

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K/S HIMPP,

Petitioner

v.

BRAGI GmbH,

Patent Owner

Case No. IPR2023-00901

Patent No. 10,635,385

PATENT OWNER'S SURREPLY TO PETITIONER'S REPLY

Mail Stop "PATENT BOARD"
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	HENSEN-VIDEO IS NOT PRIOR ART TO THE '385 PATENT	2
	A. PO Properly Compared the Bragi Disclosures with the Hensen-Video to Determine Whether They Disclose the Same Subject Matter under 35 U.S.C. § 102(b)(1)(B).....	2
	B. Bragi's Prior Disclosures Disclose the Same Subject Matter As the Hensen-Video and Therefore Disqualify Hensen-Video As Prior Art under 35 U.S.C. § 102(b)(1)(B).....	4
	C. The Board Should Prohibit Petitioner from Attributing the Teachings of Hensen-Video to Hensen-Kickstarter.....	6
III.	THE CHALLENGED CLAIMS REMAIN PATENTABLE OVER THE ALLEGED PRIOR ART	9
	A. Petitioner's Prior Art Fails to Disclose the Claims of the '385 Patent.	9
	B. The Board Should Give Little Weight to Petitioner's Expert Declaration.	15
IV.	OBJECTIVE INDICIA OF NONOBVIOUSNESS HAVE A NEXUS TO THE '385 PATENT.....	16
	A. The Industry Praised the Embodiment of the '385 Patent, and the Praise Relates to the Specific Claims of the Patent.....	17
	B. The Praise Given Relates to the "Visual Representation" Aspect of the '385 Patent.	19
	C. Petitioner Does Not Rebut How the Failed FreeWavz Product Evidences Nonobviousness.	20
V.	CONCLUSION.....	21

I. INTRODUCTION

Petitioner has not carried its burden of proving that any of the Challenged Claims of the '385 Patent are invalid. Petitioner's key reference, the Hensen-Video, is not prior art to the '385 Patent, and its teachings cannot be attributed to the earlier-in-time Hensen-Kickstarter. This alone warrants rejecting all six of Petitioner's obviousness grounds. But even if the Board were to consider the Hensen-Video prior art, Petitioner has not established that its prior art combinations disclose or suggest all of the limitations in any of the Challenged Claims, and objective evidence of secondary considerations of nonobviousness confirms the Challenged Claims are patentable.

Petitioner's Reply arguments do little to cast doubt on these points. For the Hensen-Video, Petitioner argues that Patent Owner ("PO") applies the wrong legal test to determine whether the video is prior art. But that is not the case. In accordance with the PTO's guidance, Patent Owner's Response ("POR") compares PO's inventor-originated public disclosures ("Bragi Disclosures," Exs. 2005-2016) to the Hensen-Video and confirms these materials disclose the same subject matter relied upon by the Petition. For the disclosure of individual claim limitations, Petitioner contends that PO fails to address the actual teachings of the references and fails to draw the proper nexus for secondary considerations, neither of which is true. The

Board should therefore reject these arguments and confirm the patentability of the Challenged Claims.

II. HENSEN-VIDEO IS NOT PRIOR ART TO THE '385 PATENT

Section 102(b)(1)(B) provides that a reference published within a year of a patent's priority date is not prior art if the inventor previously publicly disclosed the same subject matter relied upon in the reference. Petitioner does not disagree that the Bragi Disclosures were made within a year of the '385 Patent's priority date and that they predate the Hensen-Video. Rather, Petitioner argues that PO applies the wrong test to determine whether the Bragi Disclosures and Hensen-Video disclose the same subject matter by comparing the Bragi Disclosures to the subject matter of the '385 Patent's claims rather than the Hensen-Video. *See* Reply, 3-6. But PO did in fact make the correct comparison, and the Bragi Disclosures and Hensen-Video cover the same subject matter Petitioner relies upon.

A. PO Properly Compared the Bragi Disclosures with the Hensen-Video to Determine Whether They Disclose the Same Subject Matter under 35 U.S.C. § 102(b)(1)(B).

Whether the prior-art exception for inventor-originated disclosures applies is assessed by comparing the inventor disclosure with the purported prior art reference to determine whether they disclose the same subject matter. M.P.E.P. §§ 717.01(b)(2) and 2153.02. Section V.A.2. of the Patent Owner's Response ("POR") expressly compares the subject matter from Bragi's prior public disclosures to the

Hensen-Video by identifying and confronting the specific subject matter that Petitioner alleges is taught by Hensen-Video. *See, e.g.*, POR, 24 (“Bragi’s public disclosures before September 10, 2015 of The Dash wireless earbuds comprised the same subject matter cited in the Petition and allegedly disclosed by Hensen-Video.”), 27 (“Petitioner alleges that Hensen-Video discloses a software application executing on a smartphone computing device.”), 29 (“Petitioner alleges that Hensen-Video discloses that a software application is configured to display screen displays on the display referenced with regard to limitation [1B].”), 30 (“Petitioner alleges that Hensen-Video discloses a remote control device that ‘allows a user to interact with the earpieces by sending commands to the earpieces and displaying information received from the earpieces.’”), and 36 (“Petitioner alleges that Hensen-Video discloses ‘that the remote control device includes a software application that provides for tracking the one or more physical activities using the physiological sensor.’”).

Petitioner does not allege that any of the POR’s characterizations of the Hensen-Video’s subject matter, which the Petition’s obviousness grounds rely upon, are inaccurate or misleading. Indeed, these are straightforward recitations of the subject matter from the Hensen-Video that Petitioner chose to describe and rely on. To the extent that PO analyzes whether the Bragi public disclosures teach the same subject matter as the ’385 Patent’s claim limitations, PO does so in the context of

analyzing whether the Hensen-Video teaches these limitations in the way Petitioner alleges. *See* POR, 20-23.

B. Bragi’s Prior Disclosures Disclose the Same Subject Matter as the Hensen-Video and Therefore Disqualify Hensen-Video as Prior Art under 35 U.S.C. § 102(b)(1)(B).

As just explained, the POR details how the Bragi Disclosures and the Hensen-Video disclose the same subject matter for the purposes of § 102(b). *See* POR, 19-44. However, in addition to asserting that PO applied the wrong subject-matter test, Petitioner contends that the Bragi Disclosures and the relied-upon teachings of the Hensen-Video do not disclose the same subject matter because there are numerous differences between them. Reply, 6. But Petitioner is incorrect.

The subject matter comparison that § 102(b)(1)(B) calls for is not just *any* subject matter found between the prior public disclosure and intervening disclosure, but only the subject matter that Petitioner *relies upon* from the alleged prior art in forming its obviousness argument. M.P.E.P. § 2153.02 (“The exception in AIA 35 U.S.C. 102(b)(1)(B) applies to the subject matter in the intervening grace period disclosure being relied upon as prior art for a rejection under AIA 35 U.S.C. 102(a)(1)”).

The supposed differences between the Bragi Disclosures and the Hensen-Video do not pertain to any subject matter in the Hensen-Video *relied upon* for Petitioner’s obviousness grounds. Rather, the differences Petitioner cites relate to

immaterial factors such as “colors, icons, and arrangement and organization of menu options,” the “overall look and feel” of the application, and “outlines/silhouettes” versus “photorealistic depiction” in the interface. *See* Reply, 8-11. Petitioner also argues that another notable difference between the Bragi Disclosures and Hensen-Video is that the FreeWavz smartphone application (Hensen-Video) is an Android software application while The Dash application (Bragi Disclosure) is an iOS app. Reply, 8. But the Petition does not state that the type of operating system employed by the Hensen-Video supports the obviousness of any claim limitation of the ’385 Patent or differentiates the Hensen-Video from the Bragi Disclosures. And any such potential argument is undercut by the fact that FreeWavz was available for both Android and iOS devices. *See* Ex. 1007.

Besides the fact that these differences cited in its Reply are immaterial, Petitioner did not raise them in the Petition, so the Board should not consider them when deciding whether Hensen-Video is prior art. *Intelligent Bio-Sys. v. Illumina Cambridge*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“It is of the utmost importance that petitioners in . . . IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.’” (citing 35 U.S.C. § 312(a)(3)); Office Trial Practice Guide Update (August 2018), at 14-15. Accordingly, the Board should find that the Bragi

Disclosures and Hensen-Video disclose the same subject matter for the purposes of § 102(b) and disqualify Hensen-Video as prior art.

C. The Board Should Prohibit Petitioner from Attributing the Teachings of Hensen-Video to Hensen-Kickstarter.

Hensen-Kickstarter is a printed publication that Petitioner claims was posted on Kickstarter on November 22, 2014, before the '385 Patent's priority date and before the Bragi Disclosures were made. Ex. 1007. Hensen-Kickstarter is a short blog post that discloses general information about the FreeWavz earpiece system. *Id.* Petitioner contends that for its obviousness Grounds 4-6, the reference combinations are the same as those for Grounds 1-3, except Hensen-Kickstarter replaces Hensen-Video. Pet., 99. Further, Petitioner asserts in its Reply that unless otherwise stated its arguments for Hensen-Video apply equally to Hensen-Kickstarter. Reply, 1 n.2.

Petitioner cannot treat Hensen-Kickster and the Hensen-Video interchangeably because they are separate references with different teachings. *Compare* POR, 13-14 *with* POR, 16-18. In fact, Petitioner's combinations for Grounds 4-6 do not list Hensen-Video as a reference, so Petitioner cannot rely on it for these Grounds at all. *See Corephotonics, Ltd. v. Apple Inc.*, 84 F.4th 990, 1002 (Fed. Cir. 2023) ("[T]he Board is not permitted to entertain '[s]hifting arguments' but must, instead, reject any 'entirely new theory of prima facie obviousness absent

from the petition,’ if the petitioner attempts to inject such a theory into the proceeding post-petition.” (quoting *Wasica Fin. GmbH v. Cont’l Auto. Sys., Inc.*, 853 F.3d 1272, 1286 (Fed. Cir. 2017)). Nor can Petitioner sneak in a new invalidity theory by trying to import the teachings of the Hensen-Video into Hensen-Kickstarter, which was published almost a year earlier. *See* Exs. 1004 and 1007.

Besides not being asserted as a reference for Grounds 4-6, Hensen-Kickstarter does not disclose everything contained in the Hensen-Video.¹ Again, Hensen-Kickstarter is a minimal disclosure: it is a five-page blog post that gives a preview of the FreeWavz earpiece system and predates Hensen-Video by almost a year. *See* Ex. 1007. For Grounds 1-3, which list the Hensen-Video as a reference, Petitioner

¹ Though PO has responded to some of Petitioner’s grounds together, noting that Petitioner cites elements from Hensen-Video for Grounds 1-3 and then attributes some of these same elements (with no analysis) to Hensen-Kickstarter for Grounds 4-6, *see* POR, 44-45, this does not mean that PO agrees that Hensen-Kickstarter and Hensen-Video disclose *all* the same content. Rather, Hensen-Video discloses *some* contents of Hensen-Kickstarter, but Petitioner specifically relies on additional contents of Hensen-Video for Petition Grounds 1-3 that are not disclosed by Hensen-Kickstarter.

relies on Dr. Hensen's statements and explanations in the video as disclosing claim elements of the '385 Patent. *See, e.g.*, Pet., 58-68. Petitioner cannot now claim that the two references are coextensive by merely comparing screenshots from the Hensen-Video to the mockups and vague descriptions of functionality provided in Hensen-Kickstarter—without also mapping the elements of the Kickstarter to the language of the '385 Patent's claims. Pet., 99-106. In fact, the Kickstarter concedes that the FreeWavz Android and iOS apps were not completed at the time of its publication, meaning there were likely modifications to FreeWavz (and also the Kickstarter disclosure) in the year that elapsed between the Kickstarter publication and Hensen-Video.

Ultimately, Petitioner wants to rely on the teachings of the Hensen-Video with the priority date of Hensen-Kickstarter to sidestep the Bragi Disclosures and avoid § 102(b) disqualification. But the Board should not allow Petitioner to do this: Hensen-Video is not listed in the Petition as a reference for Grounds 4-6, and the disclosures of Hensen-Video and Hensen-Kickstarter are not the same.

III. THE CHALLENGED CLAIMS REMAIN PATENTABLE OVER THE ALLEGED PRIOR ART

A. Petitioner's Prior Art Fails to Disclose the Claims of the '385 Patent.

Even if the Board were to decide that Hensen-Video is prior art to the '385 Patent, Petitioner's reference combinations do not disclose or suggest all of the limitations in any of the Challenged Claims.² *See* POR, 44-57.

Limitation 1[D]. This limitation of the '385 Patent requires a "software application" that provides a user interface for a user "to interact with the at least one wireless ear piece." The Petition's relied upon combination of Hensen-Patent and Hensen-Video does not disclose this limitation. POR, 45. The Hensen-Patent does not disclose a software application, but merely "[a] stereo audio headphone apparatus." Ex. 2020 ¶ 101 (citing Ex. 1003, 13:55); POR, 45-46. Likewise, the

² PO first notes that Petitioner's arguments in Section III.B. of its Reply apply only to Grounds 1-3 as they address Hensen-Patent, Hensen-Video, and the LG Manual. These arguments do not apply to Hensen-Kickstarter and Petitioner's Grounds 4-6 because the teachings of Hensen-Video cannot be attributed to Hensen-Kickstarter for the reasons just explained. For Grounds 1-3, PO reasserts its arguments raised in the POR and addresses Petitioner's points raised in its Reply for individual limitations and claims.

Hensen-Video does not disclose an interface that interacts with “at least one wireless ear piece” by sending commands to the earpiece using a software application. *Id.*; *see also* Ex. 2020 ¶ 102. So the alleged combination of Hensen-Patent and Hensen-Video does not render obvious limitation 1[D].

Limitation 1[F]. The Petition fails to disclose limitation 1[F] because Hensen-Video, the only reference relied on for this limitation, does not include a visual representation of a wireless earpiece that indicates a function or property of the earpiece. POR, 46-48. As explained in the POR, limitations 1[E] and 1[F] should be read together as they provide for the display of a “visual representation of the at least one ear piece” where the “visual representation” is “indicative of a function or property of the at least one wireless ear piece communicated from the at least one wireless earpiece to the computing device.” *Id.* 46-47. Limitation 1[F] further describes the “visual representation of the at least one ear piece” claimed in 1[E], requiring that this representation of the ear piece indicate a function or property of the ear piece, i.e., that the visual representation *itself* indicate a function or property of the ear piece. *Id.*; *see also* Ex. 2020 ¶ 106.

In the Hensen-Video, the visual representation of the earpieces themselves on the interface includes no information about the properties or function of the earpieces. *See* Pet., 52. Rather, the battery life indicator on the interface, which Petitioner cites as meeting limitation 1[F], is displayed as a numerical representation

in the interface and not as a visual representation. *Id.* Therefore, Hensen-Video does not disclose this limitation because the visual representation of the earpiece *itself* does not include an indicator of a function or property of the earpiece.

Petitioner's Reply argues that PO's antecedent basis argument is incorrect and that PO improperly reads the claim language to require the earpiece graphic itself to convey information on the function or property of the earpiece. Reply, 18-19. Both of these arguments are meritless. First, Petitioner's parsing of limitations 1[E] and 1[F] is an improper reading of the claims. The limitations must be read together to properly capture the full scope of the claimed "visual representation of the one or more wireless ear pieces." The Board read these limitations together in its institution decision; the parties should do the same. *See K/S HIMPP v. Bragi GmbH*, IPR2023-00901, Paper 14 at 18 (PTAB Nov. 13, 2023); *see also* Ex. 2020 ¶ 104. Second, limitations 1[E] and 1[F] require the visual representation of the one or more ear pieces themselves to include the information on the ear piece function. POR, 47-48; Ex. 2020 ¶¶ 104-06. Limitation 1[E] expressly claims the visual representation of the earpiece and 1[F] provides the additional information the visual representation of the *earpiece* must include. *Id.* Moreover, the Petition even credits this reading of the claims. Pet., 48. For limitation 1[E] it states that the visual representation of the earpieces is satisfied by the "left (L) and right (R) earpieces"—the graphic of the earpieces themselves—displayed on the "home screen" of the Hensen-Video. *Id.* 51-

52. Therefore, to meet limitation 1[F], this representation of the one or more earpieces must include the information indicating a property or function of the earpiece(s). Petitioner's only counterargument to this is that PO's reading of the claim language improperly excludes embodiments where adjacent elements on the interface are used to convey the function or property of the earpieces. Reply, 18. But PO's reading of the claim language correctly reads limitations 1[E] and 1[F] together to give the "visual representation" of the one or more earpieces its full scope, which includes providing data related to the earpiece(s) on the earpiece(s) graphic and which the Hensen-Video does not disclose.

Claim 2. For this claim, Petitioner relies solely on Hensen-Video, but it does not disclose a wireless earpiece that "comprises a physiological sensor." POR, 49-50. Petitioner points to a clip of the video where Dr. Hensen claims to have "engaged the pulse oximetry" as meeting this limitation. *Id.* But he does not state that the earpieces can measure heart rate and oxygen saturation. *Id.*; Ex. 2020 ¶ 115. In fact, Hensen-Video relies on an external pulse oximeter that is not part of the earpiece. POR, 50.

Claim 3. For this claim, the combination of the Hensen-Video and Hensen-Patent does not disclose "tracking one or more physical activities using the physiological sensor." *Id.* 51. A POSITA would understand that tracking a physical activity means recording data related to the physical activity, not just transmitting.

Id. 52; Ex. 2020 ¶¶ 116-19. The Petition cites the Hensen-Video and Hensen-Patent as capable of transmitting pulse-oximetry data, but neither discloses *recording* this data or any other data related to physical activity. Pet., 59-66. Petitioner’s primary response is to argue that the plain meaning of tracking does not require recording of data. Reply, 20. But it does. *See* POR, 52; Ex. 2020 ¶¶ 116-19. Therefore, this limitation is not disclosed.

Claim 4. Neither Hensen-Video nor Hensen-Patent disclose the system of claim 3 for “tracking one or more physical activities using the physiological sensor” “wherein the physical activities are selected from a set consisting of running, biking, *and* swimming.” POR, 53-54. Nothing in Petitioner’s cited references suggests that earpieces should be used for swimming or that it would have been obvious or trivial to adapt the teachings of Hensen-Video and Hensen-Patent to swimming as this would require waterproofing the earpieces, which is not common practice for consumer electronics, particularly at the time of the invention. *Id.* This limitation is therefore not rendered obvious by Hensen-Patent and Hensen-Video.

Claims 5-7. Petitioner’s Ground 2 cites the LG Manual as disclosing the “lighting of the at least one wireless ear piece” element of Claims 5-7. Pet., 86-91. But as the POR points out, the portion of the LG Manual Petitioner cites for this element discloses coloring the ear piece icons pink on the interface when they are connected. POR, 54-55; Pet., 87. PO’s expert explains that a POSITA would have

understood that there's a difference between "highlighting" as in changing the color of an icon on a phone screen (what the LG Manual discloses) and "lighting" as in illuminating a physical ear piece (what the '385 Patent discloses). POR, 54; Ex. 2020 ¶ 167. Petitioner's response here is that PO offers no support for this distinction. Reply, 22-23. But PO offers its expert's declaration. Ex. 2020 ¶¶ 164-82. Petitioner cites Figures 4 and 5 of the '385 Patent to support conflating lighting (illuminating) a physical ear piece and highlighting (coloring) an icon on a phone screen, but changing the color of an icon on a phone screen cannot satisfy the requirement for "lighting of the at least one ear piece" of the '385 Patent. Pet., 86.

Claim 10. This claim requires the "system of claim 1 wherein one wireless ear piece is configured to store at least one playlist." Petitioner relies on Hensen-Patent for this limitation. But while this reference discloses the possibility of an audio source storing music, it does not disclose storing a "playlist." Reply, 23-24. As PO explained in the POR and its expert declaration, a POSITA would understand a playlist to be songs organized into a list by a user, not just stored on a device. POR, 55-56; Ex. 2020 ¶¶ 141-43. The Hensen-Patent therefore does not disclose this claim.

Claims 13-14. For Claims 13 and 14, Petitioner relies on the elements of Hensen-Patent and Hensen-Video cited for Claim 1. Pet. 72-83. Therefore, Hensen-

Patent and Hensen-Video do not disclose the elements for Claims 13 and 14 for the reasons explained for limitation 1[D]. *See* POR 57-58.

B. The Board Should Give Little Weight to Petitioner’s Expert Declaration.

The Board should afford Petitioner’s expert declaration little to no weight. The Board has held that “merely repeating an argument from the Petition in the declaration of a proposed expert does not give that argument enhanced probative value.” *See Kinetic Techs., Inc. v. Skyworks Sols., Inc.*, IPR2014-00529, Paper 8 at 14-15 (PTAB Sep. 23, 2014); *Samsung Elecs. Co. v. RightQuestion, LLC*, IPR2022-0025, Paper 17 at 24 (PTAB June 9, 2022) (“Petitioner’s declarant also makes this same statement verbatim, without more, and with no further explanation or additional citations to evidence . . . We give such conclusory, unsupported assertions by Petitioner’s expert little or no weight.”); *see also In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1368 (Fed. Cir. 2004). Petitioner’s expert declaration does exactly this: it repeats attorney argument raised in the Petition and should be disregarded. *See e.g., compare* Pet., 77-83 *with* Ex. 1002 at ¶¶ 120-132.

Petitioner’s argument that PO’s expert declaration is not properly incorporated into the POR is incorrect and a red herring. *See* Reply, 26-27. Yes, not all of Dr. Johnson’s expert declaration is directly restated in the POR. But his declaration also does not raise new arguments outside of the POR. Instead, it

expounds upon and adds color to the arguments made in the Petition, and it is proper for the Board to consider the complete contents of this declaration in deciding the patentability of the Challenged Claims.

IV. OBJECTIVE INDICIA OF NONOBVIOUSNESS HAVE A NEXUS TO THE '385 PATENT

Petitioner relies on obviousness for each of the six grounds in the Petition. When objective evidence of nonobviousness is present, it must be considered. *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016). “[T]he patentee retains the burden of proving the degree to which evidence of secondary considerations tied to a product is attributable to a particular claimed invention.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1378 (Fed. Cir. 2019). But, “when the patentee shows that the asserted objective evidence is tied to a specific product and that product ‘embodies the claimed features, and is coextensive with them,’” a patentee is entitled to a presumption of nexus. *Id.* at 1373 (quoting *Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013)).

Here, industry praise and commercial success of the patented invention, and the failure of others to develop the patented invention confirm the nonobviousness of the Challenged Claims. *See* POR, 58-66; *see generally* Exs. 2011-2019, 2022. And Petitioner fails to sever the nexus established in the POR, because Petitioner primarily relies on conclusory statements with little analysis. *See* Reply, 27-31. The

POR addressed the two faults that the Board noted in granting institution: (1) the articles were unclear as to whether the praise was due to extraneous factors other than the claimed invention, and (2) there was no mention of whether the products provide a visual representation of the earpieces. As explained in detail below, the nexus between the product and these secondary considerations remains.³

A. The Industry Praised the Embodiment of the '385 Patent, and the Praise Relates to the Specific Claims of the Patent.

Petitioner incorrectly singles out examples of evidence provided in the POR to claim that PO relies on evidence unrelated to the claimed invention. *See* POR, 28. These include touch control features, long battery life, and a charging case. *Id.* First, Petitioner fails to consider that each of these features is necessarily dependent on and specifically relate to claimed portions of the patent, thus the product “embodies the claimed features, and is coextensive with them.” *Fox Factory*, 944 F.3d at 1373. For example, the presence of touch control features on The Dash is coextensive with

³ Petitioner also states that even if a nexus is found, it should be afforded little weight. *Id.* at 30-31. But if a nexus is found, it should be afforded substantial weight as secondary considerations must be considered before finding a claim obvious. *OSRAM Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 709 (Fed. Cir. 2012).

Claim 14, which describes “[a] method for communicating data from a set of wireless ear pieces.” Ex. 1001. Moreover, the long battery life is an embodiment of Claim 1 (describing a “wireless ear piece” which would require a battery), Claim 4 (describing activities such as running and swimming that would require a long battery), Claim 7, as well as others. *Id.*

Second, Petitioner ignores the abundance of other praise mentioned in the POR that establishes a nexus. *See* POR, 60-65; Reply, 28. As for the first article mentioned in the POR, Petitioner fails to mention other features the article praised including two separate ear buds that connect to each other wirelessly, onboard storage, and a self-contained media player. *See* POR, 60 (describing Ex. 2011). This praise ties the specific product to the claims of the patent. *Id.* Further, the article suggested a long-felt need for wireless headphones with these features, and many “big industry players” stated it “simply wasn’t possible.” Ex. 2011. Similarly, the Verge published an article titled “The First Truly Wireless Earbuds Are Here, And They’re Awesome” where the author praised The Dash as the “best headphones [he] tried” listing features such as fitness sensors, a built-in accelerometer, and a comfortable design. Ex. 2012. Finally, the first commercial embodiment of the ’385 Patent, received **BEST OF CES 2015** in both wearables and health & fitness categories. Ex. 2013. The article credits the built-in fitness tracking, capability to

store songs as a media player, and the presence of a heart-rate monitor as reasons for this praise. *Id.*

B. The Praise Given Relates to the “Visual Representation” Aspect of the ’385 Patent.

Petitioner incorrectly interprets the praise related to the visual representation of the earpieces. *See* Reply, 28-30. For example, the POR included an excerpt from the DC Rainmaker article. *See* Ex. 2019.

Petitioner tries to discredit the clear visual representation of the earpieces accompanied by the battery life by pointing to the sentence discussing customizing macros and stating it references the bottom left photo. *See* Reply, 29-30; Ex. 2019. But that sentence refers to the top photo as it displays “EDIT MACRO” in large letters at the top of the phone screen. So the sentence expressing how “impress[ive] . . . [the] polished app looks” is directly praising the photo with the visual representation of the earbuds. *See* Ex. 2019. As explained in the POR, this DC Rainmaker article includes a picture of “a software application for executing on a computing device having a display associated therewith.” *Id.* This software application is “configured to display one or more screen displays on a display of the computing device” a “user interface for use by a user of the at least one wireless ear piece to interact with the at least one wireless ear piece.” The article highlights several other features of the ’385 Patent, including a visual representation of the at

least one wireless earpiece(s), and the battery charge percentage under each ear piece suggesting a function or property of the at least one wireless earpiece. *Id.* This praise of The Dash was specifically due to claimed features of the product. *See* POR, 60-63.

Next, in the Kickstarter Update entitled “Bragi Update – The App Preview, The Charger, The SDK, Bragi Funding and Chinese New Year,” Petitioner tries to argue the coextensiveness requirement is not met by selecting one comment about the iOS app. *See* Reply, 30. Petitioner glosses over many of the other comments by excited buyers. *Id.* Of the other 110 posts, many buyers, including backers of the product, express enthusiasm saying things like “[t]he app looks gorgeous,” “[n]ice app,” and “[y]our demo app looks gorgeous,” as well as those mentioned in the POR. Ex. 2022. Therefore, because the objective evidence can be tied to The Dash and that the product embodies and is coextensive with the claimed features, a nexus should be presumed. *Fox Factory*, 944 F.3d at 1373.

C. Petitioner Does Not Rebut How the Failed FreeWavz Product Evidences Nonobviousness.

In rebuttal to PO’s argument that FreeWavz created a defunct product further evidencing nonobviousness, Petitioner responds by (1) stating PO made this argument without addressing the merits, and (2) making a conclusory statement lacking explanation that there is no nexus. *See* Reply, 30. Again, Kickstarter failed

to produce earpieces with oxygen saturation monitoring (i.e., a physiological sensor), and failed to produce a working product in general. Therefore, Petitioner's own alleged prior art suggests others' failure to produce a product that could compete with The Dash. *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1054 (Fed. Cir. 1988) (“[F]ailure of others to provide a feasible solution to a long standing problem is probative of nonobviousness.”).

V. CONCLUSION

For the above reasons, Petitioner has failed to prove by a preponderance of the evidence that any of the Challenged Claims is unpatentable. Patent Owner requests that the Board confirm the patentability of the Challenged Claims and enter judgment against Petitioner.

Date: June 10, 2024

Respectfully submitted,

/s/ Richard A. Kamprath

Richard A. Kamprath
Reg. No. 65,320
rkamprath@mckoolsmith.com
Casey L. Shomaker
Reg. No. 77,998
cshomaker@mckoolsmith.com
McKool Smith, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
Telephone: (214) 978-4210
Facsimile: (214) 978-4044

*Counsel for Patent Owner,
BRAGI GmbH*

CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that the portions of the above-captioned **PATENT OWNER'S SURREPLY TO PETITIONER'S REPLY** specified in 37 C.F.R. § 42.24 have 5,012 words, in compliance with the 5,600 word limit set forth in 37 C.F.R. § 42.24(c)(4). This word count was prepared using Microsoft Word 2010.

Date: June 10, 2024

Respectfully submitted,

/s/ Richard A. Kamprath

Richard A. Kamprath
Reg. No. 65,320

CERTIFICATION OF SERVICE

The undersigned hereby certifies that the above-captioned **PATENT OWNER'S SURREPLY TO PETITIONER'S REPLY** is being served on counsel for petitioner via electronic mail on, in its entirety on the following counsel of record for Petitioner:

Haixia Lin
haixia.lin@ilmerhale.com
Brian Lambson
Brian.lambson@wilmerhale.com
Trishan Efram
Trishan.esram@wilmerhale.com

Date: June 10, 2024

Respectfully submitted,

/s/ Richard A. Kamprath

Richard A. Kamprath
Reg. No. 65,320