

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GODBERSEN-SMITH CONSTRUCTION COMPANY
d/b/a GOMACO CORPORATION,
Petitioner,

v.

GUNTERT & ZIMMERMAN CONST. DIV., INC.,
Patent Owner.

Case PGR2024-00026
U.S. Patent No. 11,772,723

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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I. Introduction

Guntert & Zimmerman respectfully requests that the Director grant Director Review and reverse or vacate the FWD because it is predicated on a series of fundamental legal and factual errors that independently and cumulatively render the Board's analysis arbitrary, capricious, and contrary to law. At every critical juncture—eligibility, motivation to combine, and objective indicia—the Board misapplied or failed to apply governing precedent, overlooked or ignored key arguments, or failed to engage with the evidentiary record. Director Review is warranted to correct these errors and restore confidence in the integrity of the post-grant review process.

The Board's determination that the '723 Patent is eligible for post-grant review rests on a major factual error and a flawed application of collateral estoppel. The Board improperly disregarded the decision in IPR2021-00135—where the parties actually litigated the effective filing date of Claim 8 of the ancestral '571 Patent and the -00135 Panel found written description—and instead gave preclusive effect to the decision in IPR2021-00136, where the issue was never contested and the -00136 Panel reached the opposite conclusion. This inversion of estoppel doctrine contravenes binding precedent and the Restatement (Second) of Judgments and led to the perverse result of privileging a non-litigated finding over one that was actually litigated. The Board's legal and factual errors in this case demand reversal.

The Board also abused its discretion by failing to consider G&Z's Sur-Reply arguments in the correct context—or at all. When addressing Petitioner's new theories regarding the motivation to combine CIII and Rio, the Board cited irrelevant portions of the Sur-Reply that addressed a different issue entirely while ignoring the specific pages where G&Z directly rebutted those theories. As a result, the Board's analysis rests on a one-sided view of the record that omits the very arguments that were intended to respond to Gomaco's shifting rationales. These omissions are not mere oversights, they reflect a breakdown in the adversarial process and a failure to adjudicate the dispute presented. Director Review is warranted to ensure that the Board's analysis reflects the arguments actually presented.

The Board's one-sided view of the record continued with its treatment of the objective indicia of non-obviousness. Although G&Z has been a proud family-owned American manufacturer since World War II, whose inventions were “a ***revolutionary change*** to the conventional slipform paver,” “a ***license to print money***,” and a “***game changer***,” one would not know that from the FWD. FWD at 69 (citing POR at 51, 58–60; Ex. 2022 ¶¶ 6–7; Ex. 2023 ¶ 7) (emphases added). The Board also failed to resolve a central claim construction dispute that bore directly on its nexus analysis, ignored express claim language that satisfied its own stated nexus requirement, and overrode its own “inference” of copying without explanation.

In light of the Board's multiple errors and abuses of discretion, G&Z respectfully requests that the Director grant review and reverse the FWD.

II. Argument

A. The Director Should Reverse the FWD Because the '723 Patent Is Not Eligible for PGR

1. *The Board Overlooked or Ignored G&Z's Arguments Concerning Claim 8 of the '571 Patent in IPR2021-00135*

The Panel's mistaken finding that "[t]he parties in IPR2021-00135 . . . did not present arguments specifically for claim 8" alone requires Director Review and vacatur. FWD at 14; *Dish Network LLC v. Entropic Commc'ns, LLC*, No. IPR2024-00373, Paper 47 at 3 (P.T.A.B. Oct. 15, 2025) (granting Director Review when the panel erroneously overlooked an argument that had been presented). However, with this this error corrected, there is no real dispute that collateral estoppel should have protected G&Z from "having to litigate" this issue because it was "fully and fairly tried in a previous action and adversely resolved against" Gomaco. *See Nestle USA, Inc. v. Steuben Foods, Inc.*, 884 F.3d 1350, 1351 (Fed. Cir. 2018) (citation omitted).

The Board's determination that the parties did not "present arguments specifically for claim 8" in IPR2021-00135 was a mistake. FWD at 14. In IPR2021-00135, Gomaco filed a patentability challenge that depended on establishing a late priority date for the '571 Patent, including Claim 8. Ex. 2002 at 8 ("The '571 patent claims are entitled to an effective filing date of June 14, 2017"); *id.* at 23

(arguing that the “laterally telescoping leg” and “linear position transducer” limitations of claim 8 lacked written description support). In response, G&Z successfully argued that the ’571 Patent has a pre-AIA effective filing date because it is entitled to claim priority to Guntert (Ex. 2003), which was filed on March 22, 2011. *See* Ex. 2004 at 20-32; Ex. 2001 at 10-12, 23. The Preliminary Response contained over four pages of argument specifically dedicated to the limitations of Claim 8, including its “laterally telescoping leg” and “linear position transducer” limitations. Ex. 2004 at 28-32.

The -00135 Panel resolved these arguments in G&Z’s favor. *See* Ex. 2001 at 11-12. When considering Gomaco’s assertion that certain limitations of Claim 8 lacked written description the -00135 Panel credited G&Z’s arguments for Claim 8, which are found at pages 28-31 of G&Z’s -00135 Preliminary Response. *Id.* at 11; Ex. 2002 at 23; Ex. 2001 at 12 (“In its Preliminary Response, Patent Owner details where and how Guntert discloses each of the limitations Petitioner lists.” (citing Ex. 2004 at 25-32)); *see also* Ex. 2004 at 28-31.

The Board, however, overlooked or ignored this argument and evidence despite G&Z repeatedly bringing it to the panel’s attention, including at the Oral Hearing. POPR at 6-7 (arguing that the parties actually litigated the written description issue for Claim 8 in IPR2021-00135 (citing Ex. 2002 at 23 and Ex. 2004 at 28-32)); POR at 7-8; Sur-Reply at 5-6; Paper 47 at 50:16-24, 55:4-56:19, 72:2-8

(confirming that “those arguments showing written description for those limitations were about Claim 8 of the '571 Patent”).

Although this factual error requires vacatur, reversal is appropriate because the -00135 Decision meets every requirement for collateral estoppel. POR at 4-8; Sur-Reply at 4-6. Gomaco's argument that institution decisions cannot give rise to collateral estoppel because they are not “appealable” is meritless because the Restatement¹ extends the definition of a final judgment to any final decision that is reviewable by “extraordinary writ,” which decisions denying institution decisions are. Restatement (Second) of Judgments § 28 cmt. *a* (1982) (issues decided in “a valid and final judgment” are only exempt from collateral estoppel when “the party who lost on that issue is . . . disabled as a matter of law from obtaining review by appeal or, **where appeal does not lie**, by injunction, **extraordinary writ**, or statutory review procedure.”) (emphasis added)]. Accordingly, decisions denying institution

¹ The Restatement (Second) of Judgments guides the Federal Circuit's application of the principles of collateral estoppel. *Purdue Pharma L.P. v. Iancu*, 767 F. App'x 918, 922 (Fed. Cir. 2019) (citing *Voter Verified, Inc. v. Election Sys. & Software LLC*, 887 F.3d 1376, 1383 (Fed. Cir. 2018); *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1575-76 (Fed. Cir. 1984) (citing cases)).

of *inter partes* review can, when all other requirements are met, give rise to collateral estoppel. POR at 5-6; Sur-Reply at 4-6.

Gomaco's only other argument—that its arguments were too feebly presented in IPR2021-00135 for it to be “actually litigated”² (Prelim. Reply at 3; Reply at 2)—fails because a determination giving rise to collateral estoppel “may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.” Restatement (Second) of Judgments § 27 cmt. *d* (1982). Regardless of how feeble Gomaco's argument was, the fact that G&Z contested the issue and the Board resolved it in G&Z's favor means that it was “actually litigated.” *Id.* at cmt. *e* (an issue is not actually litigated when a party does not “contest an assertion”); *see also VirnetX Inc. v. Apple Inc.*, 792 F. App'x 796, 804-05 (Fed. Cir. 2019) (distinguishing “adversarial contest” from “such a ‘feeble effort’ at presenting an issue that the case could be characterized as not involving actual litigation of the issue”).

Because the Board overlooked or ignored that the parties presented arguments about effective filing date of Claim 8 of the '571 Patent, the FWD was arbitrary and capricious. 5 U.S.C. §706(2)(A). The Director must at least vacate the FWD so that

² The same feeble arguments were presented in IPR2021-00136, so if the issue was not actually litigated in IPR2021-00135 where G&Z contested the issue, it cannot have been actually litigated in IPR2021-00136. POR at 8-10; Sur-Reply at 4-6.

the Board can resolve the parties' arguments with this key mistake corrected. The Director should, however, reverse the FWD because, with the Board's error corrected, the -00135 Decision collaterally estops Gomaco from attempting to re-litigate this issue. POR at 4-8; Sur-Reply at 4-6.

2. *The Board Erred as a Matter of Law in According Collateral Estoppel Effect to the Decision in IPR2015-00136*

Director Review is also necessary because the Board improperly accorded collateral estoppel effect to the -00136 Decision without establishing that the decision meets the standard for collateral estoppel. FWD at 11-12; *see Google LLC v. Hammond Dev. Int'l., Inc.*, 54 F.4th 1377, 1381 (Fed. Cir. 2022). In fact, the Board's finding that "Petitioner in IPR2021-00136 . . . specifically presented arguments for claim 8 ***without any dispute from Patent Owner***" precludes the application of collateral estoppel because it confirms that the issue was not "actually litigated" in IPR2021-00136. FWD at 14 (emphasis added)

To show that it was entitled to "invoke collateral estoppel" based on the -00136 Decision, it was Gomaco's burden to establish that "the issue was actually litigated in the first action." *Google*, 54 F.4th at 1381 ("The party seeking to invoke collateral estoppel must show: (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) [the party against whom collateral estoppel is being asserted] had a full and fair opportunity to litigate

the issue in the first action.”). Uncontested issues, like the issue of Claim 8’s effective filing date in the -00136 case, do not give rise to collateral estoppel:

An issue is not actually litigated if . . . it is raised by a material allegation of a party’s pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading . . . if it is the subject of a stipulation between the parties. . . . In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated.

Restatement (Second) of Judgments § 27 cmt. *e* (1982); *Jackson Jordan*, 747 F.2d at 1576 n.8 (an issue is not “actually litigated if it is raised by a material allegation of a party’s pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading” (citing Restatement (Second) of Judgments § 27 cmt. *e*)); *Voter Verified*, 887 F.3d at 1382-83 (refusing to apply collateral estoppel when one party made an assertion in the prior proceeding, and the other party did not contest it).

Gomaco never attempted to meet burden. In the Petition, Gomaco cited the -00136 Decision for its finding that Claim 8 “has an effective filing date of June 14, 2017” but it did not mention or attempt to meet the standard for invoking collateral estoppel. Pet. at 118-119; *see also* Reply at 1 (same). In its Reply, Gomaco effectively conceded that the -00136 Decision could not give rise to collateral estoppel and, instead, shifted its focus concerning PGR eligibility away from collateral estoppel and towards its ultimately unsuccessful allegation that “each of the challenged claims lacks written description in any pre-AIA application,” an

argument that was not raised in the Petition. Reply at 1. On the other hand, G&Z argued throughout the proceedings that black letter law precluded the application of collateral estoppel from the -00136 Decision because the issue was not “actually litigated” in that case. POPR at 11; POR at 8-10; Sur-Reply at 4-5; Oral Hearing Tr. at 50:16-51:16.

The Board overlooked or ignored these arguments and granted preclusive effect to the -00136 Decision without demonstrating that it met the standard for collateral estoppel. FWD at 12 (“The determination regarding claim 8 makes the ’723 Patent eligible for post-grant review.”). Not only did the Board not mention the standard for invoking collateral estoppel, its finding that Gomaco “specifically presented arguments for claim 8 ***without any dispute from Patent Owner***” precludes the application of collateral estoppel here. *In re Corey*, 583 F.3d 1249, 1251-52 (10th Cir. 2009) (because there are “many reasons why a party may choose not to raise an issue, or to contest an assertion, in a particular action,” collateral estoppel does not apply to “unraised or uncontested issues”).

Although the Board’s legal error in granting preclusive effect to the -00136 Decision requires vacatur, the Director should reverse the FWD because there is no other open issue that could support a finding that the ’723 Patent is eligible for PGR. POR at 4-10; Sur-Reply at 4-6. The only basis for PGR eligibility raised in the Petition relied on giving preclusive effect to the -00136 Decision, and the only basis

for PGR eligibility raised in the Reply was foreclosed when the Board determined that the '723 Patent enjoys written description support in its pre-AIA ancestral applications. FWD at 98-100. Accordingly, G&Z respectfully requests that the Director grant Director Review and reverse the FWD.

B. The FWD Mismatched and Overlooked Arguments Concerning the Motivation to Combine CIII and Rio

Director Review is also necessary because the Board failed to properly map G&Z's Sur-Reply arguments to the arguments made in Gomaco's Reply. These mistakes led the Board to reach its obviousness conclusions on an incorrect and one-sided record that overlooked or ignored crucial arguments and evidence.

The Board's determination that it would have been obvious to replace CIII's steering cylinder with Rio's rotary actuator overlooked key arguments from the Sur-Reply by citing to other, unrelated arguments instead. *See* FWD at 43-51. After accurately summarizing the parties' POR and Reply arguments about this issue (*id.* at 45-47), the Board mistakenly referred to G&Z's arguments concerning an altogether different issue, *i.e.* whether it "would have been **obvious** to move the swing legs while under load in a way not suggested in the Petition." *Id.* at 47 (citing Sur-Reply at 11-14). G&Z's arguments concerning the rotary actuator issue were made at pages 15-17 of the Sur-Reply, which were not evaluated while the Board decided this issue or cited anywhere else in the decision. FWD at 47-50.

As might be expected from this first mistake, the arguments G&Z made at pages 11-14 of the Sur-Reply also were not considered in the appropriate context. These arguments responded to the Reply's **new** argument that a POSITA would have it would have found it obvious to modify Rio's anti-swing device "to pivot under load simply by flipping a switch that releases the anti-swing device" and its related arguments about relocating jacking columns under load and on-the fly. Reply at 14-20. But when the Board considered the Reply argument it overlooked or ignored G&Z's Sur-Reply argument. See FWD at 78-80 (ignoring or overlooking the arguments made at pages 11-14 of the Sur-Reply).

Consequently, the Board concluded that "Patent Owner's arguments that swing-legs are locked in place does not address Petitioner's proposed modification to replace CIII's locking pins with Rio's actuated locking pin to 'automate[e] both the pivoting and locking of the swing legs.'" FWD at 80. The arguments were made, but the Board did not evaluate them. Sur-Reply at 11-14. The Board's errors deprived G&Z of a fair evaluation of its rebuttal and led the Board to adopt conclusions unsupported by the full evidentiary context.

C. Director Review is Also Necessary to Correct Manifest Errors and Inconsistencies in the Board's Evaluation of the Objective Indicia of Non-Obviousness

1. *The Board's Failure to Find Nexus to the Long-Felt Need Depends on a Claim Construction Issue it Refused to Resolve*

Over the course of the proceedings, the parties disputed whether various claims were directed to the “on-the-fly” steering embodiments, with G&Z arguing that Claim 1, 6, and 7 all recite limitations that limit the claims to the “on-the-fly” embodiments and Gomaco arguing that only Claim 6 is limited to on-the-fly steering. See POR at 15-16, 20-21, 34-35, 47-48; Reply at 11-13; Sur-Reply at 8-11. The Board declined to resolve these claim construction issues, which itself is error that warrants Director Review. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (“When the parties raise an actual dispute regarding the proper scope of these claims, the court . . . must resolve that dispute.”); see also *Nearmap US, Inc. v. Eagle View Techs. Inc.*, No. IPR2022-00734, Paper 43 at 8-9 (P.T.A.B. Feb. 20, 2024) (granting Director Review because the Board failed to resolve a claim construction dispute pertinent to the objective indicia analysis).

Even if the Board had determined that Claims 1 and 7 were not directed to the on-the-fly steering embodiments, *i.e.*, a “paving machine that could reposition its swing legs and crawler tracks while moving and under load,” that does not explain why the Board failed to find a nexus between long-felt need and the subject matter of Claim 6, which expressly recites the limitation that the Board said was required to show nexus. Ex. 1001, Claim 6; FWD at 64 (“Patent Owner does not argue how the claims are limited to a ‘paving machine that could reposition its swing legs and crawler tracks while moving and under load.’”).

Director Review is, therefore, necessary so that G&Z's evidence that its inventions satisfied a long-felt need can be properly considered in the Board's obviousness analysis.

2. *The Board's Conclusions Concerning Copying Do Not Follow From Its Factual Findings*

Regarding copying, the Board's explanation was vague and ambiguous. The Board acknowledged that Gomaco's access to G&Z's pavers, and the similarity between G&Z's SmartLeg/AccuSteer technology and GOMACO's GP3's slew gear drive design, "support[s] an inference of copying." FWD at 68. It would be hard to deny such an inference because undisputed evidence shows access and similarity, which is all that is necessary to "create a strong inference of copying." Sur-Reply at 22-23; POR at 52-57; *Cable Elec. Prods., Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1027 (Fed. Cir. 1985) ("Access in combination with similarity can create a strong inference of copying."), *overruled on other grounds by Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999).

After acknowledging that the evidence "support[s] an inference of copying," the Board simply concluded that "the totality of the evidence does not support copying." FWD at 68. It was left as an exercise for the reader to determine what "evidence does not support copying" and imagine the reasons that it overcame the acknowledged "inference of copying." *Id.* The Board abused its discretion by adopting a legal conclusion that does not follow from its factual findings.

3. *The Board Legally Erred by Disregarding Industry Praise*

The Board committed twofold error in evaluating industry praise for G&Z's invention. FWD at 68-70. The Board's determination that none of the industry praise for G&Z's claimed invention came from competitors was contingent on its unexplained determination that the "evidence does not support copying." *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1311 (Fed. Cir. 2010) (competitor copying is the sincerest form of flattery). G&Z argued, with supporting evidence, the competitors' "implement[ation of] G&Z's SmartLeg/AccuSteer technology in their paving machines" constituted just the kind of industry praise that the Board found lacking. POR at 48, 54-58. With the Board's legal error concerning copying rectified, the record shows praise from competitors.

Second, the Board erred in overlooking or ignoring praise from industry professionals merely because it did **not** come from competitors. FWD at 68-70. Precedent is clear that "[a]ppreciation by contemporaries skilled in the field of the invention is a useful indicator of whether the invention would have been obvious to such persons at the time it was made." *Vulcan Eng'g Co. v. Fata Aluminum, Inc.*, 278 F.3d 1366, 1373 (Fed. Cir. 2002). This evidence, which went unmentioned in the FWD praised G&Z' technology as "a **revolutionary change** to the conventional slipform paver," "a **license to print money**," and a "**game changer**." Sur-Reply at 21 (citing Ex. 2022, ¶¶6-7); Ex. 2023, ¶7 (emphases added).

These industry professionals purchased G&Z's pavers for their paving companies because G&Z's SmartLeg/AccuSteer technology allowed the operator to easily and quickly maneuver the machine around on the fly. Ex. 2022 at ¶ 4 ("I needed a slipform paver that could automatically readjust not only its swing legs to different positions but also its crawler tracks for easy maneuverability and transportation from one paving site to another."); Ex. 2023 at ¶ 6 ("Given the foregoing issues with the conventional slipform paver, there was therefore a need for new paving equipment technology that could reduce the number of workers and time spent on repositioning the slipform paver's swing legs and crawler tracks from one mode to another.").

Rather than finding reason to doubt or discount this uncontroverted testimony, the Board simply ignored it and gave the evidence no weight in its overall patentability determination. FWD at 69; *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1391 (Fed. Cir. 1988) ("The commercial response to an invention is significant to determinations of obviousness, and is entitled to fair weight."). G&Z is entitled to an explanation as to why undisputed glowing praise of its revolutionary technology was accorded no weight in the Board's analysis.

III. Conclusion

For the foregoing reasons, Director Review should be granted and the Final Written Decision reversed, or alternatively vacated and remanded.

Patent Owner's Request for Director Review
PGR2024-00026 (U.S. Patent No. 11,772,723)

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), and pursuant to agreement by the parties that filing with the Board through the Patent Trial and Appeal Case Tracking System (P-TACTS) constitutes electronic service, that service was made on the Petitioner as detailed below.

<i>Date of service</i>	December 15, 2025
<i>Manner of service</i>	Electronic Filing with the Board
<i>Documents served</i>	PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW
<i>Persons Served</i>	Finnegan, Henderson, Farabow, Garrett & Dunner, LLP: Jason E. Stach Luke J. McCammon David K. Mroz Sonja W. Sahlsten Robert K. High

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