

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PERMIAN GLOBAL INC., AND
MANTICORE FUELS, LLC
Petitioner,

v.

FUEL AUTOMATION STATION, LLC,
Patent Owner

Case No. IPR2023-01238

Patent 10,974,955

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
TABLE OF EXHIBITS	iii
I. CLAIM CONSTRUCTION	1
II. INSTITUTION SHOULD BE DENIED UNDER <i>ADVANCED BIONICS</i> ...	3

TABLE OF AUTHORITIES

Cases	Pages
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<i>Dropworks, Inc. v. The University of Chicago</i> , IPR2021-00100 (P.T.A.B. May 14, 2021)	4, 5
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Other Authorities	Page
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MPEP 2111	2
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TABLE OF EXHIBITS

Exhibit	Description
FAS2001	WO 2007/087849 with translation
FAS2002	U.S. 2,769,572
FAS2003	Independent Claim Comparison
FAS2004	Parent Application 15/890,584, 10/05/2018 Office Action
FAS2005	Parent Application 15/890,584, 3/29/2019 Office Action
FAS2006	Co-owned Application 16/148,403, File History Excerpt of 10/1/2018 IDS
FAS2007	Co-owned Application 16/148,403, File History Excerpt of Notice of Allowance
FAS2008	U.S. 3,826,275
FAS2009	Jayanti, "Bends Flow and Pressure Drop"
FAS2010	Keulegan et. al., "Pressure Losses For Fluid Flow In Curved Pipes"

I. CLAIM CONSTRUCTION

The claim word "connected" is in dispute, and construction of this phrase is necessary since the word touches all three of the independent claims in the '955 Patent. POPR at 7-8. Despite this and Petitioner's own recognition that PO might assert "fluidly connected" (Petition at 37), Petitioner chose not to propose an express construction. As there is no competing construction, PO requests that the Board adopt PO's construction and decline to reward Petitioner for what appears to be an attempt to avoid a construction that might interfere with Petitioner's argument.

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 any claim construction 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.

Petitioner's argument that PO's construction adds new limitations and ignores differences in claim language is without merit. There are few, if any, inquiries in patent law that are so rigidly applied as Petitioner seems to advocate for in its Reply. Indeed, PO describes how "fluidly connected" is inferred from the context of the claims and that it would have been redundant to recite "fluidly" given the context. POPR at 9-10. Thus,

even if other elements are recited as being "fluidly connected," use of the word "fluidly" for the connection of the reels would have inappropriately added a superfluous word that is understood from the context. Claim construction is not conducted in a vacuum, nor is construction a rigid exercise that precludes or ignores usage of the term in context. See MPEP 2111.

Petitioner's assertion that there is nothing in the claims indicating that the reels must be "fluidly connected" (Reply at 3) seems disingenuous. PO discussed the claim context, including how, in each of claims 1[e], 11[d] and 19[e], "connected" is preceded by a recitation that the first and second manifold (claim 1) or the at least one manifold (claims 11 and 19) are/is fluidly connected with the pump (claim 1) or the at least one pump (claims 11 and 19). Further, claim 1 recites "reels are connected to be fed from the first manifold." Petitioner fails to explain how, if not fluidly connected, the reels could be understood to be connected in some other manner *to be fed* from the manifold. And contrary to Petitioner's assertion that PO cites to no embodiment in the specification, the POPR does indeed point to supporting disclosure of fuel flow from the manifold to the reel. POPR at 11.

The Board should also decline Petitioner's tardy offer of a construction. The burden lies with Petitioner to specify, **in the Petition**, how the challenged claim is to be construed (see POPR at 6, Legal Standards section; 35 U.S.C. § 312(a)(3) requiring IPR *petitions* to identify "with particularity ... the evidence that supports the grounds

for the challenge to each claim."). Now, for the first time in the Reply, Petitioner offers a semblance of a construction, suggesting that "fed from" defines how "connected" should be understood. Reply at 3. Further, notwithstanding the tardiness of that construction, Petitioner's assertion appears to at least concede that there is a contextual aspect that informs the meaning of "connected" and implicates a fluid connection. If not fluidly connected, there does not seem to be another type of connection that would permit the reels *to be fed* from the manifold.

There is no express meaning of "connected" by which the parties and Board can analyze and decide the issues. 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 9. Petitioner thus had the opportunity to address Amman and Harman, 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 15.

Petitioner suggests that Cable discloses (claim 1[e]) "a portion of the reels are connected to be fed from the [] manifold," and that Amann and Harman do not. Reply at 4. This argument, however, is a straw man. The Petition relies on Van Vliet for teaching the features of claim 1[e], not Cable. Petition at 26, Ground 1. Insofar as the Petition relies on Cable in relation to claim 1[e] under Ground 2, Petitioner does not specifically look to Cable for teaching "reels are connected to be fed from the [] manifold." Accordingly, Petitioner's shift in focus to Cable for features of claim 1[e] in the Reply is immaterial to determination of the cumulative nature of Amann and Harman.

In further 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 are substantially similar to that of Cable. POPR at 15-16. Notably, Petitioner has no explanation for 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 31), 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 leading to the side of the reel, and Amann describes (FAS2002 at p. 14) that dispensing pipe or lines 70 and there are hoses with a dispensing openings 20. Given how Amann shows the line 70 leading to 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.

Additionally, Petitioner's perceived differences between the certified translation of Amann provided with the POPR (FAS2001) 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 side of the reel/spindle and then the hose at 20. These features are shown and described in both translations (see EX1009 at 532, 533, 544; FAS2001 at 14, 25).

Petitioner's assertion that Cable is a stark contrast to Amann because Cable has a reel rotatable coupling, i.e. a swivel joint (Petition at 44), is also without merit. The teachings need not be identical. See *Dropworks, supra*. It is of no consequence whether Cable discloses extraneous details such as a swivel joint (see Reply at 5), since a swivel joint is not explicitly claimed in the '955 Patent.

Similarly, the analysis of Harman cannot be distilled to an *ipsissimis verbis* test. Harman clearly shows a reel with a pipe or tube leading to the side of the reel, and

describes flow of fuel to reel 21 and hose 22.¹ FAS2003, col. 2, ll. 31-38. Like Amann, fluid from the pipe connected at the side of the reel would inherently have to flow through the reel/spindle to get to the hose that is carried on the spindle. It is unclear what ambiguity there could be, particularly since Petitioner does not raise any plausible alternative where there would not be flow through the reel/spindle in the depicted and described arrangement of Harman. Moreover, Petitioner's assertion that disclosure is "nonexistent" in Harman seems disingenuous, as Harman explicitly shows and describes reels 21, hoses 22, and a pipe 20 that leads to the reels to convey fuel for delivery from the hoses. *Id.* Indeed, no "disguise" is needed, as there is no plausible reading of Harman where the fuel would go through the pipe 20 that leads to the reel 21 for delivery to the hose 22 but avoid going through the reel into which the pipe leads (*Id.* "[a] pipe 20 leads from the meter 18 to hose reels 21").

Petitioner further asserts that, as explained by its expert (Reply at 7), Amann and Harman lack information that is in Cable. To be clear, neither Amann nor Harman are discussed by Petitioner's expert, and neither Petitioner nor its expert identifies what that information is or how it is relevant, if at all, to the claims of the '955 Patent. As discussed

¹ The POPR cites to col 3, ll. 31-38 (POPR at 17). However, there is an inadvertent error and the citation should have been to col. 2 that introduces the pipe 20, 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.

above, the Petition relies on Van Vliet for teaching the features of claim 1[e], not Cable. Petitioner has failed to identify any meaningful difference between Cable and the disclosures of Amann and Harman.

Petitioner did not address Amann or Harman in its Petition and has failed in its Reply to show that Cable is not cumulative. The examiner expressly considered Amann and Harman (POPR at 15-16), and Petitioner has failed to demonstrate any error. POPR at 23-26. 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

/Matthew L. Koziarz/
Matthew L. Koziarz
Registration No. 53,154
400 West Maple Road, Suite 350
Birmingham, MI 48009
Telephone: (248) 988-8360

STATEMENT OF COMPLIANCE

Pursuant to the Board's email of December 18, 2023 (EX1039), 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.

CARLSON, GASKEY & OLDS, P.C.

Dated: January 12, 2024

/Matthew L. Koziarz/
Matthew L. Koziarz
Registration No. 53,154
400 West Maple Road, Suite 350
Birmingham, MI 48009
Telephone: (248) 988-836

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 DLPermianIPR@bakerbotts.com.

Elizabeth D. Flannery
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
liz.flannery@bakerbotts.com

Bradley P. Henkelman
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
brad.henkelman@bakerbotts.com

Matthew D. Chuning
BAKER BOTTS L.L.P.
2001 Ross Ave., Suite 900
Dallas, TX 75201-2980
matthew.chuning@bakerbotts.com

Roger Fulghum
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
roger.fulghum@bakerbotts.com

Dated: January 12, 2024

/Matthew L. Koziarz/
Matthew L. Koziarz
Reg. No. 53,154