

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNITED LABORATORIES INTERNATIONAL, LLC,
Petitioner,

v.

REFINED TECHNOLOGIES, INC.,
Patent Owner.

IPR2019-01544
Patent No. 9,017,488 B2

**PETITIONER'S MOTION FOR REHEARING
PURSUANT TO 37 C.F.R. § 42.71(d)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. ALLEN IS ANALOGOUS PRIOR ART TO THE '488 PATENT.....	1
II. A PERSON OF ORDINARY SKILL IN THE ART WOULD HAVE BEEN MOTIVATED TO COMBINE FOUTSITZIS AND ALLEN.....	7
III. A PERSON OF ORDINARY SKILL IN THE ART WOULD HAVE BEEN MOTIVATED TO COMBINE FOUTSITZIS, ALLEN, AND JANSEN.....	13
IV. CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17
CERTIFICATE OF COMPLIANCE.....	18

TABLE OF AUTHORITIES

Cases

<i>Airbus S.A.S. v. Firepass Corp.</i> , 941 F.3d 1374 (Fed. Cir. 2019).....	1, 2, 5, 6, 7
<i>Harmonic Inc. v. Avid Tech., Inc.</i> , 815 F.3d 1356 (Fed. Cir. 2016).....	1, 2
<i>In re Bigio</i> , 381 F.3d 1320 (Fed. Cir. 2004).....	1
<i>In re Magnum Oil Tools Int’l, Ltd.</i> , 829 F.3d 1364 (Fed. Cir. 2016).....	1, 2
<i>KSR International Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007).....	7, 8, 10, 11, 12
<i>Randall Manufacturing v. Rea</i> , 733 F.3d 1355 (Fed. Cir. 2013).....	6
<i>Renda Marine, Inc. v. U.S.</i> , 509 F.3d 1372 (Fed. Cir. 2007).....	1

Statutes

35 U.S.C. § 103.....	13, 15
----------------------	--------

Regulations

37 C.F.R. § 42.24.....	18
37 C.F.R. § 42.24(a)(1).....	18
37 C.F.R. § 42.6(e).....	17
37 C.F.R. § 42.71(c).....	1
37 C.F.R. § 42.71(d).....	1

Pursuant to 37 C.F.R. § 42.71(d), Petitioner United Laboratories International, LLC hereby requests rehearing of the Board’s Decision (Paper 9) entered January 22, 2020. The Board reviews a request for rehearing for abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion “occurs when a court misunderstands or misapplies the relevant law or makes clearly erroneous findings of fact.” *Renda Marine, Inc. v. U.S.*, 509 F.3d 1372, 1379 (Fed. Cir. 2007). As set forth below, that standard is met.

I. ALLEN IS ANALOGOUS PRIOR ART TO THE ‘488 PATENT.

“A reference qualifies as prior art for an obviousness determination only when it is analogous *to the claimed invention.*” *Airbus S.A.S. v. Firepass Corp.*, 941 F.3d 1374, 1379 (Fed. Cir. 2019) (citation omitted) (emphasis added). Whether a reference qualifies as analogous prior art is a question of fact. *Id.* (citing *In re Bigio*, 381 F.3d 1320, 1324 (Fed. Cir. 2004)). A reference is analogous prior art (1) if it is from the same field of endeavor regardless of the problem addressed, or (2) if it is not within the field of the inventor’s endeavor, it is reasonably pertinent to the particular problem with which the inventor is involved. *Id.* (citing *In re Bigio*, 381 F.3d at 1325).¹ Thus, the field of endeavor is evaluated first.

¹ The Board referred to *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356 (Fed. Cir. 2016) and *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364 (Fed. Cir. 2016),

“To determine the applicable field of endeavor, the factfinder must consider ‘explanations of the invention’s subject matter in the patent application, including the embodiments, function, and structure of the claimed invention.’” *Airbus*, 941 F.3d at 1380. “While the disclosure of the references is the primary focus, [the Federal Circuit] has also instructed that the factfinder must consider each reference’s disclosure in view of the ‘reality of the circumstances,’ and ‘weigh those circumstances from the vantage point of the common sense likely to be exerted by one of ordinary skill in the art in assessing the scope of the endeavor.’” *Id.* (citations omitted). Respectfully, Petitioner asserts that the Board misapprehended this law.

The Board held that the field of endeavor is “the operation and maintenance of chemical plants and refineries.” Decision at 6. However, the Board only cited one sentence from the Background section to support this holding: “This disclosure pertains to the operation and maintenance of chemical plants and refineries.” *Id.* (citing Ex. 1001 at 1:8-9). The Board disregarded the testimony of Dr. Wilhite,

Decision at 5-6, but their holdings do not apply here. *Harmonic* addresses the level of detailed required to show that a reference teaches a limitation, 815 F.3d at 1363-64, which is not at issue here, and *Magnum* deals with a petitioner who merely argued that the same analysis for one reference applied to another reference, without further explanation, 829 F.3d at 1380, which is also not at issue here.

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