

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C&D ZODIAC, INC.  
Petitioner

v.

B/E AEROSPACE, INC.  
Patent Owner

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IPR2017-01273  
Patent No. 9,434,476

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**PETITIONER C&D ZODIAC, INC.'S NOTICE OF APPEAL**

Pursuant to 35 U.S.C. §§ 141-144, 319; 5 U.S.C. §§ 702-704, 706; 37 C.F.R. §§ 90.2(a) and 90.3(a), and Rules 3 and 4(a) of the Federal Rules of Appellate Procedure, Petitioner C&D Zodiac, Inc. (“C&D Zodiac”) hereby gives notice that it appeals to the United States Court of Appeals for the Federal Circuit from the Decision Denying Institution of the Patent Trial and Appeal Board (“Board”) entered on October 31, 2017 (Paper 12) and the Board’s Decision Denying Petitioner’s Request for Rehearing entered on March 8, 2018 (Paper 15), and from all underlying findings, orders, decisions, rulings, and opinions adverse to C&D Zodiac, including, without limitation, the Board’s decision denying Petitioner’s request to file a reply and new evidence in response to Patent Owner’s Preliminary Response (Ex. 1022). Copies of the Board’s October 31, 2017 Decision Denying Institution and the Board’s March 8, 2018 Decision Denying Petitioner’s Request for Rehearing are attached to this Notice.

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), Petitioner further notes that the issues on appeal may include, but are not limited to, whether the Board exceeded its statutory limits under 35 U.S.C. §§ 311 *et seq.* by making a determination of indefiniteness, and on that basis denying institution of *inter partes* review; and whether the Board’s decision ignoring record evidence of the meaning of a claim term that was not placed at issue and that was understood by the parties and persons of ordinary skill in the art was arbitrary and capricious. *Cuozzo Speed*

*Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141-42 (2016) (holding that the Board may not “act outside its statutory limits” and that “[s]uch ‘shenanigans’ may be properly reviewable in the context of §319 and under the Administrative Procedure Act, which enables reviewing courts to ‘set aside agency action’ that is . . . ‘in excess of statutory jurisdiction,’ or ‘arbitrary [and] capricious.’”); *see also Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018) (*en banc*). One example of an issue on appeal is the Board’s explanation that “[t]he fact that others appeared to understand the meaning of a claim term does not illuminate for us what that meaning is, constrain us to blindly adopt the same understanding, or dictate how we are to apply the prior art in this case.” IPR2017-01273, Paper 15 at 3 (P.T.A.B. March 8, 2018). The issues on appeal may further include all other issues decided adversely to C&D Zodiac in any orders, decisions, rulings, and opinions of the Board.

In accordance with 37 C.F.R. 90.2(a), copies of this Notice of Appeal are being filed simultaneously with the Patent Trial and Appeal Board and with the Director of the United States Patent and Trademark Office. In addition, this Notice of Appeal, along with the required docketing fees, is being filed electronically with the Clerk of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Dated: March 19, 2018

By: /John C. Alemanni/  
John C. Alemanni (Reg. No. 47,384)  
Lead Counsel for Petitioner

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## **CERTIFICATE OF FILING**

I hereby certify that on March 19, 2018, a true and correct copy of the foregoing **PETITIONER C&D ZODIAC, INC.'S NOTICE OF APPEAL** was filed electronically through the Patent Trial and Appeal Board's End to End (E2E) system, and that the original of the foregoing was hand-delivered to the Director of the United States Patent and Trademark Office, at the following address in accordance with 37 C.F.R. §§ 42.6(b), 90.2(a), and 104.2:

Office of the General Counsel  
United States Patent and Trademark Office  
10B20, Madison Building East  
600 Dulany Street  
Alexandria, Virginia 22313-1450

## **CERTIFICATE OF FILING**

I hereby certify that on March 19, 2018, a true and correct copy of the foregoing **PETITIONER C&D ZODIAC, INC.'S NOTICE OF APPEAL** was filed electronically via the CM/ECF system with the Clerk of Court for the United States Court of Appeals for the Federal Circuit, and that the requisite fee was paid in accordance with 37 C.F.R. § 90.2(a)(2) and Federal Circuit Rule 15.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below a copy of this **NOTICE OF APPEAL** has been served by email at [Zodiac-BE-Aero-IPRGroup@irell.com](mailto:Zodiac-BE-Aero-IPRGroup@irell.com) and upon the following:

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*Counsel for Patent Owner  
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Dated: March 19, 2018

By: /John C. Alemanni/  
John C. Alemanni (Reg. No. 47,384)  
Lead Counsel for Petitioner

# Attachments

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C&D ZODIAC, INC.,  
Petitioner,

v.

B/E AEROSPACE, INC.,  
Patent Owner.

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Case IPR2017-01273  
Patent 9,434,476 B2

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Before JENNIFER S. BISK, MICHAEL J. FITZPATRICK, and  
SCOTT A. DANIELS, *Administrative Patent Judges*.

BISK, *Administrative Patent Judge*.

DECISION

Denying Institution *Inter Partes* Review  
35 U.S.C. § 314, 37 C.F.R. §§ 42.4, 42.108

I. INTRODUCTION

A. BACKGROUND

C&D Zodiac, Inc. (“Petitioner”), filed a Petition (Paper 2, “Pet.”) to institute an *inter partes* review of claims 1–6 (the “challenged claims”) of U.S. Patent No. 9,434,476 B2 (Ex. 1001, “the ’476 patent”). 35 U.S.C. § 311. B/E Aerospace, Inc. (“Patent Owner”), timely filed a Preliminary



Response. Paper 7 (“Prelim. Resp.”).<sup>1</sup> Institution of an *inter partes* review is authorized by statute when “the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a); 37 C.F.R. § 42.108.

For the reasons that follow, we decline to institute an *inter partes* review.

#### B. ASSERTED GROUNDS OF UNPATENTABILITY

Petitioner contends that the challenged claims are unpatentable under 35 U.S.C. § 103(a)<sup>2</sup> based on the following grounds (Pet. 10–79):

References	Claims challenged
Admitted Prior Art <sup>3</sup> and U.S. Patent No. 3,738,497 (Ex. 1005, “Betts”)	1–6
Admitted Prior Art and KLM Overhead Crew Rest Document (Ex. 1009, “KLM Crew Rest”) <sup>4</sup>	1–6

<sup>1</sup> Patent Owner filed two versions of the Preliminary Response: Paper 6, to which access is restricted to the parties and the Board; and Paper 7, a publicly available, redacted version of Paper 6. For purposes of this Decision, we refer only to Paper 7, the redacted version of the Preliminary Response.

<sup>2</sup> The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, took effect on March 18, 2013. Because the application from which the ’476 patent issued was filed before that date, our citations to Title 35 are to its pre-AIA version.

<sup>3</sup> Petitioner defines “Admitted Prior Art” as certain portions of the ’476 patent. Pet. 11–14 (citing Ex. 1001, Fig. 1, 1:24–26, 4:6–8).

<sup>4</sup> File history for U.S. Application serial No. 09/947,275, which issued as

### C. RELATED PROCEEDINGS

The parties have identified, as a related proceeding, the co-pending district court litigation of *B/E Aerospace, Inc. v. Zodiac Aerospace, Inc.*, Case No. 2:14-cv-01417 (E.D. Tex). Paper 5, 3; Pet. 2. Petitioner concurrently filed *inter partes* review proceedings IPR2017-01274, IPR2017-01275, and IPR2017-01276 challenging three related utility patents and PGR2017-00019 challenging a related design patent. Pet. 2.

In addition, Petitioner previously filed a Petition challenging Patent No. 8,590,838 (“the ’838 patent”) in IPR2014-00727, which resulted in a final written decision finding unpatentable claims 1, 3–7, 9, 10, 12–14, 16–19, 21, 22, 24–29, 31, and 33–37 of the ’838 patent. IPR2014-00727, Paper 65 (Oct. 26, 2015). On October 3, 2017, the Federal Circuit affirmed that decision. *B/E Aerospace, Inc. v. C&D Zodiac, Inc.*, 2017 WL 4387223 (Fed. Cir. Oct. 3, 2017). The ’476 is a continuation of application No. 14/043,500, which in turn is a continuation of application No. 13/089,063 that matured into the ’838 patent. Ex. 1001, [63]. The disclosure of the ’476 patent, therefore, is identical to that of the ’838 patent.

### D. THE ’476 PATENT

The ’476 patent relates to space-saving aircraft enclosures, including lavatories, closets and galleys. Ex. 1001, 1:17–23, 2:17–22. Figure 2 of the ’476 patent is reproduced below.

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U.S. Patent No. 6,520,451 to Moore and which file history contains a drawing and related description of a KLM Crew Rest. *See, e.g.*, Ex. 1009, 70. Petitioner terms the file history “the KLM Crew Rest Document.” Pet. 16. We employ the same nomenclature.

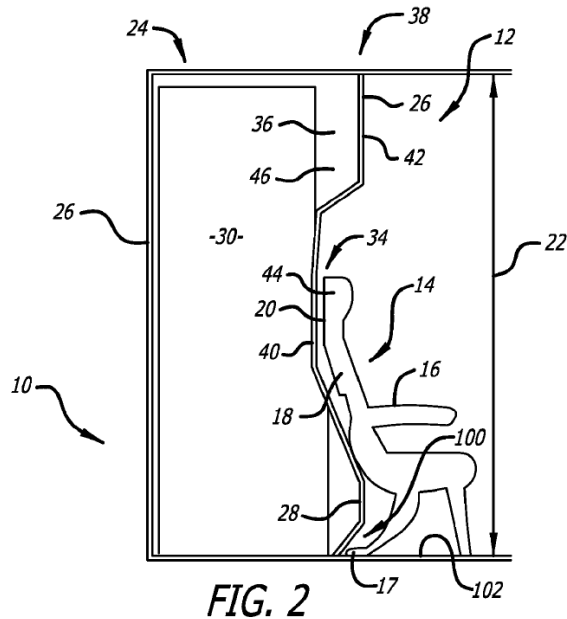


Figure 2, reproduced above, illustrates enclosure 10, such as a lavatory, positioned aft of aircraft cabin 12. Ex. 1001, 4:9–12, 4:17–24. Forward wall 28 of the lavatory is described as “substantially not flat in a vertical plane” and “disposed immediately aft of and adjacent to or abutting the exterior aft surface of” passenger seat 16. *Id.* at 4:24–34. In particular, the forward wall is shaped to provide recess 34, which accommodates the partially-reclined backrest of the passenger seat, as shown in Figure 2. *Id.* at 4:34–38. In addition, the forward wall is shaped to also provide lower recess 100, which accommodates “at least a portion of an aft-extending seat support 17.” *Id.* at 4:41–46.

The '476 patent contrasts the embodiment of Figure 2 with a prior art configuration shown in Figure 1, which is reproduced below.

**FIG. 1**  
(Prior Art)

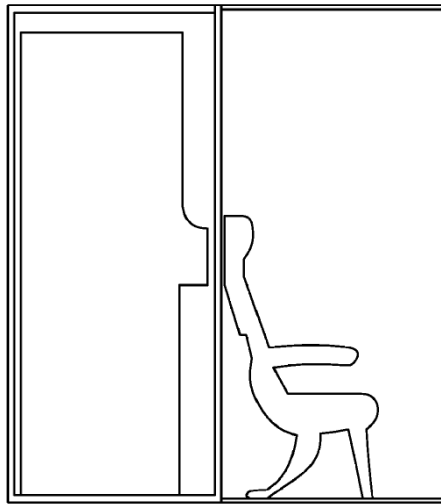


Figure 1, reproduced above, illustrates “a prior art installation of a lavatory immediately aft of and adjacent to an aircraft passenger seat.” Ex. 1001, 4:6–8.

#### E. THE CHALLENGED CLAIMS

Of the challenged claims, claims 1 and 2 are independent. Claim 1, which is illustrative, recites:

1. A method of retrofitting an aircraft to provide additional passenger seating in the cabin of said aircraft, the cabin including a passenger seat having a seat back with an exterior aft surface that is substantially not flat, a seat bottom, and a seat support that interfaces with the floor of the aircraft cabin and holds the seat bottom in an elevated position above the floor of the aircraft cabin, the method comprising the steps of:

installing an aircraft enclosure unit comprising

a forward wall, said forward wall being part of an outer boundary defining a single enclosed space that includes a toilet, said forward wall being substantially not flat and configured to receive a portion of the exterior aft surface of the seat back when the seat back is in an unreclined seat position;

wherein said forward wall is adapted to provide more space forward of the enclosure unit such that the seat support can be

positioned further aft in the cabin than if the cabin included another enclosure unit having a substantially flat front wall located in substantially the same position in the cabin as the forward wall, and

wherein said enclosed space is taller than the passenger seat; and

positioning said seat support further aft in said aircraft cabin than said seat support could have been positioned prior to retrofitting said aircraft, whereby a portion of the exterior aft surface of said passenger seat back in the unreclined seat position is received by said forward wall.

*Id.* at 5:6–35.

## II. ANALYSIS

### A. CLAIM INTERPRETATION GENERALLY

“A claim in an unexpired patent that will not expire before a final written decision is issued shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b). When applying that standard, we interpret the claim language as it would be understood by one of ordinary skill in the art in light of the specification. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning ‘is the meaning that the term would have to a person of ordinary skill in the art in question.’”). Only terms which are in controversy need to be construed, and then only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

B. THE HYPOTHETICAL ENCLOSURE UNIT LIMITATION

Although neither party proposes an express construction for this limitation (*see* Pet. 30–31; Prelim. Resp. 25–27), we nevertheless address the meaning of “wherein said forward wall is adapted to provide more space forward of the enclosure unit such that the seat support can be positioned further aft in the cabin than *if the cabin included another enclosure unit having a substantially flat front wall located in substantially the same position in the cabin as the forward wall,*” which we refer to as “the hypothetical enclosure unit limitation.”<sup>5</sup> Ex. 1001, 5:21–27 (emphasis added).

Having considered the entire record, we are unable to determine the metes and bounds of this limitation. It is clear that this limitation requires the forward wall of the claimed enclosure unit to provide more space such that the seat support can be positioned “further aft in the cabin” compared to some other configuration (the “frame of reference configuration”). This frame of reference configuration, however, is unclear. For example, the language “if the cabin included another enclosure unit,” by its plain language, requires the second configuration in the claimed comparison to include an *additional* hypothetical enclosure unit, with its own “front wall” that is “located in substantially the same position in the cabin as the forward wall.” Clearly, having two enclosures with front walls in substantially the

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<sup>5</sup> Independent claim 2 includes a limitation with very similar wording, “wherein said forward wall is adapted to provide more space forward of the enclosure unit such that the seat support can be positioned further aft in the cabin than *if the cabin included another enclosure unit having a front wall that is substantially flat and is located in substantially the same position in the cabin as the forward wall.*” Ex. 1001, 6:5–13 (emphasis added).

same position is likely to be physically impossible. This limitation, therefore, would only make sense were the second configuration to instead include an *alternative* hypothetical enclosure unit.

However, even if we were to overlook its plain meaning and read the language “if the cabin included another enclosure unit” to mean an alternative hypothetical enclosure unit, the limitation does not recite any of the other characteristics of such alternative enclosure unit. This leaves us to compare the claimed enclosure unit with a configuration that we know nothing about, except that it has an alternative hypothetical enclosure unit with “a substantially flat front wall located in the substantially the same position in the cabin as the forward wall.” Among the questions unanswered is what it means for a substantially flat wall to be “in substantially the same position” as a wall that is explicitly “substantially not flat.” It is unclear, for example, whether such comparison is made between the forward-most section of the claimed “substantially not flat” wall or the aft-most section.

In its analysis, Petitioner does not shed light on the claim scope of the hypothetical enclosure unit. Instead, Petitioner explains that “[a] person of ordinary skill in the art would realize that [Betts’] contoured forward wall provides additional space forward of the enclosure unit for the seat to be placed further aft in an aircraft cabin than would be possible if the forward wall was instead substantially flat” and that the KLM Crew Rest design “allows for passenger seats to be placed further aft than they could be placed with a flat wall.” Pet. 36, 59 (citing Ex. 1004 ¶¶ 103–105, 146). There is no explanation, however, of how the required comparison was made. We cannot find, and Petitioner does not point to, any part of the specification of the ’476 patent which reveals any definite frame of reference explaining the

relationship between the claimed “substantially not flat” forward wall and the hypothetical “substantially flat front wall.” Indeed, Petitioner appears to conflate the hypothetical enclosure unit limitation with the subsequent claim limitation of “positioning said seat support further aft in said aircraft than said seat support could have been positioned prior to retrofitting said aircraft.” *Id.* at 36–37 (Petitioner, arguing in support of its obviousness challenge that “Betts specifically states that it ‘provide[s] more room for passengers in an aircraft.’”), 59 (“This allows for additional seating in the cabin of an aircraft when installed.”).

In summary, Petitioner has not provided sufficient information for a determination of the scope of the hypothetical enclosure unit limitation and, therefore, we cannot conduct the necessary factual inquiry for determining whether the prior art meets this limitation. *See In re Aoyama*, 656 F.3d 1293, 1298 (Fed. Cir. 2011) (quoting *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010)) (“[A] claim cannot be both indefinite and anticipated.”); *In re Steele*, 305 F.2d 859, 862–63 (CCPA 1962) (reversing the Board’s decision of obviousness because it relied on “what at best are speculative assumptions as to the meaning of the claims”); 37 C.F.R. § 42.104(b)(3)–(4) (A petition must show “[h]ow the challenged claim is to be construed” and “[h]ow the construed claim is unpatentable.”).

We are unable to conclude, therefore, that there is a reasonable likelihood that Petitioner would prevail in either of its challenges of claims 1–6.

### III. CONCLUSION

For the foregoing reasons, based on the information presented in the Petition, we are not persuaded that there is a reasonable likelihood that



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Petitioner would prevail in showing unpatentability of claims 1–5 of the '476 patent. We, therefore, decline to institute *inter partes* review as to any of the challenged claims. 37 C.F.R. § 42.108.

#### IV. ORDER

It is ordered that the Petition is *denied* as to all challenged claims, and no trial is instituted.

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Patent 9,434,476 B2

PETITIONER:

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Case IPR2017-01273  
Patent 9,434,476 B2

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Before JENNIFER S. BISK, MICHAEL J. FITZPATRICK, and  
SCOTT A. DANIELS, *Administrative Patent Judges*.

BISK, *Administrative Patent Judge*.

DECISION  
Denying Petitioner's Request for Rehearing  
*37 C.F.R. § 42.71(d)*

## INTRODUCTION

Petitioner, listed above, filed a Request for Rehearing (Paper 14, “Request” or “Reh’g Req.”) of our decision denying institution of *inter partes* review (Paper 12, “Institution Decision” or “Inst. Dec.”). The Request contends that we misapprehended or overlooked evidence regarding the meaning of, and improperly construed, the claim term “wherein said forward wall is adapted to provide more space forward of the enclosure unit such that the seat support can be positioned further aft in the cabin than if the cabin included another enclosure unit having a substantially flat front wall located in substantially the same position in the cabin as the forward wall,” which we refer to as “the hypothetical enclosure unit limitation.” Reh’g Req. 3–9. In addition, Petitioner argues that “regardless of any ambiguity,” the panel should consider the indefinite limitation, compare the limitation to the prior art, and find the claims invalid. *Id.* at 10–13.

“When rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” 37 C.F.R. § 42.71(c). “The burden of showing a decision should be modified lies with the party challenging the decision[,]” which party “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” 37 C.F.R. § 42.71(d).

For the reasons discussed below, Petitioner’s Request is *denied*.

## ANALYSIS

### A. Background

Petitioner requested, under 35 U.S.C. § 311, *inter partes* review of claims 1–6 (the “challenged claims”) of U.S. Patent No. 9,434,476 B2

(Ex. 1001, “the ’476 patent”) based on obviousness over several references. Paper 2 (“Pet.”), 10–79. The ’476 patent relates to space-saving aircraft enclosures, including lavatories, closets and galleys. Ex. 1001, 1:17–23, 2:17–22.

In the Institution Decision, we explained that we were unable to determine the metes and bounds of the hypothetical enclosure unit limitation required by all the challenged claims. Inst. Dec. 7–9. Specifically, we found that the claim language “leaves us to compare the claimed enclosure unit with a configuration that we know nothing about, except that it has an alternative hypothetical enclosure unit with ‘a substantially flat front wall located in the substantially the same position in the cabin as the forward wall.’” Inst. Dec. 8. In light of this uncertainty, we found that “Petitioner has not provided sufficient information for a determination of the scope of the hypothetical enclosure unit limitation and, therefore, we cannot conduct the necessary factual inquiry for determining whether the prior art meets this limitation.” *Id.* at 9.

According to Petitioner, because “[n]ot even the Patent Examiner that issued the ’476 Patent was confused by this and similar claim elements,” the Patent Office “indicated that it believed this and other substantially similar claim terms were clear.” Reh’g Req. 5–6. And, Petitioner asserts that we overlooked expert testimony indicating that Petitioner’s expert “did not have any problem understanding what the claims meant.” *Id.* at 6. These arguments are unpersuasive. The fact that others appeared to understand the meaning of a claim term does not illuminate for us what that meaning is, constrain us to blindly adopt the same understanding, or dictate how we are to apply the prior art in this case.

Petitioner contends also that we overlooked substantial evidence as to the meaning of the hypothetical enclosure unit limitation introduced by the Patent Owner, in the form of “a claim chart purporting to compare certain *claims of a related patent* to an allegedly infringing product.” Reh’g Req. 3–4 (emphasis added). Moreover, according to Petitioner, we have abused our discretion in this case, because the panel, itself, understood a similar claim term in other cases. *Id.* at 8–9 (citing IPR2017-01274, -01275, -01276). Petitioner asserts that “[t]he only difference in the two claims is that [the related patent claim] requires replacing an existing ‘substantially flat’ partition rather than a hypothetical enclosure unit having a forward wall that is ‘substantially flat.’” *Id.* at 9. According to Petitioner “[t]he use of the hypothetical here does not alter the meaning of the claim.” *Id.* Petitioner, however, provides no analysis, either in the Petition or in this Request, explaining how the two claim terms, *using different language*, mean exactly the same thing.

Essentially, Petitioner invites us to ignore the actual words of the hypothetical enclosure unit limitation and instead assume that this limitation has the same meaning as a limitation found in claims of related patents regardless of the differences in language. *Id.* We decline this invitation, because to ignore the words and limitations in the claims before us now—that would be an abuse of discretion. *See Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007) (denouncing claim constructions that render phrases in claims superfluous), *see also Bicon Inc. v. Straumann Co.*, 441 F.3d 945, 950 (Fed. Cir. 2006) (“claims are interpreted with an eye toward giving effect to all terms in the claim”). Petitioner also argues that because neither party addressed the construction of this term, it was legal

error for the panel to consider its construction and that “[u]nder any reasonable interpretation, this claim term encompasses” the prior art. *Id.* at 9–11. Petitioner, however, fails to explain what that reasonable interpretation is, or how the actual words of the hypothetical enclosure unit limitation lead to such an interpretation.

We address specifically Petitioner’s reliance on *GPNE Corp. v. Apple Inc.*, 830 F.3d 1365 (Fed. Cir. 2016), for the proposition that the Board “is under no obligation to address other potential ambiguities that have no bearing on the operative scope of the claim.” *Id.* at 10 (citing *GPNE*, 830 F.3d at 1372). This precedent, however, does not support Petitioner’s contention that we have made an error of law. *See id.*, *see also Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970–71 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996) (Where the district court had properly undertaken claim construction, the Federal Circuit explained “that the interpretation and construction of patent claims, which define the scope of the patentee’s rights under the patent, is a matter of law exclusively for the court.”). Our interpretation is not one of a mere ambiguity, instead the hypothetical enclosure limitation bears directly on, and in fact attempts to define, the scope of the “more space forward of the enclosure unit” limitation as recited in independent claims 1 and 2. *See Ex. 1001*, 5:21–5:27. 6:5–11, *see also Bicon*, 441 F.3d at 950. Moreover, in citing to *GPCE*, Petitioner fails to explain why the hypothetical enclosure limitation, as it modifies and defines the “more space” limitation, is not an operative part of the claim scope. Reh’g Req. 10.

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Accordingly, it is

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

PETITIONER:

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