement Petition, complete with its own expert report and supporting documents. VF’s belated evidence and arguments cannot and should not be used to salvage the Petition. *See Wasica Finance GmbH v. Continental Automotive Sys., Inc.* 853 F.3d 1272, 1286-1287 (Fed. Cir. 2017) (“Shifting arguments in this fashion is foreclosed

by statute, our precedent, and Board guidelines”; “prohibiting parties from submitting evidence necessary for a prima facie showing of obviousness in a reply”). VF does not dispute that Exs. 1044 and 1049-1059 could have been presented with the Petition. Instead, VF attempts to sidestep the rules, which would preclude late submission of a de facto replacement petition complete with a 67-page expert report and exhibits. *See Redline Detection, LLC v. Star Envirotech*, 811 F.3d 435, 448-449 (Fed. Cir. 2015) (Upholding exclusion of 60-page expert report on reply as a “de novo expert report submitted for the first time”).

Third, VF’s arguments about *Anacor* are unpersuasive and misplaced. “Notice” and “opportunity to respond” alone do not govern the introduction of new evidence; such a blanket rule would vitiate the requirement that evidence and argument must be presented in the petition and would moot the process for submitting supplemental information. Such a rule would also defeat the Board’s policy goals of “just, speedy, and inexpensive resolution.” Indeed, the Board has rejected this type of reliance on *Anacor*. *Aisin Seiki Co., Ltd. v. Intellectual Ventures II LLC*, IPR2017-01538 (PTAB Dec. 12, 2018) (Paper 74, at 67-68). In *Anacor*, the patent owner was deemed to have sufficient notice of the new references at issue, since it discussed the references in its own papers. By contrast, in *Aisin Seiki Co.* and here, there was no such notice. *Id.* (“Moreover, the fact that Petitioner's counsel questioned PO's declarant about [new evidence], or that Petitioner presented new

contentions regarding [new evidence] in the Reply brief, is insufficient to put P on notice”). VF’s improper new evidence should be excluded.

Fourth, VF’s new evidence should be excluded as improper supplemental information under § 42.123. The appropriate mechanism to submit new evidence, and in particular, foundational evidence that should have been presented with the Petition, is for a party to seek permission to submit supplemental information. *Corning, Inc.* at 16. VF has not alleged that its new evidence could not have been submitted with the Petition, nor has it explained why it delayed 15 months from the filing of the Petition to submit 67-pages of expert testimony and eleven supporting and allegedly foundational documents. Any good cause has long passed, and VF’s new evidence and arguments should be excluded as improper supplemental information.

#### **B. Unauthenticated Documents Should Be Excluded**

Exs. 1049-1051 and 1053-1058 should be excluded for the reasons set forth in the motion. Ex. 1056 is cited only in Ex. 1044 at Paragraph 61; the Reply fails to cite to Ex. 1056 itself. The Reply also fails to cite to Paragraph 61 of Ex. 1044. Ex. 1057 is referenced only in a footnote to Paragraph 13 of Ex. 1044. That footnote is referenced once in the Reply (Paper 33, at 2) without any explanation. Exclusion is appropriate. *See Cisco Sys., Inc. v. C-Cation Techs.*, IPR2014-00454 (PTAB Aug. 29, 2014) (Paper 12) (informative).

VF admits that Exs. 1053-1056 are website printouts. Ex. 1049 at ¶¶10-13; Paper 45. FRE 902 does not apply, and thus those documents should be excluded. *See Comcast Cable Communications, LLC v. Rovi Guides, Inc.*, IPR2017-00941 (PTAB Sept. 7, 2018) (Paper 70, p. 55-57) (“...[T]o authenticate printouts from a website, various Board panels have required the party proffering the evidence to produce some statement or affidavit from someone with knowledge of the website, such as a web master or someone else with personal knowledge”).

Exs. 1049 and 1050 are not self-authenticating under FRE 902. Neither exhibit bears a statement of publication or identification of alleged publishing. Ex. 1049 only shows a date of July 2, 1974 as “received,” and shows it was “accepted in revised form” on November 30, 1974. An unknown date of “1975” also appears above a copyright symbol. The absence of publication information precludes authentication under FRE 902. *See TRW Automotive U.S. LLC v. Magna Elec. Inc.*, IPR2014-01348 (PTAB Jan. 15, 2016) (Paper 25, p. 12). The same holds true of Ex. 1050, which bears only a series of dates following a copyright symbol.

Finally, each of Exs. 1049-1051 and 1053-1058 should be excluded as inadmissible hearsay. Oelker relies extensively on these exhibits specifically for the truth of the matters asserted—not merely to show the state of the art. No applicable exception applies, and these exhibits should be excluded.

Dated: February 15, 2019

Respectfully submitted,  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel for Petitioner:

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