Paper 8

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTEX RECREATION CORP.,
Petitioner,

v.

BESTWAY INFLATABLES AND MATERIAL CORP.,
Patent Owner.

Case No. IPR2023-00489
Patent No. 10,687,633

PATENT OWNER'S PRELIMINARY RESPONSE

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Pursuant to 35 U.S.C. § 313 and 37 C.F.R. § 42.107, Patent Owner Bestway Inflatables and Material Corp. ("Patent Owner" or "Bestway") hereby submits its Preliminary Response to the Petition.

I. INTRODUCTION

Petitioner has simultaneously filed four IPR petitions against U.S. Patent No. 10,687,633 ("the '633 Patent"). Based on the Board's experience, "one petition should be sufficient to challenge the claims of a patent in most situations," while "[t]wo or more petitions filed against the same patent at or about the same time . . . may place a substantial and unnecessary burden on the Board and the patent owner and could raise fairness, timing, and efficiency concerns." PTAB Consolidated Trial Practice Guide (November 2019) ("Trial Practice Guide") at 59 (citing 35 U.S.C. § 316(b)).

However, Petitioner has once again ignored the Board's clear guidance to file only one IPR petition per challenged patent in all but unusual circumstances.[1] These

[1] In a previous unrelated proceeding, Petitioner similarly filed multiple, parallel petitions challenging identical claims of Patent Owner's U.S. Patent 7,269,866 B2. *Intex Recreation Corp. v. Bestway (USA), Inc.*, No. IPR2019-00493, Paper 7 at 2 (PTAB June 24, 2019). There, the Board exercised its discretion to deny institution of multiple petitions that were "filed by the *same* petitioner and includes challenges

four petitions "filed against the same patent at or about the same time … raise fairness, timing, and efficiency concerns." *Id*. Petitioner's reasons for filing four IPR Petitions, as presented in its Ranking and Explanation of Material Differences Statement (Paper 3), are facially inadequate. Accordingly, because Petitioner fails to justify the need for multiple burdensome proceedings, the Board should not institute on more than one petition (if it institutes any at all).

II. BACKGROUND

On January 21, 2023, Petitioner filed four separate petitions in IPR2023-00486, IPR2023-00487, IPR2023-00488, and IPR2023-00489 (collectively, "the Petitions") challenging claims of the '633 Patent. Specifically, both IPR2023-00486 and IPR2023-00487, challenge the same five (5) claims of the '633 Patent that were initially asserted in a related district court action: claims 1, 2, 16, and 19-20 of the

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to the *same* claims, claims 1–4, of the *same* patent, the '866 Patent, based on substantially the same references," because the Board did not find "the differences between the asserted references and arguments in the [petition] to be sufficiently material to outweigh the inefficiencies and costs of instituting an additional proceeding." *See id.* at 14 (emphasis in original).

‘633 Patent (“Asserted Claims”). Paper No. 3 at 1-2.[2] And, IPR2023-00488 and IPR2023-00489 challenge the same fourteen (14) claims of the ‘633 Patent which have not been initially asserted in the related district court action: claims 3-11, 12-15, and 17 of the ‘633 Patent (“Non-Asserted Claims”). *Id.* Additionally, Petitioner’s four IPR proceedings include multiple grounds per claim. In particular, IPR2023-00486 and IPR2023-00488 each present obviousness grounds with the Aoki reference as the primary reference. *Id.* And, IPR2023-00487 and IPR2023-00489 present obviousness grounds with the Lin reference as the primary reference. *Id.*

Further, each of Petitioner’s individual IPR petitions themselves already include multiple redundant grounds for at least some claims, independent of the arguments of the other IPR Petitions. For example, IPR2023-00486 includes two grounds challenging claims 1-2 (grounds 1 and 2) and two grounds challenging claim 16 (grounds 2 and 3). Paper 3 at 1. Similarly, IPR2023-00487 includes two grounds challenging claim 16 (grounds 2 and 3) and two grounds challenging claim 20 (grounds 1 and 4). *Id.* Also, IPR2023-00488 includes two grounds challenging claims 3-11 and 17 (grounds 1 and 2) and two grounds challenging claim 12

[2] Petitioner’s ranking chart contains an apparent typographical error, erroneously referring to IPR2023-00487 as IPR202**2**-00487. Paper No. 3 at 1.

(grounds 2 and 3). *Id.* And, finally, IPR2023-00489 includes two grounds challenging claims 12 and 13 (grounds 1 and 2). *Id.*

In Petitioner's Ranking and Explanation Of Material Differences Between Petitions statement (Paper 3), Petitioner argues that it should be permitted to split the challenged claims between two sets of IPR Petitions because "the length of the claims, disparate features recited, and issues required to be addressed in each petition make it impossible to challenge all Asserted and Non-Asserted Claims in one petition." Paper 3 at 3. And, Petitioner argues it should be permitted to present grounds with both the Aoki and the Lin references because "Aoki is an older reference that PO may argue does not disclose certain limitations reciting how the claimed bed sheets and tensioning structures are coupled to each other (which Petitioner refutes)." *Id.* And, Petitioner argues that "Lin is a newer reference that was applied by the Examiner during prosecution of the '633 Patent" and thus may be challenged "under 35 U.S.C. §325(d)" and that "all of the Lin-based grounds involve a combination with the Catalog" which may be challenged as "not qualify[ing] as a printed publication." *Id.* at 3-4.

III. THE BOARD SHOULD EXERCISE ITS DISCRETION UNDER SECITON 314 TO INSTITUTE NO MORE THAN ONE OF PETITIONER'S FOUR IPR PETITIONS

A. Petitioner Fails To Justify Dividing the Challenged Claims Into Separate IPR Proceedings

Petitioner's argument that nineteen challenged claims necessitate splitting the challenged claims into separate petitions fails scrutiny. In particular, nineteen is a small number of claims and is not large enough to justify multiple petitions. *See Apple Inc. v. Koss Corp.*, No. IPR2021-00679, Paper 14 at 12 (PTAB Oct. 12, 2021) (denying institution of parallel petitions because "[t]he Board routinely receives petitions challenging ***more than 18*** claims," there was "nothing unusual in the complexity of the '325 patent's claims or the technology of the challenged patent and prior art that would distinguish this case from the 'vast majority of cases' in which one petition is sufficient," and conducting two trials instead of one will place an unnecessary burden on the Board) (emphasis added); *Square, Inc. v. 4361423 Canada Inc.*, No. IPR2019-01626, Paper 14 at 10 (PTAB Mar. 30, 2020) (finding there is not a "sufficient justification for filing multiple petitions" because "there are only eighteen challenged claims, which generally is not a significantly large number of claims to address in a single petition"). For example, in the context of ordinary patent prosecution, the Patent Office's fee regulations only considers more than 20 claims to be "excess[ive]." 37 CFR 1.16(i); MPEP 607(III).

Moreover, Petitioner's contention that the challenged claims recite different and unrelated features that necessitate separate explanations and discussions of the asserted prior art is unfounded. The '633 Patent contains only one independent claim, and the claims recite features that generally relate to the same technology: the structure and composition of an inflatable bed. Ex. 1001, cls. 1-17, 20. Petitioner fails to explain why the claim features here require more description or analysis than a typical IPR. Indeed, many of the purported "different and unrelated features" identified by Petitioner are self-evidently highly related—the "support structure of inflatable bed," "process for coupling tensioning structures, "orientation and characteristics of I-beams," "composition and attachment of tensioning structures," and "characteristics of top sheet in relation to tensioning structures" all plainly relate to the structure and configuration of tensioning structures within an inflatable bed. Paper 3 at 1. *See Fantasia Trading LLC v. Cognipower, LLC*, No. IPR2021-00068, Paper 22 at 7, 10 (PTAB May 12, 2021) (exercising discretion to deny institution of all but one IPR petition where petitioner "split up the claims across multiple petitions to create the illusion that it did not have enough space to address each set of challenged claims in a single petition" and did not show "it could not fit all of its grounds against the asserted claims into a single petition").

Furthermore, this is also not a situation that involves lengthy claims that necessitate multiple petitions—the Asserted Claims total 439 words and the Non-

Asserted Claims total 493 words. *See Intel Corp. v. Tela Innovations, Inc.*, No. IPR2019-01520, Paper 14 at 15 (PTAB Mar. 11, 2020) (finding multiple petitions were useful for claims totaling over 3,000 words). Indeed, all of the '633 Patent's claims (including non-challenged claim 18) span merely a total of 115 lines—less than two standard 67-line columns of text. Ex. 1001 at 12:36-67, 13:1-42, 14:1-41; *see Apple Inc.*, No. IPR2021-00679, Paper 14 at 12, Ex. 1001 at 18:5-67, 19:1-36, 20:1-35 (where challenged patent's claims spanned 134 lines, finding lack of justification for multiple IPRs). Further, there is "nothing unusual in the complexity of the ['633 Patent's] claims or the technology of the challenged patent and prior art that would distinguish this case from the 'vast majority of cases' in which one petition is sufficient." *See Apple*, No. IPR2021-00679, Paper 14 at 12.

Petitioner also asserts that the Board should grant multiple petitions simply because there is no overlap in claims between the Petitions challenging the Asserted Claims and Non-Asserted Claims.[3] Paper 2 at 2-3. However, even where there is no overlap in challenged claims across multiple petitions, the Board has exercised

[3] The only decision Petitioner cites to in support of this assertion (Paper 3 at 2-3) is inapposite because the patent owner in *Exactech* never filed a preliminary response disputing the petitioner's asserted need for filing multiple petitions. *Exactech, Inc. v. ORTHOsoft ULC*, IPR2022-00837, Paper 6 at 4 (PTAB Nov. 8, 2022).

its discretion to institute only a petition challenging asserted claims in litigation while denying to institute a concurrent petition challenging non-asserted claims. *See Samsung Elecs. Co., Ltd. v. Lynk Labs, Inc.*, No. IPR2022-00150, Paper 15 at 10-11 (PTAB July 5, 2022). In *Samsung*, the Board denied institution of multiple petitions, finding that "asserting 5 claims in litigation does not rise to the level of a rare circumstance requiring two petitions." *Id.* at 10. The Board held that "[i]f Petitioner had been more selective in presenting its arguments, it may have been possible to challenge all claims within the word limits for a single Petition," because it presented redundant challenges based on the same secondary reference combined with two different primary references. *Id.*

Petitioner also asserts that it will not challenge the fourteen (14) Non-Asserted Claims if Patent Owner confirms that it will not sue Petitioner for infringement of those claims. Paper 3 at 3. However, this burden is not on Patent Owner—it is Petitioner's burden to overcome the presumption that one IPR is sufficient per challenged patent. Petitioner's contention that "separation of the petitions between Asserted and Non-Asserted Claims serves administrative efficiency and the finite resources of the Board" (*id.*) is plainly wrong—having more petitions to litigate and adjudicate is plainly more burdensome to the parties and the Board. If Petitioner wishes to challenge claims that were not asserted in the Complaint, Petitioner could have complied with the Trial Practice Guide and fit those grounds into a single

petition by using the prescribed word limits judiciously to balance Petitioner's right to pursue a petition with the Board's concerns and Patent Owner's right to fairness and efficiency in the proceeding. *Samsung Elecs.*, No. IPR2022-00150, Paper 15 at 10-11. And in any event, Patent Owner is *not* willing to "confirm that it will not sue on the Non-Asserted claims," and thus Petitioner's suggested efficiency from the potential that "Petitioner will agree to move to terminate any proceedings on petitions 3 and 4" is entirely illusory. Paper 3 at 3. By contrast, the Board can *actually* achieve efficiency by exercising its discretion under section 314 to simply not institute those multiplicative proceedings. 35 U.S.C. § 314; *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) ("§ 314(a) invests the Director with discretion on the question whether to institute review").

B. Petitioner Fails To Justify Filing Multiple Petitions to Present Multiple Grounds Per Challenged Claim

As discussed, Petitioner contends it should be entitled to file multiple petitions—petitions based on Aoki and Petitions based on Lin—because Patent Owner may challenge the Aoki-based grounds and the Lin-based grounds on different bases. Paper 3 at 3-5. However, Petitioner: (1) fails to adequately justify the need to include both Aoki-based and Lin-based grounds; and (2) fails to demonstrate it could not have included both Aoki-based and Lin-based grounds in a single petition.

1. Petitioner Fails To Justify the Necessity of Including Both Aoki-Based and Lin-Based Grounds

Petitioner here asserts multiple grounds of unpatentability across separate parallel petitions. But, "[t]here is no entitlement to assert . . . more than one ground of unpatentability against each challenged claim." *Global Tel*Link Corp. v. HLFIP Holding, Inc.*, No. IPR2021-00445, Paper 14 at 18 (PTAB June 22, 2021). Moreover, Petitioner fails to sufficiently explain the material differences in the specific issues that justify the need to present both Aoki-based and Lin-based grounds. *See Comcast Cable Commc'ns, LLC v. Rovi Guides, Inc.*, IPR2019-01432, Paper 10 at 8 (PTAB Jan. 23, 2020) ("Petitioner fails to sufficiently explain why [the different prior art combination in each petition] is material and supports the exercise of discretion to institute on more than one petition.").

For example, Petitioner's explanation as to the necessity of the Lin-based grounds is nebulous, stating merely that "Aoki is an older reference that PO may argue does not disclose certain limitations reciting how the claimed bed sheets and tensioning structures are coupled to each other." Paper 3 at 3. But, Petitioner does not: (1) identify the specific claim limitations of the '633 Patent that this statement vaguely references; or (2) explain how Lin's disclosures are materially different from Aoki's disclosures with respect to those limitations.

As to explaining the necessity of the Aoki-based grounds, Petitioner does not even attempt to refer to claim limitations of the '633 Patent implicated by the Lin-

based grounds, but merely argues that Patent Owner "may" make arguments disqualifying certain references in the Lin-based combinations. Paper 3 at 3-4. Such speculative arguments are inadequate. *SolarEdge Techs. Ltd. v. Koolbridge Solar, Inc.*, IPR2022-00014, Paper 10 at 9-10 (PTAB Apr. 19, 2022). In particular, Petitioner argues, citing *Xilinx*, that all of the Lin-based grounds involve a combination with the Catalog and Patent Owner may argue "that the Catalog does not qualify as a printed publication." Paper 3 at 3-4. Petitioner's reliance on *Xilinx* is misplaced. There, the petitioner relied on Elbornsson, a printed publication, but contended that it needed to file an additional petition because the patent owner "could attempt to challenge the publication date." *Xilinx, Inc. v. Analog Devices, Inc.*, IPR2020-01484, Paper 11 at 8 (PTAB Mar. 15, 2021). To address the potential challenge based on publication date, the *Xilinx* petitioner filed an additional petition relying on Eklund, a U.S. Patent, in place of Elbornsson, because "its issue date cannot be challenged." *Id.*

Unlike *Xilinx*, Petitioner here does not rely on a different reference *in place of the Catalog*[4] in its additional petitions to avoid a challenge on the Catalog's status as a printed publication. Rather, Petitioner filed additional petitions relying on Aoki

[4] Petitioner asserts the Catalog as a necessary reference in each ground of the Petitions relying on a Lin-based ground. Paper 3 at 1.

in place of Lin to pursue grounds based on separate primary references in an attempt to get "two bites at the apple," i.e. nothing in the Aoki-based grounds acts as a substitute for the Catalog. Notably, as Aoki is a Chinese Patent Application and Lin is a Chinese Patent, it is unclear how Patent Owner could challenge the publication dates of either of these references. Instead, Patent Owner merely asserts the Catalog as an *optional* reference in each of the Lin grounds in an attempt to rectify apparent deficiencies in Lin. IPR2023-00487, Paper 1 at 46-47 (after arguing that Lin alone satisfies limitation, relying on Catalog "to the extent Lin's disclosure was unclear" as to the configuration of its tensioning structures); IPR2023-00489, Paper 1 at 38 (same). Therefore, the Board cannot hold here, as it did in *Xilinx*, that the potential to challenge the publication status of the Catalog appears to justify two petitions with identically challenged claims—Petitioner's use of the Catalog as an optional reference to merely *bolster* its Lin arguments does not justify additional petitions.

Thus, "[i]n the absence of explaining, with good reason, why the combinations are not equivalent for purposes of institution of trial, and/or why one petition is not sufficient," only one IPR should be instituted. *Comcast Cable Commc'ns.*, IPR2019-01432, Paper 10 at 8; *see also Intel Corp. v. Tela Innovations, Inc.*, IPR2019-01513, Paper 16 at 15-16 (PTAB Mar. 30, 2020) (denying institution of multiple petitions because although the petitions were based on different

references, Petitioner "failed to establish sufficient differences between the grounds of the [multiple petitions] addressing the same claim sets").

2. Petitioner Fails To Demonstrate That the Aoki-Based and Lin-Based Grounds Could Not Have Been Presented in a Single Petition

Even if Petitioner had adequate justification to present both Aoki-based and Lin-based grounds—as discussed, *it did not*—Petitioner has not adequately shown that it could not have done so in a single petition. As noted, the background sections of the Petitions—the '633 Patent and file history; level of ordinary skill in the art; claim construction; and discretionary denial under Fintiv and §325(d)—are mostly repetitive in each petition. Moreover, the arguments in Petitioner's ranking statement wholly ignore the fact that, as discussed above, each of the four petitions themselves *already* contain *multiple* redundant grounds for at least some challenged claims. Paper 3 at 1. Petitioner presents zero justification for those existing redundancies within the petitions. *Id.* at 5. Obviously, omitting those intra-IPR redundant grounds could have helped in accommodating the Lin-based and Aoki-based grounds in a single petition. Petitioner presents no argument to the contrary. Also, the Petitions include redundant secondary references—including Lin '773 in each IPR petition, Metzger in three of four petitions, and Liu in three of four petitions. Paper 3 at 1. This further demonstrates that the Aoki-based and Lin-based grounds could have been presented in a single petition. *See Nalox-1 Pharma., LLC*

v. Opiant Pharma, Inc., IPR2019-00686, Paper 11 at 6-10 (PTAB Aug. 27, 2019) (discretionarily denying institution of multiple IPRs which used different primary references but redundant secondary references).

Furthermore, Petitioner asserts that because the EPO applied Lin in a proceeding involving a related patent, it was necessary to address why the EPO erred with respect to Lin. Paper 3 at 5. Indeed, in the Petitions asserting Lin, Petitioner contends that the EPO "erred with respect to certain disclosures in Lin," but then noted that "these errors do not affect the grounds set forth in this Petition." IPR2023-00487, Paper 1 at 8 n.3; IPR2023-00489, Paper 1 at 7 n.3. Thus, Petitioner's concession demonstrates that Petitioner's purported need to discuss why the EPO erred with respect to Lin was—according to Petitioner itself—unnecessary.

Because Petitioner has failed to show "that it could not fit a single ground against the asserted claims into a single petition," Petitioner has not shown that it was "necessary to distribute its challenges across four petitions." *See Fantasia Trading LLC*, No. IPR2021-00068, Paper 22 at 12-13.

IV. PATENT OWNER RESERVES ALL OTHER ARGUMENTS

Patent Owner hereby exercises its right to defer raising any additional arguments relating to this Petition and the asserted grounds until after any decision instituting review.

V. CONCLUSION

For the foregoing reasons, the Board should not institute more than one of Petitioner's four simultaneously filed IPR petitions (if any).

Dated: June 23, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 23, 2023, I will cause a true and correct copy of the foregoing Patent Owner's Preliminary Response, and all associated exhibits or appendices referred to therein (if any), to be served via e-mail to Petitioner's counsel of record at:

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CERTIFICATE OF COMPLIANCE PURSUANT TO 37 C.F.R. § 42.24

This paper complies with the type-volume limitation of 37 C.F.R. § 42.24. This paper contains 3,199 words as counted by the word-processing program used to generate this paper, excluding the parts of the paper exempted by 37 C.F.R. § 42.24(a)(1) and counsel's signature block.

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