

Filed on behalf of Patent Owner by:

Paper No. ____

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HP INC., DELL TECHNOLOGIES INC., DELL INC.,
ASUSTEK COMPUTER INC., and ASUS GLOBAL PTE. LTD.,
Petitioners,

v.

LITL LLC,
Patent Owner.

Case No. IPR2024-00404

Patent No. 8,624,844

PATENT OWNER'S PRELIMINARY SUR-REPLY

I. PETITIONERS' REPLY IS IMPROPER

The Board's April 1st email stated that "Petitioner is not authorized to address the inoperability of the Lane-Pogue combination at this time." Petitioners did so anyway. Paper 10 ("Reply"), fn 1. The Board should not reward Petitioners' misconduct by crediting Petitioners' statement that they "stand[] ready" to belatedly produce evidence of alleged operability that needed to be in the Petition to establish *prima facie* obviousness. *Id.* Petitioners do not "proffer" evidence that a POSA would have understood **Pogue** to disclose that Windows XP supported a touchscreen, but instead proffer evidence of a third-party hack that would be irrelevant to the grounds which are based on what **Pogue** discloses.

II. AGREEMENT RE ROADMAPPING

During a meet and confer on Petitioners' request for a pre-institution reply, LiTL informed Petitioners that a reply was unnecessary to address the impact of the Director's recent *Neo Wireless* decisions on LiTL's *General Plastic/Valve* roadmapping arguments under 314(a). LiTL represented that it would be willing to concede to the Board that, under the Director's recent decisions, discretionary denial based on a follow-on petition under *General Plastic/Valve* is not warranted because the Director's guidance in the *Neo Wireless* decisions states that a "substantial relationship" is required for *Valve* to apply and LiTL is unaware of any substantial relationship between Lenovo and the Petitioners in this IPR.

III. PETITIONERS' BELATED ATTEMPT TO SHOW ERROR TO AVOID DISCRETIONARY DENIAL UNDER § 325(D) FAILS

The Patent Owner Preliminary Response (“POPR”) demonstrated that “Petitioners failed to make the required showing of error.” POPR, 21-25. The only proper reply would have been to identify where the *Petition* made that required showing. Instead, the Reply belatedly seeks to make a showing of error for the first time. The Board should not consider Petitioners’ belated attempt to make a showing that could, and should, have been in the Petition.

The Reply is notable for what it does *not* dispute. Petitioners do not dispute that: this is the third serially-filed challenge to the ‘844 Patent (POPR, 6-8); Petitioners reuse Lane the same way Lenovo’s reexamination did (*id.*, 16-17, 20); the version of Pogue Petitioners use and the versions used in both of Lenovo’s prior challenges are “similar in all respects relevant to this IPR” (*id.*, 6, 12-18); Lenovo’s reexam and IPR alleged that Pogue discloses the claimed content modes (*id.*, 20 and 12-18); and *Advanced Bionics* step 1 is met (*id.*, 11-18). Petitioners also do not dispute that under *Advanced Bionics* step 2: the Board generally denies institution when petitioner fails to show material error (*id.*, 19); the Board considers *Becton Dickinson* (“BD”) factors (c), (e) and (f) (*id.*, 19) under step 2; and BD factors (c) and (f) favor denial of institution (*id.*, 19-21, 25-26).

Petitioners only allege that BD factor (e) weighs against denial because Petitioners allegedly established error. Petitioners rehash the Petition’s assertion

that the Examiner erred after withdrawing her rejection over Lane and Ledbetter by failing to appreciate that an alternative rejection could have been made based on Lane and Pogue because Pogue allegedly teaches the claimed content modes. Reply, 5 (citing Petition, 68-70). But Petitioners have no meaningful response to LiTL's explanation that "[n]o *evidence* supports this assertion." POPR, 21.

Petitioners cannot refute that "the Examiner was well-aware of Lenovo's allegation that Pogue disclosed the claimed content modes" because the Examiner "considered" Lenovo's IPR alleging that Pogue met the claimed content modes, and Lenovo's reexamination request listed Pogue as one of only two "Additional References Disclosing Different Modes of Content." *Id.*, 16-18 and 21.

Additionally, even in Reply Petitioners still identify no evidence explaining how the Examiner could *not* have been aware of Pogue's "notoriously well-known" (Petition, 69) folder icon feature that the grounds rely on. POPR, 22.

Petitioners assert that the "central issue" in the reexamination was a single claim limitation relating to content modes (Reply, 2), but never dispute that the Examiner allowed the claims based on "the combination of all of the elements and limitations." POPR, 22-23. Unable to distinguish it, Petitioners fatally ignore the Board's caselaw finding that under such circumstances a showing of alleged error is insufficient if it fails to deal with the claims as a whole. *Id.*, 23-24. Petitioners cannot dispute that their alleged error showing ignores the claims as a whole and

requires the Board and LiTL to review the *entirety of the Petition's grounds* to evaluate whether the Examiner allegedly erred in evaluating “the combination of all of the elements and limitations.” *Id.*, 23-25. Unable to distinguish it, Petitioners also ignore the Board’s caselaw finding that this fails to point out sufficiently how the examiner erred. *Id.*

Petitioners continue their erroneous focus on a single claim limitation, rather than the claims as a whole, by alleging that “the absence of any attempt in PO’s 70-page POPR to explain why” Pogue’s folder icons do not meet the claimed content modes “magnifie[s]” that the Examiner was “wrong” to not reject the claims over Lane and Pogue. Reply, 2. Petitioners’ suggestion that LiTL’s POPR should be read as somehow supporting that a rejection over Lane and Pogue would have been proper is astonishing given the POPR’s explanation that all grounds fail because Petitioners’ Lane-Pogue combination is inoperable. POPR, 42-70.

Petitioners allege a “mountain of evidence” (Reply, 5) refutes LiTL’s explanation that the “more reasonable reading of the record is that the Examiner did not believe a rejection over Lane and Pogue was proper,” rather than that the Examiner was somehow unaware of Pogue’s “notoriously well-known” folder icon feature (Petition, 69) and thus did not recognize that she could have rejected the claims over Lane and Pogue. Reply, 5 (quoting POPR, 21-22). Despite *bearing the burden* to establish error, Petitioners cite no evidence establishing that Petitioners’

speculation about why the Examiner did not reject the claims over Lane and Pogue is the more reasonable reading of the record. That is fatal to Petitioners because the Board's precedent is clear that "[i]f reasonable minds can disagree regarding the purported treatment of the art or arguments [by the Office], it cannot be said that the Office erred in a manner material to patentability." POPR, 26 (quoting *Advanced Bionics* at 8-9).

Petitioners newly allege that if the Examiner "did not believe that a rejection over Lane and Pogue was proper ... such a belief by the examiner would have been error." Reply, 5. This conclusory assertion is facially insufficient. It fails to identify any specific error and would require the Board and LiTL to review the entirety of the grounds. Petitioners ignore the extensive authority cited in the POPR which makes plain that such a conclusory assertion fails to meet the Board's requirement that the petitioner "point[] out sufficiently how the examiner erred." POPR, 23-25 (quoting *BD* and citing *Microsoft*, *Google*, *Roku* and *Gator Bio*).

Petitioners ask the Board to devote its limited resources to addressing this third serially-filed challenge to the '844 Patent based on evidence the Office has already considered, in the hopes that the Board might reach a different conclusion. That fails to meet Petitioners' burden to demonstrate material error. *Advanced Bionics* at 8-9 ("If reasonable minds can disagree ... it cannot be said that the Office erred in a manner material to patentability."). Institution should be denied.

Respectfully submitted,
LiTL LLC

Date: April 15, 2024

/Richard Giunta/

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CERTIFICATE OF SERVICE UNDER 37 C.F.R. § 42.6 (e)(4)

I certify that on April 15, 2024, I will cause a copy of the foregoing document, including any exhibits filed therewith, to be served via electronic mail, as previously consented to by Petitioner, upon the following:

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