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 IPR2018-01669
Patent 9,517,876

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

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CASES:

Becton, Dickinson & Co. v. Braun Melsungen AG,
IPR2017-01586 (PTAB Dec. 15, 2017) 1

Shenzhen Silver Star Intelligent Tech. Co., Ltd. v. iRobot Corp.,
IPR2018-00761 (PTAB Sept. 5, 2018) 3

STATUTES & OTHER AUTHORITIES:

USPTO, PTAB Trial Prac. Guide at 10 (Aug. 2018 Update),
https://www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf 3

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

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

Petitioner does not dispute that four of the seven references cited in the Petition were before the Examiner. Instead Petitioner incorrectly 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). ABI demonstrated that factors (a)-(b)—similarities and cumulative nature of the art—are met because four of the seven references cited in the Petition—Butterworth, 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 an Office Action (Preliminary Response at II.C, IV.C), and Richter was distinguished by the Examiner over the claims in the Notice of Allowance (Preliminary Response at II.C, IV.C; Exh. 1003 at 276); as such, these four references were thoroughly evaluated during examination and either meritoriously overcome or were deemed not relevant. *See id*. *Becton* factor (d) was met because the Petition relies on Butterworth and Richter, and in substantially the same manner as relied on during prosecution (*i.e.*, for a delaminable bottle). *Id*.

Petitioner's baseless accusations that the Peirsman Declaration is "misleading" and "false" cannot overcome the fact that the Examiner carefully considered the Butterworth reference. As explained in the Peirsman Declaration and attested to by Patent Owner'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. 1004 at 488-94; Preliminary Response at Section V.A.1.a.i; and Exh. 2001, ¶¶ 105-107, 125-148. Petitioner's Expert does not point to any personal testimony evidencing her experience or expertise with dispensing blow-molded containers with a wall thickness less than 100 µm, nor does she cite to any testing performed (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, ¶¶ 57-66.) As such, Dr. Reitman's opinions are unsubstantiated and do not rise to the level of additional evidence and facts which warrant reconsideration.

Heineken's argument with respect to whether Beyens is cumulative to US 4,147,278 to Uhlig and whether Brady is cumulative to WO 99/03668 are irrelevant. ABI did not make these assertions in the Preliminary Response filed in the instant proceeding. These arguments were made in Patent Owner's Preliminary Response for IPR 2018-01663 and have been addressed in ABI's

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