UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. AND HP INC.,
Petitioner

v.

XR COMMUNICATIONS, LLC,
D/B/A VIVATO TECHNOLOGIES,
Patent Owner

IPR2022-01155
U.S. Patent No. 10,715,235

PATENT OWNER'S PRELIMINARY RESPONSE SUR-REPLY

I. THE PETITION FAILS ON THE MERITS

Contrary to Petitioners' arguments (Reply at 5), the merits of the Petition are not strong and don't favor institution.

A. The Petition fails to show that 'x' in Saunders's equation 1 describes two received signals, as required by the claims.

The Petition's theory requires 'x' in Saunders's equation 1 to satisfy the "determined first signal information and second signal information." Pet. at 41–43. Thus, to meet the claims, Saunders's 'x' must describe *two* received signals that are received simultaneously from the same remote station. POPR at 5–6. Indeed, the "first and second signal information" (to which 'x' allegedly corresponds) must be determined for *two* received signals: a "first signal transmission" and a "second signal transmission." *Id*. But Saunders expressly teaches that 'x' describes only *one* received signal; it defines 'x' as a "received signal vector at n branches (i.e. n antenna elements)." *Id.* at 7–11; EX-1027 at 2:1–18. And a "received signal vector x" is *one* received signal—*not* two received signals as Petitioners contend. The Reply does not and cannot dispute Saunders's express disclosure in col. 2.

Ignoring col. 2, the Reply instead focuses on Fig. 3 and col. 5 to argue that 'x' describes multiple received signals. Reply at 5 (citing EX-1027 at 5:16–59). But at most, col. 5 might indicate that there is a received signal vector 'x' for each received signal that is received over time. EX-1027, 5:16-59. This does not mean that 'x' ever describes *two* received signals, as the claims and Petitioners' theory requires.

The Reply's sole reference to Hottinen cannot save Petitioners' theory, which relies exclusively on Saunders's 'x' for limitation [1c-4]. Pet. at 41–43. Importantly, the Petition doesn't assert any modification to Saunders's 'x' for limitation [1c-4] in a combined Saunders-Hottinen system. *Id.* Thus, Hottinen fails to cure Saunders's deficiency, and the combined system fails to satisfy the claimed "first and second signal information" for the same reasons. Nor do Petitioners show that a POSITA would be motivated to combine Saunders with Hottinen to meet this claim limitation with a reasonable likelihood of success.

Petitioners' conclusory attorney argument that the Saunders-Hottinen system "also determines covariance matrices and weight values that can be used for transmission back to the first radio communication device" is supported only by its expert's bare assertion—which simply repeats the attorney argument verbatim and is due no weight. *Compare* Pet. at 43; *with* EX-1027 ¶ 94; *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016); *Smartmatic USA Corp. v. Election Sys. & Software*, IPR2019-00527, Paper 32 at 34 (Aug. 5, 2020) (giving no weight to an expert declaration that "merely parrots the language in the Petition").

B. The Petition fails to show that 'x' in Saunders's equation 1 describes two *simultaneously* received signals, as required by the claims.

Petitioners' theory fails for an independent reason. Even if Saunders discloses computing a received signal vector 'x' for each received signal, each such instance of 'x' does not describe two signals received *simultaneously* from the same remote

station as the claims require. POPR at 9. Any interpretation of col. 5 in which 'x' describes two signals received simultaneously is unsupported and inconsistent with Saunders's definition of 'x' as a received signal vector.

Lacking any evidence from Saunders that would satisfy limitation [1c-4], the Reply relies on Dr. Akl's assertion that "Saunders explicitly teaches that 'x' in Saunders equation 1 is directed to signals received from one station by different antenna elements." Reply at 5; Pet. at 41–32. This fails. Dr. Akl's assertion is incompatible with Saunders itself, in which the received signal vector 'x' in equation 1 only describes one received signal. EX-1027 at 2:1–18. Dr. Akl's bare opinion that 'x' represents multiple signals cannot take the place of a disclosure in Saunders, which is completely absent here. *See* Consolidated Trial Practice Guide at 36.

Likewise, Petitioners and Dr. Akl provide zero evidence that 'x' describes two signals that are received simultaneously from the same remote station. And again, Petitioners' sole "evidence" for this argument is the say-so of Dr. Akl. But any assertion by Dr. Akl on this point is conclusory and unsupported and cannot substitute for disclosures in the prior art of record. *See Cisco v. XR*, IPR2022-00958, Paper 9 at 24 (PTAB Nov. 29, 2022) (denying institution and finding that "Petitioner may not rely on Dr. Jeffay's testimony alone for element 15B.2. Testimony cannot take the place of disclosure in a prior art reference, when that disclosure is required as part of the unpatentability analysis.") (citing TPG at 36).

II. DISCRETIONARY DENIAL IS WARRANTED

In view of recent events, and under Director Vidal's June 2022 guidance, discretionary denial remains warranted. The Apple case is temporarily stayed pending a transfer decision, which is imminent. And as the Reply acknowledges, if transfer is denied, then the estimated trial date is October 2023 based on WDTex's median time to trial. Reply at 2. This is three months before the FWD deadline in this IPR (in January 2024). Since the Apple case is pending in WDTex, the mere possibility that it will be transferred to NDCal and put on a later schedule is remains speculative. Unless the case is transferred,[1] the Board should find that Factor 2 weighs against institution. As to the other *Fintiv* factors, discretionary denial remains warranted for the reasons in the POPR. *See* POPR at 17–24.

Further, Director Vidal's guidance makes clear that "even if the PTAB does not deny institution under *Fintiv*, it retains the right to deny institution for other reasons under 35 U.S.C. §§ 314(a), 324(a), and 325(d)." June 21, 2022, Memo on Interim Procedures at 9. Thus, even if the *Fintiv* factors don't apply, the Board should exercise its discretion to deny institution under the *General Plastic* factors. *See* POPR at 24–28 ("The Board has recognized that § 314(a) provides an additional discretionary basis for denying institution of 'follow on' petitions.").

[1] If the Apple case is transferred from WDTex to NDCal, the parties will promptly update the Board, and it will be reflected on the WDTex docket.

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