

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF Outdoor, LLC
Petitioner

v.

Cocona, Inc.
Patent Owner

Patent No. 8,945,287
Inter Partes Review No. IPR2018-00190

**PATENT OWNER'S OPPOSITION TO PETITIONER'S REQUEST FOR
REHEARING**

Petitioner VF Outdoor, LLC (“VF”) filed a Request for Rehearing (Paper 51, “RR”) regarding certain aspects of the Final Written Decision (Paper 50, “FWD”). The Board authorized Patent Owner Cocona, Inc. (“Cocona”) to file an opposition to the RR. Paper 53. Cocona hereby submits its Opposition.

I. SUMMARY OF THE ISSUES

The Board correctly determined that VF did not show, by a preponderance of the evidence, that claims 27, 28, 30, 32 and 35 of U.S. Patent No. 8,945,287 (the “’287 Patent”) were unpatentable as obvious over a combination of Dutta and Haggquist (Ground 2), and that claims 38 and 39 were unpatentable as obvious over a combination of Halley and Haggquist (Ground 4). The Board did not “misapprehend[] or overlook[]” the arguments and evidence identified in the RR regarding an alleged expectation of success for the combinations presented in Grounds 2 and 4. 37 C.F.R. § 42.71(d). To the contrary, all of the matters allegedly “overlooked” are merely new arguments conceived after receiving an adverse final result. VF’s request for rehearing should be denied. *Id.*

II. LEGAL STANDARDS

In a request for rehearing, a dissatisfied party “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).

III. CLAIMS 27, 28, 30, 32 AND 35 ARE PATENTABLE OVER DUTTA + HAGGQUIST

The Board correctly concluded that VF did not meet its burden of proof in establishing that the combination of Dutta and Haggquist would “result in a membrane having an MVTR within the claimed range.” FWD at 36. The Board did not overlook or misapprehend VF’s arguments or purported evidence on this point. Rather, the Petition failed to present evidence that the super-hydrophilic, super-swelling, absorbent particles in Dutta (“Dutta Particles”) could be simply “swapped-out” with the surface active, non-swelling, adsorbent activated particles from Haggquist (“Haggquist Particles”) with a reasonable expectation of success at arriving at the invention of claim 27.

VF’s statements on page 5 of the RR that Cocona “did not challenge VF’s demonstration of reasonable expectation of success...until its Sur-Reply” and on page 6 that Cocona argued expectation of success “without evidentiary support” are false.

The Challenged Claims are also patentable over the obviousness Grounds, Grounds 2 and 4, because the Petition fails to articulate a legally sufficient obviousness rationale or provide any reasonable expectation of success. The Petition, and the Petitioner’s expert fail to appreciate the fundamental difference in the science between the use of super-hydrophilic swelling particles in Dutta and Halley, on the one hand, and surface-active adsorptive particles in the Patent, on the other.

Patent Owner Response (“POR”) at 1 (Emphasis added).

Cocona presented substantial evidence showing that there would be no motivation or reasonable expectation of success when combining Dutta and Haggquist in Ground 2, or Halley and Haggquist in Ground 4, because the particle science of those primary references is fundamentally different from the science of the ‘287 Patent. *See, e.g.*, POR at Footnote 4, page 45 (“Dr. Oelker’s report fails to provide any evidence or reasoning that Halley modified with activated carbon would work for its intended purpose, or that a POSITA would have a reasonable expectation of success for such a modification.”) (Emphasis added); Ex. 2005 at ¶ 57-64 (Dutta science); *Id.* at ¶ 67-70 (Halley science); *Id.* at ¶ 76-84 (no motivation for Dutta + Haggquist, including no expectation of success); *Id.* at ¶ 92-98 (no motivation for Halley + Haggquist); Ex. 2006 at ¶ 39-47 (absorption versus adsorption); *Id.* at ¶ 79-85 (Dutta science); *Id.* at ¶ 89-95 (no motivation for Dutta + Haggquist); *Id.* at ¶ 98-103 (Halley science); *Id.* at ¶ 105-108 (no motivation for Halley + Haggquist).

Indeed, VF’s primary reference Dutta discloses that non-absorbent particles, including carbon, are “inert” for purposes of water vapor transport. Ex. 1002, 9:35-10:7; Ex. 2005 at ¶ 79; Ex. 2006 at ¶ 82. There is no question about the degree of predictability—Dutta teaches that non-absorbent particles like activated carbon play no role in water vapor transport. *Id.* According to Dutta, there would be no expectation of success.

Aventis, cited by VF, is inapposite. See *Aventis Pharma Deutschland GMBH v. Lupin, Ltd*, 499 F.3d 1293 (Fed. Cir. 2007). *UCB, Inc. v. Accord Healthcare, Inc.*, 890 F.3d 1313, 1328-1329 (Fed. Cir. 2018) clarified that *Aventis* concerned whether a purified compound was prima facie obvious over a mixture without an explicit teaching that the ingredient should be concentrated or purified. VF mischaracterizes the holding of *Aventis*, since this action does not concern the arguable obviousness of a purified versus mixture issue. Moreover, VF offers *Aventis* for the issue of expectation of success, but *Aventis* does not discuss that issue.

The Board did not overlook or misapprehend VF's argument or purported evidence regarding an alleged expectation of success for Dutta + Haggquist. The FWD at page 35 specifically quotes VF's argument made on page 41 of the Petition regarding the alleged expectation of success, and so *expressly considered* VF's argument. The Board also considered the alleged evidence presented on pages 41 and 42 of the Petition as shown by the Board's discussion of Figure 2 of the '287 Patent. VF's reference to the '287 Patent on pages 41 and 42 of the Petition (and elsewhere) is pure hindsight reasoning and is not evidence supporting of success.

Nonetheless, VF argues that the Board committed error by allegedly overlooking a bare legal conclusion followed by an unexplained citation to its expert report. RR at 3-4 (“As such, Dutta in view of Haggquist discloses the above limitation.’ (Petition, 42 (citing Ex. 1005 at ¶¶171-172)).” Regarding VF’s “As

such...” legal conclusion on page 42 of the Petition, nothing was, or could be, overlooked. First, that statement is not only attorney argument which carries no weight, but it is a bare legal conclusion devoid of analysis. *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017). Second, as shown above, the Board did not overlook, but specifically addressed, VF’s actual argument on page 35 of the FWD.

The allegedly-overlooked citation to Ex. 1005 at ¶¶171-172 on page 42 of the Petition was not only not overlooked, but it does not establish, or even purport to establish, a reasonable expectation of success at meeting the MVTR of claim 27. First, that citation appears in the middle of page 41 of the Petition and with respect to an alleged motivation to combine Dutta + Haggquist. VF does not dispute that the Board considered that citation on page 41 of the Petition in the context of a motivation to combine. It was not overlooked.

Second, the citation to Ex. 1005 at ¶¶171-172 on page 42 of the Petition does not establish, or even purport to establish, a reasonable expectation of success at meeting the MVTR of claim 27. ¶¶171-172 of Ex. 1005 refer to an alleged expectation of success for claim 36—not claim 27. The discussion in ¶¶171-172 is directed to allegedly establishing that Dutta + Haggquist discloses the “quick-drying” limitation of claim 36, not the MVTR of claim 27. The language quoted from ¶171 on page 4 of the RR states that “the active particles as disclosed in

Haggquist would exhibit a performance in terms of WVTR that is similar to those [particles] disclosed in Dutta,” and ¶171 concludes that “Therefore, a POSITA would understand that [Dutta + Haggquist] would possess quick drying properties [of claim 36].” Ex. 1005, ¶171. Nothing in ¶171 addresses an alleged expectation of success for the MVTR recited in claim 27.

The discussion in ¶172 likewise does not address an alleged expectation of success for the MVTR in claim 27. The first two sentences of ¶172 improperly use the invention of the ‘287 Patent as prior art in a blatant act of hindsight reasoning. The third sentence states that “Haggquist discloses applying activated carbon to different base layers.” *Id.* The remaining sentences are directed to the “quick-drying” limitation of claim 36, and say nothing about an expectation of success for the MVTR of claim 27. *Id.* Moreover, VF does not explain how the “quick-drying” limitation of claim 36 further limits or modifies the MVTR of claim 27. Nothing in ¶¶171-172 addresses, let alone establishes, an expectation of success for the MVTR of claim 27. As such, the claims in Ground 2 are patentable over Dutta + Haggquist.

VF makes a number of additional arguments on pages 6-8 of the RR regarding claims that depend from claim 27. These arguments seek to cure deficiencies in the Petition, not identify matters that were overlooked. The Board correctly noted that the dependent claims are patentable because they depend from patentable claim 27. FWD at 36-37. Moreover, VF fails to address record evidence showing that it makes

no sense to encapsulate (e.g., clog the surface pores of) Sephadex since Sephadex does not work by trapping water on its surface, but by bulk absorption. *See, e.g.*, Ex. 2005, ¶¶81-82; Ex. 2005, ¶66, 108. Thus there is also no evidence showing that encapsulant is “removeable to reactivate” Sephadex as recited by claim 38. Accordingly VF’s “argument concerning encapsulation” is without merit. RR at 6.

VF also improperly raises an issue of claim construction on the alleged basis that it is surprised to learn after trial that claim 38, which depends from claim 27, must include all of the limitations of claim 27. RR at 8-13. This is improper for multiple reasons. First, VF never raised this alleged issue of claim construction in the Petition or its other papers, and so the Board could not have misapprehended or overlooked it. § 42.71(d). Second, it is black-letter patent law that a dependent claim includes all of the elements of its parent claims. *See* 35 U.S.C. § 112 (Pre-AIA), 37 C.F.R. § 1.75. Third, the arguments now given by VF on pages 8-13 of the RR are attorney argument, not evidence. Fourth, assuming *arguendo* that there might be some ambiguity regarding the scope of claim 38, it was VF’s burden to raise that issue in the Petition, which it did not do. VF’s new claim construction and related arguments are untimely, improper on rehearing, without merit, and as such do not implicate any alleged due process issues.

IV. CLAIMS 38 AND 39 ARE PATENTABLE OVER HALLEY + HAGGQUIST

The Board correctly concluded that “Petitioner has not met its burden of proof to demonstrate that the proposed combination [Halley + Haggquist] retains the claim 27 MVTR requirement...” FWD at 47.

VF’s primary contention is that the Board misunderstood VF’s argument, namely that Halley’s Black Pearls 2000 particles (“Halley Particles”) were allegedly combined with the encapsulant in Haggquist for the purposes of Ground 4. RR at 10-13. That is simply not the case. First, the Board *expressly* considered that argument. *See, e.g.*, FWD at 47 (“The Petition is silent as to whether encapsulating Halley’s Black Pearls 2000 with Haggquist’s encapsulants retains the MVTR required in claim 27 ... it is unclear that the conditions leading to the MVTRs in Table 3 of Halley would be applicable to the combination of Halley and Haggquist proposed by Petitioner.”). Second, as correctly identified by the Board on pages 45-46 of the FWD, Petitioner at the oral hearing argued swapping the Halley Particles with the Haggquist Particles, stating that “...the issue is when you switch out a different particle...” Tr. 25:18-22. The Board nonetheless addressed both arguments in the FWD, and VF does not identify any evidence that the Board allegedly overlooked. Rather, VF simply reiterates its prior arguments. *See, e.g.*, RR at 12. Rehearing should be denied pursuant to § 42.71(d).

VF also raises the same new claim construction issue it made for Ground 2, namely whether dependent claim 38 must include the MVTR limitation of claim 27,

and on that basis makes new obviousness arguments. RR at 12-13. As discuss above this is untimely, improper on rehearing, and is contrary to black-letter patent law. Rehearing should be denied. § 42.71(d).

V. VF HAS NOT SHOWN GOOD CAUSE TO SUBMIT NEW EVIDENCE ON REHEARING

VF's submission of new evidence (Ex. 1060) lacks good cause and is improper for a number of reasons. First, VF's submission is untimely. VF argues that good cause exists on the basis that its late evidence "refutes arguments made by Patent Owner only during its rebuttal time at the Oral Hearing..." regarding the MVTR of Dutta + Haggquist. RR at 14. That is incorrect. As pointed out above, Cocona specifically argued a lack of motivation to combine and correspondent expectation of success in the POR and in its expert reports.

Second, VF's alleged basis for submitting late evidence relies on a mischaracterization of the record. Dr. Haggquist's testimony in Ex. 1060 is not inconsistent with other testimony of record or with Cocona's arguments during the oral hearing. Cocona has consistently argued that "active particles" are "particles that adsorb or trap substances on their surface." *See, e.g.*, POPR at 1-12; POR at 6-14; Ex. 2001 at ¶¶8-14; Ex. 2005 at ¶¶22-36; Ex. 2006 at ¶¶59-67. Dr. Haggquist's discussion of "active particles" in his deposition and in Ex. 1060 all reflect Cocona's interpretation of "active particles" as surface-active particles that exclude super-hydrophilic, super-swelling, absorbent particles like Sephadex. *Id.* None of his

testimony, or Dr. Daniel's testimony, supports the notion of swapping what Cocona contends are non-active particles (e.g., Sephadex) with "active particles," let alone suggests that particle swapping between Dutta and Haggquist would result in the MVTR of claim 27. *See, e.g.*, Ex. 1001 at ¶¶8-11 (discussing the difference between the surface-active process of adsorption and the bulk process of absorption). Accordingly, VF has not shown good cause to submit Exhibit 1060 on rehearing and the Board should exercise its discretion to expunge Exhibit 1060.

VI. CONCLUSION

Cocona respectfully requests that, for the reasons given above, VF's Request for Rehearing should be denied, and VF's newly-submitted evidence should be expunged from the record.

Dated: August 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Patent Owner hereby certifies that the foregoing document was served electronically via email on August 6, 2019, on Petitioner's counsel as follows:

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