

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HENNY PENNY CORPORATION,
Petitioner,

v.

FRYMASTER L.L.C.,
Patent Owner.

Case IPR2016-01435
Patent 8,497,691 B2

Before BART A. GERSTENBLITH, DAVID C. McKONE, and
ROBERT J. WEINSCHENK, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge*
GERSTENBLITH.

Opinion dissenting-in-part filed by *Administrative Patent Judge* McKONE.

GERSTENBLITH, *Administrative Patent Judge*.

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

Henny Penny Corporation (“Petitioner”) filed a Request for Rehearing (Paper 20, “Req. Reh’g”) of our Institution of *Inter Partes* Review Decision (Paper 19, “Dec.”), dated December 22, 2016. Our Decision instituted *inter partes* review on two of the eleven grounds raised in the Petition (“Pet.”; Paper 3): (1) whether claims 1–3, 5–12, 17, 19, 21, and 23 of U.S. Patent No. 8,497,691 B2 (“the ’691 patent”) would have been obvious over Kauffman and Iwaguchi, and (2) whether claims 18 and 20 would have been obvious over Kauffman, Iwaguchi, and Howard. Dec. 51. Our Decision denied institution of the other nine grounds raised in the Petition. *Id.* at 1. Petitioner requests reconsideration of the first five grounds raised in its Petition, grounds which rely upon Iwaguchi as the sole or primary reference. Req. Reh’g 1. Petitioner does not request rehearing on the remaining four grounds that were not instituted. *See generally id.*

Petitioner contends that we overlooked or misapprehended Petitioner’s arguments and citations to Iwaguchi, which Petitioner asserts show that Petitioner’s reliance on circulation pipe 290 is not limited to only that portion of pipe extending from detection vessel 200 to oil vessel 300, but instead includes the entirety of the conduit path both before and after the oil vessel 300, including heat dissipator 700, and other conduit structures forming the circulation loop of Iwaguchi.

Id. at 3–4. For the reasons stated below, Petitioner’s request is *denied*.

I. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567

(Fed. Cir. 1988) (citations omitted). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked, and the place where each matter was addressed previously in a motion, opposition, or reply. *See* 37 C.F.R. § 42.71(d).

II. DISCUSSION

In our Institution Decision, we determined that Petitioner had not established a reasonable likelihood of prevailing in showing that Iwaguchi teaches “wherein said return pipe or said drain pipe comprises two portions and said sensor is disposed in an adaptor installed between said two portions,” as recited in claim 1. Dec. 24–25. Petitioner asserts that it argued that “Iwaguchi discloses a single conduit (circulation pipe 290) to drain and return oil to a fryer pot,” and that we overlooked or misapprehended Petitioner’s argument with respect to Iwaguchi’s circulation pipe. Req. Reh’g 4 (citing Pet. 26). Petitioner’s citation to page 26 of the Petition is directed to Petitioner’s challenge of claim 4 based on the combination of Iwaguchi and Howard. *See* Pet. 26. Petitioner never raised this argument in its challenge to claim 1.

Additionally, contrary to Petitioner’s arguments in its Rehearing Request (Req. Reh’g 4), Petitioner’s claim charts directed to claim 1 do not point to circulation pipe 290 as disclosing a conduit for transporting cooking oil from and returning cooking oil back to a fryer pot. Petitioner’s claim chart with respect to this element of claim 1 is reproduced below:

C	a conduit fluidly connected to said at least one fryer pot for transporting cooking oil from said at least one fryer pot and returning the cooking oil back to said at least one fryer pot;	“The second inner vessel 212 is for returning the oil and fat subjected to detection to the oil vessel 300 again after the detection. To this second inner vessel 212 is connected a circulation pipe 290, and oil and fat that was subjected to detection is returned to the oil vessel 300 via this circulation pipe 290.” ¶ [0021]
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Pet. 11. As reflected above, the only mention of circulation pipe 290 in Petitioner’s claim chart directed to the “conduit” element of claim 1 refers to circulation pipe 290 returning oil to vessel 300. *Id.* It does not refer to circulation pipe 290 as transporting cooking oil from said at least one fryer pot. Thus, because Petitioner did not raise this argument in its Petition directed to claim 1, it was not overlooked or misapprehended.

Further, Petitioner contends that “attempting to draw a distinction between a drain portion and a return portion in a closed circuit ‘circulation pipe’ relies on semantics while overlooking what is illustrated in Figure 1 of Iwaguchi.” Req. Reh’g 5. In this regard, Petitioner argues that circulation pipe 290 is not limited to the pipe extending from detection vessel 200 to oil vessel 300; rather, “it includes the entirety of the conduits both before and after the oil vessel as well as before and after detection vessel 200, including heat dissipator 700, and other conduit structures forming the circulation loop of Iwaguchi.” *Id.* at 5–6.

Contrary to the argument now raised by Petitioner, it was Petitioner, not the Board, that drew distinctions between the drain and return pipes recited in claim 1 and as allegedly taught by Iwaguchi. Petitioner annotated Iwaguchi’s Figure 1 (Pet. 9), Petitioner prepared its claim chart directed to

claim 1 (*id.* at 10–13), and Petitioner chose to argue that certain portions of the various pipes shown in Iwaguchi disclosed the elements of claim 1. Nowhere in the Petition did Petitioner argue that a distinction cannot be drawn between a drain pipe and return pipe in a conduit that transports oil to and from a fryer pot, as recited in claim 1. Thus, we could not have overlooked or misapprehended an argument that was not raised.

III. ORDER

Accordingly, it is hereby ORDERED that Petitioner's request for rehearing is *denied*.

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McKONE, *Administrative Patent Judge*, dissenting-in-part.

As explained in my Dissent-in-part to the Institution Decision, I would have instituted on the challenges in which Iwaguchi was the primary reference. Petitioner requests rehearing based, in part, on the reasons stated in my Dissent. I would grant the Request for those reasons.

As the Majority points out, Petitioner also raises several new arguments in its Request. I agree with the Majority that the new arguments could not have been misapprehended or overlooked. Thus, I would not grant rehearing based on the new arguments.

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