

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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YITA LLC  
Petitioner

v.

MACNEIL IP LLC  
Patent Owner

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Case IPR2020-01139  
Patent 8,382,186

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**PETITIONER YITA LLC'S NOTICE RANKING PETITIONS FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 8,382,186**

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## **I. Introduction**

Petitioner Yita LLC (“Petitioner”) is simultaneously filing two petitions (IPR2020-01138 and IPR2020-01139) challenging the patentability of claims 1-7 in U.S. Patent No. 8,382,186 (“the ’186 patent”). Under the Board’s July 2019 update to the Trial Practice Guide, Petitioners submit this paper with each petition to “identify: (1) a ranking of the petitions in the order in which it wishes the Board to consider the merits ... and (2) a succinct explanation of the differences between the petitions, why the issues addressed by the differences are material, and why the Board should exercise its discretion to institute additional petitions ....” TPG (July 2019), 27.

## **II. Ranking of the Petitions**

The Board should consider the merits of the petitions in the following order:

1. IPR2020-01138 (“the MacNeil Petition”); and
2. IPR2020-01139 (“the Rabbe-Yung-Gruenwald Petition”).

## **III. Succinct Explanation of Differences Between the Petitions**

Petitioners challenge each claim of the ’186 patent only once in the MacNeil Petition and only once in the Rabbe-Yung-Gruenwald Petition. The petitions have *two grounds in total*:

IPR2020-01138			
Ground	Basis	References	Claims
1	§103	MacNeil <sup>1</sup>	1-7
IPR2020-01139			
Ground	Basis	References	Claims
1	§103	Rabbe, <sup>2</sup> Yung, <sup>3</sup> and Gruenwald <sup>4</sup>	1-7

One main difference between the two petitions is the prior-art dates of the asserted references. The asserted reference in IPR2020-01138 predates August 27, 2012. The references in IPR2020-01139 predate October 29, 2004. This difference is material because the MacNeil Petition relies on the '186 patent not being entitled to claim priority to any of its parent applications.

IPR2020-01138	
MacNeil	Issued November 4, 2008
IPR2020-01139	
Rabbe	Published December 14, 1984
Yung	Published April 18, 2002
Gruenwald	Published in 1998

The obviousness grounds also contain other material differences. Indeed, the petitions rely on completely different references. Although each set of references

<sup>1</sup> U.S. Patent No. 7,444,748 to MacNeil (EX1004).

<sup>2</sup> French Publication No. 2547252 to Rabbe (EX1005).

<sup>3</sup> U.S. Publication No. 2002/0045029 A1 to Yung (EX1006).

<sup>4</sup> Gruenwald, G., *Thermoforming: A Plastics Processing Guide*, CRC Press, 2nd Edition, 1998 (EX1007).

discloses every claim element, they do not use identical language or the same level of detail. For example, in the MacNeil Petition, MacNeil discloses, by itself, all the claim elements. In the Rabbe-Yung-Gruenwald Petition, Petitioner relies on, for example, Rabbe's floor tray, Yung's thermoplastic material and baffles, and Gruenwald's properties of the thermoforming process.

#### **IV. The Board should exercise its discretion to institute both petitions.**

The Board's July 2019 update to the Trial Practice Guide gives examples of when multiple petitions may be necessary, including "when there is a dispute about priority date." TPG (July 2019), 26. The MacNeil Petition and the Rabbe-Yung-Gruenwald Petition fall squarely within this situation. In short, two petitions are warranted because the parties dispute the '186 patent's priority date.

When the application that issued as the '186 patent was filed, the specification included a new paragraph that was not present in the parent applications. The added text states that "[t]he tray is thermoformed from a sheet of polymer material having substantially uniform thickness, and this means that the components of the tray after thermoforming will have a substantially uniform thickness." EX1001, '186 patent, 5:8-32. Nowhere else in the '186 patent is there written description support for the '186 patent claim element that requires "the central panel, the first panel, the second panel, the reservoir and the baffles each having a thickness from a point on the upper surface to a closest point on the

bottom surface thereof, said thicknesses, as a result of the tray being thermoformed from the sheet of thermoplastic polymeric material of substantially uniform thickness, being substantially uniform throughout the tray.” *Id.*, 20:9-16.

Accordingly, the parent applications (which did not include this added text) do not contain an explicit or inherent description of the molded floor tray having a thickness that is substantially uniform throughout the tray.

Despite this missing support from the parent applications, Patent Owner alleges that the ’186 patent is entitled to an early priority date. The ’186 patent’s priority date has not been decided, so Petitioner’s two petitions provide invalidating art based on different possible priority dates. The MacNeil Petition is based on a priority date no earlier than August 27, 2012—the filing date of the application that matured into the ’186 patent. The Rabbe-Yung-Gruenwald Petition is based on a priority date no earlier than October 29, 2004—the filing date of the earliest ancestor of the ’186 patent. No tribunal has decided the priority date of the ’186 patent, so both petitions are necessary to address the possible outcomes.

## **V. Conclusion**

This case satisfies the Board’s example justification for filing two petitions. Specifically, the petitions depend on the Board’s ultimate finding on the priority date of the ’186 patent. Even with the two petitions, Petitioner has raised only two grounds of unpatentability. These two grounds will not unduly burden the Board or

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