

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

AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST

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I. INTRODUCTION

Patent Owner (PO)'s Request does not identify any issue warranting Director Review. A request for Director Review of a final written decision is 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.” USPTO, Director Review Process; *see* 37 C.F.R. § 42.75(c). PO identifies none.

The Board issued a detailed Final Written Decision (FWD) after full briefing, several rounds of expert testimony, and oral argument, and found all challenged claims unpatentable on multiple grounds. The bulk of PO's Request is directed towards relitigating claim construction and anticipation arguments for only one of the five grounds presented in the Petition. The Board already considered and rejected those arguments. And all claims addressed by that ground were also found unpatentable on two other grounds.

The remainder of PO's Request is a challenge to the institution decision with respect to a single dependent claim. PO could and would have raised that issue before the Board if it had merit, but chose not to because it does not.

PO never explains how any of its arguments satisfy the high standard for Director Review. Instead, PO mischaracterizes the FWD, re-raises arguments the Board already addressed, and belatedly challenges the Decision on Institution after the IPR has served its purpose as an alternative to district-court litigation. None of

those positions warrants disturbing the Board’s final decision. The Request should be denied.

II. ARGUMENT

A. PO Identifies No Error in the Board’s Construction of “Perforated Polymeric Layer” or Its Analysis of Bergstrom

PO first requests Director Review based on the Board’s construction of “perforated polymeric layer” in claim 1 and its finding in connection solely with Ground I that Bergstrom’s forming element 60 discloses that limitation. But PO identifies no abuse of discretion, material factual error, legal error, or important issue of law or policy. Its argument instead depends on mischaracterizing the Board’s construction, highlighting intrinsic evidence the Board already considered, and disputing the Board’s fact finding on Bergstrom. PO’s argument does not warrant Director Review.

1. The Board correctly rejected PO’s construction of “perforated polymeric layer”

PO mischaracterizes the claim construction dispute to argue that the Board issued a *sua sponte* claim construction of the claim term “first perforated polymeric layer” in violation of the APA. Request, 3-4. It did not. The Board addressed the actual constructions proposed by the parties and construed “first perforated polymeric layer” to be a layer that is pierced through with holes or apertures. FWD, 10-14. The Board did not find, and there is no evidence in the record, that a layer

“pierced through with holes or apertures” would encompass liquid impermeable materials, as PO now contends. Tr. 34:6-21; *see also* Tr. 64:20-65:1.

During this proceeding, PO did not propose construing “first perforated polymeric layer” to exclude liquid impermeable materials. PO instead proposed construing “perforated polymeric layer” as:

“a polymeric layer that is pierced through with holes or apertures **[to allow] free flow of liquid bodily waste therethrough.**”

POR, 19 (emphasis added). PO explained that the perforations must “be large enough that fluid can flow through the layer as intended,” and highlighted other structural features the ’138 patent discloses for the perforations, such as their size and shape. POR, 20-21. In response, Petitioners agreed “perforated” means “pierced through with holes/apertures” and explained PO’s additional functional language was improper:

“PO’s attempt to further require that the perforations must be “**large enough that [liquid bodily waste] can flow through the layer as intended**” (Response, 20), should be rejected.”

Pet. Reply, 1-2 (emphasis added); *see also* Tr. 7:12-8:7 (“We do object to that additional functional language. The claim language is clear on its face.”); PO Sur-Reply, 4-5. Petitioner explained that perforated has an understood meaning and that “[n]othing in the claims or specification requires any particular size” perforations. Pet. Reply, 1-2. Ultimately, the Board rejected PO’s added functional language /

perforation size requirement and construed “perforated polymeric layer” as “a polymeric layer pierced through with holes or apertures.” FWD, 14. That construction tracks the dispute the parties actually briefed and does not constitute an APA violation.

PO’s additional arguments that the Board’s claim construction is incorrect are wrong. They do not come close to meeting the high standard for Director Review.

First, the Board properly evaluated and rejected PO’s argument that the phrase “fluid flow control structure” required “perforated polymeric layer” to be construed as requiring “free flow of liquid bodily waste.” FWD, 11-14. PO restates its argument that because the “perforated polymeric layer” is part of the “fluid flow control structure,” the layer must be construed to require a free flow of bodily waste. Request, 4-6; POR, 19-23. But, as the Board properly found, claim 1 recites the required structure: a “fluid flow control structure” comprising “a non-perforated fibrous polymeric layer and a first perforated polymeric layer,” where the perforated layer has holes. Nothing in the claims or specification supports adding PO’s “free flow of liquid bodily waste” requirement. EX1001, claim 1; FWD, 10-14. *SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 874-75 (Fed. Cir. 2004) (claim terms carry a “heavy presumption” that they have their ordinary meaning, and limitations from the specification should not be imported into the claims absent a clear redefinition or disavowal). This is nothing more than a routine claim

construction dispute and not a Director Review issue.

Second, PO mischaracterizes the Board's dependent-claim analysis. PO suggests that the FWD improperly used dependent claims directed to basis weight and aperture size to "discard PO's argument that [the] 'perforated polymeric layer' cannot be construed as impermeable." Request, 5. As explained above, the premise of PO's point, that the Board found "perforated polymeric layer" could cover liquid impermeable materials, is incorrect. The Board, therefore, also did not rely on the dependent claims to find a "perforated polymeric layer" could be impermeable. Instead, the Board simply found that claim 1 requires a "polymeric layer pierced through with holes or apertures," while the dependent claims further limit the shape and size of the holes or apertures. EX1001, claims 1, 4, 7, 8; FWD at 12–13. As dependent claims "specify a further limitation of the subject matter claimed" in the independent claim, this analysis was entirely proper. 35 U.S.C. § 112.

Third, the prosecution history was addressed and does not support PO's construction. PO argues that the prosecution history requires construing "perforated polymeric layer" to exclude liquid impermeability. Request, 6-8. The Board considered and rejected PO's previous arguments about the prosecution history, finding that the cited statements did not justify importing PO's additional "free movement of liquid bodily waste" requirement into the claim term. FWD, 13-14. At most, the prosecution history reflects arguments about particular prior art

structures and embodiments; it does not rewrite claim 1 to include PO's proposed functional limitation. POR, 21-23; Pet. Reply, 1-2; FWD, 13-14.

Thus, PO's claim construction fails. Further, although PO takes a different claim construction position in its Request, each of the arguments made in support of that position were fully and adequately addressed by the Board and do not warrant Director Review. POR, 19-23; Pet. Reply, 1-2; PO Sur-Reply, 4-5; FWD, 10-14.

2. PO identifies no error in the Board's finding that Bergstrom discloses a "first perforated polymeric layer."

PO rehashes the argument it presented to the Board that Bergstrom does not disclose a "first perforated polymeric layer," despite Bergstrom's express disclosure that forming element 60 can be made of a "perforated plastic film." Request, 2-8; EX1004, 10:1-4. The Board fully considered these arguments and correctly found PO's position lacks merit. FWD, 10-14. The Director should not revisit the Board's well-supported and well-reasoned findings.

First, Bergstrom expressly discloses the very structure claim 1 requires. Claim 1 recites a "fluid flow control structure . . . comprising a non-perforated fibrous polymeric layer and **a first perforated polymeric layer**." EX1001, claim 1 (emphasis added). Bergstrom likewise discloses the same structure as claimed:

"[S]uitable materials for the forming element 60 are plastic films, **perforated plastic films** and reinforced tissue or reinforced nonwoven materials. Combinations of such materials in laminate form are also possible."

EX1004, 10:1-4 (emphasis added). PO's expert agreed that Bergstrom discloses using perforated plastic films to make forming element 60. EX1022, 185:20-187:1; Tr. 6:15-22, 63:21-65:1.

Second, PO's argument that Bergstrom's "perforated plastic film" does not meet the claimed "first perforated polymeric layer" depends on reading "typically" to mean "always." PO's argument is plainly legally incorrect. *CRFD Rsch., Inc. v. Matal*, 876 F.3d 1330, 1349 (Fed. Cir. 2017) (prior art must be considered for all that it teaches). PO relies on Bergstrom's statement that "[f]orming element 60 is **typically liquid-impermeable**, and thus in use, the forming element 60 makes liquid flow around the edges of the forming element 60 in the width (X) direction of the article," EX1004, 9:24-30 (emphasis added), to argue forming element *must* be liquid impermeable, Request, 8-10. The Board already addressed this argument and rejected it for two reasons: (1) "'typically' does not mean 'always,'" and (2) PO's argument disregards Bergstrom's express disclosure that a suitable material for forming element 60 is "perforated plastic films." FWD, 20; EX1004, 10:1-4. And, as PO's counsel admitted, there is no record evidence that Bergstrom's forming element 60 would be liquid-impermeable when made from the disclosed perforated plastic film. Tr. 34:15-21; *see also* Tr. 64:20-26.

PO's reliance on *Verve*, *Wasica*, and *Continental Can* therefore misses the point. Request, 9-11. *Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1120 (Fed.

Cir. 2002); *Wasica Finance GmbH v. Continental Automotive Systems, Inc.*, 853 F.3d 1272, 1284 (Fed. Cir. 2017); *Continental Can Co. USA, Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268–69 (Fed. Cir. 1991). This is not a case where anticipation depends on silence, ambiguity, or a disclosure that does not exclude the claimed limitation. Bergstrom discloses using the same material as claimed—“perforated plastic films”—to make forming element 60. EX1004, 10:1-4; Pet., 38-41; FWD, 19-21.

Third, forming element 60’s stiffness or structural role does not negate Bergstrom’s express disclosure. Claim 1 does not exclude layers that also provide structure or stiffness, and it does not require that the perforated polymeric layer perform only one function. EX1001, claim 1; FWD, 19-21. The ’138 patent itself contemplates that the fluid flow control structure may have stiffness-related properties. EX1001, 2:63-66; Pet. Reply, 6-7. The Board, therefore, correctly found that forming element 60’s structural role does not negate Bergstrom’s express disclosure that it may be made from perforated plastic film. FWD, 20-21.

Fourth, PO’s arguments about inherency depend entirely on PO’s rejected construction. The Board properly declined to construe structural claim limitations to require “free flow of liquid bodily waste.” FWD, 10-14, 19-21. Petitioners demonstrated express anticipation: Bergstrom discloses forming element 60 made from “perforated plastic films,” which is all the claim requires. Pet., 38-41; Pet.

Reply, 3-7; EX1004, 10:1-4; FWD, 14, 19-21.

PO asks the Director to address arguments that were already raised before and addressed by the Board and reach a different factual finding regarding the content of a single piece of prior art. As the Board correctly found, Bergstrom discloses exactly what is claimed in the '138 patent. And in any event, Director Review is not the vehicle to challenge a factual finding about the teachings of a lone piece of prior art describing absorbent articles.

B. PO Identifies No Error in the Board's Finding that Bergstrom Discloses the Claimed Fluid Flow Control Structure.

PO's argument that the Board improperly construed "fluid flow control structure" identifies no error warranting Director Review. PO contends the Board erred (1) by not examining the claim language, specification, or file history when construing the phrase and (2) in not construing "fluid flow control structure" to "allow[] the flow of fluid through the structure and into the absorbent layers of the absorbent article in the Z-direction away from the body." Request, 12-13.

Prior to the request for Director Review, PO did not advocate for a claim construction of "fluid flow control structure." POR, 19-23. In addressing Bergstrom, PO contended acquisition layer 40 and forming element 60 were not a fluid flow control structure because there were not a "cohesive arrangement of elements to accomplish a particular function." POR, 64-65. To make this argument,

PO cited the '138 patent's discussion of an embodiment where the fluid flow control structure has a highly porous internal structure and an embodiment where the edges of the fluid flow control structure function as barriers. *Id.* PO never cited the file history to make this argument. *Id.*

The Board rejected PO's argument and explained that "[u]nder Patent Owner's interpretation, it would be nearly impossible to know whether a structure falls within the claim or not based on some implied but unclaimed structure, performance, or function metric." FWD, 21. The Board then held that "[i]n light of the Specification and the plain and ordinary meaning of the claim terms, a structure that provides control over fluid flow falls within the scope of a 'fluid flow control structure.'" FWD, 21.

PO provides an incomplete excerpt of the Board's decision to argue the Board's construction of "fluid flow control structure" was too broad. Request, 12. The complete sentence in the FWD reads:

The language of limitation 1[h] is broad and not limited to a particular kind of structure or to any particular kind of control, such as a "highly porous internal structure" or, i.e., using "edges" as barriers.

FWD, 21. Limitation 1[h] recites the entire structure of the "fluid flow control structure" and the Board properly rejected PO's attempt to construe the claim to be limited to certain embodiments disclosed in the specification. *Id.*; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005) ("one of the cardinal sins of patent law

[is] reading a limitation from the written description into the claims”).

The Board properly found that “fluid flow control structure” should not be limited as PO proposes after considering the claim language, the specification, both sides’ arguments, and the competing expert testimony. FWD, 17-22. Contrary to PO’s argument, the Board’s analysis was thorough, reasoned, and legally sufficient. *See Praxair Distrib., Inc. v. Mallinckrodt Hosp. Prods. IP Ltd.*, 890 F.3d 1024, 1033-34 (Fed. Cir. 2018) (affirming Board claim construction); *Bradium Techs. LLC v. Iancu*, 923 F.3d 1032, 1042-44 (Fed. Cir. 2019) (affirming Board construction).

The footnote PO raises about a challenge to the Board’s mapping of Bergstrom’s acquisition layer 40 (Request, 13 n.2) was not made before the Board and is undisputedly a new argument, so it should be disregarded. 37 C.F.R. § 42.75(c)(3).¹

C. First Quality’s District-Court §112 Position Is Consistent with the IPR Grounds and Is Not a Basis to Disturb the FWD

As a last resort, PO argues that this proceeding “should never have been instituted” because First Quality argued in district court that dependent claim 21’s phrase “opening extending through an entire crotch portion” is indefinite, while also addressing claim 21 in the Petition. Request, 14-15; EX2013, 14-34, 53-64; Pet.,

¹ Further, like PO’s other arguments, this argument ignores clear disclosure in Bergstrom that manmade (i.e., synthetic) fibers are made from polymeric materials, like polyester, polyethylene, polypropylene, and viscose. EX1004, 10:35-11:3.

44-45, 73-74. This argument fails for multiple reasons.

First, PO's challenge comes way too late. PO had Petitioner's claim construction positions fully briefed in the district court *before* the Board instituted this IPR proceeding. PO chose not to raise any argument before the Board that Petitioner's indefiniteness position for Claim 21 was inconsistent with a finding that the claim is obvious. A Director Review request *after* PO has already lost on that issue – and more than 14 months after district court briefing on the indefiniteness issue concluded – is not the right time for PO to first raise this argument. If PO truly thought that institution was improper, it should not have wasted an entire year of Board resources litigating the IPR through Final Written Decision (to see if it won or lost first) before stating its position. Nothing in the Director's decisions supports that kind of gamesmanship.²

Second, it's no mystery why PO did not raise this alleged "inconsistency" in Petitioners' positions earlier: there is no inconsistency. In this proceeding, the Bergstrom reference – which PO owns and authored – uses *the same language* as

² The cases PO cites were decided and designated as precedential well after this proceeding was instituted and after the parallel district-court litigation was stayed. Request, 14-15. Those decisions address circumstances where IPR proceedings were not functioning as a true alternative to district-court litigation. That concern is absent here. This IPR has done exactly what IPRs are intended to do: provide an efficient alternative forum for resolving patentability while the district court case remains stayed. Petitioners' Updated Mandatory Notices, Paper 17 (Nov. 13, 2025).

claim 21. It states that its absorbent article has a “crotch portion” and both describes and depicts an opening spanning that portion. Thus, whatever “crotch portion” means in Claim 21, Bergstrom discloses it. Pet., 44-45; EX1004, 7:2-4, 10:21-23, Fig. 6, claim 1; EX1002 ¶¶129-131.

On the other hand, determining whether Claim 21 is infringed in the district court would not be so simple, because PO did not identify any part of the accused product that is described in Petitioners’ documents as the “crotch portion.” The outer boundaries of the “entire crotch portion” must be reasonably ascertainable to determine the full scope of claim 21. *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901, 910 (2014). First Quality thus argued in the district court that the ’138 patent fails to provide reasonable certainty about the outer bounds of the “crotch portion” and what it means for an opening to extend through the “entire crotch portion.” EX2013, 16-17, 25-26, 31-34, 53-64.

Again, this argument was irrelevant to the IPR, where Bergstrom itself identifies its absorbent article’s “crotch portion” and shows the opening spanning it. Pet., 44-45; EX1004, 7:2-4, 10:21-23, Fig. 6; EX1002 ¶¶129-131.

Indeed, PO agreed at the hearing that Bergstrom discloses the additional limitation of claim 21. When asked whether there was any counterargument to Petitioners’ position that Bergstrom discloses claim 21, PO answered, “No,” and stated that “Bergstrom’s opening extends through an entire crotch portion for

purposes of Claim 21.” Tr. 67:4-13. PO’s clear admission demonstrates there is no inconsistency. In this regard, PO’s reliance on *Samsung*, *Intel*, and *SAS* is misplaced. *Samsung* and *Intel* recognize that the Board may sometimes face limits when claim indefiniteness makes a prior-art analysis impossible; they do not hold that a petitioner’s parallel §112 defense automatically prevents the Board from deciding §102/§103 grounds – particularly where disclosure of the relevant limitation in the prior art is undisputed and Patent Owner chose to raise no argument to the contrary throughout the entire IPR trial. Request, 15; *Samsung Electronics America, Inc. v. Prisia Engineering Corp.*, 948 F.3d 1342, 1355 (Fed. Cir. 2020); *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 801, 813–14 (Fed. Cir. 2021) And *SAS* requires the Board, once it institutes, to address challenged claims; it does not require vacatur whenever a petitioner pursues an indefiniteness argument in a parallel litigation for a dependent claim. Request, 15; *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358–60 (2018).

Third, contrary to PO’s argument, First Quality did not “force[] the Board to attempt to construe the claims on its own without input from the parties.” Request, 15. Claim 21 was briefed in the Petition, Patent Owner Response, Reply, and Sur-Reply, and the parties argued claim 21 at the hearing. Pet., 44-45, 73-74; PO Resp., 39-42; Pet. Reply, 18-20; PO Sur-Reply, 19-21; Tr. 21:16-22:23, 47:12-50:21; FWD, 39-44.

Fourth, PO identifies no risk of inconsistent rulings warranting Director

Review. PO's cited Director decisions addressed petitioners who advanced materially different claim constructions or indefiniteness positions across active parallel proceedings without adequate explanation. Here, the district-court case has been stayed during this proceeding and remains stayed (*see e.g.*, Petitioner's Updated Mandatory Notice on 11/13/2025 (Paper 17)), so there is no competing district court claim construction or validity ruling that could conflict with the FWD. And if the FWD stands, claims found unpatentable cannot be pursued in district court.

Finally, PO's requested remedy is disproportionate. The alleged indefiniteness issue relates only to dependent claim 21. PO's argument provides no basis to disturb the Board's unpatentability findings for independent claim 1 or for the other challenged claims under Grounds 1-4. FWD, 7, 39-44, 61-62.

III. CONCLUSION

Patent Owner identifies no issue warranting Director Review. The Board resolved the disputed claim-construction and Bergstrom issues on a full record, and PO's far too late challenge to the obviousness finding for Claim 21 identifies no inconsistency in Petitioner's positions and no basis to disturb the FWD. Patent Owner's Request for Director Review should be denied.

Dated: June 18, 2026

Respectfully submitted,

/Alexis R. Cohen/

Alexis R. Cohen

Reg. No. 76,998

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2026, a copy of the foregoing and accompanying exhibits, has been served in its entirety by electronic mail on the following counsel of record for patent owner:

Kevin M. Flannery	kevin.flannery@dechert.com
Sharon K. Gagliardi	sharon.gagliardi@dechert.com
Daniel R. Roberts	daniel.roberts@dechert.com
Todd R. Walters	todd.walters@bipc.com
James T. Moore	james.moore@bipc.com
Sharon Hwang	sharon.hwang@bipc.com

Dated: June 18, 2026

Respectfully submitted,

/Amy Mahan/

Amy Mahan

Reg. No. 75,997

Attorney for Petitioners