

IN THE 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 IPR2023-01236

Patent No. 10,815,118

PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO PATENT
OWNER'S PRELIMINARY RESPONSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

TABLE OF EXHIBITS iv

I. CLAIM CONSTRUCTION.....1

II. INSTITUTION SHOULD BE DENIED UNDER *ADVANCED BIONICS*.....4

TABLE OF AUTHORITIES

Cases	Pages
<i>Dropworks, Inc. v. The University of Chicago</i> , IPR2021-00100 (P.T.A.B. May 14, 2021)	5, 6, 7
Rules	Page
37 C.F.R § 42.65(a).....	2

TABLE OF EXHIBITS

Exhibit	Description
FAS2001	Dictionary definitions
FAS2002	WO 2007/087849 with translation
FAS2003	U.S. 2,769,572
FAS2004	Parent Application 15/290,304 File History
FAS2005	GB 2485832
FAS2006	Sister Application 15/673,730 File History
FAS2007	U.S. 3,826,275
FAS2008	Jayanti, "Bends Flow and Pressure Drop"
FAS2009	Keulegan et. al., "Pressure Losses For Fluid Flow In Curved Pipes"
FAS2010	Haile Parent Application

I. CLAIM CONSTRUCTION

The claim phrase "a tube and a sleeve that circumscribes the tube" is in dispute, and construction of this phrase is necessary since the phrase touches twelve of the eighteen claims of the '118 Patent. POPR at 7-8. Despite this, Petitioner chose not to propose an express construction. As there is no competing construction, PO requests that the Board adopt PO's construction. Petitioner's Reply does not change these facts.

Petitioner's position, if adopted, would likely impede resolution of the IPR. Petitioner asserts that a plain and ordinary meaning and lack of intrinsic record "should end the inquiry." Reply at 2. However, since there is no express plain and ordinary meaning, Petitioner is implicitly advocating for an ambiguous understanding that has no metes and bounds. Such an ambiguity, if permitted, is likely to impede resolution of the IPR, since neither the parties nor the Board would be able to analyze the issues based on a common understanding of the claims.

Indeed, Petitioner even highlights an instance in which it has attempted to use such an ambiguity to its advantage. Petitioner asserts that its expert opined that Shoap discloses "a tube and a sleeve that circumscribes the tube. Reply at 3 (citing EX1003 ¶182). Notably, however, ¶182 only provides a conclusory statement,

without any underlying reasoning or basis. It is thus unclear what the basis is for the expert's interpretation or conclusion¹.

Petitioner's argument of improperly added limitations is also without merit. Reply at 2. The POPR expressly discusses how the proposed construction is supported by the disclosure of the '118 Patent, cites to portions of the '118 Patent, maps the proposed construction language to excerpts from the '118 Patent, and discusses the claim language context (which is part of the internal record). POPR at 9. Accordingly, PO has indeed offered intrinsic support for its constructions, and the constructions do not import limitations based on extrinsic dictionary definitions. In contrast, there is no express definition for a plain and ordinary meaning, nor does Petitioner provide any support, intrinsic or extrinsic, for a plain and ordinary meaning of the claim phrase, which leaves the PO and Board to guess what meaning Petitioner ascribes in its grounds.

Petitioner's argument that alleged added limitations are only supported by circular attorney argument is also meritless. Tellingly, rather than address PO's analysis of the claim language context on the merits, Petitioner instead resorts to a straw man allegation that "physically separate" is not in any of the definitions. However, PO has not contended that "physically separate" is from the dictionary

¹ It is also noted that under 37 C.F.R § 42.65(a), "Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight."

definitions (see Table 1, POPR at 9). Rather, as PO explained, this feature is implicit from the language context. Importantly, PO's analysis of the claim language context stands uncontroverted, as Petitioner has not made any substantive contention that PO's proposed claim language context is unreasonable.

Petitioner instead attempts to argue that PO has contradicted its own argument. Reply at 3. Petitioner asserts that in the prosecution of the parent '304 Application, the examiner mapped the embodiment of Griffiths – a single hose with walls – to a "tube and sleeve that circumscribes the tube." Petitioner then argues that since PO did not argue against that interpretation, PO implicitly agreed with it. Petitioner failed to mention, however, that the alleged interpretation was in a rejection of a dependent claim (claim 3) (see FAS2004 at 579). In that prosecution response, applicant/Patent Owner relied on independent claim 18 for patentability though (FAS 2004 at 572), not on the features of dependent claim 3. As a result, insofar as the examiner made an interpretation for dependent claim 3, the rejection of dependent claim 3 was rendered moot and it was not necessary for the applicant/PO to expressly address claim 3 in order to advance prosecution.

Additionally, that portion of the prosecution history of the parent '304 Application is less than four full lines of text and is, obviously, a point that the examiner did not fully develop. Indeed, the examiner did not provide an explicit interpretation, or any underlying analysis made in light of the specification. Thus, it

is not at all clear that there was even a proper interpretation to argue against. There is no reasonable inference that PO agreed with any interpretation, nor is there reasonable basis to conclude that PO's proposed construction is inconsistent with four lines of an undeveloped rejection from the parent application.

Finally, Petitioner contends that requiring the tube to function to convey fluid is unnecessary and ignores the alternative function from the dictionary definition as a passage. Reply at 3. This is a distinction without a difference, as Petitioner fails to identify any meaningful issue that this raises. Nevertheless, Petitioner concludes that neither of those requirements should limit the plain and ordinary meaning of a "tube," though it is unknown what that meaning is.

There is no express meaning of the noted claim phrase by which the parties and Board can analyze and decide the issues of the present IPR. Petitioner is in essence advocating for an ambiguous understanding that has no metes and bounds. Such an ambiguity would likely impede resolution of the IPR, and PO thus urges the Board to adopt PO's construction.

II. INSTITUTION SHOULD BE DENIED UNDER *ADVANCED BIONICS*

Petitioner raised Advanced Bionics and argued that the Board should not deny institution under the Becton factors. Petition at 7. Petitioner represented that the art it asserts "is not cumulative of the prior art presented to the Examiner during prosecution." Petition at 8. Petitioner thus had the opportunity to address Amman,

Harman, and Griffiths, but chose not to do so. Now, with the hindsight benefit of PO's arguments, Petitioner seeks to revisit its choice.

As PO pointed out, the analysis of whether a reference is cumulative does not require that the teachings be identical or entirely cumulative, only that they are substantially the same. *Dropworks, Inc. v. The University of Chicago*, IPR2021-00100, Paper 9 at 13-14 (P.T.A.B. May 14, 2021). POPR at 12-13.

In effort to circumvent the issue, Petitioner attempts to distill the analysis to an *ipsissimis verbis* test of whether the same language is found. Petitioner suggests that since Amann doesn't use the word "spindle" or "reel," Amann does not have these features. However, the alleged reel/spindle from Amann looks substantially similar to that of Coxreels, as the spindle of Amann appears to have substantially the same shape as the spindle of Coxreels. POPR at 15. Notably, Petitioner does not explain what Amman shows, if not a reel and spindle.

Petitioner's argument that PO has contradicted itself is also without merit. Reply at 4. While reels without fluid passages exist, as Petitioner demonstrated (POPR at 30), such a reel would clearly have no need to be connected with a delivery pipe or line 70 as in Amann. Amann clearly shows delivery line 70 connected to the side of the reel, and Amann explicitly describes (FAS2002 at p. 14) that dispensing pipe or lines 70 have hoses at the end with a dispensing opening 20. Given how Amann shows the line 70 being connected on the side of the alleged reel/spindle, the

fluid from the line 70 would inherently have to flow through the reel/spindle to get to the hose that is on the spindle. There is, therefore, no ambiguity that there is a flow path through the reel of Amann. Moreover, even if Coxreels had more detail in some aspects than Amann (which PO does not concede), the teachings need not be identical. See *Dropworks*, *supra*. Indeed, it is of no consequence whether Coxreels discloses extraneous details such as a solid brass swivel inlet (see Reply at 5), since a brass swivel inlet is not claimed in the '118 Patent.

Additionally, Petitioner's perceived differences between the certified translation of Amann provided with the POPR (FAS2002) and the translation of Amann from prosecution are not meaningful to the analysis. PO's contention that Amann has an inlet was based on the function of fluid being provided through the line 70 to the reel/spindle and then the hose at 20. These features are shown and described in both translations (see EX1008 at 732, 743; FAS2002 at 14, 25).

Similarly, the analysis of Harman cannot be distilled to an *ipsissimis verbis* test. Harman clearly shows a reel with a pipe or tube connected at the side, and describes flow of fuel to reel 21 and hose 22.² FAS2003, col. 2, ll. 31-38. Like Amann, fluid from the pipe connected at the side of the reel would inherently have

² The POPR cites to col 3, ll. 31-38 (POPR at 16). However, there is an inadvertent error and the citation should have been to col. 2 that introduces the reel 21 and hose 22. Harman is an older patent that is of lower copy quality and element 20 was inadvertently misread as 29 in the POPR. However, Patent Owner's annotation (POPR at 11) identifies the pipe structure.

to flow through the reel/spindle to get to the hose that is on the spindle. It is unclear from Petitioner's argument why expert testimony would be needed to draw that conclusion, particularly since Petitioner does not raise any plausible alternative where there would not be flow through the reel/spindle in the depicted and described arrangements of Harman and Amann.

Finally, Shoap is cumulative to Griffiths. Petitioner fails to see the forest for the trees. Griffith discloses a tensioned reel and that the data cables "may be embedded within the walls of the fluid supply pipes." FAS2005 at 18, 40. Petitioner does not deny that Griffiths discloses these features. Even if Shoap disclosed extraneous details that are not in Griffiths (which PO does not concede), the teachings need not be identical (*Dropworks, supra*), and Petitioner fails to identify any material differences. As PO pointed out (POPR at 18-21), Griffiths was cited during prosecution and Examiner Arnett was aware of Griffiths because he used it in a rejection in the parent '304 Application, which suggests that he considered it but did not find it to be applicable to the claims of the '118 Patent.

Petitioner did not address Amann, Harman, and Griffiths in its Petition and has failed in its Reply to show that Coxreels and Shoap are not cumulative. Examiner Arnett expressly considered Amann, Harman, and Griffiths, and Petitioner has not demonstrated any error. POPR at 21-26. Accordingly, for the reasons above and in the POPR, the Petition should be denied.

Respectfully Submitted,

CARLSON, GASKEY & OLDS, P.C.

Dated: January 12, 2024

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STATEMENT OF COMPLIANCE

Pursuant to the Board's email of December 18, 2023 (EX1037), the undersigned hereby certifies that, exclusive of the tables of contents and authorities, the signature page, and the certificate of service, the foregoing document complies with the 7 page limit.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 12, 2024, a true and correct copy of the foregoing document was served electronically via e-mail in its entirety on counsel identified below by Petitioner for service at

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