

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CONOPCO, INC. dba UNILEVER
Petitioner

v.

THE PROCTER & GAMBLE COMPANY
Patent Owner

Case IPR2013-00510
Patent 6,649,155 B1

Before LORA M. GREEN, GRACE KARAFFA OBERMANN, and
RAMA G. ELLURU, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

On March 14, 2014, Conopco Inc., dba Unilever (“Petitioner”) filed a request for rehearing (Paper 10, “Rehearing Req.”) of our decision denying *inter partes* review (Paper 9, “Dec.”) of claim 19 of U.S. Patent No. 6,649,155 B1 (Ex. 1001, “the ’155 patent”). The Petition (Paper 2, “Pet.”) challenged claims 1-23 of the ’155 patent. We determined that the information presented does not show sufficiently that there is a reasonable likelihood that Petitioner would prevail at trial with respect to at least one claim of the ’155 patent. Accordingly, we denied the Petition and declined to institute trial on any claim.

Petitioner’s request for rehearing is limited to our decision declining to institute trial with respect to claim 19 of the ’155 patent. For the reasons that follow, we deny the request for rehearing.

ANALYSIS

When considering a request for rehearing of a decision on a petition, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P’ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315-16 (Fed. Cir. 2000). The party requesting rehearing bears the burden of showing that the decision should be modified, and “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d).

Petitioner seeks rehearing of the Board’s denial of *inter partes* review of claim 19 on the following grounds: (1) inherent anticipation or obviousness over

Bowser (US 5,723,112 (Mar. 3, 1998) (Ex. 1009)); (2) obviousness over Bowser and Cardin (US 5,104,645 (Apr. 14, 1992) (Ex. 1014)); and (3) obviousness over Bowser, Schwen (WO 95/03319 (Feb. 2, 1995) (Ex. 1015), and Gibson (US 5,015,470 (May 14, 1991) (Ex. 1030)). Rehearing Req. 1. Petitioner contends that legal errors made in connection with those grounds of unpatentability resulted in an abuse of discretion. Rehearing Req., 2.

Petitioner does not address those grounds individually, but argues them as a group in the request for rehearing. Rehearing Req. 3-14. The crux of Petitioner's rehearing argument is that the Board overlooked, or applied an incorrect legal standard to, evidence that Bowser inherently describes a cationic guar derivative having a molecular weight within the range specified in claim 19. *Id.* We address that argument below.

Claim 19 specifies, among other things, a cationic guar derivative having “a molecular weight from about 100,000 to about 400,000.” Bowser identifies JAGUAR™ C15 as a cationic guar derivative suitable for use in shampoo compositions. Pet. 12, 14; *see* Ex. 1009 5:17. We determined in our decision that the information presented does not show sufficiently that Bowser's reference to JAGUAR™ C15 inherently describes a cationic guar derivative having a molecular weight that falls within the range required by claim 19. Dec. 7-8.

Petitioner acknowledges that Bowser “is facially silent as to whether the molecular weight of the disclosed cationic guar . . . falls within the recited range of molecular weights.” Rehearing Req. 1. Petitioner contends, however, that the Board “overlooks the only evidence of record—Jaguar™ C15's molecular weight falls within the claimed range.” Rehearing Req. 2-3 (citing Pet. 14-15, 23; Ex. 1012, 7:12-37 (Table 2, fn. 4); Ex. 1003 ¶ 37; Ex. 2001, 9:58-61; Patent Owner's Preliminary Response (Paper 7), 24-25). In particular, the Petition rests on

evidence that a different patent, issued to Bartolo¹, establishes that Bowser discloses a cationic guar derivative meeting the molecular weight limitation of claim 19. Pet. 14-15, 23; Ex. 1012, 7:12-37 (Table 2, fn. 4).

We did not overlook the evidence raised in the Petition. We considered it, but deemed it insufficient to support a finding that Bowser inherently discloses a cationic guar derivative having a molecular weight that satisfies claim 19. Dec. 7-8. Petitioner suggests that the Board erred in failing to identify a “scintilla” of evidence that the molecular weight of the cationic guar derivative described in Bartolo (filed on December 30, 1991) differs from the molecular weight of the cationic guar derivative described in Bowser (filed on July 9, 1996). Rehearing Req. 3-5. The burden never shifts from Petitioner, however, to establish that Bowser inherently discloses a cationic guar derivative having the required molecular weight. On that point, Petitioner failed to identify evidence that “make[s] clear that the missing descriptive matter is necessarily present in the thing described in the reference.” Dec. 7 (citation omitted).

For reasons stated in our decision, the evidence submitted with the Petition does not establish sufficiently that the product described in Bowser (in 1991) under the JAGUAR™ C15 trade name necessarily exhibits the same molecular weight as the product described in Bartolo (in 1996). *Id.* at 7-8. Petitioner directs us to declaration testimony that does not make out that connection. Rehearing Req. 8-9 (citing Declaration of Mr. Arun Nandagiri (Ex. 1003 ¶ 37)). Bare attorney argument that “it is perfectly reasonable to conclude that JAGUAR™ C15 is the same product, with the same molecular weight, in both Bowser and Bartolo” (Rehearing Req. 11), falls short of establishing an inherent disclosure, which “is

¹ US 5,202,048 (Apr. 13, 1993) (Ex. 1012).

not proven ‘by probabilities or possibilities.’” Dec. 7 (citing *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999)). Furthermore, in reaching our decision, we applied the correct legal standard—that is, we determined that the information presented is insufficient to establish a reasonable likelihood that Petitioner would prevail at trial with respect to claim 19. Dec. 2, 10.

On this record, Petitioner does not show that denying *inter partes* review of claim 19 represents an abuse of discretion.

CONCLUSION

Petitioner’s request for rehearing is *denied*.

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