

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PERMIAN GLOBAL INC., AND
MANTICORE FUELS, LLC
Petitioners

v.

FUEL AUTOMATION STATION, LLC,
Patent Owner

Case No. IPR2023-01236
Patent 10,815,118

**PETITIONERS' AUTHORIZED REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE**

TABLE OF AUTHORITIES**Page(s)****CASES***Becton, Dickinson and Co. v. B. Braun Melsungen AG,*

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STATUTES

35 U.S.C. § 325(d) 1

LIST OF EXHIBITS¹

Exhibit #	Description
EX1003	Expert Declaration of Dr. Robert A Durham, PE, FIEEE
EX1008	File History of '118 Patent
EX1037*	Email titled "RE: IPR Nos. IPR2023-01236 and -01238; Petitioner request to file replies to POPRs" from Esther Goldschlager on Dec. 18, 2023
EX1038*	Order Granting Joint Motion to Stay Pending Inter Partes Review
EX1039*	Director Vidal's June 21, 2022 Memorandum Regarding Interim Procedure for Discretionary Denials
FAS2001	Dictionary definitions
FAS2002	WO 2007/087849 with translation
FAS2003	U.S. 2,769,572
FAS2004	Parent Application 15/290,304 File History
FAS2007	U.S. 3,826,275

¹ Petitioner has noted new exhibits with "*".

In its December 18, 2023 email, the Board authorized Petitioners to submit this Reply to address claim construction and § 325(d) issues from Patent Owner's ("PO") Preliminary Response ("POPR") identified in Petitioners' request. EX1037.

Regarding the construction of "a tube and a sleeve that circumscribes the tube", PO concedes that "[t]he '118 Patent provides no explicit definition of the claim term, nor does the prosecution history provide any insight on the claim term," and appears to agree that the plain and ordinary meaning of these plain English words should apply. *See* POPR, 8. Nevertheless, PO proposes a construction that improperly adds limitations. Neither the intrinsic record nor PO's dictionary definitions support narrowing this claim term as PO proposes.

PO also urges the Board to exercise its discretion to deny institution under *Advanced Bionics* and 35 U.S.C. § 325(d), arguing that *Coxreels* and *Shoap* are cumulative of references considered by the USPTO during prosecution. However, neither *Coxreels* nor *Shoap* are cumulative, and PO's arguments only serve to highlight the strength of the Petition and relevance of those references. Petitioners respectfully request the Board institute *inter partes* review of the '118 Patent.²

² Petitioners also respectfully inform the Board that, after the Petition was filed, PO agreed to stay its district court action asserting the '118 Patent pending the outcome of this proceeding; the district court ordered a stay on August 28, 2023. *See* EX1038.

I. CLAIM CONSTRUCTION

As an initial matter, PO apparently agrees that the plain and ordinary meaning of “a tube and a sleeve that circumscribes the tube” should apply, and that the intrinsic record does not provide any further definition of that term. *See* POPR, 8. That should end the inquiry. Nevertheless, the POPR proposes a construction that improperly adds new limitations (at least those underlined) to the claims, as shown in Claim 5 as an example below.

Claim 5	Claim 5 under POPR’s construction
... wherein each of the hoses includes a tube and a sleeve that circumscribes the tube, and each said sensor communication line is routed in the respective different one of the hoses between the and the sleeve.	... wherein each of the hoses includes a hollow cylinder <u>that conveys fluid</u> and <u>a physically separate</u> case that encircles the tube, and each said sensor communication line is routed in the respective different one of the hoses between the and the sleeve.

PO concedes that none of these limitations are required by the intrinsic record, instead improperly importing them based on extrinsic dictionary definitions. *See Mosaic Brands, Inc. v. Ridge Wallet LLC*, 55 F.4th 1354, 1362 (Fed. Cir. 2022) (criticizing party and noting that it “offers no intrinsic evidence for [its] position, only extrinsic dictionary definitions and attorney argument”). But worse, “physically

separate” is not found in any of the definitions that the POPR cites. *See* POPR, 9. This limitation is supported by nothing other than bare, circular attorney argument that the structure described in the claim is “unreasonable” unless the tube and the sleeve are physically separate. *See* POPR, 9-10. Of course, PO ignores the expert testimony of Dr. Robert Durham who opined that *Shoap* discloses this element without a physically separate structure. *See e.g.*, EX1003, ¶182.

Even PO’s own arguments elsewhere in the POPR contradict its logic. In arguing that *Shoap* is cumulative of *Griffiths*, the POPR cites the examiner’s statement during prosecution of the parent application that *Griffiths* discloses a sensor communication line “in the hose between the tube and the sleeve (in the embodiment where the lines are routed in the walls of the hose...)”. *See* POPR, 18-19 (quoting FAS2004, 578-579). There, the examiner mapped that embodiment in *Griffiths*—a single hose with walls—to “a tube and a sleeve that circumscribes the tube”, expressly asserting that the phrase does not require physically separate structures. PO did not argue that examiner’s interpretation was wrong, at least suggesting that PO agreed with it. *See* FAS2004, 572. At minimum, PO’s proposed construction is inconsistent with this unrebutted interpretation in the intrinsic record.

Further, requiring the tube to perform the function of “convey[ing] fluid” is not only unnecessary to define the claimed “tube” but also ignores the alternative function that PO’s own dictionary definition allows (“or functions as a passage”).

FAS2001, 5. But neither of these functional requirements should limit the plain and ordinary meaning of “a tube”. Accordingly, the Board should expressly reject PO’s proposed construction and apply plain and ordinary meaning to the term at issue.

II. INSTITUTION SHOULD NOT BE DENIED UNDER § 325(D)

A. The cited references are not cumulative.

i. *Coxreels* is not cumulative of the disclosure of *Amann*.

The POPR annotates *Amann*’s FIG. 1 in an attempt to match its disclosure to that of *Coxreels*. See POPR, 15. However, the POPR’s attempt fails under any scrutiny. For example, the POPR acknowledges that what it labels a “spindle” [sic] and refers to as a “reel[]” are unnumbered in *Amann*’s figures and undescribed in *Amann*’s text. Indeed, neither the word “spindle” nor “reel” appears anywhere in *Amann*’s specification—either in the English translation that PO provided during prosecution or the new English translation it provides with the POPR. See EX1008, 717-745; compare with FAS2002.

Nor does *Amann* disclose a fluid passage through the alleged “reel” or “spindle”. The POPR’s annotations of *Amann*’s Figure 1 assert that an “outlet” is “implied, for [the] fluid to go from [the] inlet to [the] hose.” See POPR, 15. However, elsewhere the POPR asserts that “it is quite possible to have a reel in which there is no fluid passage running through the reel,” and that a “hose [] mechanically secured to the reel by inserting the end of the hose through a slot in the reel hub” would not

be a reel with a fluid passage running through the reel. *See e.g.*, POPR, 30 (discussing FAS2007 (the “’275 Patent”). Even if the unnumbered structure of *Amann* were a reel, it is at best ambiguous whether it suggests an interior fluid passage in the alleged reel (as clearly disclosed by *Coxreels*) or something like the arrangement of the ’275 Patent.³ *Coxreels*’ disclosure is explicit and more detailed, showing in a photograph and describing in the text the inlet and the outlet of the fluid passage in the reel (*e.g.*, “[e]xternal fluid path with machined from solid brass 90° full-flow NPT swivel inlet”) such that *Coxreels* cannot be cumulative.

PO’s reliance on a new translation of *Amann* (FAS2002) further undermines its argument that *Coxreels* is cumulative of *Amann*, particularly since that translation differs from the translation PO provided during prosecution of the ’118 Patent and available to the examiner (EX1008, 717-745). For example, PO’s new translation and annotated Figure 1 labels element 70 as an “inlet” (*see* EX2002; POPR, 13, 15), whereas the translation of *Amann* that PO provided during prosecution refers only to an “input side” of a “dispensing line[]” (*see e.g.*, EX1008, 732). Thus, the examiner did not consider any disclosure of an “inlet” in *Amann*.

ii. *Coxreels* is not cumulative of the disclosure of *Harman*.

³ To be clear, Petitioner does not necessarily agree with PO’s suggestion that the ’275 Patent fails to read on the relevant limitations.

The POPR similarly attempts to match elements of *Harman* and *Coxreels*—and fails for similar reasons. For example, the POPR states, “the depiction of pipes leading into the sides of reels to provide fuel to the nozzles of the hoses” in *Harman* “means that there is a flow path through the reel.” *See* POPR, 16-17. But once again, the POPR provides no expert testimony or other evidence why this must be the case. *See e.g.*, POPR, 30 (discussing alternative arrangement in another context). As another example, the POPR states “pipe inlets 29 lead[] into the sides of the reels to provide fuel through nozzles 23 of the hoses” and labels a supposed “inlet” on its annotated *Harman* FIG. 2—but reference numeral 29 does not refer to a “pipe inlet” in *Harman*, nor does reference numeral 29 appear in FIG. 2 where the POPR shows its “inlet” annotation. *See* POPR, 16. Instead, reference numeral 29 refers to a “filler line” and is shown in an entirely different part of FIG. 2. *See* FAS2003, FIG. 2, 2:51.

iii. *Shoap* is not cumulative of *Griffiths*.

Shoap’s disclosure of the relevant limitations is far more detailed than that of *Griffiths*. *Griffiths* does not include any figure showing a wire in the walls of a hose and only briefly mentions it at the end of the specification. In contrast, *Shoap* includes at least 6 figures illustrating that configuration with more specification detail. Similarly, *Griffiths* includes 2 passing mentions of a “tensioned reel,” whereas *Shoap* includes figures illustrating reels and uses the word “reel” 106 times. Finally, *Griffiths* was not cited in a rejection of the application that issued as the ’118 Patent.

In light of these differences and the noncumulative nature of the art, *Becton* factors (a) and (b) weigh strongly in favor of institution. *See Becton, Dickinson and Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017). Additionally, the Examiner did not discuss *Amann*, *Harman*, or *Griffiths* at all during prosecution of the '118 Patent; rather, they were merely listed in lengthy IDS's submitted by PO and were among over 100 references of record. *See e.g.*, EX1008, 106, 87. Thus, *Becton* factor (d) weighs strongly in favor of a conclusion that neither *Coxreels* nor *Shoap* is cumulative. Thus, *Becton* factors (a), (b), and (d) each weigh strongly against exercising discretionary denial.

B. Even if the references were similar, the Board should still institute IPR.

Further, Petitioners have established a compelling case on the merits based on the prior art in the Petition. This overwhelmingly weighs in favor of institution. *See* EX1039, 4; *Opensky Industries, LLC v. VLSI Tech. LLC*, 2021-01064, 47-49 (Oct. 4, 2022) (precedential). Thus, to the extent the Examiner considered references similar to those in the Petition, the Examiner erred in a manner material to patentability by overlooking their combined disclosures. Finally, if the Board finds that *Shoap* is cumulative, it should still institute IPR. Institution is a “binary choice”, and other grounds in the Petition leave out *Shoap* or combine it with noncumulative references. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Thus, denial under § 325(d) is not warranted. Petitioners respectfully request the Board institute.

Respectfully submitted,

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Lead Attorney for Petitioners

Date: January 5, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I caused a true and correct copy of the foregoing Petitioners' Authorized Reply to Patent Owner's Preliminary Response to be served via email on:

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The undersigned further certifies that a courtesy copy of the foregoing Petitioners' Authorized Reply to Patent Owner's Preliminary Response, and all supporting exhibits, were provided by electronic service to counsel retained by Patent Owner in the Related Matters identified in the Petition:

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