UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC.,
Petitioner,

v.

ALIVECOR, INC.,
Patent Owner

IPR2021-00972
U.S. Patent No. 10,638,941

PATENT OWNER'S SUR-REPLY

TABLE OF CONTENTS

Page

I. INTRODUCTION

Apple's Reply asks this Board for second bite at its Petition, abandoning its Petition positions by recasting its arguments and improperly submitting new evidence. This new evidence includes both hearsay testimony from Dr. Stultz (its ***ITC expert***), as well as unauthenticated prior art references and other testimony cited for the first time. Importantly, Dr. Stultz did ***not*** submit a declaration in this IPR. Yet, Apple nevertheless heavily cites to Dr. Shultz's out-of-court testimony in an apparent attempt to rehabilitate its IPR expert (Dr. Chaitman), who is barely cited at all in its Reply. Apple's use of Dr. Stultz's testimony is not only an improper attempt to submit new evidence, it is impermissible hearsay, and AliveCore was not given an opportunity to cross-examine him in this forum. His testimony, and any argument based on that testimony, should be struck on that basis alone. So too should the other additional new evidence submitted in Reply, which includes almost ***two dozen newly added*** prior art references, expert reports from other proceedings, and testimony transcripts, none of which was cited in the Petition. Just like Apple's new expert testimony, this new evidence was all improperly submitted for the first time on Reply, and the record is devoid of any argument or evidence that any of it is authentic or that they were in fact printed publications. It should all be struck, as should any arguments based on that evidence.

Even if that evidence is not struck, it fails to establish unpatentability. Tellingly, in many instances Apple does not address AliveCor's arguments head on, instead reading in teachings from the prior art's general disclosures. Apple would have this Board find that Shmueli's teaching of the broad genus of irregular heart conditions and Osorio's teaching of the broad genus of pathological conditions are both necessarily teachings of the species of arrhythmia. Yet Apple concludes so without applying the proper legal framework that the prior art disclosures must be viewed in context to ascertain what they teach to a POSITA. And as AliveCor established in its Response, when the references are reviewed by the skilled artisan in their entirety, it is clear that Shmueli is directed to techniques for detecting and preventing heart attacks, while Osorio is directed to neurological conditions such as seizures. The references' disclosures are all in service of these broader contextual purposes. Indeed, perhaps recognizing that the primary prior art references are directed at non-analogous technical fields, Apple recasts its obviousness argument to rely on Amano, a reference that is not part of the grounds.

II. THE BOARD SHOULD REJECT APPLE'S NEW EVIDENCE

Apple submits almost ***two dozen new*** prior-art exhibits in its Reply, including testimony from its ***ITC*** expert (Dr. Stultz) and multiple unauthenticated printed publications. Both categories of new evidence should be rejected. With respect to

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.