

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DBR FINANCE, INC.,
Petitioner,
v.

RUGGED CROSS HUNTING BLINDS, LLC,
Patent Owner.

Patent 11,399,535
Filing Date: June 11, 2021
Issue Date: August 2, 2022
Title: CAMOUFLAGE MATERIAL, FOR A HUNTING BLIND

Inter Partes Review No.: IPR2024-00291

**PETITIONER'S REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE**

PETITIONER’S UPDATED EXHIBIT LIST

Exhibit	Description
Ex.1001	U.S. Patent No. 11,399,535
Ex.1002	U.S. Patent No. 8,375,968 (Whybrew)
Ex.1003	U.S. Patent No. 6,709,993 (Strength)
Ex.1004	U.S. Patent No. 7,137,399 (Ransom)
Ex.1005	U.S. Patent No. 5,385,165 (Hazinski)
Ex.1006	File wrapper of U.S. Patent No. 11,399,535
Ex.1007	Declaration of Michael Ellison, Ph.D.
Ex.1008	Dictionary of Fiber and Textile Technology, Hoechst Celanese Corporation, 1990
Ex.1009	Textile Science, Kathryn L Hatch, West Publishing, 1993
Ex.1010	Pitman, Donald, Many Uses of PVC Coated Polyester Yarns, J Coated Fabrics, vol 9, Oct 1979, p. 138
Ex.1011	Maureen M Grasso, Effect of Textile Properties on the Bidirectional Solar-Optical Properties of Shading Fabrics, Textile Research Journal, 62(5), pp. 247-257, May 1992
Ex.1012	USPTO memorandum, dated June 21, 2022, entitled, “Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation.” Katherine K. Vidal, Undersecretary of Commerce for Intellectual Property and Director of the USPTO
Ex.1013	(Dkt. 101) Order, <i>Rugged Cross Hunting Blinds, LLC v. DBR Finance, Inc.</i> , Case No: 1:23-cv-02231 pending in the United States District Court for the Northern District of Ohio, March 20, 2024

The procedural *Fintiv* factors do not weigh in favor of a discretionary denial, but even if they did, the Petition presents “a compelling unpatentability challenge,” which stands unrebutted, and which “alone demonstrates that the PTAB should not discretionarily deny institution.” *Commscope Technologies LLC v. Dali Wireless, Inc.*, IPR2022-01242, paper 23, at 3; *see also* Guidance Memo, Ex. 1012, at 4.

Factor 1: The first factor looks at whether co-pending district court litigation is stayed or may be stayed if a proceeding is instituted. Even if a stay is denied, if there is an indication that the court “will consider a renewed motion or reconsider a motion to stay if a PTAB trial is instituted,” that weighs against denial. *Id.*, at 8. Here, after Patent Owner filed its POPR, the Ohio court issued a stay in the litigation between Patent Owner and Petitioner DBR. Ex. 1013. Also, Patent Owner relies heavily on a denial of a stay in the Wisconsin case against non-party FeraDyne, but even there, the Court specifically invited a renewed stay motion if Institution is granted: “If PTAB grants the petition and initiates review, FeraDyne is encouraged to renew its motion for a stay.” Ex. 2010. Thus, factor 1 weighs against denial.

Factor 2: The second factor considers the proximity of a trial date to the Board’s deadline for final written decision. *Fintiv*, at 9. Here, the IPR statutory deadline is June 15, 2025. In the suit against DBR in Ohio, there is no trial date and the case is stayed. The trial date against FeraDyne in Wisconsin is not relevant, but even if it was, it is June 16, 2025—a day after the Board’s statutory deadline. Ex.

2023. However, the trial date is at best tentative and may very well change since the Wisconsin court encouraged a renewed stay motion upon institution of this IPR. Factor 2 weighs against denial.

Factor 3: The third factor considers whether the district court has made substantive rulings. *Id.*, at 9–10. Here, there has been not a single substantive ruling in Ohio. The Court never even entered a scheduling order before staying the case. Neither has the Wisconsin Court—despite some early discovery and exchange of contentions, the Court itself has issued not a single substantive ruling. Claim construction has not yet begun. Ex. 2023 (construction briefs due August 2024).

The promptness of filing the IPR is also a consideration. Patent Owner contends DBR was somehow not diligent, but the fact is Patent Owner never filed suit against DBR until June 20, 2023, and DBR’s petition was filed promptly within six months, well within the statutory deadline. Patent Owner suggests the Board should look at the date of service against non-party FeraDyne, but even if it did, DBR’s petition is within the one-year statutory deadline. Far from suggesting tactical delay, this timeline demonstrates diligence by Petitioner DBR. Factor 3 favors denial also.

Factor 4: This factor considers whether the petition includes materially different grounds, arguments, or evidence than those in the district court. *Id.* at 12–13. Other than generic affirmative defenses under §§ 102 and 103 (which is plainly

not enough to favor denial), DBR has not yet prepared invalidity contentions in the Ohio case, and the case is stayed. Even if the Board were to consider the Wisconsin case against FeraDyne, Patent Owner admits it does not know the defenses that will be presented there. Paper 10, p. 19. Factor 4 weighs against denial.

Factor 5: If the petitioner is not the defendant in the parallel proceeding, then this factor weighs against denial, unless the issues are the same or substantially similar to those in the parallel proceeding. *Fintiv*, at 13–14. As noted above, although Petitioner DBR is a defendant in a parallel proceeding, that case is stayed. Ex. 1013. The various other cases involving the challenged patent, do not include Petitioner. Therefore factor 5 weighs against denying institution.

Real Party In-Interest: Patent Owner has not met its burden of rebutting the presumption that FeraDyne is not a real party in-interest (“RPI”). *See First Quality Baby Products LLC v. Kimberly-Clark Worldwide, Inc.*, IPR2015-00956, paper 18, at 7 (“a petition is accorded a rebuttable presumption that its identification of real parties-in-interest is accurate and complete”). Patent Owner relies solely on the alleged indemnity claim from FeraDyne to DBR, but ignores the other factors relevant to the analysis. Indeed, the Petition points out the relationship with FeraDyne but asserted that the lack of control between the parties weighed against a finding that FeraDyne is an RPI. Paper 1, at 5-6. Regardless, even if FeraDyne is

an RPI, it is irrelevant because Petitioner filed this Petition prior to FeraDyne's one year statutory bar. Paper 1, at 8.

Further, for the benefit of the PTAB, in the arbitration with Tru-View, an interim ruling has held that third-party Tru-View must indemnify both DBR and FeraDyne. Thus, the relationship between the Petitioner and FeraDyne has no bearing on the *Fintiv* factors.

The above *Fintiv* factors weigh against a discretionary denial under Section 314(a). However, even if the Board disagrees, the POPR failed to address the required compelling merits analysis which is dispositive of the issue.

Compelling Merits: Patent Owner's failure to even address the merits of the Petition establishes that there are compelling merits to the Petition. The only argument on the merits is Section VII of the POPR, which attacks the arguments relating to claim 19—on the merits the POPR ignores every other challenged claim, invalidity ground, and asserted prior art.

The challenge to claim 19 is not even a challenge to the underlying merits, but rather an attempt to highlight an alleged technical defect. The Petition states element [19L] is analogous to claim 18, and the POPR argues that they are not. But upon a full reading of the Petition and attached Claim Appendix, the reference to claim 18 was a typographical error and clearly intended as a reference to claim 17. Paper 1, p. 84. The claim language of claim 17 and element [19L] is of course nearly

identical. In any event, Whybrew is cited as teaching the subject matter in each of claims 17, 18 and 19 (particularly element [19L]), thus making this typo harmless and a PHOSITA would recognize that a reference teaching claim 17 would likewise teach element [19L]. Thus, the compelling merits heavily outweigh any minimal discretionary denial considerations in this case.

§ 325(d) Considerations. Patent Owner argues that the prior art in the Petition is “substantially the same” as, or otherwise cumulative to, the art considered by the examiner during prosecution. That is incorrect. The key references in the Petition were not considered during prosecution, and they are all materially different than the references that Patent Owner discusses in the POPR. They are different blind designs with different types of materials and different uses of mesh and camouflage. While there may be similar individual aspects in these references, the totality of the references themselves are different and necessarily unique. In any event, to the extent the examiner found the prior art of record did not render the claimed patent obvious, the examiner did not have the benefit of sworn testimony from one of skill in the art describing in detail the reasons that a PHOSITA would be motivated to combine the references in the manner set forth in the Petition. Patent Owner’s conclusory assertions to the contrary is no basis to deny institution.

Dated: March 29, 2024

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above-captioned **PETITIONER’S
REPLY TO PATENT OWNER’S RESPONSE** was served electronically in their
entireties on March 29, 2024, upon the following parties by email:

- Robert L. Wolter – rwolter@Savvyiplaw.com
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Respectfully submitted,

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