

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICRO MOTION, INC.,
Petitioner,

v.

ENDRESS + HAUSER FLOWTEC AG,
Patent Owner.

Case PGR2018-00017
Patent 9,593,973 B2

Before JEREMY J. CURCURI, LYNNE E. PETTIGREW, and
MIRIAM L. QUINN, *Administrative Patent Judges*.

CURCURI, *Administrative Patent Judge*.

DECISION
Denying Institution of Post Grant Review
35 U.S.C. § 324

I. INTRODUCTION

Petitioner filed a Petition for post-grant review of claims 1–56 of U.S. Patent No. 9,593,973 B2 (Ex. 1001, “the ’973 patent”). Paper 2 (“Pet.”). Patent Owner filed a Preliminary Response. Paper 7 (“Prelim. Resp.”). Based on the information presented, we determine that Petitioner has not demonstrated that the ’973 patent is eligible for post-grant review.

Accordingly, we deny the Petition.

A. Related Proceedings

Petitioner states “[t]here are no related judicial or administrati[ve] matters having any b[e]aring on this matter.” Paper 4 (“Mandatory Notice”).

B. The Priority Applications Relating to the ’973 Patent

The ’973 patent issued from an application (No. 14/758,323, “the ’323 application”) that was filed on November 26, 2013 under the Patent Cooperation Treaty (PCT). Ex. 1001, Appl. No. (21), PCT Filed (22).

The ’973 patent claims an earliest possible priority date of December 30, 2012 based on the filing of a German application (DE 10 2012 025 246, “the German ’246 application”). Ex. 1001, Foreign Application Priority Data (30). The ’973 patent also claims priority to another German application (DE 10 2013 102 711, “the German ’711 application”), filed March 18, 2013. Ex. 1001, Foreign Application Priority Data (30).

C. The Claimed Subject Matter of the ’973 Patent

The ’973 patent, entitled “Measuring Transducer of Vibration-Type as well as Measuring System Formed Ther[e]with,” relates to a Coriolis-force mass-flow meter. Ex. 1001, Title, Abstract.

D. Illustrative Claim

Claim 1, the only independent claim, is illustrative of the claimed subject matter and is reproduced below:

1. A measuring transducer of the vibration-type for a Coriolis mass flow measuring device, which measuring transducer comprises:

a measuring tube exhibiting an inlet-side, first tube end and an outlet-side, second tube end, and exhibiting a tube wall with a predetermined wall thickness and with a lumen surrounded by said tube wall and extending between said first and said second tube ends, which measuring tube is adapted to guide a flowing medium in its lumen, and during guiding the flowing medium to be caused to oscillate about a static resting position for producing Coriolis forces;

a first support element, said first support element exhibiting a first support end connected mechanically with said first tube end of said measuring tube and said first support element exhibiting a second support end connected mechanically with said second tube end of said measuring tube;

a second support element, said second support element is laterally spaced from said measuring tube and is mechanically connected with said first support end of said first support element with a first support end as well as also with the second support end of said first support element with a second support end;

an oscillation exciter; and

at least a first oscillation sensor, wherein:

the measuring transducer exhibits a wanted mode, namely an oscillatory mode, in which said measuring tube can execute wanted oscillations, namely oscillations about its said static resting position suitable for producing Coriolis forces with a wanted frequency corresponding to a resonant frequency of said wanted mode;

said oscillation exciter is adapted to excite said wanted oscillations of said measuring tube; and

said first oscillation sensor includes a first sensor component affixed externally on said measuring tube, and a second sensor component mounted on said second support element, and said first oscillation sensor is adapted to register

movements of oscillations of said measuring tube relative to said second support element, and to convert said registered movements into a first oscillatory signal representing oscillations of said measuring tube.

Ex. 1001, 23:25–67.

E. Grounds of Unpatentability

Petitioner raises six grounds of unpatentability. Pet. 4–5. Our decision, however, turns on the threshold question of whether the '973 patent is eligible for post-grant review. Pet. 23–30. Because we ultimately conclude that the patent is not eligible, we do not reach the merits of any asserted ground of unpatentability.

II. ANALYSIS

A. Statutory Analysis Pertaining to Post Grant Review Eligibility

Post-grant review is available only for patents “described in section 3(n)(1)” of the Leahy-Smith America Invents Act (“AIA”), Pub L. No. 112-29, 125 Stat. 284 (2011). AIA § 6(f)(2)(A). Those are patents that issue from applications “that contain[] or contained at any time . . . a claim to a claimed invention that has an effective filing date in Section 100(i) of title 35, United States Code, that is on or after” “the expiration of the 18-month period beginning on the date of the enactment of” the AIA. *Id.* § 3(n)(1).

Because the AIA was enacted on September 16, 2011, post-grant review is available only for patents that issue from applications that, at one point, contained at least one claim with an “effective filing date,” as defined by 35 U.S.C. § 100(i), on or after March 16, 2013. Our rules require that Petitioner certify that the challenged patent is available for post-grant review. 37 C.F.R. § 42.204(a) (“petitioner must certify that the patent for which review is sought is available for post-grant review”). Petitioner includes the

requisite certification and, further, asserts that at least one claim of the '973 patent has an effective filing date after March 16, 2013. Pet. 23–30, 82. However, Petitioner bears the burden of proving that the '973 patent is subject to the first-inventor-to-file provisions of the AIA and eligible for post-grant review. *US Endodontics, LLC v. Gold Standard Instruments, LLC*, Case PGR2015–00019, slip op. at 9–10 (PTAB Dec. 28, 2016) (Paper 54).

As stated above, the '973 patent claims priority to two German applications: the German '711 application (March 18, 2013) and the German '246 application (December 30, 2012). Because the critical date in eligibility analysis is March 16, 2013, our analysis here focuses on Petitioner's arguments concerning whether any of the claims of the '973 patent cannot claim priority to the German '246 application, which, of the two German applications, is the only one with a filing date before the March 16, 2013 critical date. Therefore, if all of the 56 claims of the '973 patent are entitled to priority to the German '246 application, then the '973 patent is *not eligible* for post-grant review.

Petitioner advances two principal arguments in support of its position that at least one claim of the '973 patent has an effective filing date after March 16, 2013. First, Petitioner argues that the priority claim to the German '711 application, filed March 18, 2013, is an admission that at least one claim of the '973 patent has an effective filing date after March 16, 2013. Pet. 24. Second, Petitioner argues that claim 29 of the as-filed claims, filed October 28, 2015, when read as depending from claim 17, is not enabled by the '246 German application. Pet. 24–30.

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