

Client Alert: Debunking Conventional Wisdom –
You CAN End *Inter Partes* Reexamination

The following pages are the following documents (page numbers at page bottom):

Page 1 – A PTO Central Reexamination Unit Director’s Decision Vacating Reexamination. This decision was before reexamination was granted.

Page 6 – A PTO Office of Patent Legal Administration Decision Granting Petition to Terminate Reexamination Proceeding. This decision was after reexamination had been granted.

Page 13 – A PTO CRU examiner’s Right of Appeal Notice excerpted to show the reexamination was not maintained as to original claims, followed by the Final Decision and Order Pursuant to Stipulation which provided this result. This Notice does not maintain reexamination as to original claims, but does maintain reexamination as to new claims added during reexamination. The proceeding is expected to result in a Reexamination Certificate.

REVIEW OF FACTS

1. U.S. Patent No. 6,467,939 (hereinafter, the '939 patent), issued to Deutsch et al., on October 22, 2002, from an application filed on January 9, 2001.
2. On June 3, 2003, a request for *inter partes* reexamination of the '939 patent was filed in the Office by the third party requester. The real party in interest is Liteglow Industries, Inc.
3. The initial determination under 35 U.S.C. 312(a) as to whether or not a substantial new question of patentability is raised by the request has not yet been made.
4. On July 28, 2003, the third party requester filed a notice of concurrent proceedings under 37 CFR 1.985, advising the Office of a final decision issued by the U.S. District Court for the Southern District of Florida, which holds that the requester (Defendant) has not sustained its burden of proving the invalidity of any patent claim in the '939 patent. A copy of the Court's order is attached to the notice of concurrent proceeding.
 - a. Requester advises the Office that under 35 U.S.C. 317(b), in view of the Court's final holding the '019 *inter partes* reexamination proceeding filed by the requester (Defendant) may not thereafter (after the court's final order) be maintained by the Office.
 - b. Requester further requests a partial refund of the reexamination filing fee. Requester notes that the statute and rules provide for a partial refund of the reexamination filing fee upon a determination by the Director that no substantial new question of patentability has been raised. Requester acknowledges that no determination has been made, but urges that the Court's final holding makes the Director's determination moot and therefore, a refund is appropriate.

DECISION

I. Decision Vacating *Inter Partes* Reexamination 95/000,019.

Section 317(b) of Title 35 provides:

Once a final decision has been entered against a party in a civil action ... that the party has not sustained its burden of proving the invalidity of any patent claim in suit ... then neither that party nor its privies may thereafter request an *inter partes* reexamination of any such patent claim on the basis of issues which that party or its privies raised or could have raised in such civil action ... and an *inter partes* reexamination requested by that party or its privies on the basis of such issues may not thereafter be maintained by the Office.

The record shows that the present '019 *inter partes* reexamination request was filed on June 3, 2003, on behalf of Liteglow Industries, Inc. (the real party in interest). Reexamination is requested of all of the patent claims. The determination as to whether the cited prior art raises a substantial new question of patentability has not been made at this time.

The record further shows that Liteglow Industries, Inc. is the defendant in a civil action in the U.S. District Court for the Southern District of Florida. On July 25, 2003, the Court issued a CONSENT FINAL JUDGMENT AND PERMANENT INJUNCTION. In its Judgment the Court found and/or ordered:

1. The defendant has not sustained its burden of proving the invalidity of any patent claim in the '939 patent.
2. The Consent Final Judgment is intended to be an Order of the Court which is final, enforceable, and not appealable (emphasis added).
3. All the claims of the '939 patent are valid.
4. The defendant Liteglow Industries, Inc. is directed to take any and all action necessary to withdraw and/or terminate its Request for *Inter Partes* Reexamination Number 95/000,019 filed on June 3, 2003, in the United States Patent and Trademark Office.

The record further shows that on July 28, 2003, the third party requester Liteglow Industries, Inc. filed a notice of concurrent proceedings under 37 CFR 1.985 advising the Office of the Court's final decision. In its' notice requester does not allege that the '019 *inter partes* reexamination is based on issues which could not have been raised in the litigation.

In view of all of the above, the '019 *inter partes* reexamination is hereby vacated under the provisions of 35 U.S.C. 317(b).

II. Decision Denying Partial Refund of Reexamination Filing Fee.

Requester requests a partial refund of the *inter partes* reexamination filing fee. Congress has set forth the conditions under which the Director has discretion to refund a fee. Under 35 U.S.C. 42(d):

The Director may refund any fee paid by mistake or any amount paid in excess of that required.

This authority is further interpreted in the first sentence of 37 CFR 1.26(a):

The Director may refund any fee paid by mistake or in excess of that required. A change in purpose after the payment of a fee, such as when a party desires to withdraw a patent or trademark filing for which the fee was paid, including an application, an appeal, or a request for an oral hearing, will not entitle a party to a refund of such fee.

The requirements for a refund are not met in this case. Requester sought and received an *inter partes* reexamination proceeding based on the '939 patent claims. The Director has no discretion to accept a request for *inter partes* reexamination from a third party requester without payment of the filing fee. 35 U.S.C. 311(b)(1) and 41(d). Requester made no mistake in payment

of the reexamination filing fee. Requester intended to pay the filing fee to receive an *inter partes* reexamination proceeding based on the '939 patent claims. Requester achieved the goal sought. The filing fee required by the Office was not in excess of that required by the statute and applicable USPTO rules. Hence, requester did not pay an amount in excess of a proper filing fee. Accordingly, requester is not entitled to a refund of the filing fee under 35 U.S.C. 42(d).

Absent specific authorization under the statute, the Director has no authority to refund any part of the *inter partes* reexamination filing fee. Requester points to the authority under 35 U.S.C. 312(c) for a partial refund of the filing fee upon a determination by the Director that no substantial new question of patentability has been raised. Requester acknowledges that no determination has been made, but urges that the court's final holding makes the Director's determination moot and therefore, a refund is appropriate.

Requester's arguments are not persuasive. 35 U.S.C. 312(a) and (c) provide in part:

(a) [t]he Director shall determine whether a substantial new question of patentability affecting any claim of the patent concerned is raised by the request, with or without consideration of other patents or printed publications (emphasis added).

(c) Upon a determination that no substantial new question of patentability has been raised, the Director may refund a portion of the *inter partes* reexamination fee required under section 311 (emphasis added).

The plain language of the statute clearly shows that Congress intended for a partial refund of the *inter partes* reexamination filing fee when the Director determined that the prior art patents and printed publications cited in the request for reexamination are found not to raise a substantial new question of patentability and reexamination would be denied. This language is specifically directed to the determination as to whether a substantial new question of patentability is present and does not extend to and include other circumstances under the statute which would terminate and/or vacate a pending *inter partes* reexamination proceeding. If Congress had intended a partial refund of the *inter partes* reexamination filing fee upon a final court order under 35 U.S.C. 317(b) resulting in the prohibition of continuing an *inter partes* reexamination in the Office, Congress could have authorized the Director to make a partial refund of the filing fee. Congress did not do so. Without such authorization, the Director has no authority for refunding a portion of the *inter partes* reexamination filing fee in this case.

In view of all of the above, the request for a refund of a portion of the *inter partes* reexamination filing fee is denied.

CONCLUSION

1. Pursuant to the final order of the U.S. District Court for the Southern District of Florida holding that the requester (Defendant) has not sustained its burden of proving the invalidity of any patent claim in the '939 patent, the '019 *inter partes* reexamination is vacated under the provisions of 35 U.S.C. 317(b).

2. The request for a refund of a portion of the *inter partes* reexamination filing fee is denied.

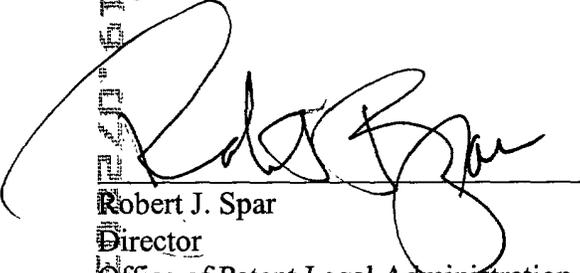
All correspondence relating to an *inter partes* reexamination proceeding should be directed:

by Mail to: Mail Stop *Inter Partes* Reexam
Central Reexamination Unit
Office of Patent Legal Administration
United States Patent & Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

by FAX to: (703) 305-1013
Central Reexamination Unit

By hand: Central Reexamination Unit
Crystal Plaza Three-Four, 3D68
2201 South Clark Place
Arlington, VA 22202

Telephone inquiries with regard to this decision should be directed to Gerald A. Dost, Senior Legal Advisor, at (703) 308-8610.


Robert J. Spar
Director
Office of Patent Legal Administration
Office of the Deputy Commissioner
for Patent Examination Policy

C:\zJerry\95_000,019 decision vacating ip reexam.wpd



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,167	04/14/2009	6784873	1659401-0011	1207

74162 7590 02/24/2010
Law Office of Scott C Harris Inc
PO Box 1389
Rancho Santa Fe, CA 92067

EXAMINER

ART UNIT PAPER NUMBER

DATE MAILED: 02/24/2010

Please find below and/or attached an Office communication concerning this application or proceeding.



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

CONTROL NO.	FILING DATE	PATENT IN REEXAMINATION	ATTORNEY DOCKET NO.
95/001,167	04/14/09	6784873	1659401-0011

WHITE & CASE LLP
PATENT DEPARTMENT
1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

EXAMINER

KOSOWSKI, ALEXANDER

ART UNIT PAPER

3992

DATE MAILED:

MAILED

FEB 24 2010

CENTRAL REEXAMINATION UNIT

**INTER PARTES REEXAMINATION
COMMUNICATION**

BELOW/ATTACHED YOU WILL FIND A COMMUNICATION FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE OFFICIAL(S) IN CHARGE OF THE PRESENT REEXAMINATION PROCEEDING.

All correspondence relating to this *inter partes* reexamination proceeding should be directed to the **Central Reexamination Unit** at the mail, FAX, or hand-carry addresses given at the end of this communication.



Law Office of Scott C. Harris, Inc.
P.O. Box 1389
Rancho Santa Fe, CA 92067

(For Patent Owner)

MAILED

FEB 24 2010

CENTRAL REEXAMINATION UNIT

White & Case LLP
Patent Department
1155 Avenue of the Americas
New York, NY 10036

(For Third Party Requester)

In re Boesen et al.
Inter Partes Reexamination Proceeding
Control No. 95/001,167
Filed: April 14, 2009
For: U.S. Patent No. 6,784,873

:
: **DECISION GRANTING**
: **PETITION TO TERMINATE**
: **REEXAMINATION**
: **PROCEEDING**

This is a decision on the December 15, 2009 paper entitled “Renewed Petition To Terminate Inter Partes Reexamination Under 35 U.S.C. §314(c)/317(b) (and under 37 CFR 1.182)” requesting termination of the prosecution of, and conclusion of *inter partes* reexamination proceeding control number 95/001,167, (hereinafter, “renewed petition to terminate”).

The December 15, 2009 renewed petition to terminate is before the Office of Patent Legal Administration for consideration.

SUMMARY

The December 15, 2009 renewed petition to terminate prosecution and conclude the instant *inter partes* reexamination proceeding 95/001,167 is granted.

REVIEW OF RELEVANT FACTS

1. U.S. Patent number 6,784,873 (the ‘873 patent) issued on August 31, 2004.
2. On July 1, 2008, the patent owner, SP Technologies, LLC, filed suit against Samsung Group, Samsung Telecommunications America, Samsung Electronics America, Inc., HTC Corporation and HTC America, Inc. for infringement of the ‘873 patent in the United States District Court for the Northern District of Illinois.¹

¹ *SP Technologies, LLC v. Samsung Electronics Co., Ltd. et al.*, Civil Action No. 1:08 cv 03760 (N.D. Ill. July 1, 2008)

3. A request for reexamination of claims 1-10 of the '873 patent was deposited on April 6, 2009. The request was assigned control No. 95/001,167 (the '1167 proceeding) and was accorded a filing date of April 14, 2009, the date compliance with the filing requirements of 37 CFR 1.915 was completed. The request identifies HTC Corporation and HTC America, Inc. as the real party in interest.
4. Reexamination was ordered for the '1167 proceeding on June 1, 2009. A first action on the merits was mailed on June 16, 2009.
5. On July 23, 2009, the patent owner filed a petition requesting termination of the '1167 proceeding, based on the July 15, 2009 stipulation of dismissal and consent judgment order, issued from the U.S. District Court, Northern District of Illinois, in the litigation between SP Technologies, LLC and HTC Corporation and HTC America, Inc (HTC).
6. On August 5, 2009, the patent owner filed a request for extension of time under 37 CFR 1.956.
7. On August 7, 2009, a notification of prior and concurrent litigation under 37 CFR 1.985 was filed by counsel for Garmin International, Inc. and TomTom, Inc.
8. On August 10, 2009, the patent owner filed a paper titled "Request to Remove Inappropriate Papers Under 37 CFR 1.939/MPEP 2667" requesting the Office to remove the notification under 37 CFR 1.985 filed August 7, 2009.
9. On August 11, 2009, the Office mailed a decision dismissing the August 5, 2009 petition for extension of time.
10. On August 13, 2009, the patent owner filed a request for reconsideration of the request for extension of time.
11. On August 17, 2009, the patent owner filed a response to the June 16, 2009 Office action.
12. On October 20, 2009, the Office mailed a decision dismissing the July 23, 2009 petition to terminate. The Office also mailed a decision dismissing the August 10, 2009 petition to remove the August 7, 2009 paper.
13. On December 7, 2009, the Office mailed a "Notice Re Defective Paper In Inter Partes Reexamination" which stated that the amendment filed on August 17, 2009 does not comply with 37 CFR 1.530.
14. On December 15, 2009, the patent owner filed a "Renewed Petition To Terminate Inter Partes Reexamination Under 35 U.S.C. §314(c)/317(b) (and under 37 CFR 1.182)."
15. On December 30, 2009, the third party requester filed a paper entitled "Third Party Requester's Response to Patent Owner's Renewed Petition to Terminate Inter Partes Reexamination."
16. On January, 5, 2010, the third party requester filed a certificate of service for the third party requester's response paper filed December 30, 2009.

17. On January 8, 2010, a “Notification of Prior and Concurrent Litigation Under 37 CFR 1.985” was filed by counsel for Garmin International, Inc and TomTom, Inc. via the Office’s electronic filing system, EFS-Web.
18. On January 11, 2010, a copy of the paper filed on January 8, 2010 was filed.

STATUTES, REGULATIONS, AND PATENT EXAMINING PROCEDURES

35 U.S.C. 317(b) provides (emphasis added):

Once a final decision has been entered against a party in a civil action arising in whole or in part under section 1338 of title 28, that the party **has not sustained its burden of proving the invalidity of any patent claim in suit** or if a final decision in an inter partes reexamination proceeding instituted by a third-party requester is favorable to the patentability of any original or proposed amended or new claim of the patent, then neither that party nor its privies may thereafter request an inter partes reexamination of **any such patent claim** on the basis of issues which that party or its privies raised or could have raised in such civil action or inter partes reexamination proceeding, and an inter partes reexamination requested by that party or its privies **on the basis of such issues** may not thereafter be maintained by the Office, notwithstanding any other provision of this chapter. This subsection does not prevent the assertion of invalidity based on newly discovered prior art unavailable to the third-party requester and the Patent and Trademark Office at the time of the inter partes reexamination proceedings.

37 CFR 1.907(b) provides:

Once a final decision has been entered against a party in a civil action arising in whole or in part under 28 U.S.C. 1338 that the party has not sustained its burden of proving invalidity of any patent claim-in-suit, then neither that party nor its privies may thereafter request *inter partes* reexamination of any such patent claim on the basis of issues which that party, or its privies, raised or could have raised in such civil action, and an *inter partes* reexamination requested by that party, or its privies, on the basis of such issues may not thereafter be maintained by the Office.

37 CFR 1.985(a) provides:

In any *inter partes* reexamination proceeding, the patent owner shall call the attention of the Office to any prior or concurrent proceedings in which the patent is or was involved, including but not limited to interference, reissue, reexamination, or litigation and the results of such proceedings.

MPEP 2686.04 V., Discussion Of Affect Of Litigation Where Requester Was A Party To The Litigation, provides, in pertinent part:

Where a final decision was entered against a party in a Federal Court civil action (arising in whole or in part under 28 U.S.C. 1338) that the party did not sustain its burden of proving invalidity of a patent claim in suit, then that party and its privies may not request *inter partes* reexamination of any such patent claim on the basis of issues which that party or its privies raised or could have raised in the civil action. Further, an *inter partes* reexamination already requested by that party, or its privies, on the basis of such issues will not be maintained by the Office; in such an instance, the prosecution

will be terminated and the proceeding will be concluded.

DECISION

The July 23, 2009 petition to terminate was dismissed because it had not been established that the July 15, 2009 consent judgment was “a final decision...entered against a party in a civil action...that the party has not sustained its burden of proving the invalidity of any patent claim in suit...” as required by 35 U.S.C. 317(b). The petition decision also stated that patent owner had not established that each and every patent claim was involved in the suit and that HTC had the burden of showing invalidity of all of the patent claims, because it appeared that SP Technologies, LLC only asserted that HTC infringed claims 1, 4, 9, and 10 of the ‘873 patent and it had not been established that HTC had the burden of proving invalidity of any of the non-asserted claims (i.e., claims 2, 3, and 5-8).

Patent owner now renews its petition to terminate the ‘1167 proceeding pursuant to 35 U.S.C. 317(b) and 37 CFR 1.907(b), based on the December 8, 2009 amended stipulation of dismissal and consent judgment order, issued from the U.S. District Court, Northern District of Illinois, Eastern Division. In third party requester’s December 30, 2009 response to patent owner’s renewed petition, requester states that “HTC...does not oppose the Renewed Petition and agrees with the patent owner that this *inter partes* reexamination should be terminated pursuant to 35 U.S.C. §317(b).”

Pursuant to 35 U.S.C. 317(b) and 37 CFR 1.907(b), once a final decision has been entered against a party in a civil action arising in whole or in part under 28 U.S.C. 1338, that the party has not sustained its burden of proving the invalidity of any patent claim in suit, an *inter partes* reexamination requested by that party on the basis of issues that the party raised, or could have raised, in the civil action must not thereafter be maintained by the Office.

A copy of the December 8, 2009 amended stipulation of dismissal and consent judgment order of the district court accompanied the December 15, 2009 renewed petition to terminate. The December 8, 2009 consent judgment order states, in particular:

The Court further orders and decrees that the original Consent Judgment Order of July 15, 2009 and this Amended Consent Judgment Order are intended and shall constitute, for purposes of 35 U.S.C. § 317(b), a final decision entered against a party (*i.e.*, HTC) in a civil action arising in whole or in part under section 1338 of title 28, that the party (*i.e.*, HTC) has not sustained its burden of proving the invalidity of any patent claim in suit, with all claims (1-10) of the ‘873 patent having been in suit.

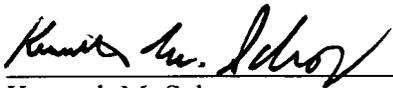
The December 8, 2009 amended stipulation of dismissal and consent judgment order was entered against the third party requester of the instant ‘1167 proceeding, that the third party requester did not sustain its burden of proving invalidity of any of the patent claims of the ‘873 patent, which are identical to the claims under reexamination in the instant ‘1167 proceeding.

Accordingly, based upon 35 U.S.C. 317(b), the prosecution of the ‘1167 *inter partes* reexamination proceeding is hereby terminated.

Jurisdiction over the '1167 *inter partes* reexamination proceeding is being forwarded to the Central Reexamination Unit (CRU) for conclusion of the proceeding. The CRU will mail the present decision, and process the reexamination file to update the Image File Wrapper (IFW) records for this proceeding. The file will be assigned an 820 status. A copy of the PALM "Application Number Information" screen and the "Contents" screen will be printed, the printed copy will be annotated by adding the comment "PROCEEDING CONCLUDED," and the annotated copy will then be scanned into Image File Wrapper (IFW) using the miscellaneous letter document code.

CONCLUSION

1. The renewed petition to terminate is granted.
2. The prosecution of the '1167 *inter partes* reexamination proceeding is terminated, and the '1167 proceeding will be concluded.
3. Jurisdiction over the '1167 *inter partes* reexamination proceeding is being forwarded to the Central Reexamination Unit (CRU) for further processing to conclude the '1167 proceeding, as set forth above.
4. Any inquiry concerning this communication should be directed to Eugenia Jones, Senior Legal Advisor, at (571) 272-7727, or in her absence, to the undersigned at (571) 272-7710.



Kenneth M. Schor
Senior Legal Advisor
Office of Patent Legal Administration

2-24-10
Kenpet7/



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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95/000,437	02/03/2009	7174661	051291.00218	8842
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22908 7590 05/06/2010
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 SUITE 3000
 CHICAGO, IL 60606

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MAY 13 2010

BANNER & WITCOFF
DOCKETING DEPT.

EXAMINER

FOSTER, JIMMY G

ART UNIT	PAPER NUMBER
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3993

MAIL DATE	DELIVERY MODE
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05/06/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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United States Patents and Trademark Office
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THIRD PARTY REQUESTER'S CORRESPONDENCE ADDRESS
TOWNSEND AND TOWNSEND AND CREW LLP
TWO EMBARCADERO CENTER
EIGHTH FLOOR
SAN FRANCISCO, CA 94111-3834

Date:

MAILED

MAY 06 2010

CENTRAL REEXAMINATION UNIT

**Transmittal of Communication to Third Party Requester
Inter Partes Reexamination**

REEXAMINATION CONTROL NO. : 95000437
PATENT NO. : 7174661
TECHNOLOGY CENTER : 3999
ART UNIT : 3992

Enclosed is a copy of the latest communication from the United States Patent and Trademark Office in the above identified Reexamination proceeding. 37 CFR 1.903.

Prior to the filing of a Notice of Appeal, each time the patent owner responds to this communication, the third party requester of the inter partes reexamination may once file written comments within a period of 30 days from the date of service of the patent owner's response. This 30-day time period is statutory (35 U.S.C. 314(b)(2)), and, as such, it cannot be extended. See also 37 CFR 1.947.

If an ex parte reexamination has been merged with the inter partes reexamination, no responsive submission by any ex parte third party requester is permitted.

All correspondence relating to this inter partes reexamination proceeding should be directed to the Central Reexamination Unit at the mail, FAX, or hand-carry addresses given at the end of the communication enclosed with this transmittal.

PTOL-2070(Rev.07-04)

Art Unit: 3993

Effect of Final Decision and Order by U.S. District Court regarding the Patent Claims

A Decision and Order has been rendered on March 8, 2010 by the U.S. District Court for the Northern District of California, stating:

Pursuant to joint motion and stipulation of the Plaintiff, ESCO Corporation and Defendant, Berkeley Forge & Tool, Inc., which includes the stipulation that this final decision should be entered, this Court enters this final decision that Berkeley Forge & Tool, Inc. has not sustained its burden of proving the invalidity of any patent claim of U.S. Patent No. 7,171,771 or U.S. Patent No. 7,174,661. This action is dismissed with prejudice. This decision is an Order of the Court which is final, enforceable and not appealable.

(see NPL (03/12/2010)). Accordingly reexamination in this proceeding is not being maintained for patent claims 1-44; thus, claims 1-44 are no longer subject to reexamination in this proceeding.

Amendments after ACP

The amendments after ACP, filed November 25, 2009 (see RXPET. (11/25/2010)) and March 12, 2010 (see XI.A... (03/12/2010)), are entered for examination and are considered in this Right of Appeal Notice (RAN).

Claim Status

Claims Not Subject to Reexamination in this Proceeding: 1-44

Claims Examined and Allowed: 51-60, 62, 64-71, 74, 75, 77, 78, 82, 84 and 86

Canceled Claims: 45-50, 61, 63, 72, 73, 76, 79-81, 83 and 85

Rejected Claims: None

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ESCO CORPORATION)
an Oregon corporation,)
)
Plaintiff,)
)
v.)
)
BERKELEY FORGE & TOOL, INC.,)
a California Corporation,)
)
Defendant.)
_____)

Case No. CV 09-1635 SBA
FINAL DECISION AND ORDER
PURSUANT TO STIPULATION

Pursuant to joint motion and stipulation of the Plaintiff, ESCO Corporation and Defendant, Berkeley Forge & Tool, Inc., which includes the stipulation that this final decision should be entered, this Court enters this final decision that Berkeley Forge & Tool, Inc. has not sustained its burden of proving the invalidity of any patent claim of U.S. Patent No. 7,171, 771 or U.S. Patent No. 7,174,661. This action is dismissed with prejudice. This decision is an Order of the Court which is final, enforceable and not appealable.

IT IS SO ORDERED.

Dated: March 8, 2010

By: *Sandra B. Armstrong*
The Honorable Sandra B. Armstrong
United States District Court Judge