UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DABICO AIRPORT SOLUTIONS INC.,
Petitioner,

v.

AXA POWER APS,
Patent Owner.

Inter Partes Review No. IPR2025-00408

U.S. Patent No. 9,771,169

PATENT OWNER'S AUTHORIZED RESPONSE TO PETITIONER'S REQUEST FOR DIRECTOR REVIEW

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PETITIONER APPLIES THE INCORRECT STANDARD FOR RE-REVIEW OF A DECISION BY THE DIRECTOR 4

III. EVEN UNDER PETITIONER'S STANDARD, THE DIRECTOR DID NOT ABUSE HER DISCRETION 5

A. The Director Has Broad Discretion To Deny Institution, Including For Reasons Not Raised By A Patent Owner 5

B. "Settled Expectations" Was Not A "New Policy" And Any Uncertainty Over How It Would Be Applied Does Not Warrant Further Briefing 8

C. The Director Specifically Denied Institution Based On "All the Evidence And Arguments" And Not Solely On The Age Of The Patent—Other Non-Precedential Decisions Involving Older Patents Were Also Ruled On Based On A "Holistic" Approach 10

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Ikea Supply AG v. Everlight Elec. Co., Ltd.,
IPR2024-00988 (P.T.A.B. July 9, 2021) 7

Microsoft Corp. v. X1 Discovery, Inc.,
IPR2025-00253 (P.T.A.B. June 25, 2025) 11

Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.,
989 F.3d 1375 (Fed. Cir. 2021) 7, 10

NPX USA, Inc. v. Impinj, Inc.,
IPR2020-00554 (P.T.A.B. Sept. 1, 2020) 7

Samsung Elec., Co., Ltd. V. LED Wafer Sols.,
IPR2021-01526 (P.T.A.B. June 8, 2022) 5

Shopify Inc. v. DKR Consulting, LLC,
IPR2025-00131 (P.T.A.B. June 2, 2025) ..... passim

TQ Delta, LLC v. DISH Network LLC,
929 F.3d 1350 (Fed. Cir. 2019) 9

Statutes

35 U.S.C. § 135 4

35 U.S.C. § 314 ..... 2, 4, 6

35 U.S.C. § 324 4

Rules

37 C.F.R. § 42.71 ..... 2, 4, 5

37 C.F.R § 42.107 7

I. INTRODUCTION

Patent Owner AXA Power ApS ("AXA Power" or "Patent Owner") submits this response to the Request for Director Review filed by Dabico Airport Solutions Inc. ("Dabico" or "Petitioner") under the Director's July 16, 2025 email authorization (Exhibit 3100). Petitioner's Request for Director Review—in effect a request for re-review or rehearing of the Director's June 18, 2025 decision granting Patent Owner's request for discretionary denial—should be denied. Petitioner misapprehends the broad discretion afforded to the Director in deciding whether to grant or deny institution. As the Director recently explained:

> "Congress invested the Director with broad authority 'on the question whether to institute review' under Section 314(a). There is no statutory or regulatory requirement that a patent owner must first request the Director to exercise discretionary denial authority . . . The Director's statutory authority to institute *inter partes* review, moreover, is permissive, not mandatory, and the Director may deny institution for reasons of administrative efficiency.

Shopify Inc. v. DKR Consulting, LLC, IPR2025-00131, Paper 10 (P.T.A.B. June 2, 2025). Each of Petitioner's three arguments for why the Director allegedly abused her discretion are contrary to the Director's permissive authority.[1]

[1] As discussed below, because Petitioner's Request is not a request for Director

First, Petitioner's argument that the Director abused discretion by "denying institution on 'settled expectations' without Patent Owner requesting such denial" has no basis. Patent Owner broadly requested discretionary denial under 35 U.S.C. § 314(a), the catch-all discretionary denial provision. *See* Paper 10 at 1, 67. Moreover, the Director's decision specifically states that discretionary denial was based on a "holistic" review of "all the evidence and arguments presented"—not just the "settled expectations" factor. *See* Paper 21 at 3. But in any event, the Director already specifically recognized in *Shopify* that the Director can grant discretionary denial on bases not raised by a Patent Owner. *Shopify*, IPR2025-00131 at Paper 10. It has also long been recognized that the Director can grant discretionary denial even if, for example, a Patent Owner files no preliminary response. *See infra* at § III.A. Petitioner cites no Rule, law, or binding authority to the contrary.

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review *of a Board decision* (i.e., a decision by another factfinder), but rather a request for the Director to reconsider *her own* prior decision, the standard for a request for rehearing under 37 C.F.R. § 42.71 (d) should apply. Petitioner, however, does not apply this standard, instead vaguely characterizing its disagreements with the Director's decision as "abuse of discretion."

Second, Petitioner's argument that the Director abused discretion by "changing USPTO policy without providing Dabico an opportunity to be heard" has no basis. The Director did not "change" any policy—the "settled expectations" factor for discretionarily denying an IPR petition was already set forth in the Director's March 25, 2025 memorandum—two months before Petitioner filed its May 28, 2025 response on discretionary denial. Petitioner was on notice that the Director could rely on that basis to deny institution. Petitioner's real complaint is simply that Petitioner did not anticipate that the Director would apply it here.

Third, Petitioner's argument that the Director abused discretion by finding "settled expectation" on the facts here fails. Petitioner's primary basis for arguing that the Director erred is that the Director did not discretionarily deny institution based on "settled expectations" in two other non-precedential decisions involving older patents. But in those decisions, as with the decision here, the Director specifically stated the decision was based on "all of the evidence and arguments," including the strength of the merits—not solely "settled expectations." *See infra* at § III.C. Every case turns on its own facts, and the Director may institute proceedings for even old patents if the Director believes they are facially invalid and should be removed from the USPTO rolls.

For these reasons and the reasons discussed below, the Director should deny further review. The decision denying institution should stand.

II. PETITIONER APPLIES THE INCORRECT STANDARD FOR RE-REVIEW OF A DECISION BY THE DIRECTOR

As an initial matter, Petitioner's Request for Director Review can be denied because it does not apply the correct standard for review. Petitioner applies the standard for Director review of a Board decision, i.e., the standard for reviewing the decision of another decisionmaker. That standard is set forth below:

> "Requests for Director Review ***of a Board's decision*** on institution under 35 U.S.C. §§ 135, 314, or 324, or decisions granting rehearing of such a decision, shall be limited to decisions presenting (a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law."

See USPTO, Director Review Process at 2.B, Availability of Director Review: Proceedings under part 42 of 37 C.F.R. (last modified March 18, 2025), https://www.uspto.gov/patents/ptab/decisions/director-review-process#RIDRP (emphasis added).

But Petitioner's current Request is not a typical request for Director Review. Here, the Director ruled on whether to discretionarily deny the Petition. *See* Paper 21. This Request is in effect a ***second*** Request for Director Review. Therefore, the standard of 37 C.F.R. § 42.71 (d) should instead apply, which states:

> A party dissatisfied with ***a decision*** may file a single request for rehearing . . . The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically

> identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, a reply, or a sur-reply.

37 C.F.R. § 42.71 (d). And while a request for rehearing is analyzed on an "abuse of discretion standard," that is referring to an abuse of discretion in overlooking or misapprehending arguments—the predicate for such a request. *See, e.g., Samsung Elec., Co., Ltd. V. LED Wafer Sols*., IPR2021-01526, Paper 11 (P.T.A.B. June 8, 2022). Here, ***Petitioner did not point to any matter that the Director misapprehended or overlooked***, or where the matter was previously addressed on the record. Instead, Petitioner merely disagrees with the Director's authority and power—but that is not within the scope of § 42.71(d). If Petitioner wishes to challenge the Director's authority and power, Petitioner must pursue other legal mechanisms.

III. EVEN UNDER PETITIONER'S STANDARD, THE DIRECTOR DID NOT ABUSE HER DISCRETION

A. The Director Has Broad Discretion To Deny Institution, Including For Reasons Not Raised By A Patent Owner

Even if one applies a more general "abuse of discretion" standard to Petitioner's request for re-review, Petitioner's criticisms of the Director's decision still fail. For example, Petitioner's principal argument is that the Director allegedly abused her discretion by denying institution based on "settled expectations" without

Patent Owner requesting denial on that specific basis. Paper 22 at 2-4. But that argument fails for several reasons.

First, Patent Owner broadly requested discretionary denial under § 314(a), the catch-all provision for discretionary denial. *See* Paper 10 at 1, 67. Furthermore, the Director specifically stated that the discretionary denial was not based solely on any one fact or factor, including "settled expectations." Paper 21 at 3. Rather, the Director stated that "[a]lhough certain arguments are highlighted above, the determination to exercise discretion to deny institution is based on a holistic assessment of all of the evidence and arguments presented." *Id.* For example, Patent Owner explained how the merits of the Petition were weak, making the Petition an inefficient use of Patent Office resources. *See* Paper 10 at 2 ("The Petition lacks substantive merit … Granting discretionary denial avoids unnecessary further burden on PTAB resources."). The Director identified in her decision that Petitioner "does not provide any persuasive reasoning why an *inter partes* review is an appropriate use of Office resources." Paper 21 at 3.

Second, the Director has already specifically recognized that discretionary denial may be granted on bases not raised by a Patent Owner, holding in *Shopify*:

> Petitioner is correct that Patent Owner . . . did not request discretionary denial … The exercise of the Director's discretion ***does not depend on receiving a request for discretionary denial from Patent Owner***, as urged by Petitioner. Congress invested the Director with broad

> authority "on the question whether to institute review" under Section 314(a). There is no statutory or regulatory requirement that a patent owner must first request the Director to exercise discretionary denial authority, and Petitioner has cited none.

Shopify, IPR2025-00131 at Paper 10 (Representative Decision) (internal citations omitted). There is no legal "right" to institution of an IPR. The Director may deny institution for any reason, including administrative efficiency or workload demands—reasons a Patent Owner could not raise since they are considerations internal to the Patent Office. *See Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021) ("The Director is permitted, but never compelled, to institute an IPR. And no petitioner has a right to such institution. For example, the Director is free, as in this case, to determine that for reasons of administrative efficiency an IPR will not be instituted, as agencies generally are free, for similar reasons, to choose not to initiate enforcement proceedings.").

Third, the Rules specifically recognize that the Director can deny institution for reasons not raised by a Patent Owner because a Patent Owner is not even required to file a preliminary response. *See* 37 C.F.R. § 42.107 (a patent owner "***may*** file a preliminary response") (emphasis added); *NPX USA, Inc. v. Impinj, Inc.*, IPR2020-00554, Paper 16 (P.T.A.B. Sept. 1, 2020) (denying institution for discretionary reasons even though Patent Owner filed no preliminary response); *Ikea Supply AG v. Everlight Elec. Co., Ltd.*, IPR2024-00988, Paper 6 (P.T.A.B. July 9, 2021) (same).

Nothing in the Director's Memorandum enacted any changes to the CFR Rules.

None of Petitioner's contrary arguments have any merit. Most importantly, Petitioner cites to no rule, law, or other binding authority holding that the Director cannot deny a petition on bases not raised by a Patent Owner. Instead, Petitioner, for example, points to a non-binding ***webinar*** where a USPTO representative stated that the PTAB does not "foresee" the Director denying institution on issues not raised in a discretionary denial brief and that the Director would "primarily" rely on arguments raised by a party. *See* Paper 22 at 2. These statements leave open the possibility that the Director ***could*** sometimes rely on arguments not raised by a party. Additionally, Petitioner cites the discretionary denial FAQs posted on the USPTO's website, which state that a Patent Owner must file a request for discretionary denial to invoke the new discretionary denial process, and that the request must set forth bases for denial. *See id.* at 3. Here, consistently, Patent Owner filed a request for discretionary denial, and that request set forth specific bases. Nothing in the FAQs bind or limit the Director's decision to only those bases.

B. "Settled Expectations" Was Not A "New Policy" And Any Uncertainty Over How It Would Be Applied Does Not Warrant Further Briefing

Inconsistently with Petitioner's argument that Patent Owner should have raised "settled expectations" in its discretionary denial brief, Petitioner next argues that the Director abused discretion by denying institution based on a "new policy"

that "had never been announced by the Office." Paper 22 at 4. Petitioner suggests this either warrants overturning the discretionary denial or granting Petitioner an additional brief. *Id.* at 4-5. But neither of Petitioner's suggestions is warranted.

First, the "settled expectations" factor for discretionary denial is not new. It was set out in the Director's March 25, 2025 memorandum—months before Petitioner filed its May 28, 2025 response on discretionary denial. *See* Director's Memorandum at 2. The Director's memorandum even specifically states that the settled expectations could simply be based on the "length of time the claims have been in force." *Id.* Petitioner was on notice, therefore, that the Director could rely on that basis to deny institution and had an opportunity to address that factor in Petitioner's brief. *See TQ Delta, LLC v. DISH Network LLC*, 929 F.3d 1350, 1356 (Fed. Cir. 2019) (no APA violation where "the party asserting the APA violation 'had notice…and an opportunity to be heard'"). Petitioner's real complaint is simply that it did not anticipate that the Director would apply the "settled expectations" factor here. Petitioner argues that it relied on a lack of past decisions of the PTAB applying this factor based on the age of a patent, for example. *See* Paper 22 at 4-5. But Petitioner points to no precedential Board opinion holding that "settled expectations" can only be applied in certain circumstances, or based on certain facts.

Second, Petitioner ignores that the Board has broad discretion not to institute an IPR based on constantly shifting considerations, such as administrative efficiency

and workload considerations. *See Mylan Labs.*, 989 F.3d at 1382 ("Director is free . . . to determine that for reasons of administrative efficiency an IPR will not be instituted."). The current workload and administrative concerns of the Office may not be readily apparent to the parties. This is unsurprising since they are not privy to data regarding Administrative Judge workloads. Nothing in *Mylan* (or otherwise) indicates that the Director must provide parties with advance notice of current workloads, or to provide parties an opportunity to brief and argue the impact of current workloads. Again, this is because granting institution of an IPR proceeding is permissive, not mandatory. *Shopify*, IPR2025-00131 at Paper 10. Petitioner fails to explain how this situation is any different.

C. The Director Specifically Denied Institution Based On "All the Evidence And Arguments" And Not Solely On The Age Of The Patent—Other Non-Precedential Decisions Involving Older Patents Were Also Ruled On Based On A "Holistic" Approach

Finally, Petitioner argues that the facts here allegedly do not support "settled expectations," arguing that the age of the patent alone (8 years) is purportedly not enough. *See* Paper 22 at 6-7. Petitioner's primary argument is that the Director's finding contradicts two other recent decisions where the Director declined to grant discretionary denial in cases involving older patents. *See id*., citing IPR2025-00250, Paper 14 at 2 and IPR2025-00253, Paper 13. Petitioner, however, ignores that in each of these cases the Director specifically stated that the decision to institute (or

not) was made "holistically" based on the entirety of "all of the evidence and arguments presented." *See id.*

In those other cases, there appears to have been evidence and arguments that overcame the age of the patents, such as arguments on the relative merits. And public policy strongly favors removing clearly invalid patents from the Patent Office rolls, regardless of their age. For example, in IPR2025-00253, the Director specifically noted the strong merits, stating that "Petitioner persuasively argues, for purposes of this Decision, that cited prior art teach both incremental searching as well as searching using two strings in the same field." *See Microsoft Corp. v. X1 Discovery, Inc*., IPR2025-00253, Paper 13 at 2 (P.T.A.B. June 25, 2025). Here, Patent Owner explained that the merits of the Petition were particularly weak. Petitioner, for example, provided no motivation to combine the prior art in the specific matter claimed (e.g., using a separate VFD for each compressor in a multi-compressor refrigeration system). *See* Paper 10 at 2-3, 45-41, 53-56. Additionally, the prior art taught away from the claimed invention. *See id.* at 40-45.

Otherwise, Petitioner offers little explanation for why it believes that there were no settled expectations in this case. For example, Petitioner argues that any policy preference by the Patent Office for PGR proceedings is irrelevant because the patent here was not eligible for PGR—but the Director did not cite to any PGR policy in the decision. And the only other factor that Petitioner points to for a lack of settled

expectations is that Petitioner filed the petition "early after being sued in India, not waiting to be sued in the United States." Paper 22 at 6. But that says nothing of the seven years that the patent was in force before the Petition was filed. For example, Petitioner does not describe how its own market participation might have affected its settled expectations. And it does not discuss the effect that settled expectations of patent validity may have had on Petitioner's decision to stay out of or enter the U.S. market. In other words, Petitioner does not present or even preview any argument (such that if the Director allowed further briefing or otherwise remanded this case) that would change the end result.

IV. CONCLUSION

For these reasons, the Director should deny Petitioner's Request for Director Review and either decline to revisit the decision granting discretionary denial or reaffirm that decision.

Dated: July 23, 2025

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CERTIFICATE OF SERVICE

I certify that Patent Owner's Authorized Response to Petitioner's Request for Director Review was served on July 23, 2025 by electronic mail to:

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