

No. 23-1023

IN THE
Supreme Court of the United States

JODI A. SCHWENDIMANN,
Petitioner,

v.

NEENAH, INC.
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review to examine the Federal Circuit’s decision to issue a Rule 36 order in this case (or any other case)—a process by which that court issues a summary affirmance after determining a written decision would have no precedential value—in order to conduct fact-bound error correction of the PTAB’s Order that the patents at issue were invalid as anticipated by prior art; or

Whether the Court should hypothesize a ground on which the Federal Circuit may have affirmed when it issued the Rule 36 Order in order to resolve the same question of fact-bound error correction in claim constructions.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Neenah, Inc. was petitioner in the *Inter Partes* review proceedings below. Ms. Jodi A. Schwendimann was the patent owner in the proceedings below.

Pursuant to Rule 29.6, Respondent Neenah, Inc. (“Neenah”) states that it is a wholly-owned subsidiary of Mativ Holdings, Inc., which is a publicly held company.

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STATEMENT OF THE CASE

1. This petition stems from a consolidated appeal in the Federal Circuit affirming three final written decisions by the U.S. Patent and Trademark Office's Patent Trials and Appeals Board. The Board held that all challenged claims in the three related patents-at-issue,¹ were unpatentable as anticipated by the Kronzer prior art reference. App.33a-34a, App.79a, App.113a-114a.

Each of the patents is directed to "polymeric compositions" both per se and as a "release layer" in an image transfer sheet that may be used for transferring images to fabrics, such as T-shirts. App.5a. The claimed compositions include three or four components, such as "an acrylic dispersion, an elastomeric emulsion, a water repellent, and a plasticizer." App.5a-6a. In turn, the specification lists examples of suitable materials that can be used as each claimed component in the compositions. App.18a.

The Board determined that Kronzer disclosed all the components (and, in fact, disclosed the very same materials listed as suitable examples in the patent specifications) of the claimed polymeric compositions and the layers and other features of the claimed image transfer sheets. *See* App.22a-32a. Thus, Kronzer rendered the challenged claims invalid as anticipated.² App.33a-34a

¹ U.S. Patent Nos. 6,410,200, 6,723,773, and 7,008,746.

² Respondents asserted additional reasons why the claims were unpatentable, namely, they were anticipated by several other prior art references. App.32a-34a. Because the Board deter-

(continued . . .)

2. Before the Board, Petitioner made (1) two arguments about claim constructions and (2) a separate argument that a related, co-pending lawsuit in Delaware district court supported Petitioner's positions on claim construction. The Board rejected each of these arguments.

First, for certain components of the claimed compositions (e.g., "film-forming binder," "water repellent," etc.), Petitioner raised the same two arguments for each disputed component, namely that it: (i) must impart particular characteristics or provide specific functions *to the claimed composition or image transfer sheet as a whole*, and (ii) does not necessarily cover the exemplary materials listed in the specification. App.11a-14a. According to Petitioner, for example, the fact that a prior art composition includes a wax (one of the examples listed in the specification as a suitable "water repellent") is not enough to satisfy the claims unless the prior art also discloses that the composition *as a whole* actually repels water. App.25a-26a.

The Board rejected these two arguments on claim constructions. App.16a-22a. As to the first, the Board correctly held that the patent claims are broadly recited and simply require that the claimed composition includes each component—not that it must be included in any particular amount or impart any particular characteristics or functions to the composition as a whole. It held that "[t]he language of the claims themselves demonstrates that there is no express re-

mined that Kronzer rendered all the challenged claims unpatentable, it did "not address [Respondent's] additional grounds challenging [those] claims." *Id.*

quirement of a specific amount of [each component] . . . [n]or is there an express requirement . . . that [each component] perform a particular function.” App.16a-17a.

As to the second argument, the Board correctly held that each component must at least cover the examples listed in the specification. It analyzed the specification and held: “the Specification uses the claim terms to refer to broad categories of suitable polymers/materials as opposed to requiring the materials perform specific functions in the polymeric composition.” App.20a-21a; *see also* App.21a (“Thus, we determine that the Specification supports a construction of the disputed terms that includes the examples listed in the Specification.”) As a result, the Board determined that each of the claimed components should be construed as “at least encompass[ing] the explicit examples recited in the . . . Specification.” App.22a.

Second, Petitioner also argued a decision by the Delaware district court in a related and co-pending lawsuit involving the same patents supported Petitioner’s claims. App.14a-15a. Petitioner argued that the district court construed each claimed component as requiring a specific “function in the composition” and “declined to include a list of exemplary materials” in each express construction. App.15a.

The Board examined the “Delaware district court’s Claim Construction Order, and f[ou]nd it to be consistent with [the Board’s] determination” that each claimed component “at least encompasses” the explicit examples listed in the specification. App.21a. In support of its decision, the Board pointed to the district court’s express findings that “nothing in the claim language requires that any of these materials “impart” any “desired characteristics” to the release

layer” and nothing in the claims or the specification requires any of the materials to be “present in any particular amount.” *Id.* The Board further explained that “although the court did not expressly include all of the exemplary materials in its construction[s], we discern nothing in the court’s decision suggesting that the materials listed in the Specification are not examples of the claimed materials.” App.21a-22a.

Notably, as the Board found, there was no dispute that the compositions disclosed in the Kronzer prior reference included the same polymers/materials listed as suitable examples for each component in the specifications of the challenged patents. App.23a-27a. As an example, Petitioner did not dispute that Kronzer discloses compositions including waxes and/or polyethylenes, which the patents explicitly list as suitable examples of a “water repellent.” App.24a-25a. Thus, the Board’s constructions for each of the claimed components—that it “at least encompasses the explicit examples” in the specification fully resolved the dispute between the parties.

3. On appeal to the Federal Circuit, the sole issue raised by Petitioner was that the Board’s claim constructions were erroneous. Following oral argument, the Federal Circuit affirmed the Board’s three final written decisions under Rule 36. *See* App.1a. Rule 36 allows the Federal Circuit to “enter a judgment of affirmance without opinion . . . when it determines that any of [five enumerated] conditions exist and an opinion would have no precedential value[.]” Fed.Cir.R.36 (reproduced in full at App.117a). The Federal Circuit also denied Petitioner’s petition for panel rehearing and rehearing en banc. App.115a-116a.

4. Petitioner asks the Court to review the Federal Circuit’s practice of issuing affirmances under Rule 36

to clarify “when Rule 36 Judgments without opinions are proper (and when they are not)” and to prelude the Federal Circuit from issuing such Rule 36 judgments “affirming invalidation of a patent . . . in circumstances where it is unclear which claim construction was applied to invalidate.” Pet.7.

5. Petitioner also asks the Court to opine on the impact of a hypothetical: “to the extent that the Panel’s affirmance on anticipation was based upon a finding that the District Court’s claim constructions were correct, the Panel erred in finding anticipation[.]” Pet.9-10.

REASONS FOR DENYING THE PETITION

The Court should deny the petition. Petitioner’s halfhearted challenge to Federal Circuit Rule 36—a procedure employed by that court to manage its docket and promote judicial efficiency—is not cert worthy. The Court has twice recently denied petitions asking to review the use of Rule 36 and this petition should fare no better. Worse, in this case, Petitioner challenges the use of the Rule in order to seek nothing more than simple error correction. No greater principle or important legal question is at stake.

Moreover, the core premise for Petitioner’s challenge—that it is “unclear which claim constructions the Federal Circuit adopted when it engaged in its anticipation analysis”—is wrong. Pet.5. The *only* claim constructions being reviewed by the Federal Circuit were those decided by the Board. The Board also squarely considered the Delaware court’s claim constructions and found them consistent with the Board’s constructions.

Beyond that, the Court should deny the petition because it presents no question worthy of review. The

central holding below—that the challenged patents are invalid because they are anticipated—is fact-bound, supported by substantial evidence, and holds no special importance on any issue outside the confines of this case. Moreover, and contrary to the arguments the Petition makes, the Board correctly applied Federal Circuit precedent on claim construction and anticipation.

I. THE COURT SHOULD NOT REVIEW PETITIONER’S COMPLAINT ABOUT THE FEDERAL CIRCUIT’S SUMMARY AFFIRMANCE TO RESOLVE THIS FACT-BOUND APPEAL.

The Court should not entertain Petitioner’s challenge to Federal Circuit Rule 36 because Petitioner offers no legal basis for why Rule 36 is improper (in this case or generally), nor does she explain why this Court should prohibit its use by the Federal Circuit (in this case or generally). Moreover, she seeks review of Rule 36 for purposes of simple fact-bound error correction, and Petitioner’s case-specific arguments are based on a faulty premise—that the decision below is wrong (it is not) and conflicts with the claim constructions by the Delaware court (it does not). Summary affirmance by the Federal Circuit reflects that the fact-bound claim constructions in this case were properly resolved by the Board.

1. Rule 36 is a procedural mechanism that allows the Federal Circuit to issue a summary affirmance where the Federal Circuit determines that one of five conditions are met *and* the Federal Circuit determines that any opinion would not be precedential. Fed.Cir.R.36. As relevant here, two of the conditions on which the Court may grant summary affirmance are when “(4) the decision of an administrative agency

warrants affirmance under the standard of review in the statute authorizing the petition for review; or (5) a judgment or decision has been entered without an error of law.” Fed.Cir.R. 36(4)-(5).

The Federal Circuit, like all federal courts of appeals, has discretion to promulgate procedural rules, particularly those directed to managing its own docket and promoting judicial efficiency. It is not the only federal appellate court that allows for summary affirmance when a panel of the court determines that a formal written order would have no precedential value. *See*, 2d. Cir. IOP 32.1.1 (“When a decision in a case is unanimous and each panel judge believes that no jurisprudential purpose is served by an opinion (i.e., a ruling having precedential effect), the panel may rule by summary order.”).

Likely because it has not considered the exercise of this discretion by federal courts problematic, this Court has twice recently declined to grant review of cases seeking to police the Federal Circuit’s use of Rule 36 judgments. *See Virentem Ventures, LLC v. Google LLC*, No. 22-803, 143 S.Ct. 1060 (Mar. 27, 2023) (petition denied); *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.*, No. 21-158, 142 S.Ct. 235 (Oct. 4, 2021) (petition denied).

The Court should again deny review in this case. Petitioner does not argue that the Federal Circuit’s use of Rule 36 here was unconstitutional or otherwise violates any statute or other applicable legal authority. Quite the contrary: Petitioner simply argues that the Federal Circuit’s summary affirmance under Rule 36 is wrong in this case because she lost. For purely case-specific reasons, she alleges, this Court should

grant review to correct and examine the Federal Circuit's use of Rule 36. That question does not merit review.

2. Moreover, even if this Court wanted to review an alleged error in a summary affirmance in *some* case, this is not the vehicle in which to do it because the court below did not err. The Board held Respondent “satisfied its burden of demonstrating, by a preponderance of the evidence, that the subject matter of [the] claims . . . is unpatentable.” App.33a. The Federal Circuit's affirmance means that decision “[4] warrants affirmance under the standard of review in the statute authorizing the petition for review; or (5) a judgment or decision has been entered without an error of law.” Fed.Cir.R. 36(4)-(5). This Court need not look through the summary affirmance to evaluate the substantiality of the evidence and application of the law.³

To challenge that, Petitioner fundamentally mischaracterizes the issues resolved below. She posits that the Federal Court must have reviewed both the Board's claim constructions and the district court's claim constructions to determine which were correct and which were erroneous. Pet.4-5. Petitioner then speculates as to three “possibilities” how the Federal

³ The ultimate question of claim construction is a matter of law that the Federal Circuit reviews de novo, except that it reviews any subsidiary fact findings under the substantial evidence standard. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015). Over 120 years ago, this Court held that “[a]nticipation is a question of fact.” *Busch v. Jones*, 184 U.S. 598, 604 (1902); *see also Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015) (“Anticipation under 35 U.S.C. § 102 is a question of fact [and] [w]e review the Board's factual findings for substantial evidence[.]”).

Circuit decided these questions. *Id.* Based on this, Petitioner asserts that the “Rule 36 Judgement creates uncertainty and confusion,” because she cannot know which “possibility” the appellate court adopted. Pet.6.

This characterization creates confusion where none exists. The Board squarely considered whether the constructions it adopted and the Delaware court’s constructions conflicted and held that although they were different, they were not inconsistent. App.21a (“[We have considered the Delaware district court’s Claim Construction Order, and find it to be consistent with this determination.”).

That was because, the Board explained, “the Specification uses the claim terms to refer to broad categories of suitable polymers/materials as opposed to requiring the materials perform specific functions in the polymeric composition,” and, thus, “the Specification supports a construction of the disputed terms that includes the examples listed in the Specification.” App.20a-21a. That created no conflict because “although the [Delaware] court did not expressly include all of the exemplary materials in its construction, [the Board] discern[ed] nothing in the [Delaware] court’s decision suggesting that the materials listed in the Specification *are not examples* of the claimed materials.” App.21a-22a (emphasis added).

Moreover, the *reason* the Delaware court did not include examples is that *Petitioner asked it not to do so*. App. 22a n.14 (“Patent Owner *argued against* including a list of examples in the construction of the terms because ‘such a list may mislead the jury, if it concludes—despite the statement that these are mere examples—that the accused products must include one

of the listed materials.”) (emphasis added and citation omitted). Thus, any confusion the Petition argues the district court’s constructions creates flows directly from Petitioner’s own litigation strategy.

In any event, there is no conflict. Instead, that the court and the Board adopted different (but consistent) constructions reflects the different legal questions each body had to resolve. The district court had to apply express constructions to each component to assist a jury in determining infringement of various accused products (and invalidity under various grounds). But the Board faced no such possibility of jury confusion, and its determination that each claimed component covers at least the examples in the specification fully resolved the parties’ dispute whether Kronzer anticipated each of the components. App.25a-27a. There was thus no need for the Board to further construe the claimed components, because it “need only construe terms ‘that are in controversy, and *only to the extent necessary to resolve the controversy.*” See App.10a (quoting *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (emphasis added)).

When the Federal Circuit affirmed, it must have determined *only* that the Board’s decision “warrant[ed] affirmance under the standard of review in the statute authorizing the petition for review,” or the “decision [was] entered without an error of law.” Fed. Cir. R. 36. And, of course, the Federal Circuit determined that its resolution of those questions “would have no precedential value.” *Id.* Petitioner argued below (to the Board and the Federal Circuit) that the Board’s constructions were inconsistent with those of the district court. The Board and the Federal Circuit simply

disagreed. The Board expressly found the constructions were consistent and the Federal Circuit determined that was supported by substantial evidence and not legal error.

3. The parade of horrors Petitioner alleges follows from the issuance of a summary affirmance in this case also do not exist. There is no risk of “confusion” to Petitioner or the public about the scope of the claims, *see* Pet.5-6. That is because the three patents-at-issue *expired more than three years ago*, in 2020. *See* PTAB.Appx233, PTAB.Appx258, and PTAB.Appx278 (face of the patent, making clear the first claim was March 31, 2000); 35 U.S.C. § 154 (patent term is 20 years). Nor is Petitioner’s non-sequitur about the Patent Office “playing ‘both sides of the street’,” Pet.6-7, by both issuing and then later invalidating patents, relevant to the issues at hand. Any structural problem with the Patent Office approval and review process is a question for Congress (or, perhaps—in a case in which it was fully briefed, preserved, and argued below—this Court).

Put simply, the Board’s decision squarely examined its constructions and the Delaware court’s constructions and found no conflict. The Federal Circuit affirmed because that decision was supported by substantial evidence and not legal error. Nothing about that process for resolving these claims implicates any issue worthy of this Court’s review.

II. PETITIONER'S REQUEST FOR REVIEW OF A HYPOTHETICAL HOLDING SEEKS AN ADVISORY DECISION OF FACT-BOUND ERROR CORRECTION THAT DOES NOT MERIT REVIEW.

Petitioner's second question presented squarely (and wrongly) asks the Court to issue an advisory opinion—as Petitioner frames it, the Court has “no way of knowing” the basis for the Rule 36 Order—to engage in routine error correction of the Board's claim constructions and fact-bound anticipation determination. This question does not merit review. The courts below properly applied the law and examined the facts, and the decisions create no conflict with any other Federal Circuit authority.

1. It is axiomatic that “the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.” *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)). Yet that is squarely what this Petition requests when it asks the Court to “assum[e] . . . and with no way of knowing” that the Federal Circuit “found that the District Court's constructions of the claim terms were correct.” *Pet.i*. The Petition does not explain how to get around this problem.

In any event, properly understood, the Court and the Parties *do know* the basis for the Federal Circuit's decision, because the Rule squarely explains it: the Board's decision is supported by substantial evidence and commits no error of law. That *includes* the Board's holding that its claim constructions *do not conflict* with the Delaware court's constructions. That Petitioner does not like the decision below does not make it incomprehensible.

2. Nothing in the Federal Circuit’s affirmance (or the underlying Board decision) merits this Court’s review, and questions as to the proper construction of certain terms in the patents and whether these patents are invalid as anticipated have no special importance beyond this case. Granting review would be inconsistent with the Court’s “institutional role,” which is to “ensur[e] clarity and uniformity of legal doctrine,” not to engage in “the case-specific process of reviewing the application of law to the particularized facts of individual disputes[.]” *United States v. Young*, 470 U.S. 1, 34 (1985) (Blackmun J., concurring); *see also Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (“To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.”). The meaning of this summary affirmance and the construction of these claims fail that bar. Nowhere in its ten pages does the Petition explain this case’s general importance.

3. In any event, the Petition should be denied because the Board’s decisions faithfully apply the Federal Circuit’s precedent on claim construction and anticipation. The Board’s decisions addressed the two claim construction issues raised by Petitioner in a detailed discussion spanning approximately 12 pages. App.10a-22a. Consistent with the guidance set forth in the Federal Circuit’s en banc decision in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-1315 (Fed. Cir. 2005), the Board began its analysis with the claims (App.16a-17a) and then analyzed the specification (App.18a-21a). The Board found that both make clear that the claims: (i) do not require the components to impart specific functions to the composition as a

whole, and (ii) cover at least the example materials explicitly listed in the specification. App.16a-21a. The Board then also considered the district court's claim construction order and "[fou]nd it to be consistent with [the Board's claim construction] determination." App.21a-22a.

In affirming the Board's decisions under Rule 36, the Federal Circuit presumably found no legal error in the Board's constructions. *See* Fed. Cir. R. 36(4)-(5). In turn, such a finding fully resolved all issues on appeal below.

The Petition does not engage in any meaningful explanation why the Board's claim constructions were purportedly erroneous. Petitioner only argues it in passing, relegating it to a single footnote and merely stating that the Board "failed to apply *Phillips*" because "both the claim terms themselves and the specification state that the materials must perform a function." Pet.8 at n. 2. Instead, the petition *assumes* the decision must be wrong and, because it must be wrong, it must also have "violated Federal Circuit precedent." Pet.8. This is poorly disguised error correction.

As explained above, it was the Board's—not the district court's—claim constructions that were before the Federal Circuit and the Federal Circuit found no error in the Board's constructions. Put simply, the question whether Kronzer anticipates the claims under the district court's claim construction was not an issue that was decided by the Board, nor an issue that was before

the Federal Circuit.⁴ Thus, Petitioner speculative assertions that the Board’s anticipation analysis would have been deficient *if* the Federal Circuit had found the district court constructions to be correct are entirely inapposite.

* * *

Ultimately, the Board’s anticipation analysis, and the Federal Circuit’s review and affirmance of it, aligns with the Federal Circuit’s precedent on claim construction and anticipation. The decision is supported by substantial evidence, commits no legal error, and offers no importance to parties beyond this dispute. The Court should not grant this case to engage in routine error correction, particularly given that no error was committed.

⁴ Contrary to Petitioner’s assertions, Pet.9, Respondent did dispute before both the Board and the Federal Circuit that whether or not a material “acts as” a claimed component depends on the composition as a whole. Respondent also argued before the Board that, even under Petitioner’s narrower proposed claim constructions, Kronzer (and the other cited prior art) still rendered the claims anticipated. Given the Board’s rejection of Petitioner’s claim constructions, App.10a-22a, however, the Board did not reach this issue.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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