

21-2137

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LOW TEMP INDUSTRIES, INC.

Plaintiff-Appellee

v.

DUKE MANUFACTURING CO.,

Defendant-Appellant

Appeal from the Eastern District of Missouri (St. Louis)
Civil Action No. 4:20-cv-00686-MTS
Honorable District Judge Matthew T. Schelp

**APPELLEE'S COMBINED PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

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CERTIFICATE OF INTEREST

Counsel for Low Temp Industries, Inc. certifies the following:

1. The full name of every party represented by us is:

Low Temp Industries, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by us are:

Not Applicable.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

David P. Stoeberl

Tyler C. Schaeffer

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

Not applicable.

6. Provide any information required under Fed. R. App. P. 26.1(b) (organized victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

Not applicable.

Date: January 27, 2022

/s/D. Clay Holloway_____

D. Clay Holloway

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe the Panel decision is contrary to at least the following decisions: *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372 (Fed. Cir. 2009); *Acumed LLC v. Stryker Corp.*, 483 F.3d 800 (Fed. Cir. 2007); *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 328-29 (2015); and *Jack Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352 (Fed. Cir. 2002). I believe the **full Court** should answer the following question to alleviate an intra-circuit split of authority:

1. Whether a district court's grant of preliminary injunction can be properly reversed under an abuse of discretion standard because the claims appear "vulnerable" to a validity challenge even though the district court made factual findings on other bases indicating the entire validity challenge "lacked substantial merit" in light of the ultimate burdens at trial?

Separately, I believe the Panel overlooked or misapprehended the following points of law or facts and the **full Court or Panel should address them in rehearing**:

1. The intrinsic record makes clear the spacing between the claimed wells is measured between the inner walls of "adjacent" wells. Appx0014. Challenger's sole argument and evidence for the term "adjacent," an extrinsic dictionary, supports this construction, which the district court considered when

construing “adjacent.” The Panel’s findings regarding “adjacent” are inconsistent with the intrinsic evidence and factual findings regarding extrinsic evidence, which should have been shown deference.

2. The district court made two additional, separate findings of fact supporting its conclusion the patentee was likely to succeed on the merits: the lead prior art reference lacked “two [1] thermally isolated and insulated ‘pans’ [2] within a single module that can be operated at different temperatures simultaneously.” Appx0023. These bases, when viewed through the proper lens of deference, *independently* support the injunction.

3. Given the district court’s findings on independent grounds, the Panel’s decision to reverse, rather than vacate and remand, deprived the district court of its sound discretion in determining likelihood of success.

/s/D. Clay Holloway
D. CLAY HOLLOWAY

INTRODUCTION

In reversing the determination that Plaintiff-Appellee LTI established a likelihood to prevail on the merits, the Panel gave no deference to the district court’s factual findings and performed its own assessment of Duke’s validity case that conflicts with this Court’s precedent. Opinion at 8 (quoting *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1359 (Fed. Cir. 2001)). In *Titan Tire*, this Court clarified a district court must consider *all* of patentee’s rebuttal to a

charge of invalidity, and the determination of whether a patentee is likely to ultimately prevail is left to the sound discretion of the district court. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1379-80 (Fed. Cir. 2009)(“Thus, when analyzing the likelihood of success factor, the trial court, after considering all the evidence available at this early stage of the litigation, must determine whether it is more likely than not that the challenger will be able to prove at trial, by clear and convincing evidence, that the patent is invalid...This decision process...rests initially in the capable hands and sound judgment of the trial court.”).

As the Panel recognized, the district court found multiple, independent reasons for determining Duke’s validity challenge lacked substantial merit. However, in reversing the district court’s decision, the Panel simply found the patent “vulnerable” to Duke’s validity challenge without giving deference to the district court’s findings based on the totality of the evidence—including patentee’s rebuttal evidence—for why the lead prior art reference failed to raise a substantial question of validity. In doing so, the Panel widened the intra-circuit split regarding the proper lens by which to review the grant or denial of a preliminary injunction. The full Court should confirm a district court does not abuse its discretion when it finds a patentee is likely to succeed on the merits after considering *all* of the evidence and arguments raised in rebutting a validity challenge and not merely looking for “vulnerability.”

The Panel’s reversal—based on its conclusion that the district court’s understanding of “adjacent” and corresponding comparison of the claim to the prior art was erroneous—also misapprehended the record regarding LTI’s patent and the prior art, and overlooked the district court’s separate bases and factual findings for determining the prior art failed to raise a substantial question of validity. Despite acknowledging the challenger’s anticipation case was flawed (Opinion at 6) and the district court’s independent bases, the Panel reversed without construing “adjacent” or addressing the district court’s separate findings. Reversal was the incorrect remedy. Given the question of likelihood of succeeding in showing a validity challenge lacks substantial merit lies in the sound discretion of the district court, the Panel should have remanded to the district court to determine whether the other bases in finding the lead reference insufficient warrant maintaining the preliminary injunction.

BACKGROUND

The district court heard testimony and oral argument concerning LTI’s Motion for Preliminary Injunction. Appx0086-0087. *As the Panel stated*, the invalidity case presented by Duke was legally flawed; instead of presenting an element by element analysis of whether the lead reference—Finegan—was anticipatory, Duke presented a “points of novelty” theory, which only compared Finegan to three claim elements. Opinion at 6; Appx0019 (n.12); Appx6091-6104;

Appx0261(14:11-21)(“Our invalidity contentions that we are required to produce under the Local Rules demonstrate a variety of good invalidity arguments, but we’re going to focus on some of the most straightforward ones today because it turns out, in this case, we had an examiner who it was her job to issue these patents and she literally singled out three things that she thought were not in the prior art....”). Patentee presented rebuttal evidence and argument, demonstrating several claim elements were missing from Finegan beyond the so-called points of novelty, destroying Duke’s anticipation claim and weakening its obviousness claim. While the Panel stated “[t]he district court did not address whether or how its construction of ‘insulative air gaps’ affected Duke’s invalidity theories” (Opinion at 6), which it concluded made Finegan anticipatory, the district court assessed **both** Duke’s anticipation and obviousness theories relying on Finegan, and, as required under *Titan Tire*, all of LTI’s evidence and argument that **claimed** elements, as opposed to legally irrelevant “points of novelty,” are missing from Finegan and contrary to Finegan’s teachings. Appx0017-29.

The district court made three factual determinations supporting its finding that LTI was likely to prevail on the merits. Appx0018.

First, both the intrinsic and extrinsic records confirm “adjacent,” as used in the claims, means the wells are immediately next to one another. Appx0022. In rejecting the district court’s read as a “constricted understanding of ‘adjacent,’ [] at

odds with the patents' disclosure, which describes a 'distance D1' 'between adjacent wells,' 'with D1 preferably being approximately three inches'" (Opinion at 10), the Panel misread the patent, per Duke's distortion, and failed to appreciate the teachings of the intrinsic record. Indeed, the Panel did not construe "adjacent," and thus, did not consider all of the teachings of the patent or any of the extrinsic evidence provided, which confirm the district court's understanding.

LTI presented un rebutted evidence and argument at the preliminary injunction hearing showing the patent uses "well" to describe the *opening created by the inner walls of a well* to receive a pan containing food, not the entire double-walled structure. Appx344-345(97:10-98:19); Appx0051(4:62-64)("[E]ach well 18 has dimensions of approximately 12"x20"x6" and is designed to receive a foodstuff-containing pan."). The specification provides dimensions for the claimed module, explaining the wells have two walls—interior and exterior—preferably spaced two inches apart, and the *wells* are spaced apart by a distance "D1" of three inches. Appx0051(3:46-49, 3:61-62). As the district court recognized, this well structure and disclosure of dimensions confirms the distance D1 between adjacent wells is the distance between the *openings* of the wells (inner wall to inner wall). Appx0014("Thus, the claims contemplate that there will be space between the wells for purposes of insulating the well from one another: the 'insulative air gap.'" "[B]y the very nature of the structure described by the claims, the

positioning of the interior and exterior walls creates a space between those walls.”). Further, for the well openings to be three inches apart, the outer wall of one well must be abutting or immediately next to the outer wall of the adjacent well otherwise none of the structural dimensions in the specification make sense. Appx0345(98:2-10).

This was confirmed by the only evidence Duke offered regarding “adjacent”: extrinsic evidence stating “adjacent” means “next to or *adjoining*” and “having a common vertex and a *common side*.” Appx6322. Given this definition, and the intrinsic record, the district court was within its discretion as fact finder to factually determine a person of ordinary skill in the art would have understood “adjacent” to mean immediately next to or adjoining when comparing the claim elements to the prior art. Appx0022.

Second, “Finegan does not, the Court finds, disclose or teach two *thermally isolated and insulated ‘pans’*....” Appx0023(emphasis added). Independent of whether Finegan’s pans are adjacent, the asserted claims require each well be “individually insulated and thermally isolated.” Appx0052(5:27-28). The district court’s factual finding that the presence of “thermally conductive material” filling the gap between the inner and outer walls of Finegan’s pans was an independent basis for the district court’s finding of no substantial question of validity. Appx0022. The Panel’s conclusion the patent was vulnerable to Duke’s validity

challenge did not address this independent finding, which should have been given deference under both the standard of review and *Titan Tire*'s requirement that all the evidence presented be considered.

Third, “Finegan does not, the Court finds, disclose or teach two... ‘pans’ within *a single module*....” Appx0023(emphasis added). Independent of whether Finegan’s pans are adjacent, the asserted claims require the wells be housed within a single modular frame. Appx0052(5:23-25). The district court’s factual finding that Finegan describes two apparatus elements depicted in a wiring schematic, separated by untold distance, and not expressly contained in the same module,¹ was an independent basis for the district court to find Duke’s validity challenge lacked substantial merit. Appx0021-0024. This too should have been given deference and considered under *Titan Tire*.

REASONS FOR GRANTING THE PETITION

I. REHEARING IS WARRANTED TO APPLY THE DISCRETIONARY LIKELIHOOD OF SUCCESS STANDARD.

The Panel’s reversal for abuse of discretion conflicts with precedent requiring deference to the factual findings of the district court and that

¹ While the Panel states the district court failed to explain its reasoning here, that is incorrect. The district court cited at Appx0022-0023 LTI’s expert declaration by paragraph number—Dkt. 48-3, ¶¶57-74—which indicates the district court, in its discretion, credited LTI’s expert over that of Duke. *See High Point SARL v. Sprint Nextel Corp.*, 817 F.3d 1325, 1331 (Fed. Cir. 2016).

determination of whether a validity challenge raises a substantial question is within a district court's discretion and to be made after weighing *all* the evidence related to the challenge presented at the preliminary injunction stage.

The review of a grant of preliminary injunction is not unique to patent law and this Court applies regional circuit law. *Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1165 (Fed. Cir. 2014). In the Eighth Circuit, a “grant of a preliminary injunction is reviewed for abuse of discretion.” *Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020), *motion denied*, No. 4:19-CV-0112-AGF, 2021 WL 616153 (E.D. Mo. Feb. 17, 2021), *and motion to amend denied*, No. 4:19-CV-0112-AGF, 2021 4191613 (E.D. Mo. Sept. 15, 2021). An abuse of discretion occurs “when the district court relies on clearly erroneous factual findings or an error of law.” *Id.*

When looking for clear error on appeal, this Court must show deference to the factual findings of the district court below. For example, “[w]hether a prior art reference discloses a particular claim limitation presents a question of fact that we review for substantial evidence.” *Tech. Consumer Prods., Inc. v. Lighting Sci. Grp. Corp.*, 955 F.3d 16, 22 (Fed. Cir. 2020). Similarly, in addressing claim construction issues, the factual underpinnings stemming from a dispute as to what a claim states resolved by the district court is given deferential review. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 328-29 (2015).

In reviewing whether a patentee has demonstrated a likelihood of success on the merits despite a validity challenge, this Court has made clear it is within the discretion of the district court in the first instance to determine whether the validity challenge lacks substantial merit. *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1049 (Fed. Cir. 2010). A mere challenge, or appearance of vulnerability, is insufficient to demonstrate a challenge lacks substantial merit. Rather, “the movant [] must persuade the court that, despite the challenge presented to validity, the patentee nevertheless is likely to succeed at trial on the validity issue.” *Titan Tire*, 566 F.3d at 1377. Thus, “the trial court, after considering all the evidence available at this early stage of the litigation, must determine whether it is more likely than not that the challenger will be able to prove at trial, by clear and convincing evidence, that the patent is invalid....[T]he proof of invalidity will require clear and convincing evidence is a consideration for the judge to take into account in assessing the challenger’s case at the preliminary injunction stage....” *Id.* at 1379-80.

In reversing, the Panel found it sufficient to show the claims are vulnerable to a validity challenge. Opinion at 8. But the vulnerability standard suggested in *Amazon.com* conflicts with the standard articulated in *Titan Tire*, which tracks the burdens at trial. Before *Titan Tire*, panels of the Court were split on what was required to rebut a validity challenge for preliminary injunction. As Judge

Newman articulated in her dissent in *Erico International Corp. v. Vutec Corp.*, 516 F.3d 1350, 1359-60 (Fed. Cir. 2008), issued between *Amazon.com* and *Titan Tire*, “[r]aising a ‘substantial question’ concerning validity is not the same as establishing the ‘likelihood’ of establishing invalidity. Precedent is clear that the standard is the likelihood of success at trial, with recognition of the presumptions and burdens.” (citations omitted). There, Judge Newman criticized use of “doubt” as the standard, which is akin to the “vulnerability” test the Panel applied here. Notably, the Court’s *Titan Tire* decision mentions neither “doubt” nor “vulnerability,” but reiterates “the patentee’s rebuttal of the challenger’s invalidity evidence is an important part of the court’s overall evaluation of the evidence,” and explained the phrase “raises a substantial question” “refers to the net of the evidence after the trial court considers all evidence on both sides of the validity issue available at this early stage of the litigation.” *Titan Tire*, 566 F.3d at 1378(citations omitted).

Duke never alleged, and the Panel did not find, that the district court wrongly considered evidence surrounding the prior art’s disclosure. Nor was there any dispute the district court made *three* separate determinations, with underlying factual findings, that the prior art failed to raise a substantial question of validity. These factual determinations—based on the entire record—should be given weight because as the fact-finder, the district court determined Duke was unlikely to

ultimately carry its burden of showing the asserted claims were invalid.² In reversing, however, the Panel did not show deference to these findings. The Panel supplanted its own determinations regarding likelihood of success for that of the fact-finder without considering all of the evidence presented. This was an improper review and resulted in an analysis at odds with the standard set forth in *Titan Tire*.

The Panel determined, contrary to the intrinsic and extrinsic records, the district court's application of "adjacent" was too narrow. In doing so, the Panel gave no deference to the district court's factual findings regarding "adjacent," as used in the patent, and as compared to the prior art. Nor did the Panel consider LTI's argument and evidence presented at the preliminary injunction hearing, and unrebutted by Duke, demonstrating the space between wells is measured from inner wall to inner wall.³ Appx0051(3:44-49; 3:61-65)(sole embodiment disclosed has single 58.5 inch frame with four wells having twelve inch wide openings inner and outer walls spaced about two inches apart); Appx0345(98:2-10)("If you add all those up, you get 57 inches, and that leaves the one and a half inches for the two

² As explained before the Panel, the anticipation case Duke presented was legally flawed. It was not element by element; it focused solely on whether the articulated reasons for allowance in prosecution might be mapped to Finegan. This alone was a sufficient basis for the district court to conclude in its discretion Duke would ultimately fail to carry its burden.

³ To the extent Duke, or the Panel, believes this language is not clear (it is), the district court's reliance on Duke's extrinsic evidence confirming the meaning clearly entitles that factual determination to deference.

overhangs you see at the end of the counter. The math only works, though, if the space between the adjacent wells is measured from the interior walls of adjacent wells and the exterior walls of the adjacent wells are abutting.”).

It cannot be error or an abuse of discretion for the district court to conclude a factual dispute existed as to whether the outer walls of adjacent wells must be abutting, assess the intrinsic and extrinsic records, and resolve the issue in LTI’s favor. *See Teva*, 574 U.S. at 328-29. Unlike in *Unwired Planet L.L.C. v. Google, Inc.*, 660 F. App’x 974, 980 (Fed. Cir. 2016), where the district court made no factual determination, the district court applied Duke’s dictionary definition of “next to or adjoining” in finding the claims require the adjacent wells be immediately next to one another. The Panel’s reversal did not consider all of this evidence, contrary to the standard.

Putting aside the adjacency issue, the Panel’s reversal did not address all of the evidence presented or the district court’s determinations that Finegan lacked two other claim elements and thus was neither anticipatory nor obvious-generating. The district court was within its discretion to determine Finegan lacked “thermally isolated and insulated ‘pans’” because the unrebutted evidence showed Finegan’s pans include “thermally conductive material” filling the gap between the inner and outer walls to ensure that the flange of the Finegan pan frosts. Appx0022-0023; Appx2350-51(¶¶57-58); Dkt. 25 at 30-31. This factual determination based on

accepting LTI's evidence shows Finegan fails to teach "thermally isolated and insulated" wells, and provides an independent reason for why LTI was likely to succeed on the merits.

Similarly, the district court was within its discretion to determine Figure 7 of Finegan was merely a schematic drawing, and failed to show two pans in a single module. Appx0023. As explained in Appellee's Brief (Dkt. 25) at 31-33, the district court heard testimony that when an apparatus has two pans separated by countertop, like pans 18A and 18B separated by counter 14 in Figure 7 of Finegan, this denotes two separate modules. Appx0464(217:20-24). This is consistent with Finegan's description of the invention, which explains each pan is an apparatus 10 and is surrounded by a counter 14, and each apparatus can be hot or cold. Appx2166(5:10-15). Figure 7 shows two apparatuses separated by a counter, not necessarily within one module. Appx0023. This express factual determination, accepting LTI's evidence, shows Finegan fails to teach the claimed "module" comprising "a frame" housing two pans, and is another independent basis for the district court's conclusion LTI was likely to succeed on the merits.

Under the applicable standard of review and *Titan Tire*, the Panel should have given all the district court's findings deference **and** considered **all** of the factual determinations and evidence in assessing whether Duke's challenge lacked substantial merit.

II. REHEARING IS WARRANTED BECAUSE THE PANEL’S REVERSAL, AS OPPOSED TO REMAND, GIVES NO DEFERENCE TO ALTERNATIVE BASES FOR FINDING LIKELIHOOD OF SUCCESS.

In *reversing*, the Panel afforded no deference to the district court’s review of the entire rebuttal to the validity challenge presented below. However, as this Court has made clear, “[t]his decision process, which requires the court to assess the potential of a ‘clear and convincing’ showing in the future, but in terms of what is ‘more likely than not’ presently, *rests initially in the capable hands and sound judgment of the trial court.*” *Titan Tire*, 566 F.3d at 1380 (emphasis added). Further, “[i]f we were to weigh the evidence ourselves to reach a conclusion on injunctive relief, we would effectively be exercising our own discretion as if we were the first-line court of equity. That role belongs exclusively to the district court. Our task is solely to review the district court’s decisions for an abuse of discretion.” *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 811 (Fed. Cir. 2007) (citations omitted). Therefore, upon determining the district court’s understanding of “adjacent” was “constricted,” the Panel should have vacated and remanded for the district court to determine if, absent the “adjacent” basis, the district court still found it more likely than not LTI would prevail. It should not have, as it did, weighed the evidence regarding Duke’s validity challenge and “reach[ed] a conclusion on injunctive relief.” *Id.*

Indeed, in *Jack Guttman, Inc. v. Kopykake Enterprises, Inc.*, 302 F.3d 1352, 1363 (Fed. Cir. 2002), this Court deemed reversal improper when the district court needed to address alternative bases of denying the injunction in the first instance. Likewise, in *Trebo Manufacturing, Inc. v. Firefly Equipment, LLC*, 748 F.3d 1159, 1168, 1171 (Fed. Cir. 2014), this Court held remand was proper given the error in claim construction underlying the findings regarding likelihood of success. The same should be true here.

As the Panel acknowledged, the district court made factual findings regarding Finegan's teachings *independent* of the "adjacent" limitation. Specifically, the pans in Finegan are not thermally isolated because the walls of the pans contain thermally conductive material to create frosting by intentionally transferring heat. Dkt. 25 at 30; Appx2350-2351(¶¶57-59); Appx0022(citing same). Likewise, the pans described in Figure 7 of Finegan are not in the same module. Dkt. 25 at 32; Appx0487(240:4-14); Appx0464(217:20-24); Appx0488-0489(241:15-242:3). Both Judge Chen and the Parties understood the district court made these separate factual findings. Audio Tr. 12:12-12:12:50(Duke Counsel stating district court made factual findings on module). However, the Panel never addressed these factual findings, despite LTI raising them. *See* Dkt. 25 at 29-33; Audio Tr. 3:35-3:42(Question by Judge Chen); 29:13-29:47(Answer by LTI).

In light of these findings, and this Court’s review of judgments and not opinions, *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983), the Panel should have remanded to determine whether the injunction should be maintained even apart from “adjacent.” This is true even though the Panel addressed a single claim on obviousness grounds. Opinion at 11. Because the Panel failed to give deference to the district court’s findings on elements other than “adjacent,” the Panel’s focus on a combination unrelated to the “thermally conductive” and “frame/module” determinations does not fully settle the likelihood of success question.

Instead, the proper recourse was remand to consider the question the district court expressly answered: “The Court’s own review of the Finegan patent—on which Duke relies in argument the infringed claims are invalid, see Doc. [31-3] at 65-66—leads the Court to conclude that Finegan is different *in meaningful and relevant aspects from the invention described by the infringed claims.*” Appx0021. In light of the other reasons for finding Finegan was not anticipatory—aside from Duke’s failure to properly present an anticipation case—the Panel should have allowed the district court to consider the likelihood of success on those bases.

CONCLUSION

The petition should be granted.

Dated: January 27, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing document with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system and served a copy on counsel of record by the CM/ECF system.

Dated: January 27, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certified that this motion complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the portion exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), this motion contains 3587 words, as counted by the word-processing system used to prepare the motion.

Dated: January 27, 2022

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ADDENDUM

NOTE: This disposition is nonprecedential.

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

LOW TEMP INDUSTRIES, INC.,
Plaintiff-Appellee

v.

DUKE MANUFACTURING CO.,
Defendant-Appellant

2021-2137

Appeal from the United States District Court for the Eastern District of Missouri in No. 4:20-cv-00686-MTS, Judge Matthew T. Schelp.

Decided: December 28, 2021

DAVID CLAY HOLLOWAY, Kilpatrick Townsend & Stockton LLP, Atlanta, GA, argued for plaintiff-appellee. Also represented by COURTNEY DABBIERE, RICHARD W. GOLDSTUCKER; KATHLEEN GEYER, Seattle, WA,

KEVIN DONALD CONNEELY, Stinson LLP, Minneapolis, MN, argued for defendant-appellant.

Before DYK, TARANTO, and CHEN, *Circuit Judges*.

2 LOW TEMP INDUSTRIES, INC. v. DUKE MANUFACTURING CO.

CHEN, *Circuit Judge*.

Duke Manufacturing Co. (Duke) appeals the entry of a preliminary injunction related to its products accused of patent infringement by Low Temp Industries, Inc. (LTI). The district court found that LTI is likely to show that Duke’s accused products infringe several claims of U.S. Patent Nos. 8,307,761 (’761 patent) and 8,661,970 (’970 patent), and that Duke had failed to raise a substantial question of validity as to those claims based on the Finegan¹ reference. Because the district court relied on an erroneous claim construction and misread the Finegan reference, it failed to recognize that Duke raised a substantial question as to the validity of the relevant claims. We *reverse*.²

BACKGROUND

A

LTI owns U.S. Patent Nos. 8,307,761 (’761 patent) and 8,661,970 (’970 patent),³ which relate to multi-well food presentation modules—essentially, a buffet where hot food in one well can be next to cold food in another well. *See* ’761 patent at Abstract, col. 1 ll. 6–13. According to the common patent specification, prior art food presentation equipment, whether a serving bar or some other device, “is dedicated to heating or to cooling food contained therein.” Col. 1 ll. 34–35; *Id.* at ll. 43–44 (describing prior art serving bar as “dedicated to heating or to cooling all wells.”). The specification further explains that it can be “undesirable” for dine-in, self-service restaurants with multi-well food bars to have all the wells at the same temperature. *Id.* at ll. 55–58. The patents claim to solve what they describe

¹ PCT Pub. No. WO 2000/71950 (Finegan).

² Duke’s motion to stay the preliminary injunction pending appeal is hereby denied as moot.

³ The patents share a common specification.

as the “taco-presentation type problem” such that “ambient-temperature items (such as tortilla shells), heated items (such as meat), and refrigerated items (such as lettuce and cheese)” can be displayed together and in adjacent wells in the same food bar. ’761 patent at col. 2 ll. 24–28. To accomplish this goal, “[e]ach well is isolated thermally from adjacent wells and has an independently controlled heating and cooling system.” *Id.* at ll. 32–33. The specification explains that “pipes 40,” which can carry refrigerant, are in contact with the sidewalls of a well and a “heating mechanism” is located below the well floor. *Id.*, col. 4 ll. 29–53.

Claims 1–4 of the ’761 patent are representative and are reproduced in part below:

1. A food presentation module generally immobile in use, comprising:
 - a. a frame;
 - b. adjacent first and second wells for receiving containers of bulk food, each well being individually insulated and thermally isolated from an adjacent well via interior walls and exterior walls forming insulative air gaps therebetween . . .; and
 - c. a temperature-control system for controlling temperatures of the first and second wells independently . . . such that both wells may be refrigerated, both wells may be heated, or the first or second well may be refrigerated while the other of the first or second well is heated.
2. A module according to claim 1 in which the temperature-control system is configured to allow food received in the first well alternately to be heated to a temperature substantially above ambient.
3. A module according to claim 2 in which the temperature-control system is configured to allow food

received in the second well alternately to be refrigerated to a temperature substantially below ambient.

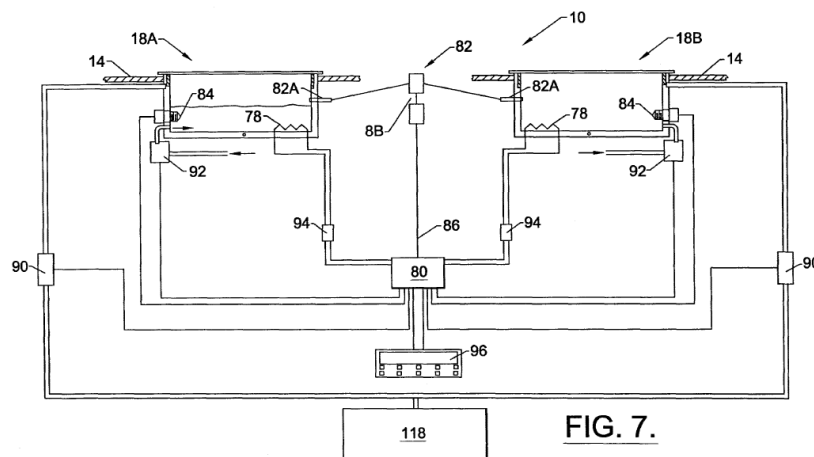
4. A module according to claim 1, further comprising one or more additional wells for receiving a container of food and in which the temperature-control system controls temperature of the one or more additional wells independently of temperatures of the first and second wells.

'761 patent at claims 1–4.

B

Finegan discloses a food service display that can be used as “an open-topped styled self service food bar [] or buffet unit [] for maintaining food at a desired temperature.” *Id.* at 5, FIG. 1. Cooling coils are mounted along the sidewalls of a pan and a heating element is located beneath the pan. *Id.* at 3, FIG. 1. The pan in Finegan’s Figure 1 embodiment can be operated “in a heating mode or a cooling mode.” *See id.* at 5.

Finegan’s Figure 7, reproduced below, shows an alternative embodiment with “multiple pans 18A, 18B.” *See id.* at 8, FIG. 7. This embodiment includes “[o]ne control system [controller 80 plus sensors that] allow[] the user to



control the temperature of two pans [18A, 18B] independently. For example, one pan could be hot and the other pan could be cold.” *Id.* at 9–10.

C

LTI and Duke are competitors in the market for food presentation modules that can maintain adjacent food wells at different temperatures. LTI was first to market, having developed its QuickSwitch product in 2007. LTI applied for patent protection in 2008 which resulted in the ’761 and ’970 patents.

LTI initially sold its QuickSwitch product as a part of its own counters. In 2012, LTI began offering QuickSwitch through distributors as a drop-in option for its customers’ counters. Duke was one such customer.

In 2019, Duke approached LTI about buying the QuickSwitch product directly from LTI instead of through a distributor; LTI declined. Duke then brought a competing Hot-Cold-Freeze (HCF) product to market in 2020. This patent infringement suit followed.

LTI moved for a preliminary injunction enjoining Duke from activities related to its allegedly infringing competing products. *See Low Temp Indus., Inc. v. Duke Mfg. Co.*, No. 4:20-CV-00686-MTS, 2021 WL 2634671, at *1 (E.D. Mo. June 25, 2021) (*PI Order*). The district court found that each of the four preliminary injunction factors—(1) the probability that the movant will prevail on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between that harm and the harm that granting the injunction will inflict on other parties; and (4) the public interest—weighed in favor of granting an injunction. *See id.* at *3.

The district court performed the required two-part analysis for likelihood of success on the merits. *See id.* at *4 (“To demonstrate a likelihood of success on the merits, LTI must show that (1) it will likely show that Duke’s HCF

infringes any one of the Asserted Patents, and (2) its infringement claims ‘will likely withstand [Duke’s] challenges to the validity and enforceability of the [Asserted Patents].’” (alterations in original)). As to infringement, the district court determined that LTI is likely to show at trial that Duke’s competing product infringes claims 3, 4, 9, 10, 13, 15, and 16 of the ’761 patent and claim 8 of the ’970 patent (the Infringed Claims). *See id.* at *7. Central to that finding was the district court’s construction of the claim term “insulative air gaps” or “insulative gaps” to not exclude a gap filled with insulation. *See id.* at *6.⁴

As to Duke’s validity challenge, Duke asserted that the Infringed Claims were either anticipated by Finegan or rendered obvious by Finegan in view of one or more secondary references. Duke’s invalidity theories accounted for the district court’s claim construction. For example, Duke contended that, if the district court found “insulative air gaps” included gaps filled with insulation, then Finegan was anticipatory for all but claim 4 of the ’761 patent. If, on the other hand, the district court limited “insulative air gaps” to exclude gaps filled with insulation, Duke’s challenge was one of obviousness based on Finegan and a secondary reference containing a gap without insulation.

The district court found Duke’s anticipation arguments unpersuasive because Duke’s expert stated that Finegan disclosed only “the vast majority of claimed features” and because Duke based its anticipation case in part on a legally incorrect “point of novelty” theory. *See id.* at *8 & n.12. The district court did not address whether or how its construction of “insulative air gaps” affected Duke’s invalidity theories.

⁴ Duke does not challenge the district court’s claim construction or preliminary infringement determination on appeal.

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The district court then found that a skilled artisan would not have considered the Infringed Claims obvious based on Finegan. *See id.* at *9. The district court concluded there were “meaningful and relevant” differences between Finegan and the Infringed Claims. *See id.* The district court focused on Finegan’s goal of providing frosting on the pan’s flanges and Finegan’s use of a hot water bath to heat the individual pans. *See id.* Ultimately, the district court concluded that:

Finegan does not . . . disclose or teach two thermally isolated and insulated ‘pans’ within a single module that can be operated at different temperatures simultaneously. Nor would it be obvious to modify Finegan to arrive at the Asserted Patents, given Finegan’s incorporation of thermally conductive material, emphasis on frosting, and its description of a single-temperature, one-pan module.

Id.

The district court also found that objective indicia of nonobviousness supported its conclusions that the Infringed Claims were nonobvious. *See id.* at *10–11. Namely, LTI presented evidence of commercial success and that Duke copied LTI’s HCF technology. *See id.*

Duke timely appealed the district court’s entry of a preliminary injunction and specifically its finding that Duke failed to raise a substantial question of validity. We have jurisdiction pursuant 28 U.S.C. § 1292(c)(1).

DISCUSSION

A

Both the Eighth Circuit and the Federal Circuit review the grant or denial of a preliminary injunction for abuse of discretion. *See Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020); *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1375 (Fed. Cir. 2009). “Abuse of

discretion is a deferential standard of review that requires a showing that ‘the court made a clear error of judgment in weighing relevant factors or exercised its discretion based upon an error of law or clearly erroneous factual findings.’” *Titan Tire*, 566 F.3d at 1375 (quoting *Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1364 (Fed. Cir. 1997)).

“In seeking a preliminary injunction, the patentee has the burden to show a likelihood of success regarding the patent's validity; if the accused infringer raises ‘a substantial question regarding validity,’ the district court should find that the patentee has not shown a likelihood of success on the merits.” *E.I. du Pont de Nemours & Co. v. MacDermid Printing Sols., L.L.C.*, 525 F.3d 1353, 1358 (Fed. Cir. 2008). “The burden on the accused infringer to show a substantial question of invalidity at the preliminary injunction stage is lower than what is required to prove invalidity at trial.” *Tinnus Enterprises, LLC v. Telebrands Corp.*, 846 F.3d 1190, 1205 (Fed. Cir. 2017) (quoting *Altana Pharma AG v. Teva Pharm. USA, Inc.*, 566 F.3d 999, 1006 (Fed. Cir. 2009)). “Vulnerability is the issue at the preliminary injunction stage, while validity is the issue at trial.” *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1359 (Fed. Cir. 2001).

“Where the alleged infringer attacks the validity of the patent, ‘the burden is on the challenger to come forward with evidence of invalidity,’ which the patentee must then rebut.” *Tinnus*, 846 F.3d at 1205 (quoting *Titan Tire*, 566 F.3d at 1377–78). “[I]f the trial court concludes there is a ‘substantial question’ concerning the validity of the patent, meaning that the alleged infringer has presented an invalidity defense that the patentee has not shown lacks substantial merit, it necessarily follows that the patentee has not succeeded in showing it is likely to succeed at trial on the merits of the validity issue.” *Titan Tire*, 566 F.3d at 1379.

As explained below, the district court abused its discretion in determining that Duke had not raised a substantial question of validity as to the Infringed Claims.

B

The district court initially erred by not considering the impact of its construction of “insulative air gap” to Duke’s invalidity challenges. The district court was correct that Duke’s expert stated at one point that “Finegan discloses the vast majority of claimed features” and that “minor other features . . . are found in secondary references.” *PI Order* at *8 (citing J.A. 1067). But Duke’s expert made that statement with the caveat that, for each of the Infringed Claims except for claim 4 of the ’761 patent, a secondary reference was required only “[t]o the extent ‘air gaps’ or ‘air gap’ (required for each of the Asserted Claims) is construed to exclude foam.” *See* J.A. 1067; *see also* J.A. 1075 (Duke’s expert stating that “[i]f ‘air gaps’ is interpreted . . . to cover insulation material (e.g., foam) between the walls, Finegan meets [this] element.”). Since the district court construed “insulative air gap” as *not* excluding foam, Duke’s invalidity challenges for all but one of the Infringed Claims are based on anticipation by Finegan. *See* J.A. 1067–68.

When properly viewed, Duke’s anticipation challenges to claims 3, 9, 10, 13, 15, and 16 of the ’761 patent and claim 8 of the ’970 patent raise a substantial question of validity. Anticipation “under 35 U.S.C. § 102 requires that a prior art reference disclose every limitation of the claimed invention, either explicitly or inherently.” *CommScope Techs. LLC v. Dali Wireless Inc.*, 10 F.4th 1289, 1295 (Fed. Cir. 2021). LTI has not contested that Finegan’s Figure 7 discloses two temperature-controlled wells that can be operated at different temperatures (one hot and one cold) or that Finegan discloses the other required elements of the claims (except for claim 4). LTI only disputes whether Finegan’s wells in Figure 7 are “adjacent” to each other within a single module. *See* Appellee’s Br. 49–53.

The district court clearly erred in finding no substantial merit as to whether Finegan discloses the adjacent wells limitation because (i) the court relied on an overly narrow understanding of “adjacent,” and (ii) it did not fully account for Finegan’s alternative embodiment disclosed in Figure 7 and its corresponding description. First, the district court appeared to understand the claims as requiring Finegan, for anticipation purposes, to teach “two *immediately adjacent* pans within a single module that can be maintained at different temperatures,” *PI Order* at *9 (emphasis added), even though the claims require the wells to be simply “adjacent.” While the district court did not explicitly say so, both parties state that the district court adopted LTI’s argument that the adjacency limitation requires the wells to touch. *See* Appellant’s Br. 45; Appellee’s Br. 49. And that Finegan could not disclose touching wells (*i.e.*, *immediately adjacent* wells) because its protruding flanges are thermally conductive, and a hot flange in contact with a cold flange would destroy Finegan’s goal to provide the “attractive feature” of “frosting” or a “frost top” for a cold food well, which “give[s] the appearance of the food such as salad or additional condiments resting in ice.” *See* Finegan at 1; *PI Order* at *9. But this constricted understanding of “adjacent” is at odds with the patents’ disclosure, which describes a “distance D1” “between adjacent wells,” “with D1 preferably being approximately three inches.” ’761 patent col. 3 ll. 46–52. Given the specification explicitly states that adjacent wells preferably have a distance between them (and not defined to be bounded by a particular outer distance), the basis for the district court’s finding that Finegan’s pans 18A and 18B are not adjacent, or next to, each other—because Finegan’s cold pan calls for frosted flanges—cannot be sustained.

At this stage of the proceeding and on this record, Duke has sufficiently raised a substantial question that Finegan anticipates all of the Infringed Claims except for claim 4, including disclosure of the adjacency limitation. Finegan’s

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Figure 7 discloses a single “apparatus 10” with two wells 18A and 18B that are independently temperature controlled by “one control system.” Finegan at 8, 9. Those wells are shown within a single countertop 14. Though Finegan does not disclose any particular measured distance between its wells, neither the district court nor LTI provides any explanation as to why a disclosure of two wells within a single apparatus (with no other components disposed within the countertop) are not adjacent under a proper understanding of that term.

And to the extent that the district court implicitly found that Finegan’s Figure 7 only discloses a single pan in each of two separate modules, its order fails to explain the basis for that finding as well.⁵ In sum, on this record, we conclude that the district court abused its discretion in concluding that Duke failed to raise a substantial question of validity as to claims 3, 9, 10, 13, 15, and 16 of the ’761 patent and claim 8 of the ’970 patent. *Titan Tire*, 566 F.3d at 1379.

C

Duke’s challenge to the remaining Infringed Claim, claim 4 of the ’761 patent, is grounded in obviousness under the district court’s claim construction. Dependent claim 4 requires one or more additional wells that are independently temperature controlled. *See* ’761 patent at claim 4. Duke acknowledged that Finegan’s two-well disclosure does not meet this limitation but argued that additional wells would have been obvious in light of Finegan alone, *see* J.A. 1080, and that several other references, including

⁵ We also note, contrary to the district court’s conclusion, that the type of heating mechanism Finegan uses is of no moment because the claims do not require a particular heating scheme.

the Safyan⁶, Hansen⁷, and Shei⁸ references, teach three or more independently temperature-controlled wells, *see* J.A. 1067, 1082–83, 2269–71, 2275–76, 2279–81, 2283–84.

We limit our analysis to Finegan in light of Safyan. Safyan discloses a “chill-hot buffet tray” with “[a] pair of heating and cooling units,” Safyan col. 3 ll. 13–20, and that each unit receives a pan of food, *see id.* at col. 2 ll. 58–59. Safyan is not limited to two temperature-controlled pans, however. *See id.* at col. 3 ll. 46–49 (“It is to be understood that one or more than two pairs of aligned openings may be provided to accommodate as few or as many heating and cooling units as may be required or desired.”); *see also id.* at col. 1 ll. 61–63 (“Multiple temperature controlled units supported in similar openings may be used for heating and/or cooling different foods.”).

The district court addressed Finegan in light of Safyan but limited its analysis to whether Duke improperly relied on hindsight to argue that the references rendered obvious two wells within the same food bar that simultaneously allow the display of hot and cold foods. *See PI Order* at *11. As we determined above, Duke made the requisite showing, for purposes of opposing the preliminary injunction motion, that Finegan discloses this feature. Thus, the district court’s hindsight finding fares no better.

At the district court, Duke argued that a skilled artisan would have been motivated to add additional wells to Finegan generally and, further, in light of Safyan’s disclosure of more than two wells. *See* J.A. 1080 (“[I]n view of Finegan alone, it would have been obvious to [a skilled artisan] to add a third and fourth well.”), 1080–81 (arguing a skilled artisan “would have found it obvious to modify Finegan’s

⁶ U.S. Patent No. 5,941,077 (Safyan).

⁷ U.S. Patent No. 5,961,866 (Hansen).

⁸ PCT Pub. No. WO 2008/127330 (Shei).

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food bar to have three, four, or even more wells (for holding additional pans of food) that are all independently controllable with respect to each other” in light of Safyan’s disclosure); *see also* J.A. 2275–76 (same).

LTI responded that a skilled artisan would not modify Finegan to include additional wells because “[t]he mechanical design, heat transfer, and fitment in the Safyan Reference are distinctly different from the mechanical design described and disclosed in the asserted claims” and thus a skilled artisan “would not look to the teaching of Safyan to teach the three or more well system of the Asserted Patents because Safyan does not consider or teach how refrigeration would occur in a three or more well system.” *See Low Temp Indus., Inc. v. Duke Mfg. Co.*, No. 4:20-CV-00686-MTS, ECF No. 43-3 at 32, ¶ 103; *see also* Appellee’s Br. 28 (“Safyan . . . disclose[s] mechanical designs, mechanisms of heat transfer and fitment that are different from both Finegan and the Asserted Patents.”). LTI’s argument is not responsive to Duke’s position. Duke did not argue that a skilled artisan would incorporate Safyan’s heating and cooling units into Finegan or that a skilled artisan would add one of Safyan’s units to arrive at a third well in Finegan. Rather, Duke argued that a skilled artisan would modify Finegan to include a third (or more) of *Finegan’s* wells. *See* J.A. 2275–76 (“With the idea of adding a third well (or as many as desired or required) introduced by Safyan, additional wells to the food bar of Finegan would have been no more than a duplication of [Finegan’s] parts according to [Finegan’s] methods.”). Duke’s evidence to modify Finegan to arrive at claim 4 therefore stands un rebutted.

We next consider the objective indicia of nonobviousness presented by LTI. *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1328 (Fed. Cir. 2016) (“[O]bjective considerations of non-obviousness must be considered in every case.”). The district court found that significant evidence supported a finding that Duke copied LTI’s product. *See PI*

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Order at *10. The district court also found that LTI had presented evidence of commercial success of its Quick-Switch unit. *See id.* at *11.

Without commenting on the sufficiency of LTI's objective indicia evidence, our determination that Duke has made a sufficient showing, at this stage, that Finegan anticipates all of the Infringed Claims (except for claim 4) renders LTI's objective indicia irrelevant as to those claims. *See Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1364 (Fed. Cir. 2008); *In re Fracalossi*, 681 F.2d 792, 796 (C.C.P.A. 1982) (concurring opinion) (“[Objective indicia] relevant to a case of prima facie obviousness are not considered for purposes of determining anticipation.”). As for claim 4, LTI did not tie any objective indicia to the presence of three or more wells, or to additional wells in combination with the features that, there is substantial reason to believe on this record, are disclosed by Finegan. At the district court, LTI instead tied its objective indicia evidence to the feature of multiple wells in the same food presentation module where the module can heat and cool foods at the same time. *See Low Temp Indus., Inc. v. Duke Mfg. Co.*, No. 4:20-CV-00686-MTS, ECF No. 43-3 at 55, ¶ 193; *id.* at 56, ¶ 194; *id.* at 56, ¶ 195. Thus, we conclude that at this preliminary stage, LTI failed to present sufficient evidence of a nexus between any objective indicia and claim 4 of the '761 patent. *See Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013) (“[O]bjective evidence of nonobviousness lacks a nexus if it exclusively relates to a feature that was known in the prior art.”) (citation omitted).

On the current record, we conclude the district court abused its discretion in determining that Duke failed to raise a substantial question of validity as to claim 4 of the '761 patent.

CONCLUSION

We have considered LTI's remaining arguments and find them unpersuasive. For the reasons set forth above,

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we reverse the district court's entry of a preliminary injunction against Duke.

REVERSED