

No. _____

In The
Supreme Court of the United States

—◆—
LARRY GOLDEN,

Petitioner,

v.

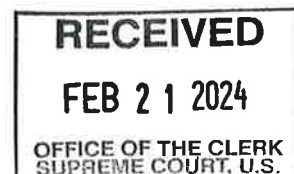
THE UNITED STATES,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

Considering the Supreme Court precedence and the Fifth Amendment of the U.S. Constitution, is it a violation of procedural due process to order the Patent Owner to prove the Government directly infringed Patent Owner's patents under 28 U.S.C. § 1498(a) as a predicate to showing the Government *appropriated or used* Petitioner's patented invention, without just compensation?

On record, the Government in DHS S&T BAA07-10 *Cell-All*, took property from the Petitioner and awarded contracts to LG, Samsung, Apple, and Qualcomm to develop and commercialize Petitioner's property supposedly for the benefit of the Government and for public use. "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo*, 125 S.Ct. at 2661. Therefore, is it a violation of the Fifth Amendment of the U.S. Constitution and the "Due Process" Clause for the Government to deprive Petitioner of his property, by contracting LG, Samsung, Apple, and Qualcomm to develop and commercialize Petitioner's property, without paying just compensation?

The Supreme Court explicitly recognized that patents are property secured by the Fifth Amendment Takings Clause. In *Horne v. Department of Agriculture*, 576 U.S. 350 [2015] the Court held that the Takings Clause imposes a "categorical duty" on the government

QUESTIONS PRESENTED—Continued

to pay just compensation whether it takes personal or real property. As the Supreme Court summed up in *James v. Campbell*, 104 U.S. 356, 358 (1882): “[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation”. The Fifth Amendment of the U.S. Constitution provides that “no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Federal Circuit were Petitioner Larry Golden and Respondent United States.

RELATED CASES

- *Golden v. Qualcomm, Inc.*, Petition for a Writ of Certiorari, 23-740, United States Supreme Court. Pending
- *Golden v. Google LLC*, 3:2022cv05246, California Northern District Court. Pending
- *Golden v. Qualcomm, Inc.*, 4:2022cv03283, California Northern District Court. Judgment entered March 15, 2023
- *Golden v. Intel Corporation*, 5:2022cv03828, California Northern District Court. Judgment entered November 22, 2022
- *Golden v. Apple, Inc.*, 3:2022cv04152, California Northern District Court. Judgment entered October 20, 2022
- *Golden v. Samsung Electronics America, Inc.*, 3:2023cv00048, California Northern District Court. Judgment entered June 8, 2023
- *Golden v. Samsung Electronics America, Inc.*, 0:2023cvpri02120, U.S. Court of Appeals, Federal Circuit. Pending
- *Golden v. Qualcomm Incorporated*, 0:2023cvpri01818, U.S. Court of Appeals, Federal Circuit. Judgment entered October 10, 2023

RELATED CASES—Continued

- *Golden v. US*, 0:2023cvus02139, U.S. Court of Appeals, Federal Circuit. Judgment entered December 15, 2023
- *GOLDEN v. USA*, 1:2013cv00307, U.S. Court of Federal Claims. Judgment entered November 10, 2021
- *GOLDEN v. USA*, 1:2023cv00811, U.S. Court of Federal Claims. Pending

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PETITION FOR A WRIT OF CERTIORARI

Larry Golden petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Federal Circuit in this case.



OPINIONS BELOW

The Patent Trials and Appeals Board final written decision addressing the questions (App. 1-39). The Patent Trials and Appeals Board decision denying rehearing addressing the questions (App. 40-49). The Court of Appeals for the Federal Circuit opinions addressing the questions (App. 50-67), (App. 76-79), and (App. 80-81) are unreported. The Court of Federal Claims opinions addressing the questions (App. 68-72), and (App. 73-75) are unreported.



JURISDICTION

The Patent Trials and Appeals Board (PTAB) entered judgement on October 1, 2015 (App. 1). The PTAB denied a timely filed petition for rehearing on November 17, 2015 (App. 2). The Court of Appeals entered judgement on December 15, 2023 (App. 6). The Court of Appeals denied a timely filed petition for rehearing en banc on January 25, 2024 (App. 7). This Court has jurisdiction under 28 U.S.C. § 1254(1).



STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1491(a)—Government Unconstitutional IPR-Based “Takings” of Property under the Fifth Amendment Clause of the United States Constitution, without “Due Process” of Law and without Just Compensation.



INTRODUCTION AND STATEMENT

The Petitioner, as far back as year 2003, provided the Government with three Economic Stimulus and Terrorist Prevention Packages: “The SafeRack Project” which includes the technology for ubiquitous CBRNE sensing for our Nation’s most vulnerable places; “The V-Tection Project”, which includes controlling a vehicle’s stop, stall, and slowdown, both remotely, and through satellite and cellular, by means of at least a smartphone—a pre-programmed stop, stall, and vehicle slowdown that is triggered to avoid a collision; and the “Anti-Terrorism Product Grouping (ATPG) Project”, which includes a communicating, monitoring detecting, and controlling (CMDC) device from the products grouped together by common features of design similarities of at least that of a smartphone, or a new, improved upon, and useful laptop, PC computer, desktop, tablet, PDA, or cell phone [35 U.S.C. § 101]:

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful

improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”

Six months after the DHS was established on Nov. 25, 2002, Petitioner receive a response letter on May 21, 2003 from the Honorable Senator Fritz Hollings: “I have contacted the Department of Justice and the Department of Homeland Security to try to be of assistance”; on June 3, 2003 from the Office of the Vice President, Dick Cheney: “[y]our correspondence has been forwarded to the Department of Homeland Security for review. You will hear back directly from the Department”; on October 1, 2003 from the Honorable Senator Fritz Hollings: “[t]hank you for contacting me regarding your difficulty with receiving a response from the Department of Homeland Security”; on October 21, 2003 from the Honorable Senator Lindsey Graham: “I have contacted the Department of Homeland Security on your behalf. I have asked that they review your request and respond directly to you”; on June 20, 2005 from the Office of the President, George Bush: “[t]hank you for your letter regarding homeland security technology procurement. Please know I have forwarded it to the Department of Homeland Security for review and response”.

“‘HE SHARED HIS INFORMATION WITH OUR GOVERNMENT’ only to discover that he and his patents were being infringed. Larry sued and consequently faced a brutal Patent Trial and Appeal Board (PTAB) attack by Homeland Security, joined by the Department of Defense. Larry has experienced

incredible hardships due to our government infringing on his “constitutionally protected” property rights. Facing PTAB attacks by large entities is the norm for an inventor with a truly valuable invention. When facing such an attack, the inventor is often fighting an assailant with resources that seem unlimited. In Larry’s case, it didn’t just seem that way. The entity that attacked and invalidated his patent was actually the US Government!
<https://usinventor.org/portfolio-items/larry-golden-inventor-founder-of-atpg-technology-llc/>

Petitioner will demonstrate how the Government, on multiple occasions since 2008, has “taken” Petitioner’s property under the Fifth Amendment Clause of the United States Constitutional, without due process of law and without just compensation. Petitioner will demonstrate how the Government has continuously violated certain statutes and procedurals as a means of retaliation because Petitioner filed a Government “Takings” claim against the Department of Homeland Security (DHS) in the United States Court of Federal Clams in 2013. Petitioner will also show how the Department of Justice (DOJ) participated in the “takings” of Petitioner’s property by narrating and directing the Court, to litigate on actions and defenses unrelated to Petitioner’s cause of action, such as “having plaintiff prove direct infringement under 35 U.S.C. § 271(a) as a predicate to proving direct infringement under 28 U.S.C. § 1498(a)”. Overturned in *Zoltek V.*

The DOJ discarded seven of the eight Government Contractors (i.e., NASA, SeaCoast, Rhevision, Synkera, Qualcomm, LG, Samsung, and Apple) for the DHS S&T BAA07-10 *Cell-All Ubiquitous Biological and Chemical Sensing* initiative, to that of a dispute between private parties, the Petitioner and Apple, Inc.

The jurisdiction of the United States Court of Federal Claims (COFC) is to resolve disputes for money damages brought against the United States Government. The COFC was outside its jurisdiction to adjudicate a dispute between the private parties of Golden and Apple.

The DOJ and the DHS used this jurisdictional violation to avoid addressing Petitioner's Government "taking" claim. The Government must be a Defendant (DHS) for a claim of a Fifth Amendment "takings" under 28 U.S.C. § 1491(a), and a Defendant (DHS) for a claim of Government "infringement" under 28 U.S.C. § 1498(a).

Likewise, Petitioner's Unconstitutional IPR-Based "Takings" claim, that was joined with the lead case [COFC Case No. 13-307C] in 2019, cannot legally be dismissed under the doctrine of the statute of limitations, because the COFC allowed Golden's Unconstitutional IPR-Based "Takings" claim to sit on the docket after the CAFC *Golden v. US*, Case No. 19-2134 (2020), and the COFC Court never addressed the claim before the COFC closed the lead case on 11/10/2021.

Petitioner is the only person in American history who spent years working on projects to restore our

Nation's economy after the 9/11 attacks with strategies and technology, that when revealed to the U.S. Government; the Government has spent years discrediting Petitioner's work, and making Petitioner's life a living hell. The Civil Rights Division of the Department of Justice, created in 1957 by the enactment of the Civil Rights Act of 1957, suppose to work to uphold the civil and constitutional rights of all persons in the United States, particularly some of the most vulnerable members of our society. Included are Blacks and/or African Americans.



REASONS FOR GRANTING THE WRIT

The PTAB Judges in *Department of Homeland Security v. Larry Golden*, Case No. IPR2014-00714, were intimidated and forced to act under duress, by the DHS and the DOJ, to ignore the multiple times the Patent Owner "begged" the DOJ, DHS, and PTAB before, in the Patent Owner's Preliminary Response (paper 23); during the IPR trial in papers 25, 26, 29, 33, and 35; and in the Patent Owner's Request for Rehearing (paper 36), not take the Patent Owner's patent claims with unqualified patent references of Astrin, Breed, and Mostov.

Under no conditions, nor any prevailing law, can an *inter partes review* (IPR) be instituted with three unqualified patent references that do not antedate the priority date of the challenged patent or patent claims. A claimed invention may be rejected under 35 U.S.C.

102 when the invention is anticipated (“not novel”) over a disclosure that is available as prior art.

To reject a claim as anticipated by a reference, the disclosure must teach every element required by the claim under its broadest reasonable interpretation. See, e.g., MPEP § 2114, subsections II and IV. “A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). The basis for “anticipation” is that the patent references considered for prior art, has priority filing dates that precedes the challenged patent.

Procedural Due Process refers to the constitutional requirement that when the federal government acts in such a way that denies a citizen [Patent Owner] of a life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker.

The Government has been given multiple years and multiple opportunities to retract or reverse its unlawful acts but fail, or simply refuse to do so. As a result of the Government’s reluctance to rectify, Petitioner has suffered a government “taking” of his Property under the Fifth Amendment Clause of the U.S. Constitution without being paid “just compensation”.

The Unconstitutional “Takings” begin on 04/30/2014 when the Department of Homeland Security (DHS) petitioned the U.S. Patent Trial and Appeal Board

(PTAB) with unqualified patent references. The “Takings” continued when on 10/08/2014, the PTAB instituted trial on two of the unqualified patent references [Astrin and Breed]. The “Takings” ended when the PTAB issued a Final Written Decision on 10/01/2015.

Petitioner filed his Unconstitutional IPR-Based “Takings” claim against the Government on 01/17/2019 *Golden v. US*, Case No. 19-104 (2019). Well within the statutory six-year statute of limitations. Judge Brugink join this case with the lead case *Golden v. US*, Case No. 19-104 on 01/29/2019. The Federal Circuit on 04/10/2020 *Golden v. US*, Case No. 19-2134 determined Petitioner was well within his constitutional rights to file an Unconstitutional IPR-Based “Takings” claim in the U.S. Court of Federal Claims (COFC).

The COFC allowed Golden’s Unconstitutional IPR-Based “Takings” claim to sit on the docket, after the Federal Circuit’s decision in *Golden v. US*, Case No. 19-2134 (2020), and never addressed the Unconstitutional IPR-Based “Takings” claim before the COFC closed the lead case on 11/10/2021. The Government’s argument that the claim is barred because of the statute of limitations, is simply a “lie” used to justify the “takings” of Petitioner’s property.

The Leahy-Smith America Invents Act (AIA) of 2011 created the Patent Trial and Appeal Board, 35 U.S.C. § 6(c), and established three types of administrative review proceedings before the Board that enable a “person” other than the patent owner to challenge the validity of a patent post-issuance: (1) “inter partes

review,” §311; (2) “post-grant review,” §321; and (3) “covered-business-method review” (CBM review), note following §321.

In the absence of an express statutory definition, the Supreme Court applied a “longstanding interpretive presumption that ‘person’ does not include the sovereign,” and thus excludes a federal agency like the Postal Service. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000); see *United States v. Mine Workers*, 330 U.S. 258, 275 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 603-605 (1941); *United States v. Fox*, 94 U.S. 315, 321 (1877).

Plaintiff-Appellant’s “takings” case was decided when the U.S. Supreme Court in *Return Mail Inc. v. U.S. Postal Service* (2019) decided the [Dept. of Homeland Security (DHS) and the Dept. of Justice (DOJ)] are not “persons” authorized to petition the PTAB for *inter partes* review. The decision nullified the IPR proceedings as whole because of the fraudulent and deceitful activities [violation of constitutional statutes and procedures] of the Dept. of Homeland Security (DHS) and the Dept. of Justice (DOJ) and the Patent Trials and Appeals Board (PTAB).

In Golden’s Motion for Leave to File a Motion for Summary Judgement *Larry Golden v. United States*, COFC Case 1:13-cv-00307-EGB Document 196 Filed **11/03/20**, Golden continued his efforts to get the DOJ and the COFC Court to address Golden’s Unconstitutional IPR-Based “Takings” claims. Golden believed

the U.S. Supreme Court decision in *Return Mail Inc. v. U.S. Postal Service* (2019) provided sufficient evidence for Summary Judgement in view of the malicious prosecution in which the Patent Owner claims the DOJ & DHS knowingly pursued a base IPR case against the Patent Owner.

The COFC ignored Petitioner's attempt to have Petitioner's Unconstitutional IPR-Based "Takings" claims adjudicated. The claim was never adjudicated before being dismissed.

The Unconstitutional IPR-Based "takings" proceedings ended with the only Patent Owner (Black and/or African American inventor) in the Nation to have his property taken by unauthorized Government agencies, without paying just compensation.

Malicious prosecution means the Defendants [DOJ & DHS] began or continued the civil legal proceeding without reasonable grounds to believe the basis for it, or the allegations made in it. Even if the DOJ & DHS who petition the PTAB for an *inter partes review*, think they have a winning case and are petitioning for a legitimate reason when they begin the case, they can be guilty of malicious prosecution if they discover a reason they cannot win during the case, and continue the case for improper motives anyway.

After being exposed by the Patent Owner that the references of Astrin, Breed, and Mostov are unqualified references to satisfy a 102-antipatent objection; and the Government agencies [DOJ & DHS] are unauthorized "persons" for petitioning the PTAB to

invalidate the Patent Owner's patent claims, the DOJ and DHS continued the case for the improper motive of "Taking" the Patent Owner's property under the Fifth Amendment Clause of the U.S. Constitution, without "due process of law", and without paying "just Compensation."

Therefore, the statute of limitations does not apply because Petitioner's "Unconstitutional IPR-Based "takings" claim, that was joined in the lead case in 2019, was still an active cause of action until the COFC closed the lead case on 11/10/2021.

The inappropriate behavior of the DOJ and the DHS; the indisputably bias, partial, and erroneous decisions of the lower Courts in favor of the DOJ & DHS; and the violations of Petitioner's rights enforceable against the United States for money damages; still, does not answer the questions of when, what, and how the Government's appropriation or use of a patented invention, without paying just compensation, creates liability for the Government?

I. AN EXAMPLE OF "WHAT", "HOW", AND "WHERE" THE GOVERNMENT APPROPRIATED OR USED PETITIONER'S PATENTED INVENTION(S) WITHOUT PAYING JUST COMPENSATION: A DESCRIPTION OF INVENTIONS THAT SUPPORTS THE THREE ECONOMIC STIMULUS PACKAGES

Petitioner owns 11 patents that has over 300 patent claims. U.S. Patent No. 9,589,439 [the '439 patent]

was issued on March 7, 2017 with a Priority date of Disclosure [Conception] filed at the USPTO on November 26, 2004, and a Priority patent application filing date of April 5, 2006. The following Claim 1 of the '439 patent was issued with the presumption of validity [35 U.S.C. § 282(a)] and illustrates the product grouping strategies for intergrading the technology rational of the three economic stimulus packages for Border Security. The claim describes “what” in Petitioner’s patent is being appropriated or used:

1. A multi sensor detection system capable of identifying, monitoring, detecting, and securing those critical areas (e.g., U.S. borders), sites, locations and facilities vulnerable to terrorist activity that can be integrated with and interconnected to watchtowers to form a network, comprising:

at least one of an integrated watchtower, a fixed watchtower, a surveillance watchtower, a watchtower capable of scanning, a watchtower capable of monitoring, a watchtower equipped with sensors or a watchtower interconnected to a central monitoring terminal for sending signals thereto and receiving signals therefrom;

wherein the at least one watchtower is equipped with a remote video surveillance camera that provides at least one night vision means of surveillance or an infrared human detection means of surveillance capability and is integrated into a watchtower’s

remotely controlled system that can monitor, detect, track, and identify humans;

a communication device of at least one of a mobile communication device, a mobile communication unit, a portable communication device, portable communication equipment, a wired communication device, a wireless communication device, a monitoring site, a monitoring terminal, a web server, a desktop personal computer (PC), a notebook personal computer (PC), a laptop, a satellite phone, a smart phone, a cell phone, a Universal Mobile Telecommunications System (UMTS) phone, a personal digital assistant (PDA), a liquid crystal display (LCD) monitor, a satellite, or a handheld, interconnected to a monitoring equipment for sending signals thereto and receiving signals therefrom;

a communication method of at least one of a Bluetooth, Wi-Fi, Wi-Max, Internet, Ethernet, Broadband, Network Bandwidth, Wireless, Wired, Text Messaging, Cellular, Satellite, Telematics, Wide Area Network (WAN), Wireless Wide Area Network (WWAN), Local Area Network (LAN), Radio Frequency (RF), Broadband Wireless Access (BWA), Global Positioning System (GPS), or central processing unit (CPU), used to interconnect the communication device to the monitoring equipment for sending signals thereto and receiving signals therefrom;

a plurality of sensors for detecting or sensing humans that is at least one of a

chemical human sensor, biological human sensor, radiological human sensor, infrared human detector, motion human detector, or image human detector, interconnected to or disposed within the multi-sensor detection system for sending signals thereto and receiving signals therefrom;

a mobile multi-sensor detection device that is at least one of a ground surveillance sensor, a surveillance radar sensor, a surveillance camera, or a stand-alone surveillance scanner, that is mounted in, on, or upon at least one of a car, a truck, a camper, a bus, a van, an unmanned aerial vehicle (UAV), an unmanned ground vehicle (UGV), or a utility vehicle, interconnected to the monitoring equipment for sending signals thereto and receiving signals therefrom;

a hand-held multi-sensor detection device that is capable of at least one of thermal imaging or infrared imaging for monitoring, detecting, tracking and identifying humans, that is controlled or operated by at least one authorized person who is an owner, pilot, conductor, captain, drivers of vehicles identified as high security, airport security, police, highway patrol, security guard, military personnel, hazardous material (HAZMAT) personnel, Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), Secret Service, port security personnel, border security personnel, first responders, or monitoring site and terminal personnel, interconnected to the monitoring equipment for sending signals

thereto and receiving signals therefrom, wherein the authorized person manually initiates the signal to the monitoring equipment to alert upon the monitoring, detecting, tracking and identifying of the human;

whereupon, detection by the mobile multi-sensor detection device causes an automatic signal transmission to be sent to, or received from, any products in product grouping categories of storage and transportation, sensors, detector case; modified and adapted, monitoring and communication devices, communication methods, biometrics;

whereupon, detection of an unauthorized vehicle, an unauthorized driver or operator of a vehicle or mobile unit, a signal is sent from the communication device to the vehicle or mobile unit to stop, stall or slowdown the vehicle;

wherein, a communication device of at least one of a mobile communication device, a mobile communication unit, a portable communication device, portable communication equipment, a wired communication device, a wireless communication device, a monitoring site, a monitoring terminal, a web server, a desktop PC, a notebook PC, a laptop, a satellite phone, a smart phone, a cell phone, a UMTS phone, a PDA, a LCD monitor, a satellite, or a handheld, interconnected to the monitoring equipment for sending signals thereto and receiving signals therefrom, comprising a lock disabling mechanism that is able to

engage (lock), and disengage (unlock) and disable (make unavailable) after a specific number of tries.

DHS “Secure Border Initiative Network” (SBInet):

A new integrated system of personnel, infrastructure, technology, and rapid response to secure the northern and southern land borders of the United States. It was a part of Secure Border Initiative (SBI), an overarching program of the United States Department of Homeland Security (DHS).

Towers were meant to be set up along the border, with varying surveillance and communications equipment depending on the climate, terrain, population density, and other factors. Towers were slated to include radar, long-range cameras, broadband wireless access points, thermal imaging capabilities, and motion detectors. SBInet was meant to also include some ground sensors for seismic detection as well.

Border Patrol agents were meant to carry PDAs (i.e., smartphones) with GPS capabilities, to allow the command center to track the location of agents interdicting illegal entries and watch the encounter in real time on the common operating picture. Additionally, the PDAs (i.e., smartphones) were supposed to have advanced fingerprint identification technology, to allow Border Patrol agents to identify an individual at the interdiction site immediately and the ability to view and control tower cameras from the PDA (i.e., smartphone). In addition, Border Patrol agents were

to be given laptops in the patrol car to provide the information necessary to effectively and safely approach a given threat.

Airborne sensors on unmanned aerial vehicles (UAVs) were meant to fill in gaps in the “virtual fence” in remote areas where building and maintaining towers was impractical. A small UAV called the Skylark operated by a single individual, was considered.

II. PETITIONER’S PATENTED INVENTIONS FOR THE “SAFERACK” PROJECT; APPROPRIATED OR USED BY THE GOVERNMENT(DHS) ITSELF, WITHOUT JUST COMPENSATION”

DHS “BioWatch” GEN 3:

The purpose of this acquisition is to obtain a fully autonomous networked biodetection capability (known as Generation 3 or Gen-3) that will be deployed, operated, and sustained, both indoor and outdoor, in selected US BioWatch jurisdictions throughout the United States to continuously monitor the air for agents of biological concern. This requirement supports the Department of Homeland Security (DHS) plans to [implement] an autonomous biodetection capability that will improve timeliness, time resolution, population coverage, and cost effectiveness.

The BioWatch Gen-3 Autonomous Detection capability must be able to: (1) rapidly process and accurately analyze aerosol samples with a high level of confidence, (2) automate and integrate the major

system functions into the detector including aerosol sample collection, preparation, analysis, and analytical results reporting, (3) operate in its intended indoor and outdoor environments, and (4) disseminate and archive analysis results and system operational data via the C3 network, known as the Gen-3 BioWatch Operations Support Service (G3BOSS).

Thus, it is necessary to acquire an autonomous biological detection capability. An autonomous biodection system is capable of integrating the sample collection, preparation, analysis, and reporting functions, and autonomously executing these tasks without requiring human intervention or control. An autonomous biodection system will maximize current technology and enhance biosurveillance by reducing the time required to provide awareness of the presence of biothreat agents and provide economies of scale enabling the expansion of population coverage with incrementally reduced costs. Accordingly, the Department of Homeland Security (DHS) Office of Health Affairs (OHA) plans to procure and deploy a BioWatch Generation 3 (Gen-3) fully autonomous detection system.

III. PETITIONER'S PATENTED INVENTIONS FOR THE "V-TECTION" PROJECT; APPROPRIATED OR USED BY THE GOVERNMENT (DHS) ITSELF, WITHOUT JUST COMPENSATION"

DHS S&T Directorate "Autonomous Technology":

DHS continues to partner with companies that manufacture technologies that can disrupt, disable,

and control UAVs. In particular, DHS works with the Department of Defense, other government agencies, and private corporations to develop the means to incapacitate rogue autonomous drones. DHS ensures such technology is in place to protect high-value targets like government buildings, borders, prisons, and sensitive facilities. DHS is mandating UAVs are only made available that include GPS geo-referenced data with denied areas restrictions programmed into all flight modes.

Techniques to protect crowds and high value targets from terrorist threats include working with autonomous trucking companies and major carriers; devising methods for safeguarding and detecting lethal payloads through embedded and remote sensors; preventing the hacking and the manipulation of electronic manifests; restricting access by autonomous trucks to areas proximate to vulnerable high-value targets; and promoting technologies, such as geofencing, and sensors, for stopping such vehicles from being used nefariously.

Autonomous technology is a true force multiplier for DHS CBP, enabling Border Patrol agents to remain focused on their interdiction mission rather than operating surveillance systems. Investments in autonomous operation, artificial intelligence, and other advanced technologies native to the Autonomous Surveillance Towers are absolutely essential to border security and compliment other capabilities such as the Border Wall System, Remote Video Surveillance System, Integrated Fixed Towers, Mobile Surveillance and small drones.

IV. PETITIONER'S PATENTED INVENTIONS FOR THE "ATPG" PROJECT; APPROPRIATED OR USED BY THE GOVERNMENT (DHS) ITSELF, WITHOUT JUST COMPENSATION"

The DHS "*Cell-All*" Project:

Cell-All is a program managed by DHS to develop software and hardware that enables smartphones to function as handheld, pervasive environmental sensors. In the initial research and development phase, engineers miniaturized sensors to detect abnormal levels of potentially dangerous chemicals in the surrounding environment. When dangerous levels are detected, an application on the cell phone should automatically send sensor and location data over the network to a centralized server, which will then contact appropriate agencies and first responders. The eventual goal of the project is to embed multiple nanoscale sensors (for environmental chemicals, industrial toxins, radiation, and bioagents) directly into mobile phones.

During the development of second-generation prototypes, chemical sensors were separated from the phones, allowing for initial market deployment of the sensors through third-party products, such as sleeves, that could be added to existing phones (U.S. Department of Homeland Security, 2011a). This use of third-party accessory products is intended to speed up the technology's commercial availability so that people can begin using the *Cell-All* applications with their current phones before integrated sensors are fully operational and readily available. At a September 2011 live test

and demonstration of second-generation prototypes at the Los Angeles Fire Department's Frank Hotchkin Memorial Training Center, Synkera's prototype was already on the market and NASA's sensor was awaiting clearance for public release. DHS presentations at this event conveyed that next generation, sensor-embedded phones would roll out gradually over the next few years and, as with cameras in phones, would soon become standard (U.S. Department of Homeland Security, 2011a).

As the Court summed up in *James v. Campbell*, 104 U.S. 356, 358 (1882), a case concerning the alleged appropriation of a patent by the Government: “[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation”. Without question, the Government is appropriating and using Petitioner's patented inventions, without paying just compensation.

V. THE DISTRICT AND APPELLATE COURTS' YEARS OF SYSTEMIC AND STRUCTURAL RACISM LANDED WITH THE GOVERNMENT "TAKING" THREE OF THE MOST SIGNIFICANT ECONOMIC STIMULUS AND TERRORISM PREVENTION PACKAGES IN AMERICAN HISTORY

Standards of Review for a Continuous Non-Stop Government "Takings"

“The Fifth Amendment prohibits the federal government from taking private property for public use

without paying just compensation. U.S. Const. amend. V. “It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source [of law] for purposes of Tucker Act jurisdiction” in the Court of Federal Claims. *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

Petitioner brought an action in the Court of Federal Claims [2013] against the Government for allegedly “taking” Petitioner’s property. Petitioner alleged three counts of a government “takings” under the same case no. 13-307C *Golden v. US. Takings I* happen before the case no. 13-307C *Golden v. US* was filed in 2013 and is the basis for the claim. *Takings II* happen after the case no. 13-307C *Golden v. US* was filed in 2013, in a USPTO PTAB IPR Trial. *Takings III* happen as a result of the Claims Court adjudicating a dispute between private parties that is outside the Court’s jurisdiction in case no. 13-307C *Golden v. US*.

“Takings” I

As a result of the 9/11 attacks, between the years 2003-2005, Golden submitted three (3) Economic Stimulus and Terrorism Prevention Packages, that included strategies for stimulating our economy as a whole and the African-American community, to at least that of President Bush, VP Cheney, and S.C. Senators Holland, DeMint, and Graham.

President Bush, VP Cheney, and S.C. Senators Holland, DeMint, and Graham sent the *nonfrivolous* “Economic Stimulus and Terrorism Prevention

Packages”, that included technology for CBRNE detection devices (the “SafeRack” package); technology for a new, improved upon, and useful cell phone, PC, tablet, laptop, etc. (the “ATPG” package); and technology for a remote stop, stall, and vehicle slow-down system, and pre-programmed stopping, stalling, and slowing down of a vehicle (the “V-Tection” package), over to the Department of Homeland Security (DHS) for development and implementation.

Golden’s evidence is the response letters Golden received from the offices of President Bush, VP Cheney, and S.C. Senators Holland, DeMint, and Graham.

Golden traveled to Colorado in 2006 for the Government Agencies (DoD, DOE, DHS, etc.) SBIR Tour. Golden met with, and left behind copies of Golden’s stimulus packages with Lisa Sabolewski, DHS SBIR Program Manager, who in turn asked Golden to send the information to her via email. (E-mail correspondence available).

Golden responded to an RFI in 2007 to the DHS/S&T Safe Container (SafeCon) Initiative, and discussed the intellectual property subject matter of Golden’s inventions with DHS Margo Graves; Program Manager. (E-mail correspondence available).

Golden submitted a proposal in 2007, in response to the DHS S&T *Cell-All Ubiquitous Biological and Chemical Sensing* request for proposals, and upon request, resubmitted Golden’s intellectual property directly to the Stephen Dennis, DHS Program Manager for the *Cell-All Ubiquitous Biological and Chemical*

Sensing initiative in 2008. (E-mail correspondence available).

Golden traveled to Washington, DC in 2008 with his lead engineer [Harold Kimball] to discuss a “read-ahead” document of Golden’s intellectual property and the possibility of Golden incubating his company at the Department of Homeland Security (DHS). Golden and Mr. Kimball met with Ed Turner, DHS/S&T Program Manager.

Golden was invited by DHS to Sacramento, CA in 2008 to attend a T.R.U.ST Industry Day Symposium. Golden discussed and left copies of his intellectual property subject matter with a selected panel. Golden was walked out by the Program Manager Dave Masters, where he promised Golden, he will release a Request for Proposal in the near future that aligns with Golden’s intellectual property technological rational.

Takings I begin in 2008 when the DHS made a “final decision” to take and give Golden’s intellectual property subject matter to Apple, Samsung, LG, NASA, Synkera, SeaCoast, Rhevision, and Qualcomm for development and commercialization. This happened two years before the DHS cause the release of the first infringing product in 2010.

Some statistics about the award: 1) Golden was the only person (African American) to hold a patent(s) for the cell phone sensing device the Government was requesting; Golden owned the only African American company (ATPG Technology, LLC) not awarded a contract, in view of the eight other white-owned

companies that was awarded to develop and assemble Golden's patented devices; and, sixty millions African Americans are the only ones who are not benefitting from the three economic stimulus packages, through the not-for-profit company (ATPG Corporation) Golden established to receive funding specifically targeted for African Americans.

Within the six-year statute of limitations period, in 2013 Golden filed a takings claim in the COFC under case no. 13-307C *Golden v. US*. The DOJ & DHS motioned to "stay" Golden's takings claims and in 2014 the COFC court stayed Golden's takings claim until 2019.

The DOJ & DHS spent six years lying to the Court that Golden's takings claim was no different than Golden's infringement claims.

The COFC dismissed Golden takings claim because DOJ & DHS said "taking Golden's property and giving it to Apple, Samsung, LG, and Qualcomm, sounds like infringement". The takings begin in 2003 and a final decision to take Golden's property [ripeness of the takings] was made in 2008. Two years before the first infringing product that included all the inventions' elements were released.

Therefore, Golden's Takings claim, for the Government taking Golden's property and giving it to Apple, Samsung, LG, and Qualcomm, was never adjudicated before the case closed on November 10, 2021. In government-mediated private takings, private actors functionally seize property through eminent domain,

but rely upon the government's formal authority to do so.

These types of takings do not involve any delegation of the power of eminent domain. Rather, the government exercises its own taking power to seize property from one private actor, before then granting it to another private actor. Such takings have also been designated "public private takings."

"Takings" II

Within the six-year period from **10/01/2015**, Golden filed in the United States Court of Federal Claims, on **01/17/2019** in *Larry Golden v. United States*, Case No. 1:19-cv-00104-EGB, Golden initiated the filing of an Unconstitutional IPR-Based Takings claim against the Government, the United States.

In *Larry Golden v. United States*, Case No. 1:19-cv-00104-EGB *OPINION*. Document: 12 Page: 4 Filed: **05/14/2019**. The United States Court of Federal Claims responded to the Government's Motion to Dismiss for lack of jurisdiction: "Finally, as we held in the related action, plaintiff fails to state a claim to the extent that his complaint alleges a taking by the actions of this court, the Federal Circuit, or the PTAB." . . . "Plaintiff appears to argue that the cancellation of his '990 independent claims in the IPR at the PTAB constitutes a taking by the PTAB." . . . "In sum, plaintiff's takings claim duplicates his related patent action in Docket No. 13-307C, asserts claims over which this court does not have jurisdiction, and fails to state a takings

claim. Defendant's Motion is granted pursuant to Rule12(b)(1) and Rule12(b)(6)."

On Appeal from the United States Court of Federal Claims in No. 1:19-cv-00104-EGB, Senior Judge Eric G. Bruggink, in the *OPINION* for *Larry Golden v. United States*, CAFC Case No. 19-2134 Document: 37 Pages: 11-12 Filed: **04/10/2020**. The Federal Circuit clarified the COFC's jurisdiction:

"We next turn to Golden's IPR-based takings claims. We first address whether the Claims Court had jurisdiction to hear these claims. . . . The government argues that the American Invents Act ("AIA")'s creation of inter partes review by the Board, followed by judicial review before this court, creates a "'self-executing remedial scheme' that 'supersedes the gap-filling role of the Tucker Act.'" Id. at 41 (quoting *United States v. Bormes*, 568 U.S. 6, 13 (2012))."

"According to the government, the AIA statutory scheme displaces Tucker Act jurisdiction because there is no procedural impediment to presentation of a takings claim to the agency and because the remedial scheme provides for judicial review of constitutional challenges to the agency's action. Id. at 43-49. The government's argument is without merit."

"In *Bormes*, the Supreme Court explained that Tucker Act jurisdiction is displaced "when a law assertedly imposing monetary liability on the United States contains its own judicial remedies." 568 U.S. at 12 (emphasis added). More recently, the Court explained that, "[t]o determine whether a statutory

scheme displaces Tucker Act jurisdiction, a court must ‘examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes.’” *Horne v. Dep’t of Agric.*, 569 U.S. 513, 526-27 (2013) (quoting *United States v. Fausto*, 484 U.S. 439, 444 (1988)). Thus, when there is a precisely defined statutory framework for a claim that could be brought against the United States, the Tucker Act gives way to the more specific statutory scheme. Regardless of the structure of review it establishes, the AIA is not a statute that provides for claims against the United States.”

“The government is correct that, under the AIA, parties may raise constitutional challenges in our court on appeal from Board decisions. But this remedial scheme does not convert the AIA into a statutory framework for claims against the United States. The AIA is by no means “a law assertedly imposing monetary liability on the United States.” *Bormes*, 568 U.S. at 12. Accordingly, we reject the government’s argument that the AIA displaced Tucker Act jurisdiction over Golden’s IPR-based takings claims.”

In Golden’s Motion for Leave to File a Motion for Summary Judgement *Larry Golden v. United States*, COFC Case 1:13-cv-00307-EGB Document 196 Filed **11/03/20**, Golden continued his efforts to get the DOJ and the COFC Court to address Golden’s IPR-Based Takings claims. Golden could never be time barred when the Claim was still pending in an active case.

When the United States causes injury to property, a property owner can sue in the Court of Federal

Claims. This is a result of the Tucker Act, which waives the United States' sovereign immunity in the COFC only, *United States v. Mitchell*, 463 U.S. 206, 215-19 (1983).

Significantly, a suit alleging a compensable taking in the Court of Federal Claims is viable as soon as government invades a property interest without proving a statutory compensation guarantee. *Kirby*, 467 U.S. at 5; *Dow*, 357 U.S. at 22. The claimant need not sue in another court to "ripen" the takings suit. As the Court stated long ago in *Great Falls Mfg. Co.*, 112 U.S. at 656.

Unless proven otherwise, Golden is the only African American Patent Owner that has ever been petitioned for *Inter Partes Review* at the PTAB by two Government agencies [the Department of Justice (DOJ) and the Department of Homeland Security (DHS)], who are not "persons" authorized to petition the PTAB to invalidate Golden's patents.

Unless proven otherwise, the DHS & DOJ has never petitioned the PTAB for *Inter Partes Review* of patent(s) owned by a White(s).

Unless proven otherwise, Golden is the only African American Patent Owner that has ever been petitioned for *Inter Partes Review* at the PTAB by two Government agencies [the Department of Justice (DOJ) and the Department of Homeland Security (DHS)], who are not "persons" authorized to petition the PTAB to invalidate patents; with three unqualified patent references [Astrin, Breed, and Mostov] that do not antedate Golden's patents.

Unless proven otherwise, the DHS & DOJ has never petitioned the PTAB for *Inter Partes Review* of patent(s) owned by a White(s) with any number of unqualified references.

The Trial Court dismissed the lead case COFC 13-307C, without adjudicating Golden's "Unconstitutional IPR-Based "Takings" claim on **11/10/2021**, which "ripen" the takings claim.

"Takings" III

When the DOJ & DHS insisted on a dismissal in their favor *Golden v. US*, Case No. 13-307C; dismissed 11/10/2021, without proving non-infringement or that the patents are invalid, it left the patents with the "presumption of validity". Which means the government cannot appropriate or use Golden's patents without paying "just compensation".

The Supreme Court explicitly recognized that patents are property secured by the Fifth Amendment Takings Clause. In *Horne v. Department of Agriculture*, 569 U.S. 513 (2013) ("Horne I"); 576 U.S. 350, 135 S. Ct. 2419 (2015) ("Horne II"), the Court held that the Takings Clause imposes a "categorical duty" on the government to pay just compensation whether it takes personal or real property.

Chief Justice Roberts, writing for the Court, noted the long history of private property being secured against uncompensated takings by the government, beginning with the Magna Carta some 800 years ago.

In further support, Roberts cited a Supreme Court opinion from the late nineteenth century:

Nothing in this history suggests that personal property was any less protected against physical appropriation than real property. As this Court summed up in *James v. Campbell*, 104 U.S. 356, 358 (1882), a case concerning the alleged appropriation of a patent by the Government:

“[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.”

James Madison, the author of the Takings Clause, once wrote: “Government is instituted to protect property of every sort.” The Court’s decision vindicates Madison’s intent to limit the government’s power to take property, both personal and real, without just compensation. And it extends a long line of cases recognizing that “property” in the constitutional sense subsumes all things arising from labor and invention.

The DOJ & DHS never proved Golden’s patents are invalid, and yet, continues to used them without paying just compensation. The only thing the DOJ & DHS proved in the *Golden v. US*, Case No. 13-307C is how much of massive liars they are. Examples of their falsehoods are:

The DOJ/DHS made the *Golden v. US*, Case No. 13-307C a case between private parties [Golden v. Apple] which placed the case outside the COFC jurisdiction.

When the DOJ/DHS stated the sensors must be “native to the manufacturing of the Apple and Samsung products, the DOJ/DHS knew they were demanding proof of direct infringement under 35 U.S.C. Sec. 271(a) as a predicate to direct infringement under 28 U.S.C. Sec. 1498(a) *Zoltek III*, that was overturned at the CAFC in *Zoltek V*.

The DOJ/DHS narrowed the case to that of Apple, LG, & Samsung, thereby omitting the sensors developed by Qualcomm, Synkera, NASA, SeaCoast, and the camera sensors for detecting CBR developed by Rhevision.

The DOJ & DHS stated “Golden’s patented Central Processing Units (CPUs) was an enlargement of the case. The DOJ & DHS motioned to have the case dismissed because they believe the CPU was an enlargement of the case; which means Golden violated a Court order not to amend the case. The DOJ & DHS lied to the Court.

The DOJ & DHS also stated Golden claimed his CPU is a sensor located inside the product used for detecting. As stated, the CPU is used for carrying out the operational and functional instructions of the devices, and the CPU is considered by many as the brains of the devices.

Nowhere, did Golden claim the CPU is used as a sensor for CBR detection. Golden did not enlarge the case with the CPU. Rule 4 required Golden to identify where each element is found in the alleged infringing products. Golden located where the CPU was found, which is not an enlargement. Further, if the products do not have CPUs, the products cannot function correctly. The case was dismissed because the DOJ & DHS lied to the Court.

The Federal Circuit in *FastShip, LLC v. U.S.*, “[W]e interpret “manufactured” in § 1498 [] such that a product is “manufactured” when it is made to include each limitation of the thing invented and is therefore suitable for use. Without the sensors the products will never be suitable for use.

The DOJ & DHS made sure the sensors and detectors required to have a product “suitable for use” never happen. The DOJ & DHS blocked the sensors and detectors of Qualcomm, NASA, Synkera, SeaCoast, Rhevision, Apple, Samsung, and LG.

The DOJ & DHS chose not to challenge the communication methods limitation, because a challenge would verify the internet, Bluetooth, and RF connections makes the smartphones “capable of” integrating detectors and sensors remote the smartphone.

The DOJ & DHS decided to challenge the term “capable of” without a claim construction hearing because 21 of the 25 patent claims that the USPTO issued with the presumption of validity” in the related *Golden v. US*, case no. 13-307C, has “capable of” in it.

Golden made multiple repeated attempts to inform the DOJ & DHS that the sensors, according to the DHS Cell-All initiative, can be located both inside and outside the phones. When Golden identified sensors both inside (camera sensor) the phone, and outside (NODE+) the phone, the DOJ & DHS did not accept the devices.

Apple and NASA are two of the third-party contractors in the related *Golden v. US*, case no. 13-307C for the DHS *Cell-All* initiative. NASA's contribution to the development of the "cell phone sensing device" was not accepted or considered by the DOJ & DHS. The DOJ & DHS pled that "to include the NODE+ is an enlargement of the case; which is a violation of the Court's order not to amend."

The DOJ & DHS created the substantive right for Golden to receive "just Compensation for the taking of Golden's property under the Fifth Amendment Clause of the U.S. Constitution when they violated 28 U.S. Code § 1498(a): "a money-mandating constitutional provision" and the "statute or regulation" of the provision.

After the Department of Homeland Security (DHS) received information from the then President, Vice-President, three U.S. Senators from South Carolina, a DHS SBIR Program Manager, and a DHS Contracting Officer for the SafeCon initiative, the DHS in 2007 released the DHS S&T Cell-All Ubiquitous Biological and Chemical Sensing solicitation for a cell

phone “capable of” detecting for CBR agents and compounds.

Using Golden’s Product Grouping strategies, the DHS contracted Apple, Samsung, LG, Qualcomm, Synkera, NASA, Rhevision, and SeaCoast to assemble Golden’s CMDC device in a way that will group products together by common features and design similarities.

The DOJ & DHS has continually retaliated against Golden for 10 years (2013-2023) for filing a claim in the United States Court of Federal Claims for just compensation.

Golden has two disabling locking mechanism that follows the same patterns: detection; lock; reset. The first is when a hazardous substance is detected it sends a signal to lock the device. The second is when and unauthorized attempt (fingerprint, facial, code) to unlock the device, a signal is sent to lock the device. The DOJ & DHS repeatedly stated in signed pleadings that Golden did not identify the locking mechanism.

The “takings” occurred when the Government removed itself, and seven of the eight third-party contractors with the exception of Apple from the case and made it a case between private parties. Under 28 U.S. Code § 1498(a), a “party infringement” claim against the Government, must have the Government as a Defendant.

28 U.S. Code § 1498(a) is a “money-mandating constitutional provision” that “assertedly impos[es]

monetary liability on the United States.” *Bormes*, 568 U.S. at 12. Accordingly, 28 U.S. Code § 1498(a) does not displaced Tucker Act jurisdiction over Golden’s Unconstitutional Jurisdictional-Based takings claims.”

The Supreme Court explained that when there is a precisely defined statutory framework for a claim that could be brought against the United States, the Tucker Act gives way to the more specific statutory scheme. Regardless of the structure of review it establishes, [28 U.S. Code § 1498(a)] is [] a statute that provides for claims against the United States.”

◆

CONCLUSION

Petitioner has another case no. 23-811C *Golden v. US* pending in the Court of Federal Claims whereby the case has been assigned the same Judge Bruggink and DOJ Attorney Grant. The same Judge and Defense Attorney who violated Petitioner’s “money-mandating constitutional provision” that “assertedly impos[es] monetary liability on the United States”. *Bormes*, 568 U.S. at 12, in the three counts of Government “*Takings*” [I, II, & III] presented in this petition.

Six months ago, Petitioner asked Judge Bruggink to disqualify himself because the case mirrors that of *Takings III*. If the Judge over reach the Court’s jurisdiction and makes the case a dispute between private parties, the same as in *Takings III*, before dismissing the case in favor of the Defendant, it qualifies as

another Unconstitutional Jurisdictional-Based “takings” claim”.

Not until 1911, was a provision enacted requiring a district-judge recusal for bias in general. In its current form, codified at 28 U.S.C. § 144, that provision reads as follows:

“Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.”

Judge Bruggink has yet to respond to the request for disqualification and the Federal Claims Court has yet re-assigned the case to another. If history is known to repeat itself, Judge Bruggink will allow the request to sit on the docket for years, only to never address it. The same as in *Takings I, II, & III*.

Also, the three Economic Stimulus and Terrorism Prevention Packages are so massive, and the patented inventions of the Petitioner are being appropriated and used in such abundance, it stands to reason that this Court will grant this petition to stop future filings.

For instance, Petitioner has specific patents at issue in *Takings I, II, & III* for the Petitioner’s patented “new, improved upon, and useful cell phone and/or smartphone” [ATPG Project], that are U.S. Patent

9,589,439 (“the ‘439 patent”) that includes eleven (11) independent patent claims for the smartphone (i.e., new, improved upon, and useful “cell phone”); U.S. Patent 9,096,189 (“the ‘189 patent”) that includes nine (9) independent patent claims for the smartphone (i.e., new, improved upon, and useful “cell phone”); U.S. Patent 10,163,287 (“the ‘287 patent”) that includes six (6) independent patent claims for the smartphone (i.e., new, improved upon, and useful “cell phone”); and, U.S. Patent 10,984,619 (“the ‘619 patent”) that includes two (2) independent patent claims and eighteen (18) dependent patent claims for the smartphone (i.e., new, improved upon, and useful “cell phone”). That’s a combined total of forty-six (46) independent and dependent patent claims for the Petitioner’s patented smartphone (i.e., new, improved upon, and useful “cell phone”).

As the Court summed up in *James v. Campbell*, 104 U.S. 356, 358 (1882), a case concerning the alleged appropriation of a patent by the Government: “[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation”. Without question, the Government is appropriating and using Petitioner’s patented inventions, without paying just compensation.

The Government continuously appropriated and used Petitioner’s inventions, daily, without paying just compensation.

For the foregoing reasons, the court should grant this petition.

Respectfully submitted,

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App. 1

Trials@uspto.gov
571-272-7822

Paper 35
Entered: October 1, 2015

UNITED STATES PATENT
AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
Petitioner,

v.

LARRY GOLDEN,
Patent Owner.

Case IPR2014-00714
Patent RE43,990 E

Before LORA M. GREEN, JON B. TORNQUIST, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

CHERRY, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

The United States Department of Homeland Security (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 11, 74, and 81 of U.S. Patent No. RE43,990 E (Ex. 1001, “the ’990 patent”). Paper 1 (“Pet.”). Larry Golden (“Patent Owner”) timely filed a Patent Owner Preliminary Response. Paper 10 (“Prelim. Resp.”). In a Decision to Institute (Paper 16, “Dec. to Inst.”) issued October 8, 2014, we instituted an *inter partes* review of claims 11, 74, and 81 of the ’990 patent.

On January 13, 2015, Patent Owner filed a Patent Owner Response (Paper 24 (“PO Resp.”)), a Non-Contingent Motion to Amend (Paper 25 (“Non-Cont. Mot. to Amend”)), and a Motion to Amend (Paper 26 (“Mot. to Amend”)).¹ Petitioner filed a Reply to Patent Owner’s Response (Paper 31, “Pet. Reply”) and an Opposition to the Motion to Amend (Paper 32, “Opp.”). Patent Owner filed a Reply to Petitioner’s Opposition. Paper 33 (“PO Reply”). No oral hearing was held.

¹ As explained in our February 4, 2015 order, Patent Owner confirmed in a conference call with the Board that the Motion to Amend is non-contingent. Paper 29, 2 (“We reminded Mr. Golden that, as set forth in our order of January 13, 2015 (Paper 23), with a noncontingent motion to amend, he bears the burden of demonstrating that the claims are patentable, and that he is abandoning the claims on which trial was instituted. Mr. Golden confirmed again that the motion to amend was a non-contingent motion to amend.”). As we further explained in that order, we are treating Paper 25 and Paper 26 collectively as the Motion to Amend. *Id.*

App. 3

With its Petition, Petitioner provided a declaration from Dr. Sriram Vishwanath, dated April 29, 2014. Ex. 1005 (“Vishwanath Decl.”).

We have jurisdiction under 35 U.S.C. § 6(c). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, and addresses issues raised during trial.

In the Motion to Amend, Patent Owner requests cancellation of claims 11, 74, and 81, and substitution of those claims with proposed claims 154156. Non-Cont. Mot. to Amend 1.² For the reasons discussed below, Patent Owner’s Motion to Amend is *granted* with respect to the cancellation of claims 11, 74, and 81, and *denied* with respect to the proposed substitution of claims 154–156.

A. *Related Proceedings*

Patent Owner and Petitioner note that the ’990 patent is asserted in a proceeding pending before the U.S. Court of Federal Claims, *Golden v. United States*, Case No. 13-307 C. Paper 5, 2; Pet. 1. Patent Owner also identifies a related pending patent application: U.S. Application No. 14/021,693 (“the ’693 application”). Non-Cont. Mot. to Amend 1.

² Paper 24 has no page numbers. We treat the first page after the caption page as page 1 and number the pages consecutively from there.

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B. The '990 Patent (Ex. 1001)

The '990 patent is a reissue of U.S. Patent No. 7,636,033 (“the '033 patent”). Ex. 1001, at [64]. The '033 patent issued from U.S. Application No. 12/155,573 (“the '573 application”), which was filed on June 6, 2008. *Id.* The '573 application, in turn, was a continuation-in-part of U.S. Application No. 11/397,118 (“the '118 application”) that was filed on April 5, 2006. *Id.* at [63].

The '990 patent relates generally to a multi-sensor detection and lock disabling system for detecting agents, such as, chemical, biological, and radiological agents in, for example, cargo containers, shipping containers, and tractor trailers. *Id.* at col. 3,11. 16–26, 37–41. Specifically, one embodiment of the system of the '990 patent includes detector cases for holding interchangeable detectors. Ex. 1001, Abstract. The detectors sample for chemical, biological, and radiological compounds. *Id.* Each detector case is disposed in, or upon, a monitored product, such as a shipping container or tractor trailer. *Id.* If a specific nuclear, chemical, or other agent is detected, alarm indicators on the detector case light up, and the detector case transmits information to a monitoring computer. *Id.* The detector case may lock or unlock the monitored product by communicating with a lock disabler in the container or may perform other actions based on instructions received directly from the monitoring site. *Id.*

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Figure 16 of the '990 patent is reproduced below:

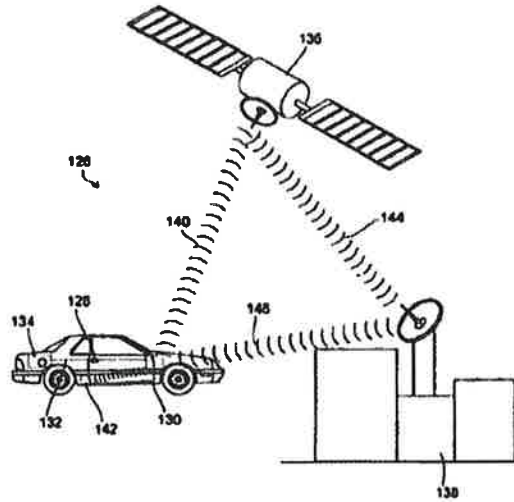


Fig. 16

Figure 16 is representation of an embodiment of the multi-sensor detection system of the '990 patent.

Figure 16 shows an embodiment of the multi-sensor detection and lock system that incorporates satellite 136 for signal receipt and transmission from vehicle 130, in which the detector system is placed, to a monitoring site with monitoring equipment 138. Ex. 1001, col. 11, 11. 1-22.

C. Proposed Substitute Claims

In the Motion to Amend, Patent Owner proposes to add substitute claims 154-156. Proposed substituted claims 154-156 are reproduced below, with bracketed, italicized subject matter indicative of subject matter deleted from challenged claims 11, 74, and

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81 and underlined subject matter indicative of subject matter added to challenged claims 11, 74, and 81:

154. (Substitute to claim 11) A communication device of at least one of [*a cell phone, a smart phone, a desktop, a handheld, a PDA, a laptop, or a computer terminal at a monitoring site*] the products grouped together by common features in the product groupings category of design similarity (e.g., computer terminal, personal computer (PC)) for monitoring products, interconnected to a product for communication therebetween, comprising:

at least one of a central processing unit (CPU) for executing and carrying out the instructions of a computer program, a network processor which is specifically targeted at the networking application domain, or a front end processor for communication between a host computer and other devices;

a transmitter for transmitting signals and messages to at least one of plurality product groups based on the categories of a multi-sensor detection device, a maritime cargo container, [*a cell phone detection device,*] a locking device, a device for stalling and stopping a vehicle, or a building monitoring device;

a receiver for receiving signals, data or messages from at least one of plurality product groups based on the categories of a multi-sensor detection device, a maritime cargo container, [*a cell phone detection device,*] a locking

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device, a device for stalling and stopping a vehicle, or a building monitoring device;

at least one satellite connection, [*Bluetooth connection, WiFi connection,*] internet connection, radio frequency (RF) connection, [*cellular connection, broadband connection,*] long and short range radio frequency (RF) connection, or GPS connection;

the communication device is at least a fixed, portable or mobile communication device interconnected to a fixed, portable or mobile product, capable of wired or wireless communication therebetween; and

whereupon the communication device, is interconnected to a product equipped to receive signals from or send signals to lock or unlock doors, stall, stop, or slowdown vehicles, activate or deactivate security systems, or activate or deactivate multi-sensor detection systems[, *or to activate or deactivate cell phone detection systems*];

[wherein, the communication device receives a signal via any of one or more products listed in any of the plurality of product grouping categories;]

wherein at least one satellite connection, [*Bluetooth connection, WiFi connection,*] internet connection, radio frequency (RF) connection, [*cellular connection, broadband connection,*] long and short range radio frequency (RF) connection is capable of signal communication with the transmitter and the receiver

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of the communication device and transceivers of the products.

* * *

155. (substitute to claim 74) A built-in *[embedded]* multi sensor detection system for monitoring products with a plurality of sensors detecting at least one chemical, biological, radiological, nuclear, explosive, human, contraband agent;

comprising at least one built-in *[embedded]* sensor for detecting at least one of the following: motion, perimeter, temperature, tampering, breach, and theft;

comprising a built-in *[embedded]* sensor array or fixed detection device into the product that detects an agent that includes at least one of a chemical agent, a biological agent, a nuclear agent, an explosive agent, a human agent, contraband, or a radiological agent; and

wherein, when an alarm occurs, the built-in *[embedded]* multi sensor detection system communicates the alarm by way of at least one of, product-to-product, product-to-satellite, *[product-to-cellular]*, product-to-long or short range radio frequency, product-to-radio frequency (RF), product-to-internet, *[product-to-broadband, product-to-smartphone or cell phone,]* product-to-monitoring site *[or central controlling station, product-to-WiFi or WiMax]*, product-to-authorized persons, *[product-to-handheld,]* or product-to-laptop or desktop.

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* * *

156. A multi-sensor detection system for monitoring products and for detecting at least one explosive, nuclear, contraband, chemical, biological, human, or radiological agents and compounds, comprising:

a plurality of sensors for detecting at least one chemical, biological, radiological, explosive, nuclear, human or contraband agents and compounds and capable of being disposed within a multisensor detection device

monitoring equipment [*located at a determinate site, comprising at least one of plurality product groups based on the categories of a computer, laptop, notebook, PC, handheld, reader, cell phone, PDA or smart phone*] of at least one of the products grouped together by common features in the product groupings category of design similarity (e.g., computer terminal, personal computer (PC)) for the receipt and transmission of signals therebetween;

[at least one cell phone tower interconnected to the monitoring equipment for sending signals thereto and receiving signals therefrom]

at least one satellite capable of transmitting signals to the monitoring equipment [*and receiving signals from the monitoring equipment*];

[at least one satellite or at least one cell phone tower capable of two-way signal communication between the multi sensor detection device and the monitoring equipment;]

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at least one *[modem]* transceiver for short *[and/or]* and long range radio frequency communication with the monitoring equipment; and at least one internet connection capable of communication between the multi sensor detection device and the monitoring equipment;

whereupon a signal sent *[from]* to the multi sensor detection device *[to]* from a satellite; *[or to a cell phone tower;]* or through short *[and/or]* and long range radio frequency; causes a signal to be sent to the monitoring equipment that includes location data and sensor data;

[wherein the communication device receives a signal via any of one or more products listed in any of the plurality of product grouping categories;]

wherein at least one satellite connection, *[Bluetooth connection, WiFi connection,]* internet connection, radio frequency (RF) connection, *[cellular connection, broadband connection,]* long and short range radio frequency (RF) connection is capable of signal communication with the transmitter and the receiver of the *[communication device]* monitoring equipment and transceivers of the products.

II. ANALYSIS

A. *Claim Construction*

In an *inter partes* review, we interpret claim terms in unexpired patents according to their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1276–79 (Fed. Cir. 2015). There is a “heavy presumption” that a claim term carries its ordinary and customary meaning. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002). However, a “claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history.” *Id.*

In the Decision to Institute, we construed certain claim terms. Those constructions are reproduced in the chart below.

Claim Term	Construction
“built in, embedded” (claim 74)	“something is included within, incorporated into, disposed within, affixed to, connected to, or mounted to another device, such that it is an integral part of the device”
“communication device” (claim 81)	“monitoring equipment”

Dec. to Inst. 11–16.

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No party challenges these constructions. Both of these terms were modified or removed in the amendment. To the extent that any of these constructions remain relevant after the amendment, we see no reason to modify them.

We further determined that no explicit construction was necessary for any other claim terms. Dec. to Inst. 10–11. Based on the record adduced during trial, we see no need to construe any other terms.

B. Patent Owner Response

The Patent Owner Response contains arguments directed both to claims 11, 74, and 81 and to the proposed substitute claims. To the extent Patent Owner argues the patentability of claims 11, 74, and 81, those arguments are moot because Patent Owner has cancelled those claims. To the extent that Patent Owner wishes us to apply the arguments made regarding claims 11, 74, and 81 to the patentability of the amended claims or incorporate arguments regarding claims 154–156 from the Patent Owner Response into the Motion to Amend, we decline to do so. Pursuant to 37 C.F.R. § 42.6(a)(3), “[a]rguments must not be incorporated by reference from one document into another document. Combined motions, oppositions, replies, or other combined documents are not permitted.” Patent Owner is precluded from incorporating arguments regarding the patentability of claims 11, 74, and 81 from the Patent Owner Response into the Motion to Amend to address how proposed substitute claims 154–156 are

patentable. Such incorporation by reference circumvents our rule limiting the pages in a motion to amend to twenty-five pages. *See* 37 C.F.R. § 42.24(a)(v). Arguments that are not developed and presented in the Motion to Amend, itself, are not entitled to consideration. *See Intellectual Ventures Mgmt., LLC v. Xilinx, Inc.*, Case IPR2012-00023, slip op. at 41 (PTAB Feb. 11, 2014) (Paper 35).

We do address two arguments that Patent Owner raises in the Patent Owner Response that are applicable to the proceeding generally: (1) Patent Owner's contention that Petitioner failed to name all of the real-parties-in-interest (PO Resp. 6–8); and (2) Patent Owner's contentions regarding Petitioner's expert (*id.* at 8–11).

i. Real Party In Interest

Petitioner has identified itself, the U.S. Department of Homeland Security, as the real party in interest. Pet. 1. Patent Owner contends that Petitioner should also have identified “the United States Department of the Treasury, seven (7) Government Agencies named as indirect infringers [in Patent Owner's U.S. Court of Federal Claims action], and the at least twenty-seven (27) third-party direct infringing Companies.” PO Resp. 7.

A petition for *inter partes review* must identify “all real parties in interest.” 35 U.S.C. § 312(a)(2). The Office Patent Trial Practice Guide provides guidance regarding factors to consider in determining whether a

party is a real party in interest. 77 Fed. Reg. 48,756, 48,759–60 (Aug. 14, 2012). Considerations may include whether a non-party “funds and directs and controls” an IPR petition or proceeding. *Id.* at 48,760. Additional relevant factors include: the non-party’s relationship with the petitioner; the non-party’s relationship to the petition itself, including the nature or degree of involvement in the filing; and the nature of the entity filing the petition. *Id.* Generally, a party does not become a “real party-in-interest” merely through association with another party in an unrelated endeavor. *Id.* A party also is not considered a real party in interest in an *inter partes* review solely because it is a joint defendant with a petitioner in a patent infringement suit or is part of a joint defense group with a petitioner in the suit. *Id.*

Whether a party who is not a named participant in a given proceeding is a “real party-in-interest” to that proceeding “is a highly fact-dependent question.” *Id.* at 48,759. There is no “bright line test.” *Id.* Courts invoke the term “real party-in-interest” to describe relationships and considerations sufficient to justify applying conventional principles of estoppel and preclusion. *Id.*

Here, even assuming this contention is timely, Patent Owner has failed to provide any evidence, besides the mere fact that the other parties are co-defendants in a lawsuit or alleged infringers, to support the contention that Petitioner has failed to name all of the real parties in interest. That one fact, without any further proof of control or involvement by these parties in this

proceeding, is insufficient to establish that Petitioner has failed to name all of the real parties in interest. *See Sony Computer Entmt. Am., LLC v. Game Controller Tech. LLC*, Case IPR2013-00634, slip op. 8 (PTAB Apr. 2, 2015) (Paper 31) (denying request to terminate based on failure to name all real parties in interest when Patent Owner failed to provide sufficient evidence that other parties were a real party in interest); *see also First Quality Baby Prods., LLC v. Kimberly-Clark Worldwide, Inc.*, Case IPR2014-01021, slip op. 3–7 (PTAB July 16, 2015) (Paper 42) (same).

ii. Petitioner’s Expert

Patent Owner asks that we “dismiss [Petitioner’s] Expert Declaration and disqualify [Petitioner’s Declarant] for making and using a false writing.” PO Resp. 9. Patent Owner contends that Petitioner’s Declarant falsely claimed that certain patent applications were patents by listing them under the heading “Patents” in his Resume. *Id.* at 8–9. A Patent Owner Response is not the proper vehicle to seek to exclude testimony. *See* 37 C.F.R. § 42.64(c). Moreover, even if it were the proper vehicle, we are not persuaded that the alleged “falsehood” that Patent Owner identified—listing patent applications, which are clearly identified as such, under a heading titled “Patents”—is, in any way, misleading. Thus, we decline Patent Owner’s request that we dismiss Dr. Vishwanath’s testimony.³

³ Patent Owner also argues that Petitioner’s declarant has a conflict of interest because he has received grants from the federal

C. Motion to Amend

As discussed above, in the Motion to Amend, Patent Owner requests that challenged claims 11, 74, and 81 be canceled and replaced with proposed substitute claims 154–156. Non-Cont. Mot. to Amend 1; see 35 U.S.C. § 316(d)(1); 37 C.F.R. § 42.121(a)(3) (“A motion to amend may cancel a challenged claim or propose a reasonable number of substitute claims.”). Patent Owner’s request to cancel challenged claims 11, 74, and 81 is not contingent on the claims being determined to be unpatentable. *Id.* Patent Owner’s request to cancel challenged claims 11, 74, and 81 is *granted* and we need not address these claims further. Instead, we analyze proposed substitute claims 154–156 set forth in the Claims Appendix (Ex. 2020) to the Non-Contingent Motion to Amend.

i. Level of Ordinary Skill in the Art

Neither party puts forward a succinct definition of the level of ordinary skill in the art. Petitioner’s declarant, however, has put forward a detailed discussion of various references dated before April 2006⁴ (the date Patent Owner now alleges is the priority date) related to subject matter of the ’990 patent. See Ex. 1005 11120–74, 94–99. We have reviewed that discussion and the references cited in those paragraphs. We have

government. PO Resp. 10–11. Patent Owner, however, does not ask for any relief on this basis. *Id.*

⁴ We accept this date as the priority date only for the sake of argument.

found it accurately reflects the teachings of the references. Moreover, we agree with Petitioner's declarant that the references are analogous to the claimed invention, and, as such, represent the level of skill in the relevant art at the time of the invention. *See In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (finding that the Board did not err in concluding that the level of ordinary skill was best determined by the references of record); *In re Oelrich*, 579 F.2d 86, 91 (CCPA 1978) (“[T]he PTO usually must evaluate . . . the level of ordinary skill solely on the cold words of the literature.”); *see also Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown.’”).

ii. Proposed Substitute Claims

Unlike examination, entry of the proposed substitute claims in an *inter partes* review is not automatic. As the moving party, Patent Owner must establish that it is entitled to the requested relief. *See Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1304 (Fed. Cir. 2015); *see also* 37 C.F.R. § 42.20(c) (movant bears burden of showing entitlement to relief). In its motion to amend, a patent owner bears the burden to show, *inter alia*, that a reasonable number of substitute claims is proposed, there is no broadening of scope, the proposed claims are supported adequately by the written description of the application as filed originally, and the proposed claims are patentable over the prior art. *See*

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37 C.F.R. § 42.121; *Idle Free Sys. Inc. v. Bergstrom, Inc.*, Case IPR2012-00027, slip op. at 5–6 (PTAB June 11, 2013) (Paper 26) (“*Idle Free*”) (informative). We address each of these requirements in turn.

a. Reasonable Number of Substitute Claims

A patent owner may propose a reasonable number of substitute claims for each challenged claim. 35 U.S.C. § 316(d)(1)(B). Absent special circumstances, it is presumed that only one substitute claim is needed to replace each challenged claim. 37 C.F.R. § 42.121(a)(3). This presumption may be rebutted by showing that the substitute claims are patentably distinct from each other. *Idle Free*, Paper 26, 8–9. To the extent that no patentable distinction is shown, we may deny entry of the excess claims, or group them together for purposes of considering patentability over the prior art. *See id.* In the Motion to Amend, Patent Owner proposes adding three new claims, 154, 155, and 156, as substitutes for the three challenged claims, 11, 74, and 81, respectively. Given this one to one correspondence, we determine the number of proposed substitute claims to be reasonable.

b. No Broadening of Scope

Proposed substitute claims in an *inter partes* review “may not enlarge the scope of the claims of the patent.” 35 U.S.C. § 316(d)(3); *see* 37 C.F.R. § 42.121(a)(2)(ii). In the Motion to Amend, Patent Owner proposes claim 154

as a substitute for claim 11, claim 155 as a substitute for claim 74, and claim 156 as a substitute for claim 81. Non-Cont. Mot. to Amend 1. Patent Owner has deleted limitations from each of the challenged claims in the proposed substitute claims. *See* Ex. 2020, 1–6.

Patent Owner does not represent that the proposed substitute claims do not enlarge the scope of the challenged claims of the '990 patent. Mot. to Amend 2–7. Instead, Patent Owner appears to argue, as discussed below, that the amended claims are at least as broad as claims 11, 74, and 81 (“the original claims”). *Id.* Indeed, it appears that the purpose of Patent Owner’s amendment is not to narrow the claims to overcome the prior art, but rather to remove any matter in the claims supported only by the disclosure added in the '573 application, so that the claims can receive the April 5, 2006 priority date of the '118 application. *Id.* at 2. Patent Owner also appears to seek to correct some of the claim defects we noted, but did not act on, in our Decision to Institute. *Id.* at 7–9.

Petitioner argues that Patent Owner has enlarged the scope of challenged claims. Opp. 2–5. We agree with Petitioner that Patent Owner impermissibly has attempted to broaden the scope of the challenged claims. We consider each of the substitute claims in detail below.

1. Proposed Substitute Claim 154

With respect to claim 154, Petitioner points to two changes in the claim language that it contends

broaden the scope. Opp. 3. First, Petitioner points to the amendment in the claim preamble. *Id.* Second, Petitioner points to the deletion of the entire claim passage “wherein the communication device receives a signal via any of the one or more products listed in any of the plurality of product grouping categories. . . .” *Id.* We agree with Petitioner that both of these amendments impermissibly broaden the scope of claim 154.

Beginning with the claim preamble amendment, the preamble of claim 11 originally read: “A communication device of at least one of *a cell phone a smart phone a desktop, a handheld, a PDA, a laptop, or a computer terminal at a monitoring site* for monitoring products for communication therebetween, comprising. . . .” In claim 154, the language in italics has been eliminated and replaced with “the products grouped together by common features in the product groupings category of design similarity (e.g., computer terminal, personal computer (PC)). . . .” Patent Owner contends that this new language is consistent with words found in the disclosure of the ’118 application. Mot. to Amend 4. Patent Owner further contends that this new language is broad enough to include the removed items, such as cell phones and smart phones, because those items are “species terms” that are “included in the genus ‘monitoring equipment’ and ‘communication device’ when the clause ‘products grouped together by common features in the product groupings category of design similarity’ is included.” *Id.* Patent Owner argues that “[t]he specific devices removed, such as the cell phones and smart phones would be recognized by one

of ordinary skill in the art as a type of communication device or monitoring equipment because cell phones and smartphones are devices that are capable of communication and are capable of receiving signals.” *Id.*

We agree with Petitioner and find, based on the Patent Owner’s own arguments, that these terms improperly broaden the scope of the claims. As Patent Owner explains, the added language is broad enough to include the removed items, and is intended to reflect the entire genus of “monitoring equipment” and “communications devices” that “are capable of communication and capable of receiving signals.” Mot. to Amend 4, 5. Thus, the claim has been broadened to not only include the listed species that have been removed, but anything falling within the claimed genus. Accordingly, we find that this amendment impermissibly broadens the claim.

As for the second change in the claim language, we find that Patent Owner has failed to show why removal of the entire passage “wherein, the communication device receives a signal via any of one or more products listed in any of the plurality of product grouping categories,” would not impermissibly broaden the scope of claim 154. The deletion of this limitation necessarily broadens the claim in that limitation’s aspect. *See In re Clement*, 131 F.3d 1464, 1468 (Fed. Cir. 1997) (“For example, a reissue claim that deletes a limitation or element from the patent claims is broader in that limitation’s aspect.”). Given that Patent Owner has entirely deleted this limitation and Patent Owner bears the burden of showing entitlement to the amendment,

it was incumbent on Patent Owner to explain why removing this entire passage from claim 154 would not broaden the scope of the claim. *See In re Bennett*, 766 F.2d 524, 526 (Fed. Cir. 1985) (en banc) (IA] claim is broadened if it is broader in any respect than the original claim, even though it may be narrowed in other respects.”).

2. *Proposed Substitute Claim 155*

The amendment of claim 155 deletes, among other things, the claim term “embedded” from wherever it is found in claim 74. Ex. 2020, 3–4. Petitioner argues that deleting this limitation broadens the claim. Opp. 3. Patent Owner merely states that “a built-in component could be an embedded component” (Mot. to Amend 3) and “that the term (embedded) has been examined, reviewed and accepted by the patent Examiner and was found to have a genus, species relationship with the term (built-in)” (Mot. to Amend 7).

We agree with Patent Owner’s understanding that “built-in” reflects a broader genus of which “embedded” is a particular species. As we explained in the Decision to Institute, the term “built-in” generally means “constructed to form an integral part of a larger unit.” Dec. to Inst. 12 (quoting OED ONLINE (OXFORD ENGLISH DICTIONARY (3d ed. 2003)) available at <http://www.oed.com/view/Entry/24414> (accessed: Oct. 6, 2014) (Ex. 3003)). As also discussed in the Decision to Institute, the term “embedded” is alternatively defined as “to enclose closely in or as if in a matrix”

and “to make something an integral part of.” Dec. to Inst. 12 (quoting MERRIAM-WEBSTER.COM, available at <http://www.merriamwebster.com/dictionary/embedded> (accessed: Aug. 24, 2015) (Ex. 3007)); *see also* OED ONLINE (OXFORD ENGLISH DICTIONARY (3d ed. 2003)) available at <http://www.oed.com/view/Entry/60835> (accessed: Oct. 6, 2014) (“to enclose firmly”) (Ex. 3006). Thus, the ordinary meaning would suggest that something “embedded” necessarily is “built-in,” and that something “built-in” could be, but is not necessarily, “embedded.” As such, the term “built-in” alone would imply a broader genus than “built-in embedded.” Moreover, as discussed above, the removal of a limitation implies that the claim has been broadened. *See In re Clement*, 131 F.3d at 1468; *In re Bennett*, 761 F.2d at 526. Patent Owner has not shown otherwise. Thus, we find that Patent Owner has failed to show that claim 155 is not impermissibly broadened.

3. *Proposed Substitute Claim 156*

As for proposed claim 156, there are a number of amendments, but Petitioner directs our attention to four changes to the language of the claim. First, Petitioner points to the limitation reciting “monitoring equipment.” Opp. 4. In claim 81, the limitation originally recited “monitoring equipment *located at a determinate site, comprising at least one of plurality product groups based on the categories of a computer, laptop, notebook, PC, handheld, reader, cell phone, PDA or smart phone* for the receipt and transmission of signals therebetween.” In claim 156, the italicized portion

was deleted, and replaced by the limitation that the “monitoring equipment” be “of at least one of the products grouped together by common features in the product groupings category of design similarity (e.g., computer terminal, personal computer (PC)).” This amendment is nearly identical to the change to the preamble of claim 154. For the same reasons discussed above with respect to the similar amendment to the preamble of claim 154, we find that Patent Owner has failed to demonstrate that this claim amendment would not broaden the scope of the claim 156, as compared to claim 81.

Second, Petitioner argues that the removal of the limitation “at least one cell phone tower interconnected to the monitoring equipment for sending signals thereto and receiving signals therefrom” impermissibly broadened claim 156. Opp. 4. Patent Owner provides no argument why this would not broaden the scope.

Claim 156, unlike claim 81, has no requirement of a cell phone tower that is connected to the monitoring equipment and can send and receive signals to the monitoring equipment. The elimination of an entire physical structure from the claim has broadened its scope to include systems that do not include a cell phone tower. Moreover, as discussed above, the removal of a limitation implies that the claim has been broadened. *See In re Clement*, 131 F.3d at 1468. Patent Owner has not shown otherwise. Thus, we find that Patent Owner has failed to show this amendment would not impermissibly broaden the claim.

Third, claim 156 also has been amended to remove the entire limitation that “at least one satellite or at least one cell phone tower capable of two-way signal communication between the multi sensor detection device and the monitoring equipment.” Thus, in claim 156, there is no requirement, as was the case in claim 81, that there be a cell phone tower, or any requirement that the satellite be capable of two-way communication with the monitoring equipment. This impermissibly broadens the scope. In addition, as discussed above, the removal of an entire limitation implies that the scope is broader. See *In re Clement*, 131 F.3d at 1468; *In re Bennett*, 766 F.2d at 526. Patent Owner has not shown otherwise. Thus, we agree with Petitioner that this amendment is also impermissibly broadening in scope.

Finally, Petitioner points to the deletion of the entire limitation “wherein the communication device receives a signal via any of one or more products listed in any of the plurality of product grouping categories.” Opp. 4. This amendment is identical to an amendment made in claim 154. For the reasons discussed above with respect the same change in claim 154, we also determine that Patent Owner has failed to show that this amendment is also not broadening in scope.

4. Conclusion

In sum, the proposed amendments either replace existing claim language with new, broader claim language or delete entire limitations from claims without replacing them. For the reasons discussed above, we

determine that Patent Owner has failed to show that any of the claims were not impermissibly broadened in scope. Accordingly, we find this sufficient by itself to deny the motion to amend as to claims 154–156.

c. Written Description Support

Pursuant to 37 C.F.R. § 42.121(b), Patent Owner bears the burden in the Motion to Amend to set forth “[t]he support in the original disclosure of the patent for each claim that is added or amended,” and “[t]he support in an earlier-filed disclosure for each claim for which benefit of the filing date of the earlier filed disclosure is sought.” The test for written description support is “whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). The purpose of the written description requirement is to convey with reasonable clarity to those skilled in the art that, as of the filing date sought, applicant was in possession of the invention as now claimed. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991).

Patent Owner has provided written description support only for the amendments to the claims, and has not provided written description support for the amended claims as a whole. Mot. to Amend 2–6. Without any explanation why a person of ordinary skill in the art would have recognized that the inventor

possessed the claimed subject matter as a whole, we find that Patent Owner's citation to written description support only for the added claim language is inadequate to satisfy the written description requirement for the claims overall. *See Novozymes A/S v. DuPont Nutrition Biosciences APS*, 723 F.3d 1336, 1349 (Fed. Cir. 2013) (claim is considered as an "integrated whole" when assessing written description). Accordingly, we find that Patent Owner has failed to show adequate written description support for the amended claims in their entirety, and that this defect is also sufficient to serve as a basis to deny the Motion to Amend. *See Microsoft Corp. v. Surfcast, Inc.*, Cases IPR2013-00292, IPR2013-00293, IPR2013-00294, IPR2013-00295, slip op. at 46 (PTAB Oct. 14, 2014) (Paper 93); *Nichia Corp. v. Emcore Corp.*, Case IPR2012-00005, slip. op. at 4 (PTAB Feb. 11, 2014) (Paper 27).

d. Patentability Over the Prior Art

In a motion to amend, the patent owner bears the burden of proof to demonstrate patentability of its proposed substitute claims over the prior art, and, thus, entitlement to the claims. *Idle Free* at 7. This does not mean that the patent owner is assumed to be aware of every item of prior art known to a person of ordinary skill in the art. *See MasterImage 3D, Inc. v. RealD, Inc.*, Case IPR2015-00040, slip op. at 2 (PTAB July 15, 2015) (Paper 42) ("*MasterImage 3D*") (representative). The patent owner, however, should explain in its motion why the proposed substitute claims are patentable

over the prior art of record, as well as prior art known to the patent owner:

A patent owner should identify specifically the feature or features added to each substitute claim, as compared to the challenged claim it replaces, and come forward with technical facts and reasoning about those feature(s), including construction of new claim terms, sufficient to persuade the Board that the proposed substitute claim is patentable over the prior art of record, and over prior art not of record but known to the patent owner. The burden is not on the petitioner to show unpatentability, but on the patent owner to show patentable distinction over the prior art of record and also prior art known to the patent owner. Some representation should be made about the specific technical disclosure of the closest prior art known to the patent owner, and not just a conclusory remark that no prior art known to the patent owner renders obvious the proposed substitute claims.

Idle Free at 7. These requirements include addressing the basic knowledge and skill set possessed by a person of ordinary skill in the art even without reliance on any particular item of prior art. *Id.* at 7–8. Prior art of record includes “any material art in the current proceeding, including art asserted in grounds on which the Board did not institute review.” *MasterImage 3D*, at 2.

The petitioner then has the opportunity, in its opposition, to argue any deficiency in the patent owner’s motion and “come forward with specific evidence and

reasoning, including citation and submission of any applicable prior art,” to rebut the patent owner’s position on patentability. *Idle Free* at 8.

This case is unusual because the amendments at issue here did not add limitations to the claims, but rather, removed limitations from the claims. As we found above, the result of these amendments is that the substitute claims are not narrower, but broader than the original claims.

We instituted an *inter partes* review of claims 11, 74, and 81 of the ’990 patent because Petitioner had demonstrated a reasonable likelihood of showing that these claims were anticipated by Astrin (Ex. 1002)⁵ and Breed (Ex. 1004).⁶ Paper 16. We declined to institute on the grounds based on Mostov (Ex. 1003) because Astrin and Breed addressed all of the claims, and there was no explanation why that ground differed from the instituted grounds.⁷

In the Motion to Amend, Patent Owner states that in addition to these references, the closest “prior art of which the [Patent Owner] is aware” is U.S. Patent No. 8,564,661 to Lipton.⁸ Mot. to Amend 11–13. Patent

⁵ Astrin, US 2006/0250235 A1, published November 9, 2006, filed April 28, 2006.

⁶ Breed, US 7,961,094 B2, issued June 14, 2011, filed November 29, 2007.

⁷ Mostov, US 2006/0181413 A1, published Aug. 17, 2006, filed January 30, 2006.

⁸ Lipton, US 8,564,661 B2, issued October 22, 2013, priority date October 24, 2000.

Owner argues Lipton does not render claims 154–156 unpatentable. Mot. to Amend 11–13. Patent Owner submits that the proposed substitute claims are similar to claims that were submitted in the pending '693 application. Non-Cont. Mot. to Amend 1–2. Patent Owner further asserts that Astrin, Mostov, and Brecc were submitted to the Examiner in the '693 application and were not found to be relevant. *Id.* at 2.

We do not consider Patent Owner's arguments that the examiner of the '693 application considered Astrin, Breed, and Mostov and found them irrelevant to the patentability of the claims in the '693 application to be entitled to any weight in this proceeding for several reasons. First, the actions of an examiner in another, related case pending in the PTO are not necessarily binding upon us. *See Sze v. Block*, 458 F.2d 137, 140–41 (CCPA 1972) (*inter partes* interference not bound by prior *ex parte* examination); *Switzer v. Sockman*, 333 F.2d 935, 940–43 (CCPA 1964) (*ex parte* proceeding not binding on subsequent *inter partes* proceeding); *see also Dayco Prods. Inc. v. Total Containment Inc.*, 329 F.3d 1358, 1368 (Fed. Cir. 2003) (noting examiners are not bound to follow other examiners' interpretations). Thus, the mere fact that an examiner made statements in the '693 application regarding these references does not require us to follow them in this proceeding. Second, Patent Owner fails to establish that the claims at issue in this proceeding are identical to the claims in the '693 application. Thus, there is no link shown between this proceeding and the claims in the '693 application to allow us to assess accurately the relevance of

that examiner's action. Finally, it is unclear precisely what feature that examiner found to be lacking from Astrin, Breed, and Mostov. Thus, Patent Owner has failed to provide adequate support for us to assess whether that examiner is correct. Accordingly, we do not find that the examiner's statements in the '693 application are sufficient to establish the patentability of the substitute claims here.

We next consider Patent Owner's argument that Astrin, Mostov, and Breed are not prior art because the amended claims are entitled to the April 5, 2006 priority date. Mot. to Amend 2–7. Even accepting, for the sake of argument, that the substitute claims are entitled to this earlier priority date, at the very least, Mostov remains prior art under 35 U.S.C. § 102(e) because Mostov's non-provisional filing date is January 30, 2006. Ex. 1003, at [22]. The fact that we did not institute this proceeding on Mostov does not mean it is no longer relevant to the patentability of the substitute claims. In deciding not to institute on Mostov, we did not rule on the merits of Petitioner's case. Dec. to Inst. 28–29. We merely determined that, given the Astrin and Breed references, instituting on Mostov was not a necessary use of resources. We consider Mostov still to be relevant to the patentability of the claims. Thus, Petitioner's arguments regarding the priority date, even if accepted, do not show patentability over Mostov, which we discuss below.

Mostov (Exhibit 1003)

Mostov is titled “Transportation Security System and Associated Methods.” Ex. 1003, at [54]. *Mostov* describes a security system for monitoring shipping containers by the use of Container Security Devices (CSDs) 140 within the containers. Ex. 1003, Abstract, Figs. 1–3.

Figure 22 of *Mostov* is reproduced below:

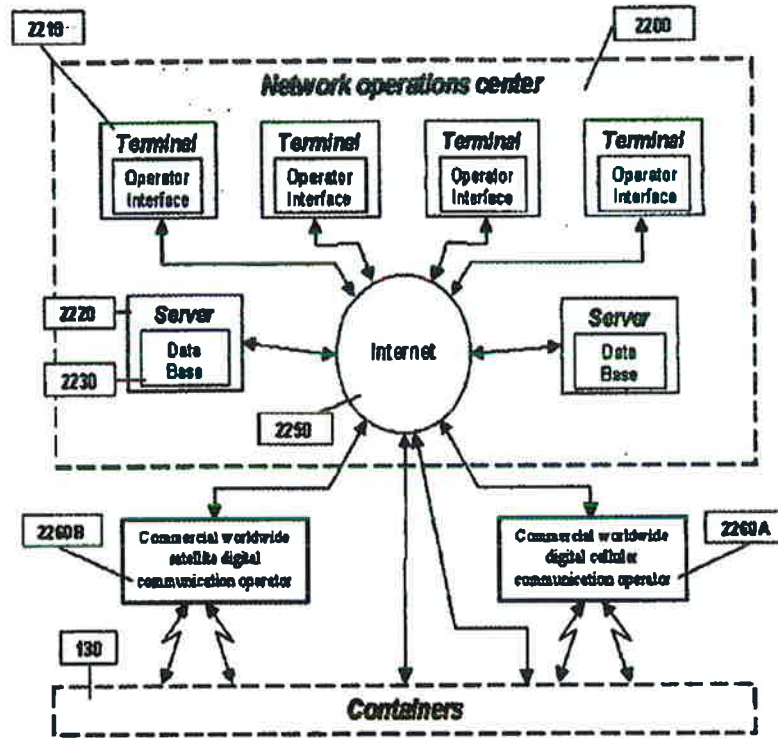


FIG. 22 NOC Structure 170

Figure 22 of *Mostov* is a block diagram illustrating the structure of Network Operations Center 170.

Network Operations Center (NOC) 170 (or 2200) consists of servers and computer terminals. *Id.* ¶¶ 9, 22, 28, 47, 88, 89. NOC 170 (or 2200) is interconnected to and serves to monitor containers 130 containing CSDs (not depicted). *Id.* ¶¶ 11–13. NOC 170 (or 2200) includes communication capabilities to communicate with CSDs. *Id.* ¶¶ 44, 45, 48, 93, 96, 97, 98, 102, 106, 112, 113, 117, Figs. 1, 2, 22, 23, 25. The CSDs report condition information to Network Operations Center 170 via a bridge, cellular, or satellite antenna. *Id.* ¶¶ 44, 46, 48, 112, 113. Based on the condition information received, NOC 170 (or 2200) may use the same communications channels to transmit instructions (e.g., an activate or deactivate instruction) back to CSD 140. *Id.* ¶¶ 96, 113, Fig. 24.

CSD 140 contains a number of built-in sensors for detecting various conditions (e.g., temperature, humidity, tampering, theft, breach, personal conditions, physical load, explosions, gunshots, etc.).⁹ *Id.* ¶¶ 4, 9, 11, 22, 28, 47, 61, 88, 89, 115, Figs. 3, 4, 10. CSD 140 can contain a variety of communications devices including cellular model 350A and satellite modem 350B, which CSD 140 uses to communicate with NOC 170 (or 2200). *Id.* ¶¶ 93, 112, Figs. 1, 3. Figure 3 of Mostov is reproduced below.

⁹ To the extent that Patent Owner contends that the sensors are RFID tags (PO Resp. 46), we do not agree. As paragraphs 47 and 58 of Mostov, which were cited by Patent Owner, make clear, the RFID reader is in addition to the sensors and receives data from sources other than the sensors. *See* Ex. 1003 ¶¶ 47, 58.

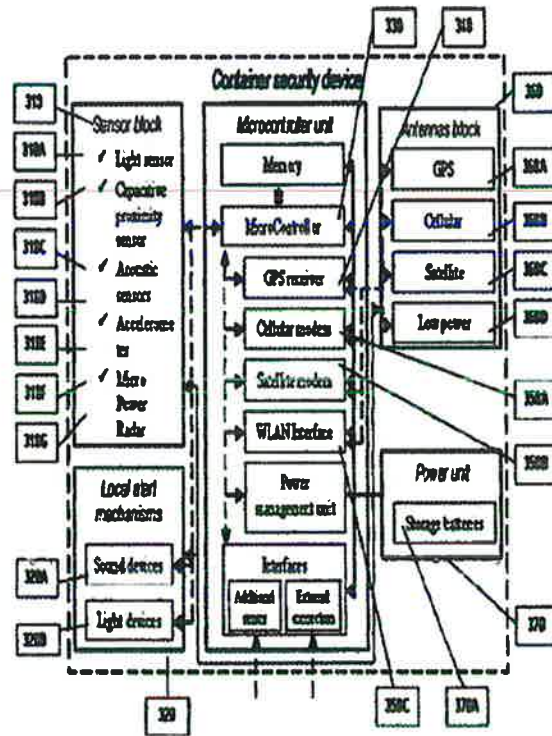


FIG. 3

Figure 3 of Mostov is a block diagram of CSD 140.

Proposed substitute claim 154

As discussed above, Patent Owner does not contend that claim 154 has been narrowed in any way over claim 11, or that any individual claim element of claim 154 is meaningfully narrower than the corresponding claim element of claim 11. *See* Mot. to Amend 5–6. Mostov discloses a PC at a monitoring site (NOC 170 (or 2200)) that can communicate, via cellular or satellite connections, with containers containing CSDs 140. Ex.

1003 ¶¶ 9, 22, 28, 44, 45, 47, 48, 88, 89, 93, 96, 97, 98, 102, 106, 112, 113, 117, Figs. 1, 2, 22, 23, 25. CSDs 140 include a number of different sensors and can be activated or deactivated by NOC 170 (or 2200). *See* ¶¶ 4, 9, 11, 22, 28, 47, 61, 88, 89, 93, 112, 115, Figs. 1, 3, 4, 10. We have reviewed Petitioner’s evidence and arguments regarding why Mostov anticipates claim 11. Pet. 29–35; Ex. 1005 ¶¶ 95–99. We are persuaded that the evidence and citations establishes that claim 154, which is at least as broad in every element as claim 11, is anticipated by Mostov. Patent Owner presents no persuasive evidence or argument addressing why Mostov, which is prior art of record in this proceeding, does not anticipate claim 154, nor any persuasive evidence or argument addressing Petitioner’s analysis with respect to this reference. Patent Owner bears the burden of showing that claim 154 is patentable, but has failed to show that Mostov does not anticipate claim 154. Thus, we find that Patent Owner has failed to meet the burden of showing that claim 154 is patentable over Mostov.

Proposed Substitute Claim 155

As discussed above, Patent Owner does not contend that claim 155 has been narrowed in any way over claim 74, or that any individual claim element in claim 155 is meaningfully narrower than the corresponding element in claim 74. Mot. to Amend 3–4. Indeed, as discussed above, one of Patent Owner’s amendments to claim 74 was to remove the limitation “embedded” wherever it was found in the claim. Ex. 2020, 3–4. Thus,

as discussed above, Patent Owner broadened the claim to include not only those sensors that were “built-in embedded,” but also those that were merely “built-in.” *See supra* § II.C.ii.b.2. Patent Owner’s other amendments remove certain communication techniques from the claim (*see* Ex. 2020, 4), but not satellite communications, which Mostov discloses (Ex. 1003 ¶¶ 44, 46, 48, 112, 113).

Mostov discloses a multi-sensor detection system for monitoring products with a plurality of sensors including sensors built into CSDs 140 for detecting chemical agents and explosives, that CSDs may be fixed to the container, and that CSDs 140 can communicate alarms to the monitoring site, NOC 170. Ex. 1003 ¶¶ 4, 9, 11, 22, 28, 46, 47, 61, 87, 88, 89, 97, 112, 115, Fig. 3, 4, 25. We have reviewed Petitioner’s evidence and arguments regarding why Mostov anticipates claim 74. Pet. 36–38; Ex. 1005 ¶¶ 95–99. We are persuaded that the evidence and citations also establish that claim 155 is anticipated by Mostov. Patent Owner presents no persuasive evidence or argument addressing why Mostov, which is prior art of record in this proceeding, does not anticipate claim 155, nor any persuasive evidence or argument addressing Petitioner’s analysis with respect to this reference. Patent Owner bears the burden of showing that claim 155 is patentable, but has failed to show that Mostov does not anticipate claim 155. Thus, we find that Patent Owner has failed to show that claim 155 is patentable over, at the very least, Mostov.

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Proposed Substitute Claim 156

As discussed above, Patent Owner does not contend that claim 156 has been narrowed in any way over claim 81, or that any individual claim element in claim 156 is meaningfully narrower than claim 81. Mot. to Amend 3–7. As described above, Mostov discloses a multi-sensor detection system for detecting explosives and other compounds, including a plurality of sensors in CSD 140, and monitoring equipment, such as PCs at the NOC. In addition, both the CSDs and NOC including satellite and other types of radio transmission, to allow internet communication between the NOC and CSD. Ex. 1005 ¶¶ 95–99; Ex. 1003 ¶¶ 9, 11, 89, 90, 101–103; Figs. 1, 3, 22. We have reviewed Petitioner’s evidence and arguments regarding why Mostov anticipates claim 81. Pet. 37–42; Ex. 1005 ¶¶ 95–99. We are persuaded that the evidence and citations establish that claim 156 is anticipated by Mostov. Patent Owner presents no persuasive evidence or argument addressing why Mostov, which is prior art of record in this proceeding, does not anticipate claim 156, nor any persuasive evidence or argument addressing Petitioner’s analysis with respect to this reference. Patent Owner bears the burden of showing that claim 156 is patentable, but has failed to show that Mostov does not anticipate claim 156. Thus, we find that Patent Owner has failed to show that claim 156 is patentable over, at the very least, Mostov.

e. Conclusion

In sum, Patent Owner has failed to show that the motion to amend to substitute claims 154–156 should be granted. Specifically, Patent Owner has failed to show that claims 154–156: (1) are not broader in scope than claims 11, 74, and 81; (2) have written description support in the originally filed application; and (3) are patentable over the prior art of record.

III. CONCLUSION

Patent Owner has not demonstrated by a preponderance of the evidence that proposed substitute claims 154–156 are patentable over the prior art of record. Moreover, Patent Owner fails to demonstrate that the Motion to Amend complies with our requirements that the claims not be broadening in scope, and that the amended claims have written description support. Therefore, we grant Patent Owner’s Motion to Amend solely as to the non-contingent request to cancel challenged claims 11, 74, and 81 of the ’990 patent, and deny the Motion to Amend as to the proposed substitution of claims 154–156.

IV. ORDER

Accordingly, it is

ORDERED that Patent Owner’s Motion to Amend is *granted* as to the request to cancel claims 11, 74, and 81 of the ’990 patent; and

FURTHER ORDERED that Patent Owner's Motion to Amend is *denied* as to the request to add proposed substitute claims 154–156.

Because this is a Final Written Decision, the parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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571.272.7822

Paper No. 37
Filed: November 17, 2015

UNITED STATES PATENT
AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY,
Petitioner,

v.

LARRY GOLDEN,
Patent Owner.

Case IPR2014-00714
Patent RE43,990 E

Before LORA M. GREEN, JON B. TORNQUIST, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

CHERRY, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71(d)

Larry Golden ("Patent Owner") timely filed a re-
quest for rehearing ("Rehearing Request" or "Request")

of our Final Written Decision (Paper 35, “Final Decision” or “Final Dec.”) granting-in-part and denying-in-part Patent Owner’s non-contingent motion to amend. Paper 36 (“Req. Reh’g”).¹ In particular, the Request seeks rehearing of the portion of the Final Decision denying Patent Owner’s motion to amend U.S. Patent No. RE43,990 E (Ex. 1001, “the ’990 patent”) to add substitute claims 154–156. *Id.* at 2–3. For the reasons given below, we deny the Rehearing Request.

I. LEGAL STANDARDS

“A party dissatisfied with a decision may file a request for rehearing, without prior authorization from the Board.” 37 C.F.R. § 42.71(d). “The burden of showing [the] decision should be modified lies with the party challenging the decision.” *Id.* The request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

¹ Patent Owner sent two emails to the Board on October 2, 2015 and October 11, 2015 arguing that the Board erred in rejecting Patent Owner’s motion to amend. In view of Patent Owner’s *pro se* status, we offered to treat those emails collectively as a request for rehearing. Reh’g Req. 3. In an email on October 24, 2015, Patent Owner accepted that offer. *Id.* at 2–3. Thus, we treat Patent Owner’s October 2, 2015 and October 11, 2015 emails collectively as a request for rehearing. We have entered these emails as a captioned document in the record as Paper 36. We also have entered certain papers attached to the October 2, 2015 email as Exhibits 3008 and 3009 and the paper attached to the October 11, 2015 email as Exhibit 3010.

II. ANALYSIS

In our Final Decision, we granted Patent Owner’s non-contingent motion to cancel claims 11, 74, and 81 of the ’990 patent, which were the only claims challenged in this *inter partes* review. We also denied Patent Owner’s non-contingent motion to amend the ’990 patent to add substitute claims 154–156. In particular, we found that Patent Owner had failed to carry Patent Owner’s burden of showing entitlement to the amendment for three independent reasons: (1) substitute claims 154–156 are impermissibly broader than the claims they replaced; (2) Patent Owner failed to show written description support for substitute claims 154–156 as a whole; and (3) Patent Owner failed to show that claims 154–156 were patentable over the prior art of record. Final Dec. 15–21 (improper broadening), 21–22, (written description), 22–31 (prior art of record). Therefore, to succeed on this Rehearing Request, Patent Owner must show that we misapprehended or overlooked matters in reaching each of these determinations. Patent Owner has not done so. We address Patent Owner’s arguments in detail below.

A. *Improper Broadening*

In the Rehearing Request, Patent Owner argues:

When the Board agreed with the Petitioner, the Examiner of the ’990 patent, and the Patent Owner that the entire genus of “monitoring equipment” and “communication devices” includes as species cell phones and smart-phones, the support for an April 5, 2006

priority date had already been established. Therefore, when the Board writes in its “Final Written Decision”, pg. 15: “to remove any matter in the claims supported only by the disclosure added in the ‘573 application, so that the claims can receive the April 5, 2006 priority date of the ‘118 application” is not true.

Reh’g Req. 4.

We initially note that this argument (and the supporting arguments that appear on Reh’g Req. 4–5) appears to be directed at our decision to institute review on cancelled claims 11, 74, and 81. This and other complaints about our decision to institute review of claims 11, 74, and 81 are not persuasive of error because Patent Owner cancelled claims 11, 74, and 81, so they are no longer at issue in this proceeding. As we explained to Patent Owner (*see* Paper 23, 2–4; Paper 29, 2; Ex. 1025, 3–10), a non-contingent motion to amend is, in essence, an abandonment of claims 11, 74, and 81, and he bears the burden of showing newly presented claims 154–156 are patentable. If Patent Owner believed that Petitioner failed to show claims 11, 74, and 81 were unpatentable or that our priority date determination for those claims was incorrect, Patent Owner could have filed a contingent motion to amend.

In any event, this priority date argument does not contain any reason why our determination that substitute claims 154–156 are broader in scope than cancelled claims 11, 74, and 81 that they seek to replace was in error. Reh’g Req. 4–5. To the extent that Patent Owner does contest our finding that the claims are

broader in scope, we do not find it persuasive because Patent Owner does not show amending a claim to replace a particular species with an entire genus would not be broadening. Thus, this argument regarding priority date does not persuade us that we erred in denying Patent Owner's motion to amend.

Patent Owner goes on to argue that “[t]he Patent Owner was aware and made all claim amendments in accordance to a clause in the general rule of Broad[en]ing that allows for the justifiable deviation from the general rule if there are adequate and persuasive explanations to justify a ‘special circumstance.’” *Id.* at 5. Patent Owner provides no citation for this “clause in the general rule . . . that allows for justifiable deviation from the general rule,” and we are not aware of such a rule in the context of claim amendments in *inter partes* reviews. Indeed, 35 U.S.C. § 316(d) and 37 C.F.R. § 42.121, which govern amendments, contain no such exception. Moreover, even if such an exception existed, Patent Owner made no arguments in its Patent Owner Response or Motion to Amend that such an exception should apply, so we could not misapprehended or overlooked them.

To the extent that Patent Owner submits that we “coerced” Patent Owner into filing a motion to amend or “advised” him to do so, we note that, as the record reflects (Paper 23, 2–3), Patent Owner filed the motion to amend without ever discussing the motion with the Board. We never advised Patent Owner that a motion to amend was the proper course in this proceeding, and repeatedly warned Patent Owner of the difficulties

presented by, and consequences that result from, a non-contingent motion to amend. *See* Paper 23, 2–4; Paper 29, 2; Ex. 1025, 3–10.

B. Lack of Written Description Support

Patent Owner argues that we should also excuse Patent Owner's failure to identify written description support for the entire claim because of the "special circumstances" discussed above. Reh'g Req. 2–3. Without determining whether such an exception exists for the requirement of providing written description support for the entire claim, Patent Owner fails to identify anywhere in the Patent Owner Response or Motion to Amend where this argument was raised. Because the argument was not raised, we could not have misapprehended or overlooked it. Thus, we determine that Patent Owner has failed to show that we erred in our determination that the Motion to Amend failed to show written description support for the claim as a whole.

*C. Failure to Show Patentability
Over the Prior Art of Record*

Patent Owner argues that the Board erred in determining that Patent Owner failed to meet the burden of showing that claims 154–156 were patentable over the prior art of record for three reasons. Reh'g Req. 7–9. First, Patent Owner argues that Petitioner only introduced Mostov² as prior art under § 102(b) based

² Mostov, US 2006/0181413 A1, published Aug. 17, 2006, filed January 30, 2006.

on a June 6, 2008 priority date. *Id.* at 7–8. Patent Owner argues that Petitioner never alleged that Mostov was prior art under § 102(e). *Id.* This argument does not persuade us that our determination was in error because the burden of showing patentability was on Patent Owner. Mostov unambiguously has a non-provisional filing date that is earlier than the priority date of April 5, 2006 that Patent Owner argued in the Motion to Amend. *See* Paper 26, 2 (arguing for an April 5, 2006 filing date). Thus, the burden was on Patent Owner to show why Mostov did not render the claim unpatentable. *See Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1304 (Fed. Cir. 2015); *see also* 37 C.F.R. § 42.20(c) (movant bears burden of showing entitlement to relief). Patent Owner failed to do so.

Second, Patent Owner now argues that claims 154–156 are entitled to a November 26, 2004 priority date, which is before Mostov’s filing date and provisional date. Reh’g Req. 8–9. Patent Owner does not direct us to where he made this argument in the Patent Owner Response, Motion to Amend, or Reply. Thus, Patent Owner has not demonstrated that we misapprehended or overlooked his argument. Moreover, even if we were able to consider it for the first time on rehearing, Patent Owner fails to attach the complete copy of the Disclosure Document (*see* Ex. 3009), let alone show how the Disclosure Document actually supports claims 154–156, such that the substitute claims are entitled to the earlier filing date. *See Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1379–80 (Fed. Cir. 2015) (discussing what is required to meet the

burden of showing a claim is entitled to an earlier priority date). Thus, we are not persuaded that we overlooked or misapprehended Patent Owner's argument with respect to entitlement to the November 26, 2004 priority date.

Finally, Patent Owner argues "it is difficult, if not impossible, for someone who is examining the claims for anticipation to establish anticipation without examining each and every element of the broader claims." Reh'g Req. 9. Patent Owner further argues that "Mostov has not identified a single, 'communication device', 'multi-sensor detection device', or a single piece of monitoring equipment that comprises all the elements of any of the claims." *Id.* Patent Owner continues that "Mostov is all over the place and is combining elements to justify anticipation." *Id.* We have reviewed the disclosure of Mostov and Patent Owner's arguments and, respectfully, disagree with Patent Owner's assessment of the reference. Mostov is unambiguous that Figures 1, 3, and 22 are all part of a single embodiment. *See* Ex. 1003 ¶ 40 ("Fig. 22 shows a diagrammed depiction of one exemplary Network Operations Center depicted in Fig. 1."), 46 ("FIG. 3 is a block diagram illustrat[ing] one exemplary CSD 300. CSD 300 may, for example, represent CDS 140 of Fig. 1."). Thus, a single embodiment disclosed in Mostov meets the limitations of the substitute claims. For example, as we explained with respect to claim 154, Mostov discloses in Figures 1, 3, and 22, a PC ("[a] communication device . . . for monitoring products") at monitoring site (NOC 170 (or 2200)) that can communicate with CSDs

(“multi-sensor detection device”) via cellular or satellite communications, the CSDs include sensors and can be activated or deactivated by the PC at the monitoring site (Ex. 1003 ¶ 113). Final Dec. 29; *see also id.* at 29–31 (similar analysis for claims 155 and 156). Patent Owner does not explain with any specificity how this analysis is in error. Thus, we are not persuaded that we erred in finding that Patent Owner failed to demonstrate the patentability of claims 154–156 over the prior art of record.

D. Conclusion

We have reviewed Patent Owner’s other arguments and find them to be without merit. For the reasons given, Patent Owner has not shown anything that we misapprehended or overlooked in our Final Decision and that our Final Decision denying Patent Owner’s Non-Contingent Motion to Amend the ’990 patent to add substitute claims 154–156 was in error.

III. ORDER

Accordingly, it is:

ORDERED that Patent Owner’s Request for Rehearing (Paper 36) is *denied*.

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App. 50

**United States Court of Appeals
for the Federal Circuit**

LARRY GOLDEN,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-2134

Appeal from the United States
Court of Federal Claims
in No. 1:19-cv-00104-EGB,
Senior Judge Eric G. Bruggink.

Decided: April 10, 2020

LARRY GOLDEN, Greenville, SC, pro se.

DAVID ALLEN FOLEY, JR., Commercial Litigation
Branch, Civil Division, United States Department of
Justice, Washington, DC, for defendant-appellee. Also
represented by JOSEPH H. HUNT, GARY LEE HAUSKEN.

Before O'MALLEY, MAYER, and WALLACH, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

Larry Golden (“Golden”) appeals an order of the United States Court of Federal Claims (“Claims Court”) dismissing his claims against the United States (“government”) pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Claims Court (“RCFC”). The Claims Court held that Golden’s complaint alleges a duplicative claim over which the court lacked jurisdiction, and his complaint fails to state a claim upon which relief can be granted. *Golden v. United States*, No. 19-cv-00104 (Fed. Cl. May 14, 2019), ECF No. 12 (“*Claims Court Op.*”). For the reasons explained below, we affirm.

BACKGROUND

Golden, proceeding pro se, filed this suit pursuant to 28 U.S.C. § 1491(a) on January 17, 2019, seeking “reasonable and entire compensation for the unlicensed use and manufacture” of his “inventions described in and covered by” various patents. *Golden v. United States*, No. 19-104C (Fed. Cl. May 14, 2019), ECF No. 1; SAppx1012.¹ Relevant to this appeal are

¹ Golden filed an “Informal Brief Appendix” on September 3, 2019, using the prefix “Appx.” Golden also filed an additional appendix with his reply brief on November 7, 2019. This Reply Appendix also uses the prefix “Appx,” and restarts the numbering at Appx1. The government, for its part, filed a Supplemental Appendix, using the same “Appx” prefix as Golden’s two appendices, but beginning the numbering at Appx1000. We cite to the government’s Supplemental Appendix as “SAppx,” Golden’s “Informal

certain other proceedings involving some or all of the patents that were the subject of Golden's complaint in this case: *Golden v. United States*, No. 13-307C (Fed. Cl. May 1, 2013) ("Lead Case") and *U.S. Dep't of Homeland Security v. Golden*, No. IPR 2014-00714 ("the IPR"). Resolution of this appeal does not require a detailed recitation of the factual background of the Lead Case or the IPR. Accordingly, only the facts relevant to this appeal are discussed below.

A. Lead Case

On May 1, 2013, Golden filed the complaint in the Lead Case, alleging patent infringement by the government pursuant to 28 U.S.C. § 1498(a). The trial court allowed Golden to amend his complaint five times, and, with each amendment, Golden added claims of infringement of additional patents. Starting with the second amended complaint, Golden also included allegations of "Government Taking," alleging that the government had "taken the subject matter, scope, technology rationale, devices schematics, processes, methods, procedures and systems of what is now Golden's patents . . . for public use without just compensation." SAppx1791–93. Golden alleged that the Claims Court had jurisdiction over his takings claims under 28 U.S.C. § 1491. SAppx1791. Noting that the takings claims appeared to be duplicative of the patent infringement claims, the trial court initially stayed

Brief Appendix" as "Appx," and Golden's Reply Appendix as "RAppx."

Golden’s takings claims, “pending determination of liability for the Government’s alleged patent infringement.” SAppx1794 (citing *Zoltek Corp. v. United States*, 672 F.3d 1309 (Fed. Cir. 2012) (*en banc*)).

On August 10, 2017, Golden filed his fifth and final amended complaint in the Lead Case. SAppx2040. This voluminous filing included a general “Count I,” alleging “Fifth Amendment Takings” of nine of Golden’s patents. SAppx2065–67.² It also included additional specific “Count Is,” which recite takings allegations tailored to the use of specific electronic devices. *See, e.g.*, SAppx2069–70 (LG Electronics G5 Smartphone), SAppx2071–73 (LG Electronics V10 Smartphone), SAppx2074–75 (Apple’s iPhone/iPad Camera Biosensor for Facial Heart Rate Monitor). The complaint similarly included corresponding “Count Its” – patent infringement claims under 28 U.S.C. § 1498 referencing the same electronic devices. *See, e.g.*, SAppx2067–69; SAppx2070–71; SAppx2073–74; SAppx2075–76.³

On March 29, 2018, the Claims Court issued a memorandum opinion and order, granting-in-part the government’s motion for partial dismissal of the Lead Case and denying Golden’s motion for leave to file a

² Specifically, Golden alleged taking of the “subject matter as outlined in” his U.S. Patent Nos. 7,385,497; 7,636,033; 8,106,752; 8,334,761; 8,531,280; RE43,891; RE43,990; 9,096,189; and 9,589,439. SAppx2065.

³ Golden’s generic patent infringement “Count II” referenced the same nine patents as his takings claims, as well as his Continuation Patent Application No. 15/530,839, which later issued as U.S. Patent No. 10,163,287. SAppx2067–69.

motion for summary judgment. *Golden v. United States*, 137 Fed. Cl. 155, 159 (2018) (dismissing certain patent infringement claims). Golden appealed the partial dismissal opinion to this court. SAppx2301. We dismissed the appeal as premature because the Claims Court had not yet issued a final decision or judgment in the Lead Case. Order, *Golden v. United States*, No. 2018-1942 (Fed. Cir. Aug. 1, 2018); Order, *Golden v. United States*, No. 2018-1942 (Fed. Cir. May 31, 2018).

In November 2018, the Claims Court lifted the stay on Golden's takings claims in the Lead Case, "[t]o pursue efficient resolution of all claims in th[e] case[.]" SAppx2303–4. The court permitted the government to file a motion to dismiss those claims. SAppx2304. On May 8, 2019, the trial court granted the government's motion and dismissed Golden's takings claims. *Golden v. United States*, No. 13-307C, 2019 WL 2056662, at *3 (Fed. Cl. May 8, 2019).

Certain patent infringement allegations from the Lead Case have not yet been resolved, however. SAppx2303. The case is stayed pending resolution of Golden's petition in an *inter partes* review proceeding affecting one of the patents at issue in the Lead Case. SAppx2339–40. The court's rulings on the takings claims in the Lead Case are, accordingly, not yet ripe for appeal to this court.

B. *Inter Partes* Review of
U.S. Patent No. RE43,990

On April 30, 2014, the Department of Homeland Security (“DHS”) petitioned the Patent Trial and Appeal Board (“Board”) for *inter partes* review of claims 11, 74, and 81 of Golden’s U.S. Patent No. RE43,900. The Board instituted review on October 8, 2014. During this proceeding, Golden filed, *pro se*, a Patent Owner Response and Motion to Amend. The Board held a conference call with the parties following this filing, and informed Golden that it was unclear whether his Motion to Amend was contingent on the Board finding the challenged claims unpatentable. SAppx2434–36. The Board informed Golden that, if his Motion to Amend was non-contingent, he was “in essence, abandoning the claims at issue, and saying that we should only look at the claims as amended in the Motion to Amend.” SAppx2436. The Board also “urge[d]” Golden “to retain new counsel because of the possible consequences of this proceeding, as well as its very technical nature.” SAppx2437. In response, Golden again filed his Patent Owner Response, as well as two separate Motions to Amend, which the Board treated “in the collective as a single motion to amend.” SAppx2512.

On February 3, 2015, the Board held another teleconference, and confirmed with Golden that his Motion to Amend was, indeed, non-contingent. According to the Board, Golden confirmed “that he is abandoning the claims on which trial was instituted.” SAppx2512. The Board issued its final written decision on October

1, 2015. It granted Golden's non-contingent request to cancel the original claims. It also found that Golden had failed to demonstrate by a preponderance of the evidence that his proposed substitute claims were patentable over the prior art. SAppx2547.

Golden did not appeal the Board's final written decision, but is currently petitioning the Patent and Trademark Office ("PTO") (through counsel) to strike the *Inter Partes* Review Certificate as an *ultra vices* agency action. In that petition, Golden argues that, under the Supreme Court's recent decision in *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019), a government agency may not petition for IPR. SAppx2600-02.

C. The Present Case

Golden filed the present case in January 2019, shortly before the Claims Court granted the government's motion to dismiss the takings claims in the Lead Case. In this action, Golden again seeks compensation for the government's Fifth Amendment Taking of his property, i.e., several of his U.S. patents, which were also at issue in the Lead Case. *Golden v. United States*, No. 19-104C (Fed. Cl. May 14, 2019), ECF No. 1; SAppx1012. In this complaint, Golden alleges takings of the subject matter of his patents based on actions by different entities, including the Board, the Department of Justice, DHS, the Claims Court, and our court. SAppx1011-12. The complaint alleges the takings occurred by virtue of: (1) the government's use, manufacture, development, and disclosure of the

subject matter “outlined” in the claims and specifications of Golden’s patents; (2) the cancellation of certain patent claims during the IPR initiated by the government; and, (3) certain actions by the Claims Court and the Federal Circuit in the Lead Case. On January 29, 2019, the trial court determined that Golden’s complaint raises identical questions of law and fact as the Lead Case and consolidated the cases.

On May 14, 2019, upon the government’s motion pursuant to RCFC 12(b)(1) and 12(b)(6), the Claims Court dismissed Golden’s complaint in the present case as largely duplicative of the takings claims in the Lead Case, which the court had recently dismissed. *Claims Court Op.* at 1. The court held that, even if the complaint was not duplicative of the Lead Case, the Claims Court did not have jurisdiction over the takings claims because Golden cannot label his patent infringement claim as a “taking” in order to proceed under the court’s Tucker Act jurisdiction. According to the trial court, patent infringement claims against the government are to be pursued exclusively under § 1498, and ‘patent rights are not cognizable property interests for Takings Clause purposes.’” *Id.* at 3–4 (citing *Zoltek v. United States*, 442 F.3d 1345 (Fed. Cir. 2006) (“*Zoltek I*”), *vacated on other grounds on reh’g en banc*, 672 F.3d 1309 (Fed. Cir. 2012) (“*Zoltek II*”) and quoting *Christy, Inc. v. United States*, 141 Fed. Cl. 641, 657–60 (2019)).

As to Golden’s IPR-based takings claims, the trial court found that patent rights are not private property for purposes of a Fifth Amendment takings claim. The

court then concluded, “setting aside whether an action by the Board could ever constitute a government taking,” the cancellation of claims in the IPR was the result of Golden’s voluntary amendment of his claims. *Id.* at 4. Finally, as to Golden’s grievances against the Claims Court and this court, the trial court explained that the courts adjudicate patent rights, and, “in any event, as Mr. Golden himself notes, both courts have allowed his patent claims to continue in the [Lead Case].” *Id.* Golden timely appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

Whether the Claims Court properly granted the government’s motion to dismiss is a question of law. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). This court reviews a question of law *de novo* and reverses the Claims Court’s legal conclusion only if it is incorrect as a matter of law. *See Placeway Constr. Corp. v. United States*, 920 F.2d 903, 906 (Fed. Cir. 1990).

On appeal, Golden argues that the trial court improperly dismissed his takings claims based on: (1) the government’s infringement of his patents; (2) the institution of the IPR; and (3) the Claims Court’s dismissal of his causes of action relating to patent claims that were “unjustly cancelled in the IPR.” Appellant’s Br. 5, 13. He also argues that there were “several breaches of implied-in-fact contracts” by the government. *Id.* at 5. We address each argument in turn.

A.

We first consider the dismissal of Golden’s patent infringement-based takings claims. The Claims Court held that it did not have jurisdiction over these claims pursuant to 28 U.S.C. § 1491, because patent infringement claims against the government are to be pursued exclusively under 28 U.S.C. § 1498. *Claims Court Op.* at 3–4 (citing *Zoltek I*, 442 F.3d at 1350–53). We agree.

The Claims Court has limited jurisdiction to entertain suits against the United States. The Tucker Act is the principal statute governing the jurisdiction of the Claims Court. It waives sovereign immunity for claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491. Section 1491 carves out an important exception: it does not waive sovereign immunity for claims sounding in tort. *Id.* As relevant to this case, another statute, 28 U.S.C. § 1498(a) permits suits against the United States for its unauthorized use of a patented invention. Under this statute, a patent owner may “recover [] . . . his reasonable and entire compensation for such use and manufacture.” 28 U.S.C. § 1498(a).

In support of its conclusion that § 1498 provides the sole avenue for pursuing a claim of patent infringement against the United States, the Claims Court relied on our decision in *Zoltek I*. There, we affirmed the Claims Court’s decision that patent owner *Zoltek*’s § 1498(a) infringement claims against the government

were barred because every step of the claimed method was not performed in the United States. And, relying on the Supreme Court's decision in *Schillinger v. United States*, 155 U.S. 163 (1894), we held that Zoltek was not permitted to proceed under the Tucker Act by alleging that the infringement was a taking. *Zoltek I*, 442 F.3d at 1350. As the subsequent history of the *Zoltek* case shows, our decision in *Zoltek I* does not control the jurisdictional analysis here.⁴ We agree, however, with the conclusion in *Zoltek I* that 28 U.S.C. § 1498 provides the only avenue for a patent owner to bring an action against the government for patent infringement.

The Takings Clause of the Fifth Amendment states that private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. But a cause of action under the Fifth Amendment is unavailable to patent owners alleging infringement by the government. *Schillinger*, 155 U.S. at 168–69. In *Schillinger*, the Supreme Court held that a patentee could not sue the government for patent infringement as a Fifth Amendment taking. *Id.* The

⁴ There, on remand, the Claims Court granted the patent owner's motion to amend its complaint and to transfer the case, and certified that decision to us for an interlocutory appeal. We then voted *en banc* to vacate the *Zoltek I* holding that Zoltek's § 1498(a) infringement claims were barred. *Zoltek II*, 672 F.3d at 1326–27. And, we held that, “[s]ince the Government's potential liability under § 1498(a) is established, we need not and do not reach the issue of the Government's possible liability under the Constitution for a taking. The trial court's determinations on that issue are vacated.” *Id.* at 1327. The *Zoltek I* takings analysis, is therefore, persuasive authority, but not binding on us.

Court explained that, under the Tucker Act, Congress waived its sovereign immunity as to certain types of claims, but that waiver does not extend to “claims founded upon torts.” *Id.* at 168. According to the Court, a patent infringement action “is one sounding in tort[,]” and, just as Congress could not have intended every wrongful arrest or seizure of property to expose it to damages in the Court of Claims under the Due Process Clause, the wrongful appropriation of a patent license cannot expose the government to liability under the Fifth Amendment’s Takings Clause. *Id.* at 168–169. Thus, under *Schillinger*, prior to the Patent Act of 1910 (later codified as amended at 28 U.S.C. § 1498), the Claims Court lacked jurisdiction over patent infringement actions against the government. As we recognized in *Zoltek I*, *Schillinger* remains the law. 442 F.3d at 1350.

Subsequent legislation confirms that a patent owner may not pursue an infringement action as a taking under the Fifth Amendment. Following *Schillinger*, Congress enacted the Patent Act of 1910, which “augmented the Court of Claims’ Tucker Act jurisdiction by providing jurisdiction over the tort of patent infringement.” *Id.* at 1351. We explained in *Zoltek I* that 28 U.S.C. § 1498 “add[ed] the right to sue the United States in the court of claims’ for patent infringement.” *Id.* (quoting *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 304 (1912)) (alterations in original). Before the 1910 Act, no patent infringement action could be brought against the government “unless in the Court of Claims under a contract or implied contract

theory.” *Id.* The Act “was intended alone to provide for the discrepancy resulting from the right in one case to sue on the implied contract and the non-existence of a right to sue’ for infringement.” *Id.* (quoting *William Cramp & Sons Ship & Engine Bldg. Co. v. Int’l Curtis Marine Turbine Co.*, 246 U.S. 28, 41 (1918)). If the right to challenge the government’s infringement already existed under the Fifth Amendment, there would be no need to expressly add to the Claims Court’s jurisdiction through the Patent Act. *See id.* Indeed, as we recognized in *Zoltek I*, holding to the contrary would “read an entire statute, § 1498, out of existence.” *Id.* at 1352.

Schillinger mandates the conclusion reached by the *Zoltek I* court, which we expressly adopt today: the Claims Court does not have jurisdiction to hear takings claims based on alleged patent infringement by the government. Those claims sound in tort and are to be pursued exclusively under 28 U.S.C. § 1498. Thus, the Claims Court was without jurisdiction to hear Golden’s patent infringement-based takings claims, and it properly dismissed these claims.⁵

B.

We next turn to Golden’s IPR-based takings claims. We first address whether the Claims Court had jurisdiction to hear these claims.

⁵ Because we find the Claims Court did not have jurisdiction to hear Golden’s patent infringement-based takings claims, we need not address the court’s alternative holding that these claims are duplicative of the claims in the Lead Case.

The government alleges that, “upon further consideration,” it has identified a jurisdictional problem that was not recognized below. Appellee’s Br. 40. The government argues that the American Invents Act (“AIA”)’s creation of *inter partes* review by the Board, followed by judicial review before this court, creates a ‘self-executing remedial scheme’ that ‘supersedes the gap-filling role of the Tucker Act.’” *Id.* at 41 (quoting *United States v. Bormes*, 568 U.S. 6, 13 (2012)). According to the government, the AIA statutory scheme displaces Tucker Act jurisdiction because there is no procedural impediment to presentation of a takings claim to the agency and because the remedial scheme provides for judicial review of constitutional challenges to the agency’s action. *Id.* at 43–49.

The government’s argument is without merit. In *Bormes*, the Supreme Court explained that Tucker Act jurisdiction is displaced “when a *law assertedly imposing monetary liability on the United States* contains its own judicial remedies.” 568 U.S. at 12 (emphasis added). More recently, the Court explained that, “[t]o determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must ‘examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes.’” *Horne v. Dep’t of Agric.*, 569 U.S. 513, 526–27 (2013) (quoting *United States v. Fausto*, 484 U.S. 439, 444 (1988)). Thus, when there is a precisely defined statutory framework for a claim that could be brought against the United States, the Tucker Act gives way to the more specific statutory scheme.

Regardless of the structure of review it establishes, the AIA is not a statute that provides for claims against the United States. Looking to the purpose and text of the statute, the AIA represents an overhaul of the U.S. patent system from a first-to-invent to a first-to-file regime. 35 U.S.C. § 100. It also establishes post-grant review of patents. 35 U.S.C. § 321. The government is correct that, under the AIA, parties may raise constitutional challenges in our court on appeal from Board decisions. But this remedial scheme does not convert the AIA into a statutory framework for claims against the United States. The AIA is by no means “a law assertedly imposing monetary liability on the United States.” *Borne*, 568 U.S. at 12. Accordingly, we reject the government’s argument that the AIA displaced Tucker Act jurisdiction over Golden’s IPR-based takings claims.⁶

As to the merits of Golden’s IPR-based takings claims, on appeal, Golden argues, *inter alia*, that the government’s actions (including in the IPR) resulted in a reduction of value of his property, destroyed his competitive edge, and interfered with his “reasonable investment-backed expectations.” Appellant’s Br. 7–8. We rejected similar arguments in *Celgene Corp. v. Peter*, 931 F.3d 1342 (Fed. Cir. 2019). There, we explained that *inter partes* review proceedings, like patent

⁶ This does not, of course, alter our conclusion that an action for patent *infringement* sounds in tort and the only avenue to sue the United States government for unauthorized licensing of patent rights is a suit pursuant to 28 U.S.C. § 1498. *See supra*, Section A.

validity challenges in the district court, “serve the purpose of correcting prior agency error of issuing patents that should not have issued in the first place[.]” *Id.* at 1361. Additionally, we noted that “[p]atent owners have always had the expectation that the validity of patents could be challenged in district court. For forty years, [they] have also had the expectation that the PTO could reconsider the validity of issued patents on particular grounds, applying a preponderance of the evidence standard.” *Id.* at 1362–63. Accordingly, we held that retroactive application of *inter partes* review proceedings to pre-AIA patents is not an unconstitutional taking under the Fifth Amendment. *Id.* at 1362.

Although Golden does not challenge *retroactive* application of *inter partes* review in this case, *Celgene* controls the outcome here. Golden, as a patent owner, has “always had the expectation that the validity of patents could be challenged in district court” or before the PTO. *Id.* at 1362–63. Under *Celgene*, subjecting patents to *inter partes* review proceedings is not an unconstitutional taking under the Fifth Amendment.⁷ *Id.* at 1362.

⁷ Although it does not expressly address the issue here, the government has “not dispute[d] that a valid patent is private property for the purposes of the Takings Clause.” *Celgene*, 931 F.3d at 1358. And, as we noted in *Celgene*, the Supreme Court’s recent decision in *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018), is not to the contrary. In *Oil States*, the Court explained that “the decision to *grant* a patent is a matter involving public rights—specifically the grant of a public franchise.” 138 S. Ct. at 1373 (emphasis in original). At the same time, it “emphasize[d] the narrowness of [its] holding”

We are mindful, of course, of the unique circumstances of the IPR in Golden's case. This IPR was initiated by DHS, a federal agency. Following the cancellation of certain claims of his RE43,990 patent in the IPR, the Supreme Court made clear in *Return Mail* that "a federal agency is not a 'person' who may petition for post-issuance review under the AIA." 139 S. Ct. at 1867. Golden may argue that, in view of *Return Mail*, the cancellation of the patent claims in an *inter partes* review initiated by the government could be considered an unconstitutional taking under the Fifth Amendment. We need not decide whether that is the case, however, for two reasons. First, Golden did not appeal the Board's final written decision in the IPR to this court, and the decision became final before the *Return Mail* decision was issued. Second, Golden voluntarily filed a non-contingent motion to amend the claims on which the IPR was instituted. His substitute claims were then found unpatentable. The claims at issue were therefore cancelled as result of Golden's own voluntary actions. In these circumstances, cancellation of the claims in the government-initiated *inter partes*

explaining that it was addressing "only the precise constitutional challenges" raised in that case. *Id.* at 1379. The Court admonished that its "decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause." *Id.* Despite the Claims Court's express finding on the status of patent rights under the Fifth Amendment, we decline to address that question here, however, because, even if Golden's patents are his private property for Takings Clause purposes, under *Celgene*, cancellation of patent claims in *inter partes* review cannot be a taking under the Fifth Amendment.

review cannot be chargeable to the government under any legal theory.

C.

Finally, we address Golden's arguments regarding the alleged takings by the Claims Court and the breach of "implied-in-fact contracts" by the government. Appellant's Br. 5, 13. As the Claims Court explained, the actions of the Federal Circuit and the Claims Court cannot be an unconstitutional taking, as both courts "adjudicate rights in patents." *Claims Court Op.* at 4. As to the breach of "implied-in-fact contracts," it appears these arguments are made either in support of Golden's takings claims, discussed above, or raised for the first time on appeal. Accordingly, these arguments are either unpersuasive or waived.

CONCLUSION

For the foregoing reasons, we affirm the Claims Court's decision. We have considered the parties' remaining arguments and find them unpersuasive.

AFFIRMED

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In the United States Court of Federal Claims
No. 23-185C
(Filed: May 31, 2023)

LARRY GOLDEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

Plaintiff Larry Golden, appearing *pro se*, filed his complaint, his third in this court, on February 7, 2023, alleging that the United States government, through the Department of Homeland Security (“DHS”), took the independent claims of one of his patents under the Fifth Amendment without compensating him. On April 4, 2023, defendant moved for dismissal of plaintiff’s complaint for lack of jurisdiction under the applicable six-year statute of limitations as well as for failure to state a claim due to the application of the doctrine of *res judicata*. The motion is fully briefed; oral argument is unnecessary. Because the complaint is clearly late, we must dismiss it for lack of jurisdiction. Plaintiff also attempted to file what we construe as a motion for leave to amend his complaint.¹

¹ That motion, received on May 3, 2023, was not docketed by the court’s clerk’s office, however, because it was not able to

This is the third lawsuit that Mr. Golden has filed against the United States in this court in the past decade, stemming from the same factual dispute. In the first case, filed on May 1, 2013, plaintiff alleged that the government infringed the claims of U.S. Patent No. RE43,990 (“the ’990 patent”) through a DHS initiative known as “CELL-ALL.” *Golden v. United States*, No. 13-307C (Fed. Cl. 2013) (“*Golden I*”). After plaintiff amended his complaint six times, *Golden I* was dismissed on November 10, 2021, with prejudice for failure to conform his infringement contentions to the court’s rules. *Golden v. United States*, 156 Fed. Cl. 623, 632 (2021). Plaintiff appealed, and the Federal Circuit affirmed the dismissal on September 8, 2022. *Golden v. United States*, 2022 WL 4103287 (Fed. Cir. 2022). Plaintiff’s second action in this court was filed on January 17, 2019, alleging a Fifth Amendment taking based on the Patent Trial & Appeal Board’s (“PTAB”) cancellation of claims 11, 74, and 81 of the ’990 patent during an *inter partes* review (“IPR”) (“*Golden II*”). The court dismissed *Golden II* with prejudice on May 14, 2019, finding that the cancellation of the patent claims was plainly the result of plaintiffs voluntary amendment, not government action. *Golden v. United States*, No. 19-104C (Fed. Cl. 2019). Defendant appealed, and the Federal Circuit also affirmed our dismissal of

ascertain the nature of the filing. We will allow the motion to be filed, along with its attachments, but deny it due the futility of allowing such an amendment because, after reviewing the putative new claims, none would be within our jurisdiction or, to the extent they seek to relitigate matters already decided, would be barred by *res judicata*.

Golden II. Golden v. United States, 955 F.3d 981 (Fed. Cir. 2020).

This current suit, as the government points out, is nearly identical to plaintiff's accusations in *Golden II*. It is plainly barred by *res judicata*, but we do not reach that issue because the complaint is too late. Our statute of limitations is set by 28 U.S.C. § 2501, which requires that a complaint be filed within six years of an action's accrual. Mr. Golden's current claim accrued no later than 2015, but his complaint was filed in 2023, more than six years later.

In April 2014, DHS filed a petition to the PTAB requesting IPR of the three independent claims of the '990 patent (claims 11, 74, and 81) that plaintiff had asserted in his original *Golden I* complaint. The PTAB issued an Institution Decision on October 8, 2014, finding a reasonable likelihood that DHS would prevail in its IPR challenge. *U.S. Dept. Of Homeland Security, Petitioner, v. Larry GOLDEN, Patent Owner*, 2014 WL 5025206. Mr. Golden subsequently filed a non-contingent motion to amend the '990 patent, canceling challenged independent claims 11, 74, and 81, while proposing new, substitute claims. Def.'s Appx. at A7 (IPR2014-00714, Paper No. 25 (Jan. 22, 2015 Non-Contingent Motion to Amend)). The PTAB issued its Final Written Decision on October 1, 2015, which granted plaintiff's request to cancel his independent claims, but found his substitute claims unpatentable. *Id.* at A35 (IPR2014-00714, Paper No. 35 (Oct. 1, 2015 Final Written Decision)). Plaintiff filed a Request for Rehearing of the Final Written Decision, which the

PTAB denied on November 17, 2015. *Id.* at A72 (IPR2014-00714, Paper No. 37 (Nov. 17, 2015 Decision)). Plaintiff did not appeal either the PTAB's Final Written Decision or its subsequent decision denying his request for rehearing. As a result, under 37 CFR § 90.3(a), the PTAB's decision became final and unappealable in January 2016. Plaintiff now asks for damages on a takings theory for an unlawful cancellation of his patent claims.²

Any claim plaintiff asserts based on the effect of the Final Written Decision issued by the PTAB in the IPR of plaintiffs '990 patent in 2015 are now well-past the court's six-year statute of limitations under 28 U.S.C. § 2501. Plaintiff asserts that the statute of limitations is subject to equitable tolling. Given that the statute of limitations is jurisdictional in nature in this court, however, equitable tolling is unavailable. See *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1382 (Fed. Cir. 2012). Defendant's motion to dismiss for lack of jurisdiction is thus granted. Accordingly, the following is ordered:

² Mr. Golden alleges that the PTAB's actions were a taking because the IPR was instituted as a result of a petition from a federal agency, which the Supreme Court has since clarified is not a person under the meaning of the America Invents Act. *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853, 1867 (2019). Thus, the IPR should not have been instituted, the cancellation of his claims *ultra vires*, and a taking occurred, per plaintiff. Plaintiff has submitted two motions for the court to take leave of documents from the IPR's docket and patents relied upon by the PTAB in its decision.

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1. Defendant's motion to dismiss is granted.
2. Plaintiff's two requests, filed on April 20, 2023, and May 18, 2023, for the court to take judicial notice of the record in the prior IPR proceedings at the PTAB and to take notice of the prior art references relied upon by the PTBA in that matter are denied as moot.
3. The clerk's office is directed to accept for filing and to docket the motion for leave to file an amended complaint, received on May 3, 2023. That motion is denied as futile.
4. The Clerk of Court is directed to dismiss the complaint for lack of jurisdiction and to enter judgment accordingly.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

In the United States Court of Federal Claims

No. 23-185C

(Filed: June 22, 2023)

LARRY GOLDEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER ON RECONSIDERATION

Plaintiff Larry Golden, appearing *pro se*, filed his third complaint in this court on February 7, 2023, alleging that the United States government, through the Department of Homeland Security (“DHS”), took the independent claims of one of his patents under the Fifth Amendment without compensating him. On May 31, 2023, the court dismissed plaintiff’s complaint for lack of jurisdiction under the applicable six-year statute of limitations. On June 2, 2023, plaintiff filed a motion for reconsideration, arguing that the court overlooked his evidence and otherwise failed to recognize the merits of his claim.

Motions for reconsideration are governed by Rule 59(a)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). Pursuant to Rule 59(a)(1)(B), “the court may, on motion, grant . . . a motion for reconsideration on all or some of the issues – and to any

party – as follows: . . . for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.” Typically, a motion under RCFC 59 “must be based upon manifest error of law, mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court.” *Parsons ex rel. Linmar Prop. Mgmt. Tr. v. United States*, 174 Fed. Appx. 561, 563 (Fed. Cir. 2006). Specifically, RCFC 59 permits reconsideration for one of three reasons: 1) an intervening change in the controlling law has occurred; 2) previously unavailable evidence is now available; or 3) the motion is necessary to prevent manifest injustice. *Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006). Furthermore, “the movant must point to a manifest error of law or mistake of fact” and must do more than “merely reassert[] arguments which were previously made and were carefully considered by the court.” *Henderson Cnty. Drainage Dist. No. 3 v. United States*, 55 Fed. Cl. 334, 337 (2003).

Plaintiff does not argue a change in the controlling law or offer any newly discovered evidence. Instead his motion largely restates the allegations of his complaint and his arguments in opposition to his dismissal. We found in our order that the court lacks jurisdiction to entertain plaintiff’s complaint because the events Mr. Golden alleges are outside the six-year statute of limitations applicable to his takings claim.¹ As we noted

¹ 28 U.S.C. § 2501 (claims in the United States Court of Federal Claims must be “filed within six years after such claim first accrues.”). To the extent that plaintiff is arguing that the limitations period should not apply in takings cases, that assertion is without merit. See *Kemp v. United States*, 65 Fed. Cl. 818 (2005).

then, that limitation is jurisdictional, meaning that, if it applies, we cannot hear the claim. Plaintiff's rehashing of his merits assertions regarding the *inter partes* review at the PTAB and other allegations concerning the government's invalidity contentions in the prior case, 13-307C, change nothing. This complaint is too late.

Plaintiff's motion failed to demonstrate a change in the law, new evidence, or a clear error of law or fact that would result in a manifest injustice as required under RCFC 59. No response from defendant is necessary, and the motion is denied.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

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NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

LARRY GOLDEN,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2023-2139

Appeal from the United States
Court of Federal Claims
in No. 1:23-cv-00185-EGB,
Senior Judge Eric G. Bruggink.

ON MOTION

Before PROST, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

(Filed Dec. 15, 2023)

The United States moves for summary affirmance
of the judgment of the United States Court of Federal

Claims. Larry Golden opposes the motion and separately moves for relief from the judgment. The United States opposes Mr. Golden's motion. Mr. Golden replies. For the following reasons, we grant the United States' motion to summarily affirm and deny Mr. Golden's motion.

In *Golden v. United States*, 955 F.3d 981 (Fed. Cir. 2020), we described the background and prior litigation that form the basis of the underlying complaint. We therefore summarize that background only briefly here.

In 2014, the Department of Homeland Security petitioned the Patent Trial and Appeal Board for *inter partes* review ("IPR") of Mr. Golden's U.S. Patent No. RE43,990. During those proceedings, Mr. Golden moved to cancel the challenged claims of the patent while proposing new substitute claims. In 2015, the Board issued its final written decision, which granted Mr. Golden's request to cancel his claims but found his substituted claims were unpatentable. Mr. Golden sought rehearing, which the Board denied on November 17, 2015. Mr. Golden did not appeal, allowing the decision to become final in January 2016. *See* 35 U.S.C. § 142; 37 C.F.R. § 90.3(a).

In 2019, Mr. Golden filed suit in the Court of Federal Claims, alleging, *inter alia*, that the cancellation of his claims during the IPR amounted to an unlawful taking of his property that required compensation under the Fifth Amendment. In May 2019, the Court of Federal Claims granted the government's motion to

dismiss, finding that Mr. Golden's voluntary amendment of his claims did not constitute a cognizable taking of property. On appeal, we affirmed the trial court's judgment. *Golden*, 955 F.3d at 989.

On February 7, 2023, Mr. Golden filed this complaint in the Court of Federal Claims again seeking compensation for the alleged taking due to the cancellation of the claims of his patent. *See* ECF No. 7–2 at A031-A032. The government moved to dismiss the complaint for lack of jurisdiction. The Court of Federal Claims granted the motion on the ground that that the complaint was out of time under the applicable six-year statute of limitations, 28 U.S.C. § 2501. Mr. Golden then filed this appeal. We have jurisdiction over his appeal under 28 U.S.C. § 1295(a)(3).

Here, the judgment of the trial court dismissing the complaint is so clearly correct as a matter of law that no “substantial question regarding the outcome of the appeal exists.” *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Mr. Golden clearly filed his complaint outside of the six-year jurisdictional filing deadline. Further, this court has already resolved the merits of Mr. Golden's claims in his earlier appeal such that the Court of Federal Claims was clearly correct to dismiss the complaint.

Accordingly,

IT IS ORDERED THAT:

- (1) The United States' motion for summary affirmance is granted. The judgment is summarily affirmed.
- (2) All other pending motions are denied.
- (3) Each side shall bear its own costs.

FOR THE COURT

[SEAL]

Jarrett B. Perlow
Clerk of Court

December 15, 2023

Date

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NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

LARRY GOLDEN,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2023-2139

Appeal from the United States
Court of Federal Claims
in No. 1:23-cv-00185-EGB,
Senior Judge Eric G. Bruggink.

ON PETITION FOR REHEARING EN BANC

PER CURIAM.¹

ORDER

On December 19, 2023 Larry Golden filed a petition for rehearing en banc [ECF No. 14]. The petition was first referred as a petition to the panel that heard

¹ Circuit Judge Newman did not participate.

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the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

[SEAL]

Jarrett B. Perlow
Clerk of Court

January 25, 2024
Date
