

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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**Lufthansa Technik AG,**  
Junior Party  
(Application 15/218,669,  
Inventors: Sebastian Giljohann, Daniel Gobel, Michael Mensch,  
Joachim Heine, and Joachim Hacker),

v.

**EcoServices, LLC,**  
Senior Party  
(Patent 7,445,677  
Inventor: Peter Asplund).  
Patent Interference No. 106,098

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**Judgment- 37 C.F.R. § 41.127(a)**

Before SALLY GARDNER LANE, JAMES T. MOORE, and DEBORAH KATZ,  
*Administrative Patent Judges.*

KATZ, *Administrative Patent Judge.*

In light of the judgment in Interference 106,053 (Paper 174), claims 1–20 of EcoServices patent 7,445,677 have been cancelled. In the Decision on Motions in the current interference, we deny EcoServices Motion 1, arguing that claim 10 of Lufthansa application 15/218,669 is unpatentable under 35 U.S.C. § 135(b). (*See* Paper 87.)

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Accordingly, it is ORDERED that judgment be entered against EcoServices in regard to Count 1.

It is also ORDERED that a copy of this judgment shall be entered into the administrative record of EcoServices patent 7,445,677 and Lufthansa application 15/218,669;

It is further ORDERED that the parties are directed to 35 U.S.C. § 135(c) and to 37 C.F.R. § 41.205 regarding the filing of settlement agreements; and

It is further ORDERED that a party seeking judicial review timely serve notice on the Director of the United States Patent and Trademark Office; 37 C.F.R. §§ 90.1 and 104.2. *See also* 37 C.F.R. § 41.8(b). Attention is directed to *Biogen Idec MA, Inc., v. Japanese Foundation for Cancer Research*, 785 F.3d 648, 654–57 (Fed. Cir. 2015) (determining that pre-AIA § 146 review was eliminated for interference proceedings declared after September 15, 2012).

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Patent Interference No. 106,098 (DK)  
(Technology Center 1700)

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**Decision on Motions- 37 C.F.R. § 41.125(b)**

Before SALLY GARDNER LANE, JAMES T. MOORE, and DEBORAH KATZ,  
*Administrative Patent Judges.*

KATZ, *Administrative Patent Judge.*

- 1 *Introduction*
- 2 Junior Party Lufthansa Technik AG (“Lufthansa”) and Senior Party
- 3 EcoServices LLC (“EcoServices”) are involved in this proceeding based on their

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1 claims to methods of cleaning a turbine engine. (*See* Lufthansa Clean Copy of  
2 Claims, Paper 4, and EcoServices Clean Copy of Claims, Paper 9.) The  
3 interference was declared with claims 10–18, 20–36, 38–45 and 47 of Lufthansa’s  
4 involved application 15/218,669 (“the ’669 application”) and claims 10–20 of  
5 EcoServices’s involved patent 7,445,677 (“the ’677 patent”) designated as  
6 corresponding to the count. (*See* Declaration, Paper 1, 4:5–21.) Following a  
7 stipulation by the parties, the interference was redeclared with none of Lufthansa’s  
8 claims designated as corresponding to the count, except claim 10. (*See*  
9 Redeclaration, Paper 16.) Thus, the only Lufthansa claim currently involved in the  
10 interference is claim 10 of the ’669 application.

11           Previously, judgment was entered against EcoServices in  
12 Interference 106,053 and claims 1–20 of EcoServices’s currently involved patent  
13 7,445,677 were canceled. (*See* 106,053 Decision on Motions, Paper 172, and  
14 Judgment, Paper 174.) EcoServices’s claims remain canceled regardless of the  
15 decision on the motions before us now. This interference continues because  
16 EcoServices persuasively argued that it would be unfairly prejudiced if it were not  
17 allowed to complete briefing and have a decision rendered on whether claim 10 of  
18 Lufthansa’s ’669 application is barred under 35 U.S.C. § 135(b). (*See* Order –  
19 Continued Proceeding, Paper 77.) Accordingly, EcoServices Motion 1 (Paper 40),  
20 Lufthansa Opposition 1 (Paper 58), and EcoServices Reply 1 (Paper 78), are

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1 currently before us. Lufthansa Miscellaneous Motion 3 to exclude evidence  
2 presented by EcoServices (Paper 80) is also before us.<sup>1</sup>

3 *EcoServices Motion 1*

4 EcoServices argues that claim 10 of Lufthansa’s ‘669 application is barred  
5 as having been untimely filed under 35 U.S.C. § 135(b).<sup>2</sup> (*See* EcoServices  
6 Motion 1, Paper 40, 1:2–6.) Under 35 U.S.C. § 135(b)(1)

7 [a] claim which is the same as, or for the same or substantially the same  
8 subject matter as, a claim of an issued patent may not be made in any  
9 application unless such a claim is made prior to one year from the date on  
10 which the patent was granted.

11  
12 Thus, if Lufthansa filed claim 10 more than one year after EcoServices’s claims to  
13 the same or substantially the same subject matter, claim 10 may be barred under  
14 35 U.S.C. § 135(b)(1).

15 EcoServices’s ’677 patent issued on 4 November 2008. (*See* ’677 patent,  
16 Ex. 1001.) One year after the issue of EcoServices’s claims, the “critical date,” is  
17 4 November 2009. Lufthansa first presented its claim 10, copied from  
18 EcoServices’s involved claim 1, on 28 April 2010 in application 12/769,514.<sup>3</sup> (*See*

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<sup>1</sup> EcoServices requested oral argument on the substantive issues raised by its Motion 1, Lufthansa’s opposition, and EcoServices’s reply. (*See* Paper 83.) Lufthansa did not request oral argument. (*See* Paper 82.) After review of the parties’ briefs and evidence, oral argument was not considered to be necessary. Accordingly, as is our discretion, no oral argument was held. *See* 37 C.F.R. § 41.124(c) (“If a request for oral argument is granted . . .”).

<sup>2</sup> Interferences continue under the statutes that were in effect on March 15, 2013. *See* Pub. L. 112-29, § 3(n), 125 Stat. 284, 293 (2011).

<sup>3</sup> Lufthansa’s currently involved ’669 application is a divisional of its prior

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1 EcoServices Motion 1, Paper 40, 2:26–3:4.) Luftansa does not dispute these dates  
2 and the record supports them. (See Lufthansa Opp. 1, Paper 58, Appendix 2, 1:3–  
3 15; responses to MFs 1–3.) Because Lufthansa claim 10 was first filed more than a  
4 year after the issue date of EcoServices’s involved claims, claim 10 is subject to  
5 the bar of 35 U.S.C. § 135(b)(1).

6 Lufthansa may avoid this statutory bar if it can rely on a filing date that is  
7 earlier than one year after the issue date of EcoServices’s claims. See *Corbett v.*  
8 *Chisholm*, 568 F.2d 759, 764–65 (C.C.P.A. 1977); see also *Regents of Univ. of*  
9 *California v. Univ. of Iowa Research Found.*, 455 F.3d 1371, 1374 (Fed. Cir.  
10 2006). “To establish entitlement to the earlier effective date of existing claims for  
11 purposes of the one-year bar of 35 U.S.C. § 135(b), a party must show that the later  
12 filed claim does not differ from an earlier claim in any ‘material limitation.’” *In re*  
13 *Berger*, 279 F.3d 975, 981-82 (Fed. Cir. 2002) (quoting *Corbett v. Chisholm*, 568  
14 F.2d 759, 765–66 (Fed. Cir. 1977)).

15 “[I]nclusion of a limitation in a claim to avoid the prior art provides strong  
16 evidence of the materiality of the included limitation.” *In re Berger*, 279 F.3d 975,  
17 982–83 (Fed. Cir. 2002) (citing *Parks v. Fine*, 773 F.2d 1577, 1579  
18 (Fed.Cir.1985)). For example, “[w]hen an applicant adds limitations in response to  
19 an examiner’s rejection, and those limitations result in allowance, there exists a  
20 well established presumption that those limitations are necessary to patentability  
21 and thus material.” *Adair v. Carter*, 668 F.3d 1334, 1339 (Fed. Cir. 2012) (citing  
22 *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734 (2002)

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application 12/769,514.

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1 and *Corbett v. Chisholm*, 568 F.2d 759, 765 (C.C.P.A. 1977)). Other evidence  
2 may also support materiality, such as the Examiner’s and applicant’s comments.  
3 *See Parks v. Fine*, 773 F.2d 1577, 1579–80 (Fed. Cir. 1985) (holding that a  
4 limitation was material, in part because of the Examiner’s statements and  
5 admissions made by Fine’s attorney at oral argument). Although we do not  
6 compare the limitations of EcoServices’s involved ’677 patent claims to  
7 Lufthansa’s ’669 application claims, statements made regarding prior art to both  
8 parties may shed light on the material limitations of Lufthansa’s involved claims.  
9 *See In re Berger*, 279 F.3d 975, 983 (Fed. Cir. 2002) (“Because the prior art  
10 applies in like manner to the claims as copied, the materiality of a limitation in a  
11 claim copied to provoke an interference translates to the copying inventor’s  
12 application for purposes of assessing compliance with 35 U.S.C. § 135(b).”).

13 If Lufthansa’s earlier, pre-critical date, claimed subject matter does not  
14 differ from claim 10 in any material limitation, claim 10 can avoid the statutory bar  
15 of 35 U.S.C. § 135(b)(1). Lufthansa claim 10 recites<sup>4</sup>:

16 A method of cleaning a gas turbine engine, said engine including an  
17 engine inlet portion having a fan hub and an array of fan blades connected to  
18 and extending radially outward from said fan hub, the method comprising:

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<sup>4</sup> Lufthansa argues that claim 10 was not amended during prosecution in the involved ’669 or during the prosecution of patent application 12/769,514. (*See* Lufthansa Opp. 1, Paper 58, 5:26–27, citing Amendment filed 8 January 2018, in the ’669 appl., Ex. 2035, 2.) The record supports Lufthansa’s argument, showing that claim 10 as originally filed in the involved ’669 application and parent application 12/769,514 is the same as Lufthansa’s currently involved claim 10. (*See* Claims filed 25 July 2016 in the ’669 appl., and claims filed 28 April 2010 in appl. 12/769,514.)

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1           providing a mobile harness assembly;  
2           positioning and securing the harness assembly directly onto the fan  
3       hub;  
4           cranking the gas turbine engine, thereby causing the fan hub to rotate;  
5           supplying washing fluid to the harness assembly; and  
6           *injecting the washing fluid between fan blades and directly into the*  
7       *gas turbine engine core as the fan hub rotates.*  
8

9       (Lufthansa Clean Copy of Claims, Paper 4 (emphasis added).) Lufthansa argues  
10   that the claim term “as the fan hub rotates” is the “key limitation” for allowance of  
11   claim 10. (Lufthansa Opp. 1, Paper 58, 7:12–14.)

12           We agree with Lufthansa that cleaning with a mobile harness assembly that  
13   allows for injecting washing fluid “as the fan hub rotates” is material to claim 10  
14   because this is the feature that EcoServices emphasized as being different from its  
15   own prior art and that the Examiner emphasized when allowing the EcoServices’s  
16   claims. (*See* Lufthansa Opp. 1, Paper 58, 8:11–10:21.) Lufthansa cites arguments  
17   that EcoServices made regarding prior art patent 5,868,860 in an Accelerated  
18   Examiner Support Document, filed in application 12/124,199, which became the  
19   ’677 patent, Ex. 2027. (*See id.* at 8:11–9:15, citing Accelerated Examiner Support  
20   Document, Ex. 2027.) Lufthansa also cites to statements made by EcoServices  
21   inventor Asplund, wherein

22           [i]n summary, the wash system described in the Application is a rotating  
23   wash system configured to mount directly onto a fan hub, and to rotate with  
24   the fan hub and engine during a washing operation. The [prior art] Asplund  
25   patent, in sharp contrast, describes a non-rotating wash system that mounts  
26   directly onto an engine's non-rotating guide vanes. Both the guide vanes and  
27   wash system mounted thereto remain static relative to a rotating fan hub  
28   when an engine is being cranked.  
29

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1 (Asplund Decl., Ex. 2032, ¶ 8; *see* Lufthansa Opp. 1, Paper 58, 10:2–13.)  
2 Lufthansa cites further to the Examiner’s reasons for allowance, which explains  
3 that “[n]o suggestion of placing and attaching a rotatable cleaning assembly on the  
4 fan hub and using this assembly to clean the engine during rotation of the hub is  
5 found in the prior art.” (Notice of Allowance, Ex. 1008, 10; *see* Lufthansa Opp. 1,  
6 Paper 58, 10:14–21.)

7 The figures in EcoServices’s ’677 patent are illustrative of the differences  
8 between the prior art assembly and the assembly used in the claimed method as  
9 discussed by the Examiner, which is also recited in Lufthansa claim 10.

10 EcoServices Figure 1, depicting a prior art assembly, is reproduced below.

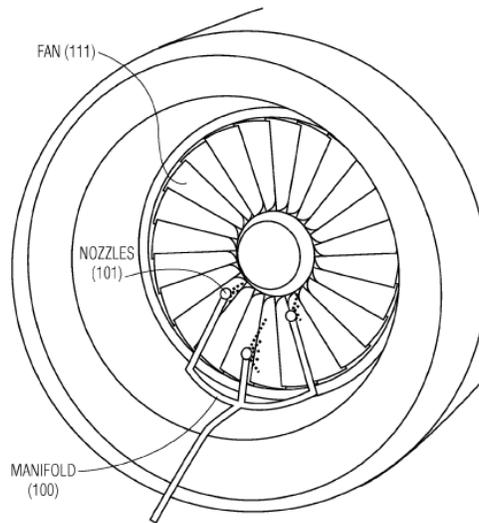


FIG. 1  
PRIOR ART

11  
12 In Figure 1, the manifold (100) is not mounted directly on the fan hub and will not  
13 rotate with the fan hub and engine. EcoServices Figure 3, depicting an assembly  
14 as claimed, is reproduced below.

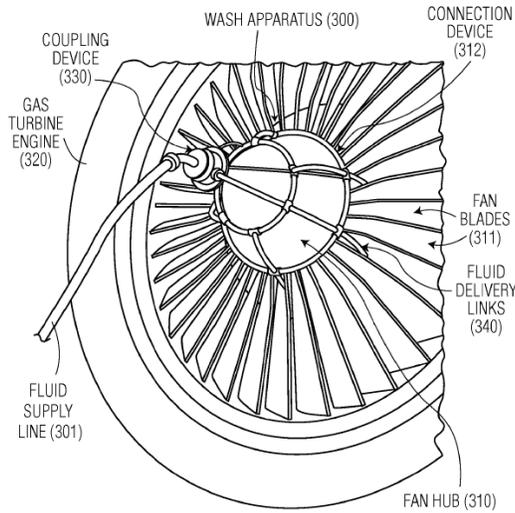


FIG. 3

1

2 The assembly (300) in Figure 3 is mounted on the fan hub (310) and will rotate  
3 with the fan hub and the engine. (*See* '677 patent, Ex. 1001, 5:51–53.)

4 EcoServices does not disagree that “as the fan hub rotates” is material to  
5 claim 10, but argues that the beginning of the phrase regarding fan hub rotation,  
6 “injecting the washing fluid between fan blades and directly into the gas turbine  
7 engine core,” is also material. (*See* EcoServices Reply 1, Paper 78, 2:10–3:16; *see*  
8 EcoServices Motion 1, Paper 40, 5:12–7:2.) EcoServices argues that “fan hubs  
9 have been rotating for decades since the advent of the turbojet [16] engine and  
10 thus, the mere five words of claim 10 – “*as the fan hub rotates*” – could not  
11 possibly form the **complete** material limitation.” (EcoServices Reply 1, Paper 78,  
12 2:15–17.)

13 We do not read “as the fan hub rotates” in complete isolation. Instead, we  
14 understand the patentability of claim 10 to hinge on the washing fluid being

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1 injected from the harness assembly “as the fan hub rotates,” as evidenced by the  
2 portions of the Support Document, inventor Asplund’s declaration, and the  
3 Examiner’s reasoning identified by Lufthansa.

4 Even if we consider the entire phrase “injecting the washing fluid between  
5 fan blades and directly into the gas turbine engine core as the fan hub rotates” to be  
6 material, we are persuaded by Lufthansa that its pre-critical date claims does not  
7 differ materially from claim 10 because the assembly recited would inject washing  
8 fluid between the fan blades and directly into the gas turbine engine.

9 Lufthansa relies on claim 18 of its earlier application 12/302,682 (“the  
10 ’682 application”) to overcome 35 U.S.C. § 135(b). (*See* Lufthansa Opp. 1,  
11 Paper 58, 14:11–15.) Lufthansa’s ’682 application was filed on 16 October 2009  
12 and is a parent<sup>5</sup> of Lufthansa’s currently involved ’669 application. (*See*  
13 EcoServices Motion 1, Paper 40, Appendix 2:12–14; Statement of Material  
14 Fact 4.) EcoServices does not dispute that claim 18 of Lufthansa’s ’682  
15 application was filed before the critical date of 4 November 2009.

16 Claim 18 of Lufthansa’s ’682 application recites:

17 A method for cleaning the core engine of a jet power plant, using a  
18 device as claimed in one of claims 1 to 15, with the steps:

- 19 a. Attaching the nozzle unit to the hub (3) of the fan so that the  
20 discharge openings of the nozzles (7) are oriented towards the front  
21 blades of the core engine in the flow direction of the power plant;  
22 b. Allowing the jet power plant to rotate;

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<sup>5</sup> According to USPTO records, Lufthansa’s currently involved ’669 application claims priority to application 12/769,514, filed 28 April 2010, which is a continuation ’682 application. (*See also* EcoServices Motion 1, Paper 40, Appendix 2, Statement of Material Fact 4.)

1                   c. Pressurizing the nozzle unit with cleaning medium and  
2                   cleaning the core engine.  
3

4 ('682 appl., Ex. 1004, 19.) Claim 1 of Lufthansa's '682 application, from which  
5 claim 18 depends, recites:

6                   A device for cleaning the core engine of a jet power plant with a  
7                   supply unit which provides cleaning medium, a nozzle unit which is  
8                   designed for introducing the cleaning medium into the core engine, and with  
9                   a line connection (10) between the supply unit and the nozzle unit,  
10                  characterized in that the nozzle unit has means for the rotationally fixed  
11                  connection to the shaft of the fan of the jet power plant, and in that a rotary  
12                  joint (5) is provided between the nozzle unit and the line connection (10).  
13

14 ('682 appl., Ex. 1004, 16.)

15                  Lufthansa argues that

16                  pre-critical date claim 18 describes a method that includes using a nozzle  
17                  unit that is "rotationally fixed" to the "shaft of the fan" with discharge  
18                  openings oriented "towards the front blades of the core engine in the flow  
19                  direction of the power plant," and "designed for introducing the cleaning  
20                  medium into the core engine" while "allowing the jet power plant to rotate."  
21

22 (Lufthansa Opp. 1, Paper 58, 14:11–15.) We agree with Lufthansa, and

23 EcoServices does not dispute, the method of claim 18 includes the material  
24 limitation of injecting washing fluid through an assembly that rotates with the fan  
25 hub, as the fan hub rotates.

26                  Lufthansa argues further that claim 18, when read in light of Lufthansa's  
27                  specification, "necessarily requires that the injected cleaning fluid *must* pass  
28                  between the fan blades and directly into the engine core to clean the engine" to  
29                  support the complete limitation in involved claim 10 (*See* Lufthansa Opp. 1,

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1 Paper 58, 14:15–17.) According to Lufthansa, the cleaning fluid could not get  
2 “into” the engine core in the method of claim 18 if it were not injected between the  
3 fan blades and directly into the core. (*See id.* at 14:17–19.) We agree with  
4 Lufthansa that there would be no other way to get the washing fluid to the core to  
5 achieve the recited goal of claim 18 (“[a] method for cleaning the core engine of a  
6 jet power plant . . .”) unless the washing fluid was injected between the fan blades,  
7 directly into the engine core. (*See id.* at 14:15–24.)

8 EcoServices argues that because claim 18 recites “[a]ttaching the nozzle unit  
9 to the hub (3) of the fan so that the discharge openings of the nozzles (7) are  
10 oriented *towards the front blades of the core engine* in the flow direction of the  
11 power plant”, it cannot support injecting washing fluid *between* the blades. (*See*  
12 EcoServices Motion 1, Paper 40, 7:13–8:19 (emphasis added to quoted claim  
13 limitation).) EcoServices argues that “towards the front blades” is not the same as  
14 “between the fan blades.” In support, EcoServices cites to Lufthansa’s  
15 specification, arguing that it differentiates between the phrase “in front of . . . the  
16 fan blades” and “between the fan blades.” (*See id.* at 7:13-8:5.)

17 EcoServices cites to only selected words in Lufthansa’s specification and  
18 fails to provide the pages and line numbers where these words can be found. (*See*  
19 *id.* at 7:26–8:3.) The full text of what appears to be the words cited by  
20 EcoServices is:

21 The discharge openings of the nozzles are oriented behind the plane of the  
22 turbofan, or in front of or between the fan blades so that an essentially  
23 unhindered jet penetration is possible.  
24

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1 ('669 appl.<sup>6</sup>, Ex. 1002, 8:2–4.) EcoServices argues that this text differentiates  
2 between “in front of” the fan blades and “in between” the fan blades. (*See*  
3 EcoServices Motion 1, Paper 40, 7:21–8:19.) Although both “in front of” and “in  
4 between” are provided as options for the placement of the nozzle openings in the  
5 assembly, the full text indicates that both allow for unhindered jet penetration.  
6 (See Lufthansa Opp. 1, Paper 58, 13:8–19.) Thus, according to the full text cited  
7 by EcoServices, the Lufthansa specification demonstrates that nozzles placed in  
8 front of the fan blades can also provide for injection of washing fluid directly into  
9 the gas turbine engine core. EcoServices does not explain why nozzle openings  
10 oriented “towards the front blades of the core engine in the flow direction of the  
11 power plant” cannot also inject “washing fluid between fan blades and directly into  
12 the gas turbine engine core as the fan hub rotates” when it is the washing fluid that  
13 goes between the fan blades, not the nozzles. Thus, we are not persuaded that the  
14 portion of the Lufthansa specification cited by EcoServices indicates that claim 18  
15 fails to support Lufthansa’s involved claim 10.

16 The testimony of EcoService’s witness, Mr. Magginetti, does not persuade  
17 us otherwise. Mr. Magginetti states that “[c]onsistent with the well-understood  
18 difference of orienting something ‘towards the front’ of as opposed to in ‘between’  
19 another object . . .” the specification of the ’669 application differentiates pre-  
20 critical date claim 18 from the term “between fan blades” in claim 10. (Magginetti

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<sup>6</sup> EcoServices cites to the specification of the Lufthansa ’669 application to interpret the claims of the prior ’682 application, but Lufthansa does not dispute that the specifications of both applications are the same.

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1 Decl., Ex. 1005, ¶ 24.) But Mr. Maggini fails to recite any other evidence to  
2 support that these terms are “well-understood” to be different. The full text of the  
3 portion of Lufthansa’s specification indicates they are not inconsistent with each  
4 other in the context of the claimed method.

5 EcoServices argues that Lufthansa relies on unsupported attorney argument  
6 and that its opposition should be disregarded. (*See* EcoServices Reply 1, Paper 78,  
7 7:15–24.) Specifically, EcoServices argues that Lufthansa’s statement that its  
8 application “discloses three different positions of the nozzle relative to the fan  
9 (behind, in front or between the blades)” and that all three positions require the  
10 washing fluid to be directed between the blades and into the core engine, is  
11 unsupported attorney argument. (*See id.*, citing Lufthansa Opp. 1, Paper 58,  
12 14:19–22.)

13 We disagree, because the plain language of the Lufthansa specification  
14 supports Lufthansa’s argument. The specification states: “The discharge openings  
15 of the nozzles are oriented behind the plane of the turbofan, or in front of or  
16 between the fan blades so that an essentially unhindered jet penetration is  
17 possible.” (Ex. 1002, 8:2–4.) Expert testimony is not necessary to interpret this  
18 statement because the plain language indicates that the nozzles can be either  
19 behind, in front or, or in between the fan blades to achieve unhindered jet  
20 penetration. EcoServices fails to explain why it does not.

21 EcoServices also argues that cross-examination testimony from Lufthansa’s  
22 witness, Robert Marshall, demonstrates that nozzle openings located in front of the  
23 fan blades would not result in “injecting the washing fluid between fan blades and  
24 directly into the gas turbine engine core” as required in the complete material

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1 limitation of claim 10. (*See* EcoServices Reply 1, Paper 78, 4:6–18.) Specifically,  
2 EcoServices points to the following testimony by Mr. Marshall:

3 Q. So if you have the nozzles in front of the fan blades, --

4 A. Yes.

5 Q. -- would you be able to inject the washing fluid directly into the gas  
6 turbine?

7 A. You would be able to inject fluid into the gas turbine, yes, into the core of  
8 the engine.

9 Q. Would you be able to inject the washing fluid directly into the gas  
10 turbine?

11 A. Not directly. It would still have to go through the fan blade.

12 Q. So it would not be directly?

13 A. No.

14 (Marshall Depo., Ex. 1012, 23:2–15.)

15 The testimony cited refers to the prior art described in a publication  
16 reproduced in Exhibit 2009, not to the method of Lufthansa’s pre-critical date  
17 claim 18. Mr. Marshall described this portion to Exhibit 2009 as “the previous  
18 method of core washing engines prior to this invention.” (Marshall Depo., Ex.  
19 1012, 21:22–24.) When Mr. Marshall agreed that nozzles in front of the fan blades  
20 would not be able to inject fluid directly into the gas turbine engine, he was  
21 referring to prior systems that involved spraying water into the engine core by  
22 spraying onto the fan with a conventional water hose, not to an assembly that  
23 allowed for injection of washing fluid between the fan blades as the fan hub  
24 rotates. (*See id.* at 22:21–23:1.) This testimony does not demonstrate that Mr.

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1 Marshall agreed that the method of pre-critical date claim 18 would not be able to  
2 inject washing fluid directly into the gas turbine engine core.<sup>7</sup>

3 EcoServices argues further that the Board’s decision in related  
4 interference 106,053 supports its position that Lufthansa cannot rely on pre-critical  
5 date claim 18 to avoid the bar of 35 U.S.C. § 135(b). (*See* EcoServices Reply 1,  
6 Paper 78, 4:19–24.) That decision stated:

7 For example, Mr. Marshall testifies that count 1 requires that the washing  
8 fluid is delivered “directly into the gas turbine engine core,” which can only  
9 be accomplished if the fluid goes directly between the upstream fan blades,  
10 as required in claim 12. (*See* Marshall Decl., Ex. 2007, ¶ 31.)

11  
12 (Decision on Motions in interference 106,053, Paper 172, 47:16–19.) This  
13 statement refers to the count of that interference, not to pre-critical date claim 18.  
14 Accordingly, it fails to persuade us that claim 18 does not support Lufthansa’s  
15 currently involved claim 10.

16 In general, EcoServices fails to persuade us that Lufthansa is incorrect in its  
17 argument that pre-critical date claim 18, when read in light of Lufthansa’s  
18 specification, necessarily requires that the injected cleaning fluid pass between the  
19 fan blades and directly into the engine core to clean the engine in order to achieve  
20 the recited result of cleaning the core engine. (*See* Lufthansa Opp. 1, Paper 58,  
21 14:15–24.) Accordingly, we are persuaded that claim 18 of Lufthansa’s

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<sup>7</sup> Lufthansa requested authorization to file a sur-reply addressing EcoServices’s arguments regarding Mr. Marshall’s testimony and the Board’s decision in interference 106,053. (*See* Order, Paper 79.) Because we are not persuaded by EcoServices’s arguments, Lufthansa’s request is moot.

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1 '862 application does not differ in any material limitation from Lufthansa's  
2 involved claim 10 and that claim 18 provides pre-critical date support for involved  
3 claim 10.

4 EcoServices also argues that Lufthansa conceded that none of its pre-critical  
5 date claims support its currently involved claim 10 when Lufthansa stipulated,  
6 along with EcoServices, that claims 11–18, 20–36, 38–45, and 47 of the  
7 '667 application should be designated as not corresponding to the count in this  
8 interference. (*See* EcoServices Motion 1, Paper 40, 10:1–12:21, citing Stipulation  
9 for Board Approval Regarding ExoServices Motion 2 (“Stipulation”), Paper 14.)  
10 According to EcoServices, because the count in this interference is the same as  
11 Lufthansa's claim 10, Lufthansa's stipulation is an admission that none of those  
12 claims would be anticipated or rendered obvious by Lufthansa's claim 10, if  
13 claim 10 were considered to be prior art to them. (*See* EcoServices Motion 1,  
14 Paper 40, 10:13–20, citing 37 C.F.R. § 41.207(b)(2) (“A claim corresponds to a  
15 count if the subject matter of the count, treated as prior art to the claim, would have  
16 anticipated or rendered obvious the subject matter of the claim.”).)

17 EcoServices asserts, further, that claim 21 of Lufthansa's currently involved  
18 '669 application “meets each limitation” of Lufthansa's pre-critical date claim 18.  
19 (*See* EcoServices Motion 1, Paper 40, 10:20–22.) In support, EcoServices  
20 provides a claim chart comparing claim 21 of the Lufthansa '669 application with  
21 Lufthansa's pre-critical date claim 18. (*See id.*) EcoServices concludes that  
22 because Lufthansa allegedly conceded that claim 21 is not anticipated or rendered  
23 obvious by its claim 10, Lufthansa also conceded that its currently involved claim  
24 10 is materially different from its pre-critical date claim 18. (*See id.* at 12:16–21.)

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1           This argument is not persuasive. A determination of whether a later filed  
2 claim can rely on the filing date of an earlier, pre-critical date claim to avoid being  
3 barred under 35 U.S.C. § 135(b) is based on the specific facts presented by the  
4 parties about the material limitations of the pre- and post-critical date claims. As  
5 explained by the Board when this interference was redeclared without Lufthansa’s  
6 other claims, “[i]n essence [Lufthansa’s] stipulation indicates that Lufthansa would  
7 not oppose [EcoServices Motion 2 to designate Lufthansa claims as not  
8 corresponding to the count] if EcoServices were to file it.” (Redeclaration,  
9 Paper 16, 2:6–7.) EcoServices has not pointed to any facts stipulated by Lufthansa  
10 when it agreed to not oppose EcoServices’s Motion 2 or to any other facts during  
11 this or any other proceeding.

12           EcoServices argues that “Lufthansa asked for and EcoServices agreed to a  
13 stipulation that claims 21-34 of the Lufthansa ‘669 application are not part of the  
14 Count -- i.e., claim 10 of the Lufthansa ‘669 application” and refers to “the  
15 stipulation requested by Lufthansa . . . .” (EcoServices Reply 1, Paper 78, 6:8–10  
16 (footnote omitted) and 19.) EcoServices argues that Lufthansa cannot “have [its]  
17 cake and eat it too.” (*Id.* at 6:7.)

18           The record does not support EcoServices’s characterization of the  
19 stipulation. Instead, EcoServices requested and was granted authorization for a  
20 motion to designate the Lufthansa claims as not corresponding to the count. (*See*  
21 *Order*, Paper 13, 3:20–21.) As indicated in the redeclaration, Lufthansa merely  
22 indicated it would not oppose EcoServices’s motion. (Redeclaration, Paper 16,  
23 2:6–7.) Furthermore, even though Lufthansa actually filed the stipulation, it did so  
24 on behalf of both parties. (*See Stipulation*, Paper 14, 1:7–8 (“the parties stipulate

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1 and agree that Lufthansa claims 11-18, 20-36, 38-45 and 47 should be designated  
2 as not corresponding to the Count and that the Board enter judgment to that  
3 effect.”). We do not agree that Lufthansa conceded any facts in choosing to  
4 protect its interests by agreeing with EcoServices that its claims should not be  
5 subject to interference.

6 EcoServices cites the testimony of Mr. Magginetti to support its argument  
7 that Lufthansa conceded that its pre-critical date claims fails to support involved  
8 claim 10. (*See* EcoServices Motion 1, Paper 40, 11:1–12:21.) Mr. Magginetti’s  
9 testimony is unpersuasive because he merely reproduces the claim chart presented  
10 by EcoServices, without providing any other factual basis for his opinions. (*See*  
11 Magginetti Decl., Ex. 1005, ¶¶ 37–41.) Furthermore, Mr. Magginetti’s testimony  
12 is presented because of his expertise in aircraft maintenance, not as a legal expert  
13 or as a fact witness. (*See id.* at ¶¶ 1–5.)

14 EcoServices’s argument that Lufthansa’s agreement that some of its claims  
15 do not correspond to the count and, therefore, are not subject to the interference,  
16 fails to provides us with any factual basis on which to determine whether  
17 Lufthansa’s currently involved claim 10 differs from its pre-critical date claim 18  
18 in a material limitation. Accordingly, EcoServices’s argument fails to persuade us  
19 that Lufthansa’s claim 10 is unpatentable under 35 U.S.C. § 135(b).

20 EcoServices has the ultimate burden of proof on it motion arguing that  
21 Lufthansa claim 10 is unpatentable under 35 U.S.C. § 135(b). *See* 37 C.F.R.  
22 § 41.121(b)(“The party filing the motion has the burden of proof to establish that it  
23 is entitled to the requested relief.”) and § 41.208(b). Because we are persuaded  
24 that Lufthansa is entitled to rely on the earlier filing date of the ’682 application,

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1 EcoServices fails to persuade us that Lufthansa's claim 10 is unpatentable under  
2 35 U.S.C. § 135(b).

3 Accordingly, we deny EcoServices Motion 1.

4

5 *Lufthansa Motion 3 – to exclude evidence*

6 Lufthansa argues that Mr. Magginietti's declaration should be excluded  
7 under Federal Rules of Evidence 702. (*See* Lufthansa Motion 3, Paper 80, 1:24–  
8 3:9.) Because we deny EcoServices Motion 1 even when we consider  
9 Mr. Magginietti's testimony, Lufthansa's arguments are moot. Accordingly, we  
10 dismiss the motion.

11

12 *Conclusion*

13 We deny EcoServices Motion 1. Accordingly, we do not finally refuse  
14 claim 10 of the Lufthansa '669 application. Judgment will be entered separately.

15

16

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