UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HEINEKEN N.V.,
Petitioner

v.

ANHEUSER-BUSCH INBEV S.A.,
Patent Owner

Case IPR2018-01663
Patent 9,944,453

PATENT OWNER'S SURREPLY TO PETITIONER'S REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

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Patent Owner submits this Surreply to Petitioner's Reply (Paper 8).

I. The Board Should Deny Institution Under Section 325(d)

Petitioner contends ABI's Response did not address the *Becton* factors. *Becton, Dickinson & Co. v. Braun Melsungen AG*, IPR2017-01586, Paper 8 at 17-18 (PTAB Dec. 15, 2017) (informative). However, ABI demonstrated that factors (a)-(b)—similarities and cumulative nature of the art—are met because five of the seven references cited in the Petition—Butterworth, Brady, Keisuke, Richter, and Schmidt—were disclosed to the USPTO or used as bases of rejections. *See* Preliminary Response, Sections II.C, IV.C. *Becton* factor (c)—the extent of evaluation during prosecution and extent of overlapping arguments—is met because Butterworth was cited by the Examiner in six Office Actions (including actions issued after the Peirsman Declaration was filed) (Preliminary Response at II.C, IV.C), Richter was cited in three Actions and deemed in the Notice of Allowance to be the closest prior art (Preliminary Response at Sections II.C, IV.C; Exh. 1003 at 1009, 1193), and Schmidt was cited in one Action (Prelim. Response at 6); as such, these five references were thoroughly evaluated during examination and either meritoriously overcome or were deemed irrelevant. *See id*. Additionally, *Becton* factor (d) was met because the Petition relies on Butterworth, Richter, and Schmidt in substantially the same manner as relied on during prosecution (*i.e.*, Butterworth and Richter for a delaminable bottle and Schmidt for a pressurized gas) (*id.*)).

Moreover, Petitioner's baseless accusations that the Peirsman Declaration is "misleading" cannot overcome the fact that the Examiner carefully considered the Butterworth reference. As explained in the Peirsman Declaration and attested to by ABI's Expert, Butterworth's Embodiment 4 is not enabled because the resulting bottle would have a wall thickness less than 100 µm and, thus, would not have sufficient mechanical strength to dispense a beverage using pressurized gas. *See* Exh. 1003 at 488-494; Preliminary Response at Section V.A.1.a.i; Exh. 2001, ¶¶ 103-106, 124-144. Petitioner's Expert does not point to any evidence of either experience with or testing performed on dispensing blow-molded containers with a wall thickness less than 100 µm. (Exh. 1002, ¶¶ 54-60; Exh. 2001, ¶¶ 130-138). Instead, Dr. Reitman relies solely on references that do not teach a bag-in-container subject to the same stresses as the claimed invention. (Exh. 1002, ¶¶ 58-67). As such, Reitman's opinions are unsubstantiated and do not rise to the level of additional evidence and facts which warrant reconsideration.

Petitioner's further contention that the counterpart WO 99/03668 to Brady was disclosed after allowance is irrelevant. This publication was filed concurrently with a Request for Continued Examination, thereby withdrawing the allowance pursuant to 37 C.F.R. § 1.114(d) and, thus, was available as a basis for rejection. Moreover, contrary to Heineken's assertions, Uhlig discloses a source of pressurized gas, an opening in the cap, and dispensing by applying pressure to an

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