

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BLOOMREACH, INC.,  
Petitioner,

v.

GUADA TECHNOLOGIES LLC,  
Patent Owner.

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IPR2019-01304  
Patent 7,231,379

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Before MIRIAM L. QUINN, KIMBERLY McGRAW, and  
MATTHEW J. McNEILL, *Administrative Patent Judges*.

McNEILL, *Administrative Patent Judge*.

ORDER

Denying Petitioner's Request for Rehearing of Decision Denying Leave to  
File Reply to Patent Owner's Preliminary Response  
*37 C.F.R. § 42.71*

On November 4, 2019, the Board received an email from Petitioner requesting authorization to file a reply to Patent Owner's Preliminary Response (Paper 6, "Prelim. Resp."). Petitioner requested authorization to respond to Patent Owner's proposed constructions and related arguments regarding the phrases "jumping to the at least one node," "jumping to the vertex," and "jumping." Patent Owner opposed Petitioner's request.

On November 18, 2019, Judges McNeill, McGraw, and Quinn initiated a scheduled telephonic conference to discuss Petitioner's request. Isaac Rabicoff, counsel for Patent Owner, was present. Petitioner failed to attend.

Although Board rules do not specifically authorize a reply to a Patent Owner's Preliminary Response, a Petitioner may seek leave to file such a reply, and any such request must make a showing of good cause. 37 C.F.R. § 42.108(c). In a November 25, 2019 Order (the "Order"), the Board denied Petitioner's request, finding that Petitioner had failed to show good cause based on the totality of the circumstances.

Petitioner filed a Request for Rehearing (Paper 8, "Request"), arguing that good cause exists for leave to file a Reply.

Petitioner argues that in the Preliminary Response, Patent Owner proposed new constructions for the terms "jumping to the node" and "jumping to the vertex" and falsely represented that Petitioner had adopted these proposed constructions. Request 2. Petitioner argues that absent a reply, Petitioner will suffer prejudice from a one-sided record reflecting Patent Owner's proposed constructions and false representations without an opportunity to reply. *Id.* According to Petitioner, it was unforeseeable that Patent Owner would propose constructions for "jumping to the node" and "jumping to the vertex." *Id.* at 3. Petitioner also argues that it was unforeseeable that Patent Owner would falsely represent that Petitioner agreed to these constructions. *Id.* at 4.

Petitioner also argues that Patent Owner's proposed constructions are incorrect because Patent Owner's constructions are nonsensical, unsupported

by the intrinsic record, and contradicted by Patent Owner's district court infringement positions. *Id.* at 4.

Under 37 C.F.R. § 42.71(d), a party dissatisfied with a decision may file a request for rehearing. The request "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." *Id.*

Petitioner has not persuaded us that we misapprehended or overlooked any argument or evidence showing good cause for leave for Petitioner to file a Reply. As an initial matter, Petitioner has not identified any argument or evidence that was overlooked or misapprehended in the Order.

However, even considering Petitioner's arguments in the Request in favor of leave for a reply brief, we are not persuaded that Petitioner has shown good cause. Petitioner's argument that it was unforeseeable that Patent Owner would propose construing "jumping to the [at least one node/vertex]" is unpersuasive because Petitioner was on notice of Patent Owner's claim construction position regarding these claim terms. In particular, as noted in the Order, Petitioner proposed a construction for the term "jumping" in the Petition (Paper 1, "Pet."), citing Patent Owner's Opposition to Defendant's Motion to Dismiss in related District Court litigation. Pet. 14–15 (citing Ex. 1003 at 18). Petitioner did not propose explicit constructions for "jumping to the at least one node" or "jumping to the vertex." *See* Pet. 10–15. But Petitioner was aware of Patent Owner's positions regarding the constructions of "jumping to the [at least one node/vertex]" because Patent Owner proposed construing these terms in the

same Opposition that Petitioner cited, and indeed on the same page of that Opposition. *See* Ex. 1003 at 18.

Petitioner also argues that absent a reply, the record is left “one-sided,” resulting in prejudice to Petitioner. Request 2. We disagree. In Patent Owner’s Preliminary Response, Patent Owner proposed construing “jumping to the [at least one node/vertex]” to mean “the system jumping to the [at least one node/vertex].” *Id.* Patent Owner stated that “[p]resumably, [Petitioner] thereby also adopts the construction of ‘Jumping to the At Least One Node’ and ‘Jumping to the Vertex.’” *Id.* However, Patent Owner provides no analysis or explanation in the Preliminary Response why the Board should adopt Patent Owner’s proposed construction of the term “jumping to the [at least one node/vertex]” beyond its presumption that Petitioner agrees with its construction. *See* Prelim. Resp. 2 n.1.

Patent Owner’s proposed construction regarding Petitioner’s claim construction position does not create a “one-sided record” resulting in prejudice to Petitioner because Patent Owner presented no arguments to which Petitioner needs additional briefing for a response. Patent Owner’s presumption that Petitioner agrees with its proposed claim construction is at odds with Petitioner’s analysis in the Petition, which implicitly construed “jumping to the [at least one node/vertex]” to not require “the system” limitation proposed by Patent Owner. *See, e.g.,* Pet. 26–29. Thus, Petitioner’s position regarding Patent Owner’s presumption is clear from the Petition.

At this stage of the proceeding and on this record, both parties have provided argument regarding these limitations under competing constructions (implicit or explicit). Accordingly, at this stage of the

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proceeding, we are not persuaded that good cause has been shown to justify additional briefing. If *inter partes* review is instituted in this case, both Petitioner and Patent Owner will have the opportunity to address these issues further.

For these reasons and based on the totality of the circumstances, Petitioner has not persuaded us that we misapprehended or overlooked any matters that were previously addressed in a motion, an opposition, or a reply.

### ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Petitioner's Request for Rehearing of Petitioner's Request for Authorization to File a Reply to Patent Owner's Preliminary Response is *denied*.

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