

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

QUEST USA CORP.,
Petitioner,

v.

POPSOCKETS LLC,
Patent Owner.

IPR2018–00497
Patent 8,560,031 B2

Before CHRISTA P. ZADO, JESSICA C. KAISER, and
STACY B. MARGOLIES, *Administrative Patent Judges*.

ZADO, Administrative Patent Judge.

DECISION

Denying Patent Owner's Request on Rehearing of Final Written Decision
37 C.F.R. § 42.71(d)

I. INTRODUCTION

On August 12, 2019, we issued a Final Written Decision determining that claims 9–11, 16, and 17 (“the challenged claims”) of U.S. Patent 8,560,031 (“the ’031 patent”) are unpatentable. Paper 59 (“Final Dec.” or “Final Decision”). PopSockets LLC (“Patent Owner”) filed a Request for Rehearing Following Final Written Decision Pursuant to 37 C.F.R. § 47.71(d), asserting the Board “misapprehended and/or overlooked Patent Owner’s arguments, the Administrative Procedure Act, Federal Circuit precedent, and other controlling law.” Paper 60, 1 (“Req. Reh’g” or “Rehearing Request”). According to Patent Owner, “[i]n so doing, the Board improperly violated Patent Owner’s due process rights and adopted new grounds of rejection that had not been raised by Petitioner.” *Id.*

Under 37 C.F.R. § 42.71(d), “[t]he 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.”

For the reasons discussed below, we deny the Rehearing Request.

II. DISCUSSION

Patent Owner’s arguments essentially amount to disagreement with: 1) our construction of the claim terms “accordion” and “cone,” and 2) our findings and determinations regarding the claim recitation “a securing element for attaching the socket to the back of the portable media player or portable media player case” (“the ‘securing element’ limitation”). Req. Reh’g 1–4. As discussed in detail below, Patent Owner’s arguments amount to mere disagreement with our claim interpretations and with our findings

and determinations regarding those interpretations, and are not the proper basis for rehearing. In addition, as shown below, our determinations in our Final Written Decision comported with the Administrative Procedure Act and did not violate Patent Owner's due process rights or adopt any unpatentability challenges that were not advanced by Petitioner.

A. Construction of the terms “accordion” and “cone”; whether “securing element” is disclosed inherently

Patent Owner contends the Board incorrectly determined Grinfas anticipates claims 9–11, 16, and 17 because (1) our determination was based on incorrect constructions for the claim terms “accordion” and “cone,” and (2) we incorrectly concluded, with regard to the securing element limitation, that the recited use is inherently disclosed, because we based our conclusion on the incorrect assumption that “Patent Owner did not dispute that this element is inherently disclosed.” Req. Reh'g 1–4. We note the term “accordion” appears in all of the challenged claims; the term “cone” appears only in claim 11; and the “securing element” limitation appears in claims 9–11.

1. “accordion”

Patent Owner contends “the Board's construction of ‘accordion’ is incorrect.” Req. Reh'g 2. Patent Owner asserts that our rejection of Patent Owner's construction of “accordion” as “a tubular structure with pleated folds” is based on our false understanding of what constitutes a “pleated fold.” *Id.* at 2. Specifically, Patent Owner states that we found a pleated fold “must only be collapsible in a manner such that the walls flanking the folds ‘stack on top of one another,’ rather than ‘next to one another,’” relying on an “incorrect methodology to reach this conclusion.” *Id.* (citing

Final Dec. 22). In addition to arguing again for its proposed construction of “accordion,” Patent Owner contends that our construction of “accordion” “would include non-accordion structures, and that we incorrectly found “a device can be an accordion even though in the expanded configuration the device no longer has pleated folds.” *Id.* at 3 (citing Final Dec. 29).

We decline to reconsider our construction. In the Final Decision, we declined to use the phrase “pleated folds” in our construction—a phrase that is not used anywhere in the ’031 patent—and instead adopted the terminology actually used in the patent, i.e., hinges, flexural hinges, and flexural membranes. Final Dec. 21–22. We cited portions of the ’031 patent that use the term “accordion,” noting the patent consistently describes an “accordion” as having “flexural hinges or flexural membranes that include hinges that facilitate extending/expanding and collapsing the accordion.” *Id.* at 20 (citing Ex. 1001, 5:50–53, 5:56–67, 6:7–16). As discussed in the Final Decision, Patent Owner provided insufficient basis to “replace the term actually used in the Specification [to describe accordions] . . . with a term that is not used in the Specification.” *Id.* at 20–21. Consistent with the use of the term “accordion” in the ’031 patent, we interpreted “accordion” as “a structure that has hinges, such as flexural hinges or flexural membranes, that fold so as to facilitate extending/expanding and collapsing of the accordion.” *Id.* at 19. We are not persuaded we erred in adopting a construction that uses the phrase “flexural hinges or flexural membranes” rather than one that uses the phrase “pleated folds.” *See id.* at 19–24 (explaining that the intrinsic evidence supports our adopted construction of “accordion”).

On rehearing, Patent Owner contends our rejection of its proposed construction was based on “a false understanding of what constitutes a

‘pleated fold,’ under which false understanding a pleated fold must be collapsible and must only be collapsible in a manner such that the walls flanking the folds stack ‘on top of one another’ rather than ‘next to one another.’” Req. Reh’g 2 (citing Final Dec. 22). Our construction of “accordion” was not based on that alleged misunderstanding. Instead, the portion of the Final Decision to which Patent Owner points describes the limited nature of an incorporation by reference in the ’031 patent. Final Dec. 21–22 (discussing incorporation by reference being limited to Figure 3B). We found the evidence did not support applying any incorporated by reference description of that figure to the other figures in the ’031 patent. *Id.* at 22 (“We discern no evidence that shows the flexibly hinged walls in Figures 3A and 5 would have been considered to have ‘pleated folds.’”). Indeed, in the Rehearing Request Patent Owner identifies no evidence or argument in the record showing that the evidence relating to “pleated folds” applies to the accordion embodied in Figures 3A and 5, or that such accordion would have been considered to have “pleated folds.”

The remainder of Patent Owner’s arguments on “accordion” address evidence we already considered, and Patent Owner does not identify any matter we misapprehended or overlooked. Final Dec. 24 (addressing the file history), 24–26 (addressing extrinsic evidence, including dictionary definitions).

Patent Owner also argues that our construction is incorrect because it would include non-accordion structures such as foldable cardboard boxes, foldable laptop computers, foldable grocery bags, and even foldable chairs. Req. Reh’g 3. Our interpretation of “accordion” resolved the issue of whether the term should be construed as a structure having “pleated folds”

versus a structure having “flexural hinges,” but we neither stated nor suggested that *any* structure with flexural hinges could be considered an “accordion.” Final Dec. 19, 22. On the contrary, we expressly stated in the Final Decision that not all structures having flexural hinges are “accordions.” *Id.* at 19–24; *see, e.g., id.* at 22 (“we do not construe the term ‘accordion’ merely as any structure that includes flexural hinges”). We explained that the flexural hinges facilitate the expanding and collapsing of the accordion. *Id.* at 24. Therefore, our interpretation of “accordion” clearly did not include structures such as foldable cardboard boxes, foldable laptop computers, foldable grocery bags, and even foldable chairs, as argued by Patent Owner in the Rehearing Request. Req. Reh’g 3.

For the foregoing reasons, Patent Owner fails to identify any matter we misapprehended or overlooked in rejecting Patent Owner’s proposed construction of the term “accordion.”

We also disagree that our rejection of Patent Owner’s construction resulted in our erroneously determining that Grinfas anticipates the challenged claims. Req. Reh’g 1–2. As to anticipation by Grinfas, during the trial, the dispute between the parties was not whether an “accordion” comprises “flexural hinges” versus “pleated folds”; the dispute was over whether an “accordion” must have “pleated folds” when the accordion is in its expanded configuration. *See, e.g.,* Reply 5 (arguing that Grinfas satisfies Patent Owner’s construction of “accordion”); *see also* Paper 54, 37:13–24 (Patent Owner’s counsel admitting that Grinfas meets Patent Owner’s definition of “accordion”); Final Dec. 15 (“[T]he parties dispute whether the claims require a structure to be an ‘accordion’ in all of the structure’s configurations, including when the structure is fully extended.”). On

rehearing, Patent Owner contends we incorrectly found a structure can be an “accordion” even if in the expanded configuration it no longer has pleated folds, without providing any further explanation or identifying what we misapprehended or overlooked in arriving at our determination. Req. Reh’g 3. Mere disagreement with our conclusion is not grounds for rehearing. We explained at length the reasons for our determination that an “accordion” is not required to maintain pleated folds in all configurations. Final Dec. 26–29.

2. “cone”

Patent Owner argues we improperly construed the term “cone” as not being limited to structures having a circular base. Req. Reh’g 3. Rather than identify a matter we misapprehended or overlooked, as required in a request for rehearing, Patent Owner provides assertions, without further explanation, that amount to mere disagreement with our interpretation. *Id.* at 3–4. Patent Owner states that our introduction of a dictionary definition into the record provided two possible definitions of “cone,” and without further explanation Patent Owner asserts its briefing showed the definition we chose should be excluded. *Id.* at 3. Patent Owner also states, without further explanation, that our construction is inconsistent with the intrinsic evidence in the ’031 patent. *Id.* Patent Owner further states, without explanation, that our interpretation is inconsistent with the extrinsic evidence regarding the term “cone.” *Id.* at 4. Assertions such as these, that merely contend that our construction is incorrect or is consistent with the evidence of record, without providing any explanation, are not a proper basis for rehearing.

Patent Owner also states, incorrectly, that it was not provided with the opportunity to submit evidence regarding whether it would be consistent

with the intrinsic and extrinsic evidence to interpret “cone” as including non-circular cones. *Id.* at 3–4. Patent Owner’s assertion is incorrect. At the oral hearing, we entered into the record a dictionary definition of “cone” upon which we later relied in the Final Decision as evidence of non-circular cones. Paper 54, 52:14–19. After the hearing, we entered as Exhibit 3001 a copy of the dictionary definition of “cone” discussed at the oral hearing, and ordered briefing from the parties regarding the interpretation of “cone,” including (1) whether the definition of “cone” in Exhibit 3001 reflects the ordinary and customary meaning of “cone” to one of ordinary skill in the art, (2) whether the intrinsic evidence of record limits the broadest reasonable interpretation of “cone shape” to a shape with a base that is circular, and (3) whether the dictionary definition of “cone” in Exhibit 3001 affects the parties’ contentions as to the broadest reasonable interpretation of “cone.” Paper 48. Each party filed an opening brief (10 pages allowed per party) (Paper 50, Paper 52), and each party filed a responsive brief (10 pages allowed per party) (Paper 55, Paper 57). In addition, with the briefs, each party submitted additional evidence regarding the term “cone.” Petitioner submitted a Supplemental Declaration of Dr. Glenn E. Vallee (Ex. 1021) and additional dictionary definitions and other evidence relating to the term “cone” (Exs. 1018–1020, 1022–1025). Patent Owner submitted a Second Declaration of James B. Babcock (Ex. 2120) and additional dictionary definitions and other evidence relating to the term “cone” (Exs. 2105–2119, 2121–2122).

Neither party requested the filing of any additional papers, cross-examination, supplemental oral hearing, or submission of any other evidence and argument on this issue. Accordingly, contrary to Patent Owner’s

assertion, Patent Owner had ample opportunity to submit evidence and argument (and did submit such evidence and argument) regarding whether interpreting “cone” as not limited to a structure with a circular base is consistent with the intrinsic and extrinsic evidence.

Patent Owner has not persuaded us to reconsider our construction of “cone” on rehearing.

3. “*securing element*”

Patent Owner also asserts we incorrectly concluded that Grinfas inherently discloses the recited use in the claim limitation “a securing element for attaching the socket to the back of the portable media player or portable media player case.” Req. Reh’g 4 (citing Final Dec. 59–60). Patent Owner suggests that we arrived at this conclusion based on our understanding that “Patent Owner did not dispute that this element is *inherently disclosed*.” *Id.* (citing Final Dec. 59–60).¹ Contrary to Patent Owner’s suggestion, our finding that Grinfas provides inherent disclosure was not based on whether Patent Owner disputed this issue. Rather, it was based on the evidence and arguments provided by Petitioner. Final Dec. 60–64. For example, we credited the testimony of Petitioner’s expert, Dr. Glenn E. Vallee, Ph.D., that the securing structures in Grinfas were inherently capable of attaching to the back of a telephone because it was supported by

¹ We note that the cited portion of our Final Decision addressed whether certain elements in Grinfas (e.g., adhesive pad 46, fastenable straps 54, and attachment portion 92) are “securing elements”—i.e., whether they are securing or fastening—but it did not address whether Grinfas inherently discloses how such elements are used—i.e., whether they are inherently capable of fastening to the back of a portable media player. That issue is addressed at pages 62–68 of our Final Decision.

the record. Final Dec. 63–64 (citing Ex. 1004 ¶ 67; Ex. 1005, 8:3–9, Figs. 4A–B). The Rehearing Request does not acknowledge or address the explanation provided in the Final Decision, much less identify what we might have misapprehended or overlooked in finding Dr. Vallee’s testimony to be credible and supported by the record. Req. Reh’g 4.

For the foregoing reasons, Patent Owner has not shown that we misapprehended or overlooked any matter in finding Grinfas discloses a securing element inherently capable of being attached to the back of a portable media player.

B. Due process and the Administrative Procedure Act

Patent Owner contends “[t]he Board raised new arguments for the first time in the Final Written Decision and thereby violated Patent Owner’s due process rights and violated these requirements of the APA.” Req. Reh’g 5. In so doing, Patent Owner provides a list of three items, each item identified by only a one sentence-clause, without any explanation as to how Patent Owner’s rights or the Administrative Procedure Act (“APA”) have been violated. *Id.* at 5–6. This sort of identification by Patent Owner fails to persuade us of any violation of Patent Owner’s rights or the APA. Moreover, Patent Owner’s contention that we violated its rights or the APA challenges the propriety of our Final Decision, but does not identify a matter we misapprehended or overlooked, and therefore is not the proper basis for a request for rehearing. 37 C.F.R. § 42.71(d). Nonetheless, below we address Patent Owner’s assertions that the Board violated Patent Owner’s due process rights and the APA.

1. “*accordion*”

Patent Owner contends one “new argument” is the Board’s construction of “*accordion*.” *Id.* Patent Owner cites neither authority to support its contention that, nor explains how, procedures or its rights have been violated by our construction. *Id.*

We did not provide an express construction of the term “*accordion*” in the Decision Instituting *Inter Partes* Review, finding that no terms required express construction at that time. Paper 8, 8 (“Inst. Dec.” or “Institution Decision”). However, we rejected Patent Owner’s preliminary proposal that an “*accordion*” must be a “structure with pleated folds so as to collapse like the bellows of a musical accordion,” explaining the ’031 patent describes accordions as having flexural hinges that allow the walls of the accordion to fold up generally in parallel to each other, rather than stacking on top of one another. Inst. Dec. 22–26. Citing numerous disclosures in the ’031 patent describing an “*accordion*” as a structure having flexural hinges, we preliminarily determined “the term ‘*accordion*’ includes structures that have flexural hinges.” *Id.* at 24 (citing Ex. 1001, 1:45–48, 5:50–53, 6:7–31, Fig. 3A, Fig. 3B, Fig. 5). Accordingly, we determined on the preliminary record that the term “*accordion*” did not preclude the structure in Grinfas, which has flexural hinges that flex and fold. *Id.* at 24–25. Therefore, our Decision on Institution gave Patent Owner notice and the opportunity to address our interpretation of an “*accordion*” as including structures that have flexural hinges. *Id.* at 24.

During trial, although Patent Owner maintained its position that “*accordion*” should be construed as having “pleated folds,” PO Resp. 5, Patent Owner agreed with our preliminary determination that the term

“accordion” may include structures with flexural hinges, *id.* at 19–20. However, Patent Owner argued that not *all* structures with flexural hinges are “accordions,” because there were well-known non-accordion structures that have flexural hinges. *Id.* at 20. In accordance with Patent Owner’s argument that not all structures having flexural hinges are “accordions,” in the Final Decision we clarified that the flexural hinges fold “so as to facilitate extending/expanding and collapsing of the accordion.” Final Dec. 20, 22–23. This clarification did not violate the APA or due process because it did not alter any requirements in the claims, which recite that the accordion is capable of extending (i.e., extending/expanding) and retracting (i.e., collapsing). *See* Ex. 1001, 7:65–8:3 (claim 9). Moreover, the outcome of the Final Decision would have been the same regardless of the clarification that not all structures with flexural hinges are an “accordion.” The clarifying language in our construction in the Final Decision clarifies that structures not present in Grinfas would not meet our construction of “accordion.” Accordingly, had we not included the clarification, the outcome of our Final Decision would have been the same.

2. “cone”

Patent Owner contends another “new argument” is the Board’s evidence and argument concerning the construction of “cone.” Req. Reh’g 6.² Upon institution, both parties were on notice of the issue

² Patent Owner refers, apparently by mistake, to our discussion of “accordion,” rather than to our discussion of “cone.” Reh’g Req. 6. As we expressed above in our discussion of “accordion” above, in the Institution Decision we were not persuaded that the record at the time supported limiting the interpretation of “accordion” to structures that “collapse[] like the bellows of a musical accordion.” Inst. Dec. 26.

concerning whether the term “cone shape” should encompass a structure with a circular base. Inst. Dec. 27–28 (noting that although Patent Owner did not raise the issue in the preliminary response, Dr. Vallee provided testimony that a cone may have a square (e.g., non-circular) base). Indeed, in the Response, Patent Owner addressed the issue of whether a structure with a non-circular base is encompassed by the claimed “cone.” PO Resp. 20–23. Patent Owner proposed to construe “cone” as a “tapered structure having a circular base and circular cross-sections along its axis,” *id.* at 21–22 (emphasis omitted), and argued that because the prior art structure in Grinfas comprised a rectangular base and rectangular cross sections, rather than a circular base and circular cross sections, Grinfas failed to disclose the claimed “cone,” *id.* at 30–32. Moreover, as we discussed above, the parties had ample opportunity to address whether the term “cone” should be construed as encompassing a structure with a non-circular base. *Supra* Sec. II.A.2; Ex. 3001; Papers 48, 50, 52, 55, 57; Exs. 1018–1025, 2105–2122.

3. “securing element”

Patent Owner also contends that another “new argument” is “the Board’s contention that the placement of a socket on the back of a portable media player is not a fundamental characteristic of the invention because the patent also recites other functions.” Req. Reh’g 6 (citing Final Dec. 65–68). The finding by the Board to which Patent Owner refers is not a “new argument” raised by the Board, but rather addresses an argument raised by Patent Owner for the first time in its Sur-Reply. Final Dec. 65–68 (citing Paper 34 (“Sur-Reply”), 7–9). Patent Owner argued, for the first time in the Sur-Reply, that the functional language in the securing element limitation is

entitled to patentable weight because it recites a fundamental characteristic without which the invention would be of little use. Sur-Reply 7–9. We disagreed “that the language at issue recites a fundamental characteristic without which the invention would be of little use,” and we provided our reasons for disagreeing. Final Dec. 65–68 (citing Sur-Reply 7–9). The statement of our reasons for rejecting an argument introduced in the Sur-Reply did not amount to a violation of due process or the APA.

C. Grounds of unpatentability allegedly not advanced by Petitioner

Patent Owner also asserts that we crafted new grounds of unpatentability not advanced by Petitioner, but fails to specify any alleged new grounds not advanced by Petitioner, much less which matters were misapprehended or overlooked. Req. Reh’g 6–7. Rather than specify the *the place where each matter* was previously addressed in the record, as required by our rules, Patent Owner states only the following:

The Board relied on multiple new grounds of unpatentability that Petitioner did not advance. *See supra* § III.a; *see also supra* § III.b. This legal error violated Patent Owner’s rights under both statutory and Federal Circuit law, and Patent Owner requests rehearing on this basis.

Id. Patent Owner does not (1) identify any alleged “new grounds of unpatentability,” (2) specify which matters were allegedly misapprehended or overlooked, (3) identify where any such matters were previously addressed in the record, or (4) offer any further explanation. Patent Owner refers to sections III.a and III.b of the Rehearing Request, stating only “[s]ee *supra* § III.a; *see also supra* § III.b,” but in those sections, Patent Owner does not argue that we relied on new grounds of unpatentability not advanced by Petitioner. Req. Reh’g 1–6. In those sections, Patent Owner

argues that we arrived at incorrect conclusions based on incorrect claim constructions, and that we raised new arguments (in the form of construing “accordion” and “cone” and in rejecting one of Patent Owner’s arguments about the “securing element” limitation). These alleged shortcomings do not amount to new grounds of unpatentability not raised by Petitioner. *Id.* Instead, our determinations in this proceeding were based on the unpatentability challenges raised by the Petitioner in the Petition (i.e., anticipation by Grinfas). Final Dec. 91–92.

D. Introduction by the Board of a Dictionary Definition to Assist Claim Construction

Patent Owner also contends, without citing any authority, that the Board lacks the authority to introduce a dictionary definition as evidence into a trial in order to assist with claim interpretation. Req. Reh’g 7. We disagree. Both parties contended the term “cone” should be given its plain and ordinary meaning. PO Resp. 21–22; Paper 30 (“Reply”), 2–3. Both parties also addressed in their briefing whether the term “cone” encompassed a shape with a square base. PO Resp. 20–23, 30–32; Reply 2–3. However, prior to the oral hearing, the parties provided little evidence regarding the plain and ordinary meaning of the term “cone.” Final Dec. 33; PO Resp. 20–23, 30–32; Reply 2–3. Despite the lack of evidence, at the hearing, Patent Owner’s counsel asserted that “the definition of a cone is what all of us understand a cone is, is that it would have a circular base.” Final Dec. 34 (quoting Tr. 51:1–54:17). In determining the ordinary and customary meaning of a non-technical term such as “cone” as viewed by a person of ordinary skill in the art, it was appropriate for us in this proceeding to consult a general purpose dictionary definition for guidance. *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010). Therefore, we

appropriately noted on the record a dictionary definition of “cone” to assist in ascertaining whether the plain and ordinary meaning of “cone” includes a structure having a non-circular base. *Id.* at 34–35. Moreover, as we discussed above, both parties were given ample opportunity to address the definition of “cone” we entered into the record at the oral hearing. *Supra* Sec. II.A.2; Ex. 3001; Papers 48, 50, 52, 55, 57; Exs. 1018–1025, 2105–2122.

E. Argument that the Board Misapprehended and/or Overlooked Patent Owner’s Arguments and Evidence of Record

Patent Owner argues we misapprehended and/or overlooked its arguments and evidence, stating only that we

misapprehended and/or overlooked Patent Owner’s arguments and evidence submitted in and/or cited in Papers 6, 17, 34, 52, and 57, including Patent Owner’s arguments and evidence regarding the proper construction of ‘accordion,’ the proper construction of ‘cone,’ and whether Grinfas anticipated the challenged claims of the ’031 patent.

Req. Reh’g 7. Patent Owner’s citation to five substantive filings (amounting to 180 pages), without specifically identifying matters we allegedly misapprehended and/or overlooked, does not comport with our rules requiring that a request for rehearing “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.” 37 C.F.R. § 42.71(d) (emphases added). To the extent this argument by Patent Owner refers to arguments discussed above, it does not persuade us to modify our Final Decision.

III. CONCLUSION

For the foregoing reasons, Patent Owner has not shown that the Board misapprehended or overlooked a matter. We, therefore, are not persuaded to modify the Final Decision.

IV. ORDER

Accordingly, it is

ORDERED that the Request for Rehearing is *denied*.

IPR2018-00497
Patent 8,560,031 B2

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