

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.,
Petitioner,

v.

IMMERSION CORPORATION,
Patent Owner.

IPR2023-00942
Patent 8,469,806 B2

Before MICHAEL R. ZECHER, PATRICK R. SCANLON, and
CHRISTOPHER L. OGDEN, *Administrative Patent Judges*.

SCANLON, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Meta Platforms, Inc. (“Petitioner”) filed a Petition (Paper 2, “Pet.”) requesting an *inter partes* review (“IPR”) of claims 11, 12, and 15 of U.S. Patent No. 8,469,806 B2 (Ex. 1001, “the ’806 patent”). Immersion Corporation (“Patent Owner”) filed a Preliminary Response (Paper 6, “Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review. *See* 35 U.S.C. § 314 (2018); 37 C.F.R. § 42.4(a) (2022). To institute an *inter partes* review, we must determine that the information presented in the Petition shows “a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). For the reasons set forth below, we determine that Petitioner has demonstrated a reasonable likelihood that it would prevail with respect to at least one challenged claim. Accordingly, we institute an *inter partes* review of all the challenged claims on all the grounds set forth in the Petition.

Our factual findings and conclusions at this stage of the proceeding are based on the evidentiary record developed thus far. This is not a final decision as to patentability of the challenged claims. Any final decision will be based on the full trial record, including any response to the Petition timely filed by Patent Owner.

II. BACKGROUND

A. *Real Parties in Interest*

Petitioner identifies itself as the real party in interest. Pet. 1. Patent Owner identifies itself as the real party in interest. Paper 3, 1.

B. Related Matter

The parties identify the following proceeding as a related matter involving the '806 patent: *Immersion Corp. v. Meta Platforms, Inc.*, No. 6:22-cv-00541-ADA (W.D. Tex. filed May 27, 2022). Pet. 1; Paper 3, 1.

C. The '806 Patent

The '806 patent, titled “System and Method for Providing Complex Haptic Stimulation During Input of Control Gestures, and Relating to Control of Virtual Equipment,” issued June 25, 2013, with claims 1–40. Ex. 1001, codes (54), (45), 24:38–28:55. The '806 patent relates to “a system and method of providing haptic stimulation to a user during performance of a complex control gesture, and/or during the control of virtual equipment.” *Id.* at 1:18–21. One aspect relates to a system configured to provide haptic stimulation to the user of a game, in which the system includes a user interface, an actuator, and one or more processors that execute computer program modules. *Id.* at 1:51–55.

Figure 1 of the '806 patent, reproduced below, illustrates one embodiment of “a system configured to provide haptic stimulation to a user.” Ex. 1001, 3:45–47.

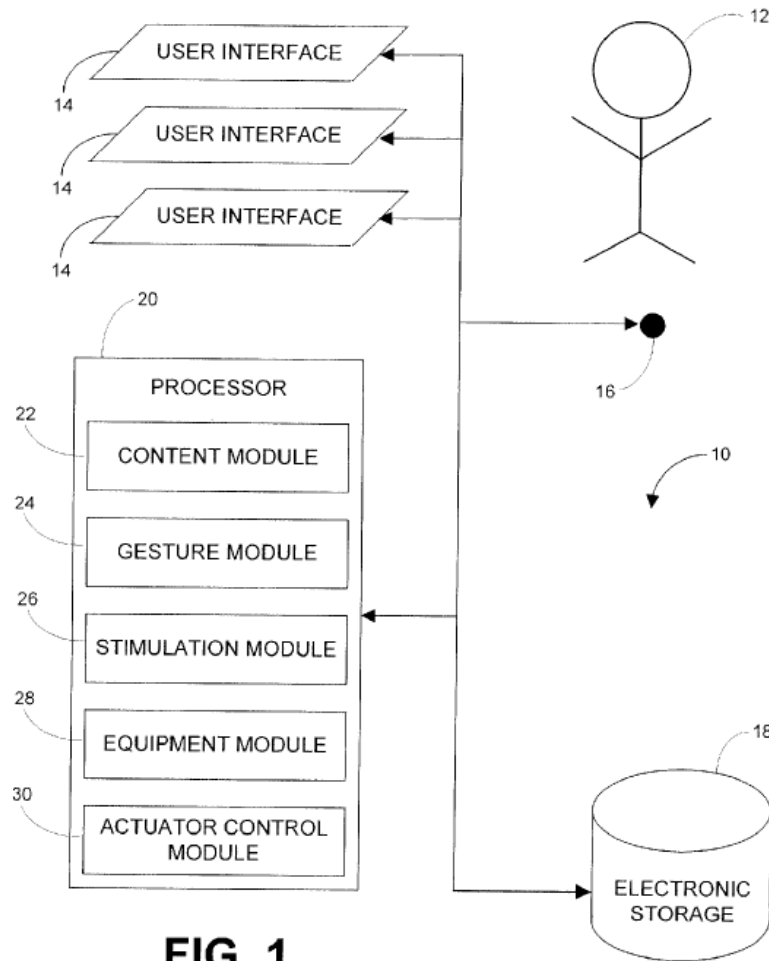


FIG. 1

Figure 1 depicts system 10 that is configured to provide haptic stimulation to user 12 in conjunction with user 12 performing one or more control gestures, where the haptic stimulation changes as the control gesture progresses.

Ex. 1001, 4:18–27. System 10 includes one or more user interfaces 14, one or more actuators 16, electronic storage 18, and one or more processors 20. *Id.* at 4:31–34.

User interfaces 14 may include one or more content delivery devices such as electronic displays (including touch-sensitive displays) and audio speakers. Ex. 1001, 5:26–29. User interfaces 14 may also include one or more control input devices such as buttons, switches, keyboards, knobs, levers, microphones, position detecting devices, accelerometers, gyroscopes,

and digital compasses. *Id.* at 5:29–38. Actuators 16 are configured to generate haptic stimuli for user 12 and can be in contact with user 12 or in contact with objects in contact with user 12. *Id.* at 5:54–58.

Processor 20 executes one or more computer modules including content module 22, gesture module 24, stimulation module 26, equipment module 28, and actuator control module 30. Ex. 1001, 6:60–65. Gesture module 24 receives signals generated by user interface 14 and monitors performance of one or more control gestures by user 12. *Id.* at 7:41–45. In the case of user interface 14 including a touch-sensitive surface, an initial portion of a control gesture may include initiating contact with the touch-sensitive surface, or, if the user is already in contact with the touch-sensitive surface, the initial portion may include moving to one or more locations, maintaining contact, motioning in one or more specific directions, making one or more specific shapes, or ending contact. *Id.* at 7:49–64. An intermediate portion of a control gesture may include maintaining stationary contact with the touch-sensitive surface, motioning in a specific direction, making a specific shape, halting motion, contacting the touch-sensitive surface at one or more additional locations, ending contact at one or more locations on the touch-sensitive surface, or pressing harder or softer on the touch-sensitive surface. *Id.* at 7:65–8:5. An ending portion of a control gesture may include one or more of ending contact at one or more locations on the touch-sensitive surface, halting motion at one or more locations, motioning in a specific direction, making a specific shape, contacting the touch-sensitive surface at one or more additional locations, or pressing harder or softer on the touch-sensitive surface. *Id.* at 8:5–11.

Stimulation module 26 receives information from gesture module 24 and determines haptic stimulation to be generated in response to the control

gestures. Ex. 1001, 9:13–16. For example, stimulation module 26 determines a first stimulation responsive to performance of the initial portion of the control gesture and a second stimulation, different than the first stimulation, responsive to performance of an intermediate portion of the control gesture. *Id.* at 9:35–58. Actuator control module 30 causes actuators 16 to generate the haptic stimulus determined by stimulation module 26. *Id.* at 14:37–39.

D. Challenged Claims

As noted above, Petitioner challenges claims 11, 12, and 15 of the '806 patent. Independent claim 11 is illustrative of the claimed subject matter and is reproduced below:

11. A computer-implemented method of providing haptic stimulation to a user of a system, the method being implemented in the system which includes a haptic device and one or more physical processors configured to execute computer program modules, the method comprising:
monitoring, on the one or more processors, performance of a control gesture by a user,
wherein the control gesture is a gesture associated with a command input to the system, and includes an initial portion, a first intermediate portion, and an ending portion;
determining, on the one or more processors, haptic stimulation associated with performance of the control gesture to be generated for the user,
wherein the haptic stimulation includes a first stimulation determined responsive
to performance of the initial portion of the control gesture, and a second stimulation that is different from the first stimulation and is determined responsive to performance of the first intermediate portion of the control gesture; and

generating, with the haptic device, the determined stimulation during performance of the control gesture.

Ex. 1001, 25:47–26:2.

E. Asserted Grounds of Unpatentability

Petitioner contends that the challenged claims are unpatentable based on the following grounds:

Claims Challenged	35 U.S.C. § ¹	Reference(s)/Basis
11, 12, 15	103(a)	Poupyrev ²
11, 12, 15	103(a)	Grant '499 ³

Pet. 3. Petitioner relies on the Declaration of Jeremy Cooperstock, Ph.D. (Ex. 1002) to support its challenges. Patent Owner relies on the Declaration of Gregory Abowd, D.Phil. (Ex. 2001) to support its Preliminary Response.

III. ANALYSIS

A. Level of Ordinary Skill in the Art

In determining whether an invention would have been obvious at the time it was made, 35 U.S.C. § 103(a) requires us to resolve the level of ordinary skill in the pertinent art at the time of the invention. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). The person of ordinary skill in the art is a hypothetical person who is presumed to have known the relevant art at the time of the invention. *In re GPAC, Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). Factors that may be considered in determining the level of

¹ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284, 287–88 (2011), amended 35 U.S.C. § 103, effective March 16, 2013. Because the challenged claims of the ’806 patent have an effective filing date before March 16, 2013, the pre-AIA version of 35 U.S.C. § 103 applies.

² US 2008/0024459 A1, published Jan. 31, 2008 (Ex. 1003).

³ US 2008/0064499 A1, published Mar. 13, 2008 (Ex. 1004).

ordinary skill in the art include, but are not limited to, the types of problems encountered in the art, the sophistication of the technology, and educational level of active workers in the field. *Id.* In a given case, one or more factors may predominate. *Id.*

Petitioner contends that a person having ordinary skill in the art “would have possessed a bachelor’s degree in electrical engineering or computer science (or an equivalent degree), and two years of practical or industry experience in the field of human computer interaction, including implementation of computer-based systems and software for providing haptic feedback effects to a user,” and “[a] person could also have qualified as an ordinarily skilled artisan with more formal education and less practical or industry experience, or vice versa.” Pet. 8 (citing Ex. 1002 ¶¶ 12–13). Patent Owner accepts Petitioner’s proposed level of ordinary skill in the art for purposes of this proceeding. Prelim. Resp. 20.

Based on our review of the record before us, we determine that Petitioner’s stated level of ordinary skill in the art is reasonable because it appears consistent with the evidence of record, including the asserted prior art and the ’806 patent. Accordingly, for the purposes of this Decision, we adopt Petitioner’s definition.

B. Claim Construction

In *inter partes* reviews, the Board interprets claim language using the district-court-type standard, as described in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). See 37 C.F.R. § 42.100(b). Under that standard, we generally give claim terms their ordinary and customary meaning, as would have been understood by a person of ordinary skill in the art at the time of the invention, in light of the language of the claims, the specification, and the prosecution history. See *Phillips*, 415 F.3d at

1313–14. Although extrinsic evidence, when available, may also be useful when construing claim terms under this standard, extrinsic evidence should be considered in the context of the intrinsic evidence. *See id.* at 1317–19.

Petitioner notes that the claims constructions for the term “control gesture” have been proposed by the parties in the related District Court proceeding, but contends that no “term requires express construction at this time because, as shown below, the claims are obvious even if the Board applied the constructions proposed by either party in the pending litigation, or any other reasonable construction.” Pet. 9–10 (citing Ex. 1006, 1–2).

Patent Owner argues that the District Court has construed “control gesture” as follows:

[A] gesture made by a user that is a single and discrete control input having separate portions. The separate portions must be performed in specific order and/or with a specific timing to effectively achieve the control input associated with the ‘control gesture.’ Performance of the separate portions, on their own, will not result in the control input associated with the ‘control gesture’ as a whole (e.g., a ‘control gesture’ is not merely a combination of other gestures, each associated with its own control input).

Prelim. Resp. 20–21 (citing Ex. 2005).⁴ Patent Owner asserts that this construction tracks language from the Specification of the ’806 patent, and argues that the Board should adopt this construction to avoid conflicting results between this proceeding and the related District Court proceeding. *Id.* at 21. Patent Owner also argues that, although Petitioner does not appear to ask the Board to adopt this construction, despite proposing it in the District Court proceeding, “Petitioner maintains its Grounds under this

⁴ Although the Preliminary Response cites Exhibit 2005, the District Court’s construction is actually set forth in Exhibit 2004.

construction, and therefore should have no reason to oppose this construction now that the District Court has adopted it.” *Id.* at 21.

We agree that the Specification provides a definition for this term that corresponds to the construction adopted by the District Court. *See* Ex. 1001, 5:7–16; Ex. 2004, 2. Inventors can act as their own lexicographers if they clearly set forth a definition of a claim term other than its ordinary and customary meaning. *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 677 (Fed. Cir. 2015). But any such definition must appear in the specification “with reasonable clarity, deliberateness, and precision.”

Renishaw PLC v. Marposs Societa’ per Azioni, 158 F.3d 1243, 1249 (Fed. Cir. 1998); *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). In this case, we are persuaded that the cited passage exhibits a clear intent to define “control gesture” and does so with the requisite clarity, deliberateness, and precision. We thus determine that the Specification provides an express lexicographic definition for the term. *See* Ex. 1001, 5:7–16. Accordingly, we preliminarily adopt the District Court’s construction of “control gesture” for purposes of this Decision.

On the present record, we do not discern a need to construe explicitly any other claim language because doing so would have no effect on our analyses below of Petitioner’s asserted grounds and will not assist in resolving the present controversy between the parties. *See Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (“The Board is required to construe ‘only those terms . . . that are in controversy, and only to the extent necessary to resolve the controversy.’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

C. Discretion Under 35 U.S.C. § 325(d)

1. Applicable Framework

Section 325(d) of Title 35 of the United States Code provides, in relevant part: “In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.” The Board uses a two-part framework for evaluating arguments under § 325(d):

- (1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and
- (2) if either condition of first part of the framework is satisfied, whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.

Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential) (“*Advanced Bionics*”).

In applying the two-part framework, we consider several non-exclusive factors from *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017) (precedential as to § III.C.5, first paragraph) (“*Becton, Dickinson*”), which provide “useful insight into how to apply the framework.” *Advanced Bionics*, Paper 6 at 9. The *Becton, Dickinson* factors are:

- (a) the similarities and material differences between the asserted art and the prior art involved during examination;
- (b) the cumulative nature of the asserted art and the prior art evaluated during examination;

(c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;

(d) the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art;

(e) whether Petitioner has pointed out sufficiently how the examiner erred in its evaluation of the asserted prior art; and

(f) the extent to which additional evidence and facts presented in the Petition warrant reconsideration of the prior art or arguments.

Becton, Dickinson, Paper 8 at 17–18. If, after review of factors (a), (b), and (d), we determine that the same or substantially the same art or arguments previously were presented to the Office, we then review factors (c), (e), and (f), which relate to whether the petitioner demonstrates that the Office erred in a manner material to the patentability of the challenged claims. *Advanced Bionics*, Paper 6 at 10.

2. Analysis

Petitioner argues that we should not exercise our discretion to deny institution under § 325(d). Pet. 4–8. Patent Owner argues that we should exercise our discretion to deny institution under § 325(d). Prelim. Resp. 4–7. We apply the framework set forth above to the facts of the current proceeding to determine whether to exercise our discretion to deny institution of *inter partes* review.

a) Relevant Prosecution History of the '806 Patent

The '806 patent issued from U.S. Patent Application No. 12/840,797 (“the '797 application”), which was filed July 21, 2010. Ex. 1001, codes (21), (22). The '797 application claims the benefit of U.S. Provisional

Patent Application No. 61/227,645, filed on July 22, 2009 (“the ’645 provisional application”). *Id.* at code (60).

In an Office Action dated June 18, 2012, the Examiner allowed claims 1–10 and 21–30, and rejected claims 11–20 and 31–40 under 35 U.S.C. § 101 as directed to non-statutory subject matter. Ex. 1007, 117–18. In response, the applicant amended several claims, including independent claims 11 and 31, and argued that the claim amendments overcame the § 101 rejection. *Id.* at 121–31. The Examiner then issued a Notice of Allowance. *Id.* at 136–43.

After the Notice of Allowance, the applicant submitted, on January 21, 2013, a Request for Continued Examination together with an Information Disclosure Statement (“IDS”) listing several references, including Poupyrev, as well as an International Search Report (dated January 12, 2011) and an International Preliminary Report on Patentability (dated February 2, 2012) for International Application No. PCT/US2010/042795. Ex. 1007, 151–53. Both the International Search Report and the International Preliminary Report on Patentability identified Poupyrev as relevant to International Application No. PCT/US2010/042795, which claims priority to the ’645 provisional application and is a counterpart to the ’797 application. *Id.* at 156, 166–67; Ex. 1009, codes (30), (86). The Examiner subsequently issued a second Notice of Allowance including an initialed copy of the IDS, indicating that all of the references listed—including Poupyrev—had been considered. Ex. 1007, 226–36.

b) Part One of the Advanced Bionics framework

As noted above, Petitioner relies on Poupyrev in Ground 1 and Grant ’499 in Ground 2. Pet. 3. Regarding Ground 1, Petitioner acknowledges that Poupyrev was cited during prosecution of the ’797

application. *Id.* at 4. Petitioner, however, argues that Poupyrev “was not the basis of any Office Action or otherwise substantially discussed.” *Id.*

Petitioner also argues that the IDS listing Poupyrev was submitted after the first Notice of Allowance was issued and more than two years after the International Search Report identifying Poupyrev. *Id.* at 5–6. Patent Owner disputes Petitioner’s arguments. Prelim. Resp. 4–6.

Petitioner’s arguments on this point are not persuasive because part one of the *Advanced Bionics* framework is not limited to prior art that was substantively considered by the Office. *Advanced Bionics* states that “[p]reviously presented art includes . . . art provided to the Office by an applicant, such as on an [IDS].” *Advanced Bionics*, Paper 6 at 7–8. Here, Poupyrev was included on an IDS. Ex. 1007, 153, 236. Moreover, the timing of the IDS submission has no impact on the first part of the *Advanced Bionics* framework given that the Examiner initialed a copy of the IDS, indicating that Poupyrev had been considered. *Id.* at 236.

Thus, based on the totality of the evidence presented, we determine that Ground 1 includes only the same prior art that previously was presented to the Office.

Turning to Ground 2, neither party contends that Grant ’499 was previously presented to the Office during any proceeding pertaining to the ’806 patent. Indeed, Patent Owner does not mention Grant ’499 explicitly in the section of its Preliminary Response addressing § 325(d). *See* Prelim. Resp. 4–7. Patent Owner’s only reference to Grant ’499 in this context is the contention in the introductory comments that “the only reference asserted in Ground 2 presents the same argument and is therefore cumulative.” *Id.* at 1. Patent Owner, however, does not specifically explain how Ground 2 presents “the same argument” made during prosecution or

even what argument that may be. *See id.* Nor does Patent Owner specifically explain how or why Grant '499 is allegedly cumulative of Poupyrev or any other reference presented to the Office during any proceeding pertaining to the '806 patent. *Id.* Accordingly, based on the totality of the evidence presented, and in the absence of a specific argument to the contrary, we determine that Ground 2 does not rely on “the same or substantially the same prior art or arguments previously were presented to the Office.”

c) Part Two of the Advanced Bionics framework

Although we determine that part one of the *Advanced Bionics* framework has not been satisfied with respect to Ground 2, we determined that part one of the *Advanced Bionics* framework has been satisfied with respect to Ground 1. Accordingly, we address whether the Examiner erred under part two of the *Advanced Bionics* framework with respect to Poupyrev.

Petitioner argues that, after Poupyrev was disclosed to the Office, the Examiner should have appreciated its relevance and issued an Office Action rejecting the challenged claims. Pet. 6. Petitioner also argues that later developments in the foreign counterpart application underscored this point, asserting that “a patent based on the foreign counterpart to the '806 patent [issued] on May 6, 2020, but only after Patent Owner amended its claims to recite additional limitations not recited in its original claims – and not recited in any of the claims of the '806 patent.” *Id.* at 7 (citing Ex. 1009, 31:57–32:2, 33:7–9; Ex. 1011).

Patent Owner argues that discretionary denial is warranted because the Examiner considered both Poupyrev and the International Search Report applying Poupyrev and still allowed the claims. Prelim. Resp. 6 (citing

Microsoft v. Almondnet, IPR2022-01319, Paper 9 at 11 (PTAB Jan. 30, 2023). Patent Owner contends that, “[a]lthough Petitioner disagrees with the Examiner allowing the claim, without providing further details regarding the material error, there is nothing in the record showing the Examiner’s actions, and like *Microsoft*, there is no basis to claim the Office materially erred.” *Id.* at 6–7.

In this case, the Examiner’s initials on the IDS indicate that Poupyrev, the International Search Report, and the International Preliminary Report on Patentability were considered. Ex. 1007, 236. Based on the totality of the evidence presented, however, we agree with Petitioner that the Examiner did not appreciate fully Poupyrev’s relevance to the claims, particularly in view of the International Search Report and the International Preliminary Report on Patentability both indicating that certain claims of the foreign counterpart application lacked novelty and inventive step in view of Poupyrev. *See id.* at 156, 162–69. We note that the Reasons for Allowance included with the first Notice of Allowance are the same as the Reasons for Allowance included with the second Notice of Allowance. *Compare id.* at 141–42, *with id.* at 231–32. Indeed, the Examiner did not mention Poupyrev in the second Reasons for Allowance and continued to identify a reference referred to as “Son” as the “closest prior art.” *Id.* at 231–32.

As such, we are persuaded that Petitioner demonstrates that the Office erred in a manner material to the patentability of the challenged claims by failing to consider fully Poupyrev’s relevance to the challenged claims.

d) Conclusion

For the above reasons, we find that the second part of the *Advanced Bionics* framework is not satisfied with respect to Ground 1 and the first part of the *Advanced Bionics* framework is not satisfied with respect to Ground 2.

Accordingly, we do not exercise our discretion under § 325(d) to deny institution in this proceeding.

D. Discretion Under 35 U.S.C. § 314(a)

Institution of *inter partes* review is at the Director’s discretion, which has been delegated to the Board under her guidance. *See* 35 U.S.C. § 314(a); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he [USPTO] is permitted, but never compelled, to institute an IPR proceeding.”); 37 C.F.R. § 42.4(a) (“The Board institutes the trial on behalf of the Director.”).

Under Board precedent, one of the considerations that may weigh in favor of denying a petition under § 314(a) is the advanced state of a parallel district court action. *See NHK Spring Co. v. Intrix-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (PTAB Sept. 12, 2018) (precedential); Patent Trial and Appeal Board, Consolidated Trial Practice Guide, 58 & n.2 (Nov. 2019), *available at* <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf>. In *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential), the Board explained that “cases addressing earlier trial dates as a basis for denial under *NHK* have sought to balance considerations such as system efficiency, fairness, and patent quality.” *Fintiv*, Paper 11 at 5. *Fintiv* sets forth six non-exclusive factors for determining “whether efficiency, fairness, and the merits support the exercise of authority to deny institution in view of an earlier trial date in the parallel proceeding.” *Id.* at 6. The Director has also issued interim guidance to the Board on applying these factors. *See* Katherine K. Vidal, Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation (June 21, 2022) 9, *available at* https://www.uspto.gov/sites/default/files/documents/interim_proc_

discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf (“Director Memo”).

The Director Memo explains that, “[c]onsistent with *Sotera Wireless, Inc.*, the PTAB will not discretionarily deny institution in view of parallel district court litigation where a petitioner presents a stipulation not to pursue in a parallel proceeding the same grounds or any grounds that could have reasonably been raised before the PTAB.” Director Memo 3 (footnote omitted) (citing *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020) (precedential as to § II.A)). The Director Memo explains that such a *Sotera* stipulation “mitigates concerns of potentially conflicting decisions and duplicative efforts between the district court and the PTAB . . . and allows the PTAB to review grounds that the parallel district court litigation will not resolve.” *Id.* at 7–8.

Petitioner acknowledges that, in the related district court case, the court has set a trial date for February 20, 2024. Pet. 4.⁵ But to address any concerns regarding duplication of efforts between the related district court case and this proceeding, Petitioner provides a stipulation that it “will not pursue in the district court any grounds of invalidity against the challenged claims that were raised or reasonably could have been raised in IPR.” *Id.*

In response, Patent Owner acknowledges that Petitioner offers a *Sotera* stipulation, and that under these circumstances “a petition should not ordinarily be denied in accordance with the *Fintiv* factors.” Prelim. Resp. 8. But Patent Owner contends that we should still exercise our discretion to

⁵ Petitioner argues that it filed a motion to transfer the case to the U.S. District Court for the Northern District of California that remained pending at the time of filing the Petition. Pet. 4. Patent Owner informs us that this motion was unsuccessful. See Prelim. Resp. 10–11.

deny the Petition under § 314(a) based on the advanced state of the district court case and the duplication of invalidity grounds asserted in this proceeding. *Id.* at 8–9 (citing *Cisco Sys., Inc. v. Estech Sys., Inc.*, IPR2021-00329, Paper 13 (PTAB July 6, 2021)). According to Patent Owner, “Petitioner’s *Sotera* declaration is conditional, and the district court case is so far along, the declaration will not result in significant savings of resources because expert discovery will be over by the time an institution decision is rendered.” *Id.* at 9. Consequently, Patent Owner contends that it “will be required to fully rebut in the district court case the same art Petitioner raises here.” *Id.*

We do not agree that we can effectively ignore the Director Memo under these circumstances. Patent Owner cites *Cisco*, a non-precedential Board decision issued prior to the Director Memo in which the panel weighed the *Fintiv* factors and determined that a *Sotera* stipulation did not overcome a trial date scheduled significantly before the projected date of a final written decision. *See* Prelim. Resp. 8–9. The Director Memo issued after this decision as “binding agency guidance.” Director Memo at 3. Thus, the Director Memo abrogates any prior inconsistent holdings by Board panels, including the non-precedential holding in the *Cisco* decision. Because Petitioner has provided a *Sotera* stipulation, the Director Memo is controlling and the *Fintiv* factors are not a basis for denying institution.

E. Ground 1: Asserted Obviousness Based on Poupyrev

Petitioner asserts that claims 11, 12, and 15 are unpatentable as obvious based on Poupyrev. Pet. 13–41. Patent Owner provides arguments addressing this asserted ground of unpatentability. Prelim. Resp. 25–28.

1. Poupyrev

Poupyrev describes an apparatus with “a haptic feedback generating unit attached to [a] touch screen,” and a “pressure sensing unit” that can “detect pressure applied to the touch screen.” Ex. 1003, code (57). The system provides (1) “tactile notification when a user touches a user interface element on a touch screen without executing functionality of the user interface element,” and separate (2) “tactile notification to the user when the functionality of the user interface element is executed.” *Id.* ¶ 7.

Poupyrev’s Figure 11 is reproduced below:

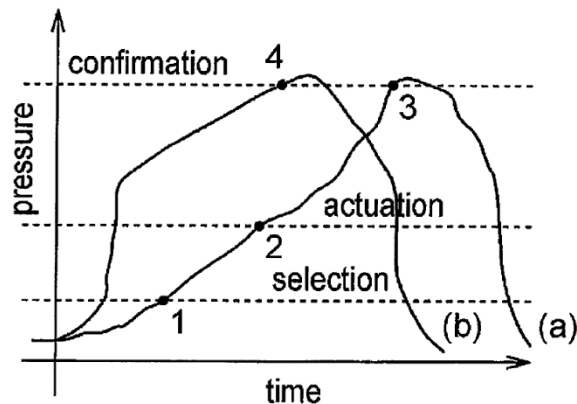


Figure 11 “demonstrates an example in which several thresholds are used in actuation and providing the tactile feedback” in response to a user’s interaction with a user-interface element. Ex. 1003 ¶ 119. The figure is a graph of pressure over time, showing curves (a) and (b) reflecting different instances of a user pressing an object on a graphical user interface (“GUI”).

In curve (a), “the user touches and pushes the GUI object to pass a selection threshold,” and in response, “a tactile feedback is provided (Point 1 . . .) without actuating the GUI object.” Ex. 1003 ¶ 119. Then “[t]he user presses further to pass the actuation threshold where a different tactile feedback is provided (Point 2). In this example, however, the GUI object is not actuated yet.” *Id.* The activation occurs when the pressure reaches a

confirmation threshold at Point 3, the purpose of which “is to avoid accidental activation of the GUI objects.” *Id.* ¶¶ 119–120.

In curve (b), the user presses the GUI object very quickly, and in this case the “selection” and “actuation” feedbacks are skipped because they would be “distracting and hamper the user interaction.” Ex. 1003 ¶¶ 121–122. Thus, the user “is presented with the tactile feedback only at the confirmation level (Point 4 of Curve (b)).” *Id.* ¶ 122.

Poupyrev also teaches that a controller “determines a current logical state of the [GUI] object using a history of detected touch positions and a history of detected pressure values.” Ex. 1003 ¶ 10; *accord id.* ¶ 21; *see also id.* ¶ 71 (“[A] history of the previous input and a history of the previous states of the GUI objects is used to determine the tactile feedback to the user.”).

2. Independent Claim 11

Petitioner contends that each limitation of independent claim 11 is either taught or suggested by Poupyrev. Pet. 13–39. To support its arguments, Petitioner identifies certain passages in Poupyrev and explains the significance of each passage with respect to the corresponding claim limitation. *Id.* Patent Owner argues that Petitioner has failed to show that Poupyrev discloses the claimed “control gesture . . . associated with a command input to the system.” Prelim. Resp. 25–28.

We have reviewed Petitioner’s contentions with respect to the limitations of claim 11, and for the reasons discussed below, we determine that the Petition shows a reasonable likelihood that Petitioner would prevail in with respect to the contention that claim 11 would have been obvious based on Poupyrev. *See* Pet. 13–39. We address Patent Owner’s arguments below.

a) The Recited Control Gesture

Petitioner maps the recited control gesture to the example disclosed in Figure 11 of Poupyrev. Pet. 20–21 (citing Ex. 1003 ¶ 87, Fig. 11).

Specifically, Petitioner contends that “the gesture shown in Curve (a) [of Figure 11] in which the user controls the GUI object by making contact with the object on the touch-sensitive display and then increasing the pressure until passing the confirmation threshold, at which point the GUI object is activated,” corresponds to the control gesture. *Id.* at 22 (citing Ex. 1002 ¶ 70). According to Petitioner, the gesture of curve (a) includes an initial portion (the portion of the gesture in which the user initiates contact with the GUI object and/or presses the GUI object, with pressure sufficient to pass the selection threshold at Point 1), a first intermediate portion (the portion of the gesture in which the user maintains contact with the GUI object and further increases the pressure until it passes the actuation threshold at Point 2), and an ending portion (the portion of the gesture in which the user further increases the pressure until passing the confirmation threshold at Point 3). *Id.* at 22–24 (citing Ex. 1002 ¶ 70).

Petitioner also contends that the control gesture of Poupyrev is associated with a command input to the system; namely, the associated command input of Poupyrev is “the actual activation of the GUI object upon passing the confirmation threshold, which serves as an input for the system to activate the command or function associated with that GUI object.” Pet. 28–29 (citing Ex. 1003 ¶¶ 49, 52, 74).

Patent Owner argues that Poupyrev does not disclose the claimed “control gesture . . . associated with a command input to the system” because Petitioner relies on Poupyrev’s disclosure of “multiple individual and distinct actions and treat[s] them as a single ‘control gesture’ contrary to

the intrinsic evidence and the District Court’s construction of that term.” Prelim. Resp. 25. In particular, Patent Owner argues that “[t]he Petition relies on Poupyrev’s disclosure of [a] user ‘selecting’ a GUI object on a touch screen by placing a finger within or dragging across a GUI object boundary on the surface of the screen,” and “then increasing pressure on the GUI object until a particular pressure threshold is reached, indicating to the system that the user is ‘actuating’ the GUI object.” *Id.* at 26 (citing Pet. 18–19). According to Patent Owner, “selecting” and “actuating” the GUI object in Poupyrev are separate and distinct control inputs and, as such, do not represent a single “control gesture” as construed by the District Court. *Id.* at 26–27 (citing Ex. 2001 ¶¶ 42–45).

Patent Owner also argues that Petitioner asserts, as an alternative, that curve (a) in Figure 11 of Poupyrev discloses a control gesture. Prelim. Resp. 27 (citing Pet. 22–24). Patent Owner asserts that curve (a) shows pressure thresholds for determining user actions such as selecting a GUI object and activating the GUI object, and these actions are two separate and distinct control inputs into the system and, thus, not a single control gesture. *Id.* (citing Ex. 2001 ¶¶ 42–45).

As an initial matter, we disagree with Patent Owner’s assertion that reliance on curve (a) in Poupyrev’s Figure 11 is an *alternative* argument. Although the Petition describes Poupyrev’s Figure 5 example “[g]enerally speaking” (Pet. 18–20), Petitioner clearly states that it is mapping the “more sophisticated” example of curve (a) to the claimed control gesture. Pet. 20–21; *see also id.* at 22 (“The ‘**control gesture**’ in Poupyrev for purposes of claim 11 thus corresponds to the gesture shown in Curve (a).”).

More importantly, we are not persuaded by Patent Owner’s argument that “selecting” and “actuating” the GUI object in Poupyrev are separate and

distinct control inputs. Instead, Poupyrev discloses that Figure 11 shows “an example in which several thresholds are used *in actuation* and providing the tactile feedback.” Ex. 1003 ¶ 119 (emphasis added). In other words, Poupyrev discloses performing a series of actions for *actuating* a GUI object. Specifically, Poupyrev discloses (1) touching and pressing the GUI object to pass a selection threshold (Point 1), (2) further pressing the GUI object to pass the actuation threshold without actuated the object (Point 2), and (3) further pressing the GUI object to reach the confirmation threshold and actuate the object (Point 3). *Id.*

To the extent the first step “selects” the GUI object, we are not persuaded that this action is a control input that is separate and distinct from actuating the GUI object. Rather, we view the first “selecting” step simply as a precursor or stepping stone to the objective of actuating the GUI object. *See* Ex. 1003 ¶ 12 (“[T]he logical state of [a] GUI object is allowed to change to the actuated state only after the selected state.”). We are not directed to any disclosure in Poupyrev of selecting a GUI object for any reason other than allowing the object to be actuated. For these reasons, we agree with Petitioner that actuation of the GUI object in Poupyrev corresponds to the command input. *See* Pet. 28–29.

Other disclosures in Poupyrev support our preliminary conclusion that actuating the GUI object is the primary command objective, for which touching or selecting the object is just a precursor as opposed to a separate and distinct input. For example, Poupyrev discloses that Figures 5(a)–5(c) illustrate an example of an “actuating operation.” Ex. 1003 ¶ 84; *see also* ¶ 87 (describing confirming the completion of the “actuating operation”), ¶¶ 89–90 (referring to “the actuating techniques” and “the actuating technique”).

We also do not credit Dr. Abowd’s testimony that, in Poupyrev, “‘selecting’ a GUI object is a separate command input, different and apart from ‘actuating.’” *See* Ex. 2001 ¶ 43. Indeed, Dr. Abowd also testifies that, “[i]f a user selects a GUI object, then does not reach the confirmation pressure threshold, *the system does not register a command input at all. Id.* (emphasis added). In other words, simply selecting a GUI object—without subsequently actuating the object—does not result in a command input. This testimony further supports the conclusion that selecting a GUI object in Poupyrev is not a separate and distinct control input from actuating the object.

For the above reasons, we do not find Patent Owner’s argument persuasive. Instead, at this stage of the proceeding and on the current record, we determine that Petitioner has made a sufficient showing that Poupyrev discloses the “control gesture” as claimed.

b) The Remaining Aspects of Petitioner’s Contentions

Patent Owner does not offer any arguments specifically addressing the remaining limitations of claim 11. *See* Prelim. Resp. 25–28. We have reviewed Petitioner’s contentions with respect to the remaining limitations of claim 11 and determine that the Petition provides a sufficient showing, at this stage of the proceeding, that Poupyrev satisfies each limitation. *See* Pet. 13–18, 34–39.

c) Preliminary Determination as to Claim 11

Based on our review and consideration of the current record, we determine that the information presented sufficiently supports, for purposes of institution, Petitioner’s assertions that Poupyrev satisfies each limitation of claim 11. We therefore determine Petitioner has met its burden to show a

reasonable likelihood it would prevail in demonstrating that claim 11 is unpatentable as obvious over Poupyrev.

3. *Dependent Claims 12 and 15*

Claims 12 and 15 depend from claim 11. Ex. 1001, 26:3–7, 26:20–22. Because Petitioner has demonstrated a reasonable likelihood of success in proving that at least one claim of the '806 patent is unpatentable, we institute on all grounds and all claims raised in the Petition. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359–60 (2018); *see also PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) (interpreting 35 U.S.C. § 314 to require “a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition”); 37 C.F.R. § 42.108(a) (“When instituting inter partes review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.”). Therefore, it is not necessary for us to assess every claim challenged by Petitioner.

Nevertheless, we note that Petitioner provides reasonable and detailed explanations, supported with the testimony of Dr. Cooperstock, indicating where Poupyrev teaches or suggests the limitations of claims 12 and 15. Pet. 39–41 (citing Ex. 1002 ¶¶ 81, 87). Patent Owner offers no particular arguments regarding claims 12 and 15 for us to consider at this stage of the proceeding. *See* Prelim. Resp. 25–28. We have reviewed Petitioner’s contentions with respect to these claims and determine that the information presented in the Petition establishes that there is a reasonable likelihood that Petitioner would prevail in its assertion that claims 12 and 15 are unpatentable as obvious over Poupyrev.

F. Ground 2: Asserted Obviousness Based on Grant '499

Petitioner asserts that claims 11, 12, and 15 are unpatentable as obvious based on Grant '499. Pet. 41–61. Patent Owner provides arguments addressing this asserted ground of unpatentability. Prelim. Resp. 28–31.

1. Grant '499

Grant '499 relates to haptic gaming devices, particularly systems and methods for casino gaming haptics. Ex. 1004 ¶ 2. In one embodiment, Grant '499 discloses a system for casino gaming haptics that comprises a touch-sensitive input device configured to sense a contact from a user, and an actuator configured to output a haptic effect to the touch-sensitive input device. *Id.* ¶ 5.

Figure 2 of Grant '499 is reproduced below.

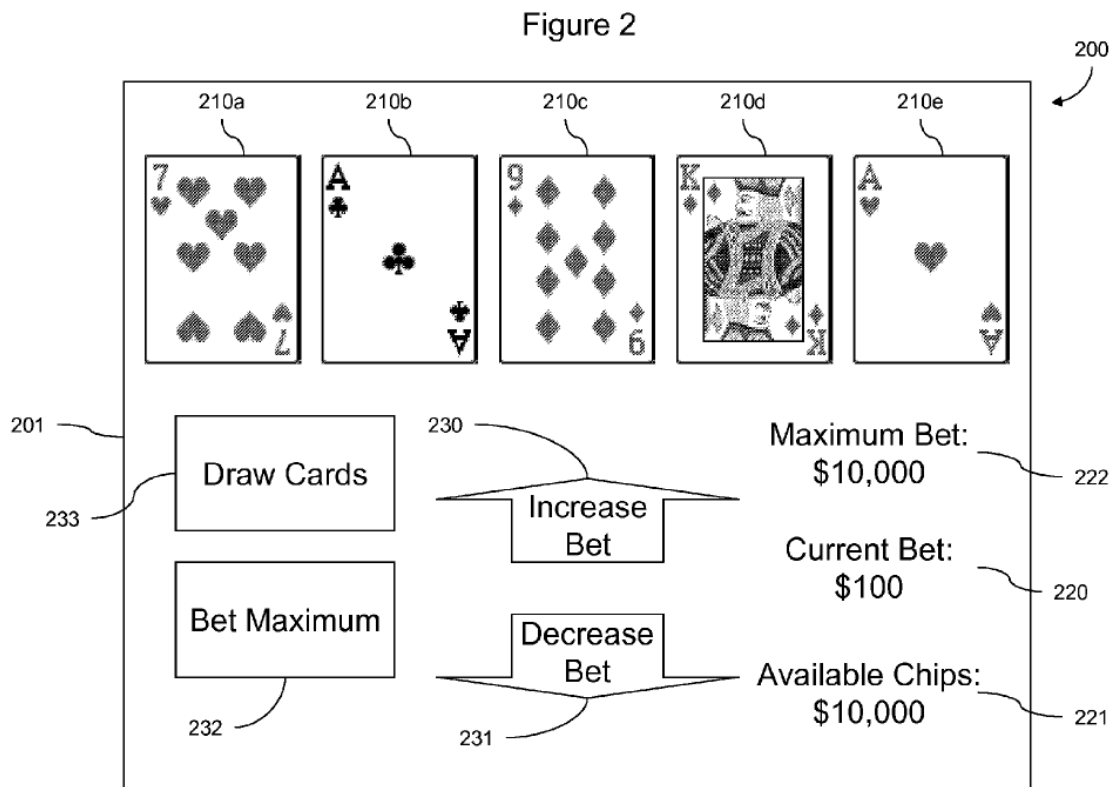


Figure 2 “is a simulated screenshot of images associated with a casino game application executed by a system for casino gaming haptics.” Ex. 1004 ¶ 19. In this example, a touch screen displays five-card draw poker game 201 in which five cards 210a–210e are dealt to the player. *Id.* The game shows current bet 220, amount of chips 221, and maximum wager 222. *Id.* Buttons 230, 231 allow the player to increase or decrease, respectively, the wager. *Id.* Button 233 allows the player to draw cards to replace any cards the player wishes to discard. *Id.* “For example, the player may choose to discard the seven of hearts 210a and nine of diamonds 210c by touching the cards on the touch screen 102 . . . and draw two new cards by pressing button 233.” *Id.*

As the player interacts with the touch screen, the system provides haptic feedback to the player. Ex. 1004 ¶ 20. By way of example,

a user may touch the nine of diamonds 210c, and feel a light pop (e.g., a low magnitude, high frequency, short duration effect) to indicate that the card has been contacted. The user may then drag the card 210c to the edge of the screen 201 to discard the card. While the user is dragging the card, the system 100 may output a low magnitude, low frequency vibration to provide the tactile sensation of a card sliding across a felt surface. When the card reaches the edge of the screen, the system 100 may generate a strong pop (e.g., a high magnitude, high frequency, short duration) effect to indicate the card has been discarded.

Id. ¶ 64.

2. Independent Claim 11

Petitioner contends that each limitation of independent claim 11 is either taught or suggested by Grant ’499. Pet. 41–59. To support its arguments, Petitioner identifies certain passages in Grant ’499 and explains the significance of each passage with respect to the corresponding claim limitation. *Id.* Patent Owner argues that Grant ’499 fails to disclose the

claimed “control gesture . . . associated with a command input to the system, and includes an initial portion, a first intermediate portion, and an ending portion.” Prelim. Resp. 28–31.

We have reviewed Petitioner’s contentions with respect to the limitations of claim 11, and for the reasons discussed below, we determine that the Petition shows a reasonable likelihood that Petitioner would prevail in with respect to the contention that claim 11 would have been obvious based on Grant ’499. *See* Pet. 41–59. We address Patent Owner’s arguments below.

a) The Recited Control Gesture

Petitioner contends that the recited control gesture corresponds to Grant ’499’s disclosure of a gesture by the user to discard a playing card from the game depicted in Figure 2, which gesture Petitioner refers to as the “discard gesture.” Pet. 46 (emphasis omitted) (citing Ex. 1003 ¶ 94).

Petitioner argues that Grant ’499’s discard gesture includes three portions:

(1) the user makes contact with a portion of the screen corresponding to a playing card in order to select the card (“an initial portion”), then (2) the user initiates a sliding motion to drag the selected card on the screen (“a first intermediate portion”), and finally (3) the user continues dragging the card until it reaches the edge of the screen to discard the selected card (“an ending portion”).

Id. at 47 (emphases omitted) (citing Ex. 1002 ¶ 95; Ex. 1004 ¶ 64).

Petitioner argues further that the discard gesture is a control gesture “because it provides a gesture that controls an aspect of the virtual card game (*e.g.*, by activating the command to discard a virtual playing card).”

Id. at 48 (citing Ex. 1002 ¶ 96).

Patent Owner argues that Grant ’499’s discard gesture as identified by Petitioner includes three actions (selecting, dragging, and discarding) that

“are actually multiple separate and distinct control inputs, not a single gesture.” Prelim. Resp. 28–29 (citing Ex. 2001 ¶¶ 46–50). In particular, Patent Owner argues that “selecting” in Grant ’499 “is itself a separate and discrete control input” because “[a]s the Petition admits, ‘selecting’ a card may be done for multiple purposes, including for rearranging cards on the display and for discarding cards.” *Id.* at 29 (citing Pet. 50; Ex. 2001 ¶ 48; Ex. 1004 ¶ 25). According to Patent Owner, “[b]ecause selecting a particular card is a control input on its own, and separate and distinct from dragging, these actions identified in the petition do not meet the ‘control gesture’ requirement because they are ‘merely a combination of other gestures, each associated with its own control input.’” *Id.* at 30 (citing Ex. 2001 ¶ 49; Ex. 1001, 5:7–17; Ex. 2005).⁶

At this stage of the proceeding, we disagree with Patent Owner’s argument. Grant ’499 discloses that, “[i]n addition to touching a card, a user may slide a playing card, such as to re-arrange the cards in the user’s hand, or to discard the card.” Ex. 1004 ¶ 63. Even though Grant ’499 discloses selecting a card for multiple purposes, however, the reference specifically discloses discarding a card by selecting the card and dragging it to edge of the screen to discard it. *Id.* ¶ 64. In this case, selecting the card is a step or portion of the overall discard gesture. This is the disclosure that Petitioner relies on as corresponding to the claimed control gesture. Pet. 46–48. Moreover, we find persuasive Petitioner’s contention that Grant ’499’s disclosure of selecting a card for multiple purposes “does not preclude the discard gesture from qualifying as a ‘**control gesture**’ under the ’806 patent

⁶ Presumably, Patent Owner intended to cite Exhibit 2004—the District Court’s claim construction order—rather than Exhibit 2005.

because nothing in the patent precludes a control gesture from having some portions that are similar to or overlap with portions used [by] other control gestures.” *See* Pet. 50–51 (citing Ex. 1001, 7:41–45).

Furthermore, we would institute on Ground 2 even if Patent Owner’s argument were persuasive because we have determined that Petitioner has demonstrated a reasonable likelihood of success with respect to Ground 1, as discussed above. *See SAS*, 138 S. Ct. at 1359–60; *PGS Geophysical*, 891 F.3d at 1360; 37 C.F.R. § 42.108(a).

Patent Owner also argues that Petitioner’s contention that Grant ’499’s disclosure of dragging the card across the screen corresponds to the claimed first intermediate portion and continuing to drag the card to the edge of the screen corresponds to the claimed an ending portion “artificially splits one natural movement into two to meet the claim language that requires a control gesture to have three portions.” Prelim. Resp. 30. According to Patent Owner, the identified ending portion (dragging the card to the edge of the screen) is merely a continuation of the same movement identified as corresponding to the first intermediate portion. *Id.* at 30–31 (citing Ex. 2001 ¶ 50). Thus, Patent Owner asserts that Petitioner has only identified two separate actions, selecting and dragging, and fails to show the claimed three portions of the control gesture. *Id.* at 31.

Based on the preliminary record, we disagree. Even if dragging the card to the edge of the screen is a continuation of initially dragging the card across the screen, Grant ’499 discloses that the card is not discarded until it is dragged to the edge of the screen. Ex. 1004 ¶ 64. Any other dragging of the card will not result in it being discarded. In addition, Grant ’499 discloses different haptic effects for initially dragging the card and the card reaching the end, which suggests that these two motions are different

portions of the overall discard gesture. *Id.* Furthermore, as Petitioner argues, the '806 patent explains that the claimed first intermediate portion and the claimed ending portion both may include “motioning in a specific direction.” Pet. 49–50 (citing Ex. 1001, 7:65–8:5, 8:5–11). We agree with Petitioner that “[t]his is precisely what occurs in Grant '499 when the user begins dragging the virtual playing card toward the edge of the screen (**‘first intermediate portion’**) and then continues dragging the card until it reaches the edge of the screen (**‘ending portion’**).” *See id.* at 50 (citing Ex. 1002 ¶¶ 95, 97).

Accordingly, at this stage of the proceeding and on the current record, we determine that Petitioner has made a sufficient showing that Grant '499 discloses the “control gesture” as claimed.

b) The Remaining Aspects of Petitioner’s Contentions

Patent Owner does not offer any arguments specifically addressing the remaining limitations of claim 11. *See* Prelim. Resp. 28–31. We have reviewed Petitioner’s contentions with respect to the remaining limitations of claim 11 and determine that the Petition provides a sufficient showing, at this stage of the proceeding, that Grant '499 satisfies each limitation. *See* Pet. 41–44, 56–59.

c) Preliminary Determination as to Claim 11

Based on our review and consideration of the current record, we determine that the information presented sufficiently supports, for purposes of institution, Petitioner’s assertions that Grant '499 satisfies each limitation of claim 11. We therefore determine Petitioner has met its burden to show a reasonable likelihood it would prevail in demonstrating that claim 11 is unpatentable as obvious over Grant '499.

3. *Dependent Claims 12 and 15*

Claims 12 and 15 depend from claim 11. Ex. 1001, 26:3–7, 26:20–22. Because Petitioner has demonstrated a reasonable likelihood of success in proving that at least one claim of the ’806 patent is unpatentable, we institute on all grounds and all claims raised in the Petition. *See SAS*, 138 S. Ct. at 1359–60; *PGS Geophysical*, 891 F.3d at 1360; 37 C.F.R. § 42.108(a). Therefore, it is not necessary for us to assess every claim challenged by Petitioner.

Nevertheless, we note that Petitioner provides reasonable and detailed explanations, supported with the testimony of Dr. Cooperstock, indicating where Grant ’499 teaches or suggests the limitations of claims 12 and 15. Pet. 59–61 (citing Ex. 1002 ¶¶ 105, 117). Patent Owner offers no particular arguments regarding claims 12 and 15 for us to consider at this stage of the proceeding. *See* Prelim. Resp. 28–31. We have reviewed Petitioner’s contentions with respect to these claims and determine that the information presented in the Petition establishes that there is a reasonable likelihood that Petitioner would prevail in its assertion that claims 12 and 15 are unpatentable as obvious over Grant ’499.

IV. CONCLUSION

After considering the evidence and arguments presented in the Petition and Preliminary Response, we determine that Petitioner has demonstrated a reasonable likelihood of prevailing with respect to at least one of the challenged claims. Thus, we institute an *inter partes* review of all challenged claims on all presented challenges. *SAS*, 138 S. Ct. at 1359–60; *PGS Geophysical*, 891 F.3d at 1360; 37 C.F.R. § 42.108(a).

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 11, 12, and 15 of the '806 patent on the unpatentability grounds asserted in the Petition; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial, which commences on the entry date of this decision.

IPR2023-00942
Patent 8,469,806 B2

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