

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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HUNTING TITAN, INC.,  
Petitioner,

v.

DYNAENERGETICS GMBH & CO. KG.  
Patent Owner.

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Case IPR2018-00600  
Patent 9,581,422 B2

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Record of Oral Hearing  
Held: February 18, 2020

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Before ANDREI IANCU, *Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office*, ANDREW HIRSHFELD, *Commissioner for Patents*, and SCOTT R. BOALICK, *Chief Administrative Patent Judge*.

Case IPR2018-00600  
Patent 9,581,422 B2

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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ON BEHALF OF THE PATENT OWNER:

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PRESTON H. HEARD, ESQUIRE  
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The above-entitled matter came on for hearing Tuesday, February 18, 2020, at 1:15pm at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1 PROCEEDINGS

2 DIRECTOR IANCU: You may be seated.

3 Good afternoon, all. This is Hunting Titan v. DynaEnergetics, IPR  
4 Number 2018-00600. Will the parties please enter their appearances? Let's  
5 begin with the Petitioner.

6 MR. SAUNDERS: Jason Saunders of the firm Arnold & Saunders  
7 appearing for Petitioner, and with me at the counsel table is Christopher  
8 McKeon.

9 DIRECTOR IANCU: Welcome.

10 Patent Owner?

11 MR. HERMAN: Good afternoon. Barry Herman with Womble Bond  
12 Dickinson for DynaEnergetics, the Patent Owner, and with me at the table is  
13 Christie Dupriest and Preston Heard.

14 DIRECTOR IANCU: All right. You may stay there for a minute, if  
15 you don't mind.

16 MR. HERMAN: Absolutely.

17 DIRECTOR IANCU: Each party will have 15 minutes to present  
18 arguments. Patent Owner will be first, and you may reserve up to five  
19 minutes for rebuttal; do you wish to do so?

20 MR. HERMAN: Yes, Your Honor. I'd like to reserve four minutes,  
21 if I could.

22 DIRECTOR IANCU: Four minutes. Very good. So we'll do that.  
23 Chief Judge Boalick is in charge of the clock.

24 CHIEF JUDGE BOALICK: Ready to go.

1 DIRECTOR IANCU: We'll see what he does. Are you ready?

2 MR. HERMAN: I am. Thank you, Director.

3 DIRECTOR IANCU: Please.

4 MR. HERMAN: Distinguished members of the Precedential Opinion  
5 Panel, may it please the panel, the AIPLA, the only neutral party that  
6 submitted an amicus brief in this matter, because they simply want to have a  
7 good system in place that is fair to all, came out almost identically to the  
8 Patent Owner in this case.

9 In contrast, other amici who have, generally have a vested interest in  
10 killing patents, came out on the side of Petitioner. In doing so, they largely  
11 try to scare this panel with a parade of horrors that could happen if the  
12 Board isn't allowed to raise their own invalidity issues sua sponte.

13 But all of these arguments about unexamined claims, about collusion  
14 between the Patent Owner and the Petitioner, about Petitioner supposedly  
15 running out of money to combat a motion to amend after they initiated the  
16 proceeding in the first place by bringing a petition and harm to the public,  
17 these are all illusory. There is no evidence that any of these horrible things  
18 have ever happened, and there are other mechanisms for the PTO to use if  
19 one of these situations arises.

20 But importantly here, Your Honors, if you look at what actually  
21 happened in the underlying dispute between DynaEnergetics and Hunting  
22 Titan, you can see what can happen in a real parade of horrors that can  
23 happen if this body decides that the Board can raise issues sua sponte.

24 In this case, the Petitioner said that the original claims were  
25 anticipated, the Patent Owner disagreed but filed a contingent motion to  
26 amend to remove the anticipation argument and the Petitioner basically

1 agreed, because they didn't raise anticipation as a defense.

2 At the hearing, Your Honors, the Board and the Patent Owner got into  
3 a heated debate about the obviousness of the amended claims and about  
4 whether secondary considerations applied, whether there was motivation to  
5 combine.

6 There was no mention or even a hint that the proposed substitute  
7 claims could be found invalid as anticipated. Yet lo and behold, in the final  
8 written decision, the Board, apparently agreeing they couldn't find the  
9 substitute claims obvious, instead found that the claims were invalid based  
10 on the, quote, anticipatory nature of the Schacherer reference.

11 Your Honors, we submit that that's somewhere in between 102 and  
12 103, kind of a 102.5 statute, that can happen when the Board is allowed to  
13 sua sponte raise arguments that were not raised by either side.

14 DIRECTOR IANCU: Let me ask, interject a question, there, and it  
15 relates to both points you have already made.

16 Assume that the Board, the panel of three APJs, does actually think,  
17 based on the records and their experience, that there is -- the claims are  
18 anticipated, the amended claims are anticipated.

19 MR. HERMAN: Yes.

20 DIRECTOR IANCU: What are they to do, close their eyes and say,  
21 "Well, too bad. The petitioner didn't make the right argument"?

22 MR. HERMAN: Well, Your Honor, that's correct. There is no  
23 statutory authority for the Board to raise their own issue sua sponte, and this  
24 has been raised head-on in the SAS - Iancu decision, and so I think the  
25 Board would, under your direction, you are permitted to initiate an ex parte  
26 reexam, and that's what can be done if the Board is really that confident that

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