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 IPR2024-01173

U.S. Patent No. 10,905,647

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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**** All emphasis added herein, unless otherwise indicated ****

Pursuant to 37 C.F.R. § 42.75, Patent Owner The Procter & Gamble Company ("P&G") respectfully requests Director Review of the Board's Final Written Decision (Paper 35, "FWD") determining all challenged claims of U.S. Patent No. 10,905,647 ("the '647 Patent") unpatentable. Specifically, P&G requests the Director: (1) vacate the FWD and reverse the Board's finding as to unpatentability of claims 1-7, 9-13, and 18-19 (or, in the alternative remand) because the FWD is based on a clearly erroneous interpretation of the claimed hardness limitations; (2) vacate and reverse the Board's findings of obviousness under Grounds II-VII (or in the alternative, remand) for failing to articulate sufficient motivation to combine the natural, aluminum-free references with non-natural aluminum- and silicone-based antiperspirants; and/or (3) vacate the FWD and dismiss the Petition in its entirety due to Petitioner's failure to properly identify all real parties in interest. This Request for Director Review is based on similar errors of law and abuse of discretion P&G outlined in its Requests for Director Review in the following related IPRs: IPR2024-01104, IPR2024-01105, and IPR2024-01174 (filed concurrently).

I. BACKGROUND

P&G is a U.S.-headquartered, world leader in the consumer products industry, manufacturing daily use products under iconic brands that include Tide, Pampers, Gillette, Crest, Dawn, Old Spice, and Secret. P&G invests heavily in formulation technology to provide everyday products of superior performance and value for

consumers. To protect its innovations, P&G maintains thousands of active U.S. patents, many of which relate to unique and inventive combinations and formulations of generally known ingredients.

At issue here is one such patent, focused on improved aluminum-free, natural deodorant sticks. At the time of the invention, natural deodorant sticks tended to be either too hard and uncomfortable to apply as a result of being draggy across the skin, or too soft or greasy, leading to sticky residue or stained clothing. With the invention described and claimed in the '647 Patent, P&G developed new and improved natural deodorant stick formulations that provide desired skin feel, glide, and hardness, without irritation, that had eluded the prior art natural deodorant sticks. (*See* Paper 16 at 1, "POR.") P&G has received numerous patents covering its natural deodorant formulation technology in addition to the '647 Patent.[1]

Just as in IPR2024-01104, IPR2024-01105, and IPR2024-01174, the FWD here finds the claimed invention unpatentable by failing to follow the binding legal requirements set forth in the Federal Circuit's *Phillips* opinion for properly determining claim scope and the Supreme Court's *KSR* decision for proving

[1] In addition to the patents challenged in the related IPRs described above, P&G also received a related patent challenged by Petitioner on substantially similar grounds in Case No. IPR2024-01498.

obviousness. Indeed, similar legal errors that pervade the FWD in IPR2024-01104, IPR2024-01105, and IPR2024-01174 are also present here.

First, with regard to claims 1-7, 9-13, and 18-19, the FWD erroneously imports an extrinsic stick hardness testing methodology into the claim over the methodology described in the '647 Patent specification. Like many of the claims of the patents at issue in the requests for Director Review of the IPRs referenced above, those claims provide a deodorant stick having "a hardness from about 70 mm*10 [or 90 mm*10] to about 140 mm*10, *as measured by penetration with ASTM D-1321 needle*." (*E.g.*, Ex. 1001 at cl. 1, 7, "'647".) Thus, just as was the case for many of the claims in P&G's other patents, the Board was required to determine the meaning of the claimed phrase "as measured by penetration with ASTM D-1321 needle," before it could assess whether Petitioner's relied upon art, the Bianchi references, disclosed the claimed hardness range as Petitioner contended. The Board and Petitioner alike recognized that interpreting this phrase required determining which hardness testing methodology the hardness claims are based on—*i.e.*, "measured by . . . needle" references a specific *test methodology* that uses the specified needle. (Paper 34 at 11:23-12:9, "Hearing Tr.") But rather than interpreting this phrase by looking to the *modified* ASTM hardness test methodology described in the '647 Patent specification, as required by *Phillips*, the Board instead improperly adopted Petitioner's expert's opinion (*i.e.*, disfavored extrinsic evidence) that the claim

incorporated the *standard* ASTM hardness testing methodology used in the Bianchi references. Only then could the Board use the hardness limitation in the Bianchi references to find the claim unpatentable. This error is dispositive as to the obviousness finding of claims 1-7, 9-13, and 18-19, which cannot otherwise stand.

Second, the Board abused its discretion as to Grounds II-VII in finding that a POSA would have looked to the Bianchi references, both of which disclose non-natural aluminum- and silicone-based antiperspirant sticks, and combined their teachings with the very different anhydrous, natural, aluminum-free and silicone-free sticks of Petitioner's primary references (Lesniak and Native) to arrive at the claimed inventions. Petitioner had no answer to P&G's expert testimony regarding the vast differences in the stick technologies of these references, and instead urged the Board to ignore this evidence entirely in favor of its expert's *ipse dixit*. In so doing, the Board failed to articulate any reason or motivation for a POSA to make these combinations, running headlong into *KSR* and its progeny which exist precisely to safeguard against picking and choosing elements from the prior art using impermissible hindsight.

Third, P&G submits that Petitioner has intentionally and improperly avoided its duty to identify the Real Parties in Interest under 37 C.F.R. § 42.8. For the reasons discussed herein, P&G respectfully requests the Director vacate the FWD.

II. LEGAL STANDARD FOR DIRECTOR REVIEW

"Requests for Director Review of a Board's final decision under 35 U.S.C. §§ 135, 318, or 328, decisions granting rehearing of such a decision, or any other decision concluding a proceeding brought under 35 U.S.C. §§ 135, 311, or 321, shall be limited to decisions presenting (a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law." *See* Director Review Process at 2.B, Availability of Director Review: Proceedings under part 42 of 37 C.F.R. (last modified March 18, 2025). "An abuse of discretion is found if a decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision." *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1367 (Fed. Cir. 2016).

III. ARGUMENT

P&G respectfully submits that the FWD: (1) rests on clearly erroneous findings regarding the '647 Patent's disclosed hardness test, and (2) represents an erroneous conclusion of law and an abuse of discretion in finding a motivation to combine the Bianchi references with other prior art references with vastly (and undisputedly) different deodorant stick technologies.

A. The FWD Clearly Erred By Using Extrinsic Evidence To Import The Wrong Test Into Claims 1-7, 9-13, and 18-19.

The Board improperly interpreted claims 1-7, 9-13, and 18-19 to incorporate the standard 100-g ASTM D-1321 / DIN 51 579 hardness test, which all parties agree is the test used by the Bianchi references for their numerical hardness ranges, rather than the non-standard 50-g test as described in the '647 Patent specification. *See Phillips v. AWH Corp*., 415 F.3d 1303, 1318 (Fed. Cir. 2005) (*en banc*) (holding that the patent and its specification are favored over extrinsic evidence in determining how to read claim terms).

Petitioner relied on the Bianchi references as allegedly disclosing the hardness limitation of the claims. As noted above, claims 1-7, 9-13, and 18-19 of the '647 Patent provide a deodorant stick with "a hardness from about 70 mm*10 [or 90 mm*10] to about 140 mm*10, *as measured by penetration with ASTM D-1321 needle*." (*E.g.*, '647 at cl. 1, 7.) To properly evaluate Petitioner's argument that either Bianchi discloses these limitations, the Board was required to interpret the claimed hardness range. The Board recognized that doing so necessitated looking beyond the claim language to the test methodology used to "measure[] by penetration with ASTM-D1321 needle." Petitioner agreed. (Hearing Tr. at 11:23-12:9.)

In its POR, P&G explained that the '647 claimed hardness ranges were not the same as in the Bianchi references, because the penetration testing methodology

in the ’647 Patent uses a needle half the weight of the test method used in the Bianchi references, which impacts penetration distance and thereby, reported hardness values. In other words, while the nominal hardness values *appear* to overlap, they do not, in fact, line up because the hardness test methodology used to arrive at the hardness values claimed in the ’647 Patent is meaningfully different from the standard test used in the Bianchi references to determine their disclosed hardness values. (POR at 34-37, 54-55; Paper 25 at 2-7, “Sur-Reply”.)

Notwithstanding this clear intrinsic evidence of the ’647 Patent’s different test, the FWD incorrectly found that “the evidence of record fails to support Patent Owner’s position that the ’647 patent discloses a unique hardness test,” different from the standard ASTM / DIN test of the Bianchi references. (FWD at 27.) In particular, the FWD concluded that the ’647 Patent “fails to expressly disclose whether the test was performed without the required 50-gram weight placed above the penetrometer needle, and its silence to that fact is insufficient to persuade us that a different test was ultimately intended or performed.” (FWD at 27-28.) The ’647 Patent’s specification explicitly contradicts the FWD’s erroneous conclusion.

The ’647 Patent describes the needle penetration test used to assess hardness of its invention, which the patent explains is “based on”—*i.e.*, not the same as—“the American Society for Testing and Materials Methods D-5, D1321 and D217 and DIN 51 579.” (’647 at 22:13-17; POR at 36-37; Sur-Reply at 2-7.). It is undisputed

that the ASTM D1321 and DIN 51 579 standards employ a total testing load of 100 grams. (*See, e.g.*, Paper 20 at 14, "Reply"; POR at 36-37; Ex. 2018 (ASTM standard); Ex. 2019 (DIN standard).) Deviating from these standard tests, the '647 Patent teaches the POSA to use a needle assembly where "the total weight of the shaft and needle is 50±0.2 grams when the shaft is in free fall." ('647 at 23:25-26; POR at 36-37.) There is no dispute that the needle and shaft (also referred to as the "rod"), together, weigh just 50 grams. (*See* Reply at 14.) In providing instructions on how to perform the test, the '647 Patent explicitly states in its "Hardness Testing Method" section: "[t]he rod is then released and allowed to travel downward, *driven* ***only*** *by the weight of the needle (or cone) and the rod*." (POR at 13; Sur-Reply at 3-6; '647 at 22:8-9, 22:64-65.). The patent twice calls for using "***only***" the needle and rod, *i.e.*, "***only***" 50 grams. (*Id.*) The patent nowhere mentions the use of the 100-gram total load required by the standard ASTM / DIN tests, or use of the standard ASTM / DIN tests unmodified.

Instead of relying on this intrinsic evidence to interpret the meaning of the hardness limitation, the FWD relies on the opinion of Petitioner's expert, who stated for the first time *in a Reply declaration* that the '647 Patent's discussion of a 50-g weight needle assembly was solely for "calibration," because the description of the 50-g needle assembly appears in the patent's "[p]eriodic calibration" section. (FWD

at 27-28.) This extrinsic expert opinion evidence is less probative than the intrinsic record under *Phillips*, and in any event, is wrong.

The 50-g needle assembly is not only used in the calibration section, but also, explicitly, in the prior section of the '647 Patent discussing its "Hardness Test Method—Penetration Measurement for Deodorant Finished Products." (POR at 13; Sur-Reply at 3-6; '647 at 22:8-9, 22:64-65.) There, by stating that the rod is driven "***only***" by the needle and rod (which indisputably weighs 50 grams), the '647 Patent explicitly disavows the additional 50-g weight place above the needle that results in the total 100-g load used in the ASTM D-1321 and DIN 51 579 tests of the Bianchi references. It would also be non-sensical for the patent to describe calibration with one needle assembly weight and then to require the use of a different needle assembly weight for testing without expressly discussing a change to the needle assembly to perform the testing. (*See* Sur-Reply at 5-6.) Indeed, the standard ASTM D-1321 test requires *adding* a 50-g weight to the 50-g needle assembly for a total load of 100 grams. (Ex. 2018 at 5-6 ("Place a 50-g weight above the penetrometer needle, making a total load of 100 ± 0.015 g for the needle and all attachments."); POR at 40-41.) The '647 Patent's explicit description in the specification of the 50-g needle assembly ***only***—no addition of the 50-g weight above the needle as in the ASTM D-1321 standard—and reference to the 50-g needle assembly ***only*** in the testing methodology section eviscerates the FWD's conclusion that the '647 Patent

"fails to expressly disclose whether the test was performed with the required 50-g weight placed above the penetrometer needle …." (FWD at 27-28.)

The hardness test described in the '647 Patent is thus clearly and significantly different from the standard ASTM and DIN tests on which the Bianchi hardness values are based. As a result, the Petition fails to establish a *prima facie* case of obviousness between the Bianchi references' hardness ranges and the '647 Patent's claimed range. The Board's conclusion that "a POSA would have been motivated to formulate Lesniak's deodorant stick to be within the claimed hardness range, *which overlaps with ranges known to be acceptable to consumers as disclosed in Bianchi '518*," (FWD at 26-28) and similar finding as to Native and Bianchi-254, is thus clearly erroneous under *Phillips* and must not be permitted to stand. As such, P&G respectfully requests that the Director vacate and reverse the FWD as to claims 1-7, 9-13, and 18-19.

B. The FWD Fails To Comply With The Motivation To Combine Requirement For Grounds II-VII.

The Board also erred in failing to articulate any reason or motivation a POSA would have had to combine the teachings of the Bianchi references with the very different types of sticks described in Petitioner's primary references, Lesniak (Ground II-IV) and Native (Grounds V-VII).

Unrebutted expert testimony of record shows that the stick technologies and natural-ingredient approaches of Petitioner's primary references (Lesniak and

Native) are vastly different from its secondary references, Bianchi-518 and Bianchi-254. (*E.g.*, POR at 12-14, 42-47, 54-58; Sur-Reply at 1-2, 20-25.) Lesniak and Native are anhydrous, natural compositions, while the Bianchi references are primarily silicone-based. (*Id.*; Ex. 2011 at ¶¶ 35, 37.) As is common knowledge, silicone—a decidedly non-natural ingredient—can be used to reduce drag on human skin, and improve overall glide and skin-feel.

When it comes to assessing the hardness limitations, importantly, the Bianchi references disclose and claim compositions having over 50% non-natural ingredients, *e.g.*, aluminum and volatile silicones. (POR at 12-14, 51-57.) Their hardness disclosures must be read in that light—they disclose a certain level of desired hardness *for their 50% silicone/aluminum stick formulations*. As P&G argued to the Board, and explained in its other requests for Director Review, there is simply no reason that a POSA seeking to develop a *natural* aluminum-free deodorant, would have been motivated to look to either of the aluminum- and silicone-laden Bianchi references for its hardness to achieve the invention of claims 1-7, 9-13, and 18-19.

As for the claims of the '647 Patent that do not contain a hardness limitation (claims 16-17), the FWD's acceptance of Petitioner's combinations for those claims is premised on the same error. That is, there would have been no reason for a POSA to look to the quantities of particular natural ingredients in Bianchi-254, where

Bianchi-254 discloses only non-natural, aluminum- and silicone-based antiperspirants comprising vast quantities (50+%) of these non-natural ingredients. (POR at 52-53; *see also id.* at 33-34.) Why would a POSA look to a completely different stick technology filled with ingredients she is trying to avoid, to determine the percentage of the other (required) ingredients?

Neither Petitioner nor the Board was able to fill this legal void. The Petition did not explain why a POSA would have looked to the heavily aluminum- and silicone- Bianchi formulations to determine the appropriate hardness level for a natural deodorant free of aluminum and silicone, or the amounts of required ingredients to be used. (POR at 53.) And neither Petitioner nor the FWD ever addressed P&G's arguments as to the difference in stick technologies.

"[T]he prior art must be considered *as a whole* for what it teaches." *Medichem, S.A. v. Rolabo, S.L.*¸437 F.3d 1157, 1166 (Fed. Cir. 2006). And the obviousness inquiry typically requires an analysis of "whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (requiring "articulated reasoning with some rational underpinning to support the legal conclusion of obviousness")). Yet, here, the Board ignored much of the Bianchi references' disclosures and did not provide any reason ***why*** the very different teachings of the Bianchi references, full of forbidden and

hardness-impactful ingredients, would have been of interest to a POSA in assessing either hardness or amounts of ingredients. There is no evidence from the prior art that a POSA would have made the Petitioner's proffered combinations, and the Board offers no genuine reason for doing so. Only by leapfrogging over this legal requirement did the Board reach its conclusions that (i) a POSA would look to the silicone/aluminum-driven hardness of the non-natural Bianchi compositions to modify the natural compositions of Lesniak and Native and arrive at P&G's claimed invention; and (ii) a POSA would look to the heavily silicone- and aluminum-based antiperspirants of Bianchi-254 to determine the amount of other, natural ingredients to use in developing a natural, aluminum-free deodorant sticks.

By failing to articulate reasoned motivation to combine, with rational underpinning, to support *prima facie* obviousness, the Board improperly shifted the burden to P&G to show why known elements in the prior art could not simply be combined because they were known. Indeed, in considering the hardness claims, the FWD takes for granted that a POSA would have aimed for the Bianchi references' hardness simply because those ranges appear in the prior art as allegedly reflecting "ranges known to be acceptable to consumers" (FWD at 28), without any discussion of a need to modify Lesniak or Native in the first place, or without any discussion of how or why a POSA would have sought the same hardness in a natural versus non-natural deodorant stick, with vastly different ingredients that may

contribute different properties to the stick and affect its hardness and stability. (POR at 40.) Similarly, with respect to the amounts of ingredients, the Board cavalierly suggests that a POSA would freely select the amount of an ingredient to be used in one personal care composition from another, without accounting for wholly different base technologies. (FWD at 42-43.) This lumping together of huge swaths of disparate "personal care compositions" is inadequate under the law. Such "reasoning" would render any "personal care composition" of known ingredients *prima facie* obvious. This type of cursory, conclusory, hindsight-based analysis infects the other combinations in the FWD as well. Here, the Board again endorsed the combination of Lesniak and Phinney without regard to the incompatible disclosures between the two references. *See, e.g.*, Case No. IPR2024-01104, Paper 36 at 13.

The FWD clearly erred by failing to articulate a motivation to combine Lesniak and Native with secondary references Bianchi-518 and Bianchi-254 (and Phinney) in contravention of *KSR* and *Kahn*. Because this error is dispositive, P&G respectfully requests that the Director vacate the FWD.

C. Petitioner Failed To Properly Identify All Real Parties in Interest Under 37 CFR § 42.8

37 C.F.R. § 42.8(a)(3) requires a party to update its mandatory notices within 21 days of a "change of information" relating to the real parties-in-interest. As explained in IPR2024-01104, Petitioner was acquired by Unilever on September 2,

2025. P&G contacted Petitioner on October 20, 2025, to inquire whether its mandatory notices were accurate. On October 21, Petitioner updated its mandatory notice, ambiguously stating, "[w]hile Dr Squatch, LLC remains the real party in interest, out of an abundance of caution, Dr. Squatch, LLC advises the Board that is [*sic*] now owned, indirectly, by Unilever PLC." (Paper 33 at 1.) At the October 22 oral hearing, P&G raised concerns about this updated notice. (Hearing Tr. at 31:7-19.) The Board noted that it would take P&G's request under advisement, but, the FWD did not address real parties-in-interest, and Petitioner has still not clarified all real parties-in-interest, which of course affects important issues such as estoppel and potential conflicts of interest. Petitioner's failure to identify all real parties-in-interest as required by 35 U.S.C. §312(a)(2), and within the deadline specified in 37 C.F.R. §42.8(a)(3), calls into question whether the Petition should be afforded a new filing date under *Corning Optical Communications RF, LLC v. PPC Broadband Inc.* (IPR2014-00440, Paper 68) as of Petitioner's October 21 disclosure, in which case the Petition is time-barred under 35 U.S.C. §315(b). In view of the above, P&G respectfully requests that the Director vacate the FWD and dismiss the Petition.

IV. CONCLUSION

For the reasons set forth above, P&G respectfully requests that the Director grant review, vacate and reverse the Board's Final Written Decision as to Grounds II-VII.

Respectfully submitted,

Date: February 27, 2026

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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 February 27, 2026, at the following address:

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