

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF OUTDOOR, LLC,
Petitioner,

v.

COCONA, INC.,
Patent Owner.

Case IPR2018-00190
Patent 8,945,287 B2

Before KRISTINA M. KALAN, CHRISTOPHER M. KAISER, and
ELIZABETH M. ROESEL, *Administrative Patent Judges*.

KALAN, *Administrative Patent Judge*.

FINAL WRITTEN DECISION

35 U.S.C. § 318(a)

I. INTRODUCTION

VF Outdoor, LLC (“Petitioner”) filed a Petition requesting *inter partes* review of claims 27, 28, 30, 32, 33, and 35–39 of U.S. Patent No. 8,945,287 B2 (Ex. 1001, “the ’611 patent”). Paper 1 (“Pet.”). Cocona, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 12 (“Prelim. Resp.”). We instituted an *inter partes* review of claims 27, 28, 30, 32, 33, and 35–39 of the ’287 patent on all grounds of unpatentability alleged in the Petition. Paper 14 (“Institution Decision” or “Dec.”).

After institution of trial, Patent Owner filed a Patent Owner Response. Paper 20 (“PO Resp.”). Petitioner filed a Reply. Paper 33 (“Reply”). Patent Owner filed a Sur-Reply. Paper 40 (“Sur-Reply”). An oral hearing was held on February 28, 2019. A transcript of the hearing is included in the record. Paper 49 (“Tr.”).

We have jurisdiction under 35 U.S.C. § 6. This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a). For the reasons that follow, we determine that Petitioner has established by a preponderance of the evidence that claims 27, 28, 30, 32, 33, and 35–37 of the ’287 patent are unpatentable, but Petitioner has not established that claims 38 and 39 of the ’287 patent are unpatentable.

A. *Related Proceedings*

The parties represent that Patent Owner filed suit against Petitioner for infringement of the ’287 patent in *Cocona, Inc. v. Columbia Sportswear Co.*, Civil Action No. 1:16-cv-2703-CMA (D. Colo. Nov. 2, 2016). Pet. 4; Paper 7, 2.

B. The '287 Patent

The '287 patent, titled “Active Particle-Enhanced Membrane and Methods for Making and Using the Same,” was issued on February 3, 2015. Ex. 1001, at [45], [54]. The '287 patent’s “breathable membrane includes a base material solution and active particles;” the “active particles incorporated in the membrane may improve or add various desirable properties to the membrane, such as for example, the moisture vapor transport capability, the odor adsorbance, the anti-static properties, or the stealth properties of the membrane.” *Id.* at [57]. Generally, there is a need for a breathable membrane having improved moisture transport properties, because a garment made from, e.g., rubber may seem “hot and humid” to the wearer because it does not permit moisture to escape from within the garment to the outside environment. *Id.* at 1:43–50. “The membrane can be a self-supporting membrane or a coating on a substrate.” *Id.* at 2:13–15. In some embodiments, “the active particles may be encapsulated in at least one removable encapsulant in an amount effective to prevent at least a substantial portion of the active particles from being deactivated prior to removal of the removable encapsulant.” *Id.* at 2:31–38.

C. Illustrative Claim

Claim 27 is the only independent claim challenged in the Petition. Claims 28, 30, 32, 33, and 35–39 depend directly or indirectly from claim 27. Claim 27 is reproduced below:

- 27. A water-proof composition comprising:
 - a liquid-impermeable breathable cured base material comprising a first thickness;
 - a plurality of active particles in contact with the liquid-impermeable breathable cured base material, the plurality of active particles comprising a second thickness; and wherein,

the first thickness comprises a thickness at least 2.5 times larger than the second thickness but less than an order of magnitude larger than the second thickness, the active particles improve the moisture vapor transport capacity of the composition, and a moisture vapor transmission rate of the water-proof composition comprises from about 600 g/m²/day to about 11000 g/m²/day.

Ex. 1001, 12:1–16.

D. Instituted Grounds of Unpatentability

We instituted an *inter partes* review of claims 27, 28, 30, 32, 33, and 35–39 of the '287 patent on the following grounds. Dec. 4, 28–29.

References	Basis	Claims Challenged
Dutta ¹	§ 102(b)	27, 28, 30, 32, and 36–37
Dutta and Haggquist ²	§ 103(a)	27, 28, 30, 32, and 35–39
Halley ³	§ 102(b)	27, 28, 30, 32, 33, and 35–37
Halley and Haggquist	§ 103(a)	38 and 39

Petitioner relies on the Declarations of Abigail Oelker, Ph.D. Ex. 1005; Ex. 1044. Patent Owner relies on the Declarations of Dr. Gregory W. Haggquist. Ex. 2001; Ex. 2011.

¹ PCT Pub. No. WO 1995/33007 A1, published December 7, 1995 (“Dutta”) (Ex. 1002).

² U.S. Patent Pub. No. 2004/0018359 A1, published January 29, 2004 (“Haggquist”) (Ex. 1004).

³ PCT Pub. No. WO 2000/70975 A1, published November 30, 2000 (“Halley”) (Ex. 1003).

II. ANALYSIS

A. Claim Construction

The Board interprets claims in an unexpired patent using the “broadest reasonable construction in light of the specification of the patent.” 37 C.F.R. § 42.100(b) (2017).⁴ Under that standard, claim terms are given their ordinary and customary meaning in view of the specification, as would be understood by one of ordinary skill in the art at the time of the invention. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Any special definitions for claim terms must be set forth with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). Only those terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (“we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

Petitioner presents a “construction of key terms,” including the terms “cured base material,” “first thickness,” “active particles,” “second thickness,” “order of magnitude,” “composition possesses odor absorbance properties at least in part due to the active particles,” and “quick drying

⁴ Our recently changed version of this Rule, which requires that we interpret claims in the same manner used in a civil action under 35 U.S.C. § 282(b), does not apply here because the Petition was filed before the effective date of the new Rule, November 13, 2018. *See Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 83 Fed. Reg. 51,340, 51,344 (Oct. 11, 2018).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.