

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

MASIMO CORPORATION

Petitioner,

v.

APPLE INC.,

Patent Owner.

IPR2023-00635

Patent No. 10,987,054 B2

IPR2023-00634

Patent No. 10,627,783 B2

TELECONFERENCE HEARING

BEFORE: THE HONORABLE JUDGE KEN BARRETT

THE HONORABLE JUDGE ROB KINDER

07/19/2023

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REPORTED BY: AMANDA GORRONO, CLR

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1 THE BOARD: Good afternoon,
2 everyone. This is Judge Ken Barrett with the
3 Patent Trial and Appeal Board. I have on the
4 line with me Judge Rob Kinder.

5 This is a call today in Masimo v
6 Apple, IPR2023-00634 and 00635.

7 Who do we have on the phone today
8 for Petitioner?

9 MR. CANNON: Good afternoon, Your
10 Honor. This is Ted Cannon of Knobbe Martens.
11 I've also got Philip Nelson and Jarom Kesler
12 of Knobbe Martens; and I believe listening on
13 the phone is our associate, Paul Spiel. And
14 we represent Petitioner Masimo.

15 THE BOARD: All right. Thank you,
16 Mr. Cannon.

17 And who do we have for Patent Owner
18 today?

19 MR. JHURANI: Good afternoon, Your
20 Honors. You have Karan Jhurani with Fish &
21 Richardson on behalf of Patent Owner Apple
22 Incorporated.

1 And with me today, I have Rob

2 Devoto, also with Fish & Richardson.

3 And perhaps later -- or they are
4 already on the line -- Rick Bisenius as well
5 as Craig Deutsch.

6 THE BOARD: All right. Thank you,
7 Mr. Jhurani.

8 I understand at least one party has
9 retained a court reporter; and if so, if you
10 would file that transcript as an exhibit
11 after it comes in, that would be much
12 appreciated.

13 MR. JHURANI: We will do that.
14 Thank you.

15 THE BOARD: All right. Thank you.

16 Okay. We have a request for another
17 round of briefing predecision on institution.
18 Let's see. It was Petitioner's request.

19 So, Petitioner, you go first.

20 MR. NELSON: Okay. This is Philip
21 Nelson. I'm --

22 MR. JHURANI: Your Honor -- sorry,

1 Counsel.

2 This is Karan Jhurani for Fish &
3 Richardson. I apologize to interrupt.

4 Just to frame and -- at least from a
5 patent standpoint -- I wanted to notice that
6 we have -- since we are addressing two
7 different proceedings today, we have two
8 arguers handling each of those -- one arguer
9 handling each of those proceedings. Myself,
10 Karan Jhurani, will be handling the 634 IPR
11 proceeding; and Rick Bisenius will be
12 handling the 635 IPR proceeding.

13 We'll take each of those serially at
14 least in terms of Patent Owner's presentation
15 to the extent it makes sense, if Petitioner
16 wants to do that as well.

17 At least Patent Owner will be
18 proceeding with two attorneys arguing
19 respective proceedings and the issues
20 therein.

21 THE BOARD: Okay. Thank you.
22 Understood.

1 Just make sure everybody identify
2 yourself when you start to talk so we can
3 have a really clean record.

4 Petitioner, I'll also leave it up to
5 you as to how you want to address these. If
6 you want to do one case and then we'll go
7 back and forth; or if you want to do both
8 cases first, but whatever you do, just be
9 very clear about it.

10 MR. NELSON: Okay. No problem.
11 This is Philip Nelson for the Petitioner, and
12 I intend to discuss the 634 IPR first, which
13 is the '783 Rothkopf patent. And then my
14 colleague, Ted Cannon, will be discussing the
15 other matter.

16 THE BOARD: Okay.

17 MR. NELSON: To start with, the
18 634 -- are you ready for me to begin now?

19 THE BOARD: Yes, go ahead.

20 MR. NELSON: Okay. In the 634 case,
21 we believe that the issues in the Patent
22 Owner preliminary response were

1 unforeseeable.

2 Apple's entire response focuses on
3 Section 325(d). And this was unforeseeable
4 to us because the art recited in the Petition
5 was totally new art. None of the Petition's
6 references were analyzed or cited at all in
7 the file history.

8 The second reason it was
9 unforeseeable is that Apple cherry-picked
10 individual references from the file and
11 argues they are cumulative to those in the
12 Petition; but many of these references were
13 never analyzed, only listed in a haystack of
14 over 600 IDS references.

15 The PTAB has cases such as Amphenol
16 versus PPC. That's IPR 2022-00718, Paper 7
17 at Page 3.

18 These cases explain that in just
19 this situation, Petitioner cannot be expected
20 to preemptively, quote, sift through IDS
21 references and rebut all possible
22 combinations.

1 Underlining the problem of this type
2 of haystack search, Apple points to one
3 reference, the Shim reference -- S-H-I-M --
4 that does not appear to be prior art.

5 Its earliest priority of October 8,
6 2014 is actually after the '782 patent's
7 priority of September 2, 2014.

8 So a reply would allow Masimo to
9 correct the record on this.

10 And the other thing, the third
11 reason that this was unforeseeable is that
12 Apple never shows that the combinations
13 argued in the Petition or any similar or
14 cumulative combination were ever considered
15 in the file history.

16 In fact, there were no combinations
17 in the file history for the present claims.

18 This is important because the
19 Advanced Bionics case, which gives the
20 framework for 325(d) says, The Board should
21 defer to previous office analysis. Here,
22 there is no such analysis in the file

1 history.

2 Apple argues some features are
3 scattered through individual file history
4 references. Unlike in Masimo's Petition,
5 Apple never shows how its selected references
6 can combine.

7 In our Petition, in contrast, we
8 show very specifically how they can
9 mechanically fit together, for example.

10 Apple never shows how sets of
11 references suggest combinations with each
12 other, with their own passages in the new
13 references themselves.

14 In a side note to 325(d) in its
15 response, at Pages 42 to 51, Apple criticizes
16 Masimo's motivations to combine; but
17 importantly, Apple never argues that these
18 motivations are cumulative to anything in the
19 file history.

20 A fourth reason is that the claims
21 are very different. The initial claims that
22 were actually analyzed in the file history

1 are different from those that were allowed
2 and issued.

3 Under the Advanced Bionics
4 framework, the Footnote 9 in that case,
5 325(d) denials are only appropriate where:
6 one, the Office evaluated the art or
7 argument; and, two, this evaluation occurred
8 with respect to the, quote, challenged
9 claims.

10 The only claims to which art was
11 applied in this file history were later
12 cancelled, so Apple has not met that
13 requirement here.

14 And then finally, I just wanted to
15 bring up a relevant case. I think our facts
16 are better than the facts in this case.

17 It's relevant in the Google LLC v.
18 Valtrus Innovations Limited case. That's
19 IPR2022-01197 Paper 12 at Page 5.

20 And in this case, one of the
21 petition's main asserted references had a
22 foreign counterpart that was listed on an IDS

1 in the file history.

2 Even so, the PTO director intervened
3 to allow the Petitioner a reply brief on
4 325(d) stating the Petitioner, quote, cannot
5 be expected to anticipate every argument that
6 may be raised at that time.

7 So I'll pause for any questions on
8 that case.

9 (Pause in proceeding.)

10 THE BOARD: All right. Then,
11 Mr. Jhurani.

12 MR. JHURANI: Thank you, Your Honor.

13 And just for the record, this is
14 Karan Jhurani again for Patent Owner.

15 I'll just ask -- check with the
16 court reporter, make sure we're good to go
17 and I'll get started with Patent Owner's
18 presentation.

19 THE COURT REPORTER: Yes, all set.

20 MR. JHURANI: All right. Great.

21 Thank you. So, Your Honors, we
22 heard Petitioners talk about the POPR's

1 reliance on references cited in the IDS,
2 references that were purportedly not
3 considered during prosecution and the claims
4 and claims go during prosecution are
5 justifications for its reply.

6 And we also heard about the Google v
7 Valtrus case, which will take in turn suffice
8 to say the patent owner's 325(d) arguments
9 were unforeseeable, at least, it appears, as
10 they relate to redundancy or cumulativeness
11 at the heart at issue in Petition relative to
12 the art of record.

13 We disagree with that, Your Honors,
14 and we submit that the arguments that we
15 raised in the POPR were, in fact, very
16 foreseeable in view of the present record.

17 And to illustrate that, let's used
18 Advanced Bionics, which states that the
19 Petitioner bears the burden to explain why
20 the art in the Petition is not the same or
21 substantially the same as the previously
22 presented art of their office. And if it is

1 same or if the art is substantial -- or if
2 the art is substantially the same,
3 Petitioner, not Patent Owner, must explain
4 how the Office erred in a manner material to
5 patentability.

6 So it is very much foreseeable to
7 carry the burden on these issues, but
8 Petitioner would scrutinize the prosecution
9 record; and, at a minimum, meet the content
10 with the claim breaches and arguments that
11 led to allowance.

12 Petitioner offers a single
13 paragraph, 106 words' worth of a single
14 paragraph for its under 325(d) analysis. And
15 that's the Petition at Pages 109 and '10.

16 But nowhere in this analysis, the
17 Petitioner address the features that led to
18 allowance.

19 All the Petition states in this one
20 paragraph is that the art is materially
21 better than the art cited during prosecution.

22 In support of this assertion, it

1 states the ground references disclosed
2 features such as wireless charging, ceramic
3 cover, convex shapes that were absent from
4 the art considered during prosecution.

5 So we heard Petitioner's counsel
6 mention the combination that was not
7 considered. The combination was brought to
8 bear, but did. When you look at the 325(d)
9 section, all we get from them is a single
10 statement with a rationale that the round
11 references simply do not disclose these
12 features such as wireless charging, ceramic
13 cover, convex shapes.

14 They're absent from the record.
15 There's no statement there about the
16 combination of references that were not
17 considered or brought to bear and that's why
18 a 325(d) is not warranted -- 325(d) denial is
19 not warranted here.

20 That's brand-new that we heard
21 today.

22 Moreover, these are -- these

1 features that they did identify, taking them
2 at their word for what's in the record in the
3 Petition, these were not the claimed features
4 that actually led to allowances.

5 What led to allowances actually was
6 different. The features here that they
7 identify are different from the ones that the
8 examiner found to be absent from the record
9 and, therefore, the Petitioner was on notice
10 that the examiner deemed these very features
11 that they have identified in the Petition to
12 be present in the art of record.

13 So, in that sense, the prior art
14 advanced by Petitioner, what cumulative asked
15 of these features. This is only confirmed
16 and underscored by statements and references
17 from the prosecution reference that we
18 identified in the POPR.

19 And there was questions raised about
20 references that we identified from IDSs. It
21 was not just limited from references IDS Shim
22 was given as an example. But UM, the

1 reference that had parallel disclosures,
2 actually provided -- was what considered and
3 applied the very same claim and features that
4 are at issue.

5 And we did not have to provide that
6 level of detail. It was not Patent Owner's
7 burden to show that the examiner was, in
8 fact, correct in finding these very features
9 were found in the prior art, these ancillary
10 features that they identified in the 325(d)
11 section.

12 It was Petitioner's burden to
13 explain why ancillary features were not
14 cumulative to the art of the record. And if
15 cumulative, it was their burden to explain
16 what the material error was with respect to
17 patentability.

18 They failed to engage in that
19 analysis.

20 Everything that counsel said was not
21 present in the Petition. Again in that
22 106-word paragraph. Nor does Petitioner

1 engage here what unforeseeable issue of what
2 the examiner actually found to be absent from
3 the art of record and what actually led to
4 allowance, which is a very specific device
5 and configuration that deals with the rare
6 cover that allows transmission of two
7 distinct types of signals: optical signals
8 and wireless power signals.

9 It is clear from the Petition -- and
10 the POPR gives several examples in our
11 POPR -- to illustrate that each of the
12 Petition's references are similarly deficient
13 in that they also fail to disclose the very
14 features that led to allowance.

15 Where does that leave us? The
16 Petitioner has the burden to explain why the
17 Petitioner's references were not cumulative
18 of the art of record, particularly as they
19 relate to these features that led to
20 allowance.

21 They didn't do that in the Petition,
22 nor did the Petition explain how, if at all,

1 the examiner cared in allowing the claim in
2 view of these features that were actually
3 found to be allowable.

4 What's also missing -- excuse me.

5 What is present is in this 106 words
6 is none of the detail about the combination
7 and sifting through the record that counsel
8 was talking about.

9 What is there? It's just 106 words
10 that list some undisclosed features that
11 allegedly were absent from the art of record.
12 But, again, those were features that we
13 explained in the POPR were very clearly
14 present in the art of record. And Petitioner
15 could have easily foreseen that by simply
16 realizing that the identified features were
17 not among those that led to allowance.

18 So now what we have is a scenario
19 where confronted with arguments in our POPR
20 that highlighted various failures in this
21 very brief analysis of 325(d), which again is
22 Petitioner's burden, Petitioner seeks to now

1 correct deficiencies with the form of
2 responding to issues in our POPR.

3 That's inappropriate and shifts the
4 burden to Patent Owner and issue -- the
5 Petitioner has the ultimate burden of proof.

6 And this type of burden shifting --
7 was highly prejudicial to Patent Owner here.

8 Instead of this, Petitioner could
9 have put forward in their Petition -- excuse
10 me -- Petitioner could have put forth in
11 their Petition that as a general matter,
12 firstly, allegation under 325(d) as
13 Petitioner does here.

14 Petitioners generally would be able
15 to benefit arguments in the POPR and then
16 take the comfort in knowing that they would
17 be afforded the opportunity to provide a more
18 fulsome analysis and appear in a Petition
19 filing -- in a post-Petition filing, which
20 then has the added benefit, to the detriment
21 of Patent Owner, that Petitioner could use
22 the POPR as a road map to rectify and bolster

1 an otherwise deficient 325(d) record.

2 What's more, Petitioner would get
3 this benefit without being subject to the
4 Petition for --

5 Now, before I turn away, Your Honor,
6 Google v Valtrus was brought up and there was
7 a suggestion that there was --

8 (Pause in proceedings.)

9 MR. JHURANI: Again, this is Karan
10 Jhurani for the record for Patent Owner,
11 Apple Incorporated.

12 Speaking of Google v Valtrus, it's
13 important -- it's important to understand the
14 context there. Yes, reply breaching was
15 granted there after a decision of denial of
16 institution and after a request for hearing,
17 but the facts of that Google v Valtrus case
18 are not analogous to the present case.

19 That case does -- expands the
20 consideration of foreign counterpart, as
21 counsel mentioned, as a reference that was
22 relied upon in the Petition. The issue there

1 was whether error had been shown in
2 examiner's consideration of similar reference
3 that was now at issue in the Petition.

4 The Google case, however, did not
5 deal with the current scenario where the art
6 of record and the Petition references are
7 deficient for similar reasons and where the
8 Petitioner failed to explain any
9 noncumulativeness from material error.

10 And while we're talking about Google
11 v Valtrus, what we do hear is the subsequent
12 posture of that case. Upon return to the
13 Board, the Board ultimately found that Prong
14 1 of the Advanced Bionics frameworks was
15 satisfied there in the view of
16 applicant-identified art in an IDS and one
17 that was not considered or spoken to or
18 addressed in form of a rejection during
19 prosecution, much like some of the references
20 that are -- that we use illustratively in our
21 POPR.

22 And also, the Board maintains that

1 the failure to explain material error in the
2 Petition warrants discretionary denial in
3 view of the two sentences' words on argument
4 on 325(d), much like what we have at issue
5 here.

6 Your Honor, finally, just really
7 briefly, I'll speak to the specific
8 unforeseeability arguments about reliance on
9 references in the IDS as well as change in
10 claim scope.

11 First, with respect to the
12 references that were found in the IDS that we
13 rely upon, again, we found and showed
14 numerous additional references that the
15 examiner himself identified, which are not in
16 the hundreds, which account to that showed
17 and had the same POPR we found the applicant
18 cited on.

19 But setting that aside, the problem
20 with this assertion that could not have
21 foreseen these references, it sidesteps
22 Petitioner's burden and what -- Petitioner's

1 burden and what was required of them in the
2 first instance. There was nothing
3 unforeseeable about features that were found
4 to be absent from the record.

5 The examiner very clearly, through
6 the record, explained that. And Patent
7 Owner's indication of references that
8 illustrate those same deficiencies, they do
9 not change or alter the foreseeability of
10 addressing those features that led to
11 allowance, which did not happen here.

12 Similarly, the features that the
13 Petitioner actually presented and found to be
14 missing from the -- alleged to be missing
15 from the art of record, as I explained
16 earlier, a first tier review of the
17 prosecution confirms that those features,
18 again which did not lead to allowance, were,
19 in fact, present in the art of record.

20 As to the change in claim scope.
21 And features that were addressed and not
22 dealt with and those claims changed

1 dramatically, is that these arguments about
2 difference between the claims and pending
3 claims, that again is a foreseeable issue.
4 Could have been discussed in the Petition,
5 but wasn't.

6 And even if there were some
7 differences between the claims that
8 ultimately issued and the pending claims, the
9 POPR relied on statements and references from
10 the record and related to the very features
11 that are still present in the claims.

12 So just because there are
13 differences, does not warrant disregard of
14 what happened during prosecution.

15 And, finally, and maybe most
16 importantly, the evolution of the claims does
17 not change or affect the foreseeability of
18 what the Petitioner should have done to meet
19 its burden.

20 The claims made in prosecution were
21 allowed in view of this very specific
22 modification amendment to the claim regarding

1 the specific device's configuration.

2 The Petitioner was on notice of
3 those features that led to allowance and
4 nothing about the evolution of the claims
5 during prosecution precluded Petitioner from
6 carrying its burden, particularly as it
7 related to thickness or error as it relates
8 to patentability.

9 And for all of these reasons, Your
10 Honors, we submit that all of the issues that
11 Petitioner raises and spoke to were
12 foreseeable and should have been addressed in
13 the Petition. There's no good cause that
14 exists for now granting reply briefing as to
15 issues that were foreseeable at the out -- to
16 this proceeding.

17 And with that, I'll turn it over to
18 Your Honors.

19 THE BOARD: Thank you.

20 MR. NELSON: Can I make a couple
21 brief points in response?

22 THE BOARD: Yes, very brief.

1 MR. NELSON: This is Philip Nelson
2 for Petitioner. I just have a couple of
3 brief points in response.

4 And the first one is: We disagree.
5 We don't see anywhere in the Advanced Bionics
6 case that shows that it's the Petitioner's
7 burden to disprove cumulativeness.

8 And so if Apple has a citation for
9 that proposition, we'd like to see that at
10 some point.

11 Second of all, they have brought up
12 the question of error. And I wanted to just
13 raise one other case that's relevant. I
14 think that's the Oticon Medical AB versus
15 Cochlear Ltd. case, IPR2019-00975.

16 And at Page 19 of that decision, it
17 says that: Material error can be an omission
18 of a reference. But you don't have to phrase
19 it in the terminology of error, but it can
20 still be presented that way.

21 And one other relevant thing about
22 that case that we think is analogous, no

1 325(d) discussion was included in the
2 Petition at all, and they were still allowed
3 to -- well, the Petitioner still prevailed on
4 that issue.

5 The Advanced Bionics case, of
6 course, also shows that where the file
7 history is not well-developed, as here, where
8 the claim -- I think Apple has admitted that
9 the claims evolved -- when the file history
10 is not well-developed on the relevant claim,
11 the error can be one of omission. And that's
12 at Page 10 in the Advanced Bionics case.

13 And if I might, I just wanted to
14 bring up that we also discussed the file
15 history in our Petition. And our Petition
16 shows references that have exactly what the
17 examiner said was missing.

18 Quote, the prior art -- this is what
19 the examiner said in the file history -- the
20 prior art failed to teach or suggest the
21 specific arrangement and configuration of the
22 claimed cover, opening in the housing, and

1 wireless charging coil, period.

2 That phrase was important in the
3 file history, and the -- Apple has tried to
4 take advantage of that for their purposes,
5 but it also matters for whether or not there
6 was cumulativeness and whether or not these
7 issues are new or whether they were
8 considered already.

9 So that ends our presentation unless
10 there are further points from Apple to
11 respond to.

12 THE BOARD: Mr. Jhurani, do you have
13 anything very brief to respond?

14 MR. JHURANI: Yes, Your Honor. I
15 promise it is very brief and just quick
16 responses to things I heard.

17 And for the record, it's Karan
18 Jhurani.

19 Starting with the burden issue, it
20 is Petitioner's burden to demonstrate at
21 issue the same or substantially the same, and
22 that includes determining whether the art is

1 cumulative of the art of record or not and
2 then advancing to the second prong of
3 Advanced Bionics. That is firmly confirmed
4 by Advanced Bionics as Petitioner's burden
5 and not Patent Owner's.

6 File history here not being
7 well-developed, that is also incorrect. We
8 do a detailed walkthrough of the file history
9 and walked through all the details of how the
10 claims changed, why they changed, and in
11 particular they changed because of interview,
12 record, and summary where the patent -- the
13 applicant and the examiner agreed of certain
14 features that were not disclosed by the art
15 of record.

16 Apple amended the claims to capture
17 those very features and then we got the
18 allowance with the examiner agreeing that the
19 very specific arrangement and configuration
20 and the dual cable to transmit two text
21 signal were not present in the art of record,
22 much like in the Petition.

1 To the issue of material error and
2 taught in the references, Google v Valtrus is
3 also instructive on that point, Your Honors.
4 And that case spoke to -- if you're not
5 addressing material error, it is not -- there
6 is no burden on the Petitioner or the Board
7 for that matter to sift through a Petition
8 that is 89 pages long to identify what
9 potentially is that error and what that
10 omission -- that Patent Owner -- that
11 Petitioner alleged was.

12 If it's clearly alleged and clearly
13 argued, yes, that would be a different --
14 that is not the case here, and certainly
15 there's no identification of what that error
16 was other than ancillary features that very
17 clearly were present in the record.

18 With that, Your Honor, that ends my
19 presentation, and I appreciate the time of
20 counsel and the Board.

21 THE BOARD: All right. Thank you.

22 Let's move on to the 635 case.

1 Petitioner?

2 MR. CANNON: Thank you, Your Honors.

3 This is Ted Cannon, and I'll talk about the
4 635 case.

5 There are two issues in this case,
6 and I'll talk about the first one.

7 And it might make sense to talk
8 about the first one entirely and -- before
9 going on to the second one, but I'd be happy
10 to go through both of them if Your Honors
11 prefer.

12 The first one, 325(d) issue, I have
13 about five minutes of material on this issue.

14 First, we acknowledge that the
15 Petition overlooked that the examiner applied
16 Rothkopf against Dependent Claim 22 in a
17 first action interview pilot program
18 preinterview communication.

19 Nevertheless, there are two bases
20 that good cause exists for our preliminary
21 reply in this case. The first reason is that
22 Apple's arguments were unforeseeable. And

1 there were at least two unforeseeable
2 arguments. I'll go through each in turn.

3 The first unforeseeable argument is
4 that Apple argued that Jung and Paulke are
5 substantially the same as art that was before
6 the Office. It's undisputed that Jung and
7 Paulke were not considered by the examiner
8 and do not show up in the file history
9 anywhere and are completely new references.

10 Apple does not compare Jung and
11 Paulke with Kegasawa or Rothkopf.

12 The only comparison Apple makes is a
13 comparison of language in the Petition. And
14 they argue that the Petition argues that
15 Rothkopf, Jung, and Paulke each disclose a
16 second electrode positioned on the carrier
17 member, which is a key limitation that got
18 the claims allowed.

19 Significantly, Apple doesn't says
20 Jung and Paulke teach exactly the same thing
21 as Rothkopf or the same thing as Kegasawa
22 with respect to that limitation. They just

1 say because Masimo argued that all three
2 references teach the same limitation, they
3 must be cumulative.

4 That's clearly not the standard. A
5 reference can teach a limitation in various
6 degrees of complexity or in various different
7 ways. And a reference can be stronger than
8 another with respect to a limitation. That's
9 exactly what happened here and the Petition
10 points out in quite a bit of detail.

11 The Petition specifically shows that
12 Jung and Paulke are stronger references than
13 Rothkopf for the key limitation, the second
14 electrode positioned on the carrier member
15 that got the claims allowed. You can find
16 that in the Petition at Pages 41 through 46
17 for Jung and 75 through 78 from Paulke.

18 We in that Petition argue that
19 Rothkopf discloses the limitation, but Jung
20 and Paulke are much more detailed and would
21 motivate a POSITA to modify Rothkopf to
22 satisfy the limitation.

1 And so it's very clear that we were
2 arguing them as a stronger reference for that
3 limitation and Apple has not done any
4 comparison to rebut that analysis in the
5 Petition.

6 The second unforeseeable argument is
7 that Apple argued that the examiner's use of
8 Rothkopf applies to the independent claim
9 limitations that resulted in allowance of the
10 claims. The file history contradicts that
11 and shows that Rothkopf was not considered
12 for the key limitations that got the claims
13 allowed.

14 The file history is Exhibit 1002 in
15 the record, and Page 114 of the file history
16 shows that the examiner cited Kegasawa as the
17 primary reference D1 against Independent
18 Claim 21 which includes the key limitations
19 and cited Rothkopf as secondary reference D2
20 against Dependent Claim 22 and only for the
21 teaching of providing a plurality of light
22 detectors for monitoring heart rate in an

1 electronic watch.

2 Pages 105 and 107 of the file
3 history are interview summaries that address
4 Kegasawa only. Page 47 of the file history
5 are the reasons for allowance and it again
6 addresses Kegasawa only. The examiner found
7 that Kegasawa was the closest prior art and
8 then only analyzed Kegasawa and found -- and
9 allowed the claims because Kegasawa's
10 electrodes are a separate component from the
11 carrier assembly. Again, not the key
12 limitation that got the claims allowed.

13 The Board's precedential decisions
14 on 325(d), including Advanced Bionics, make
15 it clear that there needs to be a comparison
16 of how the Petition applies the prior art
17 with how the examiner applies the prior art.
18 It's a substantive evaluation of what the
19 examiner actually analyzed during
20 prosecution. It's not just a check-the-box
21 exercise of finding that a reference appears
22 somewhere in the file history.

1 Apple did not show that the examiner
2 conducted any such analysis of the key
3 limitations with respect to Rothkopf, and
4 especially did not show it with respect to
5 Jung and Paulke, the secondary references
6 that also teach the key limitation and, in
7 fact, teach it in more detail and are
8 stronger references than Rothkopf.

9 The second reason for good cause is
10 that additional briefing would help the Board
11 address a novel legal question under a
12 precedential 325(d) decision.

13 Of course, we realize the Board has
14 addressed 325(d) generally, but we have not
15 seen any case where the Board has addressed
16 this specific question that Apple wants the
17 Board to address here.

18 And that is, when does the
19 examiner's use of a reference as a secondary
20 reference against one limitation of the claim
21 and for one teaching foreclose the use of
22 that reference as a primary reference against

1 all or most of the limitations of the
2 independent claims.

3 That's a very specific issue that we
4 don't believe has been addressed by the
5 Board.

6 We think it would be a prudent thing
7 for the Board to examine that issue in this
8 case. This case presents perfect facts to be
9 able to use it as a vehicle for that
10 analysis. And we think it would be prudent
11 and helpful to the Board to receive the
12 parties' application of Advanced Bionics and
13 Becton, Dickinson factors to the facts of
14 this case to help the Board resolve and
15 develop 325(d) in the facts of this
16 particular case.

17 And with that, I pause for any
18 questions.

19 THE BOARD: No questions at this
20 time.

21 I'd like to hear from our Patent
22 Owner.

1 MR. BISENIUS: Thank you, Your
2 Honor. This is Patrick Bisenius on behalf of
3 Patent Owner Apple Inc.

4 With all due respect, pretty much
5 all the arguments advanced by Petitioner's
6 counsel right now are on the merits of
7 whether or not the Board should
8 discretionarily deny under 325(d) and not
9 actually getting to the issue that this call
10 is about, which is whether they should be
11 afforded extra briefing in order to address
12 the 325(d) argument.

13 The fact that 325(d) would have been
14 raised by the Patent Owner was completely
15 foreseeable. The Rothkopf reference is cited
16 on the face of the patent with a star next to
17 it, indicating that the examiner had
18 identified it and it was applied in a
19 rejection. It was not applied to all of the
20 claims during that rejection, but it was
21 applied to some of the claims during that
22 rejection.

1 There's clear case law, informative
2 case law that's been identified in the Patent
3 Owner's preliminary response, Unified Patents
4 versus Berman, which is clear that as long as
5 the examiner had applied the reference at
6 some point during examination even if it was
7 not applied to all claims, this was a strong
8 indicator that 325(d) should apply.

9 All of this is foreseeable, and the
10 Petitioner chose not to address this issue in
11 the Petition. Instead they falsely or
12 incorrectly asserted that none of the
13 references had been considered during
14 examination. This is really just an attempt
15 by the Petitioner to exceed their word count
16 limit by having extra briefing after they've
17 already seen the arguments from the Patent
18 Owner on an issue that was completely
19 foreseeable and should have been addressed in
20 the Petition.

21 With respect to this alleged novel
22 new question that the Board has never

1 addressed before, the Board actually has
2 addressed this issue, the case I just
3 mentioned. Unified Patents versus Berman,
4 this is IPR2016-01571, Page 10.

5 It's an informative position by the
6 PTAB and it's clearly expressed that as long
7 as the examiner has reviewed that specific
8 reference and applied it in a rejection, it
9 does not matter that it was not applied to
10 all rejections of all claims.

11 This is supported by another case
12 cited in a preliminary response, Monolithic
13 Power Systems versus Altera Semiconductor
14 [phonetic]. In that case, the reference was
15 not applied in any rejection, but it was
16 discussed in the file history as being a
17 relevant reference. And so, therefore, the
18 Board considered that the examiner had
19 thoroughly reviewed that reference and
20 considered it when allowing the claims.

21 Furthermore, not mentioned by
22 Petition's counsel is the fact that this

1 Rothkopf reference is the basis of an
2 anticipation ground in the Petition, and then
3 it serves as the only primary reference for
4 all of the other obviousness grounds.

5 And, furthermore, it -- in their
6 obviousness grounds, Rothkopf is relied upon
7 solely for Element 1(f), which is one of the
8 elements that the examiner identified was
9 missing from the prior art.

10 But even with respect to that
11 element, the obviousness grounds adding any
12 additional secondary references really have
13 no bearing because the Petitioner relies on
14 this already considered reference alone.

15 All of that is beside the point.
16 All of this could have been addressed in the
17 Petition as this is simply an instance where
18 the Petitioner wanted to have extra word
19 count and so it brought the issue and wanted
20 the Board to second guess the Petition
21 already made by the examiner.

22 That's my presentation.

1 THE BOARD: Thank you.

2 Mr. Cannon, any response?

3 MR. CANNON: Yes, Your Honor. I'd
4 like to just start with this idea that the
5 examiner already considered the issue.
6 Counsel just mentioned that Rothkopf was an
7 anticipation ground in the Petition, and
8 that's true. Examiner never considered it an
9 anticipation reference.

10 The examiner considered it for one
11 teaching, a very minor teaching of a
12 dependent claim. That's precisely the issue
13 here. The Board's precedential opinions in
14 Advanced Bionics and Becton, Dickinson, they
15 talked about looking at what the examiner
16 actually analyzed in doing a substantive
17 analysis, which is not what Apple is trying
18 to accomplish here.

19 I want to talk about Unified Patents
20 and Monolithic Power. Unified Patents is a
21 pre-Advanced Bionics and pre-Becton,
22 Dickinson case. They clearly don't apply

1 those precedential factors.

2 In addition, the file history shows
3 that there was substantive examination of the
4 primary reference, Russell, to reject
5 independent claims. There was a rejection of
6 original Claims 1, 2, and 4 over Russell.
7 There was an interview summary that evidence
8 of consideration of Russell for newly added
9 claims. There was a claim-by-claim analysis
10 where the Board concluded Russell was
11 considered previously by the Office with
12 regards to Claims 2 through 8 and 10 through
13 16.

14 So it's very clearly different from
15 this case, and it's not -- it's clearly not
16 the same case. The Board has never
17 considered the issue that is presented by
18 Apple in its POPR.

19 With respect to Monolithic Power
20 Systems, that one is completely inapposite to
21 this case. It's a case where a reference was
22 discussed eight times in the specification

1 and the Board found that that ample
2 discussion of the reference put the reference
3 in front of the examiner for purposes of
4 325(d).

5 That's not a situation we have here.
6 It's simply an inapplicable case.

7 This is a case where it's a new
8 issue. I think it deserves a lot of
9 development, and it would be a good thing for
10 the Board to consider the question and
11 consider it with a fuller briefing on the
12 applicable Becton, Dickinson factors and
13 Advanced Bionics. That has not occurred to
14 this stage.

15 For those reasons, we ask for a rely
16 on the issue.

17 THE BOARD: Let me ask you a
18 question. I'm not sure that this came out,
19 but I definitely want to hear your response.

20 Do you agree that Rothkopf was --
21 your Rothkopf reference was before the
22 examiner?

1 MR. CANNON: Yeah. I think that's
2 the first thing I said in my first thing is
3 that Rothkopf was before the examiner. It
4 was considered in a first interview, office
5 interview program. And it was on a form,
6 kind of a one-line form, and it was applied
7 to Dependent Claim 22 for the --

8 THE BOARD: I understand your
9 argument.

10 (Reporter clarification.)

11 THE BOARD: It was Mr. Cannon and
12 then this is Judge Barrett.

13 Okay. Yes. So I just wanted to
14 confirm that there was no dispute that the
15 reference in the Petition was the reference
16 before the examiner.

17 I understand your arguments about
18 the quantity of the consideration, but I just
19 wanted to get that point across.

20 Let me -- let me, if I dare ask
21 Patent Owner, do you have anything briefly to
22 wrap this part up?

1 MR. BISENIUS: Just that all of
2 these arguments should have and could have
3 been addressed --

4 (Reporter clarification.)

5 MR. BISENIUS: This is Patrick
6 Bisenius for the Patent Owner.

7 Those were all issues that should
8 have and could have been addressed in the
9 Petition.

10 THE BOARD: Okay. Thank you.

11 So I think we've wrapped up that
12 issue and then if I'm not mistaken, we still
13 have the issue of the claim construction.

14 MR. CANNON: That's right, Your
15 Honor. I'm ready to talk about that.

16 (Reporter clarification.)

17 THE BOARD: Yes, Mr. Cannon. Go
18 ahead.

19 MR. CANNON: Ted Cannon. I'm going
20 to address the issue of the alleged
21 inadequacy of the means-plus claim
22 construction. This is a shorter issue and

1 I've got about two minutes on this.

2 Apple unforeseeably argued that
3 Masimo asserted that carrier member is a
4 means-plus-function limitation but that
5 Masimo did not identify the function or
6 corresponding structure.

7 The reason that that was an
8 unforeseeable argument is that Masimo spent a
9 lot of analysis on the carrier member
10 limitation and actually provided enough
11 analysis whether it's a means-plus-function
12 limitation or not.

13 Now, of course, there's no issue if
14 the carrier member is not a
15 means-plus-function limitation because
16 there's no need to identify structure or
17 function in that situation. So we put
18 forward the possibility of that and the
19 possibility of the Board reaching that
20 conclusion.

21 We also addressed the possibility
22 that it is a means-plus-function limitation.

1 And under that circumstance, we sufficiently
2 identified function and structure.

3 Now, Page 10 through 12 of the
4 Petition, the Petition identifies carrying or
5 supporting electrodes to be the function of
6 the carrier member. And on Page 10, the
7 Petition identifies structure for the, quote,
8 carrier disclosed in the specification and
9 says the disclosed carrier may be the claimed
10 carrier member.

11 Now, what Apple points out is a
12 statement in our Petition where we say that
13 the specification does not use the specific
14 claimed phrase "carrier member" or associate
15 that specific phrase with any structure.

16 So that raises the possibility that
17 there might be an indefiniteness problem.

18 Now, what Apple ignores is that
19 there's the Intel versus Qualcomm
20 precedential case from the Federal Circuit,
21 which is 21 F 4801813 through 14 Federal
22 Circuit 2021 in which the Federal Circuit

1 said that the Board should attempt to resolve
2 the patentability of a claim even when a
3 missing structure may make the claim
4 indefinite.

5 So consistent with that case, Masimo
6 actually provided an alternative construction
7 or a construction for purposes of this IPR or
8 purposes of this Petition even if the Board
9 did consider it to be a potentially
10 indefinite issue where it's inconsistent with
11 Intel versus Qualcomm. Even in that
12 circumstance, the Board should attempt to
13 have a construction for purposes of the IPR
14 and institute on that basis.

15 And that is my -- that's our
16 presentation for that -- for that portion of
17 it.

18 THE BOARD: Okay. Let me hear from
19 Patent Owner.

20 MR. BISENIUS: Thank you. This is
21 Patrick Bisenius on behalf of Patent Owner.

22 Once again, those are all issues

1 that should have and could have been raised
2 in the Petition.

3 Just to be clear, the issue of
4 construction of the term "carrier member"
5 under 112 Apple was raised by the Petitioner,
6 therefore, totally foreseeable and addressed
7 in the Petition. And Patent Owner merely
8 responded to the assertions made by the
9 Petitioner in the Petition that carrier
10 member is required to be construed under
11 112(f) and that -- and Petitioner's assertion
12 that there is -- the specification does not
13 provide any structure corresponding to a
14 carrier member.

15 All of this additional case law that
16 Petitioner has just identified on the call
17 could have been identified in the Petition.
18 This was completely foreseeable. That's it.

19 THE BOARD: Right. Thank you.

20 Mr. Cannon, anything in response?

21 MR. CANNON: Yes, very briefly.

22 And, you know, Your Honors can look at the

1 Petition. I'm not going to belabor it.

2 We just disagree about this notion
3 that we said that it has to be construed as a
4 means-plus-function limitation. We provided
5 alternatives where it could be construed in
6 that manner, but I believe what we actually
7 did -- and you can look to see if this is
8 accurate because I'm not quoting it directly,
9 but I believe what we did is we said that
10 there are cases where the word "member" has
11 been construed as means-plus function. And
12 in those cases, there's requirements to go
13 through the analysis of the
14 means-plus-function analysis.

15 But even in that circumstance, we
16 believe the Intel versus Qualcomm case is
17 really controlling here. It doesn't end the
18 inquiry. If you decide that maybe it's
19 indefinite limitation, you should still
20 decide whether you can have a construction
21 for purposes of the IPR which is what we
22 provided.

1 THE BOARD: Okay. Patent Owner, any
2 last words?

3 MR. BISENIUS: No, Your Honor.

4 THE BOARD: Thank you.

5 (Reporter clarification.)

6 MR. BISENIUS: That was Patrick
7 Bisenius on behalf of the Patent Owner again.

8 THE BOARD: Okay. So I think --
9 this is Judge Barrett again -- I think that's
10 all the issues.

11 Stay on the line. I'm going to put
12 you on hold and confer with my fellow judge
13 and we'll come back on in a few minutes.

14 (Recess taken.)

15 THE BOARD: All right, everybody.
16 This is Judge Barrett.

17 I don't think we're going to be able
18 to rule from the bench today. I'd like to
19 think about this and I'd like to see the
20 transcript.

21 How quickly can we have that
22 returned?

1 MR. CANNON: This is Ted Cannon.

2 I'm searching an e-mail right now to
3 find out when we had asked for it just to be
4 sent to us.

5 Unless the court reporter knows?

6 THE COURT REPORTER: Yes, it's for
7 three-day delivery. I'm going to send a
8 rough draft today and then final in three
9 days.

10 MR. CANNON: So that would be
11 Monday; is that correct?

12 THE COURT REPORTER: Yes.

13 MR. CANNON: We can do it Monday
14 under the current schedule unless Your Honors
15 want it expedited further. I think we could
16 do that.

17 THE BOARD: I think Monday will be
18 fine.

19 So another question for both
20 parties, if we do allow briefing -- and
21 that's an if -- how many pages -- I would
22 order briefing by both sides. It's not going

1 to be one sided.

2 How many pages for each of the
3 cases, each of two cases, and how much time
4 do you need?

5 Start with Petitioner.

6 MR. NELSON: For Petitioner -- this
7 is Philip Nelson for Petitioner.

8 On the 634 case, our thought was to
9 request 12 pages of briefing. The entire 50
10 -- over 50-page brief was spent on the 325(d)
11 issue by Apple. So I know it's a little
12 longer than sometimes you allow, but they
13 raised a lot of, we think, false issues, so
14 we're going to request 12 pages.

15 THE BOARD: And what about the --

16 MR. NELSON: And we can get that
17 done in a week and a half.

18 THE BOARD: Okay. And what about
19 the 635?

20 MR. CANNON: Yeah, this is Ted
21 Cannon. Much simpler issues, we can do it in
22 five pages and in a week.

1 THE BOARD: Patent Owner, what do
2 you think?

3 MR. JHURANI: This is Karan Jhurani
4 for Patent Owner.

5 And as to the 625 IPR or 6- --
6 excuse me -- 634 IPR, given the
7 foreseeability of the arguments here, we do
8 not believe there's any reason to grant
9 12 pages. That is quite a bit longer than
10 anything that has been granted in the recent
11 past.

12 Comparison to the Petition or --
13 excuse me -- to the Patent Owner Response, I
14 don't think that that is a good benchmark to
15 use here.

16 The number of pages used to advance
17 our 325(d) argument isn't material and they
18 had words available.

19 So we disagree and think that 12 is
20 egregiously long and that none of this should
21 -- and this should be much more limited, if
22 at all, granted.

1 So we'll leave it up to the Board,
2 but certainly 12 seems too high for us.

3 As to timing, commensurate timing I
4 think would make sense. If Petitioner is
5 requesting a week and a half, we would like
6 the same.

7 THE BOARD: Okay.

8 MR. BISENIUS: This is Patrick
9 Bisenius for Patent Owner.

10 On the 0635, I believe three pages
11 would be sufficient and the timing of a week
12 sounds about right to me.

13 THE BOARD: Okay. Anything else we
14 need to address while we're on the call
15 today?

16 Mr. Cannon?

17 MR. CANNON: I don't believe so.
18 This is Ted Cannon.

19 And Petitioner, we don't believe
20 anything else needs to be addressed.

21 THE BOARD: Patent Owner, anything
22 else?

1 MR. JHURANI: This is Karan Jhurani
2 for Patent Owner. Nothing further on my end.

3 THE BOARD: All right. Well, then I
4 want to thank everybody for your time today.
5 And we'll take a look at that transcript when
6 it comes in and issue an order as soon as we
7 can.

8 Have a lovely day, everyone.

9 MR. CANNON: Thank you.

10 MR. JHURANI: Thank you, Your Honor.

11 (Time Noted: 2:59 p.m.)

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1 CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

2 I, Amanda Gorrono, the officer
3 before whom the foregoing hearing was taken,
4 do hereby certify that the foregoing
5 transcript is a true and correct record of
6 the hearing; that said hearing was taken by
7 me stenographically and thereafter reduced to
8 typewriting under my direction; and that I am
9 neither counsel for, related to, nor employed
10 by any of the parties to this case and have
11 no interest, financial or otherwise, in its
12 outcome.

13 IN WITNESS WHEREOF, I have hereunto
14 set my hand this 19th day of July, 2023.

11

12

13

14

15

16

AMANDA GORRONO, CLR

17

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19 The State of New York

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21 My Commission No. 01G06041701

22 Expires: 01/07/2027

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