

Filed on behalf of VF Outdoor, LLC

By: Kathleen E. Ott, Esq., Reg. No. 64,038
Merchant & Gould P.C.
1801 California Street, Suite 3300
Denver, CO 80202
Main Telephone: (303) 357-1204
Main Facsimile: (612) 332-9081

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VF OUTDOOR, LLC,
Petitioner,

v.

COCONA, INC.,
Patent Owner.

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

**PETITIONER'S REPLY TO PATENT OWNERS'S OPPOSITION TO
REQUEST FOR REHEARING**

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Pursuant to the Board's July 24, 2019 Order ("Order" (Paper 53)), Petitioner VF Outdoor, LLC ("VF") respectfully submits its Reply to Patent Owner's (PO's) Opposition to Petitioner's Request for Rehearing ("Reply").

I. The Opposition Exceeds the Scope Authorized by the Board

In granting PO's request to file an opposition to VF' Request for Rehearing ("RR"), the Board noted that PO's request sought to only "address [VF's] arguments about claim construction with respect to Ground 2 and Ground 4, and to address the submission and characterization of new evidence submitted by [VF]." (Order at 2.) The Board granted PO's request. Roughly two pages (28 lines) of PO's ten page (196 line) Opposition address the alleged claim construction and new evidence issues. (Opp. (Paper 54) at 7:6-18, 8:18-10:7.) The remainder of PO's arguments exceed the scope of response authorized by the Board, and should be stricken from the Opposition. Specifically, VF requests that the Board disregard and expunge the following arguments:

- PO's unauthorized retread of its position on motivation and expectation of success from the PO's Response and PO's expert declarations, which fails to address, and, worse, crops out VF's RR argument concerning "reasonable expectation of success with respect to MVTR range" by omitting the critical phrase "with respect to the MVTR range." (*see* Opp. at 2:10-3:20, 6:20-7:5 (citing POR, Ex. 2005, Ex.2006);

- PO's unauthorized commentary on the *Aventis* case (*Id.* at 1:7-8.)
- PO's unauthorized arguments about pages 41-42 of the Petition and ¶¶171-172 of Dr. Oelker's Declaration (*Id.* at 4:9-6:15); and
- PO's unauthorized arguments regarding encapsulation of *Halley's* particles (*Id.* at 8:1-18).

II. Reply to Arguments Authorized in the Board's Order

PO contends that VF "improperly raises an issue of claim construction on the alleged basis that is it surprised to learn after trial that claim 38 ... must include all of the limitations of claim 27." (Opp. at 7, 8-9 (bridging para.)) PO misapprehends VF position, which instead relates to the Board's interpretation that "*Dutta* and *Haggquist* must 'retain[] the claim 27 requirement, despite (or because of) its encapsulation by the Haggquist composition,'" suggesting that an *encapsulated* particle must meet the MVTR limitation. (RR at 8-9, 13 (citing FWD at 47) (emphasis added).) The issue is not whether claim 38 includes the MVTR limitation of claim 27 – indeed, VF's claim 38 analysis incorporates claim 27 by reference (*see e.g.*, Pet. (Paper 1) at 31) – but that overlooked evidence, and not attorney argument alone, establishes a reasonable expectation of success in meeting the MVTR limitation, regardless of the presence (or later removal) of the encapsulant. (RR at 9-10 (*Dutta + Haggquist*), 12-13 (*Halley + Haggquist*).)

PO next contends that “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.” (Opp. at 9-10.) The Board concluded, however, that “Sephadex [as employed by *Dutta*] ... is also an adsorbent particle capable of trapping water.” (FWD at 27-28; *see also* POR at 7-8 (characterizing adsorption as a ‘surface-active’ process)). Given the Board’s holding, VF believes good cause exists to submit Dr. Haggquist’s admissions that “an active particle ... may be replaced by any other active particle to obtain a substantially similar result” and that “all other active particles are capable of improving the transmission of vapor through the water-proof cured base material,” which further evince a reasonable expectation of success in meeting the MVTR limitation of claim 27. (RR at 14-15 (citing Ex. 1060, ¶¶7-8.))

III. Reply to Unauthorized Arguments

If the Board considers the Section I unauthorized arguments, VF replies as follows without waiving its scope objections.

Regarding PO’s position that the “particle science of [*Dutta* and *Halley*] is fundamentally different from the science of the ’287 patent” (i.e., absorption vs. adsorption; *see* Opp. at 3), VF notes that the Board found Sephadex in *Dutta* and Black Pearls 2000 in *Halley* to be adsorbent particles capable of trapping water. (FWD at 27-28, 38-39; *see also* POR at 7-8 (characterizing adsorption as a

‘surface-active’ process).) According to Dr. Oelker, “a POSITA would [e.g.,] understand that the active particles disclosed in *Haggquist* would exhibit a performance in terms of [MVTR] that is similar to those disclosed in *Dutta*” (RR at 4 (citing Ex. 1005, ¶171; also citing ¶172 (the use of activated carbon in *Dutta* Example 1B would, like Sephadex, provide increased MVTR capacity).) Contrary to PO’s assertions (Opp. at 5-6), Dr. Oelker’s opinions were cited in a paragraph of the Petition that directly addressed a POSITA’s reasonable expectation of success in achieving the MVTR limitation of claim 27, after replacing Sephadex with activated carbon (from *Haggquist*) in the cured polyurethane solution in Example 1B of *Dutta*. (Pet. at 41-42, *see also* RR at 4-5.)

Regarding PO’s interpretation of *Aventis* (Opp. at 4), VF cited *Aventis* for its general holding that compounds having a sufficiently close relationship are expected to have similar properties. (RR at 5.) Application of this well-established general holding to purified compositions (over mixtures) does not render *Aventis* inapposite. Notably, PO fails to address the *Alza* case cited in the RR (*Id.*), which further supports VF’s position, i.e., if a particle traps or adsorbs water and is thus active, it is predictive of success with other particles that similarly trap or adsorb water. (*Id.*) Indeed, that is precisely Dr. Haggquist’s point as he stated in his deposition and declaration. *See supra* at 2-3.

Regarding PO's passing reference to arguments on pages 6-8 of the RR (Opp. at 6-7), the FWD makes no mention of VF's argument on the encapsulation of Sephadex itself. VF's alternate position on the obviousness of claims 38-89 was overlooked, and since the Board found Sephadex to be adsorptive (i.e., a "surface-active" particle (*supra*)), PO's unauthorized contention that it "makes no sense" to encapsulate the Sephadex used in *Dutta* Example 1B (or later reactivate it) simply has no merit.

Finally, VF respectfully reiterates that the Board overlooked clear evidence in the record establishing that even *Halley's* control composition (with no particles) meets the MVTR limitation of claim 27, such that *Halley's* Samples 1-3 (containing Black Pearls 2000) would meet that limitation whether they were encapsulated according to *Haggquist* or not. (RR at 11-12 (addressing Opp. at 8.) And if the Board relied upon VF's alleged argument during Oral Hearing as to "switch[ing] out different particles" in *Halley* to find claims 38-39 not unpatentable (Opp. at 8), then it misapprehended the obviousness contentions presented in Ground 4 of the Petition. (RR at 11-12 (explaining that VF's position relied upon the encapsulation of *Halley's* particles themselves.)

IV. CONCLUSION

The Board should disregard and expunge PO's unauthorized arguments and grant rehearing in view of the issues raised in the RR and addressed in this Reply.

Respectfully submitted,

MERCHANT & GOULD, P.C.

Date: August 20, 2019

By s/Andrew O. Larsen/

Andrew O. Larsen, Esq. Reg. No. 59,315

Kathleen E. Ott, Esq. Reg. No. 64,038

Peter A. Gergely, Esq. (*Pro Hac Vice*)

Counsel for Petitioner

Merchant & Gould P.C.

1801 California Street, Suite 3300

Denver, CO 80202

Main Telephone: (303) 357-1760

Main Facsimile: (612) 332-9081

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on August 20, 2019, **PETITIONER'S REPLY TO PATENT OWNERS'S OPPOSITION TO REQUEST FOR REHEARING** was served on the following counsel for Patent Owner:

Jason S. Jackson
(Jason.Jackson@KutakRock.com)
Kutak Rock LLP
Jacob Song
(Jacob.song@Kutakrock.com)
Kutak Rock LLP

Date: August 20, 2019

Respectfully submitted,

MERCHANT & GOULD P.C.

By: /s/ Andrew O. Larsen
Andrew O. Larsen, Esq. Reg. No. 59,315
Kathleen E. Ott, Esq. Reg. No. 64,038
Peter A. Gergely, Esq. (*Pro Hac Vice*)
Counsel for Petitioner
Merchant & Gould P.C.
1801 California Street, Suite 3300
Denver, CO 80202
Main Telephone: (303) 357-1760
Main Facsimile: (612) 332-9081