

Case IPR 2025-00136

Patent No. 11,140,841

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AARDEVO NORTH AMERICA, LLC,
Petitioner,

v.

Agventure B.V.,
Patent Owner.

IPR 2025-00136

U.S. Patent No. 11,140,841

AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST

Petitioner’s Request for Director Review (“Request”) presents arguments contrary to law and facts and fails to demonstrate an abuse of discretion or error by the Board in its decision not to institute IPR. Paper 9 (“Decision”).

First, the Board did not overlook or misapprehend Petitioner’s arguments in Grounds 2–9. The Board correctly rejected Grounds 6–9: an IPR petitioner may challenge a patent “**only** on the basis of **prior art** consisting of **patents or printed publications.**” 35 U.S.C. § 311(b); Decision at 7. Petitioner does not dispute that a physical product cannot be the basis of a ground for IPR, or that it relies on physical products for Grounds 6–9. Request at 2–3; Paper 6 (“POPR”) at 9–12. That Grounds 6–9 are based at least in part on physical products **requires** the Board to find those grounds improper; whether they **also** rely on printed publications is irrelevant.

The Board is also correct that in “identification of the challenge, Petitioner does not cite any specific printed publication for either **ground 6 or ground 8,**” which are anticipation grounds based solely on physical products. Decision at 8. Petitioner mischaracterizes this finding as for Grounds 6–9. Request at 2.

Therefore, the Board correctly found that Grounds 6–9 were unsupported by the statutory framework that provides it IPR jurisdiction. Because the Board has no “partial institution” power and must “institute on all grounds” or not at all, *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 362–66 (2018), Decision at 2, Petitioner’s inappropriate reliance on physical products supports denial of institution *and* Petitioner’s Request.

The Board also did not err by finding that Petitioner failed to rebut evidence of secondary considerations in the record. It was Petitioner's burden to establish obviousness, which includes evidence of secondary considerations of nonobviousness. Petitioner was aware of the extensive evidence of secondary considerations presented during prosecution and its relevance to allowance, yet completely failed to address specific objective indicia including industry skepticism and failure of others (which it does not contest). Request at 4; POPR at 37. Petitioner further dismissed additional objective indicia with overly broad statements, asserting that Agventure cannot establish these indicia because they were "known in the art." Request at 4. But neither Petitioner nor Dr. Jansky addressed any *specific* evidence of secondary considerations presented during prosecution, including the supporting letters from world-renowned potato breeding experts that both the Examiner and the Board found compelling. *Id.* at 4; Decision at 28–34; POPR at 36–37.

Petitioner further failed to rectify this deficiency in its reply, and blames the Board for its failure, arguing the Board only authorized Petitioner to reply to § 325(d) issues. Request at 4. This is grossly misleading. Petitioner's request for reply did not seek to respond to evidence of secondary considerations. Petitioner cannot fault the Board for not "authorizing" something Petitioner never even requested.

Second, the Board did not abuse its discretion in determining Petitioner's obviousness grounds (Grounds 2–5). Petitioner contends that the Board "failed to

analyze and weigh Petitioner’s evidence and arguments of *prima facie* obviousness.”

Request at 5. But the Decision explicitly states: “*as we balance* the objective indicia evidence *with* Petitioner’s case of obviousness and failure to address the objective indicia evidence, *even if we found Petitioner’s case sufficient to establish prima facie obviousness*, we are strongly persuaded that the claimed invention satisfied *a long-felt need*, overcame *skepticism of experts* and *failure by other inventors*.”

Decision at 34–35. This reflects that the Board undertook the balancing analysis, was willing to assume *prima facie* obviousness, and properly concluded that objective indicia were compelling. In doing so, the Board followed the *Graham* factors. *Id.* at 7, 17–35. The Decision resolves the level of ordinary skill in the art, and devotes nine pages to discussing Petitioner’s prior art references and each obviousness ground, citing the Petition, the references, and Dr. Jansky’s declaration. *Id.* at 7, 19–28. The Board thus considered “the merits of Petitioner’s *prima facie* obviousness case, including Dr. Jansky’s declaration.” Request at 7. The Board then discussed evidence of secondary considerations, assumed *prima facie* obviousness, and correctly concluded that the ’841 Patent, when “[v]iewed through the lens of the objective indicia,” which “can be the most probative evidence of nonobviousness” and which Petitioner largely disregards, is not obvious. Decision at 28–35; *Leo Pharm. Prods., Ltd. v. Rea*, 726 F.3d 1346, 1358–59 (Fed. Cir. 2013) (reversing obviousness determination based on objective indicia); *see also Robert Bosch Tool*

Corp. v. SD3, LLC, IPR2016-01753, Paper 15 at 38 (P.T.A.B. Mar. 22, 2017) (“the evidence of secondary considerations weighs ***decisively*** toward nonobviousness”). The Board also highlighted three indicia it found critical to its nonobviousness determination, two of which (skepticism of experts and failure by others) Petitioner never rebutted. Decision at 34–35; Request at 4. Petitioner’s case law is inapposite. *E.g., Nearmap US, Inc. v. Eagle View Techs., Inc.*, IPR2022-00734, Paper 43 (P.T.A.B. Feb. 20, 2024) (finding the Board failed to address ***claim construction disputes*** and provide a full obviousness analysis in the ***final written decision***).

Petitioner’s argument that the Board “credit[ed] PO’s pure attorney arguments . . . over sworn testimony of Petitioner’s unrebutted expert declaration” is without merit. Request at 5–6. Dr. Jansky’s declaration was rebutted by at least her own publication and Petitioner’s primary reference, Phumichai. Decision at 29–30. The Board also expressly relied on evidence found persuasive by the Examiner. That evidence, including inventor declarations and supporting letters from multiple renowned potato breeding experts, is not attorney argument. *Id.* at 28–34.

Petitioner then argues that the Board “failed to assess the nexus requirement between secondary considerations and the invention as claimed.” Request at 9. But the vast evidence of secondary considerations before the Board is not new. The Examiner had already considered this evidence and found it important to the patentability of both the ’841 Patent and its parent patent, supporting nexus between

the objective indicia and the claimed invention. Then, despite multiple opportunities to rebut secondary considerations, Petitioner never raised these issues in the Petition or requested leave to do so in its reply. Petitioner made those strategic decisions, and it is too late to reverse course on its strategic foot faults now.

Third, the Board acted within its discretion in denying Ground 1, anticipation by Jong. The Board found Petitioner failed to show anticipation of two elements recited by claim 1 (75% homozygosity and 200 grams tuber yields). While failure on either element requires denial, Petitioner addressed only the homozygosity element in the Request. Petitioner never argued that Jong “expressly disclose ‘75% homozygosity,’” Request at 13, but relied on inherent anticipation, arguing that a “POSA would [] *estimate* that . . . the S₂ generation described in [] Jong would be *expected* to be at least 75% homozygous.” Petition at 34. The Board did not disregard Dr. Jansky’s opinions. Rather, it specifically considered “Dr. Jansky’s *calculations*” but found that neither Petitioner nor Dr. Jansky provided any data showing “the *actual measured* homozygosity of” the S₂ generation in Jong—a point Petitioner does not dispute. Decision at 14–15. The Board further determined that Dr. Jansky’s *theoretical* calculations do not necessarily reflect real-world results, relying on *experimental* results in Phumichai, a scientific reference that Petitioner cites as a primary source. *Id.* at 15. Thus, the Board’s determination was grounded in the scientific record, not on “unsubstantiated attorney argument.” Request at 13.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

In compliance with 37 C.F.R. §§ 42.105, 42.6(e), the undersigned hereby certifies that a complete copy of the foregoing document was served on June 9, 2025 on counsel of record for the Petitioner via email to the following addresses:

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