

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'S
REPLY BRIEF REGARDING CLAIM CONSTRUCTION**

The fact that the Board was unable to ascertain from the Petition a claim construction for “release logic” establishes Head’s failure to comply with 37 C.F.R. § 42.104(b)(3). Head should not be given a second chance to correct this deficiency.

As the Board explained in its November 8 Order, one role of the Board is to construe the claims. Paper 11 at 3. The work of the Board in fulfilling this role is frustrated if a petitioner, in its petition, is not forthcoming about or obfuscates pertinent claim construction issues. For this reason, the Trial Practice Guide requires a petitioner to inform the Board when it knows a term may be construed according to 35 U.S.C. § 112(f)—even if in its petition it chooses to rely on a different construction. *See* Patent Trial and Appeal Board, Consolidated Trial Practice Guide at 45 (Nov. 2019) [hereinafter Trial Practice Guide]; *id.* (noting after stating this requirement that a “party may choose to elaborate why § 112(f) should or should not apply to the limitation at issue”). The sound reasons for this requirement are explained in prior Board decisions cited in VSD’s Preliminary Response (Paper 10, “POPR”) that Head has studiously avoided. *See 10x Genomics, Inc. v. President and Fellows of Harvard College*, IPR2023-01299, Paper 15 at 7-13 (PTAB Mar. 7, 2024); *OrthoPediatrics Corp. v. K2M, Inc.*, IPR2018-01546, Paper 10 at 11-12 (PTAB Feb. 14, 2019); *cf. Abbott Diabetes Care Inc. v. DexCom, Inc.*, IPR2022-00922, Paper 13 at 15 (PTAB Nov. 3, 2022) (declining to “forc[e] Petitioner” to adopt only a means-plus-function construction, which is not what VSD suggests or

what Board rules require), *appeal docketed*, No. 24-1326 (Fed. Cir. Jan. 5, 2024).

I. “RELEASE LOGIC” SHOULD BE CONSTRUED ACCORDING TO VSD’S PROPOSED CONSTRUCTION IN THE JCCS

Head disingenuously argues that VSD has engaged in “gamesmanship” with respect to its claim construction position. Paper 12 at 1. Nothing could be further from the truth. VSD did not argue that “release logic” should be construed as a means-plus-function term, but rather that Head was obligated to inform the Board in its Petition that this is a disputed issue about this term. VSD’s position on claim construction is the same here as it is in the district court—“release logic” is not a means-plus-function term and should be construed as “[a]n arrangement of components of the binding assembly that causes a specific sequence of actions to actuate or not actuate the first release in response to whether externally applied loads on the ski exceed a predetermined threshold correlated with risk of ACL injury”, as set forth in the Joint Claim Construction Statement (“JCCS”). Ex. 2001 at 3. However, VSD did not advocate in the POPR for a specific construction because the Petition is deficient on its face for a number of reasons, as explained in the POPR. Nonetheless, VSD does not object to the use of its preliminary construction (i.e., as quoted by Head in Paper 12 at 2), except to note that this particular construction is one that neither party at this point in time considers to be correct. *See Samsung Elecs. Am., Inc. v. Cobblestone Wireless, LLC*, IPR2024-00319, Paper 16 at 17-18 (PTAB June 24, 2024) (denying institution when the petition was based on a construction

that “**no one** agrees with” (emphasis in original)).

Head’s alternative argument of applying a plain and ordinary meaning of “release logic” (Paper 12 at 5) is not mentioned or applied in any of the Grounds in the Petition and should therefore be disregarded. *See, e.g., SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 363, 369 (2018). Head’s new attempt to map VSD’s construction to Freudiger 1 (Paper 12 at 2-3) is also not in the Petition and should be disregarded. *Id.*; *see also* VSD’s Brief on Incorporation by Reference, Paper 8 at 3-5. But even if this new argument is considered, tellingly absent is any reference to Freudiger 1 disclosing a predetermined threshold correlated with “risk of ACL injury.” This is expected, given that Freudiger 1 does not mention anything about ACL injuries. *See* Ex. 1003. Both VSD’s preliminary construction and proposed construction include a requirement that the release logic be correlated with “risk of ACL injury.”¹ Therefore, it is clear that Freudiger 1 does not disclose this limitation under the claim construction Head finally sets forth in Paper 12.

II. THE PETITION FAILED TO SATISFY RULE 104(b)(3)

When a petitioner knows that “claim language **may** be construed according to 35 U.S.C. § 112(f), a petitioner **must** provide a construction that includes both the

¹ The ’953 Patent describes that the purpose of the release logic is to allow for release at lower torques in certain directions to protect against ACL injuries. *See, e.g.,* Ex. 1001 at 1:21-59, 4:27-5:6, 7:15-8:67, 16:27-32.

claimed function and the specific portions of the specification that describe the [corresponding structure]. 37 C.F.R. § 42.104(b)(3).” Trial Practice Guide at 45 (emphasis added). Head knows that “release logic” “**may** be construed according to 35 U.S.C. § 112(f)” because it has taken that position in the district court, and if it is dissatisfied with the outcome of the present proceeding, will undoubtedly return to that position again in the district court. *See* Ex. 1014 at 3-5, 11-13; Ex. 2001 at 3; Ex. 2003 ¶¶ 74-89. Thus, regardless of the construction Head advocates for here, it had an obligation to provide the claimed function and the specific portions of the specification that describe the corresponding structure in its Petition.

Head’s reliance on *Lennox Indus. Inc. v. Rosen Techs. LLC*, IPR2023-00717, Paper 9 (PTAB Nov. 14, 2023) is misplaced. In that case, the petitioner informed the Board in its petition that it had contended in district court that several claim limitations “are governed by §112 ¶6 as means-plus-function terms and are indefinite for lack of structure.” *Lennox*, Paper 2 at 10. In contrast, Head did not inform the Board of its means-plus-function arguments in the Petition, instead leaving it up to VSD to inform the Board. *See Facebook, Inc. v. Sound View Innovations, LLC*, IPR2017-00998, Paper 13 at 17-18 (PTAB Sep. 5, 2017) (denying institution in part because the petitioner’s failure to inform the Board of its means-plus-function arguments in the district court “raise[d] the specter of lack of candor”).

As noted, VSD is not arguing and has never argued that Head was required to

adopt a means-plus-function construction here. Head merely needed to inform the Board of its means-plus-function arguments and provide an alternative analysis that included “both the claimed function and the specific portions of the specification that describe the [corresponding structure].” Trial Practice Guide at 45 (citing 37 C.F.R. § 104(b)(3)); *10x Genomics*, IPR2023- 01299, Paper 15 at 11-13 (“Petitioner chose not to argue § 112(f) does apply in the alternative, despite knowing that it is a claim term in dispute in the district court....[T]he **Petition is deficient on its face under 37 C.F.R. § 42.104(b)(3), as merely stating ‘no construction [is] necessary’—while knowing the construction is actually disputed under § 112(f)—is not sufficient for purposes of institution.**” (emphasis added)). Head failed to do this in the Petition and is unable to distinguish *10x Genomics*. Instead, Head could only argue that it “presented and cited each side’s proposed district court construction with its Petition in an attempt to be forthcoming” (Paper 12 at 5). But the Petition neither cites to nor discusses Head’s preliminary constructions, providing them only as an unreferenced exhibit (Ex. 1014), which cannot be incorporated by reference. 37 C.F.R. § 42.6(a)(3).

For the foregoing reasons, the Petition is deficient on its face for failing to satisfy Rule 104(b)(3), “release logic” is not a means-plus-function term, and when construed according to either of VSD’s preliminary or final proposed construction does not come close to being disclosed by any of the references cited in the Petition.

Dated: November 22, 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 22nd day of November, 2024,
the foregoing **PATENT OWNER VERMONT SAFETY DEVELOPMENTS
LLC'S REPLY BRIEF REGARDING CLAIM CONSTRUCTION** was served
electronically via email on the following:

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Dated: November 22, 2024

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