

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CONOPCO, INC. dba UNILEVER

Petitioner

v.

THE PROCTER & GAMBLE COMPANY

Patent Owner

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CASE IPR: 2013-00509

Patent 6,451,300

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**CONOPCO'S REQUEST FOR RECONSIDERATION**

**UNDER 37 C.F.R. § 42.71(c)**

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Patent Trial and Appeal Board

U.S. Patent and Trademark Office

P.O. Box 1450

Alexandria, VA 22313-1450

## I. Introduction

Petitioner requests reconsideration of the Board's denial of institution of *inter partes* review for claims 6, 14, and 15 of U.S. Patent No. 6,451,300 ("the '300 patent"). On February 12, 2014, the Board granted the Petition filed August 14, 2013, only as to claims 1, 2, 4, 5, 11, 13, 16, 17 and 20 as unpatentable under 35 U.S.C. § 102 by Kanebo<sup>1</sup>, and claims 3, 18, and 25 as unpatentable under 35 U.S.C. § 103 over Kanebo. See Decision on Petition ("Decision") at 6-13 and 17. Along with other claims and Grounds, the Board denied *inter partes* review of claim 6 as obvious over Kanebo, and claims 14 and 15 as obvious over Kanebo or Evans<sup>2</sup> in view of Cardin<sup>3</sup>. As discussed in detail below, the Board erroneously interpreted the relevant law in its denial of *inter partes* review for claim 6 over Kanebo, and claims 14 and 15 over Kanebo or Evans in view of Cardin. As the threshold for instituting *inter partes* review and obviousness grounds under the reasonable likelihood standard is low, the Board abused its discretion in denying review of these claims.

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<sup>1</sup> Kanebo: JP 9-188614 (July 22, 1997) (English translation) (Ex. 1006).

<sup>2</sup> Evans: WO 97/14405 (Apr. 24, 1997) (Ex. 1010).

<sup>3</sup> Cardin: US 5,104,645 (Apr. 14, 1992) (Ex. 1014).

This request is authorized under 37 C.F.R. § 42.71(c), and prior authorization of the Board is not required for the filing of this request. *See* 37 C.F.R. § 42.71(d).

## II. **Applicable rules and legal standard**

### **A. The standard of review for rehearing is abuse of discretion**

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” The Federal Circuit has held that “[a]n abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” *Gose v. United States Postal Service*, 451 F.3d 831, 836 (Fed. Cir. 2006) (internal quotations omitted); *see also O’Keefe v. U.S. Postal Service*, 318 F.3d 1310, 1314 (Fed. Cir. 2002) (“The Board necessarily abuses its discretion when it rests its decision on factual findings unsupported by substantial evidence.”) (internal quotations omitted).

### **B. The standard for instituting an inter partes review is “a reasonable likelihood” of unpatentability of at least one claim**

Under 35 U.S.C. § 314(a), as implemented by 37 C.F.R. § 42.108, *inter partes* review will only be “instituted for a ground of unpatentability” where the Board decides that the evidence put forward in a petition “demonstrates that there

is a reasonable likelihood that at least one of the claims challenged in the petition is unpatentable." "In instituting a trial, the Board will narrow the issues for final decision by authorizing the trial to proceed only on the challenged claims for which the threshold standards for the proceeding have been met. Further, the Board will identify, on a claim-by-claim basis, the grounds on which the trial will proceed. Any claim or issue not included in the authorization for review will not be part of the trial." Office Patent Trial Practice Guide (August 14, 2012). In this case, the standard has clearly been met for claims 6, 14, and 15.

### III. Argument

#### A. The Board misapprehended Petitioner's proposed obviousness ground for Claim 6 over Kanebo

The Board misapprehended Petitioner's proposed unpatentability ground that claim 6 would have been obvious over Kanebo in light of general knowledge in the art. The Board appears to have viewed Petitioner's arguments as being based on Kanebo in combination with Bartolo<sup>4</sup>. Decision at 12-13. But the Petition and the Petitioner's expert demonstrated that the shampoo composition of claim 6 would have been obvious over the disclosure of Kanebo alone, in view of the general knowledge in the art. Petition at 21-22. UNL 1003 ¶¶ 69 – 70.

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<sup>4</sup> Bartolo: U.S. Patent No. 5,202,048 (Apr. 13, 1993) (Ex. 1012).

The Petition relies on Bartolo simply to provide evidence of the general knowledge in the art relating to the molecular weights and charge densities of cationic guar derivatives. Petition at 21-22; Ex. 1003, ¶¶ 69 - 70. To establish obviousness, a party must show “some objective teaching in the prior art *or that knowledge generally available to one of ordinary skill in the art* would lead that individual to combine the relevant teachings *of the references.*” See *Tec Air, Inc. v. Denso Mfg. Michigan Inc.*, 192 F.3d 1353, 1359 (Fed. Cir. 1999) (emphasis added); citing *In re Fine*, 837 F.2d 1071, 1073 (Fed.Cir.1988). The Supreme Court has stressed the role of common sense in the obvious analysis, stating that “[r]igid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 421 (2007); see also *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1367-68 (Fed. Cir. 2006) (which states that the obviousness analysis “not only permits, but requires, consideration of common knowledge and common sense”).

Thus, it was improper for the Board to require that the Petition articulate a specific reason to combine the teaching of the sole reference (Kanebo) with references referred to simply for establishing the general knowledge in the art. Further, a person of ordinary skill in the art would have been able to determine the claimed guar molecular weight through routine optimization. The “normal desire of

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