

Filed: July 16, 2025

Filed on behalf of Resmed Corp.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RESMED CORP.,
Petitioner

v.

CLEVEMED MEDICAL DEVICES, INC.,
Patent Owner

IPR2025-00157
U.S. Patent No. 11,602,284

PETITIONER'S REQUEST FOR DIRECTOR REVIEW

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I. INTRODUCTION

Early challenges—particularly through petitions for post-grant review (“PGR”)—favor predictable, robust patent rights. Accordingly, Petitioner Resmed Corp. (“Resmed”) respectfully requests Director Review of the Board’s decision denying institution of *inter partes* review (“IPR”) of U.S. Patent No. 11,602,284 (the “’284 Patent”) because its application of *General Plastic* is inconsistent with the Director’s policies and determinations set forth in the recently-issued decision *LifeVac, LLC v. DCSTAR Inc.*, IPR2025-00454, Paper 11 (July 11, 2025).

Resmed filed a petition for PGR on the ’284 Patent that issued in 2023. However, the Board denied the petition without reaching the grounds for unpatentability because it found the ’284 Patent to be a pre-AIA patent, and therefore, not eligible for PGR. Resmed immediately filed the instant Petition based on different prior art, but the Board denied under *General Plastic* because Resmed had previously requested PGR.

The Board’s decision denying institution (Paper 10, “DI”) is inconsistent with the Director’s policy objectives and decision in *LifeVac*—namely, to encourage PGR by confirming “petitions for *inter partes* review will generally not be discretionarily denied because of an earlier petition for post-grant review when the post-grant review was not instituted.” *LifeVac*, Paper 11, at 2. Resmed should not lose its

opportunity to have the '284 Patent reviewed on the merits because it filed a PGR first.

As further explained below, maintaining the integrity of the patent system compels review given that the district court has stayed the parallel litigation to leverage the Board's familiarity with the related patents: the Board has held claims of the parent of the challenged patent unpatentable (IPR2023-00565) and instituted IPRs on three patents asserted in the parallel litigation (two related to the challenged patent) (IPR2025-00158, -00159, - 00160), and the Director herself has already referred IPRs on two related patents asserted in the parallel litigation to the Board. Thus, Resmed requests the Director vacate the Board's decision denying institution, and refer the instant Petition to the Board for consideration on the merits.

II. THE BOARD'S ERRONEOUS APPLICATION OF *GENERAL PLASTIC* IS INCONSISTENT WITH THE DIRECTOR'S *LIFEVAC* DECISION

Resmed, like LifeVac, should not be penalized for filing a petition for PGR that never reached a decision on the grounds for unpatentability. "[P]etitions for post-grant review are favored because they must be filed no later than nine months from the grant of the patent (35 U.S.C. § 321(c)), are close in time to examination, and occur before expectations in the patent rights are strongly settled." *LifeVac*, Paper 11, at 2. Thus, to encourage petitioners to file for PGR, the Director recently

clarified that petitions for IPR will generally not be discretionarily denied because of an earlier-denied petition for PGR. *Id.*

In *LifeVac*, the petitioner previously filed a petition for PGR on the challenged patent, which was denied on the merits. *LifeVac, LLC v. DCSTAR Inc.*, PGR2023-00032, Paper 11 (Nov. 23, 2023). Specifically, the Board found that the petition failed to sufficiently explain how the proposed combination would yield certain limitations and lacked sufficient reasons for the proposed combination itself. *Id.*, 20-25.

Nearly two years after the petitioner sought PGR, petitioner filed a petition for IPR based on different prior art discovered by a new prior art search firm. Among other things, the patent owner responded by requesting discretionary denial under *General Plastic*. After reviewing the parties briefing, the Director denied the request. *LifeVac*, Paper 11, at 2. Acknowledging that the “[PGR] petition was denied on the merits,” the Director emphasized “Petitioner’s earlier challenge, however, did not result in a final written decision.” *Id.*

Here, where the Board never even reached the grounds for unpatentability in the previously-filed petition for PGR, the facts are even stronger. In view of the *LifeVac* decision, the Board erred in finding that the previously-filed petition for PGR supports discretionary denial of the instant Petition under *General Plastic*.

A. *General Plastic* Factors 1-3: Fairness Weighs Against Discretionary Denial

“*General Plastic* factor 1 must be read in conjunction with factors 2 and 3.” *Code200 v. Bright Data Ltd.*, IPR2022-00861, -00862, Paper 18, at 5 (Aug. 23, 2022). This is because “[t]he absence of any restrictions on follow-on petitions would allow petitioners the opportunity to strategically stage their prior art and arguments in multiple petitions, using [the Board’s] decisions as a roadmap, until a ground is found that results in the grant of review.” *General Platics*, at 17. As such, “[w]here the first-filed petition under factor 1 was discretionarily denied or otherwise was not evaluated on the merits, factors 1-3 only weigh in favor of discretionary denial when there are ‘road-mapping’ concerns under factor 3 or other concerns under factor 2.” *Code200*, at 5.

Here, there are no such concerns. As in *LifeVac*, Resmed filed the instant Petition using prior art different from its earlier-filed PGR. Accordingly, “‘road-mapping’ concerns are minimized when, as in this case, a petitioner files a later petition ... [that] is not refined based on lessons learned from later developments.” *Code200*, at 5; *see also Toshiba Am. Info. Sys., Inc. v. Walletex Microelecs. Ltd.*, IPR2018-01538, Paper 11, at 20-22 (Mar. 5, 2019) (“Nor are we persuaded that Petitioner used our prior Institution Decisions ... as a ‘roadmap’ in a manner unfair to Patent Owner. The asserted grounds in the current Petition are based on different

prior art.”); *Shenzhen Auto Elecs. Co., Ltd v. Ultravision Techs, LLC*, IPR2021-00190, Paper 7, at 17-18 (June 9, 2021) (factor 3 given no weight where IPR challenge relied on different art than prior challenge).

Patent Owner argued that Resmed did “roadmap” because “Petitioner ‘chose to abandon’ its original unpatentability theories ... in favor of entirely new unpatentability theories.” DI, 11. And the Board adopted Patent Owner’s argument in the DI. *Id.* But this is also the very same argument made by the patent owner in *LifeVac*. There, the patent owner argued that petitioner “relied on different art and different arguments ... all while armed with the knowledge of the deficiencies of the prior art cited in the initial proceeding.” *LifeVac, LLC v. DCSTAR, Inc.*, IPR2025-00454, Paper 6, at 21-22 (April 25, 2025). “Having the benefit of the prior proceeding’s record, Petitioner could unfairly refine its argument against the same claims in the Petition.” *Id.*, 22.

Patent Owner (and ultimately the Board) also emphasized here that “Petitioner knew of the prior art asserted in this Petition, or should have known of it” (DI, 9) raising other concerns under factor 2. The Board determined that Resmed had not sufficiently explained “why it could not have found Kumar prior to filing the post-grant review petition.” *Id.* But, again, the patent owner made this same argument in *LifeVac*. Specifically, the patent owner argued that the petitioner’s “initial search was far too limited in scope” and that the prior art asserted in the later-filed petition

“could have been identified through a reasonably diligent search.” *LifeVac*, Paper 6, at 19-20.

Ultimately, neither of these arguments prevailed in *LifeVac*, and the Board erred in allowing them to prevail here. In denying the patent owner's request for discretionary denial in *LifeVac*, the Director implicitly found that these arguments could not overcome the general principle that “petitions for *inter partes* review will generally not be discretionarily denied because of an earlier petition for post-grant review when the post-grant review was not instituted.” *LifeVac*, Paper 11, at 2.

B. *General Plastic* Factors 4 and 5: Timing of the IPR Favors Institution

Factors 4 and 5 weigh against discretionary denial. To preserve the resources of the Board and parties, Petitioner reasonably waited until the Board denied its request for rehearing on the PGR on October 17, 2024, before preparing and filing the instant Petition less than a month later on November 15, 2024. *See Netflix, Inc. v. Uniloc 2017 LLC*, IPR2020-00041, Paper 10, at 12 (Mar. 25, 2020) (finding factors 4 and 5 do not favor denial where Board “perceive[s] no improper gamesmanship in the timing of the Petition”).

Moreover, Resmed filed the instant Petition far more quickly than the petitioner in *LifeVac*. Indeed, the petitioner in *LifeVac* filed its IPR on January 31,

2025—20 months after it filed its PGR on May 15, 2023. Here, in contrast, Resmed filed the instant Petition less than a year after it filed its PGR on December 13, 2023.

Patent Owner argued (which the Board credited) that “Kumar was publicly available since 2002” and that “Petitioner could have filed the instant Petition much earlier, and before receiving Patent Owner’s preliminary response and our institution decision in the post-grant review.” DI, 12. But again, this argument is repetitive of the argument made by the patent owner in *LifeVac*. The patent owner argued that petitioner improperly “waited over a year between the denial of institution in the prior proceeding and the filing of the new Petition.” Ultimately, this argument did not earn comment in the Director’s decision.

C. *General Plastic* Factor 6 and 7: The Finite Resources of the Board Favors Institution

Efficiency and consistency confirm that discretionary denial should not be exercised here. “It is an appropriate use of Office resources to provide consistency and predictability to the public, and to ensure that patent applicant or owner does not take action inconsistent with the judgment in a prior Office proceeding.” *POSCO Co., Ltd. v. ArcelorMittal*, IPR2025-00370, Paper 10, at 3 (June 25, 2025). Here, the PTAB is the best forum to determine patentability of the ’284 Patent and its family because of its prior and concurrent decisions.

First, the Board has already found unpatentable all challenged claims of U.S. Patent No. 10,076,269 (the “’269 Patent”), the parent of the ’284 Patent. *See Resmed Corp. et al. v. Cleveland Medical Devices, Inc.*, IPR2023-00565, Paper 42 (May 2, 2025). “The fact that the Board previously determined related claims to be unpatentable ... tips the balance against discretionary denial.” *POSCO*, Paper 10, at 3. Notably here, the ’269 Patent shares many of the same limitation as the ’284 Patent, and the Board should review these same limitations for predictability and consistency for the public.

U.S. Patent No. 10,076,269	U.S. Patent No. 11,602,284
15. A positive airway pressure (PAP) sleep disorder treatment system comprising: a PAP device with an enclosure further comprising: a blower having an air output, an airflow sensor internal to the PAP device adapted for measuring the respiratory airflow of a subject while using the PAP and outputting airflow sensor data; a processor adapted for receiving the airflow sensor data, and calculating both symptom data of a severity of the subject's sleep disorder symptoms and/or an index of a subject's symptoms measured during use of the PAP device and data of usage of the PAP device;	1. A positive airway pressure (PAP) sleep disorder treatment system comprising: a non-transitory computer readable medium, the non-transitory computer readable medium comprising a first software, the first software executable by a first processor and configured to be used with a cell phone to display to a subject for viewing on the cell phone on to which the first software is downloaded an index of treatment efficacy of the subject using a PAP device, the first software used for displaying the index on the cell phone, the index based in part on data of severity of sleep disorder symptoms of the subject and data of usage of the PAP device by the subject, the data of severity of sleep disorder symptoms of the subject and the data of usage of the

a mask or a nasal cannula; a first radio frequency wireless module transceiver; and a base station, cellular phone, or PDA; the first radio frequency wireless module transceiver adapted for receiving and transmitting the symptom data of the severity of the subject's sleep disorder symptoms and/or an index of a subject's symptoms measured during use of the PAP device and the data of usage to the base station, cellular phone or PDA; the base station, cellular phone, or PDA comprising a second radio frequency wireless module transceiver, a processor, a software, and a display, the base station, cellular phone, or PDA adapted to display the symptom data of the severity of the subject's sleep disorder symptoms and/or the index of the subject's symptoms, and to retransmit the symptom data of the severity of the subject's sleep disorder symptoms and/or the index of the subject's symptoms and the data of usage received from the PAP device to a remote internet site.	PAP device by the subject both calculated by the PAP device and received by the cell phone, the cell phone comprising at least one first radio frequency wireless transceiver, the first processor, the first software when downloaded and a display; the PAP device with an enclosure further comprising: a blower having an air output, an airflow sensor internal to the PAP device adapted for measuring or deriving the respiratory airflow of a subject while using the PAP and outputting airflow sensor data, a second processor adapted for receiving the airflow sensor data, for calculating the data of a severity of the symptoms of the subject and/or the index, and for calculating the data of usage of the PAP device, a mask or a nasal cannula, and at least one second radio frequency wireless transceiver, the at least one second radio frequency wireless transceiver adapted for transmitting the data of severity of the symptoms of the subject and/or the index, and the data of usage calculated by the second processor; and a remote internet site, the remote internet site adapted to receive the data of the severity of the symptoms of the subject and/or the index, and the data of usage of the PAP device by the subject both related to the subject's
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	treatment and the treatment's efficacy, in whole or part, generated by the PAP device and transmitted via the at least one second radio frequency wireless transceiver.
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Second, the Board is best positioned to address related patents efficiently and consistently. *Embody, Inc. et al. v. LifeNet Health*, IPR2025-00248, Paper 13, at 2 (June 26, 2025) (“[I]t is an efficient use of Board resources to address [] related patents.”). Here, the Board has already instituted IPR on three patents asserted in the same parallel litigation, including two related patents. *See Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2025-00158, Paper 11 (June 13, 2025); *Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2025-00159, Paper 10 (June 12, 2025); *Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2025-00160, Paper 11 (June 13, 2025). And the Director has already denied Patent Owner’s request for discretionary denial on the two remaining patents asserted in the parallel litigation (both related to the ’284 Patent). *See Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2025-00246, Paper 10 (June 12, 2025); *Resmed Corp. v. Cleveland Medical Devices, Inc.*, IPR2025-00247, Paper 10 (June 12, 2025). Particularly here, where the related patents share many of the same key limitations—including a cell phone, remote internet site, severity of symptoms, and index of treatment efficacy of the subject using a PAP device—the patentability of these patents should be addressed together.

Third, as the Board acknowledges, there is “no reason why [the Board] could not meet the requirement of 35 U.S.C. § 316(a)(11) to issue a final determination within one year after institution.” DI, 15.

At bottom, the parallel district court litigation is stayed. Thus, the finite resources of the Board are best utilized reviewing all six patents asserted in the parallel litigation (five of which are related patents including the challenged patent) together for efficiency and consistency.

III. CONCLUSION

The Board materially erred in denying institution under *General Plastic* in a manner that was contradicted by the Director's *LifeVac* decision. Accordingly, Resmed respectfully requests the Director issue an order to vacate the DI, and refer the instant Petition to the Board for consideration on the merits.

Dated: July 16, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2025, a true and correct copy of the foregoing
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