

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MITO RED LIGHT, INC., Petitioner

v.

JOOVV, INC., Patent Owner.

Inter Partes Review Case No. IPR2024-00621

U.S. Patent No. 11,253,719

**PETITIONER'S REQUEST FOR REHEARING OF DENIAL OF
INSTITUTION**

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I. STATEMENT OF PRECISE RELIEF REQUESTED

Petitioner Mito Red Light Inc. (“Petitioner”) respectfully requests rehearing of the Decision Denying Institution of *Inter Partes* Review, Paper 7 (“*Decision*”) because the *Decision* overlooked or misapprehended key segments of the applied prior art reference in reaching its decision that the prior art did not disclose *a first plurality of lights* arranged and configured to emit red light or near-infrared light. *Decision* at 13. The *Decision* overlooked or misapprehended the scope and explicit disclosure of the prior art reference *Dijkstra* to conclude, incorrectly, that the Petitioner has not demonstrated a reasonably likelihood of showing invalidity over the prior art. Petitioner respectfully requests that the Board grant rehearing and institute *inter partes* review of claims 1, 2, 3, 9, 10, 11, 16, 17, and 19 (“Challenged Claims”) of U.S. Patent No. 11,253,719 B2 (“the ’719 patent”) (Ex. 1001). This Request is timely filed within thirty (30) days of the entry of the *Decision*.

In reaching its decision to deny *inter partes* review of the Challenged Claims, the *Decision* overlooks and misapprehends a cited section of the *Dijkstra* reference which discusses the structure of the light therapy device as having LEDs. Ex. 1004, ¶ 133. When considering the whole disclosure of this paragraph—not just the second sentence in isolation as the *Decision* does—the remaining citation to the light therapy devices containing a plurality of “LEDs” becomes clear and cannot be waived away as a mere typographical error. Moreover, while mentioning the

supporting declaration of Dr. Bretschneider (Ex. 1002), the *Decision* overlooks his explanation of how the light devices disclosed in *Dijkstra* contain an array of LEDs and fails to consider the weight of evidence that multiple related prosecutions and reexaminations investigating the same disclosure and the same claim term have found that a single light device disclosed in *Dijkstra* manifestly contains a plurality of LEDs. Petitioner submits that after properly considering the overlooked evidence and reweighing all of *Dijkstra's* disclosures, the *Petition* establishes at least a reasonable likelihood that at least one Challenged Claim is invalid. *See* 35 U.S.C. § 314(a) (2018).

II. LEGAL STANDARD

A rehearing request must identify matters the decision “misapprehended or overlooked” and “where each matter was previously addressed.” 37 C.F.R. § 42.71(d). The Board reviews its decision for abuse of discretion. *Id.* § 42.71(c). An abuse of discretion occurs when a decision makes a legal error, clear factual error, or clearly erroneous assessment of the evidence. *AdjustaCam, LLC v. NewEgg, Inc.*, 861 F.3d 1353, 1358 (Fed. Cir. 2017); *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1272 (Fed. Cir. 2017) (“(1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.”). Abuse of discretion may be indicated if the decision

is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004). Here, weighing all the relevant factors, the denial of the Petition is unreasonable because it is more highly likely than not that *Dijkstra* discloses a plurality of LEDs in a single light device as explained below.

III. STATEMENT OF FACTS MATERIAL TO REHEARING

The Petitioner stated two grounds of invalidity in the Petition for *Inter Partes* Review under 35 U.S.C. §§ 311-319 and 37 C.F.R. § 42 (Paper 2) (*Petition*). The primary reference in each ground is *Dijkstra*, which discloses a phototherapeutic treatment device that uses light projection to treating body conditions. Ex. 1004. Ground I is that the Challenged Claims are obvious over *Dijkstra* in view of the common knowledge of one of ordinary skill in the art. *Petition* at 5. Ground II is that the Challenged Claims are obvious over *Dijkstra* in view of Norwood and the common knowledge of one of ordinary skill in the art. *Petition* at 36.

The '719 patent does not purport to have invented photobiomodulation treatment. In the background section, the '719 patent states that “[p]hotobiomodulation therapy (or light therapy) is a therapeutic technique that uses low-level wavelengths of light to improve health and treat a variety of health

conditions, including skin issues, such as wrinkles, scars, and persistent wounds, among many other conditions ... This treatment stimulates the body's natural healing processes.” Ex. 1001, at 1:42-45. Thus, the '719 patent is directed to therapeutic techniques using light to treat skin issues. Ex. 1002, ¶138. The patent discloses that “there is a need for photobiomodulation therapy systems that can treat several areas in fewer treatments” and existing “systems used are not big enough to treat the entire body at once.” Ex 1001, 1:54-55; 5:2-3. The patent presents a solution where “two or more light therapy devices [are] communicatively coupled together to form a light therapy system. In so doing, the area of treatment can be expanded to reduce the time and number of treatments to achieve the desired results.” Ex. 1001, 5:4-8. The specification describes the light therapy system having one or more light therapy devices and “a first plurality of lights 16a.” Ex. 1001, 5:15-16. The prosecution history confirms the existence of plurality of lights in the art. For example, U.S. Pub. No. 2011/0054573 to Mitchell (“*Mitchell*”) was found to have a plurality of lights. Ex. 1003 at 192; Ex. 1002 at 76.

Dijkstra discloses “a portable, easy to use light therapy device to a user for partial or full body treatment, wherein the light therapy device is being used by a natural person.” Ex. 1004 ¶13. “[T]he light therapy device provides a LED light based treatment which is a painless, relaxing, and non-invasive skin - care treatment, that has multiple benefits particularly stimulating collagen and requires no

downtime. Further, the LED treatments work by using an array of bright light-emitting diodes that send low-level light energy into the deeper layers of the skin.” Ex. 1004 ¶33; *see also* ¶133. *Dijkstra* explains that “[t]he light projection unit 110 [has] a light head 111, a light direction controller 112, and a light source 113. In this, the light source 113 projects a light on the light direction controller 112 which is able to control and divert the light as per the controlling unit 130 input.” Ex.1004 ¶61. *Dijkstra* subsequently describes the structure of the light therapy device 200 as having a rotatable head 250 including a light projection unit. Ex.1004 ¶59. *Dijkstra* specifically discloses that a light projection unit wherein the light source 113 can be “LEDs” and the light therapy provided from the embodiment using LEDs is specifically disclosed as “LED Light Therapy.” Ex. 1004 at ¶¶19, 28; *see also* ¶63.

Of crucial importance to this Petition, paragraph 133 of *Dijkstra*, *when considered in full*, teaches that a *single light therapy device can have an array of LEDs* to provide the numerous light therapeutic effects claimed. *Petition* at 8-10; Ex 1002 ¶¶142-145. Paragraph 133 states:

“According to an advantageous embodiment of the present disclosure, the ***light therapy device provides a LED light - based treatment*** which is a painless, relaxing, non-invasive skin - care treatment that has multiple benefits particularly stimulating collagen and require no downtime. Further, LED treatments work by using an ***array of bright light- emitting diodes*** that that send low - level light energy into the deeper layers of the skin.” (emphasis added)

Paragraph 113 unquestionably discloses that the physical structure of a light

treatment device (singular) provides the LED light treatment, which treatment is described as a “non-invasive skin-care treatment.” The very next sentence discloses that the treatment (provided by this single light device), which is specifically described as sending “low-level light energy into the deeper layers of the skin,” is provided by using an array of bright light emitting diodes.¹ The paragraph discloses both structure and function when both sentences are considered. The *Decision* expressly stated that it only considered relevant the statement in second sentence of paragraph 133. *Decision* at 14. Petitioner respectfully submits that the first sentence of paragraph 133 was overlooked and when the whole paragraph is considered, it is clear that *Dijkstra* discloses at least a single light therapy devices with an array of light emitting diodes.

The *Petition* further relies on the Declaration of Eric Bretschneider, Ph.D. to support Petitioner’s contention that the light therapy devices have a plurality of lights. In particular, Dr. Bretschneider undertook an extensive review of the reexaminations of the related ’635 patent and the ’495 patent and prosecution the ’172 where the *Dijkstra* reference was compared to claim with the exact limitation of “a first plurality of lights.” In all three examinations, “the array of LEDs”

¹ The first sentence of paragraph 133 sets the context for the second sentence. This first sentence describes the device and the treatment it provides. The following sentence, in turn, explains how the treatment is provided by the “array of bright light-emitting diodes.”

language relied upon by the Petitioner was found to teach and disclose a plurality of lights as claimed by Challenged Claim 1. Ex. 1002 ¶¶80-131. Indeed, Dr. Bretschneider stated his opinion that he “like the examiners in the reexamination of the ’635 and ’495 patents and the prosecution of the ’172 patent, [is] of the opinion that the limitations found in the challenged claims of ’719 patent are clearly and explicitly disclosed by Dijkstra.” Ex. 1002, ¶¶113, 144. Dr. Bretschneider cited to Figs, 1, 2, 8, 9 and paragraphs [0019, 0129, 0133] to demonstrate that *Dijkstra* discloses a light therapy system comprising a first light therapy device (200) comprising a first housing (210) and a first plurality of lights arranged and configured to emit red light or near-infrared light. Ex. 1002 ¶143. Figures 1 and 2, in particular, discuss the structure of a single light therapy device and the light source 113. As discussed above, Dr. Bretschneider also cites that paragraph [0019] discloses that the light source can be “LEDs.” The Decision overlooked Dr. Bretschneider’s testimony in this regard.

IV. ARGUMENT AND FULL STATEMENT OF REASONS FOR RELIEF REQUESTED

A. The *Decision* Overlooks or Misapprehends the Sufficiency of Dijkstra’s Disclosure of a Single Light Device having more than one LED.

Contrary to Patent Owner’s argument and the *Decision*, *Dijkstra* clearly discloses how Figures 1, 2, 8 and 9 and paragraphs 19, 129, and 133 “show” a first plurality of lights. When all of the citations are considered together, it is more likely

than not that *Dijkstra* discloses that a single light therapy includes a light source comprised of an array of LEDs.

The *Decision* states, “[t]he **only relevant statement** in paragraph 133 of *Dijkstra* is: ‘LED treatments work by using an array of bright light-emitting diodes that send low-level light energy into the deeper layers of the skin.’” Ex. 1004 ¶133 (emphasis added). As a result, the *Decision* admittedly overlooks the first sentence of paragraph 133, which places the whole paragraph in context and removes any ambiguity about the structure of the light source of a single light therapy device. The first sentence reads: “[a]ccording to an advantageous embodiment of the present disclosure, the ***light therapy device provides a LED light - based treatment*** which is a painless, relaxing, non-invasive skin - care treatment that has multiple benefits particularly stimulating collagen and require no downtime.” Ex. 1004, ¶133 (emphasis added). This sentence discloses a single light therapy device providing LED-light based non-invasive skin-care treatment. This sentence links the structure of a single light device to the treatment and how that treatment is administered. The next sentence further expounds on how said treatment, which sends low-level light energy into the deeper layers of the skin (provided by the single light therapy device explicitly set forth in the prior sentence), works by using an array of bright light-emitting diodes. Thus, when the first sentence is read in conjunction with the second sentence of paragraph 133, it is strong evidence that *Dijkstra* discloses a single

device for treatments where treatments using an array of LEDs. The *Decision*'s interpretation based solely on the second sentence of paragraph 133 that interprets a reference to LEDs to mean using a plurality of light devices arrayed for treatments is inconsistent with the reading of the entire paragraph, which is limited to a single light therapy device. Moreover, nowhere does *Dijkstra* discuss an array of light therapy devices, instead referring to "the light therapy system100 is having two light therapy devices." Ex. 1004 ¶96. Array, on the other hand, is linked directly with light emitting diodes that provide the treatment by the stated one light device in paragraph 113.

The *Petition*'s citation to Figure 9 does not undercut this conclusion as the *Decision* states. While Figure 9 discloses a plurality of light devices, it does not change the disclosure in paragraphs 19 and 133 that informs that the structure of a *single* light device source has an array of LEDs. The *Decision* penalizes Petitioner for choosing a Figure most closely resembling the Challenged Claims and suggests that Petitioner agrees with its interpretation of array as light devices. Petitioner does not. Nothing in *Dijkstra* requires two (or more) light therapy devices for a treatment to occur as the *Decision* concludes paragraph 133 implies. Indeed, *Dijkstra* discloses treatments can be utilized by a single light therapy device. Ex. 1004, Fig 4A, 4B and 7. The *Decision*'s premise that the disclosed treatments are where "a user using a plurality of light therapy devices according to an exemplary embodiment" as shown

in FIG. 9” misapprehends that *Dijkstra* is not limited to treatment by multiple devices. Rehearing is warranted because the *Decision* overlooks the full disclosure of paragraph 133 of single light therapy device providing treatment and those treatments work by using an array of bright light-emitting diodes. The last sentence of this paragraph cannot be considered in isolation as the *Decision* suggests and must be read in conjunction with the first sentence. Both sentences of paragraph 133 disclose structure: this first teaches single light device and the second teaches an array of LEDs within the single light device.

The *Decision* also misapprehends that scope of paragraph 19 which states:

According to yet another aspect of the present disclosure, the **light projection unit includes** a light direction controller, a light head and a light source, wherein the light source is a laser light, **LEDs**, photoreactive chemical producing light, phosphorus or any other suitable light source generating the light ranging from 100-1600 nm wavelength.

When considered in conjunction with the entirety of paragraph 133, paragraph 19’s disclosure of a single light projection device that includes a plurality of “LEDs” cannot be deemed ambiguous. Paragraph 19 clearly discloses that the light projection unit includes LEDs (plural). Moreover, Figure 2 of *Dijkstra* shows the components of light therapy device 200 where “[t]he light projection unit 110 [has] a light head 111, a light direction controller 112, and a light source 113.” Ex. 1004 ¶61; *see also* Ex. 1002 ¶143. *Dijkstra* then teaches “the light source 113 may be a LED light,

infrared light, a UV light, a laser light, photo reactive chemical producing light, phosphorus or any other suitable light source generating the light in a range of 100-1600 nm wavelength for treating a person.” Ex. 1004 ¶63. Paragraph 19 also discloses a single light projection device includes “LEDs.” Ex. 1004 ¶19

Light emitting diodes in plural is is not a typographical error as the Patent Owner speculates nor does it refer to the possibility that one of several different “LEDs” need to be selected for a specified wavelength, which is more conjecture. That language clearly qualifies the range of wavelengths not the type of light. The paragraph does not refer to laser lights, or photoreactive chemical producing lights for range but it does reference LEDs which is appropriate given the treatment intensities discussed in *Dijkstra*. Ex 1004, ¶113. Patent Owner’s suggestion that the only time “LEDs” appears in the publication is in paragraph 19 is misleading. *See* Ex 1004, claim 3. The most likely and untortured reading of paragraph 19 of *Dijkstra* when read in light of the entirety of paragraph 113 is literally that “the light projection unit includes... LEDs” which correspond to a “plurality of lights” as set forth by the challenged claims. *Petition* at 8-10; Ex. 1002 ¶¶142-145.

B. The Decision Overlooks or Misapprehends Petitioner’s Expert Testimony Regarding the Sufficiency of *Dijkstra*’s Disclosure.

The *Decision* also overlooks and misapprehends the Petitioner’s expert testimony regarding *Dijkstra*’s disclosure. While the *Decision* notes in passing that

it “considered” the Declaration of Dr. Bretschneider (Ex. 1002) (*Decision* at 18), the *Decision* overlooks and misapprehends Dr. Brettschneider’s opinions regarding the evidence in the three related examinations of *Dijkstra*’s disclosure of a plurality of LEDs in a single light housing. Ex 1002, ¶¶ 80-119. The *Decision* never addresses and, therefore, overlooks the weight of Dr. Bretschneider’s testimony.

Dr. Bretschneider testified that in the reexamination of the ’635 and ’495 patents and the prosecution of the ’172 patent, the Patent Office found that *Dijkstra* disclosed a light therapy treatment device with a plurality of lights. Ex. 1002 ¶144. Indeed, in each instance, the Examiners cited to the “array of light emitting diodes” language relied on by Petitioner albeit in a different paragraph. *See e.g., Petition* at 10; Ex. 1002 ¶143. Again, in each instance, the Patent Owner/Applicant (who is the same entity as the Patent Owner here), chose to amend the claims to include additional limitations rather than traverse the rejections. Ex. 1002, ¶131. The fact that, in three examinations, the same claim language—plurality of lights—was found in *Dijkstra* is strong evidence of a reasonable likelihood that *Dijkstra* discloses a light therapy device with a plurality of lights. Dr. Bretschneider testified that he agreed with the findings of all three examinations.

C. Petitioner has established a reasonable likelihood that it will prevail on at least one claim.

Rehearing is permissible “if the decision represents an unreasonable judgment in weighing relevant factors.” *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). The *Petition* sets forth several relevant factors that were overlooked by the *Decision*. Petitioner submits that when paragraph 133 is read and considered in its entirety, the remaining passages in *Dijkstra*, most notably, paragraph 19, are put into proper context to reveal the reasonable likelihood that a single light therapy devices has a plurality of LEDs. This conclusion is further bolstered by overlooked expert testimony considering prior examinations that reached the same conclusion. All these relevant factors, overlooked by the *Decision*, when properly weighed establish a reasonable likelihood that at least Challenged Claim 1 is obvious.

V. CONCLUSION

For the reasons stated, Petitioner respectfully requests rehearing and reconsideration of the *Petition* and that trial be instituted on the Grounds stated in its *Petition*.

October 10, 2024
Dated

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that a true and correct copy of the foregoing REQUEST OF REHEARING is being filed electronically via P-TACTS and served on counsel for Patent Owner by electronic mail on October 10, 2024as follows:

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