

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MERIAL, INC.,
Petitioner,

v.

SERGEANT'S PET CARE PRODUCTS, INC.,
Patent Owner.

Case IPR2016-00798
Patent 8,614,244 B2

Before TONI R. SCHEINER, SHERIDAN K. SNEDDEN, and
SUSAN L. C. MITCHELL, *Administrative Patent Judges*.

MITCHELL, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner Merial, Inc. (“Petitioner”) filed a Request for Rehearing of the Decision Denying Institution of *Inter Partes* Review (Paper 11, “Dec.”) of claims 1–22 of U.S. Patent No. 8,614,244 B2 (Ex. 1001, “the ’244 patent”). Paper 12, “Req. Reh’g.” For the reasons that follow, the Request for Rehearing is *denied*.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters we misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. *Id.*

When reconsidering a decision on institution, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be determined if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold Partnership v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

III. ANALYSIS

Petitioner asserts that we misapprehended the teachings of Sirinyan¹ and Garden² in light of the declaratory evidence from Dr. Clark. Req. Reh'g. 1. Specifically, Petitioner asserts that the Decision on Institution “makes **no** mention of how the Clark Declaration relates to how a POSA would understand the prior art and how it relates to the ‘key limitation of ‘3 to 16% (w/w) cyphenothrin’ (or any narrower range therein) (‘key limitation’) combined with fipronil.” Req. Reh’g. 4 (citing Dec. 11–12). Petitioner concludes that “[t]he alleged ‘invention’ is merely taking a prior art spot-on composition of fipronil and cyphenothrin and lowering the cyphenothrin concentration but maintaining the very same dosage consistent with known cyphenothrin compositions with predictable, expected results.” *Id.* at 6.

Petitioner asserts that when the art is viewed as a whole, it would suggest the claimed invention because of the following: (1) a “POSA would be motivated to use as low of an amount of cyphenothrin possible because of the known toxicity associated with this compound,” *id.* at 7–8 (citing Ex. 1002 ¶¶ 55, 89); (2) it was known that fipronil works well with cyphenothrin, *id.* at 9–10; and (3) “a POSA would have [had] a reasonable chance for success that in combination with fipronil, a lower concentration of cyphenothrin would be effective” because the effects of fipronil and

¹ Kirkor Sirinyan et al., PCT App. WO 2008/080542 A2, published Jul. 10, 2008 (Ex. 1004, “Sirinyan”). The Sirinyan reference is a German-language reference. Petitioner provided a certified English-language translation (Ex. 1005).

² Alan R. Garden, U.S. Patent No. 4,902,510, issued Feb. 20, 1990 (Ex. 1006, “Garden”).

cyphenothrin are additive and “Garden shows that cyphenothrin formulations containing 3 to 16% (w/w) cyphenothrin were well known and efficacious, and Sirinyan has general teachings that include amounts lower than the preferred 30 to 60% range of cyphenothrin,” *id.* at 11–12.

We are not persuaded by Petitioner’s contentions that we misapprehended or overlooked its arguments of what the art teaches as a whole in light of Dr. Clark’s testimony. In our Decision on Institution, we took issue with Petitioner’s assertions that Garden and Sirinyan suggest the claimed amount of cyphenothrin. Dec. 12–13. Petitioner’s assertions concerning the teachings of Garden and Sirinyan in light of Dr. Clark’s testimony do not convince us otherwise.

As previously stated, Petitioner asserts that “Garden shows that cyphenothrin formulations containing 3 to 16% (w/w) cyphenothrin were well known and efficacious, and Sirinyan has general teachings that include amounts lower than the preferred 30 to 60% range of cyphenothrin.” Req. Reh’g. 12 (citing Pet. 16–17). Petitioner relies on Dr. Clark’s testimony to support these conclusions with regard to the teachings of Garden and Sirinyan. *See* Pet. 14–19.

Specifically, Dr. Clark testifies that one of skill in the art would not be limited to the 30 to 60% w/w preferred range for cyphenothrin expressly disclosed in Sirinyan because

a POSA would understand that cyphenothrin is an α -cyanopyrethroid that exhibits Type I/II symptoms. As such, given this property of inducing Type II symptoms as well as Type I symptoms, a POSA would reasonably expect that cyphenothrin would work effectively at the lower levels as well, just as the other Type II α -cyanopyrethroids disclosed in the ’542 publication [Sirinyan].

Ex. 1002 ¶ 65. Dr. Clark also testifies with regard to Garden that, although the examples discuss the efficacy of α -cypermethrin, not cyphenothrin, at a low concentration, Dr. Clark concludes that “in view of the overall teachings, a POSA would have expected other α -cyanopyrethroids, including cyphenothrin, to be effective in the same ranges” and notes that cyphenothrin is included in Garden’s list of α -cyanopyrethroids. Ex. 1002 ¶ 70.

We considered this evidence of Dr. Clark’s testimony concerning the teachings of Sirinyan and Garden in making our Decision on Institution and found it insufficient to institute an *inter partes* proceeding. See Dec. 9–14. First, besides citing to references that indicate that cyphenothrin may exhibit Type I and Type II characteristics, Dr. Clark offers no other evidence that one of skill in the art would apply such knowledge to the teachings of Sirinyan to reasonably expect that the lower concentration range for α -cyanopyrethroids disclosed generally in Sirinyan would be effective for cyphenothrin. See Ex. 1002 ¶¶ 51, 60–67; 37 C.F.R. 42.65(a). We also noted in our Decision on Institution that “Sirinyan describes how not all pyrethroids are found to work with fipronil at the same concentrations,” which would indicate that a lower concentration than that explicitly provided for cyphenothrin may not be effective. Dec. 12. We also noted Sirinyan’s specifically disclosed lower concentration range for α -cyanopyrethroids specifically included α -cypermethrin, which is consistent with Garden’s examples using α -cypermethrin, not cyphenothrin, effectively at lower

concentrations. *Id.* at 12–13. We did not misapprehend or overlook Petitioner’s evidence; we simply found it insufficient.³

For the foregoing reasons, Petitioner has not demonstrated that we abused our discretion in denying institution of an *inter partes* proceeding in this case. Consequently, Petitioner’s Request for Rehearing is *denied*.

³ Petitioner also cites to an EPA Review as further support suggesting the claimed concentration of cyphenothrin by teaching an effective cyphenothrin dosage as required by claim 9. Req. Reh’g. 13, 13 n.3. We do not address the teachings of the EPA Review here as it was not part of the ground asserted against claims 1–7 and 10–22. See Req. Reh’g. 3, Pet. 8.

IPR2016-00798
Patent 8,614,244 B2

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