UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Dr. Squatch LLC

Petitioner

v.

The Procter & Gamble Company

Patent Owner

Case IPR2024-01105

U.S. Patent No. 10,966,915

PATENT OWNER'S PRELIMINARY SUR-REPLY

EXHIBIT LIST

Exhibit No.	Description
Ex. 2001	Full File History of the ’915 Patent
Ex. 2002	*Reserved*
Ex. 2003	Mayo Clinic, *Zinc Oxide (Topical Application Route)*, https://www.mayoclinic.org/drugs-supplements/zinc-oxide-topical-application-route/description/drg-20075525
Ex. 2004	Wayback Machine, Mayo Clinic, *Zinc Oxide (Topical Application Route)*, https://web.archive.org/web/20150102193922/https://www.mayoclinic.org/drugs-supplements/zinc-oxide-topical-application-route/side-effects/drg-20075525?p=1 (archived Jan. 2, 2015)
Ex. 2005	*Reserved*
Ex. 2006	U.S. Patent No. 10,543,164
Ex. 2007	International Publ. No. WO 99/21528
Ex. 2008	Notice of Allowance for U.S. Patent No. 10,905,647

All emphasis has been added and all internal citations have been omitted unless otherwise indicated.

Pursuant to the Board's authorization (Paper No. 8), Patent Owner The Procter & Gamble Company ("P&G" or "Patent Owner") provides the following preliminary sur-reply. Nothing in Dr. Squatch's reply alters the conclusion that the Board should deny institution.

A. Lesniak Is Directed To Sunscreen And Diaper Creams; Its Purported Antiperspirant Disclosure Is Non-Enabling And Made In Passing.

The parties' supplemental briefing centers on the Examiner's evaluation of Lesniak during prosecution of the challenged patent and related applications. As P&G explained in its Preliminary Response ("POPR"), the Examiner already considered Lesniak's disclosure during prosecution of the '915 patent and others in the family. (POPR at 11–16.) For the purposes of 35 U.S.C. § 325(d), "[p]reviously presented art includes art made of record by the Examiner, and art provided to the Office by an applicant, such as on an Information Disclosure Statement (IDS), in the prosecution history of the challenged patent," as Lesniak was here. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 7–8 (PTAB Feb. 13, 2020) (precedential); *see also Biocon Pharma Ltd. v. Novartis Pharms. Corp.*, IPR2020-01263, Paper 12 at 9 (PTAB Feb. 16, 2021) ("[W]e accept that the Examiner considered [the reference] because it is listed on the IDS and the Examiner signed the IDS with the statement 'all references considered except where lined through.'").

This is not a case where the Lesniak reference was buried in an IDS of thousands and never looked at by the Examiner. As P&G explained in its POPR, the Lesniak reference was in front of the Examiner for years during prosecution of many related applications. (POPR at 14–15.) In fact, the same Examiner expressly distinguished Lesniak during prosecution of the related '647 patent, which is being challenged by Petitioner in a co-pending IPR petition in Case No. IPR2024-01173. During that prosecution, the Examiner found that the '647 claims were not anticipated or obvious over Lesniak. (Ex. 2008 at 7.) Specifically, after Applicant submitted a post-allowance IDS identifying the reference, the Examiner reviewed it and issued another Notice of Allowance, explaining that "[t]he claims are distinguishable from Lesniak… *because Lesniak is directed towards a sunscreen composition* that requires the presence of the sunscreen agent Zinc Oxide, whereas the instant claims are drawn to a solid deodorant composition that require the presence of an antimicrobial agent." (*Id.*)

Petitioner ignores the Examiner's rationale above, which supports P&G's proffer that the Examiner chose not to apply Lesniak during the '915 prosecution because "Lesniak is about sunscreen and diaper cream, *not deodorant*." (POPR at 15.) Instead, Petitioner tries to circumvent Lesniak's focus on sunscreen and diaper cream by highlighting the Examiner's later application of the reference during prosecution of a completely different application. According to Petitioner, the

Examiner there rejected P&G's "exact argument" that Lesniak does not disclose deodorant compositions by "allud[ing] to Lesniak's express disclosure that its compositions can be used as antiperspirants." (Reply at 4–5.) But Lesniak contains the word "antiperspirant" only three times in its entire disclosure, and two of those times are to express that its "composition is ***not*** an antiperspirant." (Ex. 1003 at 4:23–24, 10:28–29.) Lesniak's purported affirmative teaching of antiperspirants amounts to a single, non-enabling sentence: "The composition can also be an antiperspirant or lip balm." (*Id.* at 10:27.) Notwithstanding this bald assertion, Lesniak discloses no description of how one could create an antiperspirant, no example compositions of antiperspirants, and recites no claims directed to antiperspirants. (*See generally* Ex. 1003.) Lesniak's disclosure of "deodorants" is even more replete; it is nonexistent. Lesniak never teaches deodorants and makes no mention whatsoever of controlling odor via its compositions. (*See id.*)

On the opposite end of the spectrum, Lesniak is chock-full of teachings on sunscreens and diaper creams *because that is what Lesniak is really about*. For example, claim 1 of Lesniak recites a "personal care composition selected from a sunscreen or a diaper cream," with later claims also limiting the invention to sunscreens and diaper creams. (*Id.* at cls. 1, 12, 14, 19.) In its specification, Lesniak provides and analyzes twelve different example compositions of sunscreen and six different example compositions of diaper creams. (*Id.* at Tables 2–3, 5.) Lesniak

further compares its inventive compositions to five different commercially available sunscreens. (*Id.* at Tables 4, 6.) Lesniak provides nothing even close regarding either antiperspirants or deodorants.

Thus, the Examiner made no "material error" during prosecution: The Examiner got it right the first time around when she considered but chose not to apply Lesniak in any rejections of the challenged claims. She was similarly right when she chose not to apply Lesniak during the prosecution of the '915 patent's parent and during the prosecution of other P&G patents that Petitioner is also challenging in front of the Board. And she was still right when she expressly distinguished Lesniak in allowing the claims of the related '647 patent, which is also directed to deodorant compositions. (*See* Ex. 2008 at 7.) The same should hold true here, and the Board should discretionally deny institution of Petitioner's challenges over Lesniak.

B. All Grounds Should Be Denied For The Reasons Presented Here And In The POPR.

For the reasons discussed above and in the POPR, Petitioner's Ground 1 challenge of anticipation or obviousness over Lesniak should be denied under 35 U.S.C. § 325(d). The Board should deny Petitioner's Grounds 2–4 for the same reasons, as the references Petitioner adds for the dependent claims cannot save the Lesniak challenge to independent claim 1. Moreover, the grounds further fail on the merits for the reasons provided in the POPR.

* * *

In light of the foregoing, the Board should decline to institute *inter partes* review of the ’915 patent.

Respectfully submitted,

Date: November 27, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), I certify that I caused to be served on the counsel for Petitioner a true and correct copy of the foregoing by email on November 27, 2024, at the following address:

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