

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VOLKSWAGEN GROUP OF AMERICA, INC.,
Petitioner,

v.

YECHEZKAL EVAN SPERO
Patent Owner.

U.S. Patent No. 11,208,029 to Spero

Case No.: IPR2022-01586*

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

* Porsche Cars North America, Inc., which filed a petition in IPR2023-01122, has been joined as a party to this proceeding.

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Patent Owner, Yechezkal Evan Spero (“Patent Owner” or “Spero”) requests Director Review for two reasons: 1) to address the important policy issue of whether partial Board decisions — those that fail to address all grounds — are permitted under governing law and 2) to seek relief for the Board’s failure to address material evidence of patentability in its decision.

I. INTRODUCTION

On October 3, 2022, Volkswagen Group of America, Inc. (“Petitioner”) filed a petition requesting inter partes review (“IPR”) of U.S. Patent No. 11,208,029 B2 (Ex.1001, “the ’029 Patent”; IPR2022-01586, Paper 1 (“Pet.”)). The Petition presented two overlapping grounds attacking claims 1-33 of the ’029 Patent — ground 1, a combination of the Beam and Kobayashi references and ground 2, a combination of the Gotou and Karlsson references. (Pet., 4.) *Inter partes* review was instituted on May 29, 2023. (DI, 17, 7.) During the ensuing trial, the parties introduced over 200 pages of evidence to address the merits of both grounds. On May 22, 2024, the Board issued a final written decision (Paper 33, “FWD”), finding claims 1-8, 10-19, 21-39 and 32-33 unpatentable as obvious. (FWD, 2.) The final written decision did not address the merits of the “redundant challenges” presented in Ground 1 because, with the exception of claims 9, 20, and 31, the challenged claims were found unpatentable based on the Ground 2 obviousness combination. (FWD, 26, “For the independent claims and most

dependent claims, we need not address Petitioner’s challenges based on Beam and Kobayashi, because we have already determined the claims are unpatentable over Gotou and Karlsson. Accordingly, we do not reach the redundant challenges.”)

Notwithstanding the Board’s reliance on this approach, the statutory framework for IPRs, legislative history of the America Invents Act (“AIA”) and the Supreme Court’s guidance in *SAS*, militate against partial Board decisions.¹ *See SAS Inst., v. Iancu*, 138 S. Ct. 1348 (2018). Contrary to the governing policy for Board proceedings, set forth in 37 C.F.R. § 42.1(b), partial final written decisions do not “secure the just, speedy and inexpensive” resolution of the parties’ dispute, or of the IPR as a whole. On balance, the additional work required to issue a complete final written decision is outweighed by the negative impact of partial decisions, which if overturned on appeal, necessitate a remand to address the “redundant” ground, resulting in significant prejudice to the parties and undue

¹ Patent Owner further identifies inconsistent application of the “redundant” challenge practice at the Board. In at least one IPR proceeding, the Board provided a complete final written decision on multiple overlapping grounds. *See Google LLC v. Virentem Ventures, LLC*, IPR2019-01244, Paper 39 (PTAB January 25, 2021). Diverse application of the redundancy practice is problematic, as it creates differentiated proceedings depending on panel selection.

delay. Here, entry of a complete final written decision could help streamline issues in related, follow-on IPRs, e.g. IPR2023-01026, IPR2023-01027, IPR2023-01040, and IPR2023-01034, where obviousness grounds rely on the primary reference from the undecided “redundant challenge”.

The Board’s unpatentability decision further rests on legal error and abuse of discretion because it ignores direct evidence of patentability in the record. In its obviousness finding, the Board violated the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551-559 (2012), and abused its discretion when it did not consider material evidence — specifically intrinsic evidence from the Karlsson reference that contradicts the Board’s interpretation of when/how the Figure 14 window functions. (*See* § III.B, *infra*; POR, 13, 16-17, 20-21; Sur-Reply 16, 18-19.) Though it purports to have considered the “full record,” the final written decision points to only pages 24-30 and 37-51 of the Patent Owner Response (“POR”), as proof of Patent Owner’s arguments contesting Petitioner’s ground 2 unpatentability assertions regarding the independent claims — overlooking all arguments made in the Sur-reply and related arguments in the Oral Hearing, and failing to address certain contradictory evidence presented in the POR on pages 13-21. (FWD, 17, 19, 21, 23.) The Board’s failure to consider material evidence of patentability is improper.

Under the revised interim Director Review process (“RIDRP”), a party may

request Director Review of a final written decision to address “important issues of law or policy.” The revised interim Director Review process (July 24, 2023) was established following the Supreme Court’s decision in *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021). Pursuant to the RIDRP, Patent Owner requests Director Review of the final written decision to address whether the Board misapplied governing law by failing to provide a merits adjudication of all grounds challenged by the Petitioner. Given the important legal and policy issues at stake — namely, whether partial final written decisions fall outside the AIA statutory framework and create a significant risk of undue delay and prejudice to the parties — Spero requests that the Director grant this Review and vacate the Board’s final written decision so the Board can completely adjudicate all grounds. Additionally, Spero asks the Director to instruct the Board to address the full scope of Patent Owner’s patentability arguments regarding intrinsic evidence that curtails application of the Figure 14 window in Karlsson.

II. BASIS FOR RELIEF REQUESTED

A. The Board Improperly Declined to Address Ground 1 of the Petition

1. The AIA Statutory Framework, *SAS* and Federal Circuit Law Require Complete Final Written Decisions

The Federal Circuit’s post-*SAS* decisions and the relevant AIA statutory

framework clearly support equal treatment of claims and grounds for both the institution and final written decisions.

The *SAS* policy rationale underlying the Federal Circuit’s decision to extend application of 35 U.S.C. § 318(a) to cover challenged claims and grounds, apply with equal force to all Board decisions. In *PGS Geophysical*, the Federal Circuit reviewed the public policy framing the Supreme Court’s *SAS* holding and concluded that “[e]qual treatment of claims and grounds for institution purposes has pervasive support in *SAS*.” *PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018). Significantly, the Federal Circuit noted that “[a]lthough 35 U.S.C. § 318(a), the primary statutory ground of decision, speaks only of deciding all challenged and added ‘claim[s],’ the Supreme Court spoke more broadly when considering other aspects of the statutory regime, and it did so **repeatedly**.” *Id.* (emphasis added.) Per the *PGS* decision, under *SAS*, “§ 312 contemplates a review ‘guided by a petition describing ‘each claim challenged’ and ‘the grounds on which the challenge to each claim is based,’” adding that “the Director does **not** ‘get[] to define the contours of the proceeding.”” *Id.* (emphasis added). Quoting *SAS*, the Federal Circuit further concluded that “the petitioner’s petition, not the Director’s discretion, is supposed to **guide the life of the litigation**,” *SAS*, 138 S. Ct. at 1356 (emphasis added), and the “petitioner’s contentions ... define the scope of the litigation all the way from institution through **to conclusion**.” *Id.*, at 1357

(emphasis added). Ultimately, the *PGS* court held: “[w]e read those and other similar portions of the *SAS* opinion as interpreting the statute to require a simple yes-or-no institution choice respecting a petition, **embracing all challenges included in the petition**, and we have seen no basis for a contrary understanding of the statute in light of *SAS*.” *PGS*, 891 F.3d at 1360 (emphasis added).

PGS noted that a related issue exists as to final written decisions: “We note that it is a distinct question (not presented here) whether, after instituting on the entire petition, the Board, in a final written decision, may decide the merits of certain challenges and then find others moot, the latter subject to revival if appellate review of the decided challenges renders the undecided ones no longer moot.” *Id.*, at 1360. Under the AIA and *SAS* because the “petitioner, not the Director [is] who gets to define the contours of the proceeding” and the “petitioner’s petition, not the Director’s discretion ... guide the life of the litigation ... from institution through to conclusion,” **all challenges** included in the petition should be part of the final decision under 35 U.S.C. § 318(a). *SAS*, 138 S. Ct. at 1355, 1356 (emphasis added).

This conclusion is echoed in the Federal Circuit’s *Amazon v. AC Tech* decision. *AC Techs. S.A. v. Amazon.com Inc.*, 912 F.3d 1358 (Fed. Cir. 2019). In that case, with a different factual predicate, the Federal Circuit affirmed the Board’s post-*SAS* decision on reconsideration, invalidating the remaining

challenged claims based on a non-instituted ground of unpatentability raised in the Petition but not addressed in the final written decision. In so doing, the Federal Circuit unequivocally stated “[p]recedent mandates that the Board consider all grounds of unpatentability raised in an instituted petition.” *AC Techs. S.A.*, 912 F.3d at 1360 (emphasis added). Citing *SAS* as well as its own precedent, the Federal Circuit explained that, not only did the Board *not* exceed its authority in this proceeding, “it would have violated the **statutory scheme** had the Board *not*” considered the third ground of unpatentability. *AC Techs. S.A.*, 912 F.3d at 1364-65 *citing PGS*, 891 F.3d 1354 at 1360. And “neither § 314(b)’s timing requirements nor § 314(d)’s limits on appealability alter the Board’s statutory obligation to **rule on all claims and grounds presented in the petition.** *See SAS*, 138 S. Ct. at 1356 (explaining that an IPR must “proceed[] ‘[i]n accordance with’ or ‘in conformance to’ the petition.” *AC Techs. S.A.*, 912 F.3d at 1365 (emphasis added).

2. Considerations of Undue Delay and Prejudice Necessitate Complete Final Written Decisions

Unless an extension is granted, the AIA requires an IPR to be **completed** and a final written decision to be issued within one year of when the proceeding is instituted. *See* 37 C.F.R. § 316(a)(11). The AIA does not contemplate partial final written decisions, which only address a subset of the challenges presented. *See* 37

C.F.R. § 42.1(b). Notably, the AIA legislative history struck down proposals that subjected Patent Owners to “serial post-grant challenges” and that denied Patent Owners the “right to expect quiet title at some point without facing an endless series of challenges.” See Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 Fed. Cir. Bar. Journal 539, 603 (2012) (discussing early legislative history) (emphasis added). Under the Board’s practice of partial adjudications, Patent Owners would necessarily be subjected to “serial post-grant challenges” if the partially adjudicated grounds are reversed on appeal. Thus, rather than providing a just, speedy and inexpensive” proceeding, per 37 C.F.R. § 42.1(b), partial adjudications subject the Patent Owner to undue delays in resolution of the underlying patentability issues — impeding their ability to enforce the patent rights conferred upon them.

Established public policy thus counsels against partial adjudications at institution and final written decision. In *Polaris Industries Inc. v Arctic Cat, Inc.*, the Federal Circuit granted a request for remand to consider both non-instituted claims and grounds, because a “patent owner has an interest in obtaining a final written decision that addresses all challenged claims and resolves all questions of patentability that might otherwise **cloud the perceived validity of its patent.**” *Polaris Indus. Inc. v Arctic Cat, Inc.*, 724 Fed. App’x. 948, 949 (Fed. Cir. 2018) (per curiam) (emphasis added). The Federal Circuit goes on to explain that the

estoppel provisions under 35 U.S.C. § 315(e) require “complete decisions” and that a request for remand is warranted “because the Board’s existing final written decisions do not address all challenged claims or all grounds.” *Polaris Indus. Inc.*, 724 Fed. App’x. 948, 949. Absent a complete adjudication of all grounds, the non-adjudicated grounds may be subject to future review should an appeal reverse the outcome of the adjudicated grounds. In that event, the patent owner could be subjected to two sets of Board proceedings, one for each ground, and two Federal Circuit appeals — requiring the patent owner to wait **up to four years** from the petition filing to finally obtain quiet title. Here, entry of a complete final written decision could help streamline issues in related, follow-on IPRs, e.g. IPR2023-01026, IPR2023-01027, IPR2023-01040, and IPR2023-01034, where obviousness grounds rely on the primary reference from the undecided “redundant challenge”.

Relatedly, the increased likelihood of district court judges staying a parallel litigation pending an ongoing IPR post-*SAS*, compounds the prejudicial nature of partial adjudications. Partial final written decisions thwart the district court’s stay rationale, as simplification of issues is only possible when the Board provides a complete adjudication. Accordingly, the parties either wait up to four years for complete adjudication and all related appeals or resume parallel litigation absent simplification of issues. The Board’s piecemeal adjudication thus fails to meet one of the core objectives of the AIA — to “improve administrative processes so that

disputes over patents can be resolved quickly and cheaply without patents being tied up for years in expensive litigation.”); 157 CONG. REC. S1053 (Mar. 1, 2011) (statement of Sen. Whitehouse).

In this IPR, following institution, the parties spent a significant amount of time, effort, and resources to brief all claims and grounds (over 200 pages of evidence were submitted). Yet, the Board chose to effectively “dismiss” a ground, precluding final judgment as to ground one and precluding appeal of a final decision on all claims and all grounds. As the Federal Circuit found in *PGS*, “[f]inality and expedition interests strongly counsel against such action. And so does the Court’s emphasis in *SAS* on the petitioner’s control of the contours of the proceeding.” *PGS*, 891 F.3d at 1363.

III. The Board’s Decision Improperly Ignores Material Evidence of Patentability

A. Patentability Determinations Must Be Based on the Entirety of the Record

The Board violated the APA and abused its discretion when it found 27 of the 33 challenged claims unpatentable but did not address the merits of the full evidentiary record of patentability. Under 35 U.S.C. § 318(a) and *Aqua Products*, the Board had a duty to address material evidence of patentability. Failure to correct this legal error and abuse of discretion would be unjust and deprive the Patent Owner of proper due process.

In an AIA proceeding, when the Board reaches a final written decision, that “final substantive decision must be based on the entirety of the record. Basic principles of administrative law compel this conclusion.” *Aqua Prod., Inc. v. Matal*, 872 F.3d 1290, 1325 (Fed. Cir. 2017) (*citing* 35 U.S.C. § 318(a); *see also* 5 U.S.C. § 554(c)(1) (“The agency shall give all interested parties opportunity for — (1) the submission and consideration of facts, arguments[.]”). Refusing to consider material evidence without rationale or explanation is an impermissible error. *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1269, 1274 (Fed. Cir. 2017) (“Because the Board failed to consider material evidence and failed to explain its decisions to exclude the evidence, we vacate and remand.”)

The Federal Circuit has held that the APA imposes a duty on the Board to provide a final substantive decision “based on the “entirety of the record.”. *See Aqua Prod., Inc.*, 872 F.3d 1290 at 1325 (emphasis added). The Board must “address all issues properly before it, even if they are contrary to its result.” *Parus Holdings, Inc. v. Google LLC*, 70 F.4th 1365, 1372 (Fed. Cir. 2023) *citing to Aqua Prod., Inc.*, 872 F.3d 1290 at 1325.

B. Material Evidence Must be Given Full Consideration

The evidence Patent Owner submitted, and the Board appears to have ignored, is material because it establishes that Karlsson seeks to **retain** “optimum” light anywhere glare is not being accommodated and thus does not teach

“increasing light in the direction of the road curvature” as required by independent claims 1, 12 and 23. (Ex.1010, 2:7-10, 4:17-21, 9:23-26; Ex.2006, ¶128.)

The ignored evidence-of-record is material to the decision as it establishes:

- 1) that Karlsson provides a high-beam or “main-beam” lighting pattern as a default setting and that such “main-beams are designed and **optimized** for long-range illumination.” (Ex.1010, 1:1-7, 1:18-23, 1:19-20; POR, 25); 2) Karlsson discloses that the “light beam 7 ... [is] controlled in such a manner that **no light at all or light having a low intensity** is emitted in those directions from which light is detected ... [thus] **glaring or blinding of oncoming traffic is effectively prevented.**” (Ex.1010, 9:18-26, Sur Reply, 15 citing to Ex.2008, 66, emphasis added); 3) Karlsson discloses “retaining an optimum light for the driver of the vehicle” while automatically suppressing “that part of the light beam which might cause inconvenience to oncoming traffic.” (Ex.1010, 2:7-9; POR, 25.); 4) Figure 14 and the accompanying description support the interpretation that the D and I “sources,” collectively, provide “existing vehicle” light beams, and thus it follows that window 50 is created by blanking a subset of the overall beam “if desired,” i.e., to reduce potential glare. (POR, 27; Ex.1010, 19:31-33; Ex.2006, ¶131.); 5) Karlsson identifies that glare occurs in two situations—when rapid velocity changes or overloading pitches the vehicle, and when turning. (POR, 13, 16-17, 28-31.) Figures 1B and 1C illustrate Karlsson’s Reduction Control Strategy during

a turning maneuver, showing possible shifts in right and left turns. (POR, 17.); 6) the base device that Karlsson improves — Flaaten (Ex.2017) — takes a similar approach to situationally reducing full emission and defines optimum lighting as enabling such control of the light that **only** the portion of the light that would inconvenience the driver of meeting cars is **removed, leaving as much as possible of the roadway and surroundings illuminated,** and further establishes that window 50 provides reduced illumination, so Karlsson can retain “an optimum lighting effect,” even under glaring situations. (POR, 20-21.); 7) “there is a clear distinction between the ‘emitted beam 50’ (used once in Karlsson) of Fig. 14 and ‘beam 7’ (a phrase used twenty different times) (Sur Reply, 18); 8) Per Karlsson, “like [sic] parts or parts having like [sic] functions bear the same reference numerals,” which means “emitted beam 50 does not have the same function as emitted beam 7”. *See* Oral Hearing, 31:20-21 (emphasis added); and 9) the ambiguity of the one sentence that Petitioner identifies to establish how Figure 14 functions, coupled with Petitioner’s own admissions that run contrary to its argument as to when and how Figure 14 applies with the vehicle in operation, impact Petitioner’s ability to meet its burden of persuasion as to Ground 2. (*See* Sur-Reply, 19; Oral Hearing, 32:1-33:20.) Had the Board considered this evidence, the Board would have seen that intrinsic evidence exists to establish 1) that window 50 provides reduced illumination in instances of situational glare and does not have the same function

as emitted beam 7; and 2) that Petitioner failed to meet its burden of persuasion as to ground 2.

Finally, the Board focused on the bundled arguments regarding claims 5, 16 and 27, but failed to address the distinct arguments presented regarding dependent claim 27. (POR, 33-34.)

Under the Chenery Doctrine, an agency’s “action must be measured by what [the agency] did, not by what it might have done,” *SEC v. Chenery Corp.*, 318 U.S. 80, 93–94 (1943), so if the Board’s “grounds are inadequate or improper, the [appellate] court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis,” *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The failure to consider all material evidence undermines one of the most important principles derived from the Chenery Doctrine: that agencies must properly justify the legality of their actions before they would wield the **colossal power of government to seize property**. *Id.* To allow otherwise is simply inconsistent with the **rule of law**.

IV. CONCLUSION

For the reasons set forth above, Patent Owner respectfully requests the Director review the Final Written Decision of the '029 Patent.

Respectfully submitted,

Dated: June 21, 2024

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Certificate of Service

The undersigned hereby certifies that on June 21, 2024, a complete and entire copy of **Patent Owner's Request for Director Review**, was served via electronic mail to the correspondence listed below:

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Certificate of Compliance Pursuant to 37 C.F.R. § 42.24

This paper complies with the type-volume limitation of 37 C.F.R. § 42.24. The paper contains 14 pages excluding the parts of the paper exempted by §42.24(c).

This paper also complies with the typeface requirements of 37 C.F.R. § 42.6(a)(ii) and the type style requirements of § 42.6(a)(iii)&(iv).

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