

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INTERNATIONAL FLAVORS & FRAGRANCES INC.,
Petitioner,

v.

ZOOMESSENCE, INC.,
Patent Owner.

Case IPR2015-01418
Patent 8,939,388 B1

Before MITCHELL G. WEATHERLY, JAMES A. TARTAL, and
JAMES A. WORTH, *Administrative Patent Judges*.

WORTH, *Administrative Patent Judge*.

DECISION
Patent Owner's Request for Rehearing
37 C.F.R. § 42.71

I. INTRODUCTION

On June 6, 2015, Petitioner International Flavors & Fragrances Inc. ("Petitioner") filed a Petition (Paper 1, "Pet.") requesting *inter partes* review of claims 1, 16, 19, and 28–30 of U.S. Patent No. 8,939,388 B1 (the '388 patent, Ex. 1001). On September 16, 2015, Patent Owner ZoomEssence,

Inc. (“Patent Owner”) filed a Preliminary Response (Paper 5, “Prelim. Resp.”).

In the interim, on September 15, 2015, a Certificate of Correction (Paper 7) issued, with a correction to claim 28. On November 3, 2015, Petitioner submitted, with authorization from the Board, a Reply Regarding *Inter Partes* Review of the Corrected Version of Dependent Claim 28 of U.S. Patent No. 8,939,388 (Paper 9, “Reply”). On November 17, 2015, Patent Owner submitted a Sur-Reply to Petitioner’s Reply Regarding *Inter Partes* Review of Claim 28 of U.S. Patent No. 8,939,388 (Paper 10, “Sur-Reply”). On December 15, 2015, we instituted an *inter partes* review of all claims against which unpatentability was asserted. Paper 11 (“Decision”).

On January 11, 2016, Patent Owner filed its Request for Rehearing Pursuant to 37 C.F.R. § 42.71(d) on Decision to Institute *Inter Partes* Review (Paper 13, “Rehearing Request” or “Request”), asking the Board to revise its claim construction and to withdraw its decision to institute based thereon. For the reasons stated below, Patent Owner’s Rehearing Request is denied.

II. STANDARD OF REVIEW

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” An abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus. Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). The request must identify, specifically, all matters the party believes the Board misapprehended or overlooked. 37 C.F.R. § 42.71(d).

III. REHEARING REQUEST

Patent Owner contends that in our Decision to institute an *inter partes* review of the '388 Patent, we misapprehended or overlooked the construction of “drying fluid comprises air at temperature that is above freezing temperature of the liquid solvent and below 100°C,” as recited by independent claim 1, under the broadest reasonable construction standard. Request 1–13. In particular, Patent Owner argues that the claim construction set forth in the Decision on Institution is unreasonably broad to the extent that it goes beyond a preferred embodiment of the '388 patent using non-heated drying fluid at less than about 100°C upon introduction into the drying chamber. Request 8 (citing Ex. 1001, 7:25–37). Patent Owner makes certain additional arguments related thereto.

Patent Owner's arguments are similar to those set forth in its Preliminary Response. Prelim. Resp. 21–29. The panel has considered these arguments in reaching the Decision on Institution and has not overlooked any arguments in the Patent Owner Preliminary Response.

Claim constructions and other determinations set forth in the Decision on Institution are preliminary in nature and may be revisited during the trial in concert with the presentation of evidence. Therefore, Patent Owner may continue to press claim construction contentions and other arguments in its Patent Owner Response. However, we decline to revisit the claim construction at this time for purposes of the Decision on Institution. Patent Owner may disagree with the Institution Decision, but Patent Owner has not shown an erroneous conclusion of law, clearly erroneous factual findings, or a clear error of judgment in the Institution Decision to show an abuse of discretion.

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ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner's Request for Rehearing is *denied*.

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