

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**Campbell Soup Company, Campbell Sales Company and
Trinity Manufacturing, LLC**
Petitioners,
v.

Gamon Plus, Inc.
Patent Owner

**Case No. IPR2017-00091
U.S. Patent No. D621,645**

**PETITIONERS' RESPONSE TO PATENT OWNER'S
MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(c)**

I. INTRODUCTION

Patent Owner's motion to exclude Exhibits 1018 and 1020, the reply declarations of Petitioners' experts James Gandy and Steven Visser, essentially restates its challenge to Petitioners' Reply (Paper No. 33), as Patent Owner demands that the Board exclude the declarations because they purportedly "present[] new claim construction and new prior art arguments not raised in the original Petition for this IPR." *See, e.g.*, Paper No. 51, at 2.¹ However, as Petitioners have shown in their response to Patent Owner's Identification of Allegedly New Arguments and Citations of Evidence in Reply (Paper No. 48), Petitioners did not submit, in either their Reply or the expert declarations accompanying that Reply, any new claim construction or new prior art arguments. Rather, Petitioners merely responded to arguments raised by Patent Owner with arguments and evidence consistent with those set forth in their Petition. Patent Owner's motion to exclude the Gandy and Visser reply declarations should therefore be denied for the same reason as its challenge to Petitioners' Reply.

Patent Owner's challenge to Exhibit 1021, excerpts from the testimony of inventor Terry Johnson, is equally unavailing. The Board is free to consider and

¹ Patent Owner requested leave to file a motion to strike portions of Petitioners' Reply for the same reasons. In its November 9, 2017 Decision (Paper No. 39), the Board declined to allow Patent Owner to file a motion to strike, but authorized Patent Owner to file a chart citing the portions of Petitioners' Reply that Patent Owner believed to be improper. *See* Paper Nos. 40 (Patent Owner's chart) and 48 (Petitioners' response thereto).

give appropriate weight to Mr. Johnson's testimony that he believes his claimed design to be "obvious," and that he conceived of it and reduced it to practice in just a few days, in the course of considering the obviousness of the patent at issue, U.S. Patent No. D612,645 (the "645 patent"), under applicable legal standards.

II. ARGUMENT

A. The Gandy and Visser Declarations Properly Address Arguments Raised in Patent Owner's Response.

Patent Owner demands that the Board dismiss entirely the two expert declarations that Petitioners submitted with their Reply (Exhibits 1018 and 1020, submitted in support of Paper No. 33). Patent Owner makes no meaningful attempt to identify, in chart form or otherwise, the specific portions of those declarations that purportedly comprise improper new matter or explain the basis for its challenge thereto.

To the extent Patent Owner's challenge to the Gandy and Visser reply declarations is co-extensive with its challenge to Petitioners' Reply (Paper No. 40), Petitioners refer the Board to their counter-citations in Paper No. 48. As those counter-citations make clear, Petitioners in their Reply (and in the corresponding portions of the reply declarations of Gandy and Visser) have cited no new prior art, no new combinations of prior art and no new grounds for invalidity; rather, they have simply responded to issues raised in Patent Owner's Response and the Institution Decision. If Patent Owner wishes to address those points further, it may

do so during oral argument. Petitioners' submissions are thus well within the bounds of the Administrative Procedure Act and constitutional due process; indeed, both the Board and the U.S. Court of Appeals for the Federal Circuit have gone considerably further in allowing consideration of evidence adduced during the *inter partes* review process. See, e.g., *Genzyme Therapeutic Prods. Ltd. Partnership v. Biomarine Pharm. Inc.*, 825 F.3d 1360, 1366-67 (Fed. Cir. 2016) (affirming Board's final written decision citing prior art combinations that were not specifically cited in the Board's institution decision, and noting that "the introduction of new evidence in the course of the trial is to be expected in *inter partes* review trial proceedings and, as long as the opposing party is given notice of the evidence and an opportunity to respond to it, the introduction of such evidence is perfectly permissible under the APA"); *Emerson Elec. Co. v. SIPCO, LLC*, Case IPR2016-00984 (Paper No. 43), at 46-47 (Oct. 25, 2017) (considering prior art not cited in *inter partes* petition or institution decision, where doing so was neither a change of theory nor reliance on a ground different from those upon which review was instituted, and where patent owner had the opportunity at oral argument to address the new prior art) (citing *Genzyme Therapeutic Products*, 825 F.3d at 1367 ("The critical question for compliance with the [APA] and due process is whether [Patent Owner] received 'adequate notice of the issues that would be considered,

and ultimately resolved.’’)).²

To the extent Patent Owner intends to challenge some other portions of the Visser and Gandy declarations beyond what is referenced in its Paper No. 40, it has not given Petitioners fair notice of the particular challenge being made or the reasons therefor. Petitioners cannot guess at the arguments that Patent Owner might have intended to make but reserve the right to respond further if and when any such arguments are properly made.

² Patent Owner asserts that Mr. Gandy and Prof. Visser have “propound[ed] a new [claim] construction[.]” Paper No. 51, at 4-5. That is not true. In his opening declaration, Mr. Gandy opined that “I believe the Board should adopt the following construction of the ‘645 Patent claim: (1) an access door/label area having a symmetrical, convex arcuate surface having a centered apex, extending forward, and (2) a cylindrical can located below the access door/label area, as shown in the drawing of the ‘645 Patent.” Ex. 1002, at ¶31. Mr. Gandy further opined that “[a]ll other portions of the gravity feed dispenser, including the edges and borders of the access door/label area and the top and bottom of the cylindrical can are disclaimed.” *Id.* at ¶ 29; *see also, e.g., id.* at ¶27; Paper No. 2 (Petition), at 19.

Mr. Gandy’s reply declaration, and the reply declaration of Prof. Visser, are entirely consistent with that construction – they merely clarify that the proposed construction should not be read to suggest “any *particular* curvature or symmetry of the label area, or any *particular* forward/rearward relationship between label area and can...[r]ather, any portions of the ‘646 patent drawing that could be construed to show curvature and symmetry of a label area, and show a label area rearward of the can, are all drawn in broken lines and thus expressly disclaimed.” Ex. 1018, at 11 n.1 (emphasis added); Ex. 1020 at 15 n.2. Mr. Gandy’s deposition testimony is similarly consistent as, although Mr. Gandy explained why one could construe the claimed design with even fewer limitations than he had defined (*i.e.*, the claimed design could be argued not to require a convexly-shaped label area), he stood by his opinion that, on balance, a person of ordinary skill would understand the label area of the claimed design to be convex. *See* Ex. 2019, at 60:6-64:2, 66:18-67:23).

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