IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL MORINVILLE and GILBERT P. HYATT, Plaintiffs, v. UNITED STATES PATENT AND TRADEMARK OFFICE, Defendant.	Civil Action No. 1:19-cv-01779-CKK

Reply in Support of Plaintiffs' Motion to Reopen Discovery

The point of discovery is to allow litigants access to materials controlled by an opposing party, especially documents created in the normal course of conduct. This material is the backbone of our litigation system because it regularly illuminates the truth and contradicts parties' self-serving litigation statements. In this case, the PTO does not and cannot deny that a high-level Department of Justice official wrote an official letter that the PTO "restarted" the SAWS program "in 2021" based on a "directive to secretly flag pending patents and allowable patent applications and claims to prevent them from issuing." Nor can the PTO dispute that Plaintiffs immediately raised the issue of reopening discovery once the media published articles about this letter. Instead, the PTO's opposition is nothing more than an invitation for the Court to force the Plaintiffs to take the PTO's representation on faith about whether it restarted the SAWS program. And while the PTO faults Plaintiffs for not conducting additional discovery into this program after one witness allegedly made a stray mention of it in a deposition, the Court can be assured that there would have been substantial discovery if that witness had characterized the program as the DOJ has outside litigation: as restarting the SAWS program to secretly flag pending and allowable applications to prevent claims from issuing. Indeed, due to the PTO's objections and refusal to identify information about this program in discovery, PTO was forced to submit a substantial new declaration just to try to contravene the Justice Department letter in

this case. The PTO's submission of this new testimony tacitly admits that the underlying discovery it provided Plaintiffs is inadequate. For these reasons and those discussed below, the Court should grant Plaintiffs' motion to reopen discovery.

Argument

I. The Court Should Not Deny Plaintiffs Discovery Based on the PTO's Self-Serving Representations

PTO does not dispute that the legal standard for relevance during discovery "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense." *Lamaute v. Power*, 339 F.R.D. 29, 34 (D.D.C. 2021). "The relevance bar for discovery material is low, requiring only that the information sought may have some bearing on proving either party's claim or defense." *Steele v. United States*, No. 1:14-CV-01523-RCL, 2022 WL 2817835, at *4 (D.D.C. July 19, 2022); *see also Yanping Chen v. Fed. Bureau of Investigation*, No. 20-MC-107 (CRC), 2020 WL 7668880, at *3 (D.D.C. Dec. 24, 2020) (noting "the liberal relevancy standard for discovery").

Nonetheless, PTO contends (at 11) that the requested discovery does not clear the relevance bar because PTO wrote a letter asserting that the program DOJ described as a "restarted" SAWS program was actually the dissimilar "large family review" program and Kathleen Bragdon's new declaration substantiates that assertion. This misses the mark. To start, PTO devotes most of its briefing to arguing that large family review is not a restarted SAWS. But DOJ's letter asserts that PTO restarted SAWS, describing the new program as an "illegal activity" because the new program authorized PTO "to secretly flag pending patents and allowable patent applications and claims to prevent them from issuing" and DOJ then requested "all internal and external emails and other documentation which lead to your discovery of the new Sensitive Application Warning System (SAWS) program, restarted in 2021…" ECF 77-1 at 26–27 (Pls' Ex. F). Whether the large family review program is in fact the subject of the DOJ's letter is one of the topics Plaintiffs should be permitted to discover.

Even assuming PTO is correct that the DOJ letter's reference to the "restarted" SAWS program actually meant the assertedly different large family review program, PTO's position that Plaintiffs should be denied discovery based on PTO's claims about relevance contradicts bedrock discovery principles. The SAWS program goes to the core issues of this case, and the possibility that PTO restarted the SAWS program is relevant to various aspects of Plaintiffs' claims. *See, e.g.*, *United States v. Wright*, 6 F.3d 811, 815 (D.C. Cir. 1993) ("[T]he Government's 'lackadaisical attitude' toward enforcing Congress's directives could well be used as evidence of a 'pattern of neglect.'"). PTO's view that it can "unilaterally mak[e] determinations of relevance…is without question unacceptable." *Klayman v. Jud. Watch, Inc.*, No. 06-cv-670 CKK, 2008 WL 11394169, at *5 (D.D.C. Mar. 12, 2008), *aff'd*, 6 F.4th 1301 (D.C. Cir. 2021). In evaluating relevance during discovery, "it is also not up to Defendants to decide what evidence is or is not relevant to Plaintiffs' case." *Browder v. City of Albuquerque*, No. 13-cv-0599, 2016 WL 10538347, at *6 (D.N.M. Apr. 15, 2016).

Tellingly, PTO cites no authority for its novel view that Plaintiffs should be denied access to discovery based solely on the PTO's say-so that the proposed discovery is not relevant or proportional. Nor could PTO because "the decision of what is relevant is not determined by [the opposing party's] subjective assessment." *Allied Prop. v. Zenith Aviation, Inc.*, No. 1:18-CV-00264, 2019 WL 10960568, at *2 (E.D. Va. Feb. 8, 2019); *see also E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 505 (E.D. Va. 2011) (similar); *Philips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1200 (D. Utah 2011) (similar). Stripped to its core, the PTO's claim that discovery is unnecessary is no different than any other case where the defendant claims that no wrong was done but the plaintiff is still able to review documents and examine witnesses. At this stage, when there is new evidence from the DOJ (based on disclosures made by the then-head of the PTO) indicating the PTO's prior representation about SAWS being ended in 2015 was at best incomplete and at worst incorrect, all that matters is whether the possibility that PTO continued or restarted the SAWS program could be relevant to either party's claims or defenses. It indisputably is relevant.

Likewise, the PTO is wrong in arguing that Plaintiffs should be denied discovery regarding the restarted SAWS program based on new evidence in the form of Dr. Bragdon's brand-new declaration. To the contrary, all Dr. Bragdon's new declaration proves is that the pre-existing discovery is inadequate on whether PTO restarted the SAWS program and, if so, how the restarted SAWS program affects Plaintiffs' claims in this case. At the very least, Plaintiffs should be permitted to depose Dr. Bragdon regarding her new declaration to determine the scope of the restarted SAWS program. For the same reason, PTO's argument about proportionality falls short because it relies on new evidence to claim that the named Plaintiffs did not have patents selected for review, which only supports Plaintiffs' view that discovery is needed because the pre-existing discovery did not address the concerns raised in the DOJ's letter about the restarted SAWS program. In short, PTO cannot simply write a letter saying DOJ was wrong about SAWS being restarted, and then "substantiate" that letter with a new declaration, to argue that Plaintiffs should be denied access to discovery regarding the restarted SAWS program.

II. Plaintiffs Have Diligently Sought Discovery About the "Restarted" SAWS Program

PTO concedes (at 13) that Plaintiffs have been diligent in seeking discovery about the restarted SAWS program "in the time frame between learning about the [DOJ's] letter and filing their motion," and that is what primarily matters in evaluating diligence on a motion to reopen discovery based on newly discovered evidence. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 281 F.R.D. 12, 14 (D.D.C. 2011) (noting that "it cannot be said that plaintiffs were not diligent in deposing King about the 'Alliance files' during discovery" because "plaintiffs did not have the documents prior to the close of discovery"). It is immaterial that during discovery one PTO witness (out of the 20 witnesses deposed in this case) casually mentioned the large-family review programs during discovery.[1] It is, as noted, far from clear that the DOJ letter even concerns the large-family review program. That aside, PTO identifies nothing in the record that

[1] PTO contends (at 14) that it disclosed the program that DOJ described as a "restarted" SAWS program in discovery because Kathleen Bragdon mentioned the large family review program in her deposition.

might have tipped off Plaintiffs that the large-family review program was anything like the SAWS program that PTO definitively represented had been shuttered for good. The first time these fact questions were even broached was the publication of Bloomberg Law's September 2025 article on the DOJ's June 2025 letter, which spurred Plaintiffs to action. Because Plaintiffs have been diligent in seeking discovery about the restarted SAWS program ever since learning about it, this factor weighs in favor of reopening discovery.

While Plaintiffs' diligence at this stage is grounds enough to grant the motion, it should also be noted that Plaintiffs have diligently sought discovery about the scope of the SAWS program from the start. The parties agree that Plaintiffs' discovery requests were drafted to obtain discovery about any SAWS-like program among any of PTO's "quality control and secondary review programs." PTO Br. at 13. Because PTO continuously represented during discovery that the SAWS program ended in 2015, and never provided any indication that the SAWS program restarted in 2021, Plaintiffs had no reason to doubt the PTO's representations and to move to compel PTO to produce discovery beyond applications flagged as SAWS in 2015 and earlier. Simply put, because PTO continuously represented that SAWS ended in 2015 and new evidence only surfaced in 2025 undermining PTO's representations, the need for discovery about any restarted SAWS program was not previously foreseeable. But now that the DOJ letter has surfaced indicating that PTO restarted SAWS in 2021 and that PTO's previous discovery responses may not have fully disclosed PTO's operation of the SAWS program, Plaintiffs should be entitled to discovery about the restarted SAWS program because they diligently sought discovery about the scope of SAWS from the start. Even in cases where the plaintiff was far less diligent than Plaintiffs here, courts have reopened discovery. *See Watt v. All Clear Bus. Sols., LLC*, 840 F. Supp. 2d 324, 327 (D.D.C. 2012) (granting motion to reopen discovery, despite requested discovery being foreseeable during discovery period and plaintiff failing to be diligent in seeking the discovery at that time, especially where "no trial date has been set").

III. There Is No Prejudice to PTO from Reopening Discovery

The only form of prejudice PTO identifies (at 15) is "delay," but this argument fails because "delay that merely prolongs litigation is not a sufficient basis for establishing prejudice." *Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv.*, LLC, 776 F.3d 1, 5 (D.C. Cir. 2015) (citation and quotation marks omitted); *Danzy v. IATSE Loc. 22*, No. CV1702083RCLRMM, 2020 WL 6887651, at *7 (D.D.C. Nov. 23, 2020) ("[C]onclusory arguments that a subpoena will prolong or delay litigation are not enough to establish prejudice."). Because PTO offers nothing more than conclusory assertions about delay, there is no prejudice to PTO in reopening discovery, and this factor weighs in favor of granting Plaintiffs' motion.

Conclusion

The Court should grant Plaintiffs' motion to reopen discovery for the limited purpose of obtaining discovery related to the DOJ letter and any restarted SAWS program.

Dated: February 11, 2026

/s/ Andrew M. Grossman

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Certificate of Service

I hereby certify that, on February 11, 2026, the foregoing was filed electronically and that all counsel of record were served via the Court's CM/ECF system.

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