

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HEAD SPORT GMBH,
Petitioner

v.

VERMONT SAFETY DEVELOPMENTS LLC,
Patent Owner

Case No. IPR2024-01099
Patent No. 7,523,953

**PATENT OWNER VERMONT SAFETY DEVELOPMENTS LLC
("VSD")'S BRIEF ON IMPROPER INCORPORATION BY REFERENCE
OF CLAIM LIMITATIONS, CLAIM CONSTRUCTIONS, AND
ARGUMENT IN CONTRAVENTION OF 37 C.F.R. §§ 42.104(b)(4),(5) PER
THE BOARD ORDER OF SEPTEMBER 13, 2024 (PAPER 7, "ORDER")**

Pursuant to the Board’s Order, this Brief sets forth where the Petition relies on incorporation by reference and why the Petition fails to comply with Rules 104(b)(4) and (5). As a result of these deficiencies, the Petition is an “incomplete petition” to which no filing date should be accorded. 37 CFR § 42.106.

At least the following arguments are improperly based on incorporations by reference: Ground 1 with respect to elements 30(a)-30(e), 53(a)-53(d), and 58(a)-58(c) applied to Freudiger 1; Ground 3 with respect to elements 30(a)-30(e), 53(a)-53(d), and 58(a)-58(c) applied to Dodge and Howell; and Ground 5 with respect to elements 58(a)-(d) applied to Sittmann. Further, because Grounds 2, 4, and 6 address only dependent claims, those grounds effectively incorporate by reference the improper incorporations of Grounds 1, 3, and 5, thus suffering of the same defect.

As the Board recognized, in lieu of stating and discussing limitations of challenged claims, the Petition uses a shorthand notation that requires the reader to repeatedly turn to the Hull Expert Declaration (Ex. 1002, “Hull”) to understand what is being discussed. Order at 6; *see, e.g.*, Pet. at 14 (referring to claim element “30(b)”).¹ The Petition also never states the purported claim constructions nor discusses how the constructions impact where elements of the claims are asserted to be found in the prior art, and instead merely states that “the Board should analyze

¹ Perhaps to avoid the overt appearance of incorporation, the Petition never anywhere informs the reader that shorthand notations for the claim elements are an incorporation of the breakdown of claim language provided in Hull.

patentability” by applying VSD’s proposed “broad” claim constructions from the District Court. Pet. at 6. By characterizing these constructions as “broad”, it is clear that Petitioner Head Sport GmbH (“Head”) does not consider them to be the plain and ordinary meaning. *Samsung v. Cobblestone*, IPR2024-00319, Paper 16 at 14 (PTAB June 24, 2024). However, the only place where the constructions appear are in the Hull declaration (Ex. 1002) and a litigation document (Ex. 1010).

In this limited briefing, the numerous incorporations by reference cannot each be explained in detail. Limitation “30(a)” of Ground 1 is a representative example. Reading just the Petition on “30(a),” one knows neither the elements of “30(a)” nor the fact that it contains a claim term disputed in the District Court for which Head asks the Board to apply VSD’s preliminary proposed construction. See Pet. at 10-14. While Hull sets forth the proposed construction in ¶ 70 (Ex. 1002), the Petition never mentions the construction nor even the relevant Hull paragraph. In order to piece together the claim term with its construction, a Petition reader must (1) come across the first instance of “30(a)”, (2) decide to look in Hull for what that could mean, (3) find the claim language in the Section VII.A.2.b heading of Hull, (4) remember that page 6 of the Petition says to apply constructions found in Ex. 1010, (5) read through Ex. 1010 to see if any claim terms are found in the Section VII.A.2.b heading of Hull, (6) see that “first release” has a proposed construction, and (7) apply that construction from Ex. 1010 to the claim element language in Ex. 1002. One

must themselves decide how to apply that construction to Freudiger 1 because the Petition never does.

Instead of presenting arguments for unpatentability, the Petition reads like a catalogue of information about the prior art. The Petition itself does not identify “[h]ow [each] construed claim is unpatentable” or “where each element of [each] claim is found in the prior art” as required by Rule 104(b)(4) because the construed claim elements are never provided in the Petition. The Petition also fails to satisfy Rule 104(b)(5) because it does not identify the relevant claim elements or their constructions, thereby rendering meaningless its conclusive assertions that prior art references allegedly disclose the claim elements. The Petition is incomprehensible unless read simultaneously with the information incorporated from Hull.

Head may argue that the claim limitations and constructions are not incorporated by reference because snippets and phrases of the claim language and constructions are scattered throughout the Petition, but one would never know any of that was claim language or claim construction without a meticulous, line-by-line comparison of the Petition with both Hull and Ex. 1010.

“Arguments must not be incorporated by reference from one document into another document.” 37 CFR § 42.6(a)(3). The Board should disregard arguments that are incorporated by reference. *Cisco Sys., Inc. v. C-Cation Techs., LLC*, IPR2014-00454, Paper 12 at 10 (PTAB Aug. 29, 2014) (informative). During the

September 5 teleconference, Head argued it had not incorporated arguments by reference because claim elements and claim constructions are not arguments. However, how a construed claim is purportedly unpatentable under the asserted statutory grounds hinges entirely on the construed claim elements. By not including the construed claim elements, the Petition itself is little more than a compilation of incomprehensible conclusory assertions of unpatentability. This is why the Board confirmed in *Cisco* that citing to claim charts in another document is an incorporation by reference of argument. *Cisco*, IPR2014-00454, Paper 12 at 8-9.

Head's violations of Rule 104 have prejudiced VSD. VSD has had to spend a significant amount of extra time and cost trying to piece Head's arguments together from the multiple documents in which they appear. As the Board recognized in *Cisco*, "the prohibition against incorporation by reference is to eliminate abuses that arise from incorporation." IPR2014-00454, Paper 12 at 10 (citing *DeSilva v. DiLeonardi*, 181 F.3d 865, 866-67 (7th Cir. 1999) (Incorporation "by reference amounts to a self-help increase in the length of the [] brief[,] and "is a pointless imposition on the court's time. A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.")). Also, because the incorporated claim constructions are not argued in the Petition, VSD's present task in responding is unnecessarily complicated, and Head strategically creates an opening to later alter positions using different theories or claim constructions. *See*

ADT LLC v. Vivint, IPR2022-00642, Paper 7 at 14 (PTAB Oct. 4, 2022) (explaining that lack of clarity “might enable [a petitioner] to deviate from the arguments initially presented in the Petition in a manner that may prejudice [the patent owner]”). Further, incorporation by reference of the claim terms and constructions reduces the Petition’s word count beyond just the deletion of spaces in citations that is the subject of the Board’s Order. Head’s counsel *knows* that playing tricks with word count and using shorthand claim element identifiers is an abuse of the Board’s rules, as it has argued as much in a Patent Owner Preliminary Response. *See Draftkings, Inc. v. Interactive Games LLC*, IPR2020-01108, Paper 6 at 42-43 (PTAB Oct. 9, 2020).

Head has clearly not complied with at least Rules 104(b)(4) and (5) (nor with Rule 104(b)(3) by not including how the claim is to be construed except, at best, by incorporation). The sanction for not filing a complete petition that “***complies with § 42.104***” is clear: “***Where a party files an incomplete petition, no filing date will be accorded....***” 37 CFR § 42.106(a)(1) and (b). This is not drastic or unprecedented relief as suggested by Head—it is, quite simply, just what the PTAB rules require.

For the foregoing reasons, the Petition’s filing date should be revoked under Rule 106, or, in the event that the Board finds the deficiencies of the Petition not to reach the level of Rule 106 incompleteness, the Board should not consider any assertions of unpatentability (as listed above) for claim elements that are only identified by shorthand or without explanation of how the claim is to be construed.

Dated: September 20, 2024

Respectfully submitted,

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

I, Thomas D. Kohler, hereby certify that on this 20th day of September 2024, the foregoing **PATENT OWNER VERMONT SAFETY DEVELOPMENTS LLC (“VSD”)’S BRIEF ON IMPROPER INCORPORATION BY REFERENCE OF CLAIM LIMITATIONS, CLAIM CONSTRUCTIONS, AND ARGUMENT IN CONTRAVENTION OF 37 C.F.R. §§ 42.104(b)(4),(5) PER THE BOARD ORDER OF SEPTEMBER 13, 2024 (PAPER 7, “ORDER”)**

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Dated: September 20, 2024

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