

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FIRST QUALITY RETAIL SERVICES, LLC,
FIRST QUALITY CONSUMER PRODUCTS, LLC,
FIRST QUALITY PRODUCTS, LLC,
FIRST QUALITY ENTERPRISES, LLC,
Petitioners,

v.

ESSITY HYGIENE AND HEALTH AB,
Patent Owner.

Case No. IPR2024-01487
U.S. Patent No. 9,308,138

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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CERTIFICATE OF SERVICE

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I. INTRODUCTION

Patent Owner (“PO”) respectfully requests Director review and reversal of the Final Written Decision, Paper 44 (“FWD”), issued May 12, 2026. 37 CFR §42.75.

U.S. Patent No. 9,308,138 (“the ’138 Patent”) issued on April 12, 2016. EX1001. PO filed a complaint for patent infringement against Petitioners on March 22, 2024 (*Essity Hygiene and Health AB et al. v. First Quality Products, Inc. et al.*, 24-cv-00374-GBW (D. Del. Mar. 22, 2024) (“Related Litigation”)). EX1014. In the Related Litigation, Petitioners asserted that Claim 21 is indefinite. EX2013, Joint Claim Construction Brief, pp.14-34, 53-64 (Mar. 23, 2025).

Petitioners filed the Petition on October 25, 2024 (“the Petition”), challenging claims in the ’138 Patent which issued more than nine years before the Petition was filed. The Board granted institution on the Petition on May 16, 2025, prior to the Director’s use of settled expectations to deny institution. *Interim Processes for PTAB Workload Management Memorandum*, p.2 (Mar. 26, 2025). Since that time, the parties have completed briefing and conducted an oral hearing. Petitioners did not inform the Board that it asserted Claim 21 was indefinite in the Related Litigation.

In the FWD, all challenged claims were found unpatentable under four of five grounds asserted in the Petition. FWD, pp.61-62. PO now requests Director review of the FWD and reversal of the decision, which will reduce and clarify issues for appeal, based on the arguments below.

II. ARGUMENT

There are two issues that are central to this dispute: (1) whether the “first perforated polymeric layer” of the “fluid flow control structure” of independent Claim 1 of the ’138 Patent requires the claimed layer to be liquid permeable; and (2) whether Bergstrom’s forming element 60 unambiguously discloses the claimed elements, and in particular, a “first perforated polymeric layer” of a “fluid flow control structure” arranged as in the claim as required under 35 U.S.C. §102. In addition, Patent Owner seeks Director Review with regard to the propriety of institution where, as here, Petitioner vehemently argued that dependent claim 21 is indefinite in the parallel proceeding. For the reasons more fully addressed below, the FWD should be reversed.

A. The FWD’s analysis of the claimed “perforated polymeric layer” improperly ignored the contexts in which “perforated” was used in the ’138 Patent versus in the Bergstrom reference.

1. The FWD erred by failing to construe the claimed “perforated polymeric layer” in the context of the ’138 Patent.

It is undisputed that the intrinsic evidence of the ’138 Patent unambiguously describes the “first perforated polymeric layer” of the “fluid flow control structure” as being liquid permeable and nowhere mentions or even suggests the possibility of such layer being liquid impermeable. It is further undisputed that, during the prosecution of the ’138 Patent, prior art was distinguished on the basis that no

“perforated polymeric layer” was present where the prior art material prevented fluid from passing therethrough. POR (Paper 13), pp.21-23. Nevertheless, focusing solely on the term “perforated” in isolation, the FWD fails to address the cooperative claim elements and concluded that “the ’138 Patent [] does not appear to require that we import any particular function having to do with movement of liquid bodily waste therethrough into the construction of ‘perforated.’” FWD, pp.13-14.

At Institution, the Board observed that “Petitioner appears to assume that ‘perforated’ should be construed not to require that a material be pierced.” Inst’n Dec. (Paper 8) at 34. However, Petitioners later conceded that, if construed, “perforated” refers to “having holes or apertures that are pierced/extend through a layer.” Pet. Reply (Paper 18), pp.1-2. Moreover, Petitioners’ expert agrees “that fluid will generally pass through a perforated polymeric layer.” EX1021, ¶19. Indeed, Petitioners never explicitly disputed that the “perforated polymeric layer” must be liquid permeable. In fact, Petitioners’ expert indicated that he was not aware of any disclosure in the ’138 Patent that teaches that the perforated polymeric layer as claimed in the patent can be liquid impermeable. EX2005, 90:17-91:6. Despite these facts, the FWD construes “perforated polymeric layer” as simply “a polymeric layer pierced though with holes or apertures” without acknowledging that, in the context of the ’138 Patent, such construction requires liquid permeability. FWD, p.14.

This construction completely sidesteps the main claim construction

controversy as it does not answer the question of whether the claim language, read in the context of the '138 Patent, excludes liquid impermeable layers. In fact, as interpreted in the FWD, the construction encompasses a liquid impermeable layer “as the first perforated polymeric layer,” a position that neither party urged during the proceeding. This cannot be a proper construction of the phrase. By construing “first perforated polymeric layer” *sua sponte* to align the disparate teachings of the '138 Patent and Bergstrom, the FWD violated the APA, which requires PO with opportunity to respond to a construction that neither party has asserted. *Qualcomm Inc. v. Intel Corp.*, 6 F.4th 1256, 1263-64 (Fed. Cir. 2021) (“it is unreasonable to expect parties to brief or argue agreed-upon matters of claim construction.”).

Further, the FWD fundamentally erred in the construction of “perforated polymeric layer” by failing to view the phrase in the context of the intrinsic evidence.¹ *Sunovion Pharm., Inc. v. Teva Pharm. USA, Inc.*, 731 F.3d 1271, 1276

¹ Bergstrom’s stray reference to “perforated plastic films” appears to be the source of the Board’s confusion because the '138 patent and associated file history unambiguously require the “perforated polymeric layer” of the “fluid flow control structure” to allow the passage of bodily fluids. But Bergstrom is extrinsic evidence that cannot be used to “vary, contradict, expand, or limit the claim language.” *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584-85 (Fed. Cir. 1996).

(Fed. Cir. 2013) (“When construing claim terms, we first look to, and primarily rely on, the intrinsic evidence, including the claims themselves, the specification, and the prosecution history of the patent, which is usually dispositive.”).

The FWD uses particularities of basis weight and aperture size from dependent claims to discard PO’s argument that “perforated polymeric layer” cannot be construed as impermeable. FWD, p.12. But there are no dependent claims defining permeability, and the FWD ignored the fact that the “perforated polymeric layer” is part of Claim 1’s “fluid flow control structure.” The two are inextricably intertwined: as part of the “fluid flow control structure,” the “perforated polymeric layer” plainly cannot be impermeable to the flow of bodily liquid through the layer.

Indeed, the FWD completely overlooks the purpose of the “fluid flow control structure” and specifically the “perforated polymeric layer” as consistently described in the ‘138 Patent specification. As described therein, the “fluid flow control structure” provides the article with high intake capacity.” EX1001, 2:21-22. “As soon as the fluid has entered into the fluid flow control structure it may run in the open pore structure of the non-perforated layer and be distributed away from the initially wetted area of the absorbent article.” *Id.*, 2:27-31. When “fluid enters the fluid flow control structure through a first perforated polymeric layer ... at least some of the fluid travels downward towards the backsheet.” *Id.*, 4:40-44. “The function of the fluid control structure is to provide the absorbent article with temporary fluid

holding capacity and to distribute fluid in the article.” *Id.*, 4:9-11. The “first and second perforated polymeric layers and the [] non-perforated fibrous polymeric layers together contribute to the [] ability of the structure to contain and move fluid therethrough.” *Id.*, 4:62-67.

Figs. 3 and 4 of the ’138 Patent consistently show the flow of bodily fluid through the “first perforated polymeric layer” 32. Had Applicant desired to define the claim language to include liquid impermeable layers as part of the definition of the “first perforated polymeric layer” it knew how to do so and expressly did not. For example, the “backsheet may be a thin, flexible, fluid-impermeable plastic film, ...” EX1001, 6:49-50. There is nothing in the ’138 Patent that suggests that the “first perforated polymeric layer” could be liquid impermeable. Indeed, if it was, the article could not function as recognized by Petitioners’ own expert. EX1021, ¶19; EX2005, 90:17-91:6.

The prosecution history of the ’138 Patent is also quite informative. The FWD indicates that “the prosecution history may not be used to infer the intentional narrowing of a claim absent the applicant’s clear disavowal of claim coverage.” FWD, p.14. The FWD is incorrect both legally and factually.

The Federal Circuit recognizes that the prosecution history may be critical in interpreting disputed claim terms because it contains the complete record of all the proceedings before the USPTO, including express representations made by the

applicant regarding the scope of the claims. *See Personalized Media Communications, LLC v. Apple Inc.*, 952 F.3d 1336, 1340 (Fed. Cir. 2020). Even where “prosecution history statements do not rise to the level of unmistakable disavowal, they do inform the claim construction.” *Id.* For example, “an applicant’s repeated and consistent remarks during prosecution can define a claim term” by demonstrating how the inventor understood the invention.” *Id.*

Here, there is a clear disavowal of liquid impermeability. Applicant made repeated and consistent remarks defining the meaning of “first perforated layer.” Applicant argued in response to a rejection by the Examiner that modifying a reference to include a first perforated polymeric layer would not work in that reference, because adding “holes, perforations or apertures” to such a layer “would allow liquid to escape from this layer.” EX1003, p.741; POR 21-22. Applicant argued in response to a different rejection that a wicking barrier in a prior-art reference was not a first perforated polymeric layer because “other than by an opening 57 in the wicking barrier 60, fluid is prevented from passing between central absorbent member 62 and outer absorbent member 56.” *See* EX1003, p.1046; POR, 22-23.

Applicant further traversed the Examiner’s rejections by arguing that what the Examiner considered to be “perforated” materials were each not a “perforated polymeric layer” within the meaning of the ’138 Patent because such materials

prevented fluid from passing through them. EX2004, ¶23. Applicant made clear during prosecution that a “perforated polymeric layer” must allow fluid to flow through the perforations. EX2004, ¶24. As such, the prosecution history of the ’138 Patent teaches a POSA that the proper construction of “perforated polymeric layer” in the context of the ’138 Patent must exclude layers that are liquid impermeable.

2. Bergstrom’s forming element 60 is not a first perforated polymeric layer meeting the limitations of Claim 1 of the ’138 Patent (Ground 1)

The finding that forming element 60 of Bergstrom discloses the “first perforated polymeric layer” of Claim 1 is wrong. FWD, p.20. The FWD states that “[e]ven though the forming element in Bergstrom might be ‘typically’ liquid impermeable (EX1004, 9:24-30), that does not preclude a layer that is perforated, particularly when Bergstrom expressly discloses a perforated plastic film as one of the possibilities for forming element 60. EX1004:1-4.” FWD, p.20. The FWD goes on to say that “although Patent Owner focuses on Bergstrom’s disclosure that forming element 60 is ‘**typically** liquid-impermeable” (PO Resp. (Paper 13), 58-60; EX1004, 9:24-30), we do not view Bergstrom’s use of the word ‘typically’ as mandating that the forming element always be liquid impermeable.” FWD, p.20. The anticipation analysis in the FWD is wrong both legally and factually.

Bergstrom’s disclosure of a “typically liquid-impermeable” forming element is not a description of a perforated polymeric layer let alone a perforated polymeric

layer that allows for the flow of liquid bodily waste. As indicated *infra*, Bergstrom’s liquid-impermeable forming element 60 does not meet the requirements of a properly construed “perforated polymeric layer.” The FWD contains yet further errors because it relies on the premise that Bergstrom “does not preclude” the “first perforated polymeric layer” of Claim 1. As detailed below, “not precluding” a limitation falls short of the strict statutory standard for anticipation.

Anticipation requires that a single reference “describe the claimed invention with sufficient precision and to establish that the subject matter existed in the prior art.” *Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1120 (Fed. Cir. 2002). The Federal Circuit has squarely held that “an ambiguous disclosure does not anticipate.” *Wasica Finance GmbH v. Continental Automotive Systems, Inc.*, 853 F.3d 1272, 1284 (Fed. Cir. 2017). To the extent the FWD implies that the missing element is inherent, an argument cannot be based on what a reference merely permits. Under long-standing precedent, inherency “may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1269 (Fed. Cir. 1991).

Even if one were to assume *arguendo* that the phrase “typically liquid impermeable” suggests that the forming element 60 could be made to be liquid permeable, which it does not because Bergstrom implies it is unlikely, that alone is

not a definite or explicit disclosure of a perforated polymeric layer that is or even may be liquid permeable. Moreover, even if the forming element could somehow be liquid permeable, that is not a disclosure of a perforated polymeric layer that allows flow of liquid bodily waste.

The FWD further fails to address that Bergstrom uniformly uses the word “typically” to define materials of a particular type, not to propose optionality. *See, e.g.*, PO Sur-Reply (Paper 29), pp.6-7. Bergstrom uses “typically” to describe “the characteristics that you would expect from” elements of the invention described therein, not to imply optionality. Bergstrom’s forming element 60 is described as having physical and mechanical properties “substantially unaffected by liquid” and as “typically liquid-impermeable.” EX1004, 9:24-27, 9:34-35.

Indeed, Bergstrom’s forming element 60 functions as a stiffening element as well as a liquid impermeable barrier that “makes liquid flow around the edges of the forming element 60 in the width (X) direction, which makes best use of the upper and lower core absorbent cores 20, 30 by distributing liquid at least in the (X) direction.” EX1004, 9:24-27. That is, instead of having liquid pass through the forming element 60 to the center of the absorbent cores, the forming element acts as a barrier to direct the flow of liquid around its edges, which distributes fluid to the outer portions of the absorbent cores. EX1004, 9:9-32.

The FWD further focuses on Bergstrom’s separate disclosure that “suitable

materials for forming element 60 are plastic films, **perforated** plastic films and reinforced tissue or reinforced nonwoven materials.” EX1004, 10:1-4 (emphasis added). FWD, p.20. Here again, Bergstrom makes no reference to the use of a perforated polymeric layer being liquid permeable let alone having the ability to allow the flow of liquid bodily waste. Importantly, the FWD is missing any analysis to support its assumption that Bergstrom’s use of “perforated plastic film” necessarily has the same meaning as the claimed “perforated polymeric layer” of the ’138 Patent. *Medrad, Inc. v. MRI Devices Corp.* 401 F.3d 1313, 1318 (Fed. Cir. 2005) (“Even absent an express definition of a term in the specification or prosecution history, or a clearly established understanding of the meaning of the term in the art, the manner in which the term is used in the patent may dictate a definition that differs from the definition that would be given to the same term in a different patent with a different specification or prosecution history.”).

The FWD apparently equates “perforated” with “liquid permeable” in the context of Bergstrom. However, the FWD fails to explain why Bergstrom’s disclosure of a perforated plastic film is an explicit or even an inherent disclosure of a liquid permeable layer, let alone a layer allowing the passage of bodily fluids therethrough. The FWD fails to account for the fact that Bergstrom makes no mention of the depth or size of the perforations that would allow for liquid permeability. The FWD nowhere explains how the invention described in Bergstrom

would work if the “typically liquid-impermeable” forming element 60 that acts as a barrier to direct the flow of liquid were suddenly liquid permeable.

PO’s expert explained that merely stating that plastic films, perforated plastic films, and reinforced tissue or reinforced nonwoven materials are “suitable materials” for the forming element does not mean that the forming element is a “perforated polymeric layer” as required by Claim 1. EX2001, ¶109. Indeed, Bergstrom expressly states that “combinations of those materials in laminate form are also possible,” meaning that the resulting combination is not necessarily liquid permeable. EX1004, 10:3-4. Moreover, Bergstrom differentiates between a perforated but liquid-impermeable film and an apertured, liquid permeable film in that it uses the term “apertured plastic film” rather than “perforated plastic film” to describe a material where “bodily fluid should be able to pass through it without hindrance,” for example topsheet 101 of Bergstrom. EX2001, ¶116; EX1004, 10:31-11:6.

B. Bergstrom’s forming element 60 and acquisition layer 40 together are not a fluid flow control structure meeting the limitations of Claim 1 of the ’138 Patent

It is noted in the FWD that the phrase “fluid flow control structure” is “broad and not limited to a particular kind of structure or to any particular kind of control.” FWD, p.21. After acknowledging a claim construction controversy, the FWD then provides a construction. *See, e.g.*, FWD, pp.21-22. However, there is no analysis of

the claim language, specification and file history. This is yet another error. *CSR, PLC v. Skullcandy, Inc.*, 594 F. App'x 672, 678 (Fed. Cir. 2014). (“A Board’s findings must be expressed with sufficient particularity to enable [the] court, without resort to speculation, to understand the reasoning of the Board, and to determine whether it applied the law correctly and whether the evidence supported the underlying fact findings.”).

Further, the conclusion in the FWD that “Bergstrom’s elements 60 and 40 are located together as a layered structure, and perform fluid flow control functions, making them a fluid flow control structure” is another error. FWD, p.21. Had there been a fulsome construction of the phrase “fluid flow control structure” in the FWD, it would have been recognized that the “fluid flow control structure” allows the flow of fluid through the structure and into the absorbent layers of the absorbent article in the Z-direction away from the body. *See, e.g.*, EX1001, 7:45-47.²

² While not the basis of this request as it may be considered as a new argument, the FWD equates Bergstrom’s acquisition layer 40 to the non-perforated fibrous polymeric layer” of the “fluid flow control structure” of Claim 1. FWD, pp.21-22. However, Bergstrom merely states that the acquisition layer 40 “typically [] comprises fibrous materials, such as e.g. synthetic fibres.” EX1004, 6:20-21. Neither Petitioners nor their expert ever asserted that Bergstrom’s “fibrous materials” are

C. Recent decisions by the Director dictate that this proceeding should never have been instituted.

Petitioners have taken inconsistent claim construction positions warranting grant of Director Review, reversal of the FWD, and revoking the institution decision. In the Related Litigation, Petitioner vehemently urged that the phrase “opening extending through an entire crotch portion” in Claim 21 is indefinite. EX2013, pp.14-34 and 53-64. Without notifying the PTAB of its position in the Related Litigation, Petitioners had no difficulty presenting their understanding of the meaning of the claim in the Petition. *See, e.g.*, Pet. 44-45 and 73-74.

Under recent decisions by the Director, “allowing a petitioner to advance a claim construction before the Board when that petitioner has made inconsistent indefiniteness arguments in district court fails to further, but instead detracts from, the Office’s goal of ‘providing greater predictability and certainty in the patent system.’” *Generac Power Systems, Inc. v. Champion Power Equipment, Inc.*, IPR2025-00805, Paper 36 at 3 (Feb. 3, 2026). As a result, the “appropriate course of action is to grant Director Review, vacate the Decision, and deny institution.” *Revvo Technologies, Inc. v. Cerebrum Sensor Technologies, Inc.*, IPR2025-00632, Paper 40 at 3 (Feb. 3, 2026) (Precedential). It is appropriate to deny institution when a

necessarily or definitionally polymeric.

Petitioner's conduct demonstrates that the dispute is less about a litigation alternative and more about inconsistent positions to gain an upper hand in the overall litigation. *Ford Motor Co. v. Autoconnect Holdings LLC*, IPR2025-01342, -01383, -01524 (PTAB May 12, 2026) (Paper 27) (Informative).

In *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018), the Court ruled that when the PTAB institutes an IPR, it must decide the patentability of all the claims challenged by the petitioner. Thus, if the Director decides institution is appropriate with respect an independent claim it must also institute on dependent claims even if Petitioners believe such claims are indefinite. Here, Petitioners failed to notify the Board that it believes that Claim 21 is indefinite, let alone the reasons for its belief as outlined on pages 14-34 and 53-64 of EX2013. This forced the Board to attempt to construe the claims on its own without input from the parties and decide anticipation on a claim that Petitioners believe is indefinite. *Samsung Electronics America, Inc. v. Prisia Engineering Corp.*, 948 F.3d 1342, 1350 (Fed. Cir. 2020); *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801, 813-814 (Fed. Cir. 2021). Such gamesmanship should not be permitted here and appears to have forced an error.

The Director should grant review, reverse and revoke the FWD, and revoke the institution decision. Otherwise, the Board will have been forced to construe a claim Petitioners believe is indefinite and decide whether that claim is anticipated and/or obvious in view of the asserted art.

III. CONCLUSION

For the foregoing reasons, Patent Owner requests Director review and reversal of the Final Written Decision.

Respectfully submitted,

Date: June 11, 2026

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of June, 2026, a true and correct copy of **PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW, UPDATED LIST OF PATENT OWNER'S EXHIBITS**, and **EXHIBIT 2013** were served on Patent Owner's counsel via electronic mail as follows:

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