

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SCENTAIR TECHNOLOGIES, LLC,
Petitioner,

v.

PROLITEC, INC.,
Patent Owner.

IPR2021-00013
Patent 9,480,767 B1

Before GRACE KARAFFA OBERMANN, KRISTINA M. KALAN, and
BRIAN D. RANGE, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing of
Decision Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

I. INTRODUCTION

Petitioner filed a Request for Rehearing (Paper 11, “Rehearing Request” or “Req. Reh’g”) of the Decision Denying Institution of *Inter Partes* Review (Paper 10, “Decision” or “Dec.”) of claims 1–19 (all claims) of U.S. Patent No. 9,480,757 B1 (“the ‘757 patent” or “Ex. 1001”). We refer to the Petition (Paper 2, “Pet.”) and Preliminary Response (Paper 8, “Prelim. Resp.”).

Upon request for rehearing, we assess a decision on institution “for an abuse of discretion” (37 C.F.R. § 42.71(c) (2020)), which occurs when a “decision was based on an erroneous conclusion of law,” “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). Applying that standard, we *deny* the Rehearing Request.

II. BACKGROUND

The ’767 patent relates to an air treatment appliance having a “cap assembly” that is “coupled to” a receptacle, which is suitable for containing “a liquid compound to be aerosolized within an interior thereof.” Ex. 1001, 3:30–34. The ’767 patent describes and claims a cap assembly comprising three distinct structural features, namely, “a cap, a venturi insert, and a base attached together” in a manner that, among other things, defines “an aerosol outlet chamber partitioned from the interior of the receptacle by the base.” *Id.* at 3:34–43; *see id.* at 15:4–13; 16:18–27 (relevant limitations of the independent challenged claims).

The ’767 patent discloses examples of air treatment appliances according to the claims, and each requires “a base” that defines “an aerosol outlet chamber partitioned from the interior of the receptacle by the base.”

See, e.g., id. at 9:57–58 (written description of the invention), 15:7, 15:12–13 (independent claim 1). As we did in the Decision (Dec. 3), we reproduce below Figure 8 from the '767 patent, which illustrates that claimed feature.

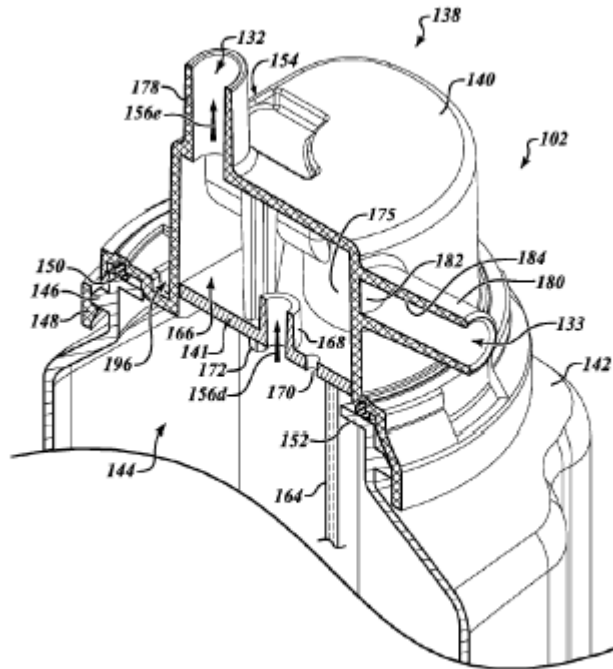


FIG. 8

Ex. 1001, Fig. 8. Figure 8 is a partial isometric cross-sectional view of a removable cartridge for an air treatment appliance. *Id.* at 4:56–57. Notably, aerosol outlet chamber 166 “is partitioned from the internal cavity 144 of the receptacle 142 by the cap base 141.” *Id.* at 9:57–58.

The Petition advances three grounds, each of which is based on obviousness and asserts Benalikhoudja¹ as a prior art reference. Pet. 5. We found in the Decision, and Petitioner does not dispute in the Rehearing Request, that each ground “depends on Petitioner’s assertion that Benalikhoudja discloses or suggests ‘an aerosol outlet chamber partitioned

¹ We refer to US 2006/0237090 A1, published Oct. 26, 2006 (Ex. 1004).

from the interior of the receptacle by the base.” Dec. 5–6. As we did in the Decision, we refer herein to that feature of the claimed invention as “the aerosol outlet limitation.” *Id.* at 6.

Based on the information presented in the Petition and Preliminary Response, we determined Petitioner did not show sufficiently, for purposes of trial institution, that Benalikhoudja discloses the aerosol outlet limitation. *Id.* at 9–10. Petitioner argues we erred on that point. Req. Reh’g 1–6.

II. DISCUSSION

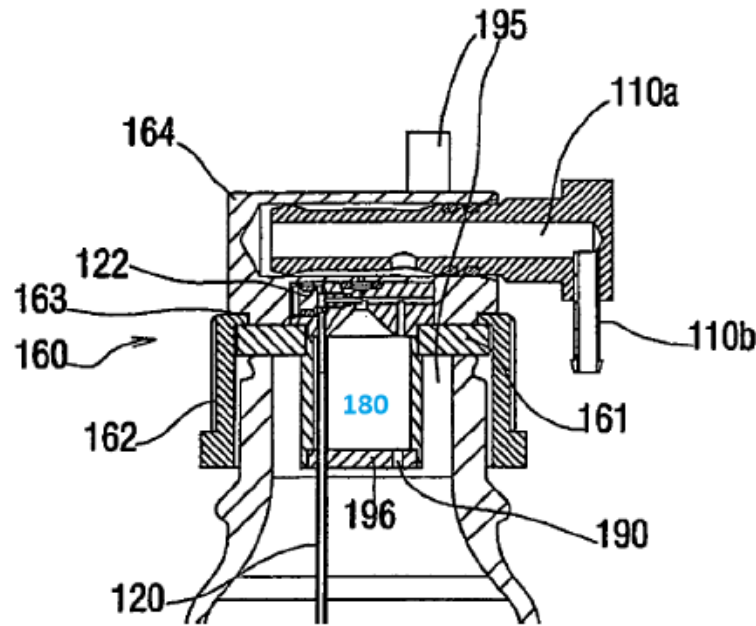
We deny the Rehearing Request for two independent reasons: Petitioner’s arguments are untimely, and they are unpersuasive. We organize our discussion into two sections that address those alternative reasons.

A. Petitioner’s Arguments Are Untimely

Petitioner, in the Petition, consistently and repeatedly identifies “centering flange 161” as the structure in Benalikhoudja alleged to correspond to the “base” required by the challenged claims. Pet. 33, 34, 35, 47, 48, 51, 58 (consistently and repeatedly mapping “the base” of the claimed invention to “centering flange 161” in Benalikhoudja). Nowhere in the Petition does Petitioner argue that any other structure in Benalikhoudja corresponds to the specified “base,” which, according to each challenged claim, must partition the interior of the receptacle from the aerosol outlet chamber of the air treatment appliance. *See generally* Pet.

In the Rehearing Request, for the first time, Petitioner argues that “vertical walls of cylindrical chamber 180,” as illustrated in Figure 6 of Benalikhoudja, “extend from – and are part of – the centering flange 161.” Req. Reh’g 4. Petitioner asserts that these walls “partition[] chamber 180 from the interior of liquid container 100” and, thereby, satisfy the aerosol

outlet limitation of the challenged claims. *Id.* at 4; *see id.* at 3–6 (for similar arguments). By way of support, Petitioner refers us to the following cropped and annotated version of Figure 6 from Benalikhoudja:



Req. Reh’g 3. The above illustration is a cropped and annotated version of Figure 6 from Benalikhoudja, which is a cross-sectional view of an embodiment of a nebulization device. Ex. 1004 ¶ 35. Petitioner crops Figure 6 to exclude approximately two-thirds of the device, leaving only the upper third in view. *Compare* Ex. 1004, Fig. 6. Petitioner also annotates the cropped illustration to include a blue-shaded numeral “180” that, according to Petitioner, emphasizes “a cylindrical chamber 180 . . . bottoming the cap,” that is, element “164” (Req. Reh’g 4–5).

Petitioner submits that the “Petition correctly pointed to the entirety of centering flange 161, including its incorporation into the sidewalls of chamber 180 of venturi device 160, as disclosing the claimed ‘base’” that must partition the aerosol outlet from the interior of the receptacle. Req.

Reh’g 1. For support, Petitioner directs us to eight pages of the Petition that, in Petitioner’s view, map the “base” of the challenged claims to structure in Benalikhoudja that includes **both** centering flange 161 and the sidewalls of cylindrical chamber 180. *Id.* 1–2. (citing Pet. 20, 33, 34, 43, 44, 47, 53, 54). We have reviewed the pages cited by Petitioner (*id.*) and, in addition, we have undertaken to reread the entirety of the Petition, but find no information supporting Petitioner’s view that this assertion previously was advanced in the Petition.

The Petition nowhere identifies the sidewalls of chamber 180 as part of the “base” that separates the aerosol outlet from the interior of the receptacle in Benalikhoudja. *See generally* Pet. On the contrary, the Petition consistently and repeatedly identifies “centering flange 161” as the sole structure in Benalikhoudja that corresponds to the specified “base.” Pet. 33, 34, 35, 47, 48, 51, 58 (consistently and repeatedly mapping “the base” of the claimed invention to “centering flange 161” in Benalikhoudja). To be clear, Petitioner identifies “centering flange 161” in Benalikhoudja as the specified “base” of the challenged claims no less than seven times in the Petition, and never once refers to the sidewalls of cylindrical chamber 180 as representing, or forming part of, the specified “base.” *Id.* To the extent any doubt remains, Petitioner, in the Petition, expressly emphasizes that centering flange 161 and the sidewalls of chamber 180 are separate and distinct structural features by shading one blue and the other purple. Pet. 33.

A request for rehearing is not an opportunity to present new arguments or evidence that could have been presented in a petition. We could not have misapprehended or overlooked matters or arguments that

were not asserted in the Petition. We deny the Rehearing Request because it is based on new arguments that Petitioner did not present in the Petition.

B. Petitioner's Arguments Are Unpersuasive

Alternatively, even if we consider the new arguments raised for the first time in the Rehearing Request, we find none persuasive to show reversible error in the Decision. The '767 patent describes and claims "a cap assembly" that is characterized by three distinct structures, namely, "a cap, a venturi insert, and *a base* attached together without welds or separate fasteners to define . . . an air outlet chamber" that is "partitioned from the interior of the receptacle *by the base.*" Ex. 1001, 15:6–13 (claim 1) (emphasis added); *see id.* at 3:30–43, 9:45–62 (written description).

The Rehearing Request blurs together those distinctly claimed structures. Req. Reh'g 1–6. For example, Petitioner blurs together the "venturi insert" and the "cap" required by claim 1 when describing "cylindrical chamber 180" as "bottoming the cap" 164 (*id.* at 3). *See* Ex. 1004, Fig. 6, ¶ 54). Petitioner argues, "cap 164 also includes a flange 161," thereby blurring the distinction between the "cap" and asserted "base" in Benalkihoudja's device. Req. Reh'g 4; *compare* Pet. 33, 34, 35, 47, 48, 51, 58 (consistently and repeatedly mapping "the base" of the claimed invention to "centering flange 161" in Benalikhoudja).

The Rehearing Request miscasts, as Patent Owner's error, Petitioner's own consistent and repeated assertion that Benalikhoudja's "blue-shaded base element 161" corresponds to the "base" structure required by the challenged claims. Req. Reh'g 4 (miscasting this as Patent Owner's "incorrect argument"). Petitioner, not Patent Owner, introduced and emphasized the argument that "centering flange 161" represents the "base"

of the claimed invention. Pet. 33, 34, 35, 47, 48, 51, 58. We find no merit in Petitioner's new argument that "'blue-shaded base element 161' indicates only the uppermost portion of the centering flange 161 and not its entirety." Req. Reh'g 4. That argument contradicts information asserted in the Petition. *See, e.g.*, Pet. 33 (indicating that blue shaded element 161 is the "centering flange" and purple shaded element 195, including the sidewalls of cylindrical chamber 180, is a "nebulisate discharge conduit"). We see no reason, on this record, why we should view blue shaded element 161 as anything less than the "entirety" of centering flange 161, where Petitioner reasonably identifies it as such by its own annotations in the Petition. Pet. 33 (annotated version of Ex. 1004, Fig. 6). Those annotations are consistent with Benalikhoudja, which expressly identifies element 161 as "a centering flange" and element 195 as "a nebulisate discharge conduct." Ex. 1004 ¶ 54.

In the Rehearing Request, without adequate explanation, Petitioner blurs together features required by the challenged claims, for example, "a cap, a venturi insert, and a base," which are specified as distinct structural components that comprise the "cap assembly." Ex. 1001, 15:6–7; 16:20–21 (independent claims 1 and 16). The claims expressly require that "the base" (not "the cap" or some structural component of "the venturi insert" itself) is the structure that must partition the aerosol outlet chamber from the interior of the receptacle. *Id.* at 15:4–13; 16:18–27 (relevant limitations of the independent challenged claims). None of the arguments presented in the Rehearing Request demonstrate that the Board overlooked or misapprehended any structure in Benalikhoudja's device that suggests the aerosol outlet limitation of the claimed invention. Req. Reh'g 1–6.

Accordingly, we find Petitioner’s new arguments are unpersuasive to show reversible error in the Decision. Req. Reh’g 1–6.

IV. CONCLUSION

For the above reasons, we find that Petitioner does not show “an abuse of discretion” in the Decision. *See* 37 C.F.R. § 42.71(c). Accordingly, we *deny* the Rehearing Request.

V. ORDER

It is

ORDERED that the Petitioner’s Rehearing Request for Rehearing of the Decision Denying Institution of *Inter Partes* Review is *denied*.

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