

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

KAHOOT! ASA & KAHOOT EDU, INC.,
Petitioner

v.

AVIEL D. RUBIN,
Patent Owner

Inter Partes Review Case No. IPR2023-00693
Patent No. 9,064,376

**PETITIONERS' SUR-REPLY IN OPPOSITION TO PATENT OWNER'S
REVISED MOTION TO AMEND U.S. PATENT NO. 9,064,376**

Mail Stop Patent Board
Patent Trial and Appeal Board
P.O. Box 1450
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June 28, 2024

LIST OF EXHIBITS

1001	Rubin, U.S. Patent 9,064,376 (“the ’376 Patent”)
1002	Declaration of Sigurd Meldal, Dr.Scient.
1003	Prosecution History File Wrapper of the ’376 Patent (excerpts)
1004	U.S. Patent 9,497,565 (“Zha”)
1005	CN 2013/10674692 (“Zha-Priority-Application”)
1006	Certified English translation of the <i>Zha-Priority-Application</i>
1007	U.S. Patent Pub. 2015/0011318 (“Takahashi”)
1008	PCT/JP2012/007595 (“Takahashi-Priority-Application”)
1009	Certified English translation of <i>Takahashi-Priority-Application</i>
1010	U.S. Patent Pub. 2014/0006485 (“Tsushima”)
1011	U.S. Patent 9,591,083 (“Gumbula”)
1012	U.S. Patent Pub. 2012/0017236 (“Stafford”)
1013	U.S. Patent 9,330,531 (“Wakeford”)
1014	Patent Owner’s Preliminary Infringement Contentions in <i>Rubin v. Kahoot! ASA et al.</i> , Civil Action No. 6:22-cv-00236 (W.D. Tex.) (Sept. 28, 2022)
1015	U.S. Patent Pub. 2012/0253841 (“’841 Application”)
1016	U.S. Patent Pub. 2012/0209770 (“’770 Application”)
1017	U.S. Patent Pub. 2014/0121015 (“Massing”)
1018	U.S. Patent Pub. 2006/0058088 (“Crawford”)
1019	March 10, 2023 Email from W.Beard (Petitioner to E.Benisek (PO)
1020	March 14, 2023 Email from E.Benisek (PO) to D.Adams (Petitioner)
1021	FedEx Proof of Delivery of Service Copy of Petition
1022	Declaration in Support of Motion for <i>Pro Hac Vice</i> Admission (Brian C. Banner)
1023	U.S. Patent Pub. No. 2012/0240203 (“Kling”)

1024	L. St. Clair <i>et al.</i> , “Password Exhaustion: Predicting the End of Password Usefulness,” ICISS 2006, LNCS 4332, pp. 37-55 (Springer-Verlag Berlin Hiedelberg 2006)
1025	U.S. Patent No. 7,865,950 (“ <i>Lipetz</i> ”)
1026	Deposition Transcript of Patent Owner’s expert Dr. Patrick Traynor – February 15, 2024 (condensed)
1027	Second Declaration of Sigurd Meldal, Dr. Scient
1028	P. Traynor <i>et al.</i> , “From Mobile Phones to Responsible Devices,” Security Comm. Networks 2011, 4:719–726, (Wiley Online Library, August 28, 2010)
1029	Third Declaration of Sigurd Meldal, Dr. Scient
1030	U.S. Patent Pub. No. 2013/0023241 (“ <i>Lim</i> ”)
1031	U.S. Patent No. 7,676,829 (“ <i>Gui</i> ”)
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I. CLAIMS 26 AND 41 LACK WRITTEN DESCRIPTION SUPPORT

The '995 application does not disclose that authentication information for the first device is not device specific. Paper 27 ("Opp."), 1. PO contends that the authentication information for the first device is a "password," which PO appears to allege is never device specific. Paper 30 ("Reply"), 2. But the '995 application does not state that a password is always device independent. In fact, PO contends that *Kling*'s password for the second device is device specific. Reply at 14; Ex-2009 ¶162.

II. CLAIM 28 LACKS WRITTEN DESCRIPTION SUPPORT

"Sensitive information" in every embodiment (poker, banking, healthcare) is shared beyond the second device. Opp., 1-2; Ex-1029 ¶¶11-12. PO does not mention the banking and healthcare embodiments, and PO admits the poker hole cards are shared with the first device. Reply, 2-3. PO's argument that the information is no longer sensitive when sharing occurs (*id.*) ignores the claim language, which requires that the second subset of information is only shared with the first device. Claim 28 does not contemplate sharing at a later time or that the sensitive information may become not sensitive. Thus, there is no written description support for Claim 28 under PO's interpretation.

III. CLAIMS 32 AND 35 ARE INDEFINITE

PO does not dispute that "the information displayed on the respective devices" lacks antecedent basis. *See* Reply, 3-4. PO also does not respond to Petitioner's

argument that “the information” could ambiguously refer to one or more types of “information” in Claim 26. Reply, 2-3; Ex-1029 ¶¶15-19. PO argues the claim scope “is easily ascertainable by a POSITA” and that “the information” may be any one of (1) “the online poker table on the first device and the hole cards on the second device,” (2) “the hand displayed on the first device” and “the hole cards on the second device,” (3) “hole cards [at the second device] and . . . community cards [at the first device],” (4) “the display of the application running simultaneously on the two devices such as online poker game.” Reply, 3-4. PO’s expert offers yet another possibility of claim scope: “it is obvious to a POSITA that ‘the information displayed on the respective devices’ refers to the online application, such as online poker or banking, which is the object of Dr. Rubin’s invention.” Ex-2009 ¶83.

These varied explanations confirm this limitation is ambiguous and its scope cannot be determined with reasonable certainty. *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014) (indefinite when scope cannot be determined with reasonable certainty). Moreover, Claims 26, 30, 32, and 35 do not recite *displaying* any information other than a graphical identifier and a graphical indicator. PO’s argument assumes information has been displayed although no limitation requires displaying information. This adds to the ambiguity of the claims because it is unclear if the claims require displaying other information.

IV. NEW “THEREBY” CLAUSE DOES NOT LIMIT THE CLAIMS

PO's expert confirms "protecting the second subset of the information" in the "thereby" clause is *simply the result of* "transmitting the second subset of the information to the second device, the second subset of the information includes information not transmitted to the first device":

The claims require that a second subset of information is sent by the application to only the second device. *This isolation of information provides protection to the second subset of information* because it is not exposed to malware that has potentially compromised the first device.

Ex-2009 ¶84 (emphasis added); *see also* Ex-1032 at 186:11-20, 184:18-186:20. Dr. Meldal agrees. Ex-1029 ¶¶27-28. The thereby clause (and preamble) should be given "no weight" because they "do not contain any limitations not inherent to the process found in claims" 26 and 41. *Texas Inst. Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1172 (Fed. Cir. 1993).

The facts here are distinguishable from *Hoffer v. Microsoft Corp.*, 405 F.3d 1326 (Fed. Cir. 2005), and *Amarr Co. Requester & Cross-Appellant v. Wayne-Dalton Corp. Pat. Owner & Appellant*, No. 2011-005126, 2011 WL 2491036 (B.P.A.I. June 20, 2011). In *Amarr* the "whereby" clause did not "simply provid[e] the functional result of all of the features of the recited [claim]." *Amarr*, 2011 WL 2491036, at *6. Instead, it "impart[ed] a further structural requirement" to the recited structure. *Id.* In *Hoffer*, the whereby clause recited a "capability [that] is more than the intended result of a process step; it is part of the process itself." *Hoffer*, 405 F.3d

at 1329. In contrast, the “transmitting the second subset . . .” limitations in Claims 26 and 41 already result in protecting the second subset of the information. Ex-2009 ¶84. And it does not impart a structure limitation to the claim.

V. CLAIM INTERPRETATION: 26[D] “PROTECTING INFORMATION”

PO makes repeated arguments suggesting a claim interpretation of the “thereby” clause that is not supported by the intrinsic record. Specifically, PO argues that “if the information sent [to] the second device is not ultimately protected from malware on the first device then the invention is not achieved.” Reply, 5. This argument is repeated throughout PO’s reply and in Dr. Traynor’s declaration. *See id.* at 10 (*Zha* 26[d]), 11-12 (*Zha* claim 28), 18 (*Takahashi* 26[d]); Ex-2009 ¶¶85, 102-103, 109-111, 186. These arguments attempt to re-write the thereby clause by inserting the word “forever”: “thereby forever protecting the second subset of the information not transmitted to the first device from potential malware on the first device.” Notably, PO had two opportunities to amend the claims and did not include the word “forever” in the amended limitation. The plain meaning of the thereby clause simply requires some protection, not complete or everlasting protection.

Moreover, PO’s interpretation would exclude the preferred embodiment, which “is rarely, if ever, correct.” *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996). The “preferred embodiment” is a poker game played with a first and second device. Ex-1001, 2:51-54, 3:9-22. The game server may be

unable to communicate with the second device when there is a “network connection disruption.” Ex-1001, 4:37-63. The game server can indicate to the first device that the second device is unavailable. Ex-1001, 4:64-5:6. The user—using the first device—“can elect to switch to not using two devices.” *Id.* Consequently, the preferred embodiment would allow an attacker that gains access to the first device access to the second subset of information (hole cards) in this scenario. There is simply no meaningful difference between the ’376 Patent’s preferred embodiment and the cited prior art systems. Thus, under PO’s reasoning, “the invention would not be achieved” *by the preferred embodiment itself*. Reply, 5; Ex-2009 ¶85. PO’s flawed interpretation should be rejected.

VI. PO’S TEACHING AWAY ARGUMENTS FAIL THE APPLICABLE LEGAL TEST

PO makes various teaching away arguments. All fail to meet the relevant legal test. A reference does not teach away if it “does not criticize, discredit, or otherwise discourage investigation into the invention claimed.” *Galderma Laboratories, L.P. v. Tolmar, Inc.*, 737 F.3d 731, 739 (Fed. Cir. 2013) (quotations omitted). In each of PO’s “teaching away” arguments, PO points to an alternative embodiment in the prior art reference and suggests that the disclosure of alternatives teaches away. *See* Reply, 12 (*Zha* claim 28 (sensitive information shared only with second device)); 9 (*Gui* 26[c] (different passwords)); 14-15 (*Lim* 26[c] (non-device specific authentication information)); 18 (*Takahashi* 26[d] (protecting information)). None

of the references criticize, discredit, or otherwise discourage investigation into the features in the revised substitute claims. Moreover, a reference must be considered for all that it teaches. *In re Mouttet*, 686 F.3d 1322, 1331 (Fed. Cir. 2012).

VII. ZHA GROUNDS

A. PO Fails to Address Grounds 1-8: These grounds are based on “*Zha*, other prior art cited in the Petition (‘Paper 2’), and the POSITA’s general knowledge (‘PGK’).” Opp, 4. PO addresses *Zha* combined with *Kling*, *Lipetz*, and *Gui*, a combination Petitioner did not advance. Reply, 6-10. *Kling*, *Lipetz*, and *Gui* provided evidence of a POSITA’s general knowledge that “a user could use different authentication information (i.e., different passwords) to login to the *Zha* microblog application at two terminals.” Opp., 6. Reliance on a POSITA’s knowledge as evidenced by the prior art is legally permissible. *Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330, 1338 (Fed. Cir. 2020) (“[T]he Board relied on expert evidence, . . . corroborated by [prior art], in concluding that pipelining was not only in the prior art, but also within the general knowledge of a skilled artisan.”). PO does not dispute or credibly rebut Petitioner’s extensive evidence demonstrating that a skilled artisan would have known about systems that use different passwords to log into the same online application (e.g., the microblog in *Zha*).

B. PO’s 26[c] Zha Argument Attacks Grounds Not Raised: PO’s arguments for *Zha* 26[c] address a ground Petitioner did not raise. Petitioner relies

on *Zha*'s authentication, i.e., logging into the microblog with two different devices. Opp., 5. The Board, PO's expert, and Dr. Meldal all agree that logging in via password authentication was well known. Paper 21 at 18-19 (Board's Preliminary Guidance); Ex-1024-001 (Dr. Traynor 2006 article: "[p]asswords are currently the dominant authentication mechanism..."); Ex-1029 ¶196 (Dr. Meldal: "it was well known by 2014 that password authentication could be used..."). PO does not seriously rebut the Board's conclusion (or Petitioner's evidence), but instead repeats its already-rejected argument that "*Zha* lacks any disclosure related to authenticating the user..." Reply, 6.

Petitioner relies on *Kling*, *Lipetz*, and *Gui* to corroborate Dr. Meldal's conclusions that (1) using different passwords for different devices was well within the POSITA's knowledge, and (2) a POSITA would use that knowledge to enhance *Zha*'s authentication process and improve security against malware. Opp., 5-6 (citing Ex-1029 ¶¶196-211). PO does not dispute that *Kling*, *Lipetz*, and *Gui* each disclose the use of two different passwords. Reply, 6-10. Instead, PO argues that these references teach a different authentication process from that claimed. *Id.* PO, however, ignores that Petitioner relies on *Zha*'s authentication of a connection from two devices combined with the prior art's teaching of using two different passwords for the two devices.

C. PO's 26[d] Argument Fails: PO's argument that *Zha* does not disclose

the “thereby” clause fails because it is not a limitation. *See* Section IV. Even if it were, *Zha* discloses protecting the second subset of the information. As Dr. Traynor admits, if the “second subset of information is sent by the application to only the second device[,] *[t]his isolation of information provides protection to the second subset of information...*” Ex-2009 ¶84 (emphasis added); *see also* Ex-1032 at 186:11-20, 184:18-186:20. Dr. Meldal agrees. Ex-1029 ¶¶27-28. *Zha* discloses “a server may send a private message *only to the cellphone* without sending the private message to the laptop computer or the desktop computer...” Ex-1004, 19:3-13 (emphasis added). Accordingly, private messages sent *only to the cellphone* (i.e., the claimed “second device”) are protected, as Dr. Traynor admits. Ex-2009 ¶84.

PO would have the Board ignore *Zha*’s express disclosure because an attacker that gains access to *Zha*’s first device could allegedly reconfigure the system to gain access to the private messages. Reply, 10-11. PO’s hypothetical scenario cannot change the fact that, while *Zha*’s system is configured to limit distribution of private messages to the cellphone—as expressly disclosed, those messages are protected because they are not sent to the other devices. *See* Ex-2009 ¶84; Ex-1029 ¶¶27-28.

D. *Zha* Expressly Discloses Claim 28: PO argues that *Zha* does not disclose “the sensitive information is only shared with the second device.” Reply, 11. As discussed above (*see* Section VII.C), *Zha* expressly discloses sending private messages “only to the cellphone.” Ex-1004, 19:3-13. PO ignores this express

embodiment and relies on a failed teaching away argument. *See* Section VI. PO's argument that *Zha* does not teach Claim 28 because it shares private messages beyond the second device must be rejected because each of the '376 Patent's embodiments also share sensitive information beyond the second device and, therefore, PO's interpretation would exclude those embodiments. *See* Section II. Finally, Petitioner does not argue that *Zha* only shares all the microblog interfaces in the single device embodiment. Reply, 11-12. As stated in its opposition, "Petitioner relies on *Zha*'s two-device embodiment..." Opp., 17.

VIII. ZHA GROUNDS 1-8 COMBINED WITH GUI

First, PO's argument that *Gui*'s authentication process does not teach 26[c] (Reply, 8-9) ignores that Petitioner relies on *Zha*'s authentication process combined with *Gui*'s teaching to use different passwords for different devices. Opp., 13-15. Second, PO's argument that *Zha+Gui* would allow a user to use the exact same password on both devices (Reply, 9) ignores that *Gui* teaches using a different password for mobile phones compared to desktop/laptop computers. Ex-1031, 9:11-17, 6:27-31, 6:65-7:6, 2:55-61, 2:20-29; Ex-1029 ¶¶237-45. Third, PO's teaching away argument related to *Gui* (Reply, 9) fails, as discussed above. *See* Section VI. Fourth, PO's argument that an attacker can use the same password on the second device is a strawman that ignores that Petitioner relies on *Gui*'s disclosure of using different passwords. Reply, 13-15. Fifth, PO's motivation to combine argument

(Reply, 9-10) fails because *Gui* provides an express motivation: “a user is able to be authenticated by the authentication system using the credential that is most appropriate for their access device.” Opp., 13-14 (citing Ex-1031, 2:24-29; Ex-1029 ¶¶ 243-45). Finally, PO cites to Dr. Traynor ¶100 as supporting the argument that “requiring a second different password on the second device adds nothing but additional operational complexity” (Reply, 10), but Dr. Traynor’s declaration does not support this attorney argument.

IX. KLING, LIM, AND A POSITA’S GENERAL KNOWLEDGE (“PGK”)

A. Kling+Lim+PGK Teach 26[d]: Petitioner’s evidence shows “[a] POSITA would modify *Kling* in one of two alternative ways.” Opp., 22. For **26[d]**, PO fails to address Petitioner’s first modification, i.e., “mov[ing] *Kling*’s mobile device login steps ... earlier in time to coincide with the PC login steps.” *Id.*; *see also*, Reply, 12-14. Thus, Petitioner’s first modification is un rebutted.

Petitioner’s alternative modification replaces *Kling*’s authentication with *Lim*’s. Opp., 24. PO incorrectly argues that *Lim* does not authenticate two devices. Reply, 13. *Lim* teaches that both the mobile terminal and user terminal are authenticated. Ex-1030 ¶¶ [0038]-[0041] (“The user of the mobile terminal 100 then authenticates with system 200 by providing an identifier/password...”), ¶[0077] (“the user terminal 50 has been successful in the authentication”)); *see also* Opp., 20-21 (citing Ex-1030 and Ex-1029 ¶¶63-66). PO misunderstands *Lim*’s disclosure

that “user terminal 50 itself ... does not perform authentication.” Reply, 13 (emphasis omitted). This passage simply recognizes that *Lim*’s authentication system (not the user terminal) performs authentication. Ex-1029 ¶¶66-69.

B. *Kling+Lim+PGK Teach 26[c]*: The Board preliminarily rejected PO’s argument that *Kling* “does not disclose using two different passwords to authenticate with *Kling*’s banking application.” Paper 21 at 14-15. PO does not respond to the Board’s guidance or to Petitioner’s evidence confirming that “PO is incorrect that *Kling*’s login by the mobile device uses device-specific authentication information.” Opp., 19-20. PO’s next argument that *Lim* teaches away from **26[c]** (Reply, 14-15) fails, as discussed above. *See* Section VI. PO admits that *Lim* discloses the use of non-device specific passwords for authentication. Reply, 14-15. PO is wrong that *Lim* only discloses authentication of one device. *See* Section IX.A.

C. *Kling+Lim+PGK Teach Claim 28*: PO’s argument that *Kling*’s sensitive information has been shared with the first device misunderstands Petitioner’s grounds. Petitioner provided evidence and explained that *Kling*’s “transaction confirmation web page information [Arrow #4]” is the “sensitive information” and it “is only shared with the user’s mobile device to prevent malware from capturing and modifying the desired transaction.” Opp., 28-29 (citing Ex-1029 ¶¶143-47). As Dr. Meldal explains (and PO does not rebut), “[t]he invitation enabling the approval of a transfer of funds and providing the means to do so, such

as transaction identifiers or cookies, (the ‘OK’ response) is clearly sensitive because it provides the ability to finally perform a critical transaction such as transferring money to an external account.” Ex-1029 ¶145. That is, *Kling* expressly discloses that the ability to approve the transaction is only sent to the second device.

X. TAKAHASHI GROUNDS

The Board preliminarily rejected PO’s arguments related to the *Takahashi* grounds and **26[c]** and **26[d]**. *Compare* Reply, 16-18, with Paper 21 at 24-27. The Board’s guidance is correct. Opp., 32-34. For **26[d]**, PO’s new teaching away argument (Reply, 18) fails, as discussed above. *See* Section VI.

Further, PO misunderstands Petitioner’s grounds based on *Gui* combined with the *Takahashi* grounds. Reply, 17-18. Petitioner relies on *Gui* for its disclosure of using different passwords to access the same user account. Opp., 34-35. PO’s arguments that (1) “*Gui*’s authentication is not carried out by the server” and (2) “*Gui*’s authentication system can use the same login information on the second device” (Reply, 17), while wrong, are irrelevant. PO’s argument that *Gui*’s passwords are the same ignores *Gui*’s express teaching that different devices may use different passwords. Ex-1029 ¶¶278-87. *Gui* teaches this is advantageous because it is more difficult to enter certain passwords on a mobile device compared to a desktop computer. Ex-1031, 6:28-43. PO’s argument that *Gui*’s two passwords are less user friendly than *Takahashi*’s two passwords makes little sense. Reply, 18.

Date June 28, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the above-captioned Petitioner's Sur-Reply in Opposition to Revised Motion to Amend was served in their entirety on June 28, 2024, upon the following parties by sending a copy via email to the following addresses:

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