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Paper No. ____

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

LITL LLC,
Patent Owner.

Case No. IPR2024-00457

Patent No. 9,880,715

PATENT OWNER'S PRELIMINARY SUR-REPLY

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¹ All emphasis is added unless otherwise indicated.

I. INTRODUCTION

Petitioners ask the Board to devote its limited resources to conducting a trial that would involve the Office’s *fourth* evaluation of the patentability of the ’715 Patent claims following (1) original prosecution, (2) Lenovo’s IPR2021-00786, and (3) Reexamination No. 90/014,958 (“’715 EPR”). Petitioners do not dispute that all three prior considerations are relevant under 35 USC § 325(d). Paper 11 (“POPR”), 17. Petitioners also do not dispute that *Petitioners* bear the burden to establish either that their art and arguments were not substantially the same as those the Office previously considered or that the Office materially erred. *Id.*; *Ecofasten Solar v. Unirac*, IPR2021-01379, Paper 11, 38-42 (PTAB Feb. 8, 2022) (“*Ecofasten*”). The Petition’s § 325(d) argument ignored the ’715 EPR entirely.

Petitioners’ Preliminary Reply (Paper 15, “Reply”) belatedly addresses the § 325(d) implications of the ’715 EPR. But the Reply fails to refute that the Petition’s grounds and a ground considered during the ’715 EPR are both based on (1) a reference (Lane or Pröll) that teaches a configurable computer but nothing about a plurality of views, (2) a reference (Pogue, Martinez or Preppernau) that teaches only *user*-selectable views, and (3) an argument that the combination of these references somehow renders obvious claims that require selecting a view in response to a detected computer configuration. POPR, 30-31. The Office already rejected this hindsight assertion. POPR, 19-20. Petitioners ask the Board to

conduct a trial in the hopes that the Board will reach a different conclusion. But Petitioners fail to carry their burden to avoid discretionary denial under § 325(d).

II. *ADVANCED BIONICS* STEP 1 IS MET

“Even though Patent Owner did not have the burden of proof on this issue” (*Ecofasten*, Paper 11, 39), LiTL provided comprehensive argument, supported by evidence, establishing that Petitioners’ art and arguments are substantially the same as art and arguments considered by the Office during the ’715 EPR before confirming the claims. PPOR, 17-31. Petitioners bear the burden to establish that their art and arguments are *materially* different from what the Office considered during the ’715 EPR. *Autel Intelligent Tech. v. Orange Elec.*, IPR2021-01545, Paper 8, 23 (PTAB Apr. 8, 2022) (denying institution; “Petitioner does not show any *material* difference between Nihei and the references cited in the Third Reexamination”); *Ecofasten*, Paper 11, 38-42. Because the Reply fails to identify any *material* differences, *Advanced Bionics* Step 1 is met.

A. No Material Difference Between Pröll and Lane

Petitioners do not dispute that Pröll and Lane both disclose laptops with a plurality of physical configurations and a sensor to keep displayed content right-way-up. PPOR, 20-22. The Reply alleges that LiTL ignored “key” and “important differences” between Pröll and Lane but identifies only a single difference and fails to explain why that difference is material under § 325(d). Reply, 5-6. It is not.

The difference Petitioners identify is that “Pröll’s switch/sensor ... detect[s]” the relative position between the computer’s modules while Lane’s sensor does not. *Id.*, 6 (citing the institution denial in IPR2024-00480 because Lane’s sensor information does not indicate relative orientation between the computer’s modules). But the ’715 EPR examiner did not reject the Lane and Pogue-based ground because of purported deficiencies in Lane’s sensor. The Examiner rejected that ground because “Pogue’s selection of views is *based on a user selection* and *not a computer’s configuration*” and Lane did not “cure the deficiencies” because “Lane ... [lacks] *explicit teaching of organizing visual representations of content differently*.” EX1005, 1680-1681. Petitioners’ grounds fail for the same reason – none of its references teach selecting a view based on the computer’s configuration as claimed. POPR, 42-77. The difference Petitioners identify between Lane and Pröll is immaterial because Petitioners never dispute that Pröll – like Lane – is “not explicit about the organization of content on its GUI” (POPR, 20 (quoting Petition, 27)) nor that “Pröll’s switch does not select a ‘view’ as claimed.” POPR, 36.

Petitioners fail to show that their identified sensor difference is material to the reason the Office rejected the Lane and Pogue-based ground. Thus, identifying this difference fails to carry Petitioners’ burden to demonstrate that their prior art and arguments are not substantially the same as what the Office rejected during the ’715 EPR. *Autel*, IPR2021-01545, Paper 8, 23; *Ecofasten*, Paper 11, 39.

B. No Material Difference Between Martinez/Preppernau and Pogue

LiTL demonstrated that Pogue, Martinez and Preppernau all disclose a plurality of views and that a view is selected *by a user* – not based on the computer’s configuration as claimed. POPR, 22-31. Petitioners allege that LiTL’s “comparison of Pogue with Martinez/Preppernau ... fails to account for key differences.” Reply, 6. But Petitioners fail to identify a single material difference.

Martinez: The Reply alleges that “Martinez’s display adjustment is based on movement detected by a sensor.” *Id.* At best, Martinez discloses a different type of gesture the user makes to choose between window arrangements than Pogue does – shaking the computer in Martinez versus selecting an arrangement from a menu in Pogue. POPR, 23. Petitioners fail to refute that this difference in how the user selects is irrelevant to the patentability of the Challenged Claims that require selecting a view in response to the detected current computer system configuration. PPOR, 23. The Reply ignored this entirely. Petitioners cannot carry their burden to identify a *material* difference between Martinez and Pogue by identifying a difference but failing to refute LiTL’s showing that the difference is immaterial.

Preppernau: Petitioners allege that the POPR only compared “Pogue and Preppernau’s covers.” Reply, 6. Not so. While the covers themselves show that these references describe the *same Windows Vista operating system*, the POPR went further and listed the four Windows Vista features from Preppernau that the

Petition relies on and showed that “Pogue discloses those same features.” POPR, 26-27. Petitioners note that “Preppernau illustrates various window configurations (e.g., the Cascade view)” but Petitioners admit that Pogue also discloses “Cascade Windows.” Reply, 7; *see also* POPR 26-27 (identifying Pogue’s disclosure).

Petitioners allege that Pogue “omits [] important visualization” of cascaded windows found in Preppernau because Pogue does not illustrate what cascaded windows look like. Reply, 7. But Petitioners’ expert admitted that “cascading and tiling are *well-known* graphical arrangements.” EX1003, ¶72. Petitioners fail to establish that POSAs needed “visualization” to understand what cascaded windows look like when their own expert admits this was “well-known.” Petitioners fail to identify any *material* difference between Preppernau and Pogue.

C. No Material Difference Between Petitioners’ Arguments and Those That the Office Previously Considered and Rejected

That substantially the same art was previously presented to the Office suffices to satisfy *Advanced Bionics* Step 1 so the Board need not even consider whether substantially the same arguments were made as well. 35 USC § 325(d) (“substantially the same prior art or arguments previously were presented to the Office”); *Advanced Bionics v. Med-El Elektromedizinische Geräte*, IPR2019-01469, Paper 6, 20 (PTAB Feb. 13, 2020) (*precedential*) (“the first condition of the first part of the framework is satisfied, and we need not reach whether the ‘same or substantially the same arguments’ previously were presented to the Office”).

But the Office *did* previously consider substantially the same arguments the Petition advances. PPOR, 30-31. Petitioners confusingly argue that “Lenovo did not rely on a combination of Lane and Pogue ... for the ‘select ... in response to the detected computer system configuration’ limitation,” despite *admitting that the Office addressed Lenovo’s “combination of Lane, Ledbetter and Pogue.”* Reply, 8. Lenovo argued that a POSA would have run Pogue’s Windows Vista operating system on Lane’s computer (EX1005, 1157; PPOR, 30) which is substantially the same argument Petitioners make in arguing that a POSA would have run Martinez’s and Preppernau’s operating systems on Pröll’s computer. Petition, 27-29 (Martinez), 78-81 (Preppernau); POPR, 30-31 (demonstrating the similarity).

Lenovo did not rely on Pogue to teach selecting a view in response to a detected computer configuration because Pogue does not disclose that and only teaches selecting a view in response to a *user* selection. But Pogue is just like Petitioners’ Martinez and Preppernau references in this respect. POPR, 20. Just like Petitioners do, Lenovo argued that a reference (Lane instead of Pröll) that teaches a configurable computer but nothing about a plurality of views in combination with a reference (Pogue instead of Martinez or Preppernau) that teaches only *user*-selectable views rendered the claims obvious. *Id.*, 30-31. The Office rejected that argument because *no reference* teaches selecting a view based on the computer’s configuration as claimed. EX1005, 1680-1681; POPR, 20. The

Petition makes the same argument and it fails for the same reasons. PPOR, 35-37, 43-44, 67-68. Petitioners identify *no material* difference between their arguments and those previously considered and rejected by the Office during the '715 EPR.

D. Conclusion: *Advanced Bionics* Step 1 Is Met

Petitioners fail to meet their burden to identify any material difference between their art and arguments and those the Office considered and rejected during the '715 EPR. *Advanced Bionics* Step 1 is thus met.

III. *ADVANCED BIONICS* STEP 2 IS MET

When the first prong of *Advanced Bionics* is satisfied, “then the Board’s decisions generally have *required* a showing that the office erred in evaluating the art or arguments” and “the Director generally will exercise discretion not to institute *inter partes* review” when “the petitioner fails to make a showing of material error.” *Advanced Bionics* at 8-9. The Reply’s showing fails because it merely alleges that the “Office erred” but never identifies any specific error. Reply, 9-10. The *Becton, Dickinson* (“*BD*”) factors favor discretionary denial.

A. *BD* Factor (c) Favors Denial: the '715 EPR Examiner Evaluated a Combination Including Lane and Pogue

BD Factor (c) evaluates “the extent to which the asserted art was evaluated during examination” (*Advanced Bionics* at 9 (f.n. 10)) and favors discretionary denial here. Lenovo’s Ground 3 was “*Lane In Combination With* Ledbetter And *Pogue* Renders Obvious Claims 1-20.” EX1005, 1151. The CRU Examiner had

wide latitude in making rejections. *See* MPEP § 2256. Contrary to Petitioners’ arguments (Reply, 10), the Office clearly evaluated Lenovo’s combination including Lane and Pogue when the CRU Examiner found that “***Lane*** and Shimura” (references like Pröll that teach a configurable computer) “do not cure the deficiencies with respect to Ledbetter and ***Pogue***” (references like Martinez and Preppernau that teach only ***user-selectable*** views) because not a single one of those prior art references teaches selecting a view in response to a detected computer configuration as claimed. EX1005, 1680-1681 (Pogue teaches selecting a view “based on a ***user selection*** and ***not a computer’s configuration***” and Lane does “not cure [Pogue’s] deficiencies” because Lane has ***no*** “teaching of organizing visual representations of content differently”). Lenovo’s combination including Lane and Pogue was undeniably “evaluated” during the ’715 EPR.

Petitioners say the Examiner did not “mention[] Lane” “until the Notice of Intent to Issue a Reexamination Certificate” but cite no authority suggesting that the ***timing*** of the Examiner’s evaluation is relevant to factor (c). Reply, 9. It is not. The Notice indicates that ***before*** confirming the claims, the Examiner evaluated Lenovo’s ground, including Lane and Pogue. Factor (c) favors discretionary denial.

B. *BD* Factor (e) Favors Denial: Petitioners Identify No Error

Petitioners say the “Examiner erred ... because the Examiner did not consider a combination of Lane and Pogue for teaching the ‘select...in response

to...’ limitation.” Reply, 10. Not so. The CRU Examiner considered a combination including Lane and Pogue and found that it did not meet the “select...in response to...” limitation because **no** reference in the combination teaches that. EX1005, 1680-1681. Petitioners’ argument amounts to “no more than a disagreement” with the CRU Examiner’s decision. *Google v. Valtrus*, IPR2022-01197, Paper 18, 20 (PTAB June 13, 2023) (discretionarily denying institution under § 325(d)). Petitioners fail to “argue that the Office misapprehended or overlooked any **specific** teaching ... or misconstrued a term” and fail to “point out sufficiently how the examiner erred pursuant to factor (e).” *Id.* (internal quotations omitted).

The Board routinely denies institution when the petitioner – as Petitioners did here – fails to explain adequately how the Examiner allegedly erred in a manner material to patentability. *See e.g., Roku v. Universal Electronics*, IPR2019-01619, Paper 11, 19 (PTAB April 2, 2020) (discretionarily denying institution because Petitioner does not explain “adequately **how** the Examiner erred”); *Gator Bio v. Sartorious*, IPR2023-00215, Paper 19, 21 (PTAB June 20, 2023) (discretionarily denying institution where petitioner’s § 325(d) “argument is **conclusory** because it is unsupported by any analysis.”). Petitioners ask the Board to review extensive portions of the Petition in the hopes that the Board will reach a different conclusion than the CRU did. Reply, 10. But even “[i]f reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be

said that the Office erred in a manner material to patentability. At bottom, this framework reflects a commitment to defer to previous Office evaluations of the evidence of record ***unless material error is shown.***” *Advanced Bionics* at 9.

Petitioners fail to ***show*** any material error. Factor (e) favors denying institution.

C. *BD* Factor (f) Favors Denial: Petitioners Fail to Identify Any New Evidence that is Materially Different

Petitioners identify Dr. Houh’s testimony as “additional evidence.” Reply, 10. But Lenovo submitted a 286-page expert declaration in which Lenovo’s expert opined that Lenovo’s Ground 3 (Lane, Ledbetter, and Pogue) rendered obvious the ’715 Patent claims. EX1005, 339-393. The Office had that testimony when concluding that a combination including Lane and Pogue did not meet selecting a view in response to a detected computer configuration as claimed. *Id.*, 1680-1681. Petitioners fail to identify any ***specific fact or opinion*** that Dr. Houh provides that Lenovo’s expert did not. Factor (f) favors institution. *Regeneron Pharmaceuticals v. Kymab*, IPR2019-01577, Paper 9, 18 (PTAB April 1, 2020) (denying institution under § 325(d): “the fact that an expert declaration was not before the Examiner during prosecution does not itself demonstrate that the Examiner erred”).

IV. CONCLUSION

The Board should deny institution under § 325(d) and not expend its resources evaluating the ’715 Patent a fourth time. Petitioners’ art and arguments are substantially the same as those the CRU rejected during the ’715 EPR.

Respectfully submitted,

Date: July 15, 2024

/ Richard Giunta/

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

I certify that on July 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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