UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JIAWEI TECHNOLOGY (HK) LTD., JIAWEI TECHNOLOGY (USA) LTD., SHENZHEN JIAWEI PHOTOVOLTAIC LIGHTING CO., LTD., ATICO INTERNATIONAL (ASIA) LTD., ATICO INTERNATIONAL USA, INC., CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN FLORIDA), CHIEN LUEN INDUSTRIES CO., LTD., INC. (CHIEN LUEN CHINA), COLEMAN CABLE, LLC, NATURE'S MARK, RITE AID CORP., SMART SOLAR, INC., AND TEST RITE PRODUCTS CORP.
Petitioner,

v.

SIMON NICHOLAS RICHMOND
Patent Owner.

Case IPR2014-00937
Patent 8,362,700

REQUEST FOR REHEARING

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I. INTRODUCTION

In its decision on institution mailed December 16, 2014, the Board denied *inter partes* review of claims 1–11, 13–15, 24–34, and 45–47, of the '700 patent because (i) the Petition failed to "construe" "*color changing cycle*", and (ii) the Petition did not provide a detailed explanation of how the prior art taught a "*cycle*," which, according to the decision, "implies some pattern or scheme; some phenomenon that happens and can happen again." Decision at 7 (emphasis added).

The petitioner respectfully urges the Board to grant this request for rehearing[1] and institute review of the challenged claims for three reasons: (i) the Board misapprehended that petitioners may rely on the ordinary and customary meaning, rather than officially "construe" a claim term, and the Board overlooked the Petition's definition of the ordinary and customary meaning of "*color changing cycle*"; (ii) the Board misapprehended or overlooked that the Petition demonstrated how the prior art taught a "*color changing cycle*," under both the Petition's definition and the patent owner's new, inconsistent, narrow definition; and (iii) due at least in part to that inconsistent definition, the Board abused its discretion by

[1] Judge Saindon authored paper 22 and Judge Grossman authored paper 27 in IPR2014-00938; petitioner respectfully asks that the public receives Judge Arbes views and decides this request, as joined with the remainder of the panel.

improperly importing "a pattern or scheme … that happens and can happen again" into "*color changing cycle*." *Id.*

II. THE BOARD OVERLOOKED THAT THE PETITION STATED THAT THE ORDINARY AND CUSTOMARY MEANING OF "*COLOR CHANGING CYCLE*" IS TO "RAMP UP AND DOWN THE INTENSITY OF THE LIGHT EMITTED OVER TIME BY SAID AT LEAST TWO LIGHT SOURCES," AS REQUIRED BY 37 C.F.R. § 104(b)(3)

Stating that Petitioner has not met its "burden to explain how the challenged claims are to be construed" abuses the Board's discretion when the rules explicitly allow for petitioners to "merely provide a statement that the claim terms are presumed to take on their ordinary and customary meaning, and point out any claim term that has a special meaning and the definition in the specification." Decision at 8, and 77 Fed. Reg. 48680, 48700. The petitioner precisely followed the Board's guidance and construed four terms that the parties previously contested, while giving the rest of the terms "their plain and ordinary meaning." Petition at 17–18. The Petition defined "*color changing cycle*" in a manner largely consistent with the patent owner's construction.

Patent Owner's Construction	Petitioner's Definitions
"ramping up and ramping down intensity of light emitted over time in a series of changing colors <u>that repeats by said at least two light sources.</u>" Prelim. Resp. at 12 (emphasis added to show unforeseeably imported limitation.)	"ramp up and down the intensity of the light emitted over time by said at least two light sources" or "vary the perceived intensity of light emitted over time by said at least two electrical light sources." Petition at 21–22, 42, and 53, and Ex. 1002, ¶ 197 (definitions used for Chliwnyj and Richmond, respectively)

Each definition indicates that changing the intensity of the two light sources "produces a color changing cycle." Thus, the Board overlooked how the Petition defined the "*color changing cycle*" by its ordinary and customary meaning.

The Board should accept petitioner's reasonable efforts to construe limitations known to be contentious and analyze the petition's express definition of the plain meaning of "*color changing cycle*." Petitioners cannot anticipate all changes in patent owners' positions that import new limitations into claims, and the Board should not deny petitions by stating that petitioners should have foreseen patent owners importing limitations into claims and therefore construed one limitation over another. Summarily denying Petitions for relying on and applying the ordinary and customary meaning of not-clearly-contentious claim limitations abuses the Board's discretion because (1) the rules do not require a Petition to construe expressly every claim limitation; and (2) the Petition defined and applied the ordinary and customary meaning of "*color changing cycle*," *e.g.*, "ramp up and down the intensity of the light emitted over time by said at least two light sources." Petition at 21–22, 42, and 53; *see also*, Ex. 1002, ¶ 197. Subjectively choosing a limitation that a Petition should have included in a claim construction section is also inconsistent with providing a just, speedy, and inexpensive determination because (i) it is unjust and unreasonable to expect parties to anticipate extraneous words that the patent owner and Board might improperly import into a claim; (ii) it

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