

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF OUTDOOR, LLC,
Petitioner,

v.

COCONA, INC.,
Patent Owner.

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

Denying Petitioner's Request for Rehearing of Final Written Decision
37 C.F.R. § 42.71(d)

I. INTRODUCTION

VF Outdoor, LLC (“Petitioner”) filed a Request for Rehearing (Paper 51, “Request” or “Req.”) of our Final Written Decision (Paper 50, “Final Written Decision” or “Dec.”) in which we determined that claims 27, 28, 30, 32, 33, and 35–37 of U.S. Patent No. 8,945,287 B2 (Ex. 1001, “the ’287 patent”) are unpatentable. We determined that Petitioner did not satisfy its burden of demonstrating, by a preponderance of the evidence, that claims 38 and 39 are unpatentable. Patent Owner, with Board authorization, filed an Opposition to Request for Rehearing (Paper 54, “Opposition to Request for Rehearing” or “Opp.”). Petitioner, with Board authorization, filed a Reply to Patent Owner’s Opposition to Request for Rehearing (Paper 55, “Reply”). For the reasons that follow, Petitioner’s Request for Rehearing is denied.

II. THE REQUEST FOR REHEARING

In pertinent part, 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence. Moreover, “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” 37 C.F.R. § 42.71(c).

Petitioner requests rehearing to address several issues with our Final Written Decision. Req. 1–15. First, Petitioner argues the Board overlooked

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the argument and evidence at Section VI.D.5 of the Petition, which Petitioner argues demonstrate a reasonable expectation of success that the combination of Dutta and Haggquist meets the claimed MVTR range: ““As such, Dutta in view of Haggquist discloses the above limitation.’ (Petition, 42 (citing Ex. 1005 at ¶¶ 171-172.))” Req. 3–4.

Second, Petitioner argues the Board overlooked Petitioner’s citation to Dr. Oelker’s Declaration in Petitioner’s Opposition to the Motion to Exclude (Paper 44, “Opposition”). Req. 5.

Third, Petitioner argues good cause exists to submit additional evidence regarding reasonable expectation of success. Req. 14–15.

Fourth, Petitioner argues rehearing is also appropriate on claims 38 and 39 because the Board overlooked Petitioner’s alternate argument concerning encapsulation and interpreted the scope of claims 38 and 39 in an unexpected manner. Req. 6–13.

In addition, in Petitioner’s Reply, Petitioner also argues that Patent Owner’s Opposition to Request for Rehearing exceeds the scope authorized by the Board in Paper 53. Reply 1–2.

We have reviewed the papers submitted in connection with this Request for Rehearing and have carefully considered the arguments presented. For the following reasons, we are not persuaded that the Board abused its discretion or misapprehended or overlooked the matters asserted by Petitioner.

III. DISCUSSION

(A) *Petitioner's First Argument*

In the Request, Petitioner argues that the Board overlooked argument and evidence at Section VI.D.5 that Petitioner alleges demonstrate a reasonable expectation of success that Dutta¹ and Haggquist² would meet the claimed moisture vapor transmission rate (“MVTR”) range of claim 27. Req. 3–4. The argument and evidence to which Petitioner refers is a single sentence and citation in the Petition, which states: “As such, Dutta in view of Haggquist discloses the above limitation.” Req. 3–4 (citing Pet. 42 (citing Ex. 1005 ¶¶ 171–172)). The Request specifically identifies the citation to Dr. Oelker’s Declaration at paragraph 171. Req. 4 (citing Ex. 1005 ¶ 171). In its relevant part, paragraph 171 states

Table 1 of *Dutta* discloses an increased WVTR (MVTR) for compositions with included Sephadex particles. (Ex. 1002 at p. 23 ll. 3-10.) Given the similarity between Sephadex particles disclosed in *Dutta* and the other active particles’ ability to trap water, a POSITA would understand that the active particles as disclosed in *Haggquist* would exhibit a performance in terms of WVTR that is similar to those disclosed in *Dutta*. (*Id.* at p. 23, ll. 3-10; Ex. 1004 at ¶ 30.). Therefore, a POSITA would understand that the combination of the *Haggquist* particles into the *Dutta* membrane would possess quick drying properties at least in part due to the active particles.

Ex. 1005 ¶ 171.

The Request asserts the Board overlooked paragraph 171, which provides evidence that the replacement of Dutta’s Sephadex particles with

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).

Haggquist's active particles would have reasonably been expected to result in a composition with the claimed MVTR range. Req. 4.

However, in the Final Written Decision, the Board expressly determined that the Petition did not establish that Dutta and Haggquist would reasonably have been expected to have the recited MVTR range.

Dec. 35. The Final Written Decision stated

[c]laim 27 requires that the moisture vapor transmission rate of the water-proof composition comprises from about 600 g/m²/day to about 11000 g/m²/day. Ex. 1001, 12:14–16. To demonstrate that the combination meets this limitation, Petitioner's claim chart relies on Table 1 of Dutta. Pet. 25–26. The claim chart, however, does not provide any reference to Haggquist for this limitation, despite Petitioner's reliance on the combination of Haggquist's particles with Dutta's composition for this ground.

Id.

We then specifically discussed Petitioner's arguments and evidence in Section VI.D.5 of the Petition:

The Petition also states: "If the activated carbon from Haggquist replaces the Sephadex particles in the cured polyurethane solution in Example 1B of Dutta, there is a reasonable expectation of success that the composition would have a MVTR within the claimed range." Pet. 41. Petitioner relies on Figure 2 of the '287 patent to show that "carbon particles combined with polyurethane have MVTRs that range from 6,356 g/m²/day to 10,385 g/m²/day." *Id.* (citing Ex. 1001, Fig. 2). The Petition, however, provides no other support for its assertion that the combination of Dutta and Haggquist would have an MVTR within the claimed range. Petitioner's reliance on the '287 patent's Figure 2 is unpersuasive, as it is unclear, absent further explanation or evidence, that the conditions leading to the MVTRs in Figure 2 would be applicable to the combination of Dutta and Haggquist proposed by Petitioner.

Id.

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