

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMPEREX TECHNOLOGY LTD.

Petitioner,

v.

SEMICONDUCTOR ENERGY LABORATORY CO., LTD.

Patent Owner

Case IPR2023-01016

U.S. Patent. No. 10,741,828

PETITIONER'S REQUEST FOR REHEARING

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All emphasis added unless otherwise noted.

Pursuant to 37 C.F.R. § 42.71(d), Amperex Technology, Ltd. ("Petitioner") submits this Request for Rehearing of the Board's Decision Denying Institution of *Inter Partes* Review of U.S. Patent No. 10,741,828, Paper 11 ("Decision"). This is Petitioner's first rehearing request. *See* 37 C.F.R. § 42.71(d).

I. INTRODUCTION

Claim 1 of the '828 Patent concerns a simple concept: that certain elements present in a positive electrode active material ("PEAM") particle's coating, including fluorine, are also present in its cracks. Ex. 1001, Cl. 1. The Petition collected a wealth of evidence confirming that this was a well-known phenomenon to a person of ordinary skill in the art ("POSITA"), who would know that cracks occur on PEAM surfaces, that fluorine-containing electrolytes decompose to create a fluorine film on exposed surfaces (including in such cracks), and that coating materials will also become present in those cracks during normal use of the battery.

Despite such evidence—and the lack of any dispute that the combinations disclosed fluorine in the coating of PEAM particles—the Board's decision not to institute an *inter partes* review focused on a perceived failure of the Petition to establish that fluorine would be found in the cracks of such particles. This conclusion misapprehended or overlooked three independent aspects of the Petition, each of which is sufficient to justify rehearing and institution.

First, the Board concluded that an opinion by Dr. Hayes regarding the

decomposition of fluorine electrolytes on exposed cracked surfaces was not properly disclosed in the Petition. This decision overlooked the Petition's fulsome development of this argument in two related elements and the explicit cross-reference of this argument during the Petition's discussion of fluorine in the cracks.

Second, the Board misapprehended Fey's teachings by concluding that it "only *suggest[ed]*, rather than *[taught] unequivocally*" that elements contained in a particle's coating will be found in its cracks. Decision at 12. This conclusion both applied the wrong legal standard for obviousness and overlooked the wealth of evidence confirming that a POSITA would have been aware of this phenomenon.

Third, the Board misapprehended material teachings of Shim by concluding that the titanium in its cracks did not come from its coating. In doing so, the Board failed to apprehend that the *only* use of titanium in Shim was from its coating, which mandates the conclusion that coating materials are found in cracks.

Accordingly, for those reasons, Petitioner respectfully requests that the Board grant rehearing of the Decision and institute an IPR trial.

II. LEGAL STANDARD

A request for rehearing "must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed," and is reviewed for an abuse of discretion. 37 C.F.R. § 42.71(c), (d). The Board clarified that such abuse of discretion exists "when we

recognize that we have misapprehended or overlooked a significant fact.” *Merial Ltd. et al. v. VIRBAC*, IPR2014-01279, Paper 18 at 8 (P.T.A.B. Apr. 15, 2015).

III. ARGUMENT

A. The Board Overlooked Argument Presented in the Petition That Fluorine Becomes Present In The Crack Portions Through Exposed Surface Interaction With The Electrolyte Solution

In concluding that there was insufficient evidence to institute an *inter partes* review, the Board acknowledged Dr. Hayes' testimony “that fluorine-containing compounds would be found in Shim's crack portions due to the reaction of newly exposed electrode surface areas (in other words, the walls of the crack) with the electrolyte,” but concluded the argument was not “persuasive” because it had not been disclosed in the Petition. Decision at 15–17. Petitioner respectfully submits that the Board overlooked the Petition's express discussion of, and citation to, this exact argument. Since consideration of this argument will resolve the Board's concerns, Petitioner believes a rehearing will result in institution of *inter partes* review.

By way of background, the Petition was structured to follow the organization of the challenged claims. Accordingly, the Petition's discussion of fluorine in the PEAM particle and why that fluorine would be found in cracks was developed over the two related “fluorine” claim elements. *First*, the Petition explains, as part of its rationale for the combination, that “a fluorine containing electrolyte (*e.g.*, LiPF₆) degrades to form a fluorine-containing layer on the cathode.” Pet. 39 (citing Ex.

1024, 1–2). Patent Owner did not dispute this mechanism. **Second**, at Section XI.A.2.f (element 1.5, “fluorine” in the PEAM), the Petition explicitly discusses that LiPF_6 decomposition will cause a fluorine-containing film to form on all exposed PEAM surfaces (which necessarily includes cracks, *see* Ex. 1001 Fig. 1C, 24:24–36; Pet. at 31). Pet. at 43–45. **Third**, the presence of fluorine in the cracks is discussed in Section XI.A.2.g.iii (element 1.6, presence of the antecedent “fluorine” in a crack), which expressly cross-references Section XI.A.2.f. regarding the formation of fluorine on all exposed PEAM surfaces. Pet. at 55. This type of cross-referencing is not only appropriate and allowable, but regular practice when discussing antecedent claim terms found in different elements. *See Intell. Ventures II LLC v. Ericsson Inc.*, 685 F. App’x 913, 920 (Fed. Cir. 2017) (proper to cross-reference a different claim of IPR when petitioner used “the same references, in the same way, to argue that the combination disclosed or suggested nearly identical limitations”); *Deere & Co. v. Gramm*, IPR2015-00898, Paper 7 at 18–19 (P.T.A.B. Sep. 23, 2015) (cross-referencing permitted even when claim language was different). Critically, when this cross-reference is read appropriately, the Petition properly discloses that fluorine is present in the cracks of the PEAM as a result of electrolyte decomposition.

The Board’s material oversight carries through its five related reasons for why this argument was not contained within the Petition. **First**, the Board concludes that “this argument in the Petition for obviousness on grounds based on Shim does not

contain the argument that Dr. Hayes makes.” Decision at 15. Respectfully, the Board appears to have overlooked the Petition’s explicit disclosure of this exact argument. This argument is discussed through the two “fluorine” elements in the Petition. In the relevant “fluorine present in a crack portion” limitation, the Petition explains “[a]s described above in Sections XI.A.2.f and XI.A.2.g.ii, Shim (either alone or in combination with Lee) discloses fluorine in Shim’s coating, *and a POSITA would have understood that such coating material would be present in crack portions.*” Pet. at 55. Contrary to the Board’s conclusion that the Petition does not argue that the “electrolyte would react with crack surfaces to create fluorine-containing coating,” (Decision at 15) that is what cross-referenced section XI.A.2.f states:

Second, Shim teaches fluorine in the PEAM particle by virtue of its LiPF₆ electrolyte. Ex. 1005, 3. *A POSITA would have known that such an electrolyte causes a fluorine-containing film to form on the PEAM’s surface, which is part of the PEAM.* Ex. 1003, ¶¶ 143; Ex. 1001, 9:30–30, 12:45–49, Figs. 1A–C.

Pet. at 44 (emphases altered). The Petition cites to Dr. Hayes’ Declaration at ¶ 143, where he explains this well-known mechanism will distribute fluorine to all exposed PEAM surfaces, including “*at cracked particle surfaces*, which suggests that the electrolyte invaded into the cracked gaps.” Ex. 1003, ¶ 143 (citing Ex. 1026). Thus, cross-referenced Section XI.A.2.f (presence of fluorine) expressly explains why fluorine would appear on the PEAM surface (including its cracks) through

decomposition of the LiPF_6 electrolyte. Pet. at 44–45.

To the extent the Board believed the Petition did not disclose that such surfaces would include cracks, that is incorrect. It is undisputed that a PEAM surface includes cracks, and that the exposed crack surfaces are exposed to the electrolyte. Indeed, both the Petition and Dr. Hayes clearly explain that the PEAM's surface includes cracks in the cited sections. *See* Ex. 1003, ¶ 165 (“As I explained previously in [the technological background], an LiPF_6 -containing electrolyte (such as the one disclosed by Shim) decomposes to form a fluorine-containing layer on the LCO surface area, which includes cracks.”).¹ Likewise, the Petition refers to at least Fey and Muto to demonstrate the well-known nature of “crevices and cracks on the cathode surface.” *See, e.g.*, Pet. at 55 (citing Ex. 1016, Fey), 25, 27–28 (referring to and showing “cracked particle surfaces” demonstrated by Ex. 1026, Muto), 51 (similar), 54 (similar), 46–50 (showing cracks at particles' surface). Accordingly, Petitioner submits that the Board overlooked the cross-referenced arguments

¹ Indeed, the '828 Patent recognizes that “[t]he crack portion is in contact with the electrolyte solution like the surface of the particle[]” (Ex. 1001 at 24:29–3; Pet. at 31), and shows that the “crack portion 106 illustrated in FIG. 1C” spans the surface. Ex. 1001, 9:58–60, Fig. 1C. Thus, the '828 Patent confirms that a POSITA would have known that surfaces necessarily include cracks.

regarding fluorine-film formation on PEAM surfaces and thus its cracks.

Second, the Board held that Dr. Hayes' earlier discussion of how "fluorine becomes present in crack portions via reaction of the crack walls and the electrolyte . . . do not form part of Petitioner's asserted ground of unpatentability." Decision at 16. This overlooked the Petition's cross-referenced discussion in XI.A.2.f (element 1.5, fluorine) and citation to Dr. Hayes' ¶ 143 in that same section, which both explain why a fluorine coating will form through decomposition of Shim's LiPF₆ electrolyte on exposed surfaces of the particle. Pet. at 43–45, 55. Indeed, Dr. Hayes provides substantial support based in the prior art to explain why a POSITA would have known about this reaction, referencing multiple examples of this reaction occurring through use of the same LiPF₆ electrolyte. Ex. 1003, ¶ 143. Further, this discussion explicitly references Dr. Hayes' description of the underlying chemical reactions of this mechanism in section VI.A.3 (covering ¶¶ 47–57), which would have been known to a POSITA. Accordingly, Dr. Hayes' Declaration at both ¶¶ 47–57 and ¶ 143 are expressly included in the Petition's stated basis that the Shim electrolyte will decompose into a fluorine coating. Pet. at 44–45. This discussion is then cited by cross-reference in XI.A.2.g.iii ("Fluorine present in a crack portion"), as part of the Petition's discussion. *Id.* at 55.

Relatedly, the Board wrote that that "the references cited by Dr. Hayes [in ¶ 165] include Wang, Jang, Bhattacharya, Dedyvère [sic], Aurbach, and Sun," and

criticizes the Petition for not “cit[ing] or discuss[ing] these references in the portion of the Petition addressing the presence of fluorine in the crack portions[.]” Decision at 16. In so concluding, the Board overlooked that cross-referenced Section XI.A.2.f discusses references cited by Dr. Hayes in ¶ 165 that teach fluorine-film formation from electrolytes, including Exhibits 1021 (Dedryvère), 1022 (Solano), 1023 (Aurbach), 1024 (Aykol), 1025 (Kitagawa), and 1026 (Muto). Pet. at 44–45, 55.

Further, the Board also overlooked both the Petition's and Dr. Hayes' explanation of the state of the art, including Muto, which specifically documented fluorine formation on PEAM surfaces, *including in crack portions*, and stated “[f]luorine was also detected at cracked particle surfaces.” Ex. 1026, 6 (cited by Pet. at 44); *see also* Pet. at 27–28 (explaining that Muto showed “fluorine present in crack portions[.]”); Ex. 1003, ¶ 143 (quoting Muto). The Board overlooked this clear evidence in concluding that Petitioner's cross-referenced argument concerned only “the presence of fluorine in or on the positive electrode active material particle, not within the crack portions of the particle[.]” Decision at 16. To the extent that Muto discloses fluorine formation on a different PEAM material, Petitioner also cited evidence of the same fluorine-film formation mechanism on LiCoO₂ surfaces. *See* Pet. at 44 (citing Exs. 1021–1024). Accordingly, the Board's oversight of the significant fact that Muto shows a POSITA's understanding of the purportedly missing limitation—namely, the presence of fluorine in crack portions—is also an

abuse of discretion. *Merial Ltd.*, IPR2014-01279, Paper 18 at 8; *Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1365 (Fed. Cir. 2015) (vacating PTAB's decision because background reference "had to be considered [] even though it was not one of the three pieces of prior art presented as the basis for obviousness"); *Randall Mfg. v. Rea*, 733 F.3d 1355, 1363 (Fed. Cir. 2013) (vacating PTAB's decision due to "its failure to consider the knowledge of one of skill in the art appropriately" where background references "constitute important evidence of the state of the art and the context in which the [] combination should be evaluated").

Third, the Board wrote that the Petition's reference to earlier portions only discusses "the presence of fluorine in or on the positive electrode active material particle, not within the crack portions." Decision at 16. Respectfully, this again misapprehends the structure of the Petition, which follows the structure of the claims. First, the Petition explains that the LiPF_6 electrolyte decomposes to deposit fluorine on the PEAM's surface—which the Petition (and Patent) consistently indicate includes cracks. Pet. at 44–45. Then, the Petition explains that fluorine will be found in crack portions with cross-reference to Section XI.A.2.F (element 1.5, fluorine), due to decomposition reactions occurring on all exposed portions of the surface, including in cracks. Pet. at 43–45, 52–55. The Petition also cites to Dr. Hayes' discussion of this phenomenon, which clarifies that the PEAM surface includes cracks. *See id.* (citing Ex. 1003 ¶¶ 143, 164–165 (describing fluorine film-

formation “on the LCO surface area, which includes cracks”)). Thus, the Petition properly discusses the presence of fluorine in crack portions.

Fourth, the Board found that that the Petition did not cite to Exhibits 1021–1030 in the “Technology Overview” section as part of its asserted ground of unpatentability. Decision at 16–17. However, the Petition’s discussion of both the “fluorine” and “fluorine in a crack portion” elements includes these same references, expressly and through citations to Dr. Hayes’ declaration. *See, e.g.*, Pet. at 44–45 (citing Exs. 1021–1026 and Ex. 1003, ¶143), 55 (citing Ex. 1003, ¶ 165, which references ¶¶ 47–57). The substance of the Petition’s “Technology Overview” section is present in the cited and cross-referenced sections of Dr. Hayes’ declaration, which includes ¶¶ 47–57, 143, and 165.

Fifth, the Board wrote that it should not be “required to speculate to the degree this discussion reflects about the nature of Petitioner’s argument.” Decision at 17. Respectfully, the Petition does not require the Board to “hunt[] for truffles buried in briefs” (*id.*) but instead structured its arguments consistent with the organization of the claim elements, cross-referencing relevant discussion regarding earlier-appearing elements where appropriate. Pet. at 40–56, 69–77.

Accordingly, for each of the reasons set forth above, Petitioner respectfully submits that the Board overlooked the Petition’s express disclosure of fluorine as a coating on the surfaces and cracks of the PEAM as a result of decomposition of

Shim's electrolyte, and then, in the appropriate section, why *that same fluorine coating* would be present in crack portions. Accordingly, Petitioner requests rehearing and institution of the Petition. *FMC Tech. Inc. v. Onesubsea IP UK Ltd.*, IPR2016-00907, Paper 27 at 5, 10 (P.T.A.B. Apr. 19, 2018) (granting request for rehearing when the Board overlooked cross-referenced arguments); *see also Snap, Inc. v. Sanderling Management Ltd.*, IPR2021-00779, Paper 20 at 39–40 (P.T.A.B. Nov. 9, 2021) (instituting IPR where petitioner relied on “‘general knowledge’ in the art as evidenced by the background references” to fulfill otherwise missing limitation); *Ariosa Diagnostics*, 805 F.3d at 1365; *Randall Mfg.*, 733 F.3d at 1363.

B. The Board Overlooked Fey's Material Teachings By Misapprehending The Standard For Obviousness

Petitioner also respectfully submits that the Board's failure to consider Fey's teachings and misapprehension of the obviousness standard provide a separate basis for rehearing. A “reference must be considered not only for what it expressly teaches, but also for *what it fairly suggests*.” *In re Rhoads*, 646 F. App'x 967, 974 (Fed. Cir. 2016) (internal citation omitted); *see Formlabs Inc. v. Envisiontec, Inc.*, IPR2017-01258, Paper 12 at 21 (P.T.A.B. Oct. 30, 2017). By faulting Fey for “only *suggest[ing]*, rather than *teaching unequivocally*, that ‘particles of the coating material . . . become ingrained in the crevices and cracks’” (Decision at 12), the Board overlooked Fey's material teaching, which, when combined with other

references and a POSITA's knowledge, fairly suggests the presence of magnesium and fluorine in cracks. *See Abbott v. DexCom*, IPR2022-00605, Paper 10 at 24 (P.T.A.B. Jul. 27, 2022) (argument that reference did not “clearly and unequivocally disclose” combined embodiment was “unavailing, as it sounds in anticipation, whereas Petitioner's unpatentability challenge is based in obviousness”).

The Petition provides a technology overview that describes the state of the art, including, as taught in Fey, that “[i]t is inevitable that coated surfaces [like PEAMs] always have defects such as cracks and pinholes in them.” Pet. at 25 (citing Ex. 1016, 1). Even if Fey merely “*suggests*” that “the cycling process could have enabled the particles of the coating material to *become ingrained in the crevices and cracks* on the cathode surface” (Decision at 12), the cited references confirm that this is more than a mere suggestion but is instead a well-known phenomenon. *See, e.g.*, Pet. at 44 (citing Ex. 1026, 6 (showing fluorine coating in crack portions)), 54–55 (citing Ex. 1005, Fig. 2(b) (showing magnesium and titanium coating materials in crack portion)). As explained in the Petition and confirmed by multiple sources, a POSITA would have been aware of this phenomenon and would have understood that coating elements would become present in the crack portion of a PEAM. Pet. at 52–55. While the Board credits Dr. Lucht's suggestion that the choices of coating material and method “can have dramatic effects on the physical and chemical properties of the resultant coating” (Decision at 12), the silence of the '828 Patent undercuts this

evidence. *See* Ex. 1001, 21:38–24:36 (describing fluorine at surface but not in cracks, thus not expressly explaining mechanism by which fluorine enters cracks).

Thus, the Board's conclusion, which was based in part on an erroneous "unequivocal" standard—rather than the correct legal standard of obviousness—overlooked Fey and is contradicted by its agreement that Fey "suggests" that coating materials become embedded in surface cracks and crevices, which is all that is required for obviousness. *In re Rhoads*, 646 F. App'x at 974; *Neurocrine Biosciences, Inc. v. Spruce Biosciences, Inc.*, Case PGR2021-00088, Paper 16 (P.T.A.B. Aug. 4, 2023) (vacating denial of institution based on errors of law). Petitioner respectfully seeks rehearing on this basis: that a POSITA's knowledge may be determined based on what information Fey would have "fairly suggested."

C. The Board Misapprehended A Material Teaching Of Shim and Failed To Consider The Totality Of The Evidence On The Record

Lastly, rehearing is also independently warranted because the Board misapprehended a material teaching of Shim and thus failed to consider the "totality of the evidence currently in the record." *See* PTAB Rules of Practice, 85 Fed. Reg. 79120 (Dec. 9, 2020) ("85 Fed. Reg. 79120") ("In determining . . . institution, the PTAB considers *the totality of the evidence currently in the record.*"); *Merial Ltd.*, IPR2014-01279, Paper 18 at 2, 14. Shim, like Fey, shows that a PEAM's coating material is also present in its crack portions. Pet. at 52–55; Ex. 1003, ¶¶ 160–164.

This is evident in Shim's Figure 2, which shows titanium present in the crack portion of the coated sample (Fig. 2(b)), but not present anywhere in the uncoated sample (Fig. 2(a)). Pet. at 42 (showing Ti present only in coated sample); *compare with* Pet. at 41, 43 (showing Li and Mg present in both coated and uncoated samples); *see also* Ex. 1003, ¶¶ 136–38. Here, Shim's coating is the **only** titanium source, since there is no titanium in the bulk material. *See* Pet. at 42 (noting that Shim discloses using lithium titanate as a coating and citing Shim's Figure 2(a)); Ex. 1003, ¶¶ 136–38. Because Shim's **only** source of titanium is its coating, the titanium present in the crack of Shim's particle must have necessarily originated from the coating. *See* Pet. at 52–55. Thus, the material teaching from Shim is that coating materials become present in the crack portions of a PEAM. Pet. at 52–55 (“a POSITA would have understood . . . elements within Shim's coating will be found in Shim's crack portions”); Ex. 1003, ¶ 162 (describing that “surface coating elements Mg and Ti” are present in the crack of Shim's Fig. 2).

The Board misapprehended this teaching and stated that “we are not persuaded that Petitioner shows sufficiently how the high-concentration areas of magnesium and titanium . . . could have resulted from portions of the coating of Shim's particle becoming ingrained in a crack.” Decision at 14. But the '828 Patent requires only that fluorine and magnesium be **present** in a crack portion of a PEAM particle—not any specific mechanism by which these elements become present in

the cracks or any particular concentration of elements in the crack relative to the coating. Ex. 1001, Cl. 1. Thus, the mechanism by which coating materials became present in the crack is irrelevant.

Shim's teaching, when combined with Lee and the knowledge of a POSITA, which includes Fey's suggestion that coating becomes ingrained in cracks, fairly suggests that a particle's coating **would be present** in its cracks. Pet. at 42–55; *Cardiovascular Systems, Inc. v. Shockwave Medical Inc.*, IPR2019-00408, Paper 70 at 31 (P.T.A.B. July 20, 2023) (“[T]he test for obviousness is . . . **what the combined teachings suggested to those of ordinary skill in the art.**”). All of the above disclosures, evidence, and knowledge fairly suggest the presence of fluorine in crack portions. *See* Pet. at 27–28 (citing Ex. 1026, 6, Fig. 13 (showing fluorine present in cracks)); Ex. 1003 ¶¶ 162–165. In sum, the Board's misapprehension of Shim with Lee and failure to consider the “totality of the evidence currently in the record” is an abuse of discretion. *See* 85 Fed. Reg. 79120.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Board reconsider its Decision and institute trial.

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Respectfully submitted,

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CERTIFICATION OF SERVICE

Pursuant to 37 CFR § 42.6(e), the undersigned hereby certifies that the foregoing Petitioner's Request for Rehearing was served on Patent Owner's lead and back-up counsel in its entirety by electronic service at the email addresses provided below:

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