

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

R.J. REYNOLDS VAPOR COMPANY,

Petitioner,

FONTEM HOLDINGS 1 B.V.,

Patent Owner.

Case IPR2018-00631
Patent No. 9,339,062

Case IPR2018-00632
Patent No. 9,326,550

Case IPR2018-00633
Patent No. 9,326,551

Case IPR2018-00634
Patent No. 9,456,632

TELEPHONIC PTAB CALL

Thursday, August 2, 2018 - 3:31 p.m.

Reported by:

Elia E. Carrion, CSR, RPR, CRR

Job no: 22483

PRESENT:

PANEL: JUDGE GRACE KARAFFA OBERMANN
JUDGE KRISTINA KALAN
JUDGE KIMBERLY McGRAW
JUDGE JO-ANNE KOKOSKI
JUDGE DONNA PRAISS

1 PRESENT:

2
3 BRINKS GILSON & LIONE
4 455 North Cityfront Plaza Drive,
5 Suite 3600, NBC Tower
6 Chicago, Illinois 60611-5599
7 312.321.4221
8 rmallin@brinksgilson.com

9 MR. ROBERT S. MALLIN, ESQ.

10 appeared on behalf of the Petitioner;

11
12
13 PERKINS COIE LLP
14 1888 Century Park East, Suite 1700
15 Los Angeles, California 90067-1721
16 310.788.3271
17 JHamilton@perkinscoie.com

18 MR. JOSEPH P. HAMILTON, ESQ.

19 appeared on behalf of the Patent Owner.
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23
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1 JUDGE OBERMANN: I'm Judge Grace Obermann, and
2 I have on the phone with me Judge Kristina Kalan,
3 Kimberly McGraw, Jo-Anne Kokoski, and Donna Praiss.

4 Could we please start with the roll call. Do
5 we have counsel for Petitioner on the line?

6 MR. MALLIN: Yes. Good afternoon. This is
7 Robert Mallin.

8 JUDGE OBERMANN: Hello, Mr. Mallin. Anyone
9 with you?

10 MR. MALLIN: No, just myself.

11 JUDGE OBERMANN: Thank you.

12 Who do we have for Patent Owner?

13 MR. HAMILTON: Good afternoon, Your Honor.
14 Joseph Hamilton of Perkins Coie for Patent Owner
15 Fontem.

16 Also, I want to mention, there is a
17 court reporter on the line. And Patent Owner will
18 take the responsibility to submit a transcript as
19 soon as it's available.

20 JUDGE OBERMANN: I appreciate that,
21 Mr. Hamilton. Thank you.

22 We've called this conference call because
23 Petitioner has requested leave to file a reply brief
24 in each proceeding. And I will just start off by

1 saying that I thought that the email was a bit much
2 in terms of going a bit beyond showing good cause
3 and actually arguing their case.

4 So I would appreciate it if both counsel would
5 refrain from submitting this kind of legal-heavy or
6 fact-heavy correspondence by email. It really does
7 abuse the process here and it makes it difficult,
8 because once we read these things, we can't unread
9 them, and it becomes an issue because it almost
10 takes it out of our discretion to grant the reply
11 brief when you sort of file an unauthorized reply by
12 email.

13 So with that, I'll ask Petitioner to please
14 begin since you lodged the request.

15 MR. MALLIN: Yes. Your Honor, I want to
16 apologize for that. I won't do that again.

17 JUDGE OBERMANN: Okay. Thank you, Mr. Mallin,
18 yeah.

19 MR. MALLIN: May I get the name of the fifth
20 judge that you mentioned that I didn't get?

21 JUDGE OBERMANN: It's Donna Praiss,
22 P-R-A-I-S-S.

23 MR. MALLIN: P-R-A-I-S-S. Thank you very much.
24 Okay. I think I got everybody now.

1 Your Honor, Petitioner here seeks authorization
2 to file a reply in these four IPR proceedings with
3 respect to the Patent Owner's issue-preclusion
4 argument and their Section 314(a) argument.

5 With regard to the issue-preclusion argument,
6 Petitioner submits that good cause exists because
7 Petitioner could not have anticipated this argument
8 because issue preclusion does not attach to a
9 preliminary institution decision from the Board.

10 As the Supreme Court made clear in In Re
11 Cuozzo, the Patent Owner's decision to initiate
12 inter partes review is preliminary and not final.
13 That's at 136 S.Ct. 21 --

14 JUDGE OBERMANN: Mr. Mallin, I think you're
15 getting into the merits.

16 MR. MALLIN: Oh, okay. I apologize.

17 JUDGE OBERMANN: That's okay.

18 MR. MALLIN: So we -- we could not have -- the
19 point is, is we could not have anticipated this
20 argument because we believe that issue preclusion
21 simply does not apply to an instant of preliminary
22 institution decision from the Board.

23 By the same token on the 3 -- moving on to the
24 314(a) argument, again, this is a situation where we

1 did not anticipate this argument because this is the
2 first --

3 JUDGE OBERMANN: Can I just ask you a question?
4 I'm sorry.

5 MR. MALLIN: Yes.

6 JUDGE OBERMANN: Because I'm less interested in
7 the merits of what you're going to say on the merits
8 of what would be in the reply.

9 What I want to know is why this is such an
10 unusual case that we should authorize a reply?
11 Because, you know, this happens all the time. Our
12 rules are set up so that a Petitioner moves first
13 and at the preliminary stage, we have a preliminary
14 response.

15 And where are you getting this idea that if an
16 argument is made that's not anticipated in the
17 preliminary response, you should be able to get a
18 reply? Why is that good cause? Why is it such an
19 extraordinary case that you should go outside of
20 what our rules provide for briefing at the
21 preliminary stage? So that's what I want to stress
22 today.

23 MR. MALLIN: And the reason, Your Honor, is --
24 is because it is something that we could not have

1 anticipated here. And, you know, we -- we
2 anticipated certain arguments, such as 325(d), and
3 we addressed all of those in here. Here, this is
4 something that was outside the realm of something we
5 would have anticipated.

6 In this case, if issue preclusion is in fact
7 granted here, it would be extraordinary in that it
8 would create a basis for, perhaps, denying this IPR
9 petition. And for that reason, it is an
10 extraordinary situation, Your Honor.

11 JUDGE OBERMANN: Okay. Do you have anything
12 else to add, Mr. Mallin, before I turn it over to
13 your friend Mr. Hamilton?

14 MR. MALLIN: I do not.

15 JUDGE OBERMANN: Okay. Thank you very much.

16 Mr. Hamilton, would you like to respond?

17 MR. HAMILTON: Sure. Your Honor, two reasons
18 for the briefing is not required: First, the
19 Board's fully capable of evaluating the cases and
20 the Board has the cases, so further briefing on
21 those cases is not necessary.

22 Second --

23 JUDGE OBERMANN: May I ask you a question? I'm
24 sorry to interrupt. Are you saying further briefing

1 isn't necessary because we have this email in front
2 of us?

3 MR. HAMILTON: Well, you have the cases. And,
4 frankly, we don't need to respond to that email.
5 So, you know, I don't want to waste the Board's time
6 with additional papers, but -- that just aren't
7 necessary.

8 JUDGE OBERMANN: But you wouldn't feel a need
9 to respond to this -- if we were to put this email
10 into the record, you would have no need to respond
11 to it?

12 MR. HAMILTON: I -- I would be happy to address
13 the three cases if Your Honor would like me to --
14 excuse me -- four cases, but -- I don't --
15 I don't --

16 JUDGE OBERMANN: I'm just wondering whether or
17 not --

18 MR. HAMILTON: I don't believe that's
19 necessary.

20 JUDGE OBERMANN: You know, like I said, now
21 that we've read it, you know, submitted --

22 MR. HAMILTON: It -- it --

23 JUDGE OBERMANN: -- this unauthorized reply,
24 does the Patent Owner feel that they need to respond

1 to this?

2 MR. HAMILTON: No. No, Your Honor.

3 JUDGE OBERMANN: So you don't need a surreply
4 if we were to grant a reply that would be nothing
5 more than the body of this email?

6 MR. HAMILTON: That's correct.

7 JUDGE OBERMANN: Okay. Anything else?

8 MR. HAMILTON: Sure. The second point:
9 Petitioner had an opportunity to address this prior
10 Board decision in its petition, and Petitioner
11 expressly identified the Board decision in the
12 petition --

13 JUDGE OBERMANN: Which Board?

14 MR. HAMILTON: The Board decision in
15 IPR2016-1270. And if you'd like, Your Honor, I can
16 orient you to -- to the issue just relatively
17 quickly.

18 JUDGE OBERMANN: Which case is that? What's
19 the name of the case?

20 MR. HAMILTON: That should be -- let me -- let
21 me get it. But it's -- it's -- excuse me.

22 JUDGE OBERMANN: Is it an email?

23 MR. HAMILTON: No, no, no. This is -- this
24 is -- well, so let me back up, and I'll just -- I'll

1 orient you to what case I'm talking about, and then
2 we can talk about it.

3 So the petition states that -- and I'm going to
4 quote from the petition -- begin quotes, the
5 intimate contact embodiment forms the basis for the
6 unpatentability analysis in this petition,
7 end quote.

8 JUDGE OBERMANN: Is this in all four cases?

9 MR. HAMILTON: That's at Petition 22.

10 JUDGE OBERMANN: This is in all four cases?

11 MR. HAMILTON: It's in all four cases. I'm
12 talking about the lead case here, 631, that
13 petition -- that same statement is in all the cases
14 that -- all the cases rely on the same issue, the
15 same prior art reference, and this specific
16 embodiment in the reference.

17 Petitioner argued that exact same reference and
18 embodiment, this intimate contact embodiment, in
19 another IPR. And that is --

20 JUDGE OBERMANN: What is that?

21 MR. HAMILTON: Pardon me?

22 JUDGE OBERMANN: It was a different patent?

23 MR. HAMILTON: That's right. IPR2016-01270.

24 JUDGE OBERMANN: And all we have is a DI there;

1 right?

2 MR. HAMILTON: That's right. And that was
3 given to you at Exhibit 2070.

4 JUDGE OBERMANN: All right.

5 MR. HAMILTON: And the relevant portion,
6 pages 12 and 13. And then there was a request for
7 rehearing, Exhibit 2016 at pages 4 and 5.

8 JUDGE OBERMANN: All right. Anything else?

9 MR. HAMILTON: So Patent Owner's brief explains
10 the reasons why that petition should be dismissed
11 based on -- by this petition should be dismissed
12 based on a -- excuse me -- why all four of these
13 petitions -- I forget that we're talking about four
14 here.

15 And patent -- excuse me -- Petitioner in the
16 petition expressly identified that decision, and
17 that's at page 15 of the petition in IPR ending in
18 631.

19 JUDGE OBERMANN: So I don't understand. Like
20 what we're really looking at here is whether this
21 case presents such a -- whether having raised the
22 issue of 314, an issue preclusion, whether those
23 issues could have been anticipated and should have
24 been raised in the petition? Or whether it's a good

1 reason to allow Petitioner to submit a short
2 reply brief that basically raises these -- I guess
3 the sense of the -- what's been raised in the
4 preliminary response?

5 So without getting into, you know, the merits
6 of issue preclusion and the merits of general
7 applicability, I'd like to hear from you,
8 Mr. Hamilton -- you know, they've already sent us
9 the email. And I'm hearing you say that you don't
10 need a surreply, as we allow a very short
11 reply brief that would simply basically give us
12 what's in the email. Is that right?

13 MR. HAMILTON: If it's the same -- and the
14 point that I was raising with respect to the
15 petition, and specifically page 15 of the petition
16 in IPR2018-00631, is Petitioner cited this prior
17 Board decision and had an opportunity to address it
18 and did not.

19 JUDGE OBERMANN: Well, I'm just --

20 MR. HAMILTON: So this isn't a surprise for
21 Petitioner in terms of --

22 JUDGE OBERMANN: Well, that doesn't mean --
23 that doesn't mean that it's not surprising that you
24 would assert the issue preclusion based on a

1 preliminary decision to institute.

2 Let me just -- let me --

3 MR. HAMILTON: So why don't we just cut to the
4 chase. In terms of if there's a reply that says
5 exactly what's in the email, Patent Owner has no
6 objection to that. We don't need to respond to it.

7 JUDGE OBERMANN: Okay. And you just referred
8 me to the 631 IPR, page 15?

9 MR. HAMILTON: That's right. That's where
10 Petitioner addresses the prior decision.

11 JUDGE OBERMANN: Okay. So you're talking about
12 their citation to IPR 801?

13 MR. HAMILTON: IPR 801?

14 JUDGE OBERMANN: I'm looking at page 15.

15 MR. HAMILTON: Okay. So page 15 of the
16 petition for IPR2018-00631?

17 JUDGE OBERMANN: Yeah. Oh, I see. Are we
18 looking at -- which particular sentence are you
19 looking at here on page 15?

20 MR. HAMILTON: So the first full paragraph on
21 page 15, it's at the bottom: Finally, the Board's
22 determination in IPR2016-01270 concerning
23 U.S. Patent No. 8,893,726 should not preclude
24 institution. Petitioner recognized the decision and

1 its effect on precluding institution had an
2 opportunity to address it. They don't need the
3 further opportunity to address it now.

4 JUDGE OBERMANN: Okay. If you're done, I'm
5 going to let Mr. Mallin address that point.

6 MR. MALLIN: Yes. Just a couple points,
7 Your Honor. First, this wasn't addressing issue
8 preclusion, rather this was addressing a 325(d) type
9 argument that they were going to make, that we
10 anticipated them making. And we were explaining why
11 2016-01270, why that IPR decision would not qualify
12 as a 325(d) argument in their -- for a lot of
13 different reasons, as explained on pages 15 and 16
14 and then later again on pages 22 through like 25,
15 including citations of cases that didn't address
16 issue preclusion, which is a different issue that
17 they're -- that's being raised in the Patent Owner's
18 preliminary response, Your Honor.

19 JUDGE OBERMANN: Okay. Unless either you have
20 anything to add, I'm going to put you on hold for
21 just a brief moment so I can confer with my
22 panelists. Anything from Mr. Hamilton?

23 MR. HAMILTON: Just want to confirm, you know,
24 that we don't object to the email that -- what is in

1 the email being submitted to the Board. If there's
2 anything else, then we may have an objection, may
3 want to reply to it.

4 JUDGE OBERMANN: Okay. Appreciate that.
5 How about from you, Mr. Mallin?

6 MR. MALLIN: Nothing else, Your Honor,
7 right now.

8 JUDGE OBERMANN: Okay. Thank you very much.
9 I'm going to place you on a brief hold.

10 (Panel confers.)

11 JUDGE OBERMANN: Counsel, Mr. Mallin, are you
12 still there?

13 MR. MALLIN: Yes, Your Honor.

14 JUDGE OBERMANN: Mr. Hamilton, are you still on
15 the line?

16 MR. HAMILTON: I am, Your Honor.

17 JUDGE OBERMANN: Thank you. The panel has
18 conferred, and what we're going to do is issue an
19 Order that confirms that we prefer that the parties
20 not submit legal arguments by email. And as an
21 attachment to that Order, we're going to include the
22 text of the email and will indicate the Patent Owner
23 did not oppose its entry.

24 And I appreciate, Mr. Hamilton, your offer to

1 have the transcript filed as an exhibit when it's
2 ready.

3 With that, I will -- since we have everyone on
4 the phone, I will ask if anyone has any other issues
5 they'd like to discuss while we have the panel
6 together? I'll start with Mr. Mallin.

7 MR. MALLIN: No, Your Honor, nothing with
8 respect to these IPRs. Thank you.

9 JUDGE OBERMANN: Thank you. Mr. Hamilton?

10 MR. HAMILTON: No, Your Honor. Thank you.

11 JUDGE OBERMANN: Thank you very much, Counsel.
12 An Order will issue in due course.

13 MR. MALLIN: Thank you.

14 JUDGE OBERMANN: This is adjourned. Thank you.
15 Bye-bye.

16 MR. MALLIN: Bye now.

17 (WHICH WERE ALL THE PROCEEDINGS HAD
18 IN THE ABOVE-ENTITLED CAUSE ON THIS
19 DATE.)

1 STATE OF ILLINOIS)

2) SS:

3 COUNTY OF C O O K)

4
5 I, ELIA E. CARRIÓN, a Certified Shorthand
6 Reporter of the State of Illinois, do hereby certify
7 that I reported in shorthand the proceedings had at
8 the PTAB CALL aforesaid, and that the foregoing is a
9 true, complete, and correct transcript of the
10 proceedings of said PTAB CALL as appears from my
11 stenographic notes so taken and transcribed under my
12 personal direction.

13
14 IN WITNESS WHEREOF, I do hereunto set my
15 hand at Chicago, Illinois, this 3rd day of
16 August, 2018.

17
18
19 Certified Shorthand Reporter

20
21 C.S.R. Certificate No. 084.004641
22
23
24

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