

Filed on behalf of: ResMed Corp.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RESMED CORP.,

Petitioner,

v.

CLEVELAND MEDICAL DEVICES INC.,

Patent Owner.

Case No. IPR2025-00247
U.S. Patent No. 11,872,029

**PETITIONER'S OPPOSITION TO
PATENT OWNER'S DISCRETIONARY DENIAL BRIEF**

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1003	Declaration of Jason Kirkness, Ph.D. (“Kirkness”)
1004	Curriculum Vitae of Jason Kirkness, Ph.D.
1005	Declaration of Sandeep Chatterjee, Ph.D. (“Chatterjee”)
1006	Curriculum Vitae of Sandeep Chatterjee, Ph.D.
1007	U.S. Patent No. 6,644,311 to Truitt et al. (“Truitt”)
1008	U.S. Patent Pub. No. 2002/0198473 to Kumar et al. (“Kumar”)
1009	U.S. Patent No. 7,575,005 to Mumford et al. (“Mumford”)
1010	<i>ResMed Corp. v. Cleveland Medical Devices, Inc.</i> , PTAB-PGR2024-00012-6, PO's Preliminary Response
1011	“ <i>T-Mobile USA and HP Launch the First Truly Integrated Wireless iPAQ Handheld - T-Mobile Newsroom</i> ” (July 2004) available at https://www.t-mobile.com/news/press/t-mobile-usa-and-hp-launch-the-first-truly-integrated-wireless
1012	WIPO Publication No. WO2005096737A2 to Farrell et al. (“Farrell”)
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1016	D. Rapoport, "Methods to Stabilize the Upper Airway Using Positive Pressure," <i>Sleep</i> 19(9):S123-S130 ("Rapoport 1996")
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1021	U.S. Patent No. 7,168,429 to Matthews et al. ("Matthews")
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1023	C. Sullivan, "Reversal of Obstructive Sleep Apnoea by Continuous Positive Airway Pressure Applied through the Nares," <i>Lancet</i> 1981:1862-5 ("Sullivan 1981")
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1025	Teschler, H., et al., "Automated Continuous Positive Airway Pressure Titration for Obstructive Sleep Apnea Syndrome," <i>Am. J. Respir. Crit. Care Med.</i> 54:734-740 (1996)
1026	ResMed, "AutoSet Portable II Plus Overview & Interpretation Guide, Rev. 1," (1999)
1027	ResMed, "AutoSet T, Optimal Therapy for your OSA Patients," (2000)

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1031	U.S. Patent No. 5,490,502 to Rapoport et al. (“Rapoport”)
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1033	Loube, D., “Technologic Advances in the Treatment of Obstructive Sleep Apnea Syndrome,” CHEST 116:1426-1433 (1999)
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1051	U.S. Patent No. 5,309,921 to Kisner et al. (“Kisner”)
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1054	CleveMed Opening Claim Construction Brief
1055	WIPO Publication No. WO2006090371A2 to Orbach (“Orbach 2006”)
1056	<i>ResMedica – clinical newsletter – An Interview with Dr. Michael Berthon-Jones (2002)</i>
1057	<i>Sleep Review – What’s New With CPAP Technology?</i> (2002), available at https://sleepreviewmag.com/sleep-treatments/therapy-devices/oral-appliances/whats-new-with-cpap-technology-2/
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1065	H.R. Rep. No. 112-98, pt. 1 (2011)

I. INTRODUCTION

The Petition should be instituted because the PTAB serves as the most efficient forum for determining patentability for U.S. Patent No. 11,872,029 (the “’029 Patent”).

As to *Fintiv*, the parallel litigation in the Northern District of Ohio has already been stayed, a trial date has never been set, no depositions have occurred, and the litigation has never even reached a *Markman* hearing. Thus, each *Fintiv* factor supports institution and will further the Board's objectives to advance “efficiency, fairness, and the merits.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11, at 6 (Mar. 20, 2020) (precedential).

PO's distortion of the facts does not establish otherwise. Specifically, PO complains that Petitioner did not file the Petition immediately after PO asserted the ’029 Patent in litigation. But Petitioner reasonably waited until mediation failed in October 2024 to file the Petition. Indeed, as PO must concede, the Petition was filed three months before the one year bar.

As to *Advanced Bionics*, the prosecution Examiner did not apply any asserted reference in an office action during examination. Critically, the combination of Truitt and Kumar addresses the very distinctions that PO identified to overcome the prior art of record. Thus, § 325(d) does not apply here because the same or substantially the same art and arguments presented in the Petition were not

previously presented to the Office in any meaningful or relevant way. *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GMBH*, IPR2019-01469, Paper 6 at 9 (Feb. 13, 2020) (precedential).

PO argues that “Petitioner relies upon cumulative art to raise substantially the same arguments already addressed during prosecution of the ’029 Patent and its family members.” PO’s Discretionary Denial Brief (“PODDB”), 2. But the file histories simply do not support this argument. Indeed, to make this argument, PO must improperly ignore the very distinctions and amendments PO made to overcome the prior art of record.

At bottom, the PODDB does not and cannot undermine the conclusion that efficiency, fairness, and the merits are best served through institution.

II. BRIEF BACKGROUND

A. The Parallel Litigation

Currently, PO asserts the ’029 Patent in *Resmed Corp. v. Cleveland Med. Devices, Inc.*, No. 1:23-cv-02221-BMB (N.D. Ohio Mar. 20, 2023) (“Ohio Case”). PO first asserted the ’029 Patent against Petitioner in April 2024 as part of a third wave of counterclaims filed by PO.

Although the case was initially transferred to the Northern District of Ohio in November 2023, the case is still in its very early stages, and the Ohio court has invested little resources into the substance of the case. In particular, the Ohio court

never set a trial date, and never held a *Markman* hearing. Importantly, the Ohio Case is currently stayed “pending the conclusion of all USPTO proceeding related to the asserted patents.” *Resmed Corp. v. Cleveland Med. Devices, Inc.*, No. 1:23-cv-02221-BMB, 2025 WL 744610, at *4 (Mar. 7, 2025).

B. The Delaware Litigation

PO initiated litigation against Petitioner by filing suit in the District of Delaware, asserting, among other patents, U.S. Patent No. 10,076,269 (the “’269 Patent”). The Delaware court stayed the litigation pending resolution of the IPR on the ’269 Patent. On May 2, 2025, the Board issued a final written decision in the IPR of the ’269 Patent finding all challenged claims unpatentable. *Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2023-00565, Paper 42 (May 2, 2025) (’269 FWD”).

Like the ’029 Patent, the ’269 Patent discloses a networked PAP system that transmits symptom severity and usage data to a cell phone. *See* ’269 FWD, 7-8. The ’029 Patent merely adds a limitation that the data is also sent to a remote internet site.

III. FINTIV SUPPORTS INSTITUTION

Here, where the parallel litigation is already stayed and a trial date has never been scheduled, each and every *Fintiv* factor supports institution. PO’s attempts to mischaracterize the facts—such as contorting Petitioner’s reasonable decision to

wait until mediation failed to file the instant Petition to be prejudicial delay and improperly relying on the Delaware litigation where the '029 Patent is not asserted as “substantial investment”—does not establish otherwise.

A. Factor 1 (stay) Strongly Favors Institution

“A district court stay of the litigation pending resolution of the PTAB trial allays concern about inefficiency and duplication of efforts.” *Fintiv*, Paper 11, at 6. “Accordingly, consideration of the first *Fintiv* factor weighs strongly against exercising discretion to deny institution.” *Snap, Inc. v. SRK Tech. LLC*, IPR2020-00820, Paper 15, at 9 (Oct. 21, 2020) (precedential) (“The granting of a stay pending *inter partes* review has weighed strongly against exercising discretion to deny institution under *NHK*.”). The Ohio Case is stayed pending the outcome of Petitioner’s post-grant challenges and the PO concedes to this fact (PODDB, 17). The district court decision to stay the case and defer to the expertise of the PTAB is unsurprising given that there are so few patent cases pending in the Northern District of Ohio. Indeed, there have only been eight patent jury trials in the Northern District of Ohio since 2008. EX1063 (DocketNavigator: Ohio Northern District Profile).

B. Factor 2 (proximity to trial) Strongly Favors Institution

No trial date has ever been set in the Ohio Case and the PO concedes to this fact (PODDB, 18). *Cf. Motorola Sols., Inc. v. Stellar, LLC*, IPR2024-01205, -01206, -01207, -01208, Paper 19, at 3 (Mar. 28, 2025) (Director Review) (denial where trial

scheduled eleven months before projected FWD). This fact alone should be effectively dispositive.

C. Factor 3 (investment in parallel litigation) Favors Institution

No *Markman* hearing has taken place nor has any claim construction order issued in the Ohio Case. *See Fintiv* at 10 (“If, at the time of the institution decision, the district court has not issued orders related to the patent at issue in the petition, this fact weighs against exercising discretion to deny institution under *NHK*.”); *cf. Stellar*, at 3 (denial where court had already issued claim construction order, and parties conducted depositions and exchanged expert reports). Indeed, the parallel case here is nearly at the exact same stage of litigation as the case in the precedential *Snap* decision, where the Board declined to exercise discretionary denial based on similar facts. *Snap*, at 10 (finding “the District Court proceeding was in its early stages” where “no claim construction orders have issued”); *see also Snap*, at 12-13 (“In view of our finding that the parallel District Court proceeding was in an early stage prior to the stay, the timing of the filing of the Petition does not weigh in favor of exercising discretion to deny institution.”); *Supercell Oy v. Gree, Inc.*, PGR2020-00038, Paper 14, at 15 (Sept. 3, 2020) (declining to exercise discretionary denial because only minimal investments had been made in the parallel proceeding although petition filed late within statutory filing window).

PO also argues that the parties have been litigating for years. PODDB, 15-16.

But PO points to the Delaware litigation (also now stayed) where the '029 Patent is not asserted, overlooking the plain text of Factor 3: “investment in the *parallel proceeding* by the court and the parties.” *Fintiv*, Paper 11, at 6 (emphasis added). The Ohio Case, not the Delaware case, is the parallel proceeding.

PO further argues that Petitioner improperly delayed filing the instant Petition. PODDB, 19-26. Not so. First, the district court already rejected this argument. *Resmed Corp. v. Cleveland Medical Devices, Inc.*, No. 1:23-cv-2221, 2025 WL 744610, at *3 (N.D. Ohio March 7, 2025) (“The Court does not find the timing of ResMed’s filings suggests it is using delay tactics.”).

Second, PO’s argument is devoid of any allegation that the timing of the filing benefited the Petitioner (because it did not), and the Board has rejected generalized arguments that petitioners should file petitions earlier. *NHK Spring Co., Ltd. v. Intriplex Techs., Inc.*, IPR2018-00752, Paper 8, at 19 (September 12, 2018) (precedential) (“The Petition, therefore, was timely, and Patent Owner does not apprise us of any tactical advantage, or opportunity for tactical advantage, that Petitioner gained by waiting to file the Petition.”).

Third, Petitioner had good reason to wait to file the petition. On September 5, 2024, the Ohio Case was stayed pending mediation. Petitioner did not file this Petition while engaged in good faith mediation to determine whether PO would drop its infringement claims, which reasonably conserved Board and party resources. *See*

also Fintiv, at 11 (“it is often reasonable for a petitioner to wait to file its petition until it learns which claims are being asserted against it in the parallel proceeding”).

Fourth, if anything, the timing of the filings establishes Petitioner's good faith and diligence. After mediation failed on October 21, 2024, Petitioner filed IPR Petitions against the asserted patents as quickly as possible. After challenging one patent in November¹ and three patents in December², Petitioner challenged another patent³ and filed this Petition on January 10, 2025. The fact that Petitioner filed six petitions within three months of mediation, demonstrates Petitioner's diligence in filing its challenges as quickly as possible. *See Sotera Wireless, Inc. v. Masimo Corporation*, IPR2020-01019, Paper 12, at 17 (December 1, 2020) (precedential) (finding that “the timing of the Petition is reasonable...in view of the large number of patents and claims challenged in this and Petitioner's other related petitions” and because the parties spent time in settlement discussions). Indeed, Petitioner filed this Petition *three months before* Petitioner's one year bar date⁴.

¹ IPR2025-00157.

² IPR2025-00158, -159, -160.

³ IPR2025-00246.

⁴ PO agrees that Petitioner filed “three months before the end of the period within which it could petition for IPR against the '029 Patent.” PODDB, 20.

At bottom, it would have been wasteful for Petitioner to file the Petition before mediation when the goal of mediation is resolving disputes and reducing litigation expenses. To the extent PO argues that Petitioner should have filed its petitions before mediation because PO had not been ordered to drop its infringement claims⁵, this argument demonstrates that PO did not approach the mediation in good faith to resolve the dispute, but rather as a costly delay tactic for burdening Petitioner with additional litigation expenses and shifting the petitions later into the statutory window. Now that mediation has failed and the Ohio Case remains stayed, the most efficient way forward is for the parties to resolve patentability before the Board. PO's arguments against resolving this issue at the Board should be rejected as a predictable attempt to burden Petitioner with additional litigation expenses in district court.

Accordingly, the facts of this Petition are similar to those that have weighed Factor 3 in favor of institution. *Sotera*, at 16-17 (the parties served invalidity contentions, the *Markman* hearing was vacated, fact discovery was ongoing, expert reports were not yet due, and the parties tried settlement discussions after which petitioner filed several petitions in short order).

⁵ This was PO's argument in the related IPR2025-00158, Paper 9, at 2-3; IPR2025-00159, Paper 9, at 6; IPR2025-00160, Paper 9, at 6.

D. Factor 4 (overlap) Strongly Favors Institution

The Ohio Case is stayed, thus there is no danger of overlap. *See Snap*, at 16 (“Based ... [in part on] the stay of the parallel District Court proceeding, the considerations of the fourth *Fintiv* factor weigh against exercising discretion to deny institution.”). Even if any challenged claims were to survive, Petitioner would be estopped under 35 U.S.C. § 315(e) from bringing any invalidity challenge that was raised or reasonably could have been raised during the IPR. Moreover, the Ohio Case would significantly benefit from the simplification of issues and the findings of the Board.

PO argues that Petitioner asserted Dong and Wright in its invalidity contentions (PODDDB, 27), but this argument is mooted by the fact that the Ohio Case is stayed. But even if it were not, PO admits that Kumar and Mumford, on which Petitioner newly relies in this Petition, were not included in Petitioner's invalidity contentions. *Id.*, 23; *see also Fintiv*, Paper 11, at 12-13 (“if the petition includes materially different grounds, arguments, and/or evidence than those presented in the district court, this fact has tended to weigh against exercising discretion to deny institution.”); *Fintiv*, Paper 15, at 15 (“Petitioner's assertion of additional invalidity contentions in the District Court is not relevant to the question of the degree of overlap for this factor”). Thus, the grounds in the instant Petition are different from those asserted in the parallel litigation.

Next, PO asserts that Petitioner has not submitted a *Sotera* or similar stipulation. PODDB, 27-30. This argument is nonsensical because the Ohio Case is stayed until all USPTO proceedings are resolved. *Resmed Corp.*, 2025 WL 744610, at *3 (“This matter is STAYED pending the conclusion of all USPTO proceedings related to the asserted patents.”). To the extent PO argues that the Ohio court could lift the stay before the FWD (PODDDB, 28), “this amounts to ‘unfounded speculation as to how the court might proceed’” and more importantly, contrary to the language of the order itself, and therefore is entitled to no weight. *Snap*, at 9. Regardless, for the avoidance of doubt, Petitioner has submitted a *Sotera* stipulation in the district court litigation. EX1064; *see also Sotera*, at 18-19.

Finally, PO complains that “substantial overlap exists” because “the District Court may still be evaluating the Dong reference in connection with other related patents where there is no estoppel effect.” PODDB, 30. But this complaint is directly contrary to the AIA. The *Sotera* stipulation ensures that this *inter partes* review would be a “true alternative” to the district court proceeding (*Sotera*, at 19) because it covers the full breadth of estoppel that Congress prescribed under § 315(e)(2)⁶ and

⁶ Petitioner notes that it submitted its *Sotera* stipulation before it became aware of the recent *Ingenico, Inc. v. IOENGINE, LLC*, No. 2023-1367 (Fed. Cir. May 7,

thereby “mitigates any concerns of duplicative efforts between the district court and the Board, as well as concerns of potentially conflicting decision” such that Factor 4 “weighs strongly in favor of not exercising discretion to deny institution under 35 U.S.C. § 314(a).” *Sotera*, at 19. Consistent with this approach, recent panels have found that a stipulation commensurate with what Petitioner has provided here strongly favors institution. *See, e.g., Palo Alto Networks, Inc. v. Croga Innovations Ltd.*, IPR2024-01421, Paper 8, 11-14 (Mar. 14, 2025); *Samsung Elecs. Co. Ltd. v. Heawater Rsch. LLC*, IPR2024-01407, Paper 9, 6-14 (Mar. 20, 2025); *SAP Am., Inc. v. Cyandia, Inc.*, IPR2024-01433, Paper 13, 12 (April 7, 2025) (“In light of the stipulation and nature of the asserted ground...this [factor] strongly favors institution.”).

E. Factor 5 (same party) Favors Institution

The Board will issue the FWD before trial (if any) in the Ohio Case. Thus, Factor 5 favors institution. *See Huawei Tech. Co. v. WSOU Inv., LLC*, IPR2021-00225, Paper 11, at 14 (June 14, 2021) (“this factor ‘favors denial if trial precedes the Board’s Final Written Decision and favors institution if the opposite is true’”). PO’s argument characterizing Petitioner as the “counterclaim-defendant” and the

2025). Regardless, the asserted references do not describe a prior art system that Petitioner relies upon in its invalidity contentions.

“plaintiff” (PODDB, 30) is contrary to the plain text (and spirit) of Factor 5: “whether the petitioner and the defendant in the parallel proceeding are the same party.” *Fintiv*, Paper 11, at 6.

F. Factor 6 (other considerations) Strongly Favors Institution

Other considerations strongly favor institution. First, the Petition presents strong arguments for unpatentability using grounds based on references that have never been considered by the Office. *See Samsung Elecs. Co. Ltd. v. Dynamics Inc.*, IPR2020-00505, Paper 11, at 14 (Aug. 12, 2020) (finding case merits favor institution). PO attempts to present merits arguments about the “second processor” and “wireless transceiver adapted for transmitting.” PODDB, 31. But the Petition establishes that the “second processor” and its calculations are disclosed by Truitt’s “controller” (Pet., 17-21, 28) (and, as discussed in Section III, disclosed in a virtual identical figure to Figure 7 of the ’029 Patent) by itself and additionally by Mumford (*id.*, 68) based on PO’s claim construction from the district court for the calculating features (*id.*, 6-8). The Petition also explained how the claimed transmissions are disclosed by Truitt in view of Kumar (*id.*, 29-34) and articulated the motivation and expectation of success for combining the references (*id.*, 7-10, 22-26).

Second, PO makes baseless allegations that Petitioner is “derailing its litigation” by filing this Petition. PODDB, 32. But such arguments have been rejected by the Board. *See Oticon Medical AB v. Cochlear Limited*, IPR2019-00975,

Paper 15, at 23 (October 16, 2019) (precedential) (finding that “Patent Owner’s arguments regarding Petitioner’s intentions or the effect of a Board proceeding are speculative” and declining to deny institution).

Third, Petitioner—ResMed Corp.—is a publicly traded U.S. company from San Diego that manufactures lifesaving medical equipment that is critical to public health and the U.S. economy as a whole. Thus, institution is consistent with the significant public interest against “leaving bad patents enforceable.” *Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 55 (2020). Indeed, Petitioner has a significant patent portfolio of its own, and institution here would further the intent of the AIA to prevent the “diver[sion of] resources from the research and development of inventions.” EX1065 (H.R. Rep. No. 112-98, pt. 1 (2011)) at 48.

Fourth, this Petition is the sole challenge to the '029 Patent before the Board—a “crucial fact” favoring institution. *Google LLC v. Uniloc 2017 LLC*, IPR2020-00115, Paper 10, at 6 (May 12, 2020).

Last, given its specialized knowledge and familiarity with patent law, the Board is a far more efficient forum to decide invalidity compared to Northern District of Ohio, which only sees a few dozen patent cases per year. EX1063 (DocketNavigator: Ohio Northern District Profile).

Accordingly, other considerations overwhelming favor institution.

IV. *ADVANCED BIONICS* SUPPORTS INSTITUTION

The § 325(d) “framework reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown.” *Advanced Bionics, LLC v. Med-El Elektromedizinische Geräte GMBH*, IPR2019-01469, Paper 6, at 9 (Feb. 13, 2020) (precedential). Here, there is no reason to exercise discretionary denial under § 325(d) because there are no previous Office evaluations of the evidence of record.

Specifically, the Petition presents five references that render the challenged claims unpatentable as follows:

Grounds	References	Claims
Ground 1	Truitt, Kumar	1-11, 13-16, 18-19
Ground 2	Truitt, Kumar, Dong	14, 15
Ground 3	Truitt, Kumar, Dong, Wright	12, 17
Ground 4	Truitt, Kumar, Mumford	1-11, 13-16, 18-19
Ground 5	Truitt, Kumar, Dong, Mumford	10, 14, 15
Ground 6	Truitt, Kumar, Wright, Mumford	12, 17

Pet., 7-71 (Grounds 1-6). Four of these references—Kumar, Dong, Wright, and Mumford—were not presented to the Office during prosecution of the '029 Patent. Only one of the references—Truitt—is cited on the face of the '029 Patent, but the Examiner did not apply it in any office action. *See generally* EX1001; *see also Amgen Inc. v Alexion Pharms. Inc.*, IPR2019-00740, Paper 15, at 65 (Aug. 30, 2019) (“The Board has consistently declined exercising its discretion under Section 325(d) when the only fact a Patent Owner can point to is that a reference was disclosed to

the Examiner during the prosecution.”).

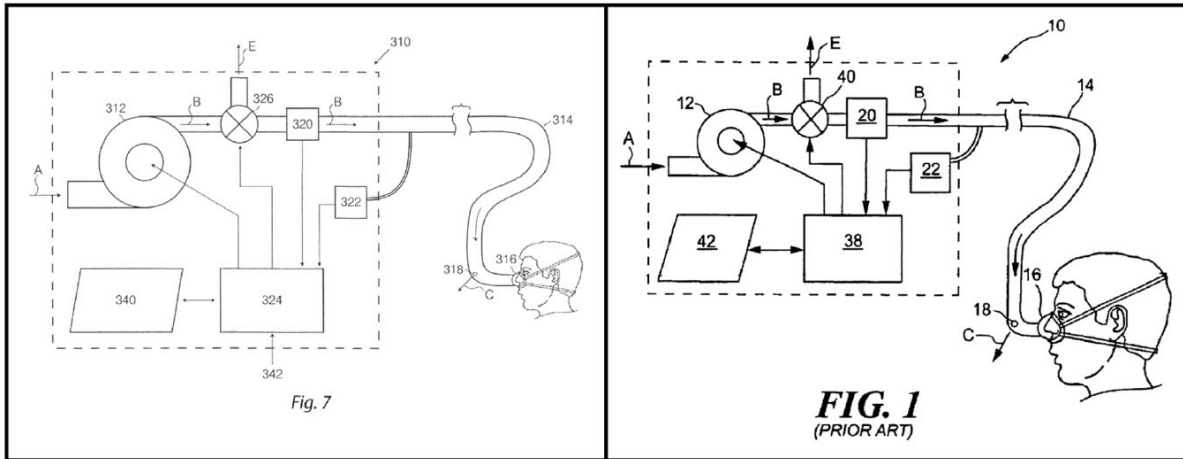
Even if the Examiner had evaluated Truitt, the Examiner would have materially erred in failing to consider the relevant teachings in Truitt. Notably, PO distinguished the prior art of record by arguing that it did not teach an internal processor to provide apnea-hypopnea index (API) and sleep disordered breathing (SBD) measurements nor internal airflow sensors:

Farrell does not describe a second processor within the enclosure, to provide for AHI and SDB measurements but indicates these may be performed on a variety of processors and devices.

...

Both the electrode sensors in Farrell and Gave are external to the PAP enclosure.

EX1002, 158, 161 (emphasis in original). Not only does Truitt disclose both limitations, Truitt discloses both in a figure that is eerily identical to the relevant figure in the '029 Patent:



EX1001, FIG. 7 (left); EX1007, FIG. 1 (right)

Pet., 15 (showing internal processor 38 and internal sensors 20 and 22 in Figure 1 of Truitt).

Unable to show that the same art was previously presented to the Office, PO relies on a tortured reading of the prosecution of the '029 Patent and its child, U.S. Patent No. 12,213,775 (the "'775 Patent") to argue that the Office considered substantially the same arguments. But a simple review of their file histories confirm that none of PO's arguments have merit. Rather, the asserted references plainly disclose the exact distinctions that PO relied on to overcome the Examiner's rejections.

A. Legal Principles

The Board considers six non-exclusive factors when deciding whether to exercise its discretion under § 325(d), including:

- (a) the similarities and material differences between the asserted art and the

prior art involved during examination;

(b) the cumulative nature of the asserted art and the prior art evaluated during examination;

(c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;

(d) the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art;

(e) whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and

(f) the extent to which additional evidence and facts presented in the Petition warrant reconsideration of the prior art or arguments.

Becton, Dickinson & Co. v. B. Braun Melsungen AG, IPR2017-01586, Paper 8, at 17-18 (Dec. 15, 2017) (precedential). In applying the *Becton Dickinson* factors, the Board applies the two-part framework of *Advanced Bionics*:

If, after review of factors (a), (b), and (d), it is determined that the same or substantially the same art or arguments previously were presented to the Office, then factors (c), (e), and (f) relate to whether the petitioner has demonstrated a material error by the Office.

Advanced Bionics, Paper 6, at 10.

B. *Advanced Bionics* Step 1: The Asserted Arguments Have Not Been Previously Presented to the Office

There is no “overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the

prior art.” *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8, at 7-8 (Dec. 15, 2017). PO claims “Petitioner’s arguments regarding *Truitt*, *Kumar*, and *Mumford* are substantially similar to those traversed during prosecution of the application that led to the ’029 Patent and its child patent, U.S. Patent No. 12,213,775.” PODDB, 35. Not so.

As a threshold, arguments made during the prosecution of a child have little relevance. When art is cited “during the prosecution of a child patent application, not the application that matured into the [challenged] patent, ... it has less relevance to the challenged claims.” *Microsoft Corp. v. Parallel Networks Licensing, LLC*, IPR2015-00483, Paper 10, at 15 (July 15, 2015); *see Advanced Bionics*, at 10 (“The factors set forth in *Becton, Dickinson* should be read broadly, however, to apply to any situation in which a petition relies on the same or substantially the same art or arguments previously presented to the Office during a proceeding pertaining to the **challenged patent**.”) (emphasis added). PO failed to present any reason why the prosecution history of the child ’775 Patent is relevant to the ’029 Patent, and indeed it is not because the Examiner never even considered Kumar, Dong, Wright, nor Mumford during prosecution of the child ’775 Patent.

Regardless, Petitioner’s arguments were never before the Examiner during the prosecution of either the ’029 Patent or the ’775 Patent. Indeed, PO’s mischaracterizations omit the very distinctions that led to the allowance of the ’029

Patent. PO did not merely argue that Farrell only disclosed a conventional CPAP processor; rather, PO argued that Farrell did not disclose an *internal* processor (a limitation disclosed in Truitt). *Cf.* EX1002, 157-158 *with* Pet., 28. PO did not merely argue that Geva only disclosed a cell phone; rather, PO argued that Geva did not disclose a remote internet site (a limitation disclosed in Kumar). *Cf.* EX1002, 102-103; EX2002, 8-10 *with* Pet., 34-40. And PO did not merely argue that Farrell and Geva only disclosed electrode sensors; rather, PO argued that Farrell and Geva did not disclose *internal sensors* (a limitation disclosed in Truitt). *Cf.* EX1002, 161 *with* Pet., 15. Rather than share the deficiencies of the prior art of record, the asserted references directly address those deficiencies.

1. The Office Did Not Consider An Internal Processor as Taught by Truitt

PO argues that Petitioner merely relies on Truitt to disclose a processor of a conventional PAP device that calculates symptom severity data, and that the Office already considered and rejected Farrell which “shares the same deficiency” as Truitt. PODDB, 35-36. This is incorrect for multiple reasons.

First, PO incorrectly claims that it overcame the Examiner's rejection by arguing “that Farrell does not disclose the claimed processor because Farrell required additional sensors and processors to perform the claimed calculations.”

PODDB, 35. This is a mischaracterization.⁷ Instead, PO overcame the rejection by amending the claims to recite a processor *within the enclosure*.

a second processor within the enclosure adapted for receiving the airflow sensor data and for calculating: ...

EX1002, 147; *see also id.*, 156-158. Put simply, PO argued that Farrell taught a processor external to the PAP enclosure, not internal.

Second, Truitt does not share Farrell's alleged deficiency. As the Petition establishes, Truitt's Figure 1 PAP device is virtually identical to Figure 7 of the '029 Patent showing the processor *internal* to the enclosure. Pet., 15. PO affirmatively asserted this difference during prosecution:

Farrell does not describe a second processor within the enclosure, to provide for AHI and SDB measurements but indicates these may be performed on a variety of processors and devices.

EX1002, 158; *see also id.*, 157 (“the present invention further claims a second processor within the enclosure adapted for receiving the airflow sensor data and for calculating: ...”) (emphasis in original). Indeed, in this passage from the file history,

⁷ PO also asserts that the “Examiner agreed.” PODDB, 35 (citing EX1002, 187-188). This is a mischaracterization because the Examiner did not provide articulated reasons for allowance. *See* EX1002, 187-188.

PO acknowledges that Farrell discloses “a variety of processors and devices” that provide AHI and SDB measurements, just not within the enclosure of the CPAP device.

Third, contrary to its admissions during prosecution, PO now argues that Farrell does not disclose a processor for determining “the severity of the subject’s symptoms or indices.” PODDB, 36. But the file history speaks for itself. Notably, PO repeatedly admitted that Farrell teaches that “other devices [and their processors] may be used to make this assessment.” EX1002, 158; *see also id.*, 157 (“Farrell teaches ‘cardiovascular related treatment or diagnostic *devices* may be implemented to query for or *measure SDB related information for the purpose of detecting SDB.*”) (emphasis in original), (“Farrell goes on teach that ‘*[s]uch data may be combined with other sleep disordered breathing data recorded by the device, for example, an AHI.*’) (emphasis in original). To the extent there is any similarity between Truitt and Farrell, they both disclose a processor for “calculating symptom severity data and/or an index.” PODDB, 37. And while Farrell performs these calculations outside the enclosure, Truitt performs these calculations “within the enclosure” as claimed.

Because Truitt discloses an internal processor, it is not cumulative of the arguments PO asserted as to Farrell. *See also Oticon*, at 15-16 (finding a reference was not cumulative with another reference because they were structurally different).

Thus, the Office has never considered arguments that teach a processor “within the enclosure” for calculating the severity of the subject’s symptoms or indices as disclosed in Truitt.

2. The Office Did Not Consider a Remote Internet Site as Taught by Kumar

PO argues that Petitioner merely relies on Kumar to disclose the cell phone limitation, and that the Office already considered and rejected Geva which “shares the same deficiency” as Kumar. PODDB, 37-39. Again, this is incorrect for multiple reasons.

First, PO incorrectly claims that it overcame the Examiner’s rejection by arguing that Geva’s “cell phone that performs the analysis of the sensor signals.” PODDB, 37. Again, this is a mischaracterization.⁸ Instead, PO argued that Geva includes “no teaching of a remote internet site as claimed with the specific capabilities as with the present invention.” EX1002, 160; *see also* EX2001, 15-16.

Second, Kumar does not share Geva’s alleged deficiency. Specifically, Kumar discloses a remote internet site for receiving data calculated by the PAP device.

⁸ PO also asserts that the “Examiner agreed.” PODDB, 38 (citing EX1002, 187-188).

This is again a mischaracterization because the Examiner did not provide articulated reasons for allowance. *See* EX1002, 187-188.

Pet., 34-40. Although PO acknowledges that the Office allowed the claims in part because of limitation “[1c.] a **remote internet site** for receiving the data calculated by the PAP device” (PODDDB, 35), PO never disputes that Kumar discloses this limitation. Because it cannot. Kumar plainly discloses a central server that hosts “the system’s Internet browser-based software that allows the remote provider, and other healthcare providers, to remotely view their patient’s real-time physiology.” Pet., 36 (citing EX1008, [0192]).

Third, PO mischaracterizes the asserted combination in the Petition. PODDB, 38. Specifically, PO argues that “Petitioner uses Kumar for its arguments directed to the cell phone but ignores that its computing device contains a data interpretation and analysis module that performs virtually identical signal analysis to its received signals such that *Truitt’s processor would not be modified* to perform full calculations.” PODDB, 38 (emphasis added). But in the Truitt-Kumar combination, the Petition does *not* propose a modification of Truitt’s processor. Rather, the Petition plainly states that the processor of Truitt performs the full calculations. Pet., 17-21.

Because Kumar (undisputedly) discloses a remote internet site, it is not cumulative with Geva. *See also Oticon*, at 15-16. Thus, the Office has never considered art or arguments that teach “a remote internet site” for receiving the data calculated by the PAP device as disclosed in Kumar.

3. The Office Did Not Consider Internal Sensors as Taught by Truitt

PO argues that Petitioner merely relies on Truitt to disclose airflow sensors, and that the Office already considered and rejected Farrell and Geva which “shares the same deficiency” as Truitt. PODDB, 39. And once again, this is incorrect for multiple reasons.

First, PO incorrectly suggests that PO overcame the Office's rejection by arguing that the “electrode sensors” are not the claimed airflow sensors. PODDB, 39. But PO distinguished the sensors of Farrell and Geva because they were external: “Both the electrode sensors in Farrell and Gave are external to the PAP enclosure.” EX1002, 161; *see also id.*, 157 (“Farrell simply does not teach internal airflow sensors in the PAP's enclosure.”), 157 (“Farrell does not disclose an airflow sensor internal to the PAP enclosure”), 156 (“The present invention further claims ‘an airflow sensor being any type of sensor internal to the enclosure of the PAP device adapted for measuring or deriving the respiratory airflow of a subject while using the PAP and outputting airflow sensor data.’”) (emphasis in original), 161 (“Clearly, the ASS & Respiratory system 3103 is not contained within the CPAP enclosure in Geva since it sends a signal to the CPAP system.”).

Second, Truitt does not share this alleged deficiency in Farrell and Geva. As discussed above, Truitt's Figure 1 is virtually identical to Figure 7 of the '029 Patent,

showing Truitt's airflow sensor *internal* to the enclosure. Pet., 15. To assert cumulateness, PO now argues that Farrell has an internal sensor: "both Farrell and Truitt disclose airflow sensor signals for measuring and determining the flow of gas *within* the PAP device." PODDB, 37 (emphasis added). But this argument is inconsistent with PO's statement during prosecution, and does not change the fact that PO overcame the Examiner's rejection by distinguishing Farrell's external sensors. More importantly, this argument does not change the fact that Truitt's Figure 1 disclosure of the internal airflow sensor is virtually identical to Figure 7 of the '029 Patent.

Third, PO mischaracterizes the asserted combinations in the Petition. PODDB, 39. Specifically, PO argues that "Petitioner fails to recognize that Mumford's sleep efficacy algorithm relies upon inputs from electrodes found in the mask worn by the patient, not airflow sensors." *Id.* But this disclosure merely describes an alternative embodiment in Mumford that uses EEGs. EX1009, 15:39-16:3 ("[T]he sleep efficacy algorithm 36 *may use* a frontal staging algorithm, based on at least the electrode signals, to determine which stage of sleep the wearer 18 is in.") (emphasis added). The asserted combination in the Petition does not rely on that embodiment. Pet., 64-71. To the contrary, the asserted combination in the Petition expressly relies on Mumford's analysis of flow sensor signals. *Id.*, 66 ("Like Truitt, Mumford discloses that the processor analyzes the signal from the flow

sensors.”).

Because Truitt discloses internal airflow sensors, it is not cumulative with the arguments PO asserted as to Farrell and Geva. *See also Oticon*, at 15-16. Thus, the Office has never considered arguments that teach internal airflow sensors as disclosed in Truitt.

4. The Office Did Not Consider Kumar, Mumford, Dong, or Wright

PO presents a theory that two of Petitioner's references—Wright and Mumford—were previously presented because they were cited in the parent patent. PODDB, 40-41. Setting aside the fact that there is no evidence that the Examiner considered those references in the prosecution of the '029 Patent, there is simply no evidence of how the Office applied Wright and Mumford in prosecution of the parent '284 Patent (if at all), let alone in the way that the Petition asserts these references. The Examiner cited to neither Wright nor Mumford in any office actions during prosecution of the parent '284 Patent.

At bottom, the Office never considered substantially the same arguments presented in the Petition. Four of the five asserted references are not cited on the face of the '029 Patent. And the only reference—Truitt—was merely cited in IDS and never presented in the combinations set forth in the Petition. The first prong of *Advanced Bionics* cannot be met. PO's arguments do not establish otherwise.

C. The Examiner Materially Erred in Overlooking the Disclosures

Even if the first prong of *Advanced Bionics* is satisfied (and it is not), the second prong of *Advanced Bionics* cannot be met. If Truitt is found to be cumulative with Farrell, then the Examiner materially erred because they were misled by the PO's statement that "Farrell simply does not teach internal airflow sensors in the PAP's enclosure" (EX1002, 157), particularly when PO now admits that Farrell has an internal sensor: "both Farrell and Truitt disclose airflow sensor signals for measuring and determining the flow of gas within the PAP device." PODDB, 37. This Petition should be instituted at least because PO should not be rewarded for making inconsistent statements to the Office.

Further, the Examiner materially erred in failing to consider the internal airflow sensor disclosed in Figure 1 and other parts of Truitt and in failing to consider the remote internet site of Kumar (or equivalent disclosures in references before the Office) as discussed above.

The Examiner also materially erred by failing to apply Wright and Mumford despite those references being cited in an earlier patent. This error could have been avoided if PO had provided those references to the Examiner in an IDS during prosecution of the '029 Patent.

V. CONCLUSION

Given that the discretionary denial considerations support institution as

discussed above, Petitioner respectfully requests that the Board reach the merits of the Petition.⁹

⁹ The Office's discretionary denial practices are currently being challenged in *Apple Inc. v. Stewart*, No. 24-1864, (Fed. Cir. May 17, 2024). Petitioner respectfully requests the benefit of any relief that may be granted in that appeal or other challenges to the Office's discretionary denial practices.

Dated: May 12, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that the foregoing **PETITIONER'S OPPOSITION TO PATENT OWNER'S DISCRETIONARY DENIAL BRIEF** exclusive of the parts exempted as provided in 37 C.F.R. §42.24(a), contains 5,958 words and therefore complies with the type-volume limitations of 37 C.F.R. §42.24(a).

Dated: May 12, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2025, a true and correct copy of the foregoing
**PETITIONER'S OPPOSITION TO PATENT OWNER'S DISCRETIONARY
DENIAL BRIEF** is being served by electronic mail on Patent Owner's counsel of
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