

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ADEMCO INC.,

Petitioner,

v.

ECOFACITOR, INC.,

Patent Owner.

Case: IPR2023-00409

U.S. Patent No. 10,584,890

PETITIONER'S REQUEST FOR REHEARING

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Patent Trial and Appeal Board
US Patent and Trademark Office
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TABLE OF EXHIBITS

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EX. 1001	“’890 Patent”	U.S. Patent No. 10,584,890
EX. 1002	“Koch Decl.”	Declaration of Edward Koch
EX. 1003		C.V. of Edward Koch
EX. 1004	“’246 Application”	File History of U.S. Patent Application No. 16/374,246
EX. 1005	“’719 Application”	File History of U.S. Patent Application No. 15/616,719
EX. 1006	“’554 Application”	File History of U.S. Patent Application No. 14/491,554
EX. 1007	“2012 ’246 Application”	File History of U.S. Patent Application No. 12/788,246
EX. 1008	“Leen”	U.S. Patent Publication No. 2009/0140056
EX. 1009	“Trundle”	U.S. Patent Publication No. 2010/0289643
EX. 1010	“Ehlers”	U.S. Patent No. 6,216,956
EX. 1011	“Wedekind”	U.S. Patent No. 5,197,666
EX. 1012		’890 Patent Infringement Contentions, <i>EcoFactor, Inc. v. Resideo Techs., Inc.</i> , Civ. No. 6:22-cv-00069 (W.D. Tex.)
EX. 1013	“Rosenblatt”	U.S. Patent Publication No. 2010/0081375
EX. 1014	“Imes”	U.S. Patent No. 8,457,797
EX. 1015	“Imes Prov.”	Provisional Application No. 61/255,678
EX. 1016	“Young”	U.S. Patent No. 6,196,468
EX. 1017	“Gupta”	Gupta, M., Intille S., Larson, K., Adding GPS-Control to Traditional Thermostats: An Exploration of Potential Energy Savings and Design Challenges, International Conference on Pervasive Computing (2009)
EX. 1018	“Shah”	Shah, N., Tsai, C., Chao, K., Monitoring Appliances Sensor Data in Home Environment: Issues and Challenges,

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		IEEE Conference on Commerce and Enterprise Computing (2009)
EX. 1019	“Leslie”	Leslie, P., et al., The Application of Smartphone Technology to Economic and Environmental Analysis of Building Energy Conservation Strategies, Intl J of Sustainable Energy (2011)
EX. 1020		Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Katherine Vidal (issued June 21, 2022).
EX. 1021		Claim Construction Order, Civ. No. 6:22-cv-00069-ADA, Dkt. 43 (W.D. Tex. Oct. 11, 2022)
EX. 1022		Reserved
EX. 1023		Reserved
EX. 1024		Reserved
EX. 1025		<i>EcoFactor, Inc. v. Resideo Techs., Inc.</i> , Civ. No. 6:22-cv-00069-ADA, Dkt. 29 (W.D. Tex. Aug. 1, 2022)
EX. 1026		<i>EcoFactor, Inc. v. Resideo Techs., Inc.</i> , Civ. No. 6:22-cv-00069-ADA, Dkt. 30 (W.D. Tex. Aug. 19, 2022)
EX. 1027		Order Granting Request for <i>Ex Parte</i> Reexamination

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(c) and (d), Petitioner Ademco, Inc. (“Petitioner” or “Ademco”) respectfully requests that the Patent Trial and Appeal Board (“Board”) reconsider its Decision Denying *Inter Partes* Review of U.S. Patent No. 10,584,890 (the “’890 Patent”) (“Decision”) entered July 21, 2023 (Paper 7).

First, the Board’s decision not to grant *inter partes* review rests on an erroneous *sua sponte* claim construction of an agreed-upon term. Despite stating that it did “not explicitly construe any limitations,” Decision at 7, the Board narrowly construed the “thermostat system” of the preamble as being limited to a thermostat itself. The Board’s construction is narrower than the claim construction agreed upon by both parties and ordered by the Court in connection with *EcoFactor, Inc. v. Resideo Techs.*, No. 6:22-cv-00069-ADA (the “District Court Action”).

Second, the Board’s error with respect to claim construction resulted in its misunderstanding Petitioner’s arguments with respect to the asserted combinations. The Board’s resultant requirement that the thermostat itself receive geo-positioning information from the mobile device is not supported by substantial evidence. Instead, the Petition and supporting evidence demonstrated that it was well known to rely on proximity / geo-positioning data based on a location of a mobile device (e.g., Trundle and Imes) to control HVAC systems (e.g., Leen and Ehlers).

Third, the Board erred in overlooking the evidence regarding Patent Owner’s

understanding of the claim language. Had it properly considered it, the Board would have concluded that the limitation at issue is squarely disclosed by the prior art combinations, and it would avoid the inconsistency that results from permitting a broad interpretation of the '890 Patent's preamble for purposes of infringement, while overly-restricting that interpretation for purposes of invalidity.

II. LEGAL STANDARD

A party may request rehearing of a decision by the Board whether to institute a trial. 37 C.F.R. § 42.71(d). 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 [the papers].” *Id.* The Board reviews its previous decisions for an abuse of discretion. 37 C.F.R. § 42.71(c). “An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors.” *Huawei Device Co., Ltd. v. Optis Cellular Tech., LLC*, No. IPR2018-00816, Paper 19, at 2-3 (PTAB Jan. 8, 2019) (precedential).

III. ARGUMENT

A. There Is Good Cause to Admit New Exhibits

A party may seek to admit evidence not already of record on a showing of “good cause.” *Huawei Device Co., Ltd. v. Optis Cellular Tech., LLC*, IPR2018-

00816, Paper 19, at 3-4 (Jan. 8, 2019) (Precedential). Petitioner submits new Exhibits 1026 and 1027 with this rehearing request. Good cause exists to admit Ex. 1026 to address the Board’s erroneous *sua sponte* construction of the preamble, “thermostat system.” *See, e.g., Axonics, Inc. v. Medtronic, Inc.*, Nos. 2022:1532, 2022-1533, 2023 U.S. App. LEXIS 20272, at *13-*14 (Fed. Cir. Aug. 7, 2023) (“[W]e have continued to recognize that a petitioner is entitled under the APA to respond to new claim construction arguments . . . adopted by the Board *sua sponte* . . .”). Petitioner could not have anticipated that the Board would adopt a construction of the preamble that (1) neither party advocated for and (2) contradicts the claim construction and infringement theories in the District Court Action. In its Preliminary Response (“Prelim. Resp.”), Patent Owner “agree[d] with Petitioner and with the District Court that the preamble, ‘A thermostat system,’ is limiting” and that “[t]his construction should be applied here.” Prelim. Resp. at 8. And Petitioner cited numerous examples of how the patentability analysis is dictated by Patent Owner’s expansive view of the “thermostat system,” as evidenced by its infringement contentions. *See, e.g.,* Pet. at 40, n.8; 18, n.2; 30, n. 4; 38, n.7; 71, n.12. In addition to Exhibit 1012, Exhibit 1026 provides further evidence of Patent Owner’s interpretation of the “thermostat system” at issue.

Good cause also exists to admit Ex. 1027 because this order granting request for *ex parte* reexamination issued after the Institution Decision and provides

evidence of how the Patent Office has understood the claims and certain prior art teachings.¹ Therefore, the Board should consider these exhibits as part of the complete factual record for its analysis.

B. The Board’s Construction of “Thermostat System” Was a Clear Error of Law

In its Decision, the Board erred with respect to its interpretation of the preamble of claim 1 by *sua sponte* adopting a construction inconsistent with the parties’ agreed-upon claim construction and the record in the related District Court Action. As the Board recognized, both parties “state that the preamble of claim 1 (“A thermostat system”) is limiting, *as the U.S. District Court for the Western District determined* (Ex. 1021 at 2).” Decision at 6-7 (emphasis added). The parties are in further agreement that “Petitioner’s grounds of unpatentability do not turn on

¹ The Examiner found a substantial new question of patentability with regard to claims 1-17. Specifically, the Examiner held “the teachings of Trundle and Poth are deemed to raise an SNQ on claims 1-17 of the ’890 patent”; “the teachings of Johnson, Wedekind, and Ehlers raise a SNQ on claims 7, 8, and 10-17 through dependency”; “the teachings of Benco, Ehlers and Poth are deemed to raise an SNQ on claims 1-17 of the ’890 patent”; and “the teachings of Johnson and Wedekind raise a SNQ on claims 7, 8, and 10-16 through dependency.” Ex. 1027.

whether the preamble is limiting.” Decision at 7 (citing Pet. 3, Prelim. Resp. 8). Despite its assurance that it “d[id] not explicitly construe any limitations,” Decision at 7, the Board limited “thermostat system” to a “thermostat.”

Both parties agreed to apply the District Court’s claim construction order (*see* Pet. at 3, Prelim. Resp. at 8), but the Board overlooked that the District Court *expressly rejected* Petitioner’s proposed construction that the “Preamble is limiting and should be construed as ‘A thermostat.’” Ex. 1021 at 2. The District Court instead agreed with Patent Owner that while limiting, the preamble would be given its plain and ordinary meaning. *See id.* In its Preliminary Response, Patent Owner “agree[d] with Petitioner and with the District Court.” Prelim. Resp. at 12. But when arguing that the “thermostat system” of the ’890 Patent should not be limited to a “thermostat” during claim construction in the District Court Action, Patent Owner repeatedly sought a broad interpretation and emphasized that “a thermostat is at least part of the overall system, but that does not mean it must be the only part.” Ex. 1026 at 4-5; *see also* Ex. 1012 at 1-7, 25-36, 53-63, 64-69. Patent Owner never provided these arguments to the Board.

Specifically, with respect to the sole limitation [1L] at issue here, Patent Owner identified remote server processors as the component of the thermostat system that “receive[s] geo-positioning data from the location-aware mobile device.” Ex. 1026 at 8 (“Defendants provide no basis for concluding that it can only

be a processor inside the thermostat that receives geo-positioning data from a mobile device, which would improperly exclude embodiments where a server processor receives and stores such data.”), 4, 7, 10, 14; *see also* Ex. 1012 at 64-69. And Patent Owner disparaged Petitioner’s argument that “the claimed one or more processors can *only* be inside the thermostat” as “plainly wrong.” Ex. 1026 at 8 (emphasis in original); *see also* Ex. 1012 at 42 (accusing “one or processors [sic] [] on the Resideo-branded thermostat device and/or one or more Resideo backend or cloud servers.”), 53. The Board’s claim construction adopts an interpretation that Patent Owner zealously advocated against and was rejected by the District Court.

The Board’s overly-narrow construction of “thermostat system” as limited to a “thermostat” is demonstrated throughout the Decision. For example, the Board explains that “Trundle does not teach an HVAC controller (or thermostat) that receives geo-positioning data,” and that Petitioner has not shown that a POSITA “would have modified Leen in view of Trundle by configuring Leen’s HVAC controller to ‘receive geo-positioning data from the location-aware mobile device.’” Decision at 13. As another example, the Board criticizes Trundle because “the geo-positioning data is processed outside the thermostat.” *Id.* at 14. Finally, the Board erroneously states that “Imes does not operate by sending geo-positioning data *to a*

thermostat.”² *Id.* at 19 (emphasis added).

The Board’s erroneous claim construction is additionally inconsistent with Patent Owner’s theory of infringement. As Petitioner identified in the Petition, Patent Owner’s infringement contentions repeatedly accused components other than the thermostat itself. For example, Patent Owner accused products that “connect to the internet via Wi-Fi and allows a mobile application to view data and adjust settings” as meeting the limitation “[t]he thermostat system of claim 2, further comprising an interface configured to allow the user to input that the building is currently unoccupied,” *despite said interface being located on a mobile device* rather than the thermostat itself. Pet. at 40, n.8; *see also id.* at 18, n.2; 30, n. 4; 38, n.7; 71, n.12. As another example, Petitioner noted that “Patent Owner asserted that [limitation [1D]] may be met by a location-aware mobile device that *communicates indirectly through a network to include one or more servers.*” Pet. at 18 (citing Ex. 1012, 25-33; Ex. 1002, ¶ 118) (emphasis added).

The infringement theories espoused by Patent Owner’s expert, Mr. Erik de la Iglesia, in his May 12, 2023 report further confirm Patent Owner’s interpretation that

² As is discussed in Section C, Imes does in fact contemplate locating the proximity detection module on the thermostat. Ex. 1014 at 27:66-28:2.

the claimed “thermostat system” includes components located outside of the thermostat itself. Specifically, and consistent with Patent Owner’s infringement contentions (*see* Ex. 1012 at 53) Mr. de la Iglesia opines that the *server processors receive geo-positioning data* that enables Resideo’s geofencing capabilities. Mr. de la Iglesia goes on to describe that in the accused Resideo products, the customer’s location-aware mobile device *sends geo-positioning data to one or more Resideo server processors*, which again is consistent with Patent Owner’s infringement contentions. *See id.* at ¶ 416 (“according to *the server’s determinations of occupancy* or non-occupancy based on the geo-positioning data received from the location-aware mobile device.”) (emphases added).

C. The Board Misapprehends the Prior Art Combinations of Petitioner’s Grounds for Invalidity

Grounds 1A and B

In addition to, or perhaps because of, its erroneous claim construction and Patent Owner’s focus on limitation [1L], the Board further erred by overlooking the substantial evidence that the combination of Trundle and Leen disclosed each limitation of claim 1. The Board appears to have interpreted the prior art combinations in the Petition to require a thermostat itself to perform the single disputed claim limitation, receiving geo-positioning data from a location-aware mobile device and automatically adjusting a temperature value based on the geo-

positioning data (limitation [1L]). *See* Decision at 13, 18. That is incorrect.

The Board has overlooked substantial evidence that the *combination* of Trundle’s mobile device-based occupancy detection with the conventional HVAC controller described in Leen discloses the claimed thermostat system. *See generally* Pet. at 9-12. For example, Petitioner explained that a POSITA would have been motivated to add the mobile device-based geolocation functionality of Trundle, which would necessarily include mobile devices and servers, to Leen, a system that already contemplated communicating via wired or wireless communications, to “leverag[e] user interfaces on existing ‘smart’ devices for the remote control of thermostats.” Pet. at 11-12 (citing Ex. 1002 at ¶ 97). Additionally, Petitioner explained that the phone-based occupancy detection of Trundle “eliminat[es] the need for complicated schedules and/or expensive sensors.” Pet. at 11.

Yet another reason Petitioner identified to combine the teachings of Leen and Trundle is the “ubiquitous nature of location-aware mobile devices,” which a POSITA would have “sought to incorporate” into the thermostat system of Leen. Pet. at 10. Together, each of the enumerated motivations suggested why a POSITA would have incorporated the mobile device (and related server(s)) of Trundle with the HVAC controller of Leen. This combination is supported by Trundle, which in fact discloses the use of mobile devices, servers, and thermostats for proximity-based control. *See, e.g.*, Ex. 1002 at ¶ 120 (describing communication between

Trundle's mobile devices, control unit, and server).

While Petitioner identified a particular HVAC controller 10 in Leen to disclose the broad “thermostat system” of the preamble, Pet. at 14, Ground 1 as a whole makes clear that it is the combination of Leen and Trundle that renders the claim unpatentable. *See e.g.*, Pet. at 21 (Trundle discloses “one or more processors included in one or more electronic devices.”) (citing Ex. 1009, [0078] (“The operations of the example processes may be performed by one of the components of the system 200 (e.g., the monitoring application server 260) or may be performed by any combination of the components of the system 200.”)). Indeed, Petitioner has demonstrated (and Patent Owner does not dispute) that the combination of Leen and Trundle teaches several claim limitations in which the claimed functionalities are not necessarily performed on the thermostat itself. For example, Petitioner explained how Patent Owner asserted in its infringement contentions that limitation [1D], “a wireless radio compatible with a wireless radio frequency protocol and configured to communication bi-directionally with a location-aware mobile device,” could be infringed by a location-aware mobile device that communicates *indirectly* through a network to include one or more servers.” Pet. at 18, n.2 (emphasis added). The combination of Trundle and Leen discloses this limitation because Trundle teaches two methods in which the wireless radio thermostat can communicate bi-directionally with a location-aware mobile device: (1) the mobile devices can send

and receive data “directly from” a thermostat (Pet. at 18-19 (citing Ex. 1009 at [0054], [0056], [0060], [0061], Fig. 2; Ex. 1002 at ¶ 121)); or (2) utilize a network 205 that facilitates communications between the monitoring application server 260, the monitoring system control unit 210, and one or more mobile devices. Pet. at 18 (citing Ex. 1009 at [0043]-[0044], [0051]; Ex. 1002 at ¶ 120). In the second embodiment, the thermostat does not communicate directly with the mobile device, but instead communicates with an intermediate server. Patent Owner’s failure to dispute that such indirect communication comes as no surprise, because Patent Owner’s infringement theory in the District Court accuses a mobile device indirectly communicating with the thermostat via a server as infringing the same limitation. *See* Pet. at 18, n.2 (citing Ex. 1012 at 25-33).

Petitioner has also demonstrated that claim limitation [1K], “[one or more processors configured with electronic circuitry to:] receive radio frequency signals from the location-aware mobile device,” is also disclosed by the combination of Leen and Trundle and does not necessarily require the processor to be located on the thermostat itself, for similar reasons as above. *See* Pet. at 26-27 (incorporating analysis of limitation [1D]). Trundle teaches that not only can its mobile device communicate *directly* with the devices controlled by the monitoring system control unit 210 such as the thermostat, Pet. at 27 (citing Ex. 1009 at [0055]-[0056]; Ex. 1002 at ¶¶ 142-43), but the mobile device can also communicate with the thermostat

via “the pathway over the network 205,” Pet. at 26 (citing Ex. 1009 at [0061]; Ex. 1002 at ¶ 140). The network 205 “may be configured to enable exchange of electronic communications between the monitoring system control unit 210, [and] the one or more mobile devices 240, 250, the one or more client devices 270, 280, and the *monitoring application server 260*.” Ex. 1002 at ¶ 120 (citing Ex. 1009 at [0044]) (emphasis added). Here, Petitioner makes clear that the combination includes the Trundle mobile device, the Trundle server, and the Leen thermostat.

Again, unsurprisingly, Patent Owner does not dispute this. Patent Owner cannot, because its own infringement theory depends on a processor external to the thermostat itself receiving radio frequency signals from the location-aware mobile device. *See, e.g.*, Ex. 1012 at 53.

Finally, Petitioner demonstrated that the combination of Leen and Trundle discloses “automatically adjust[ing] a temperature value based on the geo-positioning data,” and initiating a cooling or heating cycle “when the geo-positioning data is determined to indicate that the building is unoccupied by the user.” Pet. at 28. Specifically, the Trundle thermostat can be set to an energy conserve mode and a user’s location can be used to infer future occupancy, and then automatically set the thermostat to an energy conservation mode when the building will be unoccupied. Pet. at 28; Ex. 1009 at [0131], [0133], [0138]; *see also* Ex. 1027. Thus, the combinations described in the Petition disclose the limitations of claim 1.

Grounds 2A and 2B

With respect to Grounds 2A and B, the Board also erred for similar reasons. In describing the motivation to combine Ehlers with Imes, Petitioner described that a POSITA would have combined Imes' mobile device- and location-based automatic control of a site "on a zone by zone basis" with the teachings of Ehlers. Pet. at 58. Despite acknowledging that "the Petition provides reasons why a person of ordinary skill in the art would combine teachings from Ehlers and Imes," Decision at 19 (citing Pet. at 57-61), the Board incorrectly concluded that "the Petition does not assert, let alone show, that Imes' thermostat (TSAT or TSTAT) or its processor receives geo-positioning (or location) data from the mobile device and automatically adjusts a temperature value based on said data," or that the thermostat of Ehlers would be modified to do so. Decision at 18-19. No such showing was required.

Similarly to those described in Trundle, the mobile devices of Imes can either communicate with and control a thermostat indirectly through a server, or communicate directly with a controller by establishing a wireless network. Pet. at 63 ("mobile device 210 can communicate with controller 216 using a WIFI or 802.11 based communication"). Patent Owner does not dispute this.

Indeed, even if Claim 1 was interpreted to require that the thermostat alone "receive geo-positioning data from the location aware mobile device," Imes discloses that its proximity detection module 524 can be located anywhere in its

system. For example, the proximity detection module 524 can be located on the mobile device, and periodically requests a location from its location reporting device 512, which uses GPS or triangulation to detect the current location. Pet. at 67 (citing Ex. 1014, 32:8-24; Ex. 1015, 7-8, §1.3; 9, §1.4; 15, §2.1.8; 30; 37; Ex. 1002, ¶278); Ex. 1014 at 27:66-28:2 (the “*controller 400 can include proximity detection module 438.*”). Further, Imes specifically states that the controller and thermostat can be located *in the same unit*, confirming that even if the claims were interpreted as requiring all actions to be performed on the thermostat, Imes discloses that as well. Compare Ex. 1014 at 16:20-34 with Decision at 14 (“Imes does not operate by sending geo-positioning data *to a thermostat*”). Whether through indirect communication or direct communication between the mobile device and thermostat, the combination of Ehlers and Imes discloses the disputed claim limitation.

D. The Board Failed to Consider Patent Owner’s Infringement Theory in the District Court Action

Despite Petitioner’s repeated attempts to draw the Board’s attention to Patent Owner’s infringement theory in the District Court Action, *see, e.g.*, Pet. at 40, n.8; 18, n.2; 30, n. 4; 38, n.7; 71, n.12, the Board failed to consider it in its invalidity analysis. The Board’s oversight is an abuse of discretion because it results in a finding inconsistent with the proceedings in the District Court. If the Board had considered the evidence, it would have readily understood that the combinations

teach the disputed limitation. *See* Pet. at 30, n.4 (citing Ex. 1012 at 69).

For example, with respect to Grounds 1A and B, the system of Trundle “may determine and monitor a geographic location of one or more users relative to a geographic location of a monitored property (e.g., within a particular number of miles).” Ex. 1009 at [0131]; *see also* Pet. at 28 (citing Ex. 1002 at ¶ 145). Then, based on the received geographic location data, the system “infers future occupancy” of the user. Ex. 1009 at [0133]. “The system 200 determines an operation related to controlling the one or more energy consuming devices based on the inferred future occupancy (1130)” and “may include automatically setting a thermostat to an energy conserve mode.” Ex. 1002 at ¶ 145; *see also* Ex. 1009 at Fig. 11; Pet. at 28.

With respect to Grounds 2A and 2B, the Imes “proximity mode” involves “automatically controlling a network device based on detecting a location the mobile device may be from the residential site.” Pet. at 67 (citing Ex. 1014 at 18:59-67; Ex. 1015 at 10, §2.1.1; EX. 1002 at ¶ 278). Imes also discloses that “as mobile device 210 moves away from residential site 202, TSTAT 208 setting can be adjusted . . .” Pet. at 68. Both of these combinations are analogous to receiving a signal to switch to Away mode that Patent Owner accuses of practicing this limitation.

E. Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Board institute *inter partes* review of claims 1-17 of the '890 Patent.

Date: August 21, 2023

By: /S. Benjamin Pleune/
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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), the undersigned hereby certifies that a copy of the foregoing **PETITIONER’S REQUEST FOR REHEARING** was served by filing this document through the P-TACTS system as well as delivering a true and correct copy by electronic mail on Patent Owner’s lead and backup counsel at the following email addresses (as agreed by counsel for Patent Owner):

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