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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JIM A. HARRISON, ROB C. JONES,  
PHIL R. LEE, and ANDY WRIGHT

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Appeal 2015-005641  
Application 13/547,674<sup>1</sup>  
Technology Center 2100

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Before CATHERINE SHIANG, MELISSA A. HAAPALA, and  
KAMRAN JIVANI, *Administrative Patent Judges*.

JIVANI, *Administrative Patent Judge*.

REQUEST FOR REHEARING

On November 14, 2016, Appellants filed a Request for Rehearing under 37 C.F.R. § 41.52 (“Req. Reh’g”) requesting reconsideration of our Decision on Appeal of September 14, 2016 (“Dec.”). In our Decision, we affirmed, *inter alia*, the rejection of claims 7–18 under 35 U.S.C. § 103(a). We have reconsidered our decision in light of Appellants’ Request for Rehearing, but Appellants have not persuaded us that we misapprehended or overlooked any matters in our decision. Therefore, we deny Appellants’ Request for Rehearing.

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<sup>1</sup> Appellants identify International Business Machines Corporation as the real party in interest. App. Br. 2.

## ANALYSIS

At issue is the following limitation in independent claim 13: “the performance metric falling outside a threshold variance from the benchmark.”<sup>2</sup> App. Br. 7; Reply Br. 5. Appellants contend:

The proactive prevention of failure based upon memory usage exceeding a threshold on a SQL Server, however, is not equivalent to the claimed “benchmark” defined by the Board to mean a “standard against which measurement or comparisons are to be made”. . . . “Examiner has stretched the scope of the teaching of Dickerson in so far as the ‘problem’ that has resulted from the performance of the synthetic transaction in Dickerson is never shown in Dickerson to any metric let alone a performance metric that has been measured and determined not to meet a benchmark or standard, let alone a threshold variance from a benchmark as specifically claimed.”

Req. Reh’g 4–5.

We find Appellants’ arguments unpersuasive for the reasons given in our prior Decision. More specifically, we remain unpersuaded by Appellants’ argument that “Smith’s proactive prevention of failure based upon memory usage exceeding a threshold on a SQL Server, however, is not equivalent to the claimed ‘benchmark’” because it is not responsive to the Examiner’s findings as adopted by the Board. In our Decision, we construed “the term benchmark to encompass, *inter alia*, a standard against which measurements or comparisons can be made,” and stated:

In light of the above construction, we are not persuaded by Appellants’ argument that the cited

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<sup>2</sup> A commensurate limitation is recited in independent claim 7.

references fail to meet limitation L1. Rather, we agree with the Examiner that Dickerson's monitoring of performance data produced in response to execution of a synthetic transaction (i.e., the performance metric) and the synthetic transaction itself (i.e. the benchmark) in combination with Smith's use of proactive failover when a monitored event exceeds a threshold (i.e., the metric falling outside a threshold variance from the benchmark) at minimum suggests limitation L1. Ans. 10–11; Dickerson 6:21–24.

Dec. 8. Thus, we agreed with and adopted the Examiner's finding that Dickerson's synthetic transactions meet the claimed benchmark, not "Smith's proactive prevention of failure based upon memory usage exceeding a threshold on a SQL Server," as Appellants assert.<sup>3</sup> *Compare id. with* Req. Reh'g 4. Appellants' argument regarding Smith's use of proactive failover amounts to merely arguing the references individually. Where, as here, a rejection is based on a combination of references, one cannot show non-obviousness by attacking references individually. *In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The relevant inquiry is whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the combined teachings of the references. *Keller*, 642 F.2d at 425. Appellants fail to explain why one of ordinary skill in the art would not understand Dickerson's synthetic transactions as meeting the claimed benchmark. We observe Dickerson describes using synthetic transactions as standards

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<sup>3</sup> We subsequently referred, in a single instance, to "Smith's synthetic transactions," and hereby amend that statement to refer to "Dickerson's synthetic transactions." Dec. 8.

against which measurements or comparisons can be made. *See, e.g.*, Dickerson 2:36–39 (“The method further comprises monitoring results of successive synthetic transactions carried out by the agents, in order to detect any errors or failures associated with the successive transactions.”).

We are similarly not persuaded by Appellants’ arguments that the “metrics” of Dickerson are not related to the performance of a synthetic transaction and thus do not teach the claimed performance metrics. Req. Reh’g 5. The Examiner’s findings, with which we agreed in our Decision and reproduced above, rely on Dickerson’s performance data as meeting the claimed performance metric. Dec. 8. Dickerson teaches this performance data is produced in response to execution of a synthetic transaction. *Id.* (citing Ans. 10–11; Dickerson 6:21–24.) Specifically, Dickerson recites, “Moreover, the agent monitors performance data produced in response to execution of the synthetic transaction, and sends such performance data to monitoring server 316.” Dickerson 6:21–24. Finally, to the extent Appellants contend Dickerson fails to teach or suggest the performance data (i.e., metric) “falling outside a threshold variance” as claimed, the Examiner found and we agreed that Smith teaches or suggests using proactive failover *when a monitored event exceeds a threshold* (i.e., the metric falling outside a threshold variance from the benchmark). Dec. 8.

Accordingly, Appellants fail to show that we misapprehended or overlooked arguments and evidence in rendering our Decision. We, therefore, deny Appellant’s Request for Rehearing.

CONCLUSION

We have *granted* Appellant's Request for Rehearing to the extent that we have reconsidered our Decision dated September 14, 2016. Appellant has not shown that we misapprehended or overlooked any issue of law or fact in reaching that decision. Accordingly, we deny Appellant's Request for Rehearing.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED