Trials@uspto.gov
571-272-7822

Paper No. 14
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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.*

DECISION
Institution of *Inter Partes* Review
35 U.S.C. § 314(a)

I. INTRODUCTION

VF Outdoor, LLC ("Petitioner") requests an *inter partes* review of claims 27, 28, 30, 32, 33, and 35–39 of U.S. Patent No. 8,945,287 B2 ("the '287 patent," Ex. 1001). Paper 1 ("Pet."). Cocona, Inc. ("Patent Owner") filed a Preliminary Response. Paper 12 ("Prelim. Resp."). We have authority under 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted unless "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Applying that standard, and upon consideration of the information presented in the Petition and the Preliminary Response, we institute an *inter partes* review of claims 27, 28, 30, 32, 33, and 35–39.

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," 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 Claims

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/m^2/day to about 11000 g/m^2/day.

Ex. 1001, 12:1–16.

D. Proposed Grounds of Unpatentability

Petitioner asserts that claims 27, 28, 30, 32, 33, and 35–39 of the '287 patent are unpatentable based upon the following grounds:

Reference(s)	Statutory Basis	Claim(s) 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)	38–39

The Petition is supported by the Declaration of Abigail Oelker, Ph.D. Ex. 1005. Patent Owner relies on the Declaration of Dr. Gregory W. Haggquist. Ex. 2001.

II. ANALYSIS

We address below whether the Petition meets the threshold showing for institution of an *inter partes* review under 35 U.S.C. § 314(a). We consider the grounds of unpatentability in view of the understanding of a person of ordinary skill in the art.

Petitioner asserts that one of ordinary skill in the art

> would have had an advanced degree (Master's or Ph.D.) or a bachelor of science degree in a relevant field combined with practical experience in one of the following: (1) chemical materials, including polymers and materials that undergo sorption; (2) light and its interaction with matter; and (3) waterproof, breathable materials and garments. Four-year

[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).

> college degrees in Chemistry, Chemical Engineering, Polymer Chemistry, or Physics would be appropriate, or, at a minimum, the completion of courses in chemistry, organic chemistry, physical chemistry, polymer science, or proto-physical chemistry.

Pet. 20. Patent Owner does not appear to dispute Petitioner's definition of one of ordinary skill in the art. At this stage of the proceeding, we adopt Petitioner's uncontested definition of one of ordinary skill in the art. The level of ordinary skill in the art is further demonstrated by the prior art asserted in the Petition. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

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); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016). 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)).

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