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On behalf of **Luxottica of America Inc.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LUXOTTICA OF AMERICA INC.,

Petitioner,

v.

E-VISION SMART OPTICS, LLC,

Patent Owner.

Case No. IPR2025-01512

Patent No. 11,971,612

**PETITIONER'S RESPONSE TO PATENT OWNER'S
CORRECTED REQUEST FOR DISCRETIONARY DENIAL**

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Patent Owner (“PO”) requests discretionary denial under §§ 325(d) and 314(a). The Board should deny those requests and institute review.

I. DISCRETIONARY DENIAL UNDER § 325(D) IS UNWARRANTED

PO’s 325(d) arguments are conclusory and unsupported. Under the *Advanced Bionics* framework, each of PO’s 325(d) arguments fails because the same prior art or arguments were not previously presented to the Office.

With respect to the first *Advanced Bionics* prong, every ground in the Petition includes at least one reference that was not considered by the Examiner, as explained in the corresponding sections below. As PO admits, only three of the Petition’s six grounds rely solely on the prior art references addressed in the Request, and of the three references addressed in the Request, only one was before the Examiner.

Regarding the second *Advanced Bionics* prong, PO argues that institution should be denied because Petitioner did not preemptively address 325(d) in the Petition by identifying a material error by the Examiner. *See* Request, 8-9. Under the rules applicable at the time the Petition was filed, Petitioner was not required to address 325(d) and was, in fact, instructed not to do so. *See* <https://www.uspto.gov/patents/ptab/faqs/interim-processes-workload-management> (“25. Should a petitioner address discretionary issues in its petition? No. The petition should not address discretionary issues. A petitioner should raise any discretionary issues in its opposition to a patent owner’s discretionary denial brief,

including issues relating to 35 U.S.C. § 325(d), parallel proceedings, parallel petitions, serial petitions, and any other matter bearing on the Director’s discretion to institute.”) Because the Examiner did not consider all the Petition’s prior art, prong one is not satisfied and PO’s 325(d) arguments fail, eliminating any need to demonstrate Office error.

The Office did err in a manner material to patentability at least because the Examiner failed to consider prior art references that clearly disclose the claim limitations, as explained in detail below.

A. Howell

PO argues that Howell was considered by the Examiner during prosecution. Although the ’747 patent, which corresponds to Howell, is listed on the ’612 patent, the Examiner did not apply the ’747 patent in any office actions or rejections. The ’747 patent is one of hundreds of references submitted in IDSs during the prosecution of the ’612 patent.

Moreover, none of the Petition’s grounds are based on Howell alone. In each of the Howell grounds, it is combined with at least Gruber. PO does not argue that Gruber was considered by the Examiner, much less that the Petition’s combinations of Howell and Gruber were considered. The Examiner did not consider Gruber, and PO has failed to satisfy the first *Advanced Bionics* prong as to the Howell grounds.

Regarding the second *Advanced Bionics* prong, the Petition was not supposed to address 325(d), as explained above. Although PO has failed to satisfy the first prong, the second prong also weighs against discretionary denial. PO incorrectly argues that Petitioner cannot show that the Examiner erred in his analysis of Howell’s teachings. But there is no evidence that the Examiner analyzed Howell in any way, much less *meaningfully* considered it. *See JUUL Labs, Inc. v. NJOY, LLC*, IPR2024-00160, Paper 10 at 11–13 (PTAB May 24, 2024) (finding first prong of *Advanced Bionics* unmet where patent owner cited no evidence that the examiner substantively considered disclosed references); *Samsung Elecs. Co. v. Maxell, Ltd.*, IPR2024-00867, Paper 9 at 17, 20 (PTAB Nov. 7, 2024) (same).

More importantly, Howell alone is not asserted in the Petition, and each Howell ground includes references not considered by the Examiner. For all Howell grounds, each of which is a combination with at least Gruber, the Examiner erred by not considering Gruber and its disclosure of the claim limitations not explicitly disclosed by Howell. Thus, the Examiner erred in not combining Howell with another reference, such as Gruber, to reject the claims. When the asserted art was not substantively remarked upon or applied in a rejection of the claims, “the petitioner may show material error by showing that the Office failed to reject the claims over the asserted art.” *Quasar Sci. LLC v. Colt Int’l Clothing, Inc.*, IPR2023-00611, Paper 10 at 13–14 (PTAB Oct. 10, 2023).

Thus, both *Advanced Bionics* prongs weigh against denying institution of the Howell grounds under 325(d).

B. Jannard-740

Jannard-740 is another primary reference that was not before the Examiner. PO does not dispute that Jannard-740 was not considered. Rather, Patent Owner argues Jannard-740 is cumulative of Jannard-382, which appeared in an IDS. Request, 3-4. In arguing cumulateness, Patent Owner makes three points, none of which is persuasive.

PO argues that Jannard-740 is a continuation-in-part of Jannard-382, which is listed on the face of the '612 patent but was not applied by the Examiner. Request, 3; Ex.1001, page 4. PO acknowledges that Jannard-740's disclosure is different from Jannard-382's, and PO's table comparing the paragraphs of these references confirms that the Petition relies on several paragraphs in Jannard-740 that are absent from Jannard-382. Request, 7 (including Jannard-740 paragraphs [0104], [0158], [0160], [0161]).

PO also tries to show that Jannard-740 and Jannard-382 are similar prior art by arguing that an Examiner applied Jannard-382 to reject claims of U.S. Patent No. 11,487,138 (the '138 patent), which is a parent of the '612 patent. Request, 3-5. But PO has failed to provide any showing that the rejected '138 patent claims are similar to the '612 patent claims. Thus, PO has failed to establish that Jannard-740 is the

same or similar art. First, PO admits that Jannard-382 is different and missing several paragraphs that the Petition relies on from Jannard-740. Second, an Examiner's application of Jannard-382 to different claims from a different patent does not show similarity of the different references.

Moreover, the Board already rejected PO's 325(d) arguments relating to Jannard-740 in an IPR challenging the '138 patent (IPR2025-00216). In that IPR, PO made the same arguments that Jannard-740 is substantially the same as Jannard-382. IPR2025-00216, Paper 13 at 8-10. The Board rejected PO's 325(d) arguments and instituted the IPR, finding that PO had not satisfied the first prong of the *Advanced Bionics* framework. *Id.* at 8. The Institution Decision explained:

We are not persuaded that the first part of the framework is met. Here, Patent Owner argues that Jannard[-740] is substantially the same as Jannard382, which was before the Office. Prelim. Resp. 3–8. Notably, Patent Owner does not argue that Thiel, Gruber, Maddern, Lu, or Osterhout previously were presented to the Office—Petitioner argues that they were not (Pet. 88). Nor does Patent Owner argue that any of these five additional references are cumulative of previously presented art. *See* Prelim. Resp. Rather, Patent Owner remains silent as to these five references. In addition, Patent Owner does not address whether the

same or substantially the same arguments previously were presented to the Office. *Id.*

The Board should reject PO's Jannard-740 arguments in this proceeding for the same reasons.

Regardless, the Petition's Grounds 1 and 4, which are based on Howell, Gruber, and Osterhout, collectively challenge all claims of the '612 patent and do not include Jannard-740.

C. Osterhout

Osterhout is the primary reference in Grounds 4 and 5. PO acknowledges that Osterhout was not before the Examiner during prosecution of the '612 patent. PO fails to show that Osterhout is substantially the same as the prior art considered by the Examiner. In fact, PO's Request contains a single paragraph addressing Osterhout under 325(d) and fails to provide any analysis whatsoever of Osterhout's disclosure compared to references considered by the Examiner. PO merely states that "Osterhout does not teach the claimed response to a verbal query which was the Examiner's basis for allowance . . . Osterhout is therefore merely cumulative of the art that was before the Examiner." Request, 8. This bare assertion is insufficient and fails to provide any evidence that Osterhout is similar to the considered prior art. Osterhout was not before the Examiner and the first *Advanced Bionics* prong is not satisfied.

For the reasons provided above, PO’s 325(d) arguments are baseless and the Board should decline to exercise discretion to deny institution.

II. PATENT OWNER’S § 314(A) ARGUMENTS FAIL

A. The Petition’s Grounds Are Not Duplicative

The Petition includes only three primary references and six different grounds to address different claim groups. Even under PO’s analysis, there would only be eight grounds. It is not uncommon for IPR petitions to have many more than eight grounds and three primary references. PO fails to provide any support that the Petition’s grounds are duplicative such that institution would be an inefficient use of the Office’s resources.

In the *Zhuhai* case cited by PO, the petition asserted “at least fifteen grounds” and included tables setting forth the limitation for many of the claims and referring to arguments made in other sections of the petition to explain the challenge. *Zhuhai Cosmc Battery Co., Ltd. v. Ningde Amperex Technology Ltd.*, IPR2025-00405, Paper 24, 2-3. For example, “in challenging claim 12 . . . the table includes each limitation and then cites to Petition sections VIII.B.1-VIII.B.8.” *Id.* The Board found that at least one of the tables “does not include independent claim 20, and thus Petitioner failed to meet the reasonable likelihood standard as to that claim and its dependent claims.” *Id.* Based on these findings and deficiencies, the Board determined that the petition’s approach was unfocused and institution would “require the Board and

Patent Owner to expend resources addressing multiple claims and grounds that do not meet the reasonable likelihood standard.”

The *Zhuhai* decision is easily distinguished from the present Petition and its grounds. The present Petition has far fewer grounds and does not include the table approach that rendered that petition unfocused. Moreover, each of the Petition’s grounds meet the reasonable likelihood standard so there will be no expended resources addressing grounds that do not meet the standard.

In the *Arashi* decision, the petition includes at least 24 individual grounds and “by collapsing the at least 24 discrete obviousness challenges into six putative grounds, Petitioner makes difficult any meaningful explanation of the individual challenges.” *Arashi Vision LLC v. GoPro, Inc.*, IPR2024-01434, Paper 9, 10-11 (PTAB March 31, 2025). Even with these identified problems with the Petition, the Board determined that “[b]ecause we understand enough of the Petition’s analysis to address each group of asserted grounds on the merits, we decline to exercise our discretion to deny institution based solely on this issue.” *Id.* The present Petition does not have anything near 24 grounds or the other problems identified in the *Arashi* decision.

The *Adaptics* decision is also easily distinguished. In that decision, the Board found that the “Petition fails to meet the particularity requirement of 35 U.S.C. § 312(a)(3) and that the lack of particularity results in voluminous and excessive

grounds.” *Adaptics Ltd. V. Perfect Co.*, IPR2018-01596, Paper 20, 24 (PTAB March 6, 2019). The *Adaptics* petition included a “catch-all” ground that “if Bendel and Sartorius are not anticipatory, the challenged claims are obvious over these references in combination with each other, Williams, Turnage, Abrams, Bordin, Mettler, Digi-Star, Yuyama, and/or Wright.” *Id.* at 18. The Board determined that the petition’s “reliance on up to ten references connected by the conjunction ‘and/or’ results in a multiplicity of grounds, none of which is presented with sufficient particularity.” *Id.* This language “expands the ground to include combinations of three, four, or more references, yielding hundreds of possible combinations.” *Id.* at 18-19.

In contrast, the present Petition includes at most eight grounds, which include just three primary references and two secondary references. Ground 6 is not a “catch-all” ground, but rather an additional ground that adds a single reference (Gruber) to previous grounds. Each of the Petition’s grounds is addressed in a separate section of the Petition with analysis for each of the corresponding claim limitations. PO has not provided any analysis or evidence to show that the Petition’s grounds are improperly overlapping or unfocused. None of the decisions cited by PO are applicable to the present Petition with its small number of grounds and detailed analysis supporting each of the grounds. PO has failed to provide any

support to suggest that such a petition with clear and focused grounds should be denied institution.

B. The Petition’s Merits are Strong

1. Ground 1 (claims 2-13)

Ground 1 of the Petition challenges claims 1-13 and 15-27, but PO’s Request addresses only a subset of dependent claims (2-13) from this ground. Specifically, PO argues that the merits for claims 2-13 are weak because the Petition does not identify any “electronic lens” in Howell, let alone one that can provide the claimed functionality. Request, 11-12. PO’s arguments are incorrect.

For claim 2, the Petition identifies Howell’s **lens** which is held within the lens holder 112. Pet., 32-33. As the Petition explains, Howell’s lens can comprise a display, and “the display can be a liquid crystal display” and provide information to the user. *Id.* The display can be “located at the inside 114 of the lens holder, or at the vicinity of the junction 116 or the hinge of a lens holder . . . or at other locations on the glasses.” *Id.* Thus, contrary to PO’s arguments, the Petition relies on Howell’s lens and does not identify a part of Howell’s frame as the lens.

PO is also incorrect in arguing that the Petition’s analysis of claims 5-6 relies solely on expert testimony. Request, 12. For example, claim 5 specifies “the processor is configured to adjust a lens function of the eyewear based on data received via the video connections.” Pet., 35-36. The Petition relies on Howell for

the processor being configured to adjust a lens function, which discloses providing indications or information to the wearer through the lenses. *Id.* It also relies on Howell for basing adjustment on data received via the video connections. *Id.* Thus, the Petition relies on the prior art for the claim limitations—not solely on expert testimony.

2. Ground 2 (all claims)

PO argues that Jannard-740 does not teach the claimed verbal query and response “wherein the verbal query causes the external device to obtain the response to the verbal query by searching a computer network for the response to the verbal query.” Request, 12-13. But the Petition explains precisely how Jannard-740 discloses this limitation and renders it obvious.

The Petition explains “the microphone receives a verbal query from the wearer, thereby allowing the user to select between external content sources.” Pet., 50-51. After receiving that query “through the microphone,” the electronics module’s processor “transmit[s it] to an external receiver.” Pet., 51; Ex.1006, [0104]; Ex.1003, ¶186; *see also* Ex.1006, [0158], [0160], [0193]-[0195], [0198]. The processor also receives signals from the external device responsive to the query, and outputs corresponding audio signals via the speaker. Pet., 51; Ex.1006, [0104]; Ex.1003, ¶186; *see also* Ex.1006, [0195], [0237], [0239], [0221]. Thus, Jannard-

740 clearly discloses the claimed verbal query that causes an external device to obtain the response.

Jannard-740 also discloses that the external devices obtain the response to the verbal query by searching a computer network for the response. Pet., 51-54. For example, the audio device can communicate bi-directionally with both a stationary source device S (e.g., computer, local area network) and a body-borne source device B (e.g., cell phone, laptop computer). *Id.*; Ex.1006, [0193]-[0194], [0199]. The source device B communicates in turn with a remote source R via a “wireless data network,” which is a computer network. Pet., 51-52; Ex.1006, [0195].

As explained in the Petition, Jannard-740 discloses that the wearer may speak voice commands to offboard electronics, such as a cellular phone, which can communicate with a remote source such as the Internet. Pet., 52-53; Ex.1006, [0161], [0220], [0236]. For example, the wearer can request and listen to content, such as an email, from another device without manually operating that device. Pet., 51-52; Ex.1006, [0188], [0192], [0237] (incorporating Ex.1007); Ex.1007, [0295]-[0299]. Accordingly, as set forth in the Petition, Jannard-740 discloses the verbal query limitations of the independent claims.

The Petition also shows that these limitations would have been obvious in view of Jannard-740’s disclosure of its eyewear including “interface electronics for interacting with a wireless network and/or providing content to a user.” Pet., 52-54;

Ex.1006, [0003]; *see also* [0240]; Ex.1007, [0187], [0290], [0296]. This configuration allows a wearer to verbally request a specific Internet-accessible content (e.g., specific email, audio file, or news) from an external device and have it audibly presented via the eyewear's speaker. Pet., 52-54; Ex.1006, [0236]. This is consistent with Jannard-740's recommendation to include voice-control functionality and communicate through intermediate devices to offload electronics. Pet., 52-54; Ex.1006, [0161], [0198]; Ex.1003, ¶191. The Petition also provides several motivations and benefits for implementing Jannard-740's system in which the processor transmits the verbal query to an external device, receives a response, and provides the response via the speaker, where the query causes the external device to obtain the response by searching a computer network. Pet., 53-54.

Thus, the Petition has established a reasonable likelihood of prevailing with respect to claims 2-13 under Ground 1, and PO's arguments should be rejected.

3. Ground 3

PO argues that the Petition provides "no specific claim mapping for any of claims 2-13." Request, 14. This argument is baseless and disregards the Petition's explicit analysis. For example, the Petition explains Ground 3 as applying the Howell-Gruber combination, which discloses every limitation of claims 2-13 as set forth in Ground 1. Pet., 72-73. To the extent the Howell-Gruber combination somehow fails to disclose the claimed electronic lens, Ground 3 applies Jannard-740

for that limitation, as explained in detail in Ground 2 (VIII(B)). *Id.* The Petition also provides motivations and analysis for combining Jannard-740's lens with the Howell-Gruber combination. *Id.* Thus, the Petition provides specific mapping for claims 2-13.

PO also argues that, regarding claim 8-11, the Petition provides no analysis of how Jannard-740's processor and power supply would have been incorporated into the frame of Howell-Gruber such that the power supply is "disposed within the first temple." Request, 14-15. This argument is absurd in view of the actual ground. The Petition explains that Howell-Gruber's processor is already configured to adjust the display function, so "it would have been obvious for the processor to make the adjustment to control Jannard-740's lenses with optical devices." Pet., 73. As explained in the Petition, Howell discloses its eyewear's "circuit board can be shaped to fit, for example, the temple of the glasses." Pet., 38; Ex.1008, [0051]; *see also* [0069]-[0070], [0053]. Howell further discloses that the devices, including the processor, "can be on a circuit board in the glasses," which would include positioning Howell's processor within the temple. Pet., 38; Ex.1003, ¶120; *see also* Ex.1008, [0185]. Thus, it would be unnecessary to incorporate Jannard-740's processor into the frame of Howell-Gruber and PO's arguments fail.

4. Ground 4

PO argues that Ground 4 does not have a reasonable likelihood of prevailing because Osterhout fails to disclose “wherein the verbal query causes the external device to obtain the response to the verbal query by searching a computer network for the response to the verbal query.” Request, 15. PO’s only support for this argument is a single sentence in its Request: “accessing a database over the internet is not the same as ‘searching a computer network for a response to the verbal query.’” *Id.* This is mere attorney argument, unsupported by any explanation or evidence.

In contrast, the Petition explains that Osterhout discloses the database can be “remote[]” and “accessible over the Internet.” Pet., 79; Ex.1005, [0309]. In the context of Osterhout’s internet-connected system, a POSITA would have understood this “access[ing of] the database” as, in at least some instances, involving an intermediary, external device that identifies a network-connected database capable of servicing the verbal query. Pet., 79; Ex.1003, ¶¶313-316. After identifying that database, the external device searches a computer network for a response to the verbal query from the database to obtain the requested information. *Id.* The Petition then goes on to provide specific examples from Osterhout that further satisfy this limitation. Pet., 79-81.

Thus, PO's arguments fail because they disregard the evidence and analysis in the Petition.

5. Ground 5

Similar to its baseless arguments regarding Ground 3, PO argues that Ground 5 “provides no specific claim mapping for any of claims 2-14.” Request, 15-16. The Petition clearly explains Ground 5 as applying Osterhout, which discloses every limitation of claims 2-14 as set forth in Ground 4. Pet., 99-101. Ground 5 adds that it would also have been obvious to use Jannard-740's lenses with optical devices in Osterhout's eyewear, as explained in detail in Ground 2 (VIII(B)). *Id.* The Petition provides motivations and analysis for combining Jannard-740's lens with the Osterhout eyewear. *Id.* Thus, the Petition provides specific mapping for claims 2-14.

PO also argues that Osterhout does not disclose lenses that can provide virtual reality, augmented reality, or gaming. Request, 16. Although PO acknowledges that Osterhout discloses providing “virtual reality, augmented reality, or gaming to a person wearing the eyewear,” PO suggests that the Osterhout's eyewear does not provide these features through the lenses. *Id.* But PO fails to explain how these features are not provided by lenses. As explained in the Petition, these features are provided by Osterhout's lenses so that a person wearing the eyewear can view them. Pet., 82-83. For example, Osterhout discloses “augmented reality-based

advertis[ing],” “virtual reality,” and “virtual 3D gaming experience[s]” as display functionalities. *Id.*; Ex.1005, [0323]-[0326], [0356]; Ex.1003, ¶322. Each of Osterhout’s lens 2106 and waveguide 2108 pairs constitute the claimed electronic lens, and the waveguides reflect the augmented/virtual images electronically generated by the projectors to the wearer through the lenses. Pet., 82-83; Ex.1005, [0135]; *see also* [0125]. These images provide augmented reality, virtual reality, and gaming to the wearer on the lenses where the wearer can see them. Pet., 82-83; Ex.1005, [0323]-[0326], [0356].

Thus, the Petition’s grounds are strong, and PO’s arguments fail.

C. The Petition Supports Each Ground With Sufficient Evidence

PO argues that the Petition relies on expert testimony to supply missing claim limitations not found in the applied references. Request, 17. But PO’s Request fails to provide any analysis or explanation for how the Petition allegedly missuses expert testimony. Instead, the Request merely lists various grounds and claim limitations, without any analysis. PO’s unsupported list of claims fails to meet PO’s burden of showing impermissible use of expert testimony.

PO’s lack of analysis attempts to shift the burden onto Petitioner to show that it did not improperly use expert testimony. This is contrary to the Office’s guidance and case law. Regardless, the listed grounds do not comprise improper expert testimony and instead rely on the prior art to satisfy the claim limitations.

For example, PO lists Ground 1: claim 2 as allegedly relying on expert testimony to supply missing limitations. Claim 2 recites “an electronic lens” with specific functions. Pet., 32. The Petition relies on Howell for its disclosure of an electronic lens and explains how Howell’s lens has the claimed function of claim 2. *Id.* at 32-33.

As another example, Ground 1: claim 5 relies on the prior art for the claim limitations. Claim 5 specifies “the processor is configured to adjust a lens function of the eyewear based on data received via the video connections.” Pet., 35-36. The Petition relies on Howell for the processor being configured to adjust a lens function, which discloses providing indications or information to the wearer through the lenses. *Id.* It also relies on Howell for basing adjustment on data received via the video connections. *Id.*

The rest of the grounds and claims on PO’s list are similarly reliant on the prior art. None of them relies on impermissible use of general knowledge or expert testimony.

Respectfully submitted,

Dated: December 23, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, a true and correct copy of **PETITIONER’S RESPONSE TO PATENT OWNER’S CORRECTED REQUEST FOR DISCRETIONARY DENIAL** is being served via email pursuant to 37 C.F.R. § 42.6(e), to counsel for Patent Owner as addressed below:

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