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I. Patentability Requirements

A. Prior Art Invalidity

1. Reference Disclosure

a. Disclosing negative limitations

Negative active ingredient limitation met because “it was reasonable for the Board to find that, in the context of Garrett, a skilled artisan would recognize that the reference discloses a complete formulation—excluding the possibility of an additional active ingredient.” *Almirall, LLC v. Amneal Pharms. LLC*, 2020-2331, 3/14/22.

b. Disclosure to POSITA

“[T]he perspective of a person of skill in the art is important in both the written description and the anticipation inquiries.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

i. Plain Text

“The Board’s findings are supported by the plain text of these references We therefore find that these findings were supported by substantial evidence.” *Broadcom Corp. v. Int’l Trade Comm’n*, 2020-2342, 3/8/22.

2. Anticipation (§ 102)

a. On Sale Bar

i. Commercial Offer for Sale

“Because the facts are not disputed, we review the question of whether this particular communication constitutes a commercial offer for sale (a question of law) without deference.” The letter was found to be a commercial offer for sale because it “was directly responding to a “request for quotation”” from the company to whom it was addressed and included “a number of necessary terms typical for a commercial contract.” *Junker v. Medical Components, Inc.*, 2021-1649, 2/10/22.

“[T]he letter—which specifies multiple sized products for sale, different bulk pricing options available for each product, payment terms (net 30-day basis), and delivery terms and conditions (bulk shipment, non-sterile, FOB)—contains all the required elements to qualify as a commercial offer for sale.” *Junker v. Medical Components, Inc.*, 2021-1649, 2/10/22.

“[T]he fact that the letter uses the word “quote” three times is an important fact supporting the district court’s conclusion that the letter is a quotation, not a definite offer.” *Junker v. Medical Components, Inc.*, 2021-1649, 2/10/22.

3. Obviousness (§ 103)

a. Relationship to Anticipation

“[T]he Board expressly analyzed obviousness . . . and did not apply an improper analysis combining obviousness and anticipation as Broadcom asserts. Satisfying a more stringent standard does not undermine satisfaction of a lesser standard.” *Broadcom Corp. v. Int’l Trade Comm’n*, 2020-2342, 3/8/22.

b. Differences Between the Prior Art and the Claims at Issue

i. Prior Art Overlaps with Claimed Range

The Federal Circuit concluded that “the Board did not err in applying a presumption of obviousness of overlapping ranges”, even though the prior art ranges were of “carbomer thickeners”, not the claimed A/SA agents, because of “factual findings of similarity between carbomers and A/SA agents.” *Almirall, LLC v. Amneal Pharms. LLC*, 2020-2331, 3/14/22.

ii. Whether All Limitations Disclosed

Even though the Board “acknowledged that neither [reference] specifically taught commanding an autopilot to perform the claimed flight maneuvers of increasing pitch, reducing roll, or changing attitude upon receipt of a parachute deployment request,” the CAFC concluded that there was substantial evidence where one reference taught an autopilot receiving a parachute request and another suggested the maneuvers be performed (not necessarily by an autopilot) “to achieve safe and beneficial deployment of a ballistic parachute.” *Fleming v. Cirrus Design Corp.*, 2021-1561, 3/10/22.

“Because this limitation is not taught by Kiuchi, it must be taught by Van Hook or the combination of Kiuchi and Van Hook for there to be obviousness.” *Broadcom Corp. v. Int’l Trade Comm’n*, 2020-2342, 3/8/22.

c. Motivation/Apparent Reason to Combine/Modify

i. Government Urging

“[T]he FDA in 2012 discussed its “interest in improving the MAD Kit” and encouraged the industry to “develop an intranasal naloxone product that could be FDA approved.” “A skilled artisan, therefore, would have been motivated to develop an intranasal naloxone product.” *Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc.*, 2020-2106, 2/10/22 (citations omitted).

ii. Expert Testimony

“Dr. Smyth did not expressly provide a reason to combine or modify the prior art. But this does not warrant reversal.” “Since the Supreme Court’s decision in *KSR*, we have recognized that an obviousness case does not require expert testimony for every piece of

the analysis.” Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc., 2020-2106, 2/10/22 (citation omitted).

d. Reasonable Expectation of Success

i. Forfeiture by Patent Challenger

“Although Broadcom now argues that the Board erred in not discussing a reasonable expectation of success, Broadcom never raised that issue before the Board. Given Broadcom’s silence, it cannot show that the Board erred on that issue.” Broadcom Corp. v. Int’l Trade Comm’n, 2020-2342, 3/8/22.

e. Secondary Indicia of Nonobviousness

“Although the district court’s analysis of the objective indicia in the opinion follows its discussion of the prima facie case of obviousness, there is nothing inherently wrong with that.” Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc., 2020-2106, 2/10/22.

i. Copying

Declaration of inventor asserting copying found insufficient because it lacked meaningful infringement analysis. Fleming v. Cirrus Design Corp., 2021-1561, 3/10/22.

ii. Unexpected Results

“[A] skilled artisan would have therefore expected that using a permeation enhancer such as BZK would result in increased bioavailability compared to a formulation without a permeation enhancer, such as the AntiOp formulation, and thus the increase in bioavailability was not an “unexpected” result. We see no clear error in the district court’s finding.” Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc., 2020-2106, 2/10/22.

iii. Presumption of Nexus

“The coextensive requirement does not require a patentee to prove perfect correspondence between the product and a patent claim . . . unclaimed features, like “a ‘critical’ unclaimed feature that is claimed by a different patent and that materially impacts the product’s functionality,” indicate that the claim is not coextensive with the product.” “A patent challenger may not rebut the presumption of nexus with argument alone.” Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc., 2020-2070, 2/4/22.

iv. Weighing with other *Graham* Factors

“Although, as explained below, we agree that the district court erred in its analysis, we conclude that this error was harmless because the evidence Adapt introduced is not sufficient to overcome the strong case of obviousness as a matter of law.” “At best, the asserted “longfelt need” here, as most strongly evidenced by the FDA’s statements in 2012, began just three years before the priority date of the patents-in-suit. This need, even if

unmet, was not so long felt that it overcomes the strong case of obviousness” Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc., 2020-2106, 2/10/22.

f. Teaching Away

Even if the prior art advises against a claim limitation in many of the situations addressed by the claimed invention, “a reasonable factfinder could nonetheless conclude that the prior art does not suggest to the skilled artisan that an autopilot should *never* be used in any emergency situation for any aircraft.” “That the prior art cautioned pilots not to use an autopilot in some emergency situations on some aircraft does not mean that the skilled artisan would have been dissuaded from doing so in all emergency situations on all aircraft.” Fleming v. Cirrus Design Corp., 2021-1561, 3/10/22 (emphasis added).

“The district court, sitting as the fact finder, was entitled to consider the teachings of the prior art as a whole in finding that the prior art did not teach away from the claimed invention.” Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc., 2020-2106, 2/10/22.

g. Avoiding Hindsight

“The Board and Commission decisions refer to what “is” obvious. Because § 103 addresses what “would have been” obvious, we recommend usage of the statutory language that looks back to the past in order to avoid the appearance of hindsight bias.” Broadcom Corp. v. Int’l Trade Comm’n, n.2, 2020-2342, 3/8/22.

B. Section 282

1. References/Arguments Before the Examiner

CAFC gave weight to examiner’s withdrawal of indefiniteness rejection after amendment. “Actions by PTO examiners are entitled to appropriate deference as official agency actions, for the examiners are deemed to be experienced in the relevant technology as well as the statutory requirements for patentability.” Nature Simulation Sys., Inc. v. Autodesk, Inc., 2020-2257, 1/27/22.

C. Invalidity Based on § 112

1. Written Description (¶ 1)

a. Aspirational Claims

“[T]he jury could reasonably give little weight to evidence that CSIRO did not produce LC-PUFA in canola until after the 2004 priority date and continued working for years thereafter on such production. Because actual reduction to practice is not a requirement of possession, delay in actual production here does not negate constructive possession at the time of filing.” “The claims do not require commercially significant or any specific levels of LC-PUFA production.” BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation, 2020-1415, 3/15/22.

Substantial evidence for verdict denying written description defense consisted of “expert testimony explaining that achieving [the disclosed functionality] was *more* than just a steppingstone to—and was, in fact, highly predictive of—achieving [the claimed functionality].” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22 (emphasis in original).

b. Alternative Species

“The Prophetic Trial’s disclosure of two other dosages does not detract from the written description of the claimed dose. Nor do disclosures of dosage ranges in other areas of the specification lead away from the claimed dose.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

c. Unclaimed Properties

Appellant argued that no one, including the inventors, knew that the claimed dose would be effective as of the priority date. “That argument fails for two reasons. First, efficacy is not a requirement of the claims.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

d. Negative Limitations

“A specification that describes a reason to exclude the relevant negative limitation is but one way in which the written description requirement may be met.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

“The district court credited this expert testimony.” “Based on that evidence, the court concluded that the “absence of an immediately preceding loading dose from the specification, and from the Prophetic Trial, would tell a person of skill that loading doses are excluded from the invention.” We discern no clear error in that finding.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

e. Four Corners v. Expert/Fact Testimony

A “patentee may rely on information that is wellknown in the art to the extent it informs how a relevant artisan would reasonably understand what is actually described in the specification.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22 (internal quotations omitted).

“We find no clear error in the district court’s reliance on expert testimony in finding description of the 0.5 mg daily human dose in the EAE experiment results.” *Novartis Pharm. Corp. v. Accord Healthcare Inc.*, 2021-1070, 1/3/22.

D. Section 101

1. Abstract Idea Exclusion

a. Application of Mathematical Algorithm(s)

“It claims more than a mathematical formula because it is directed to an efficient, improved method of encoding data that relies in part on irregular repetition. This alleged improvement is not patent ineligible simply because it employs a mathematical formula.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

II. Other Defenses

A. License/Covenant Not to Sue

1. Express

a. Term of License

“Section 3.2 of the license agreement unambiguously grants a term license. In the first sentence, Wi-LAN grants Intel a worldwide license to engage in Licensed Activities only “for the Term License Period,” which expired January 21, 2017. The introductory phrase of the next sentence explains the purpose of the sentence: “[f]or clarity.” The sentence goes on to clarify that “(i) the licenses granted . . . with respect to the Licensed Activities that were actually engaged in during the Term License Period shall survive the expiration of the Term License Period.” Thus, Intel continues to enjoy protection for Licensed Activities, such as past sales, engaged in prior to the license’s expiration.” *Apple Inc. v. Wi-LAN Inc.*, 2020-2011, 2/4/22.

B. Improper Venue

1. Mandamus

“The district court held venue was proper over each car distributor under 28 U.S.C. § 1400(b).” “Because there has been disagreement on this issue in the district courts, we deem it appropriate to now take up the issue.” *In re Volkswagen Group of America, Inc.*, 2022-108, 3/9/22.

2. Third Party Defendants

“CSIRO contends that 28 U.S.C. § 1400(b) does not provide venue protection to a third-party counterclaim defendant We are persuaded.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

3. Imputation of Infringing Acts

“[Appellant] does argue that it is not itself an indirect infringer . . . that argument does not address imputation for purposes of liability for direct infringement or for purposes of

meeting the § 1400(b) standard.” BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation, 2020-1415, 3/15/22.

4. Agents

“[Appellee] has cited no evidence that undermines the franchise agreements’ provisions giving the dealerships full control over their day-to-day operations, such as sales. Thus, the terms and conditions set forth in the franchise agreements fail to give rise to an agency relationship between the Petitioners and dealerships when it comes to selling cars to consumers.” In re Volkswagen Group of America, Inc., 2022-108, 3/9/22 (citations omitted).

C. No Ownership/Standing (see also II.C.2)

1. Assignment

a. Scope of Intellectual Property Definition

“[T]he phrase “intellectual property subsisting in . . . Joint Results” must refer to . . . patent rights—which are defined by patent claims.” “But it cannot reasonably be said that merely “drawing on the lessons” of the Evaluation work to come up with new and nonobvious inventions . . . makes those inventions inherent in or an element of the results, data, or information derived from the Evaluation work.” BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation, 2020-1415, 3/15/22.

III. Literal Infringement

A. Capability

Infringement verdict upheld where claim required a connection, plaintiff’s expert testified that hardware bus was the connection, and defendant argued that the accused device “must be connected to a network to receive parameters to build “the ‘software structures’ necessary to establish a connection.” Apple Inc. v. Wi-LAN Inc., 2020-2011, 2/4/22.

B. Functional and Means plus Function Language

1. Multiple Components Together Performing the Function

Denial of JMOL affirmed where patentee’s expert argued that function occurred because “this is exactly what one sees when one looks at the “overall architecture” (“whole architecture”), not each gate alone.” California Inst. of Tech. v. Broadcom Ltd., 2020-2222, 2/4/22.

IV. Relief

A. Willfulness

1. JMOL/Summary Judgment

JMOL of no willfulness affirmed where patents issued after DJ was filed and only evidence was that “[infringer’s] witnesses were aware and kept track of [patentee’s] patents and that [infringer] did not assert its co-ownership defense” until after patents issued. *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

B. Injunction

1. Preliminary Injunction

a. Likelihood of Success

i. Invalidity

“Myco need not, to defeat a preliminary injunction, prove invalidity by clear and convincing evidence, as it must to succeed at trial. It need only present evidence showing that there is a substantial question of validity despite the presumption of patent validity and BlephEx’s arguments in favor of validity, such that BlephEx’s likelihood of success is in question.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22.

“Myco offers nothing other than attorney argument as to what the highly skilled artisan would do. Although Myco need not present the kind of evidence that would be required at trial, a substantial question of validity cannot be manufactured through mere supposition about what an artisan with highly advanced skill in the medical field might do.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22.

b. Balance of Equities

“[P]reservation of the status quo is not the sole objective of preliminary injunctions. Preliminary injunctions also serve to prevent ongoing trespasses during the pendency of an infringement case.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22.

i. Post-Sales Issuance of Patent

“Even where a patent is applied for and granted after the allegedly infringing product enters the market, a preliminary injunction may still be used to prevent future trespasses on the patent, so long as the district court correctly applies the relevant factors.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22.

c. Scope of Injunction

District court’s rejection of use-specific injunction in favor of blocking all sales affirmed where the district court did not abuse its discretion in concluding that sales would result in infringement because “two expert declarations that [accused infringer] avers present evidence of potentially non-infringing uses of the [device] do not indicate that the device has ever actually been so used. And, as the district court found, those declarations are contradicted by other expert testimony.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22.

2. Injunction to Execute Settlement Agreement

“The only possible agreement on the Covered Products term was the January agreement. In ordering that the parties sign an agreement including a different definition of “Covered Products,” the district court committed clear error.” *PlasmaCAM, Inc. v. CNCElectronics, LLC*, 2021-1689, 2/3/22.

3. Injunctions Against Other Proceedings

a. Injunctions Against IPR Petitions

Denial of preliminary injunction by Judge Stark reversed where “In this case, the plain language of the forum selection clause in Section 10 of the MCA resolves the dispute.” “Under the plain language of Section 10, Sarepta was required to bring all disputes regarding the invalidity of Nippon Shinyaku’s patents—including the allegations and contentions contained in Sarepta’s IPR petitions—in the District of Delaware.” “[P]arties are entitled to bargain away their rights to file IPR petitions, including through the use of forum selection clauses.” *Nippon Shinyaku Co. v. Sarepta Therapeutics, Inc.*, 2021-2369, 2/8/22.

C. ITC Exclusion and Civil Penalty Orders

1. Civil Penalties

“We review the ITC’s denial of a petition to rescind or modify an order pursuant to 19 C.F.R. § 210.76 for an abuse of discretion.” *DBN Holding, Inc. v. Int’l Trade Comm’n*, 2020-2342, 3/1/22.

“[T]he ITC did not abuse its discretion in declining to rescind or modify its civil penalty order in view of the asserted claims’ invalidation.” *DBN Holding, Inc. v. Int’l Trade Comm’n*, 2020-2342, 3/1/22.

D. Joint and Several Liability of Infringers in a Supply Chain

“[I]n the absence of some evidence that companies in the positions of Broadcom and Apple would engage in such separate negotiations and in the absence of additional facts that might justify separate and different treatment of the same chips at different levels of the supply chain, the mere fact that Broadcom and Apple are separate infringers alone does not support

treating the same chips differently at different stages in the supply chain and does not justify submitting such a two-tier damage theory to the jury.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

E. Reasonable Royalty

1. Established and Comparable Royalties/License Agreements

a. Adjusting Comparable License with More Patents

Federal Circuit rejected expert argument that asserted patents were “key patents” in comparable license agreements and royalty rates would only need to be adjusted downward by a limited amount. “None of the three license agreements treats the ’757 patent as a key patent, and no testimony [or] negotiations suggested the contrary. For similar reasons, the record does not support that the Doro or Unnecto licenses treated the ’145 patent as a key patent.” “[Expert]’s methodological and factual errors in analyzing the comparable license agreements render his opinion untethered to the facts of this case. Thus, [expert]’s damages testimony should have been excluded.” *Apple Inc. v. Wi-LAN Inc.*, 2020-2011, 2/4/22.

2. Post-Discovery Sales/Post Verdict Sales/Ongoing Royalties

Future royalty order vacated because the Court found certain royalty agreements irrelevant on a basis that also applied to agreements it found relevant and “[t]he seeming inconsistency at a key starting point of the royalty analysis warrants a remand for reconsideration.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

F. Lost Profits

1. Extraterritorial Profits

Halo was not “a blanket holding that design wins arising out of a sales cycle can never be domestic transactions.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

“[T]he district court expressly instructed the jury that Caltech had the burden of proving that infringement occurred in the United States. (instructing the jury that “An alleged infringer is liable for direct infringement of a claim if the patent holder proves by a preponderance of the evidence that the infringer, without the patent holder’s authorization, imports, offers to sell, sells, or uses [the accused products] within the United States,” and explaining the factors for determining whether a sale occurs in the United States). This was a proper and sufficient jury instruction with respect to the applicable burdens on the territoriality of the sales at issue.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

V. Claim Construction

A. Claim Language

1. Plain and Ordinary Meaning

a. Grammar Rules

“In accordance with common English usage, we presume a plural term refers to two or more items.” *Apple Inc. v. MPH Techs. OY*, 2021-1532, 3/9/22.

b. How the Claim Could Have Been Written

“Quanergy emphasizes that Velodyne chose to claim only “lidar” instead of “pulsed time-of-flight lidar.” But this argument assumes its conclusion—that the term “lidar” is broader than the Board’s construction “pulsed time-of-flight lidar.” As noted, in light of the intrinsic evidence, a skilled artisan would interpret the term “lidar” to mean pulsed time-of-flight lidar.” *Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, 2020-2070, 2/4/22.

c. Exceptions

i. Adding Modifiers to Claim Language

“In light of the specification, a skilled artisan would interpret lidar to mean pulsed time-of-flight lidar.” “As noted, the specification focuses exclusively on pulsed time-of-flight lidar.” *Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, 2020-2070, 2/4/22.

2. Open/Closed Claims, Generic and Negative Limitations

a. Identifiers: said, the, a, at least one, each, unitary, plurality, first, member, component, particular

“The inventors, in the independent claims, did not choose to claim a device with a “new” or “different” magazine catch bar, but instead a device with “a magazine catch bar,” which, by its ordinary meaning, could be either the removed catch bar or a new or different catch bar.” *Evolution Concepts, Inc. v. HOC Events, Inc.*, 2021-1963, 1/14/22.

3. Section 112(f)

a. When Applied

i. Evidentiary Impact of Presumption

“To overcome this presumption, Target had to show, by a preponderance of the evidence, that persons of ordinary skill in the art would not have understood the “code”/“application” limitations to connote structure in light of the claim as a whole.” *Dyfan, LLC v. Target Corp.*, 2021-1725, 2/24/22.

ii. Software Limitations

“[B]ecause the recited functions can be performed by conventional off-the-shelf software, a person of ordinary skill in the art would have understood the alleged means-plus-function “code” limitations in the asserted claims to connote structure.” *Dyfan, LLC v. Target Corp.*, 2021-1725, 2/24/22.

iii. Overcoming Presumption Against 112(f)

ALJ reversed because CAFC concludes that “lifter member” “is a non-structural generic placeholder (member) modified by functional language (lifter)” and invokes 35 U.S.C. § 112 ¶ 6. *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 2020-1046, 1/21/22.

iv. Specific Nonce Terms

“We agree that, in a vacuum, the term “system” may well be a nonce term. But in this case, the claim language itself defines the “system” to include specified structure.” *Dyfan, LLC v. Target Corp.*, 2021-1725, 2/24/22.

v. Expert Testimony

District court’s 112, 6 conclusion reversed where “Dr. Goldberg testified that the term “application” would have been commonly understood to mean a “computer program intended to provide some service to a user,” and that developers could have, at the relevant time, selected existing “off-the-shelf software” to perform specific services and functions.” “Dr. Goldberg explained that a person of ordinary skill would understand that “code” is “a bunch of software instructions.”” “Dr. Goldberg’s un rebutted testimony demonstrates that the “code”/“application” limitations here connote a class of structures to a person of ordinary skill.” *Dyfan, LLC v. Target Corp.*, 2021-1725, 2/24/22.

4. Functional and Structural Language

a. Structure Elements Limited by Method of Manufacture

“Here, nothing in the specification suggests that factory (or OEM) provenance of a bar disqualifies it from being part of the invention if, as a structural matter, it is a magazine catch bar under the ordinary meaning.” *Evolution Concepts, Inc. v. HOC Events, Inc.*, 2021-1963, 1/14/22.

b. Indirect/Direct Performance of Function

Apple argued that claim language covered sending a message indirectly, but Federal Circuit disagreed. “The phrase identifies the sender (i.e., the mobile computer) and the destination (i.e., the first network address). The proximity of the concepts links them together, such that a natural reading of the phrase conveys the mobile computer sends the secure message *to* the first network address.” *Apple Inc. v. MPH Techs. OY*, 2021-1532, 3/9/22 (emphasis added).

5. Effect of Other Limitations in Claim

a. Absent Modifiers Should Not Be Construed Into Existence

Where claim did not include process of achieving the claimed outcome, Federal Circuit affirmed construction allowing any process of achieving the claimed outcome. “The district court correctly observed that the claims require repeating but do not specify how the repeating is to occur.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

B. Written Description

1. Lexicography

a. Requirements

Specification’s statement that “[t]his bottom position is also sometimes referred to herein as the “driven position”” found sufficient to conclude that “[a]cting as their own lexicographers, the patentees defined “driven position”” and “[b]ecause the patentee clearly defined “driven position” in the written description, that definition controls.” *Kyocera Senco Indus. Tools Inc. v.Int’l Trade Comm’n*, 2020-1046, 1/21/22.

b. Insufficient Definition

“[Appellant] points to four aspects of the intrinsic record that allegedly show this redefinition: first, the patents’ interchangeable use of CPE and subscriber unit; second, the patents’ use of CPE as the sole embodiment of the “subscriber unit”; third, the patentee’s preliminary amendment that replaced claims reciting CPE with claims reciting “subscriber unit”; and fourth, the patentee’s interchangeable use of subscriber unit with other similar terms in related patents. We are not persuaded that the record in this case shows that the patentee clearly set forth this definition of subscriber unit.” *Apple Inc. v. Wi-LAN Inc.*, 2020-2011, 2/4/22.

2. Disclosed Embodiment(s)

a. Presumption of Coverage Overcome

i. Multiple Embodiments

“Thus, the written description arguably discloses multiple embodiments.” “The patentees were free to claim only the latter embodiment.” *Kyocera Senco Indus. Tools Inc. v.Int’l Trade Comm’n*, 2020-1046, 1/21/22.

3. Interchangeable Use of Terms

“The fact that a CPE is an example of a subscriber unit, however, does not show those terms are interchangeable. And there is no evidence that the patents accord CPE the same scope as subscriber unit.” *Apple Inc. v. Wi-LAN Inc.*, 2020-2011, 2/4/22.

C. Prosecution History

1. Terms Added During Prosecution

“Merely replacing one claim term with another during prosecution does not alone mean the terms are equivalent or interchangeable.” *Apple Inc. v. Wi-LAN Inc.*, 2020-2011, 2/4/22.

D. Extrinsic Evidence

1. Means Plus Function Determination

“In addition, because this inquiry turns on the understanding of a person of ordinary skill in the art, we often look to extrinsic evidence when determining whether a disputed limitation would have connoted structure to a person of ordinary skill.” *Dyfan, LLC v. Target Corp.*, 2021-1725, 2/24/22.

E. Timing of Construction and Parties’ Positions

1. Waiver

a. Changing from Ordinary Meaning Constructions

“Below, the parties agreed to a plain-and-ordinary-meaning construction. And Koki forwarded its understanding of that meaning to the ALJ, Commission, and now to us on appeal.¹⁰ Thus, Koki has not failed to preserve its arguments on appeal.” *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 2020-1046, 1/21/22.

F. Limited and Ordinary Meaning Constructions

1. Requirement to Construe Disputed Terms

“[T]he parties . . . dispute whether the district court erred in refusing to instruct the jury that the ’781 patent’s “variable number of subsets” limitation requires irregular repetition. The district court’s sole ground for refusing to instruct the jury of the interpretation the parties and the court reached during summary judgment was to avoid “confus[ing] the record on this issue.” This was error and requires remand for a new trial on infringement.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22 (citations omitted).

VI. Procedural Law

A. Setting Aside Judgment (60(b))

1. PTO and District Court Interactions

Federal Circuit affirmed ruling that statements by patentee during reexamination did not justify overturning infringement judgment under Rule 60(b). *Opticurrent, LLC v. Power Integrations, Inc.*, 2021-1712, 2/23/22 (nonprecedential).

B. Discovery/Evidence

1. Expert Testimony

“Because Dr. Pratt lacked ordinary skill in the art, the ALJ abused his discretion by admitting any of Dr. Pratt’s testimony.” “To offer expert testimony from the perspective of a skilled artisan in a patent case—like for claim construction, validity, or infringement—a witness must at least have ordinary skill in the art. Without that skill, the witness’ opinions are neither relevant nor reliable.” *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 2020-1046, 1/21/22.

2. Protective Orders and Sealed Papers

“[N]o rule of law or binding precedent says that the public is generally entitled to know what consideration a patentee receives for licensing its patent.” *Uniloc USA, Inc. v. Apple Inc.*, 2021-1568, 2/9/22.

C. International Trade Commission/Customs

1. Domestic Industry

“Broadcom failed to identify any specific integration of the domestic industry SoC and the “clock tree driver” firmware, or a specific location where the firmware was stored. Broadcom does not challenge this finding, and instead introduces new theories that the Commission properly deemed waived. Because Broadcom failed to identify an actual article that practices claim 25, the Commission’s finding that Broadcom failed to satisfy the domestic industry requirement of Section 337 was supported by substantial evidence.” *Broadcom Corp. v. Int’l Trade Comm’n*, 2020-2342, 3/8/22.

D. Transfer to New Judge or Venue

1. Writ of Mandamus Granted

“We conclude that, under our precedent, the denial of transfer was a clear abuse of discretion, and we grant mandamus directing transfer.” *In re Netflix, Inc.*, 2022-110, 1/19/22 (EDTX, nonprecedential decision)

VII. Federal Circuit Appeals

A. New Arguments/Issues on Appeal/Forfeiture/Waiver/Judicial Estoppel

1. District Court/ITC Appeals

a. Arguments Not in Granted/Denied Motion on Appeal

i. Summary Judgment

“Apple and Broadcom did not argue at the summary judgment stage that Richardson99 was different from Luby such that it was not merely cumulative. The district court rejected the

arguments as to Richardson99 because the Appellants failed to put Caltech on notice of an independent inequitable conduct theory based on alleged differences between Richardson99 and Luby. The district court’s decision was not an abuse of discretion. We therefore affirm the grant of summary judgment of no inequitable conduct.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.

2. New Argument in Reply Brief

“Quanergy failed to challenge these findings in its opening brief, and its attempt to do so in its reply brief is untimely.” *Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, n.6, 2020-2070, 2/4/22.

3. Discretion to Reach Forfeited or Waived Issue

“But we reverse as to the broader genus claims, even though the parties devote almost no separate attention to those broader claims.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

B. Issue Preclusion and Unappealed Determinations

“In view of the unchallenged [on appeal] construction, substantial evidence supports the Board’s finding that RFC3104’s disclosure of adding a new header does not satisfy the substitution required by the claims.” *Apple Inc. v. MPH Techs. OY*, 2021-1532, 3/9/22.

C. Appellate Jurisdiction

1. Final Judgment

a. Orders Not Titled Final Judgment

“We conclude that the district court order to execute the settlement agreement constitutes either an appealable injunction or a final judgment.” “Whether an order is final does not depend on the specific “form of words” that it uses but instead on whether the order evinces the district court’s clear intent to end the case. [T]he record reveals that the parties did not contemplate further proceedings regarding any substantial matters. “Any future action required—either of the parties or the district court—was merely subsidiary and concerned the execution of the judgment, not the scope of the district court’s decision. We therefore have jurisdiction over this appeal.” *PlasmaCAM, Inc. v. CNCElectronics, LLC*, 2021-1689, 2/3/22 (citations omitted).

“The April 14 order on its face merely denies Evolusion a judgment in its favor; it does not order any judgment against Evolusion, let alone a final judgment.” “[W]e think it proper to treat the April 14 order as a final judgment. The order declares that Evolusion has no claim it can pursue, and in light of that declaration there was evidently nothing left to do in the litigation in district court after the April 14 order. Indeed, the clerk notified the Patent and Trademark Office of termination of the case on the same date, and the court’s official electronic docket records the case as closed. In these circumstances, we treat the April 14 order as a final judgment, which we have jurisdiction to review under

28 U.S.C. § 1295(a)(1).” *Evolution Concepts, Inc. v. HOC Events, Inc.*, 2021-1963, 1/14/22.

2. Appeal from Injunction under Section 1292

a. Enforcing Disputed Settlement Agreement

“Whether an order constitutes an injunction does not turn on whether the district court labeled it as such, but instead on “the substantial effect of the order made.”” “Even if we do not have appellate jurisdiction over the order to pay money, the district court’s order effectually mandated specific performance in requiring CNC to execute the settlement agreement.” *PlasmaCAM, Inc. v. CNC Electronics, LLC*, 2021-1689, 2/3/22.

D. Sanctions/Contempt

“[T]he bar is on notice that this court takes compliance with these protocols very seriously and that sanctions will likely be imposed if a future violation of the protocols takes place.” In re: *Violation of the Revised Protocols for In-Person Arguments*, 2022-9000, 2/25/22.

E. Cross-Appeals v. Alternate Bases for Affirmance

1. Conditional Appeals and Cross-Appeals

“At oral argument in this court, however, Alarm.com clarified that it was withdrawing any separate, “facial” challenge to the General Policy should we hold that it may pursue its §§ 706(2)(A), (C) challenges to the vacatur decisions themselves (including the General Policy “as applied”)—challenges Alarm.com undisputedly has standing to pursue. Because the premise of that withdrawal is met by our non-preclusion holding, we do not reach the standing question concerning the now-withdrawn “facial” challenge.” *Alarm.com Inc. v. Hirshfeld*, 2021-1712, 2/23/22.

F. Scope of Claim Construction Review

1. Claim Construction Modified on Appeal

a. Affirmed/Reversed Under New Construction

“This construction not only requires reversal of the grant of summary judgment to Juggernaut []. It also requires reversal of the denial of summary judgment of infringement [], because the parties have agreed that direct infringement [] is established if the term “magazine catch bar” is construed to include a factory-installed magazine catch bar.” *Evolution Concepts, Inc. v. HOC Events, Inc.*, 2021-1963, 1/14/22 (citing oral argument).

2. Deference to Underlying Fact Findings

“We review claim construction de novo and review any subsidiary factual findings based on extrinsic evidence for substantial evidence.” *Kyocera Senco Indus. Tools Inc. v. Int'l*

Trade Comm'n, 2020-1046, 1/21/22 (citing *Cisco Sys., Inc. v. Int'l Trade Comm'n*, 873 F.3d 1354, 1360 (Fed. Cir. 2017)).

G. Standards of Review and Record/Appendix on Appeal

1. Clear/Plain Error Review

a. Based on Analysis as a Whole

“[L]ooking at the district court’s analysis as a whole and the record evidence relied on throughout its analysis, we hold that the district court’s finding that a skilled artisan would have been motivated to combine the asserted prior art references to arrive at the claimed invention is not clearly erroneous.” *Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc.*, 2020-2106, 2/10/22.

2. Abuse of Discretion

a. Granting Preliminary Injunction

“[W]e review the question of whether a movant has shown a likelihood of success in showing patent validity for abuse of discretion. We review the underlying issue of whether the patent challenger’s asserted prior art raises a substantial question of validity, a factual issue, for clear error.” *BlephEx, LLC v. Myco Indus., Inc.*, 2021-1149, 2/3/22 (citations omitted).

b. Responding to Remand

“[T]he district court failed to follow our remand instructions to make particularized determinations as to whether the third-party licensing information sought to be sealed should be made public. That failure was an abuse of discretion.” *Uniloc USA, Inc. v. Apple Inc.*, 2021-1568, 2/9/22.

3. Review Judgments not Opinions

a. Findings of Fact and Conclusions of Law

“Federal Rule of Civil Procedure 52(a), however, requires only that a district court “find the facts specially and state its conclusions of law separately.” It does not require the district court to specifically articulate the legal standard it is applying in coming to its legal conclusion. Moreover, we review judgments, not opinions.” *Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc.*, 2020-2106, 2/10/22.

4. Appellant Misidentifies Challenged Issue

“Though framed as a claim construction issue, Apple does not dispute that the limitation requires Accordingly, we treat Apple’s argument as a substantial evidence challenge.” *Apple Inc. v. MPH Techs. OY*, n.8, 2021-1532, 3/9/22.

H. Harmless Error

1. Underlying Fact in Legal Issue

“Although, as explained below, we agree that the district court erred in its analysis, we conclude that this error was harmless because the evidence Adapt introduced is not sufficient to overcome the strong case of obviousness as a matter of law.” *Adapt Pharma Operations Ltd. v. Teva Pharms. USA, Inc.*, 2020-2106, 2/10/22.

2. Mistatement in Decision/Order/Opinion

“Such a ruling might well be error But the district court here ultimately did not so rule despite making some statements suggesting the irrelevance of future projections to past damages.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

3. Reaching Issue Despite Harmless Error Assertion

“We affirm that ruling, without needing to consider whether the district court’s statement that it would not enhance damages regardless of any willfulness verdict makes it unnecessary to review the Rule 50(a) willfulness ruling.” *BASF Plant Science, LP v. Commonwealth Scientific and Industrial Research Organisation*, 2020-1415, 3/15/22.

I. Precedent

1. Conflicting/Vacated/Implicitly Overruled Decisions

“Even in the Ninth Circuit, which has one of the stricter approaches to panel overruling, “the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” We approved that higher standard in *Troy v. Samson Manufacturing Corp.*, 758 F.3d 1322, 1326 (Fed. Cir. 2014), and conclude that that standard is satisfied in this case.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22 (citations omitted).

J. Remand Determination

1. Resolution in the First Instance

a. Denied Cross MSJ

“This construction not only requires reversal of the grant of summary judgment to Juggernaut []. It also requires reversal of the denial of summary judgment of infringement [], because the parties have agreed that direct infringement [] is established if the term “magazine catch bar” is construed to include a factory-installed magazine catch bar.” *Evolution Concepts, Inc. v. HOC Events, Inc.*, 2021-1963, 1/14/22 (citing oral argument).

VIII. Patent Office Proceedings

A. Reexamination

1. Interaction with IPRs

“[W]e hold that review of the Director’s § 315(e)(1) estoppel decisions here [in an ex parte reexam] is available to Alarm.com under the APA.” *Alarm.com Inc. v. Hirshfeld*, 2021-1712, 2/23/22.

B. Inter Partes Review

1. Prior Art to be Considered

“[T]he Board erred in concluding that AAPA [applicant admitted prior art] constitutes “prior art consisting of patents or printed publications” under § 311(b).” *Qualcomm Inc. v. Apple Inc.*, 2020-1558, 2/1/22.

“As a patentee’s admissions about the scope and content of the prior art provide a factual foundation as to what a skilled artisan would have known at the time of invention, it follows that AAPA may be used . . . for example, furnishing a motivation to combine, or supplying a missing claim limitation. Thus, even though evidence such as expert testimony and party admissions are not themselves prior art references, they are permissible evidence in an inter partes review for establishing the background knowledge possessed by a person of ordinary skill in the art.” *Qualcomm Inc. v. Apple Inc.*, 2020-1558, 2/1/22 (citations omitted).

2. Burdens of Proof

Federal Circuit rejects argument in which “DynaEnergetics faults the Board for identifying this limitation as uncontested, fully supported by the record, or effectively admitted, and contends that the Board’s conduct erroneously shifted the burden of persuasion from Petitioner to Patent Owner.” *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, 2020-2163, 2/24/22.

3. Amendments

“Hunting Titan argues that the Board had an obligation to sua sponte identify patentability issues for a proposed substitute claim based on the prior art of record, and that the Panel committed legal error by vacating the Board’s decision to do so in this case. We disagree.” “We are not determining the patentability of the proposed substitute claims, nor are we deciding whether the Panel abused its discretion in determining that the Schacherer anticipation ground was not readily identifiable and persuasive such that the Board should have sua sponte raised this ground of unpatentability.” *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, 2020-2163, 2/24/22.

Board should consider potential unpatentability of substitute claims based on evidence of record that is “readily identifiable and persuasive” even if those unpatentability grounds

are not raised by petitioner in response to the motion to substitute. *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, 2020-2163, 2/24/22.

4. Scope of Estoppel

“[E]stoppel applies not just to claims and grounds asserted in the petition and instituted for consideration by the Board, but to all claims and grounds not in the IPR but which reasonably could have been included in the petition.” *California Inst. of Tech. v. Broadcom Ltd.*, 2020-2222, 2/4/22.