

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

R.J. REYNOLDS VAPOR COMPANY,
Petitioners

v.

FONTEM HOLDINGS 1 B.V.,
Patent Owner

Case **IPR2016-01268**
Patent No. **8,365,742**

**PATENT OWNER'S REPLY TO PETITIONER'S SUPPLEMENTAL
BRIEF REGARDING TESTIMONY OF MR. RICHARD MEYST IN
RELATED IPR2016-01692**

Pursuant to the Board’s September 14, 2017 Order (Paper 45), Patent Owner respectfully submits this Reply to Petitioner’s Supplemental Brief (Paper 51).

I. The Board Should Not Consider Petitioner’s Comments on Mr. Meyst’s Testimony from IPR2016-01692

Petitioner was not diligent in calling Mr. Meyst’s IPR2016-01692 testimony to the Board’s attention. Petitioner could have deposed Mr. Meyst earlier and addressed his testimony here in its Reply brief, which was due July 5, 2017. Paper 11 at 7. Mr. Meyst’s declaration in IPR2016-01692 was filed on May 25, 2017. Ex. 1015 at 44:20–25; *see* IPR2016-01692, Ex. 2030. Petitioner waited eight weeks to depose Mr. Meyst on July 21, 2017. Ex. 1035. In fact, Petitioner did not ask for Mr. Meyst’s deposition until the day after its Reply was due here. Ex. 2037; Paper 17 at 7.

Even then, Petitioner still was not diligent in calling Mr. Meyst’s testimony to the Board’s attention. Observations on cross-examination were due August 25, 2017. Paper 11 at 7. The Trial Practice Guide contemplates an “opposing party” filing observations with the Board’s authorization. 77 Fed. Reg. at 48,768 (Aug. 14, 2012). Petitioner waited until September 1, 2017—six weeks after taking the deposition—to even *request permission* to file observations. The Board should not consider Petitioner’s unreasonably delayed observations.

II. Mr. Meyst's Testimony Is Consistent and Reliable

Rigidity of Hon '043's Porous Body. Contrary to Petitioner's assertion, Mr. Meyst did not opine that "Hon '043's porous body requires no support because it is a rigid material." Paper 51 at 1. Instead, Mr. Meyst opined that "the compressive forces in Hon '043" are not "strong enough to cause any noticeable deformation of porous body 27," and that "if pressure outside the atomizer were 2 psi higher than inside, that is not enough pressure to cause the porous body" to collapse. Ex. 2015, ¶¶ 70, 80. That opinion is consistent with Mr. Meyst's testimony that the porous component "could be a very soft, pliable material" and is not "necessarily a rigid material." Paper 51 at 1–2.

Stress-Strain Curves. Petitioner mischaracterizes Mr. Meyst's opinion as "an effort to demonstrate that Hon 043's porous body is necessarily made from a rigid material." Paper 51 at 2. In the cited paragraphs, Mr. Meyst relies on stress-strain curves to show that 2 psi of pressure would not cause Hon '043's porous body to collapse. Ex. 2015, ¶¶ 76–85. Petitioner is correct that Mr. Meyst testified the stress-strain curves depict a "compressive load" and agreed with Petitioner's attorney that they reflect "a different measurement than measuring how much a material may bend." Ex. 1035, 68:1–70:12. But Mr. Meyst also explained that "how much a material may bend" is not the relevant measurement. He testified

that “compressive force” is the correct measurement because if overpressure were to occur around the atomizer, “there would be forces compressing the elements inside.” Ex. 1035, 79:14–81:7.

Tensile Strength. Petitioner reads too much into paragraph 86 of Mr. Meyst’s declaration. Paper 51 at 3; Ex. 2015 ¶ 86. That two-sentence paragraph merely notes that ceramics “have a tensile strength similar to that of metals” and thus “ceramics’ strain would also be essentially zero.” Ex. 2015 ¶ 86. Petitioner asserts that tensile strength is not relevant. Paper 51 at 3. However, the Materials Data Book relied upon by Petitioner confirms that ceramics are much stronger in compression than in tension, reciting that “ceramics are of the order of 10 times stronger in compression than in tension.” Ex. 1020-00028.

Line-to-Line Fit. Petitioner confuses the meaning of “interfering fit” and “line-to-line” fit. Paper 51 at 4. As Mr. Meyst testified, a line-to-line fit is not a “friction” or interfering fit. Ex. 1035, 25:2–27:8. Mr. Meyst also testified that the device is “going to work whether the porous component is slightly loose, line to line, or has an interference fit,” but that an interference fit may be detrimental because it “could distort one of the parts.” Ex. 1035, 28:15–23, 30:6–17. Mr. Meyst’s testimony does not support the proposition that Hon ’043’s “cavity wall prevents axial displacement of the porous body relative to the cavity wall.” Paper

51 at 4. When asked if there would be relative movement, Mr. Meyst testified: “There’s no place for item number 25 to move to. It’s held in place top, bottom and all the way around on the outside.” Ex. 1035, 58:7–22. Item 25 is the cavity wall, not the porous body 27. Ex. 1003 at 9. In other words, Mr. Meyst testified that the porous body is preventing movement, not the cavity wall. This is consistent with Mr. Meyst’s opinion that the cavity wall cannot support the porous body as alleged because the cavity wall is internal to the porous body. Ex. 2015 ¶ 51.

Internal Diameter And Holding In Place. Petitioner appears to argue that because the ’742 Patent’s frame is both touching the porous component and holding it in place, Hon ’043’s cavity wall necessarily holds the porous body in place because it touches the porous body. But the ’742 Patent and Hon ’043 disclose different atomizer arrangements. *Compare* Ex. 1003, Fig. 6 *with* Ex. 1001, Fig. 18. Mr. Meyst explained that to hold Hon ’043’s porous body in place, the porous body “would need to be anchored to something external,” and that the cavity wall cannot hold the porous body in place because the cavity wall is internal to the porous body. Ex. 2015 ¶¶ 53–55. Conversely, the frame in the ’742 Patent is external to the porous component and thus can hold the porous component in place. Ex. 1001, Fig. 18.

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