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Paper 32
Entered: November 15, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FASTENERS FOR RETAIL, INC.,
Petitioner,

v.

RTC INDUSTRIES, INC.,
Patent Owner.

Case IPR2018-00741 (Patent 9,173,505)
Case IPR2018-00742 (Patent 9,149,132)
Case IPR2018-00743 (Patent 9,504,321)
Case IPR2018-00744 (Patent 9,635,957)[1]

Before PATRICK R. SCANLON, MICHAEL L. WOODS, and JASON W. MELVIN, *Administrative Patent Judges*.

WOODS, *Administrative Patent Judge.*

DECISION
Denying Request for Rehearing
37 C.F.R. § 42.71

[1] We issue one Order and enter it in each proceeding.

I. INTRODUCTION

a. Background

Fasteners for Retail, Inc. ("Petitioner"), filed four petitions (IPR2018-00741, IPR2018-00742, IPR2018-00743, and IPR2018-00744) requesting *inter partes* review of claims in U.S. Patent Nos. 9,173,505, 9,149,132, 9,504,321, and 9,635,957. Paper 1.[2] RTC Industries, Inc. ("Patent Owner"), filed a Preliminary Response (Paper 8, "Prelim. Resp.") arguing that Petitioner failed to identify Olympus Partners LP ("Olympus") as a real party-in-interest ("RPI"). Prelim. Resp. 28–39. After receiving the Preliminary Response, we issued an order (Paper 13, "Order") permitting Petitioner to either: (1) amend its mandatory notices within 7 days to name Olympus as an RPI; or (2) file a reply brief within 7 days to address Patent Owner's RPI argument. Order 4. Although it amended its mandatory notices to add certain additional RPIs (Paper 14), Petitioner chose to file a reply brief (Paper 15, "Reply") rather than name Olympus as an RPI.

We entered a decision denying institution (Paper 25, "DDI"), in which we explained that Petitioner failed to persuade us that Olympus was not an RPI. DDI 14.

[2] Our references to the record will be to IPR2018-00741 unless otherwise noted.

Petitioner filed a timely Request for Rehearing (Paper 26, "Request"), in which it asks us to vacate our DDI and allow Petitioner to amend its mandatory notices to name Olympus as an RPI. Request 10.[3]

For the reasons that follow, we deny Petitioner's Request.

b. Standard for Reconsideration

The party filing a request for rehearing has the burden of showing a decision should be modified, and the request for rehearing must specifically identify all matters the party believes the Board misapprehended or overlooked and the place where each matter was previously addressed in its papers. 37 C.F.R. § 42.71(d). Therefore, Petitioner bears the burden of establishing that we misapprehended or overlooked the matters that it requests that we review. When rehearing a decision whether to institute a trial, the Board reviews the decision for an abuse of discretion. 37 C.F.R. § 42.71(c).

II. ANALYSIS

In its Request, Petitioner argues that the Board abused its discretion by denying institution when the Board "*instructed* [Petitioner] to brief the real party-in-interest issue '[i]f Petitioner does not believe that Olympus is an unnamed real party-in-interest.'" Request 5 (citing Order 3, emphasis added). Petitioner asserts that "Petitioner did exactly as the Board *directed*

[3] Petitioner's Request for Rehearing in each of the four cases are identified as: Paper 26 in IPR2018-00741; Paper 29 in IPR2018-00742; Paper 26 in IPR2018-00743; and Paper 27 in IPR2018-00744.

. . . [and b]ecause Petitioner did not believe Olympus was a real party-in-interest, it filed a reply brief explaining that position." *Id.* (citing Reply, emphasis added). Petitioner argues that it "would have *violated the express terms of the Board's* [Order] if it had simply responded by added [sic] Olympus as a real party-in-interest because Petitioner affirmatively did not believe Olympus was an RPI." *Id.* at 7 (emphasis added).

Petitioner's argument is without merit because it mischaracterizes our Order. Contrary to Petitioner's assertion (Request 5), our Order does not "instruct" or "direct" Petitioner to file a reply brief if it believes Olympus is not an unnamed RPI. Rather, our Order explicitly provides that if "Petitioner does not believe that Olympus is an unnamed real party in interest, in lieu of updating its mandatory notices, Petitioner *may file* a reply brief." Order 3 (emphasis added). In other words, the Order does not state "Petitioner *must file* a reply brief," as Petitioner's argument would have us believe. The Order further provides:

> ORDERED that within 7 days of the entry of this Order, Petitioner *may* amend its mandatory notices to name other parties, including Olympus as a real party in interest in each [proceeding] . . .
>
> FURTHER ORDERED that in lieu of updating its mandatory notices, Petitioner *may* file a 7-page reply brief to address Patent Owner's RPI arguments in each [proceeding].

Id. at 4.

If Petitioner amended its mandatory notices to name Olympus as an RPI within 7 days of entry of that Order—even if Petitioner believed that Olympus was not an unnamed RPI—such action would not be in violation of our Order, as Petitioner argues (Request 7).

Moreover, the 7-day period for amending its mandatory notices to name Olympus as an RPI expired on July 27, 2018, (Order 4), and we entered our decision denying institution based on Petitioner's failure to name Olympus as an RPI on September 12, 2018, (DDI 14). To permit Petitioner to now amend its mandatory notices to cure its failure to name Olympus as an RPI would be unfair to Patent Owner and would encourage gamesmanship by allowing petitioners to refrain from naming all RPIs until if and after such unnamed RPI is the cause for denying institution. Indeed, we are not aware of any Board decision that has permitted such amendment to mandatory notices *after* a decision denying institution.

Accordingly, Petitioner's Request is denied.

III. ORDER

For the reasons given, it is

ORDERED that Petitioner's Request for Rehearing is *denied* in each of IPR2018-00741 (Paper 26), IPR2018-00742 (Paper 29), IPR2018-00743 (Paper 26), and IPR2018-0744 (Paper 27).

IPR2018-00741 (Patent 9,173,505)
IPR2018-00742 (Patent 9,149,132)
IPR2018-00743 (Patent 9,504,321)
IPR2018-00744 (Patent 9,635,957)

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