UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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DR. SQUATCH, LLC
Petitioner

v.

THE PROCTER & GAMBLE COMPANY
Patent Owner

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IPR2024-01173
Patent No. 10,905,647

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PETITIONER'S RESPONSE TO PATENT OWNER'S SUBMISSION REGARDING ALLEGEDLY IMPROPER REPLY BRIEF EVIDENCE

Response authorized by Board email dated August 7, 2025

Petitioner properly submitted hardness testing evidence in reply to Patent Owner's ("P&G") Response ("POR"). The testing addresses a claim construction introduced for the first time in the POR and rebuts an unfounded opinion of P&G's expert—all of which P&G ignores in its written submission. Binding Federal Circuit precedent allows such reply evidence. Although the Board recently denied P&G's request to file a motion to strike this evidence, P&G now improperly attempts to relitigate the issue. Further, P&G asks the Board to adopt an unworkable standard that would force petitioners to predict, and preemptively rebut and debunk, every demonstrably false assertion that a patent owner's expert might contrive. No such requirement exists in the rules, or the law, and for good reason.

I. BACKGROUND

Claim 1 of the '647 Patent recites a deodorant stick having a "hardness from about 70 mm*10 to about 140 mm*10, as measured by penetration with ASTM-D 1321 needle." ASTM D-1321 is the only hardness test mentioned in any challenged claim. It is an admittedly standard test that uses a 50 g needle assembly with an additional 50 g weight, for a total load of 100 g. The Petition cited prior art (Bianchi-254 and Bianchi-518) disclosing deodorant hardness ranges nearly identical to the claimed range. As P&G concedes, both Bianchi references measured those ranges with an ASTM D-1321 needle. The Petition accordingly asserted that claim 1 was obvious in view of the overlap in hardness ranges.

P&G's preliminary response contained substantive arguments but did not propose any claim construction for the hardness limitation, or otherwise assert that the Bianchi ranges did not overlap with the claimed ranges due to differences in testing methodology. After institution, however, P&G presented a new argument. For the first time, P&G construed claim 1 to recite, "[a 50-g total force] ASTM D-1321 needle," to try to exclude the ASTM D-1321 standard methodology of using 100 g of total weight. POR, 34 (alteration original). In an attempt to support this new argument, P&G relied on the opinion of its expert, Dr. Lochhead, that a hardness range measured with a "50 g total force" needle cannot overlap "at all" with a hardness range measured by a 100 g total force needle. Ex. 2011, ¶75. P&G chose to submit Dr. Lochhead's "no overlap" opinion without the support of any testing to check its accuracy; it was pure *ipse dixit*.

At his deposition, Dr. Lochhead could not identify any claim language requiring a non-standard hardness test. Ex. 1081, 107:25-110:23.[1] Nor could he identify support for his opinions regarding the alleged lack of overlap in hardness ranges. To the contrary, Dr. Lochhead conceded that results from P&G's modified test and ASTM D-1321 "can't be correlated," as "no formulas" for converting the

[1] Dr. Lochhead avoided answering questions about the claims' ASTM D-1321 language, repeatedly misdirecting to the specification. *Id.*

results exist. *Id.*, 115:7-118:16. He acknowledged conducting no hardness testing in support of his opinion concerning lack of overlap. *Id.*

Petitioner replied to Dr. Lochhead's admittedly unsupported opinion with rebuttal evidence. Petitioner's expert, Dr. Michniak-Kohn, commissioned testing of eight deodorants, using both the ASTM D-1321 standard and P&G's modified test. Multiple deodorants fell within the claimed range under both tests. Ex. 1086, ¶4. This evidence disproved Dr. Lochhead's *ipse dixit* that there can be no overlap.

Moreover, Dr. Michniak-Kohn's testing found that the results for the ASTM D-1321 standard were on average about 37 mm*10 higher than the results for P&G's proposed modified test.[2] This delta in test results is less than the 60 mm*10 span of the claimed range (i.e., about 80-140 mm*10). Indeed, no tested deodorant showed a delta between tests that reached that span. This further confirms the overlap of (i) Bianchi-518's 70-140 mm*10 range (Ex. 1006, 6:22-29), using the ASTM D-1321 standard hardness, and (ii) the claimed range, using P&G's modified test (e.g., subtracting 37 mm*10 from both endpoints of Bianchi-518's range yields a range of 33-103 mm*10, which is approximately equivalent to Bianchi-518's 70-140 mm*10 range (under the standard test), and still overlaps with the claimed range of 80-140

[2] These opinions appear only in paragraphs four and five of Dr. Michniak-Kohn's reply declaration, Ex. 1086. P&G mistakenly cites paragraphs two and three.

mm*10 (under P&G's test)).

II. ARGUMENT

A. Petitioner's reply evidence appropriately responded to a new claim construction first advanced in the POR.

"[W]here a patent owner offers a new claim construction for the first time in its response after the institution decision, a petitioner may introduce new arguments and evidence in reply under the newly proposed claim construction." *Axonics, Inc. v. Medtronic, Inc*., 75 F.4th 1374, 1380-83 (Fed. Cir. 2023) (finding "no rule, for example, requiring a petition to describe all possible or reasonable claim constructions and to present invalidity theories under those constructions").[3] P&G neither acknowledges this rule nor cites authority to the contrary.[4]

The POR argued that the claimed hardness range "measured by penetration with ASTM D-1321 needle" refers to a non-standard test—which does not appear in any claim—that uses 50 grams of total force, rather than the 100-gram weight used

[3] *Axonics* distilled its rule from no less than four other Federal Circuit decisions. *Id.* at 1383. The Court also referred to the tactic employed by P&G here (seeking to create an estoppel without any adjudication on the merits by proposing a new construction after institution) as "sandbagging" and "gamesmanship." *Id.* at 1384.

[4] In the only case cited by P&G, *Bluecatbio*, the Board denied a motion to strike allegedly new evidence. The case offers no support to P&G.

in the ASTM D-1321 standard recited in claim 1. P&G thus construed claim 1 to include an additional "50 gram total force" limitation. Petitioner's reply testing thus confirms that the prior art applies even under P&G's newly advanced construction.

B. The testing rebuts and discredits the opinions of P&G's expert.

The reply evidence also rebuts the incorrect and unsupported opinion of P&G's expert that the claimed hardness range measured with a 50-gram total force test could not "overlap[] at all" with the prior art hardness ranges measured with the ASTM D-1321 test. Ex. 2011, ¶75. Petitioner's reply evidence disproves that unsupported statement. Binding Federal Circuit law permits reply evidence that "disprove[s]" a patent owner's arguments. *Rembrandt Diag., LP v. Alere, Inc*., 76 F.4th 1376, 1384 (Fed. Cir. 2023).

P&G's baseless complaints about prejudice contravene this authority. P&G had every opportunity to perform testing to check Dr. Lochhead's opinion. It chose not to. It cannot be prejudicial for the Board to consider test results that directly respond to a false assertion introduced by P&G's own witness. Moreover, P&G can address the evidence through cross-examination, sur-reply, and oral argument. *See Genzyme Ther. Prods. Ltd. P'ship v. Biomarin Pharm. Inc*., 825 F.3d 1360, 1364-69 (Fed. Cir. 2016) (in vivo studies properly replied to patent owner's argument on insufficiency of petition's in vitro studies, where patent owner addressed the new studies at oral argument).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served on P&G's counsel of record, on this date:

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