

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DR. SQUATCH, LLC
Petitioner

v.

THE PROCTER & GAMBLE COMPANY
Patent Owner

IPR2024-01498
Patent No. 11,844,752

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

Response authorized by Board Order dated October 17, 2025 (Paper No. 17)

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. Binding Federal Circuit precedent allows such reply evidence. Despite such precedent, 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 '752 Patent recites a deodorant stick having a "hardness from about 80 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 both a 50 g needle assembly and a "required" 50 g weight. Ex. 1087, 462 (6.2). 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 using the ASTM D-1321 standard. 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, which uses the 50 g needle with the “required” 50 g weight (*i.e.*, a 100 g total weight). POR, 31 (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” cannot overlap “at all” with a hardness range measured by the standard test. Ex. 2011, ¶83. 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. 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 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 proposed

modification. Multiple deodorants fell within the claimed range under both tests. Ex. 1086, ¶4. This evidence disproved Dr. Lochhead's *ipse dixit* assertion of 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. 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-254's 80-150 mm*10 range, using the standard test, and (ii) the claimed range, using P&G's modified test (e.g., subtracting 37 mm*10 from both endpoints of Bianchi-254's range yields a range of 43-113 mm*10, which is approximately equivalent to Bianchi-254's 80-150 mm*10 range (under the standard test), and still overlaps with the claimed range of 80-140 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”). P&G

neither acknowledges this rule nor cites authority to the contrary.¹

Although not stated in any claim, the POR argued that the claimed hardness range “measured by penetration with ASTM D-1321 needle” *excludes* the standard test—specifically, by modifying the standard to exclude the required 50 g weight. More specifically, P&G reads into claim 1 a “50 gram total force” limitation. Petitioner’s reply testing thus confirms that the prior art applies even under P&G’s pseudo claim construction.

Moreover, P&G’s claim construction contradicts controlling case law and thus would have been especially inappropriate to address in the Petition. Claims are given their ordinary meaning unless the “exacting” standards for a redefinition or disavowal are satisfied. *Thorner v. Sony Comput. Entm't Am. LLC*, 669 F.3d 1362, 1365-66 (Fed. Cir. 2012). For example, in *Thorner*, the specification *only* described attachment on an exterior surface, and *never* referred to “attachment” on an interior surface. But because the specification did not define “attached” or explicitly disclaim attachment on the interior surface, the Court still construed “attached” to have its ordinary meaning, allowing for interior and exterior attachment: “We ***do not read limitations from the specification into claims***; we do not redefine words.” *Id.*

The Petition accordingly addressed the ordinary meaning of the claims, which

¹ 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.

identifies only an accepted standard—ASTM D-1321—as the Bianchi references undisputedly disclose. In response, P&G relied on a calibration protocol from an example in the specification (which comports with ASTM D-1321) to try to change the meaning of “ASTM D-1321 needle.” *See* Paper No. 16 at 12. But P&G did not and could not identify any redefinition of that term or “clear and unmistakable disclaimer” of the standard test. *Thorner*, 669 F.3d at 1366-67. P&G’s “a 50-g total force” limitation thus violates Federal Circuit law governing claim construction, and Petitioner had no obligation to address every conceivable erroneous claim construction at the outset of this proceeding.

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

The reply evidence also rebuts the 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 statement. And Federal Circuit law permits reply evidence that “disprove[s]” an argument. *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 also had every opportunity to perform testing to check Dr. Lochhead’s opinion and to depose Dr. Michniak-Kohn on her reply declaration. It chose not to.

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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
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