

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

L'ORÉAL USA, INC.,
Petitioner,

v.

LIQWD, INC.,
Patent Owner.

Case PGR2018-00024
Patent 9,668,954 B2

Before TONI R. SCHEINER, CHRISTOPHER M. KAISER, and
TIMOTHY G. MAJORS, *Administrative Patent Judges*.

KAISER, *Administrative Patent Judge*.

DECISION

Denying Request for Rehearing
37 C.F.R. § 42.71(d)

INTRODUCTION

L'Oréal USA, Inc. ("Petitioner") filed a Petition requesting post-grant review of claims 1–30 of U.S. Patent No. 9,668,954 B2 (Ex. 1001, "the '954 patent"). Paper 1 ("Pet."). Liqwd, Inc. ("Patent Owner") filed a Preliminary Response. Paper 9 ("Prelim. Resp."). We denied the Petition and did not institute post-grant review. Paper 12 ("Dec."). Petitioner now requests rehearing of our decision not to institute review. Paper 13 ("Req.).

"The burden of showing a decision should be modified lies with the party challenging the decision." 37 C.F.R. § 42.71(d). We "review [our] decision for an abuse of discretion." *Id.* § 42.71(c). In addition, we may not consider an argument made in a request for rehearing unless the request "specifically identif[ies] . . . the place where [that argument] was previously addressed in a motion, an opposition, or a reply." *Id.* § 42.71(d).

After considering the Request for Rehearing, we determine that Petitioner has not demonstrated that we abused our discretion in denying institution. Accordingly, we deny the Request for Rehearing.

ANALYSIS

Petitioner presents two arguments that we abused our discretion in deciding not to institute post-grant review. We address each argument below.

A. Claim Construction of "Bleach Powder"

Petitioner argues that we misapprehended or overlooked nine pieces of record evidence, leading us to construe the term "bleach powder" improperly. Req. 2–14.

As an initial matter, we cannot consider the arguments Petitioner makes as to five of these nine pieces of evidence, because Petitioner does

not “specifically identify . . . the place where [these arguments] w[ere] previously addressed.” 37 C.F.R. § 42.71(d).¹ First, in arguing that “the Board overlooked disclosure in Exhibit 1011,” Petitioner argues only that this exhibit was “relied on by . . . Petitioner.” Req. 9 (citing Pet. 60). But the cited portion of the Petition does not discuss the construction of any claim term and does not mention the term “bleach powder” at all. Accordingly, Petitioner did not previously make this argument. As to Exhibits 1002, 2005, 2007, and 2012, Petitioner does not even direct us to any portion of the Petition that Petitioner believes shows that the arguments in the Rehearing Request were raised previously. *Id.* at 10–12.

This leaves four arguments that we are permitted to consider. Petitioner first argues that we “misapprehended and therefore did not give proper weight to . . . Dr. Borish’s testimony.” Req. 2–5 (citing Ex. 1039, 48:9–50:3). Specifically, Petitioner argues that we misinterpreted Dr. Borish’s statement that “alkali [is] strictly necessary in the bleaching process” as referring to the constituent components of “bleach powder,” when he actually was discussing “bleaching formulations.” *Id.* Upon further consideration of the cited portions of Dr. Borish’s testimony, it does not provide significant support for the idea that “bleach powder” itself *must* contain alkali, and instead suggests that a “bleaching formulation” must

¹ We do not mean to suggest that there are never any circumstances under which a party may raise an argument for the first time in a rehearing request. For example, waiver of the requirements of 37 C.F.R. § 42.71(d) may be appropriate when a party shows good cause for such a waiver. Here, however, Petitioner does not argue, much less persuade us, that waiver of those requirements is warranted. Req. 1–15 (arguing for particular constructions but not arguing that the failure to make these arguments previously should be excused).

contain alkali, leaving open the possibility that the alkali may be provided separately from the bleach powder. Ex. 1039, 50:7–22 (“an important aspect of bleaching formulations is the inclusion of alkali”).

Similarly, Petitioner provides a persuasive argument regarding Exhibits 2010 and 2011. Patent Owner placed these exhibits into evidence to show the constituent components of the bleach powders used in the inventive examples of the ’954 patent. Prelim. Resp. 30. We relied on them in this capacity. Dec. 9. But Petitioner is correct that there is insufficient evidence at this stage to show that Exhibit 2010 and Exhibit 2011 depict the components of these bleach powders as of the filing date of the ’954 patent, only the components of these products as of the unknown date on which the exhibits were created. See Ex. 2010; Ex. 2011. Accordingly, our citation to these exhibits as evidencing that a bleach powder, as understood at the time of the invention, conventionally included or must include an alkali was misplaced based on the existing record.

We disagree with Petitioner’s argument that our construction of “bleach powder” reads limitations from the specification of the ’954 patent into its claims. Req. 7–8. In the evidence that led to our construction of “bleach powder,” we did list the inventive examples of the ’954 patent. Dec. 9 (citing Ex. 1001, 22:55–56, 23:30–31). But we also stated that “the ’954 patent’s specification mentions ‘bleach powder’ only once and gives no express definition of the term,” so we did not rely on any definition of “bleach powder” in the ’954 patent. *Id.* Because the ’954 patent does not define “bleach powder” expressly, we gave the term its “ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure.” Dec. 6 (citing *In re Translogic*

Tech., Inc., 504 F.3d 1249, 1257 (Fed. Cir. 2007). Thus, we did not interpret the claims to be limited because of any particular language in the specification.

Finally, we also disagree with Petitioner's argument that our construction was incorrect for failing to take account of Patent Owner's inconsistent statements in a related application. Req. 12–14. First, Petitioner directs us to an application allegedly related to the '954 patent, but Petitioner did not file any documents related to this application as exhibits in this case, making Petitioner's entire position merely unsupported attorney argument. *Id.* at 13. Even giving Petitioner the benefit of the doubt that a developed record would support its argument, however, we would remain unpersuaded. In the allegedly related application, the claims allegedly recite a "bleaching mixture having an alkaline pH" that "is formed from the combination of developer, bleach powder, and maleic acid 'or salts thereof.'" *Id.* Petitioner argues that the limitation to a mixture "having an alkaline pH" would be "superfluous" if the "bleaching powder" in the mixture were required to contain "an alkalizing agent." *Id.* We disagree. The mixture also may contain maleic acid, and there is no guarantee that a mixture of alkaline bleaching powder and an acid would be alkaline in all possible ratios, so there is a purpose for the "having an alkaline pH" limitation even when bleaching powder is required to include an alkali. Petitioner also argues that Patent Owner and the Examiner of the allegedly related application "agreed that the **recitation** of the term 'alkaline' in the [allegedly related] application claims means that the mixture is alkaline," so the absence of an alkalinity requirement in the claims of the '954 patent means that no alkalizing agent is necessary in those claims. *Id.* at 13–14.

We disagree. The statement of the Examiner and Patent Owner quoted by Petitioner is “the examiner indicated as long as the claims stated the mixture was at an alkaline pH and this mixture was applied to the hair, then it necessarily mean[s] the mixture when applied was at an alkaline pH.” *Id.* This is merely a tautological statement that an alkaline mixture that is applied to hair is an alkaline mixture when applied to hair. It does not state that the recitation of the term “alkaline” is necessary to have an alkaline mixture. Even if this statement did mean what Petitioner argues it means, as discussed above, the presence of an acidic component in the mixture means that the mixture may not be alkaline without an additional limitation requiring it, even if the bleaching powder in the mixture is alkaline, so the recitation of the “alkaline” limitation does not mean that the bleaching powder can be neutral or acidic.

We are not permitted to reach several of Petitioner’s arguments regarding our construction of “bleach powder.” Of the arguments we can reach, we find two of them—those regarding our interpretation of Dr. Borish’s testimony and our use of Exhibits 2010 and 2011—persuasive. We are not persuaded that we committed any error in our consideration of the inventive examples of the ’954 patent or in failing to consider Patent Owner’s statements in an allegedly related application that was not, and still is not, part of the record of this proceeding.

Because we are persuaded by certain of Petitioner’s arguments, we reconsider the issue of our construction of “bleach powder.” The parties agree that the specification of the ’954 patent does not contain an express definition of “bleach powder,” so we are required to give the term its “ordinary and customary meaning, as would be understood by one of

ordinary skill in the art in the context of the entire disclosure.” *Translogic*, 504 F.3d at 1257; see Pet. 27–28 (arguing that, “[a]bsent any . . . clear intent, the BRI must be consistent with the interpretation that those skilled in the art would reach,” then offering no particular construction of “bleach powder”); Prelim. Resp. 29–30 (“A person of ordinary skill in the art would have understood that bleach powder combines persulfates with alkalinizing compounds . . . in a fine dry particulate form.” (citing only sources outside the ’954 patent))).

In arguments that we may consider, the parties draw our attention to six sources of evidence about the ordinary understanding in the art of “bleach powder.” Req. 2–5 (citing Ex. 1039, 48:9–49:9); Prelim. Resp. 29–30 (citing Ex. 1002, 15:45–65; Ex. 1011, 17; Ex. 2005, 6; Ex. 2007, 3; Ex. 2012 ¶¶ 34–36). There is evidence that supports Patent Owner’s view that the ordinary meaning of “bleach powder” is a powder that contains an alkalizing agent in addition to persulfates, as opposed to merely a persulfate powder. A textbook called “Hair Preparations” by Thomas Clausen and others states that, at least in paste bleaches, “a bleach powder” is used that “consists of a peroxodisulfate, an alkalinizing agent,” and other ingredients. Ex. 1011, 17. In the context of cream and gel bleaches, this reference teaches that “[p]eroxosulfate . . . can be added as a bleaching powder” but is silent about whether the “bleaching powder” contains any additional ingredients. *Id.* In a book chapter on “Hair Coloring” by Keith C. Brown, a “bleach booster” powder is discussed that “is usually a mixture of ammonium and potassium persulfates” and that has “metasilicates mixed in with the persulfates” to provide “[a]lkaline pH.” Ex. 2005, 6. Against this evidence is the testimony of Dr. Borish that “powder lighteners” or “bleach

powders” include “persulfate salts.” Ex. 1039, 48:9–49:9. But Dr. Borish does not state affirmatively that the persulfate salt is all that is required for a powder to be a bleach powder, only that a persulfate salt is a necessary component of a bleach powder. *Id.* Accordingly, his testimony does not outweigh the evidence that, to a person of ordinary skill in the art, a bleach powder contains both a persulfate salt and an alkalizing agent. We are not persuaded, therefore, that we abused our discretion by construing “bleach powder” to require both of those components.

B. Written-Description Support for “About 50%”

Petitioner also argues that we abused our discretion by determining that the claim term “up to about 50%” was supported by the specification of the ’954 patent. Req. 15. Petitioner does not identify where it made this argument previously in the Petition. *Id.* Because we do not consider an argument made in a request for rehearing unless the request “specifically identif[ies] . . . the place where [that argument] was previously addressed in a motion, an opposition, or a reply,” 37 C.F.R. § 42.71(d), we do not consider Petitioner’s claim construction argument here.

CONCLUSION

Upon consideration of the Request for Rehearing, the Petition, the Preliminary Response, and the evidence before us, we determine that Petitioner has not established that we abused our discretion in failing to institute *inter partes* review. Accordingly, we deny the Request for Rehearing.

ORDER

It is hereby

ORDERED that the Request for Rehearing is denied.

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