

Filed on behalf of VF Outdoor, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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VF OUTDOOR, LLC,  
Petitioner,

v.

COCONA, INC.,  
Patent Owner.

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Case No.: IPR2018-00190  
Patent No.: 8,945,287

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**PETITIONER'S REQUEST FOR REHEARING  
UNDER 37 C.F.R. § 42.71(d)**

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Pursuant to 37 C.F.R. § 42.71(d), Petitioner VF Outdoor, LLC (“VF ”) requests rehearing of the Final Written Decision (“FWD”) (Paper 50, 5/30/19) regarding U.S. Patent No. 8,945,287 (“the ’287 patent”).

## **I. Summary of Issues and Relief Requested**

The Board found claims 27, 28, 30, 32, 33 and 35-37 unpatentable as anticipated, however, it held that VF did not establish by a preponderance of the evidence that claims 27, 28, 30, 32 and 35-39 were obvious over the combination of *Dutta* and *Haggquist*, or that claims 38-39 were obvious over the combination of *Halley* and *Haggquist*. (FWD at 32, 36-37, 44-45, 48.)

VF respectfully submits that the Board overlooked and/or misapprehended VF evidence and argument establishing that claims 27, 28, 30, 32 and 35-39 would have been obvious.<sup>1</sup> Accordingly, VF respectfully requests that the Board grant

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<sup>1</sup> VF’s request is necessitated by Patent Owner’s recent stated intention to amend its infringement contentions in District Court to assert claims 38 and 39 over 2 years after the deadline for serving infringement contentions. *Cocona, Inc. v. VF Outdoor, LLC*, 16-cv-02703-CMA-LLC (D. Colo.), ECF No. 79 at 2-3 (Joint Status Report). Because claims 38 and 39 depend from claim 27, it is logical and efficient to also request rehearing of claims 27, 28, 30, 32, and 35-37 on the issue of obviousness, since some of the issues overlap.

rehearing and modify its decision to find that VF has shown that claims 27, 28, 30, 32 and 35-39 are unpatentable as obvious over *Dutta* and *Haggquist*, and that claims 38-39 are further unpatentable over *Halley* and *Haggquist*.

## **II. Legal Standards**

“The burden of showing a decision should be modified lies with the party challenging the decision” and “[t]he 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.” 37 C.F.R. § 42.71(d). The *Official Patent Trial Practice Guide*, 77 Fed. Reg. 48,756 (Aug 14, 2012) allows for the submission of additional evidence with a rehearing request upon a showing of good cause. (*Id.* at 48,768.)

IPR proceedings are subject to the requirements of the Administrative Procedure Act (“APA”). *SAS Institute, Inc. v. ComplimentSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016); *EmeraChem Holdings, LLC v. Volkswagen Group of America, Inc.*, 859 F.3d 1341, 1348 (Fed. Cir. 2017). The APA requires that “[p]ersons entitled to notice of an agency hearing shall be timely informed of ... the matters of facts and law asserted” (5 U.S.C. § 554(b)(3)), that “all interested parties” be given an “opportunity for ... the submission and consideration of facts [and] arguments ... [and] hearing and decision on notice ... .” (5 U.S.C. § 554(c)). *See also SAS*, 825 F.3d at 1351 (petitioners are entitled to protections of 5 U.S.C. §

554(b)(3)). Under the APA, the USPTO must also “allow a party ‘to submit rebuttal evidence ... as may be required for a full and true disclosure of the facts.’” *EmeraChem*, 859 F.3d at 1348 citing 5 U.S.C. § 556(d).

### **III. Claims 27, 28, 30, 32 and 35-39 are Obvious over Dutta in View of Haggquist (Ground 2)**

The Board’s anticipation ruling was based in part on Example 1B from *Dutta* where Sephadex active particles improved moisture vapor transmission rate (MVTR) of a composition over a control and the MVTR was in the claimed range of about 600 g/m<sup>2</sup>/day to about 11000 g/m<sup>2</sup>/day. (FWD at 26, 31.) On the issue of obviousness, the Board only cited a portion of VF’s argument: “[t]he 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 the composition would have a MVTR in the claimed range.’” (FWD at 35 (citing Petition at 41 only). The Board then stated that “[p]etitioner provides no analysis showing that Haggquist’s active particles, when substituted for the Sephadex particles of Dutta, would have reasonably been expected to result in a membrane having an MVTR within the claimed range.” (FWD at 36).

VF respectfully submits that the Board overlooked the following argument and evidence at Section VI.D.5 of the Petition demonstrating a reasonable expectation of success that the combination of *Dutta* and *Haggquist* would meet the claimed MVTR range of 600 g/m<sup>2</sup>/day to about 11000 g/m<sup>2</sup>/day: “As such, Dutta in

view of Haggquist discloses the above limitation.” (Petition, 42 (citing Ex. 1005 at ¶¶171-172)). In cited Exhibit 1005 at paragraph 171, VF’s expert Dr. Oelker opined that “[g]iven the similarity between Sephadex particles ... 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 [MVTR] that is similar to those disclosed in Dutta.**” (Ex. 1005, ¶171) (emphasis added) (citing Ex. 1002 at 23:3-10; Ex. 1004 ¶30 [Example 1B]).

The Petition demonstrated that the control composition in Comparative Example 1 from *Dutta* (with no particles) already provided an MVTR of 5583 g/m<sup>2</sup>/day falling within the claim 27 range. (Petition at 25-26, 36-37 (citing Ex. 1002, 23:3-10 (Table 1)).) The Petition also showed that adding Sephadex particles to the composition improved MVTR to 6730 g/m<sup>2</sup>/day and met the claimed MVTR range. As such, and as Dr. Oelker opined, given the similarity of the porous water-trapping Sephadex particles in *Dutta* and the porous active particles in *Haggquist* that performed the same water-trapping function, the replacement of Sephadex with active particles from *Haggquist* would have reasonably been expected to result in a composition having an MVTR within the claim 27 range (i.e., similar to the 6730 g/m<sup>2</sup>/day provided by the original Sephadex composition). (Petition 42 (citing Ex. 1005, ¶¶171-172 (substitution of activated carbon in Example 1B of Dutta would provide a similar improvement in MVTR); *see also* Petition, 48 (citing Ex. 1005,

¶157). Under Federal Circuit law, VF met its burden of demonstrating reasonable expectation of success. *See Aventis Pharma Deutschland GMBH v. Lupin, Ltd*, 499 F.3d 1293, 1301 (Fed. Cir. 2007) (it is sufficient to show that the claimed and prior art compounds possess a sufficiently close relationship to create an expectation ... that the new compound will have similar properties to the old.); *see also Alza Corporation v. Mylan Laboratories, Inc.* 464 F.3d 1286, 1295 (Fed. Cir. 2006) (characteristic of known compound predictive of success).

Petitioner respectfully submits that the Board also overlooked its citation to the above opinions of Dr. Oelker cited in Petitioner’s Opposition to the Motion to Exclude (Paper 44; “Opposition”), which specifically addressed how evidence already of record supports the requisite expectation of providing an MVTR within the claim 27 range from the combination of *Dutta* and *Haggquist*. (Opposition at 8-9 (citing Petition, 41-42; Ex. 1005, ¶¶156-158, 172-172 (*sic*, 171-172).) Here as well, Petitioner articulated and provided sufficient citations to evidence to support a reasonable expectation of success.

VF notes that Patent Owner did not challenge VF’s demonstration of reasonable expectation of success with respect to the MVTR range until its Sur-Reply. (Paper 40 at 16.) Patent Owner’s Preliminary Response and formal Response did not challenge VF’s showing of reasonable expectation of success or demonstrate any unpredictability in the art, but focused instead on an alleged “teaching away” in



the art. (Paper 20 at 32-36.) VF replied to those arguments. (Paper 33 at 15-16.) Then, in Sur-Reply, Patent Owner briefly argued, without evidentiary support, that there was no showing of reasonable expectation of success in achieving the MVTR range (Paper 40 at 16). But as shown above, the only evidence of record, and therefore a preponderance of evidence on the issue of reasonable expectation of success in achieving the MVTR range, was presented by VF and Dr. Oelker. For the above reasons, rehearing should be granted, and the Board's decision modified to hold claims 27, 28, 30, 32 and 35-39 unpatentable as obvious.

Rehearing is also appropriate on claims 38-39 because the Board overlooked Petitioner's alternate argument concerning encapsulation. On claims 38-39, the Board focused solely on a substitution of *Haggquist* active particles for those of *Dutta*. (FWD at 34.) As demonstrated above, if the *Haggquist* active particles were substituted for the Sephadex particles of *Dutta*, there would be a reasonable expectation of success in meeting the MVTR range limitation.

Nonetheless, the Board overlooked Petitioner's further argument that "[a] POSITA would be motivated to use the encapsulant method disclosed in *Haggquist* with the *adsorptive, molecular filter-type materials of Sephadex particles utilized in Example 1B of Dutta* to protect the performance characteristics of *the Sephadex particles* from premature deactivation ... ." (Petition at 47 (emphasis added) (citing Ex. 1004, Abstract, ¶13).) The Board also overlooked Petitioner's position that "[a]

POSITA would have a reasonable expectation that the combination of the encapsulant method disclosed in *Haggquist* with the *Sephadex particles utilized in Dutta* would succeed because *Haggquist* recites that this encapsulant method works on active particles ... .” (Petition at 49 (emphasis added).)

Petitioner’s argument was not limited to the substitution of *Haggquist*’s active particles for the Sephadex particles of *Dutta*, but also relied on encapsulation of the Sephadex particles already utilized in the water-proof composition prepared in Example 1B of *Dutta*. (Petition at 25-26, 31, 46-47, 49-50.) The Example 1B composition itself meets the MVTR range required by claims 38 and 39, by virtue of their dependency from claim 27. (Petition at 25-26, 36.) As discussed in the Petition, *Haggquist* is relied on to establish that its encapsulant “may protect the active particles against premature deactivation” and “may be removed to rejuvenate the active particles.” (Petition at 31, *see also* Petition at 46 (citing Ex. 1004, ¶13 (“when the removable substance is removed from the active particles, the adsorptive capacity increases or is restored.”))).)

Simply stated, the Petition establishes that it would have been obvious to encapsulate the Sephadex “active particles” specifically used in Example 1B *to protect* against premature deactivation, and then remove the encapsulant *to rejuvenate* them to their original state. (Petition at 25-26, 31, 46-47, 49-50.) As the Board should already appreciate, the original state of the Sephadex particles from

Example 1B provided a water-proof composition having an MVTR of 6730 g/m<sup>2</sup>/day; an improvement over the control composition of Comparative Example 1 (with no particles) that showed an MVTR of 5583 g/m<sup>2</sup>/day. (FWD at 22 (citing Ex. 1002, 23:1-8), 26 (citing Petition, 36), 32 (citing Petition, 29-30, 36-37); *see also* Petition at 25-26, 36.)

The Petition thus articulates and provides sufficient citations to evidence to support how *Dutta* and *Haggquist* teach or suggest each element of claims 38 and 39, and further addresses the requisite motivation to combine the references with a reasonable expectation of success. Indeed, as the Petition clearly states: “[w]hen a patent ‘simply arranges old elements,’ i.e., ***adding an encapsulant to Sephadex*** or activated carbon, ‘with each performing the same function it had been known to perform,’ i.e., ***capable of protecting Sephadex*** or activated carbon ***from premature deactivation***, ‘and yields no more than one would expect from such an arrangement,’ i.e., ***the reactivation of Sephadex*** or activated carbon ***to improve the WVTR***, ‘the combination is obvious.’ (Petition at 49-50 (emphasis added) (citing *KSR Int’l Co. v. Teleflex, Inc.* 550 U.S. 398, 417).)

If the Board would say that the combination of *Dutta* and *Haggquist* must “retain[] the claim 27 MVTR requirement, despite (or because of) its encapsulation by the Haggquist composition” (*see* FWD at 47 discussing *Halley/Haggquist* combination), it is respectfully submitted that this interpretation of claim scope was

not briefed or otherwise raised during trial (i.e., there has been no notice or opportunity to respond). 5 U.S.C. §§ 554(b)(3), 554(c); *SAS Institute* 825 F.3d at 1351; *EmeraChem Holdings*, 859 F.3d at 1348. Accordingly, Petitioner would respectfully request that the Board fully consider the following discussion, which proves a reasonable expectation of success (based on the evidence of record) in achieving the compositions of claims 38 and 39.

*Haggquist* relates to “preserving the properties of active particles through the use of an encapsulant” and specifically teaches removal of the encapsulant “to rejuvenate the active particles.” (Petition at 31, 46 (citing Ex. 1004, Abstract, ¶13); *see also* Petition at 49-50 (discussing reactivation of Sephadex to improve MVTR).) *Dutta* discloses a water-proof control composition (with no particles) already having an MVTR of **5583 g/m<sup>2</sup>/day** within the claimed range, which MVTR was improved to **6730 g/m<sup>2</sup>/day** through the incorporation of Sephadex particles. (Petition at 25-26, 36-37 (discussing Example 1B of *Dutta*).) Regardless of whether the *Haggquist* encapsulant remains on the Sephadex particles (in whole or in part) or has been removed completely, the arguments and evidence of record support that the composition of Example 1B (modified to encapsulate Sephadex) would have an MVTR no less than 5583 g/m<sup>2</sup>/day, which is within the claimed range from about 600 g/m<sup>2</sup>/day to about 11000 g/m<sup>2</sup>/day.

Indeed, even Comparative Example 1 of *Dutta* (which has no improved

MVTR from added Sephadex particles) provided an MVTR falling squarely within the claim 27 range (i.e., 5583 g/m<sup>2</sup>/day). The use of encapsulated (and thus deactivated) Sephadex in Example 1B would have provided a composition having an MVTR similar to that of control Comparative Example 1 (i.e., ~5583 g/m<sup>2</sup>/day), which MVTR would have only improved upon removal of the encapsulant to rejuvenate Sephadex to its original state (i.e., ~6730 g/m<sup>2</sup>/day as in Example 1B).

Petitioner recognizes that claim 38 allows for an encapsulant that is “removable to reactivate *at least a portion* of the active particles to improve the [MVTR] of the composition” (FWD at 47 (addressing obviousness over *Halley and Haggquist*) (emphasis original).) However, the Board has misapprehended the full scope of claim 38, which does not preclude *removal of the entirety* of the encapsulant to reactivate Sephadex to its original state. Moreover, removal of only a portion of the encapsulant from Sephadex would still be expected to improve MVTR, to provide a value greater than about 5583 g/m<sup>2</sup>/day, albeit less than about 6730 g/m<sup>2</sup>/day, which falls squarely within the claimed range.

#### **IV. Claims 38 and 39 are Obvious over Halley in View of Haggquist (Ground 4)**

In rejecting VF’s obviousness arguments concerning claims 38 and 39 over the combination of *Halley* and *Haggquist*, the Board held that “Petitioner has not met its burden of proof to demonstrate that the proposed combination retains the claim 27 MVTR requirement, despite (or because of) its encapsulation by the

Haggquist composition.” (FWD at 47.)

The Board misapprehended VF’s argument by citing Patent Owner’s position that there is “no evidence of record to show that *when an activated particle is substituted* in Halley that you get to the MVTR ranges that are in the tables of Exhibit ... 1003.”<sup>2</sup> (FWD at 45 (citing Transcript (Paper 49), 59:13-15, 23-25.) (emphasis added). VF’s argument instead stated that “a POSITA would have been motivated to utilize the removable encapsulants from *Haggquist with the active particles utilized in Halley*, because *Haggquist* discloses that the encapsulant protects the performance enhancing characteristics of the active particles from premature deactivation.” (Petition at 64 (emphasis added) (citing Ex. 1004, Abstract, ¶¶13, 30).) There is no requirement for any substitution of particles from *Halley*, as argued by Patent Owner at the hearing. VF’s argument is that, by using *Haggquist*’s teachings of encapsulating active particles, *Halley*’s particles would be encapsulated *themselves*.

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<sup>2</sup> Petitioner respectfully requests that the Board consider the full context of Patent Owner’s argument (Transcript at 59:9-25), which relates only to the substitution of active particles and not to encapsulation of the *Halley* particles themselves, and which was raised for the first time in Patent Owner’s rebuttal time during Oral Hearing.

Petitioner respectfully submits that it has met its burden to demonstrate reasonable expectation of success from the combination of *Halley* and *Haggquist* through sufficient citation to evidence. *Haggquist* relates to “preserving the properties of active particles through the use of an encapsulant” and specifically teaches removal of the encapsulant “to rejuvenate the active particles.” (Petition at 60-61 (claim chart), 62 (citing Ex. 1004, Abstract, ¶13); *see also* Petition at 65 (discussing reactivation of *Halley*’s particles to improve MVTR).) *Halley* discloses a water-proof composition (Control - with no particles) having an MVTR of **6344 g/m<sup>2</sup>/day**, which MVTR was improved to between **6924** and **7736 g/m<sup>2</sup>/day** through the incorporation of Black Pearls 2000 in Samples 1-3. (Petition at 52-53, 55 (citing Table 3 of *Halley*).

Thus, regardless of whether the *Haggquist* encapsulant remains on the *Halley* particles (in whole or in part) or has been removed completely, the arguments and evidence of record support that the compositions of Samples 1-3 (modified to encapsulate the active particles) would have an MVTR from about 600 g/m<sup>2</sup>/day to about 11000 g/m<sup>2</sup>/day. Indeed, even *Halley*’s control composition provided an MVTR falling squarely within the claim 27 range (i.e., 6344 g/m<sup>2</sup>/day). The use of encapsulated (and thus deactivated) particles in Samples 1-3 would have provided a composition having an MVTR similar to that of the control from *Halley* (i.e., ~6344 g/m<sup>2</sup>/day), which MVTR would have only improved upon removal of the

encapsulant to reactivate the particles to their original state (i.e., ~6924-7736 g/m<sup>2</sup>/day as in Samples 1-3).<sup>3</sup>

Petitioner further submits that by stating that the *Halley/Haggquist* combination must “retain[] the claim 27 MVTR requirement, despite (or because of) its encapsulation by the Haggquist composition” (*see* FWD at 47), the Board has interpreted the scope of claims 38-39 in a manner that no party argued for or expected during this proceeding, and to which Petitioner had neither notice nor an opportunity to respond. (*See* Section II, *supra* (citing 5 U.S.C. §§ 554(b)(3), 554(c), 556(d).) The PTAB “may not change theories in midstream,” i.e., finding claims 38-39 initially unpatentable (*see* Institution Decision at 27-28) and then changing course in view of a new claim interpretation, “without giving respondents reasonable notice of the change and the opportunity to present argument under the new theory.” *SAS*, 825 F.3d at 1351 citing *Belden*, 805 F.3d at 1080. Since the Board’s interpretation and analysis of the scope of claims 38-39 was not raised during Oral Hearing or any other point during trial, Petitioner respectfully submits that it is

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<sup>3</sup> Removal of only a portion of the encapsulant from the particles of Samples 1-3 would still be expected to improve MVTR, to provide a value greater than about 6344 g/m<sup>2</sup>/day, albeit less than about 6924-7736 g/m<sup>2</sup>/day, which still falls squarely within the claimed range.



entitled to an opportunity to respond in this Rehearing Request.

**V. Good Cause Exists for Petitioner to Submit Additional Evidence on Reasonable Expectation of Success**

To the extent the Board finds that Petitioner has not met its burden to establish obviousness of claims 27, 28, 30, 32 and 35-39 over the combination of *Dutta* and *Haggquist*, even after consideration of the overlooked and/or misapprehended positions discussed in Section III, Petitioner respectfully submits the following evidence from the depositions of inventor Gregory Haggquist and Patent Owner's expert Charles Daniels, which is already of record. Good cause exists for the submission of this additional evidence, which directly refutes arguments made by Patent Owner only during its rebuttal time at the Oral Hearing (to which Petitioner had no opportunity to respond).

The FWD acknowledges a statement made by Patent Owner during Oral Hearing that there is "no evidence of record to show that when an activated particle is substituted in Dutta ... that you get to the MVTR ranges that are in the original tables of Exhibit 1002." (FWD at 34 (citing Transcript, 59:13-15, 23-25.)) During deposition, Petitioner presented Dr. Haggquist with his own declaration submitted in an Information Disclosure Statement during prosecution of the '287 patent (Ex. 1060; Haggquist Deposition Exhibit 7; "Haggquist Declaration"). Dr. Haggquist was then asked the following about Paragraph 7 from the Haggquist Declaration:

Q. Sir, you also stated, correct, under penalties of perjury, "*As all organic*

*or inorganic active particle materials operate similarly by trapping substances* in an active particle surface, it is known in the art that *an active particle used in an example process or mixture may be replaced by any other active particle to obtain a substantially similar result.*”· Do you see that?

A.· Yes, I see what paragraph you're talking to.

Q.· Okay.· And so you stated that under penalties of perjury?

A.· I signed this document, yes.

Q. Under penalty of perjury, correct?

A. Correct.

(Ex. 1046, 29:25-30:10, 33:6-34:6 (emphasis added); *see also* Ex. 1060, ¶7 (testing different active particle types “is not an efficient use of resources”); ¶8 (“all other active particles are capable of improving the transmission of vapor through the water-proof cured based material”).) During deposition, Dr. Daniels agreed with the accuracy of the above-quoted section of Paragraph 7 from the Haggquist Declaration. (Ex. 1047, 138:18-139:8, 141:4-17 (Q. ·Do you agree with the accuracy of that statement? A.·I think that's a practice that's been done, yes.)

## **VI. Conclusion**

The Board should grant rehearing, consider the arguments and evidence that were overlooked, and find claims 27, 28, 30, 32 and 35-39 unpatentable, based on a preponderance of the evidence, as obvious over the combination of *Dutta* and *Haggquist*, and further find claims 38-39 unpatentable, based on a preponderance of the evidence, as obvious over the combination of *Halley* and *Haggquist*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE ON PATENT OWNER**

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on July 1, 2019, a complete and entire copy of this **PETITIONER'S REQUEST FOR REHEARING UNDER 37 C.F.R. § 42.71(d) together with EXHIBIT 1060 and PETITIONER'S UPDATED EXHIBIT LIST** were served on the following counsel for Patent Owner:

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