

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CONOPCO, INC. dba UNILEVER

Petitioner

v.

THE PROCTOR & GAMBLE COMPANY

Patent Owner

Case No. IPR2014-00507

Patent 6,451,300

**REQUEST FOR REHEARING BY AN EXPANDED PANEL
INCLUDING THE CHIEF ADMINISTRATIVE PATENT JUDGE
UNDER 37 C.F.R. § 42.71(c)-(d)**

Table of Contents

I. INTRODUCTION.....	1
II. BACKGROUND	1
III. LEGAL STANDARDS.....	4
A. The Standard Under 35 U.S.C. § 325(d).....	4
B. The Standard of Review for Rehearing by an Expanded Panel	5
IV. ARGUMENT	5
A. The Decision Should Be Reheard by an Expanded Panel	5
1. Inconsistent Analyses under 35 U.S.C. § 325(d) to Date	6
2. The Proper Scope of Analysis under § 325(d)	7
B. The Decision Relies on Erroneous Factual Findings and a Misapprehension of Relevant Law	8
1. Improper Reliance on Estoppel Considerations	9
2. There Is No Statutory, Rule, or Policy Basis for Precluding a Petitioner from Filing a Second, Improved Petition.....	10
3. The Board Committed Legal Error by Neglecting Substantial Differences in the Prior Art	11
C. The 507 Petition Arguments are Not the Same or Substantially the Same .	13
V. CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Tafas v. Dudas</i> 541 F. Supp. 2d 805 (E.D. Va. 2008).....	9
<i>In re Merck & Co., Inc.</i> , 800 F.2d 1091 (Fed. Cir. 1986).....	7, 11
<i>Renda Marine, Inc. v. U.S.</i> , 509 F.3d 1372 (Fed. Cir. 2007).....	5
 Statutes	
35 U.S.C. § 314(a).....	1, 10, 15
35 U.S.C. § 315(e)(1)	9
35 U.S.C. § 325(d).....	<i>passim</i>
 Other Authorities	
37 C.F.R. § 42.71(c).....	1, 5, 17
37 C.F.R. § 42.71(d).....	1, 17

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(c)-(d), Petitioner Conopco, Inc. *dba* Unilever (“Unilever”) respectfully requests rehearing by an expanded panel—including the Chief Administrative Patent Judge—of the decision rejecting Unilever’s petition in this proceeding (“507 Petition”) under 35 U.S.C. § 325(d). Patent policy dictates rehearing by an expanded panel to address inconsistent panel interpretations of § 325(d), including the proper scope and requirements for a panel’s analysis thereunder. *See* Board SOP (Revision 13) 2009, Section III(A)(2). Rehearing is also requested to address the mistakes of fact and law in the panel’s decision where the 507 Petition advanced numerous prior art references and arguments that were not the same or substantially the same as in Unilever’s previous petition. The Board abused its discretion in rejecting Unilever’s current petition, which specifically addressed the purported deficiencies of the first petition. The statutory framework and rules implementing *inter partes* reviews contemplate that a petitioner may file more than one petition during the statutory period, and § 325(d) should not amount to a *de facto* estoppel. Petitioner therefore seeks reconsideration of the 507 Petition on its merits under 35 U.S.C. § 314(a), and requests institution of trial on all proposed grounds of invalidity.

II. BACKGROUND

On August 14, 2013, Unilever filed a petition in IPR2013-00509 seeking

inter partes review of claims 1-25 of U.S. Patent No. 6,451,300 (“509 Petition”).

On February 12, 2014, the Board entered a decision instituting trial as to claims 1-5, 11-13, 16-20, 24, and 25 of the '300 patent, but not as to claims 6-10, 14, 15, and 21-23 (“non-instituted claims”). IPR2013-00509, Paper 10 at 2, 12-16 (“509 Decision”). As to certain non-instituted claims, the Board found that the information presented did not sufficiently show obviousness over a single reference (Kanebo) or a combination of references (Bowser and Evans), and failed to articulate “an adequate reason why a skilled artisan would have thought to incorporate the elements required by the claims.” *Id.* at 12, 15-16. Unilever sought rehearing (IPR2013-00509, Paper 12), but the Board reiterated that the 509 Petition did not contain sufficient support for the obviousness arguments advanced (*id.*, Paper 25 at 3-4).

Unilever subsequently filed the 507 Petition as to all non-instituted claims, specifically “address[ing] the concerns expressed previously by the Board.” *Id.* at 1-2. As the below chart illustrates, while relying partially on two references (Kanebo and Evans) cited in the 509 Petition, the 507 Petition: (i) cited eight new references in proposed combination with Kanebo or Evans; and (ii) detailed eight new grounds of unpatentability demonstrating that all claim elements were known in the prior art **and** that a rationale existed for combining the references. A new expert declaration also supported the 507 Petition. Ex. 1043 (“507 Decl.”).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.