

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIV FINANCIAL SYSTEMS, INC.,

Petitioner,

v.

IP RESERVOIR, LLC and
EXEGY, INC.

Patent Owner.

Case No. IPR2020-01010
U.S. Patent No. 10,062,115

PATENT OWNER'S PRELIMINARY RESPONSE
(37 C.F.R. §42.107)

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LIST OF EXHIBITS

<i>Exhibit #</i>	<i>Description</i>
2001	U.S. Patent No. 8,156,101 (“Hamati”)
2002	U.S. Patent No. 7,598,985 (“Kelleher”)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to 35 U.S.C. § 325(d), the Board should exercise its discretion to deny institution because the sole reference relied upon in the Petition was previously evaluated by the Office and Petitioner has not demonstrated that the Office erred in evaluating that reference.

Petitioner has challenged U.S. Patent No. 10,062,115 (“the ‘115 Patent”) in this proceeding based upon a single prior art reference, U.S. Patent Publication No. 2008/0243675 (“Parsons”). Petitioner has conceded that the role Parsons played during prosecution of the ‘115 Patent is sufficient to satisfy the first prong of the *Advanced Bionics*¹ test (factors (a), (b), and (d) of the *Becton Dickinson*² test).

The determination regarding whether the Board should exercise its discretion to deny the Petition pursuant to § 325(d), therefore, distills to the second prong of the *Advanced Bionics* test (*Becton Dickinson* factors (c), (e), and (f))—“whether the petitioner has demonstrated that the Office erred in a

¹ *Advanced Bionics, LLC, v. Med-El Electromedizinische Geräte GMBH*, IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020) (precedential) (“*Advanced Bionics*”).

² *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (Dec. 15, 2017) (precedential as to § III.C.5, first paragraph) (“*Becton Dickinson*”).

manner material to the patentability of challenged claims.” *Advanced Bionics*, Paper 6, 8. *Advanced Bionics* explains that its “framework reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown.” *Advanced Bionics*, 9. But Petitioner has not demonstrated any material error.

Indeed, factors (c), (e), and (f) from *Becton Dickinson* make clear the Board should defer to the Office’s previous evaluation and deny the Petition pursuant to § 325(d).

Becton Dickinson factor (c) strongly favors discretionary denial here because Parsons was *extensively* evaluated during examination. For example, application claims 1, 2, 42, and 43 were rejected in view of a combination of Hamati (Ex. 2001) and Kelleher (Ex. 2002). For the other 20 claims pending at the time of the only Office action during prosecution, Parsons was relied upon to provide teachings, in combination with Hamati/Kelleher, to reject the claims. This amounted to nine separate rejections spanning eight pages of the Office action that all relied upon and discussed Parsons. In addition, Parsons was listed in the “Related Patents” section of the ‘115 Patent and was referenced an additional seven times in the ‘115 Patent specification for its teachings regarding high speed processing of financial transactions. It cannot be reasonably stated that Parsons was not evaluated during the prosecution of

the ‘115 Patent.

Becton Dickinson factor (e) strongly favors discretionary denial here because Petitioner has not pointed out sufficiently how the Examiner erred in evaluating Parsons. Petitioner’s primary argument under factor (e) is that the Examiner failed to appreciate “Parsons’s collective teaching” of the claimed “order engine” and “price engine” that perform their tasks in parallel (“the Parallel Limitation”). The sole rationale supporting Petitioner’s argument on this factor is that “Parsons does not use the terms ‘order engine’ and ‘price engine.’” Petition, 77. But, Petitioner offers no reasoning as to why the terms “order engine” and “price engine,” which are discussed and described in the ‘115 Patent, would so befuddle the Examiner as to render them incapable of finding like structures or functionality in Parsons, if the Examiner believed they existed.

Further, it cannot be said the Examiner misapprehended or overlooked a teaching in Parsons regarding this limitation because Petitioner admits that Parsons does not disclose the Parallel Limitation. Petition, 6. Instead, Petitioner argues that a POSA would have known to modify Parsons to fill in this limitation that was missing from the Hamati/Kelleher combination and is missing from Parsons ***and then relies on the same rationale as the Examiner during prosecution.*** As such, Petitioner simply disagrees with the Examiner,

who found that “none of the prior arts of record [which included Parsons] either individually or in combination teach or suggest [the claimed limitations].” Ex. 1002, 1729. Petitioner failed to sufficiently point out how the Examiner erred in evaluating Parsons.

Lastly, *Becton Dickinson* factor (f) favors discretionary denial because Petitioner’s position on this factor repeats its arguments from factor (e), and merely adds that its expert made the relevant points in a declaration. This factor favors denial because, like the above arguments, Petitioner’s expert simply has a different opinion than the Examiner about the same art and argument. There is no indication the Examiner overlooked or misapprehended any disclosures from Parsons, only that the expert disagrees with the Examiner’s conclusion.

In view of Petitioner’s concession that the first prong of *Advanced Bionics* is met by the Examiner’s previous consideration of Parsons and that all three *Becton Dickinson* factors that comprise the second *Advanced Bionics* prong favor discretionary denial, the Board should exercise its discretion under § 325(d) to deny the present petition.

II. PROSECUTION HISTORY OF THE ‘115 PATENT

Substantively, the prosecution of the ‘115 Patent amounts to a single Office action, a Response and Amendment to that Office action, and a Notice of Allowance. Several facts are clear from this brief file history:

1) The Examiner was fully aware of the teachings of Parsons, having cited extensive teachings from Parsons in the Office action;

2) The Examiner fully recognized the advantages of improved processing performance, having cited it in each of nine sub-rejections involving Parsons;

3) The claims at issue here were amended to include an order engine and price engine (including functionality relating to each of those engines), as well as the requirement that the order and price engines perform their functions in parallel on the same coprocessor; and

4) The Examiner allowed the claims at issue here despite an intimate understanding of Parsons’s teachings.

A. July 7, 2017 Office action

On June 26, 2014, Patent Owner filed U.S. Patent Application No. 14/315,571 (“the ‘571 Application”), that matured into the ‘115 Patent. The Office issued an Office action rejecting all pending claims of the ‘571 Application on July 7, 2017. Ex. 1002, 1534-51. The action contained four bases of rejection:

- 1) all claims were rejected as unpatentable pursuant to 35 U.S.C. §101 (*id.*, 1537-39);
- 2) application claims 1, 2, 42, and 43 were rejected as obvious over Hamati (Ex. 2001) in view of Kelleher (Ex. 2002) (application claims 42 and 43 issued as “Challenged Claims” 43 and 44) (*id.*, 1539-41);
- 3) application claims 3-22 were rejected as obvious over Hamati in view of Kelleher and further in view of Parsons (this rejection was broken down into nine sub-rejections, each relying on different teachings from Parsons) (*id.*, 1541-48); and
- 4) application claims 44-46 were rejected for obviousness-type double patenting (*id.*, 1549-50).

More specifically, relative to the third ground of rejection, the Examiner discussed the teachings of Parsons in detail in each of the nine sub-rejections, referenced above. First, relative to claims 3-6, the Examiner discussed the teaching of Parsons, at 22:47-63, as disclosing the claimed limitations of the “generating step” of those claims. Ex. 1002, 1541-42. Specifically, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*, 1542.

Second, relative to claims 7-18, the Examiner discussed the teaching of Parsons at 2:7-11, 11:46-56, 11:61-65, 14:52-60, 15:62-67, 22:47-63, and 24:15-32, as disclosing the claimed limitations of the “appending step” of those claims. Ex. 1002, 1542-1546 (comprising four separate sub-rejections of: 1) Claims 7-9, 2) Claims 10-13, 3) Claims 14-16, and 4) Claims 17-18). While the “appending step” is not included in the Challenged Claims, these rejections demonstrate that the Examiner had a detailed understanding of the teachings of Parsons. As above, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*

Third, relative to claim 19, the Examiner discussed the teaching of Parsons, at 25:20-34, as disclosing the claimed limitations of the “processing step” of that claim. Ex. 1002, 1546. Again, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*

Fourth, relative to claim 20, the Examiner discussed the teaching of Parsons, at 11:50-56, as disclosing the claimed limitations of the “enriched limit order events” of that claim. Ex. 1002, 1547. Again, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*

Fifth, relative to claim 21, the Examiner discussed the teaching of Parsons, at 11:56-65, as disclosing the claimed limitations of the “enriched limit order events” of that claim. Ex. 1002, 1547. Again, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*

Lastly, relative to claim 22, the Examiner discussed the teaching of Parsons, at 4:22-42, as disclosing the claimed limitations of the “ticker plant” of that claim. Ex. 1002, 1548. Again, the Examiner asserted that it would have been obvious to combine/modify the cited combination of Hamati/Kelleher with the technique of Parsons “because it is an easy and convenient way to improved processing performance.” *Id.*

B. January 3, 2018 Amendment and Response

In response to the July 7, 2017 Office action, on January 3, 2018, Patent Owner filed an “Amendment and Response A.” Ex. 1002, 1681-1709. In that Amendment and Response, Patent Owner amended numerous claims, including application claims 42 and 43, which issued as the Challenged Claims. Among other changes, those claims were amended to specify that the claimed coprocessor “includes an order engine and a price engine” and, further, that “the order engine and the price engine are configured to perform their respective operations in parallel with each other as the limit order event data streams through the coprocessor.” *Id.*, 1694.

C. May 1, 2018 Notice of Allowance

On May 1, 2018, the Examiner issued a Notice of Allowance. Ex. 1002, 1723-30. In the “Examiner’s Statement of Reasons for Allowance,” he stated that “in the instant application none of the prior arts of record either individually or in combination teach or suggest a coprocessor including an order engine and a price engine...wherein the order engine and the price engine perform their steps in parallel with each other as the limit order event data streams through the coprocessor.” *Id.*, 1729.

III. SUMMARY OF PETITIONER'S GROUNDS FOR UNPATENTABILITY FROM THE PETITION

As discussed immediately above, the Examiner allowed the Claims 43 and 44 of the '115 Patent because the prior art of record, which included Parsons, did not disclose an order engine and a price engine that perform their steps in parallel. Petitioner agrees: "Parsons does not describe the two engines as being implemented both in parallel and on the same coprocessor." Petition, 5.

As such, Petitioner seeks to fill in the limitation missing from Parsons by arguing that "a POSA would have had numerous reasons to configure Parsons's FPGA in that manner." *Id.* In the summary of its obviousness argument, Petitioner states that "a POSA would have been motivated to implement such parallelism (*i.e.*, so that Parsons's order and price engines perform their respective operations in parallel) for *a host of reasons*." Petition, 6-7 (emphasis added). But, then Petitioner only provides one reason: "[i]t was well-known that parallel processing increases speed and decreases latency, and Parsons teaches that it is desirable to 'accelerate the speed of processing' in its system."³ *Id.*

³ Petitioner provides a longer recitation of why a POSA would have been motivated to modify Parsons to develop the Parallel Limitation (*e.g.*, Petition, 24-27), but in total, this section only speaks to the same "increased processor performance"

As discussed below, however, this is *precisely* the same argument that was considered by the Examiner.

IV. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY THE PETITION PURSUANT TO 35 U.S.C. § 325(d)

A. Legal Principles

Institution of *inter partes* review is discretionary. *Harmonic Inc. v. AvidTech, Inc.* 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“the PTO is permitted, but never compelled, to institute an IPR proceeding”). Institution may, for example, be denied under 35 U.S.C. §325(d) “because the same or substantially the same prior art or arguments previously were presented to the Office.”

In evaluating whether the same or substantially the same prior art or arguments were previously presented to the Office, the Board has identified several non-exclusive factors for consideration. *Becton, Dickinson*, Paper 8, 17-18. These factors are as follows:

- (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;

considered by the Examiner. *See, e.g.*, Petition, 25 (“high throughput”; “predictable result of increasing throughput”).

(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 prior art or arguments.

Id.

As further explained in *Advanced Bionics*, factors (a), (b), and (d) from *Becton Dickinson* relate to whether the art and arguments presented in the petition are the same or substantially the same as those previously presented to the Office. Factors (c), (e), and (f) “relate to whether the petitioner has demonstrated a material error by the Office” in its prior consideration of the art or arguments. *Advanced Bionics*, 10. As the Precedential *Advanced Bionics* decision requires, “[a]t bottom, this [§325(d)] framework reflects a commitment *to defer to previous Office evaluations* of the evidence of record unless material error is shown.” *Id.*, 9 (emphasis added). On the question of material error, “[i]f reasonable minds can disagree regarding the

purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.” *Id.*

B. The First Prong of the *Advanced Bionics* Framework (*Becton Dickinson* Factors (a), (b), and (d)) is Conceded By Petitioner

In its discussion of § 325(d), Petitioner concedes that Parsons meets the first prong of the *Advanced Bionics* framework. Petition, 75 (“As Parsons was cited during prosecution, the first part of *Advanced Bionics*’ framework is satisfied.”). Therefore, the Board need only consider Step 2 of the *Advanced Bionics* framework.

C. The Second Prong of the *Advanced Bionics* Framework (*Becton Dickinson* Factors (c), (e), and (f)) Strongly Favors the Board Exercising its Discretion to Deny the Petition

1. *Becton Dickinson* Factor (c): The Extent to Which the Asserted Art Was Evaluated During Examination, Including Whether the Prior Art was the Basis for Rejection

As discussed in Section II, above, Parsons was *extensively* evaluated during examination of the ‘571 Application that matured into the ‘115 Patent. For example, in addition to being mentioned as being related to the ‘115 Patent (Ex. 1001, 1:20-24), the teachings of Parsons are discussed in seven additional locations in the ‘115 Patent specification. *Id.*, 6:28-38; 12:35-43; 17:28-51; 23:39-64; 23:65-24:5; 28:46-49; and 28:64-29:21.

Further, as discussed in Section II.A, above, the Examiner relied upon Parsons extensively to reject numerous claims in the ‘571 Application. Ex.

1002, 1541-48. Specifically, the Examiner rejected claims 3-22 under 35

U.S.C. §103 over Hamati in view of Kelleher and further in view of Parsons.

For *nine* sub-rejections within this broader rejection, the Examiner used Parsons to reject various pending claims. *Id.* In the process, the Examiner discussed and/or quoted the following portions of Parsons (ranging from column 2 to column 25): 2:7-11, 4:22-42, 11:46-56, 11:56-65, 14:52-60, 15:62-67, 22:47-63, 24:15-19, 24:19-30, 24:27-32, and 25:20-34.

It cannot be reasonably stated that Parsons was not fully evaluated during the prosecution of the ‘115 Patent. *Becton Dickinson* factor (c) weighs strongly in favor of discretionary denial. *Universal Imaging Indus., LLC v. Lexmark Int’l, Inc.*, IPR2019-01383, Paper 7, 16-17 (PTAB February 27, 2020) (related patent discussed in specification and considered by same Examiner was “evaluated” even though it was not used to reject any claims); *ClearH2O, Inc. v. Ceva Animal Health Inc.*, IPR2020-00039, Paper 21, 26-27 (PTAB March 18, 2020); *Husky Injection Molding Sys., Inc. v. Plastipak Packaging, Inc.*, IPR2020-00428, Paper 24, 16-18 (PTAB July 28, 2020) (French patent considered “evaluated” when merely listed on an IDS and briefly discussed in a European search report also only merely listed on an IDS).

2. *Becton Dickinson* Factor (e): Whether Petitioner Has Pointed Out Sufficiently How the Examiner Erred in its Evaluation of the Asserted Prior Art

Becton Dickinson factor (e) requires Petitioner to point out *sufficiently* how the Examiner erred in evaluating Parsons. The Petition references this factor on pages 77-78 of the Petition, but the explanation of how the Examiner allegedly erred is limited to one short paragraph:

In allowing the claims (*id.*, 1729), the Examiner failed to appreciate that Parsons’s collective teachings relied upon herein render obvious (in two different ways) a coprocessor with order and price engines that perform their tasks in parallel, likely because *Parsons does not use the terms “order engine” and “price engine.”* §§ IV.B.2.i, IV.C.2.a.viii. The Examiner thus failed to appreciate Parsons’s full disclosure. Petition, 77 (emphasis added).⁴

The Petition does not, however, explain why Parsons’ nonuse of the phrases “order engine” and “price engine” would have confused the Examiner to the point that he could not search for the same or similar structures or

⁴ The internal citations in this quotation cite, in the first instance, to a discussion of the Parallel Limitation in Ground 1A. In the second instance, IV.C.2.a.viii, does not exist in the Petition.

functionality that was simply named differently in Parsons. This argument amounts to pure speculation, not sufficiently pointing out how the Examiner erred.

Importantly, though, the Examiner did not err because the Examiner considered and asserted the same argument that Petitioner advances here. Specifically, Petitioner argues that a POSA would modify Parsons such that the order and price engines perform their respective operations in parallel to achieve increased processing performance. Petition, 7 (“It was well-known that parallel processing increases speed and decreases latency, and Parsons teaches that it is desirable to ‘accelerate the speed of processing’ in its system.”).

The Examiner was, however, well aware of this knowledge. For example, numerous claims originally proposed in the ‘571 Application, including the Challenged Claims, were rejected by the Examiner. As discussed above, Application Claims 3-22 were rejected as obvious over Hamati in view of Kelleher and further in view of Parsons. Section II.A, above. On nine different occasions, in sub-rejections of various sets of the claims pending in the ‘571 Application, the Examiner’s rationale for combining/modifying Hamati/Kelleher with the technique of Parsons was: “because it is an easy and convenient way to improved processing performance.” *See, e.g.*, Ex. 1002, 1548. This is the same motivation articulated in the Petition. Petition, 7 (“It was well-known that parallel processing increases

speed and decreases latency, and Parsons teaches that it is desirable to ‘accelerate the speed of processing’ in its system”).

When the pending claims were amended to include the Parallel Limitation, it cannot be reasonably asserted that the Examiner suddenly forgot the “processing performance” rationale. It instead follows that the Examiner determined that a POSA *would not* modify the art of record to come to the Parallel Limitation when he stated that “none of the prior arts of record [which included Parsons] either individually or in combination teach or suggest [the claimed limitations].” Ex. 1002, 1729.

While it is apparent that Petitioner disagrees with the Examiner, “[if] reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.” *Advanced Bionics*, 9. Petitioner has simply not sufficiently pointed out how the Examiner erred. *Universal Imaging*, IPR2019-01383, Paper 7, 19-20 (factor (e) favors denial where the art in the Petition does not disclose what was missing during prosecution); *ClearH2O*, 2020-00039, Paper 21, 29 (no explanation in Petition why the art was not cumulative).

3. *Becton Dickinson* Factor (f): The Extent to Which Additional Evidence and Facts Presented in the Petition Warrant Reconsideration of the Prior Art or Arguments

Lastly, *Becton Dickinson* factor (f) favors discretionary denial because

Petitioner's position on this factor simply repeats its arguments from factor (e), but adds its expert's opinion about the art and arguments the Examiner already considered. The expert's declaration did explain how the Examiner made an error during his evaluation of Parsons during prosecution and, as such, this factor favors denial for the reasons stated above relative to factor (e). *Advanced Bionics*, IPR2019-01469, Paper 6, 28 (denying institution even in view of previously-unconsidered expert testimony); *Boragen, Inc. v. Syngenta Participations AG*, IPR2020-00124, Paper 18, 4-5 (PTAB August 10, 2020) (although expert testimony was not previously presented, not sufficient to overcome factor (f)).

V. CONCLUSION

For the reasons set forth above, the Board should exercise its discretion under § 325(d) and deny the Petition in this proceeding.

Dated: September 10, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type volume limitations of 37 C.F.R. § 42.24(b)(1). This brief contains 3,559 words as calculated by the “Word Count” feature of Microsoft Word 2010, the word processing program used to create this.

The undersigned further certifies this brief complies with the typeface requirements of 37 C.F.R. § 42.6(a)(2)(ii) and typestyle requirements of 37 C.F.R. § 42.6(a)(2)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 10th day of September, 2020, a true and correct copy of the foregoing **Patent Owner's Preliminary Response** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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