Paper No. _____

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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IGB AUTOMOTIVE LTD.
and I.G. BAUERHIN GmbH
Petitioner

v.

GENTHERM GmbH
Patent Owner

_____

Case IPR2014-00666
Patent 7,229,129

_____

**PETITIONER'S REQUEST FOR REHEARING PURSUANT TO 37 C.F.R. §42.71**

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## I. STATEMENT OF RELIEF REQUESTED

In response to the Decision ordering Institution of *Inter Partes* Review of claims 1-5 and 7-9 entered September 30, 2014 ("Decision"), and pursuant to 37 C.F.R. §§ 42.71(c) and (d), Petitioner IGB Automotive Ltd. and I.G. Bauerhin GmbH ("Petitioner") hereby respectfully requests that the Patent Trial and Appeal Board ("PTAB") reconsider its decision not to institute *Inter Partes* Review proceedings on claims 8 – 12 of U.S. Patent No. 7,229,129 ("the '129 patent") as requested in Ground 9 (Trotman) and Ground 10 (Kawai, Wyon, and Trotman) of the Petition for *Inter Partes* Review of U.S. Patent No. 7,229,129 ("Petition").

## II. SUMMARY

Petitioner respectfully requests the Board to reconsider whether the Board appreciated the nature of Petitioner's evidence and arguments under 35 U.S.C. § 102(b) with respect to Ground 9 demonstrating anticipation of claims 8 – 12 of the '129 patent by Trotman. Petitioner also respectfully requests the Board to reconsider Petitioner's evidence and arguments under 35 U.S.C. § 103(a) with respect to Ground 10 demonstrating the obviousness of claims 8 – 12 of the '129 patent in view of the Kawai, Wyon, and Trotman references.

In particular, Petitioner proposed a construction of certain claim terms which Patent Owner Gentherm GmbH ("Patent Owner") did not expressly challenge and which the Board declined to construe. Based upon Petitioner's undisputed and

proper reading of the claim limitations, it is virtually self-evident that U.S. Patent No. 2,992,604 ("Trotman") render claims 8 – 12 of the '129 patent anticipated, a fact made clear by the Petition evidence and argument. The proper characterization of the '129 patent claims and corresponding disclosure in the prior art is clearly articulated with appropriate argument in the Petition. Accordingly, Petitioner respectfully requests that the Board reconsider the Decision, affording consideration to the argument and evidence presented under the claim reading explained in the Petition.

Furthermore, Petitioner submits that claims 8 – 12 are in any event obvious from the disclosure of Trotman.

## III. LEGAL STANDARDS

A party may request rehearing of a decision by the Board whether to institute a trial. 37 C.F.R. §§ 42.71(c) and (d). Pursuant to 37 C.F.R. § 42.71(d), "[t]he 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, opposition, or reply." The Board will review the previous decision for an abuse of discretion. 37 C.F.R. § 42.71(c). "An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors." *Palo Alto*

*Networks, Inc. v. Juniper Networks, Inc.*, Paper 39 at 2-3, IPR 2013-00369 (February 14, 2014) (citing *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)).

## IV. ARGUMENT

### A. Ground 9 (Trotman) meets the claim construction proposed by Petitioner

The Decision declined to adopt Ground 9 based on the limitation: "an elongate tail extending between the bag and the air mover, the elongate tail being formed from an extension of the top portion of the bag and an extension of the bottom portion of the bag and including an opening coupled to the air mover." (Decision, Section II.D., p. 15). Neither the Board nor Patent Owner disputed Petitioner's construction of the terms of this limitation or expressly construe these terms. The Decision then found that Petitioner would not be reasonably likely to show that Trotman discloses the claimed elongate tail.

The Decision's holding misapprehended Petitioner's arguments and is not supported by substantial evidence considering Petitioner's unopposed, undisputed claim construction. Therefore, *inter partes* review should be instituted for claims 8 – 12 of the '129 patent.

#### 1. Claim construction

Petitioner proposed constructions for the terms "top portion," "bottom portion," and "elongate tail." For the term "top portion," Petitioner proposed "a

layer configured to be closer to a seat occupant." (Petition, Section IV.A.4., p. 12). For the term "bottom portion," Petitioner proposed "a layer opposite the top portion." (Petition, Section IV.A.5., p. 12). For the term "elongate tail," Petitioner proposed "an extension connected to a main portion of a bag." (Petition, Section IV.A.11., p. 13).

As pointed out by the Board in the Decision, Gentherm did not expressly dispute the construction of these terms. (Decision, Section II.A., p. 7). In any event, Gentherm did not indicate how any alternative construction would have affected Petitioner's proposed grounds of unpatentability. Further, the Board did not construe any of the claim terms of the '129 patent, finding that "none of our determinations regarding IGB's proposed grounds of unpatentability requires us to construe expressly any claim term." (Decision, Section II.A., p. 8).

Therefore, absent any alternative constructions, Petitioner respectfully submits that the analysis of Petitioner's Ground 9 of unpatentability as being anticipated by the Trotman reference should be based on Petitioner's proposed constructions.

**2. Detailed discussion – Trotman anticipates claim 8**

Claim 8 of the '129 requires that an elongate tail extend between the bag and the air mover, the elongate tail being formed from an extension of the top portion of the bag and an extension of the bottom portion of the bag. As noted above, an

"elongate tail" is an extension connected to a main portion of a bag, a "top portion" of a bag is a layer configured to be closer to a seat occupant, and a "bottom portion" is a layer opposite the top portion.

In Trotman, layer 77 forms a top layer of the bag which is closer to a seat occupant and layer 65 forms a bottom layer of the bag which is opposite layer 77, the top layer 77 and bottom layer 65 being sealed about a seam 66 by tape 72 to seal the edge between the upper and lower layers. (Petition, Section IV.B.9.i., p. 54). A duct 80, 180 in the form of an elongate tail extends from the seat portion 42 and is disposed between the seat portion 42 and a blower unit 10, 110. (Petition, Section IV.B.9.i., p. 55). The duct 80, 180 is an extension of top layer 77 and the bottom layer 65 of the seat portion 42 of the forced air distributing and cushioning seat pad. As disclosed on column 7, lines 3 – 10 of Trotman cited in the Petition, "[a]n edge (or edges) of the pad 40 is extended to form a flexible air supply duct 80 connected or integral along an adequate length of edge and preferably with the same thickness," and as shown FIGS. 1 and 2 of Trotman cited in the Petition, top and bottom portions 83 of the duct 80 are extensions of the same layer as the top and bottom portions 77, 65 of the seat portion 42. (Petition, Section IV.B.9.i., p. 55). While Trotman changes the reference numerals for the top and bottom layers of the duct from 77, 65 to 83, 83 (respectively), it is clear from the disclosure of Trotman that top and bottom layers 83, 83 of the duct 80 are connected or integral

extensions of the top and bottom layers 77, 65 of the seat portion 42. In other words, top layer 83 of the duct is a continuous extension of layer 77. The disclosure of Trotman therefore meets the proposed claim construction and limitations of the "elongate tail," which simply requires that the elongate tail is "an extension connected to a main portion of a bag" and that the elongate tail is an extension of the top and bottom portions of the bag. Top layer 83 of the duct 80 extends from top layer 77 of the seat portion 42, and bottom layer 83 of the duct 80 extends from the bottom layer 65 of the seat portion 42; therefore the top and bottom layers of the duct 80 are extensions of the top and bottom layers 77, 65 of the seat portion 42.

Furthermore, the Decision notes that Trotman discloses the top and bottom layers 83 of the duct 80 may be the same material as the bottom layer 65 of the pad 40 (including seat portion 42). (Decision, Section II.D.3., pp. 17-18). Regarding the bottom layer, if the bottom layer 83 of the duct 80 is the same material as the bottom layer 65 of the pad 40, then clearly the bottom layer 83 of the duct 80 is an extension of the bottom layer 65 of the pad 40. Regarding the top layer, even if the top layer 83 of the duct 80 is a different material than the top layer 77 of the pad 40, there is nothing in the claim language of the '129 patent or the proposed claim construction for "elongate tail" that requires the extension of the top and bottom portions of the bag forming the elongate tail to be the same material. And as

disclosed in Trotman (see above), the duct 80 may be formed by an extension that is connected to the pad 40; thus, no matter the materials, the top and bottom portions 83 of the duct 80 are extensions that may be connected to (or integral with) the top and bottom portions 77, 65 of the pad 40 along the edge of the pad to form continuous top and bottom layers. Thus, regardless of the materials, the disclosure of Trotman meets the proposed claim construction and limitations of the "elongate tail," which simply requires that the elongate tail is "an extension connected to a main portion of a bag" and that the elongate tail is an extension of the top and bottom portions of the bag.

For these reasons, the Board misapprehended the disclosure of Trotman as it relates to claim 8 of the '129 patent, and the Board misapprehended Petitioner's reliance on the duct 80 and top and bottom portions 77, 65 of Trotman. Top portion 83 of the duct 80 is "an extension of layer 77," because top portion 83 extends from the top portion 77 of the seat portion 42 and forms a continuous (either by connection or being integral with) top layer as disclosed in the cited portion of Trotman (Column 7, lines 3 – 10 and FIGS. 1 and 2). The Board also overlooked Petitioner's proposed claim construction, which when read on the disclosure of Trotman, results in a conclusion that Trotman anticipates claim 8 of the '129 patent. Trotman meets all of the limitations of claim 8 of the '129 patent.

**3. Detailed discussion – Trotman anticipates claims 9 – 12**

It appears that the Board did not specifically consider Petitioner's argued anticipation of dependent claims 9 – 12 of the '129 patent by Trotman due to the Board's finding that Petitioner would not be reasonably likely to show that Trotman anticipates independent claim 8. (Decision, Section II.D.3., p. 18). Based upon the foregoing arguments, Petitioner submits that it is reasonably likely to show that Trotman anticipates independent claim 8 of the '129 patent. Therefore, the Board erred in not specifically addressing Petitioner's argument and evidence regarding claims 9 – 12 of the '129 patent.

With respect to dependent claim 9, as stated in the Petition, Trotman discloses that the seat portions 41, 42 and the back sections 44, 45 each have the same construction. Each portion includes cushion layer 75, bag formed by upper layer 77 and backing layer 65, spacer formed by coil springs 51, 52, extension 80, and outer cloth cover layer 74. (See FIGS. 1, 2 of Trotman). Trotman therefore discloses "*each of the seat base and the backrest comprises a cushion, a bag, a spacer, an elongate tail, and a trim cover*." (Petition, Section IV.B.9.ii., p. 56).

With respect to dependent claim 10, as stated in the Petition, the seat portions 41, 42 and the back sections 44, 45 are coupled to the same blower unit 10. (See FIGS. 1, 2 of Trotman). Trotman therefore discloses "*the elongate tail of*

*the seat base and the elongate tail of the backrest are coupled to the same air mover*." (Petition, Section IV.B.9.iii., p. 56).

With respect to dependent claim 11, as stated in the Petition, the blower unit 10 is located on an opposite side of the cushion layer 75 as the bag formed by upper layer 77 and backing layer 65. (See FIGS. 1, 2 of Trotman). Trotman therefore discloses "*the air mover is located on the opposite side of the cushion as the bag*." (Petition, Section IV.B.9.iv., p. 56).

With respect to dependent claim 12, as stated in the Petition, Trotman discloses that the air supply conduit extension 80 extends between the seat and back portions 41 to 45 of the bag 40 and the blower unit 10 outside of cushion layer 75. (See FIGS. 1, 2 of Trotman). Trotman therefore discloses "*the elongate tail extends between the bag and the air mover on the outside of the cushion*." (Petition, Section IV.B.9.v., p. 57).

Accordingly, Petitioner submits that the Petition has demonstrated a reasonable likelihood that Petitioner would prevail in showing the unpatentability of claims 9 – 12 of the '129 patent.

**B. Board erred in not specifically addressing Petitioner's obviousness rationale for Ground 10 (Kawai, Wyon, and Trotman)**

The Decision declined to adopt Ground 10 based on the reason that it is "not persuaded that Trotman (or Kawai or Wyon) teaches the claimed elongate tail." (Decision, Section II.D.4., p. 18).

**1. Detailed discussion – Trotman renders claim 8 obvious**

For the reasons stated in Section IV.A.2. above, Trotman discloses an elongate tail as recited and claimed in claim 8 of the '129 patent. Therefore, as argued in the Petition, it would have been obvious to include the elongate tail of Trotman (air supply duct 80) in the ventilated seat system of Kawai or Wyon (in place of the port 15 and introduction passage 20 of Kawai or the opening 11 and tube 12 of Wyon), because all three structures similarly provide a passageway for air between an air supply device and a main portion of a ventilation bag. (Petition, Section IV.B.10.i., p. 58). Because the Board erred in finding that Trotman does not disclose an elongate tail, the Board erred in concluding that Petitioner would not be reasonably likely to show that claim 8 would have been obvious.

Further, the limitations of the elongate tail recited in claim 8 would have been obvious from the disclosure of Trotman alone. (Petition, Section IV.B.10.i., p. 58). In this regard, even if the layer 83 of the duct 80 of Trotman is a different layer/material than the top layer 77 of the pad 40, forming an elongate tail by

extending a top layer of the pad 40 would have been obvious from the disclosure of Trotman, as Trotman discloses a duct 80 that is connected to and continuous with the top and bottom layers 77, 65 of the pad 40, and Trotman discloses that the duct 80 may be integral with the edge of the pad 40 (column 7, lines 3 – 5).

For these reasons, the Board erred in overlooking Petitioner's argument that Kawai, Wyon, and Trotman, either alone or in combination, disclose all the limitations of claim 8

**2. Detailed discussion – Trotman renders claims 9 – 12 obvious**

It appears that the Board did not specifically consider Petitioner's argued obviousness of dependent claims 9 – 12 of the '129 patent due to the Board's finding that Petitioner would not be reasonably likely to show that the cited references disclose claim 8's elongate tail. (Decision, Section II.D.3., p. 18). Based upon the foregoing arguments and the arguments presented in the Petition, Petitioner submits that it is reasonably likely to show that Trotman anticipates or renders obvious (either alone or in combination) independent claim 8 of the '129 patent. (Petition, Sections IV.B.10.ii. through v., pp. 58-60).

For these reasons, the Board erred in not specifically addressing Petitioner's argument and evidence regarding claims 9 – 12 of the '129 patent.

## V. CONCLUSION

For the above reasons, Petitioner respectfully requests that the Board reconsider its decision. The Board should institute *inter partes* review as to claims 8 – 12 of the '129 patent based on the Trotman reference.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

Dated: October 10, 2014

## CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6, I hereby certify that a copy of the foregoing Petitioner's Request for Rehearing Pursuant to 37 C.F.R. §42.71 was served in its entirety this 10th day of October, 2014 via FEDERAL EXPRESS on the patent owner's counsel of record at the following correspondence address:

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