

# Seyfarth PTAB Blog

A legal look at Patent Trial and Appeal Board decisions and trends



## No Second Bite at the Apple - Request to Expunge Response and File Corrected Response Denied

*By Patrick T. Muffo*

The PTAB is well known for expeditiously determining the validity of a patent. Indeed, the PTAB promises to complete an Inter Partes Review proceeding within one year of institution (extendable for good cause by six months). It is therefore not surprising that patentees and petitioners are sometimes not granted many second chances to correctly prepare or file a pleading.

The case of *VigLink, Inc. v. Linkgine, Inc.*, CBM2014-00184 (August 21, 2015) is no exception. Here, Linkgine (the patent owner) moved to replace its original Response with a more complete and precise brief. Specifically, Linkgine did not include specific citations to a Declaration in the Response and argued it filed an earlier version of the Response document. These errors were brought to light when VigLink objected to the Response for failure to specifically cite to the Declaration.

The PTAB was unpersuaded by Linkgine's arguments and refused to allow the correction of what Linkgine argued was a clerical error:"

Patent Owner has failed to explain the reason it filed its Response without specific citations to the Declaration. 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. 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

It was not a complete loss for Linkgine, however. VigLink moved to expunge the original Declaration arguing the Declaration was not "cited" as required by 37 C.F.R. § 42.6(c) (An exhibit "must be filed with the first document in which it is cited."). The PTAB denied the motion to expunge the original Declaration, holding the Response was sufficiently "cited" by being cited in the Response's List of Exhibits: "[t]he Response, as filed, references the Declaration in its List of Exhibits...We find the reference to the Declaration adequate to support the 'cited' requirement in 37 C.F.R. § 42.6(c)."

This case is a notable reminder that the PTAB's procedural rules are enforced strictly, and that sloppy pleadings may not be correctable. This is true even when a short period of time has elapsed. In this case, Linkgine filed their original Response on June 30, 2015, and tried to correct it just over a month later, on August 6.

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