

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NESTLÉ PURINA PETCARE COMPANY,
Petitioner,

v.

OIL-DRI CORPORATION OF AMERICA,
Patent Owner.

Case IPR2015-00737
Patent 5,975,019

Before CARL M. DEFRANCO JR., JO-ANNE M. KOKOSKI, and
KRISTINA M. KALAN, *Administrative Patent Judges*.

KALAN, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Nestlé Purina PetCare Company (“Petitioner”) filed a Request for Rehearing (Paper 38, “Request” or “Req.”) of our Final Written Decision (Paper 37, “Final Written Decision” or “Dec.”) holding that claims 1–13, 30, and 32 of U.S. Patent No. 5,975,019 (Ex. 1001, “the ’019 patent”) had not been proven unpatentable. For the reasons that follow, Petitioner’s request for rehearing is denied.

II. THE REQUEST FOR REHEARING

In pertinent part, 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The 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.

Thus, a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence.

Petitioner seeks reconsideration based on the following principal contentions:

- (1) the Board erred in overlooking that mean particle size (“MPS”) is disclosed and readily ascertainable from the bins disclosed in both Hughes and Pattengill;
- (2) the Board misapprehended Hughes’s teaching of particle sizes and “bridging”;
- (3) the Board overlooked overwhelming evidence that it would have been obvious to combine Hughes and Pattengill;
- (4) the Board misapprehended Pattengill’s identification of the clays in “Tidy Cat with Baking Soda” and “Scoop Fresh”; and

(5) the Board erred in discounting Mr. Greene’s obviousness testimony.

Req. i; 1–15. We have reviewed Petitioner’s Request and carefully considered all the arguments presented, including those not addressed specifically in this Decision. For the following reasons, we are not persuaded that the Board misapprehended or overlooked arguments or evidence with respect to the contentions asserted by Petitioner.

III. DISCUSSION

(1) MPS

Petitioner characterizes as a “misapprehension” the Board’s decision that MPS “is neither disclosed, nor readily ascertainable” from either Hughes or Pattengill. Req. 1–2 (citing Dec. 11, 15). More particularly, Petitioner argues that both Hughes and Pattengill disclose groupings of bin sizes, not simply highest and lowest values, or theoretical values. *Id.* at 2. Petitioner further argues that Patent Owner’s experts conceded two mesh bins of group sizes yield MPS and bell shaped curves. *Id.* at 2–3.

We disagree with Petitioner’s contentions. In our Final Written Decision, we determined, after a review of the evidence, that Petitioner’s calculations in the Petition (Paper 1, “Pet.”) were theoretical; no experiments or further measurements supported Petitioner’s assertion that Pattengill’s or Hughes’s clays have any specific MPS values, or that those values, even if they were calculated or calculable, meet the MPS limitations of claim 1. Dec. 11, 15. Neither party disputed our construction of the term “mean particle size” to mean that the average of a representative sample of particle sizes or groupings of particle sizes is needed to determine the mean particle size. *Id.* at 5. We determined, after reviewing the evidence and arguments,

that Petitioner did not establish that a simple average of the highest and lowest values represents a mean particle size when the particle size distribution is unknown, and may be non-uniform. *Id.* at 11, 15–16.

Petitioner’s Request reiterates a number of the arguments presented in the Petition and the Reply regarding MPS, which we have already considered. Mere disagreement with our decision is not a proper basis for a request for rehearing. Additionally, in its Request, Petitioner presents numerous arguments that were not raised earlier, in an effort to persuade us that we should decide in its favor. Req. 2–4. We need not determine whether these arguments would have been persuasive if previously presented, because they were not so presented. These arguments are, therefore, not timely in a request for rehearing pursuant to 37 C.F.R. § 42.71(d).

To the extent the Request does not identify where its arguments were previously presented, we need not address those arguments as we could not have overlooked or misapprehended arguments or evidence that were not previously presented. Where the Request does address the place where each matter was previously addressed, we have considered those arguments and do not perceive them as having been overlooked or misapprehended.

(2) “*Bridging*”

As to its second contention, Petitioner argues that the Board overlooked that Hughes teaches (i) clumping litter comprised of smaller average size water-swellable sodium bentonite (“NaB”) and larger non-swelling calcium bentonite (“CaB”) particles; and (ii) the import of using smaller water-swellable NaB particles to bridge with larger CaB particles. Req. 5. More particularly, Petitioner argues that Hughes expressly teaches

employing smaller NaB particles. *Id.* Petitioner also argues that the Board erred in finding that Hughes fails to distinguish NaB and CaB. *Id.* Finally, Petitioner argues that the Board misconstrued Hughes’s “bridging.” *Id.* at 7.

Petitioner’s argument that Hughes teaches employing smaller NaB particles is not directed to the inquiry at hand, which was whether Hughes taught the MPS limitations of claim 1, not whether Hughes taught smaller “average-size” NaB particles. Moreover, as noted in our Final Written Decision, Hughes states that “the sodium *and* calcium bentonite clays should be present in the composition in particle sizes across substantially the entire range of about 600μ to about 3350μ.” Dec. 14 (quoting Ex. 1006, 7:19–26).

Petitioner’s arguments that the Board erred in finding that Hughes fails to distinguish NaB and CaB, and that we misconstrued Hughes’s “bridging” passage, are intertwined. Petitioner argued in its Petition that the “bridging” passage in Hughes “explains the benefit of and preference for smaller sizes of sodium bentonite particles” (Pet. 17), and much of the briefing and oral argument focused on this issue. We discussed the interpretation of Hughes’s “bridging” passage in our Final Written Decision, and set forth the reasons we found that the teachings of Hughes itself did not support Petitioner’s interpretation, notwithstanding Mr. Hughes’s testimony. Dec. 12–14. Namely, after reviewing the evidence before us, we found that “[w]ithout an explicit statement that the passage is referring to one or the other of sodium bentonite or calcium bentonite, Hughes does not express a clear preference for a smaller diameter sodium bentonite particle.” *Id.* at 14. Rather, Hughes’s statement in the “bridging” passage that the sodium *and* calcium bentonite clays should be present in particle sizes across

substantially the entire range of about 600 μ to about 3350 μ (Ex. 1006, 7:19–26) was indication to the contrary. *Id.*

(3) Obvious to Combine

With regard to its third contention, Petitioner argues that the Board neglected “mounds of evidence” in the Petition in determining that Petitioner did not establish that it would have been obvious to combine Hughes and Pattengill. Req. 7–8. Petitioner presents a table detailing “representative record evidence of the interrelated teachings.” *Id.* at 9–10.

We disagree with Petitioner. As detailed in our Final Written Decision, the Petition’s lack of a rationale to combine was instrumental in our determination that Petitioner had not met its burden to demonstrate that the challenged claims were unpatentable. Dec. 19–21. Providing additional evidence of “interrelationship” in the Request is not only untimely, but also insufficient to demonstrate an articulated reasoning with some rational underpinning to support a legal conclusion of obviousness over the combination of Hughes and Pattengill. *Id.* at 19–20. We reviewed all the evidence before us, and determined that an insufficient case of obviousness had been made by Petitioner. *Id.* at 19–21. None of Petitioner’s arguments in its Request persuade us that we misapprehended or overlooked any of Petitioner’s obviousness arguments.

(4) Identification of Clays

Petitioner contends that the Board misconstrued or overlooked Pattengill’s identification of the clays used in its Mixture 11. Req. 11. Petitioner also argues that the Board improperly rejected Mr. Hughes’s and Mr. Greene’s testimony regarding Pattengill’s ingredients and a person of ordinary skill in the art’s interpretation of Pattengill. *Id.* at 12.

As explained in our Final Written Decision, we examined the identification of the clays used in Pattengill’s Mixture 11, and found that the identification was inadequate to support Petitioner’s assertions. Dec. 16–17. We noted that Pattengill identifies the major components of “Tidy Cat w/baking soda” as “Not Available,” and that Pattengill itself did not go into detail regarding what is meant by “clay” (with respect to Tidy Cat with Baking Soda) or “clumping litter” (with respect to Scoop Fresh) in its identification. *Id.* at 7, 16–17. We further determined that neither Mr. Hughes nor Mr. Greene sufficiently supported their assertions as to the composition of Mixture 11. *Id.* at 17–18. Rather, we noted Patent Owner’s assertion that the ingredients in Tidy Cat with Baking Soda and Scoop Fresh were not available on the product packaging and not otherwise readily available to the public or persons of ordinary skill in the art. *Id.* at 16. Given that we considered the evidence in the Pattengill reference itself and in the testimony, we are unpersuaded that we misconstrued or overlooked any portion of the same.

(5) Expert Testimony

Petitioner argues that the Board overlooked evidence in Petitioner’s Reply and Mr. Greene’s declaration “establishing that it would have been obvious to combine Hughes and Pattengill.” Req. 14. Petitioner characterizes its arguments and Mr. Greene’s declaration as responding to “entirely new obviousness arguments first propounded in [Patent Owner’s] Response.” *Id.* at 15.

It is Petitioner, not Patent Owner, that bears the burden of establishing that the combined teachings of Hughes and Pattengill disclose or suggest all of the limitations of the challenged claims. Thus, the Petition, rather than

any reply or responsive evidence, should “establish[] that it would have been obvious to combine Hughes and Pattengill.” Req. 14. Patent Owner’s arguments in its Response cannot be characterized as “obviousness arguments,” as Petitioner does, because it is not Patent Owner’s obligation to make obviousness arguments. Patent Owner’s arguments in its Response properly responded to the obviousness arguments, or lack thereof, in the Petition. As stated in the Final Written Decision, consideration of Petitioner’s new arguments presented in the Reply and evidence presented in the Greene Declaration in support thereof would be unfair to Patent Owner. Dec. 24. We are not persuaded by Petitioner’s arguments that our position is erroneous.

IV. CONCLUSION

We have reviewed and considered the arguments in Petitioner’s request for rehearing and conclude that Petitioner has not carried its burden of demonstrating that the Board misapprehended or overlooked any matters in rendering the Final Written Decision. 37 C.F.R. § 42.71(d). Rather, Petitioner uses its Request for Rehearing as an opportunity to reargue positions with which we disagreed in our Final Written Decision. Merely disagreeing with our analysis or conclusions does not serve as a proper basis for a request for rehearing. Petitioner also uses its Request to raise matters without adequately demonstrating where those matters previously were raised. Thus, Petitioner’s challenge does not meet the standard set forth for a request for rehearing.

The request for rehearing is *denied*.

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