

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BESTWAY (USA), INC.,  
Petitioner,

v.

INTEX MARKETING LTD.,  
Patent Owner.

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Case PGR2017-00003  
Patent 9,254,240 B2

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Before KEN B. BARRETT, GEORGE R. HOSKINS, and  
KEVIN W. CHERRY, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
35 U.S.C. § 328(a) and 37 C.F.R. § 42.73

## I. INTRODUCTION

### A. *Background and Summary*

Bestway (USA), Inc. (“Petitioner”) filed a Petition requesting post-grant review of claims 1–7, 17–22, and 30 of U.S. Patent No. 9,254,240 B2 (“the ’240 patent,” Ex. 1001). Paper 1 (“Pet.”). The Petition contains challenges identified by Petitioner as Grounds 1, 2, and 3. *See, e.g., id.* at ii (Table of Contents). Intex Marketing Ltd. (“Patent Owner”) filed a Preliminary Response to the Petition. Paper 7 (“PO Prelim. Resp.”).

On May 11, 2017, a post-grant review was instituted on Petitioner’s challenge of claims 1–7 and 17 under 35 U.S.C. § 103 as unpatentable over Peterson and Fireman (Ground 1). Paper 9 (“Inst. Dec.”), 21. However, the instituted review did not include Petitioner’s obviousness challenge of claims 18–22 and 30 based on Peterson, Fireman, and Guan ’797 (Ground 2), or Petitioner’s obviousness challenge of claims 19–22 based on Peterson, Fireman, Guan ’797, and Wang ’615 (Ground 3). *Id.*

On May 25, 2017, Petitioner filed a request for rehearing of our decision denying institution as to Grounds 2 and 3. Paper 12 (“Reh’g Req.”). We denied Petitioner’s request for rehearing on June 20, 2017. Paper 15 (“Denial of Reh’g Req.”).

The parties subsequently fully briefed the issues involving Ground 1. Paper 17 (Patent Owner’s Response to the Petition, “PO Resp.”), Paper 21 (Petitioner’s Reply, “Pet. Reply”). The first of two oral arguments was held on February 5, 2018, and a transcript is included in the record. Paper 29 (“First Hr’g Tr.”).

On April 24, 2018, the Supreme Court issued its decision in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018). On May 2, 2018, we issued an order modifying our institution decision to institute on all of the challenged claims and all of the grounds presented in the Petition. Paper 30. An extension of the one-year period for issuing a Final Written Decision in this proceeding was granted. Paper 31 (Grant of Good Cause Extension); *see also* Paper 32 (corresponding Order).

We, thereafter, issued an order allowing any further discovery agreed-upon by the parties and authorizing additional briefing on Grounds 2 and 3. Paper 33. Specifically, we authorized Patent Owner to file either a Supplemental Response addressing Grounds 2 and 3 or a statement indicating it would rely on its arguments made in the Preliminary Response, and we authorized Petitioner to file a Supplemental Reply. *Id.* at 5–7. Patent Owner opted to rely on the arguments made in its Preliminary Response regarding Grounds 2 and 3 rather than filing a Supplemental Response.<sup>1</sup> Paper 34. Petitioner filed a Supplemental Reply. Paper 41 (“Pet. Supp. Reply”). A second oral argument was held on August 1, 2018, and a transcript is included in the record. Paper 50 (“Second Hr’g Tr.”).

We have jurisdiction under 35 U.S.C. § 6, and this Final Written Decision is issued pursuant to 35 U.S.C. § 328(a). For the reasons discussed below, we determine that Petitioner *has proven* by a preponderance of the evidence that claims 1–7 and 17 of the ’240 patent are unpatentable. We

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<sup>1</sup> We indicated that, in light of the unusual posture of this case, we would *not* deem arguments in the Patent Owner’s Preliminary Response regarding Grounds 2 and 3 waived for failure to file a post-institution response as to those grounds. Paper 33, 5.

also determine that Petitioner *has not proven* by a preponderance of the evidence that claims 18–22 and 30 of the '240 patent are unpatentable.

### *B. Related Proceedings*

One or both parties identify, as matters involving or related to the '240 patent, *Intex Recreation Corp. v. Bestway USA, Inc. et al*, Civil Action No. 2:16-cv-03950 (C.D. Cal.), *Intex Recreation Corp. v. Bestway USA, Inc. et al*, Civil Action No. 2:16-cv-03300 (C.D. Cal.), and *Intex Recreation Corp. v. Bestway USA, Inc. et al*, Civil Action No. 2:16-cv-03483 (C.D. Cal.). Pet. 2–3, Papers 5, 11.

Petitioner filed another petition seeking *inter partes* review of claims 18–22 and 30 of the '240 patent in Patent Trial and Appeal Board Case IPR2017-01655 (Paper 1). In that case, the Board exercised its discretion under 35 U.S.C. § 314(a) to not institute an *inter partes* review. IPR2017-01655, Paper 9.

### *C. The '240 Patent*

The '240 patent is titled “Inflatable Spa.” The '240 patent issued February 9, 2016, from U.S. Application No. 14/444,474 (“the '474 application”), filed July 28, 2014. Ex. 1001, (21), (22), (45). The '474 application is a continuation of PCT/US2014/047252, filed July 18, 2014. *Id.*, (63), 1:6–7. The '240 patent claims priority to several Chinese patent applications, the earliest filing date of such being July 18, 2013. *Id.*, (30), 1:9–28.<sup>2</sup>

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<sup>2</sup> Because the earliest possible effective filing date for the '240 patent is after March 16, 2013 (the effective date for the first inventor to file provisions of

As the title indicates, the '240 patent is directed to an inflatable spa. Figure 1 of the '240 patent is reproduced below:

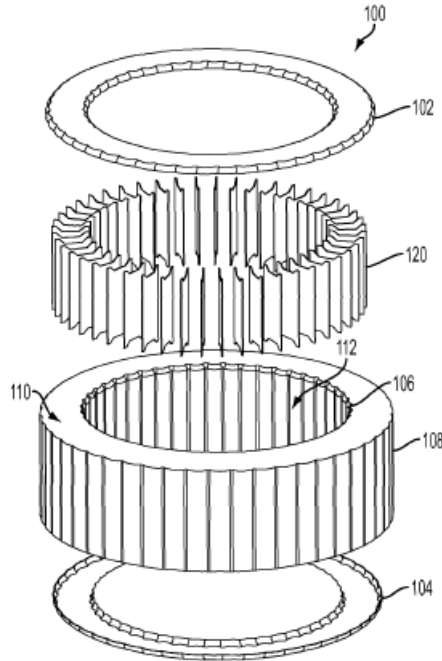


Figure 1 is an exploded perspective view of an inflatable spa, including tensioning structures. Ex. 1001, 4:27–29. The inflatable spa 100 has internal wall 106 and external wall 108 that together, along with top and bottom walls (102 and 104, respectively), define inflatable air chamber 110. *Id.* at 5:60–6:9. Tensioning structures 120 couple the inner and outer walls, and may have gaps at the top and bottom. *Id.* at 6:30–38.

Figures 5 and 6 of the '240 patent are reproduced below:

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the America Invents Act) and the Petition was filed within 9 months of its issue date, the '240 patent is eligible for post-grant review. *See* 35 U.S.C. § 321(c).

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