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Paper 7
Entered: October 26, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

H&S MANUFACTURING COMPANY, INC.,
Petitioner,

v.

OXBO INTERNATIONAL CORPORATION,
Patent Owner.

Case IPR2016-00926
Patent 7,310,929 B2

Before PHILLIP J. KAUFFMAN, JAMES A. TARTAL, and KEVIN W. CHERRY, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge.*

DECISION

Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

Petitioner, H&S Manufacturing Company, Inc., filed a Petition requesting an *inter partes* review of claims 28, 32, and 44 of U.S. Patent No. 7,310,929 B2 ("the '929 patent"). Paper 2 ("Pet."). Patent Owner, Oxbo International Corporation, filed a Preliminary Response. Paper 6 ("Prelim. Resp."). We have jurisdiction under 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted "unless . . . the information presented in the petition . . . 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."

Upon consideration of the Petition and the Preliminary Response, we conclude the information presented does not show a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any claim of the '929 patent. Accordingly, the Petition is denied and no trial is instituted.

I. BACKGROUND

A. The '929 Patent (Ex. 1001)

The '929 patent, titled "Windrow Merging Apparatus," issued December 25, 2007, from U.S. Application No. 10/405,030, filed March 31, 2003. Ex. 1001. The '929 patent describes a windrow merger apparatus used "to merge cut hay, and/or windrows into larger windrows for harvesting or baling." *Id*. at 2:34–36. According to Patent Owner, "the '929 patent was a major improvement in windrow merger technology," because it included "three pickup assemblies each having a pickup head and transverse belt conveyor that can move cut hay to either the left or the right." Prelim. Resp. 4–5.

Figure 1 of the ’929 patent is reproduced below:

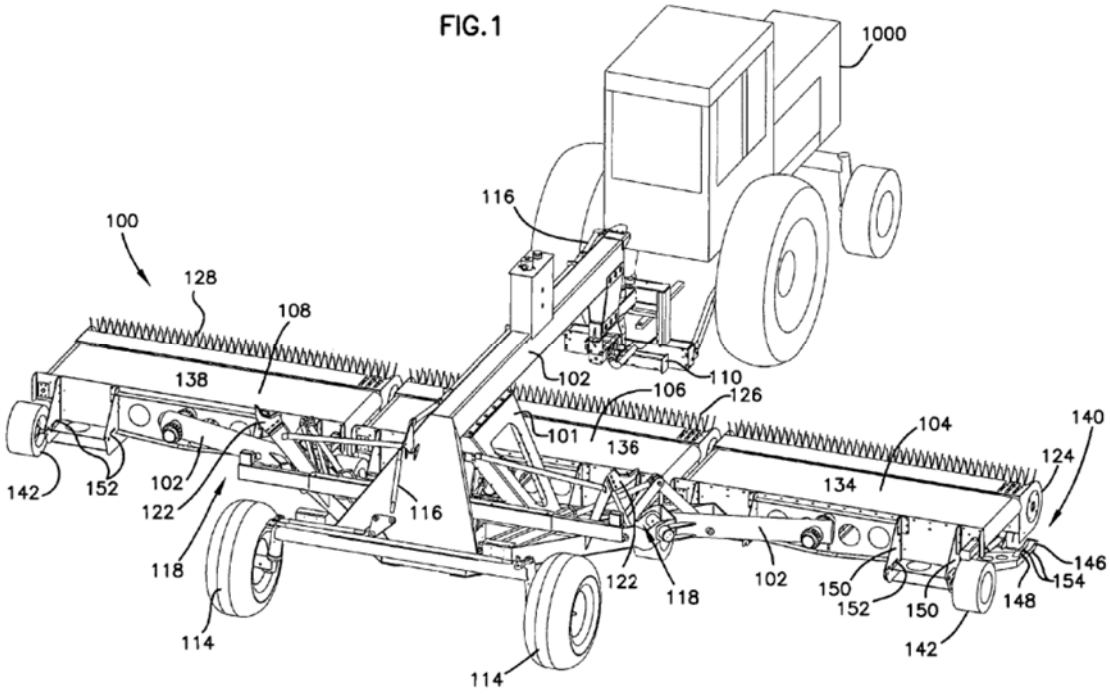

Figure 1 illustrates merger apparatus 100 with three pickup and transfer assemblies (104, 106, and 108) supported on framework 101, including folding arms 102 that provide for movement of outer assemblies 104 and 108. Ex. 1001, 4:35–47. “Each pickup and transfer assembly 104, 106 and 108 includes a head unit, designated 124, 126 and 128 respectively.” *Id.* at 4:62–64. Each “pickup and transfer assembly” is also referred to as a “pickup assembly.” *Id.* at 5:43–51. “The heads 124, 126 and 128 pick up and deliver the crop rearward to corresponding conveyors 134, 136 and 138.” *Id.* at 4:64–66. “The folding arm 102 is actuated by a linkage 118 to facilitate movement of the pivoting assemblies 104, 106 and 108 between a use position to a storage position.” *Id.* at 4:60–62.

Figure 5 of the ’929 patent is reproduced below:

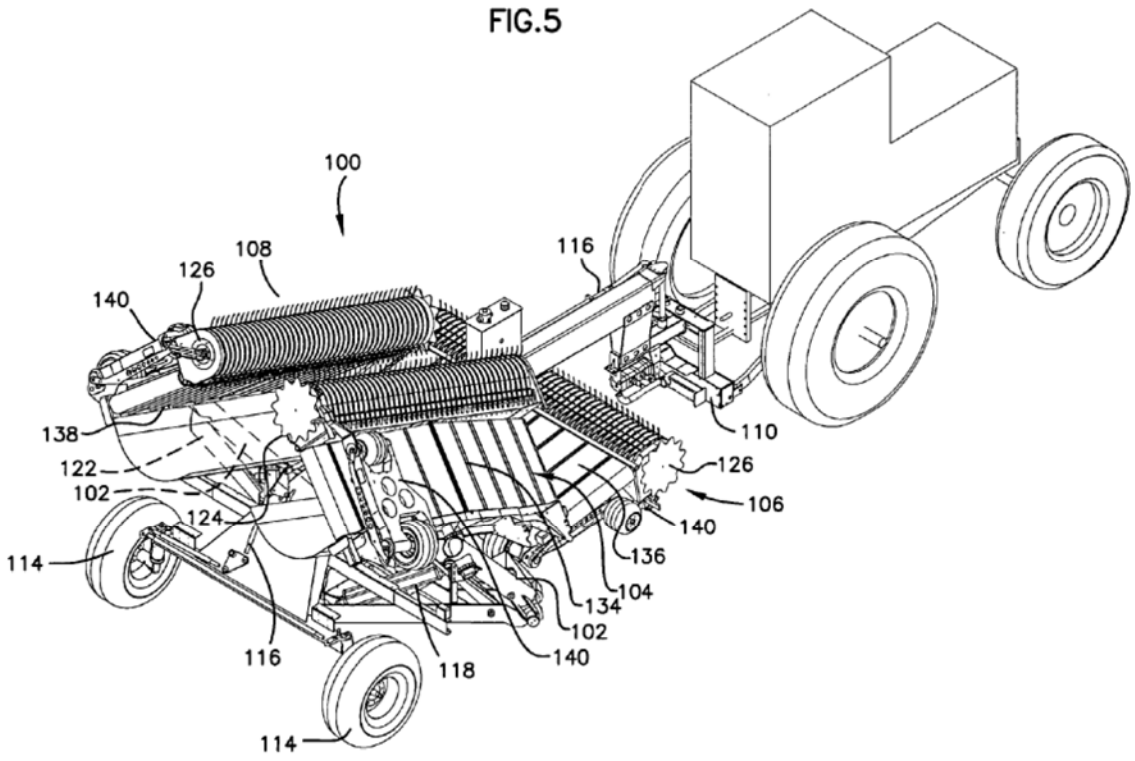

Figure 5 illustrates the merger shown in Figure 1 with two heads in a folded position. Ex. 1001, 3:61–62. “The pickup and transfer assemblies 104 and 108 fold rearward and inward to minimize the overall width and height of the merger 100.” *Id.* at 5:60–62. “[T]he merger 100 may have both pickup assemblies 104 and 108 raised simultaneously while the center pickup and transfer assembly 106 remains lowered in an operating position.” *Id.* at 5:43–46. Additionally, all three pickup and transfer assemblies may be raised for transporting the merger on public roads when not operating to collect material. *Id.* at 5:55–60.

B. Challenged Claims

Challenged claims 28 and 44 of the '929 patent are independent. Claim 32 depends from claim 28. Claims 28, 32, and 44 provide as follows:

> 28. A windrow merger apparatus, comprising:
> a frame;
> a center pickup assembly supported by the frame;
> a left folding pickup assembly supported by the frame;
> a right folding pickup assembly supported by the frame;
> wherein the left and right pickup assemblies fold between an extended use position and a retracted travel position, each of the center, left, and right pickup assemblies being aligned side by side when the left and right pickup assemblies are positioned in the extended use position;
> wherein each of the pickup assemblies is arranged and configured such that merger operations can be accomplished:
> i) when the left and right pickup assemblies are positioned in the extended use position; and
> ii) when the left pickup assembly is positioned in the extended use position and the right pickup assembly is positioned in the retracted travel position; and
> iii) when the right pickup assembly is positioned in the extended use position and the left pickup assembly is positioned in the retracted travel position; and
> iv) when the left and right assemblies are positioned in the retracted travel position.

Ex. 1001, 12:23–46.

> 32. A windrow merger apparatus according to claim 28, wherein the merger apparatus is operable in a first mode with three pickup assemblies operating, in a second mode with two pickup assemblies operating and one pickup assembly retracted, or in a third mode with one pickup assembly operating and two pickup assemblies retracted.

Id. at 12:58–63.

> 44. A windrow merger apparatus configured for travel in a first direction, comprising:
>
> a frame;
>
> a first pickup assembly supported by the frame, the first pickup assembly including a first conveyor arranged to convey material in a direction transverse to the first direction or travel;
>
> a second pickup assembly supported by the frame, the second pickup assembly including a second conveyor arranged to convey material in a direction transverse to the first direction of travel; and
>
> a third pickup assembly supported by the frame, the third pickup assembly including a third conveyor arranged to convey material in a direction transverse to the first direction of travel;
>
> wherein at least two of the pickup assemblies are foldable between an extended use position and a retracted travel position, each of the first, second, and third pickup assemblies being aligned side by side when each of the pickup assemblies is positioned in the extended use position such that the first, second, and third pickup assemblies provide a continuous line of material pickup.

Ex. 1001, 15:9–16:15.

C. Related Proceedings

The parties state that the ’929 patent is a subject of the following civil action: *Oxbo Int’l Corp. v. H&S Mfgr’g Co.*, No. 15-292-jdp (W.D. Wis. 2015). Pet. 2; Paper 5, 2.

D. Asserted Grounds of Unpatentability

Petitioner contends that claims 28, 32, and 44 are unpatentable based on the following grounds:

Reference[s]	**Basis**	**Challenged Claims**
Beougher[1]	§ 102	44
Declementi[2] and Lohrentz[3]	§ 103	44
Schnittjer[4] and Zhavoronkin[5]	§ 103	44
Zhavoronkin and CA Honey[6]	§ 103	28, 32, and 44
Dow,[7] van der Lely,[8] and von Allwörden[9]	§ 103	28, 32, and 44

II. ANALYSIS

A. Claim Construction

The Board interprets a claim using the "broadest reasonable construction in light of the specification of the patent in which it appears." 37 C.F.R. § 42.100(b). We presume a claim term carries its "ordinary and customary meaning," which is "the meaning that the term would have to a person of ordinary skill in the art in question" at the time of the invention.

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[1] U.S. Patent No. 4,409,780 issued Oct. 18, 1983 (Ex. 1010, "Beougher").
[2] EP Patent Application 0 789 990 A1 published Aug. 20, 1997 (Ex. 1015, "Declementi").
[3] U.S. Patent No. 6,415,590 B1 issued July 9, 2002 (Ex. 1016, "Lohrentz").
[4] U.S. Patent No. 4,932,196 issued June 12, 1990 (Ex. 1011, "Schnittjer").
[5] U.S.S.R. Inventor's Certificate No. SU 835359A1 published June 7, 1981 (Ex. 1012, "Zhavoronkin").
[6] Canadian Patent No. 1151431B (Ex. 1018, "CA Honey").
[7] U.S. Patent No. 6,205,757 B1 issued Mar. 27, 2001 (Ex. 1013, "Dow").
[8] U.S. Patent No. 3,468,107 issued Sept. 23, 1969 (Ex. 1014, "van der Lely").
[9] U.S. Patent No. 5,911,625 issued June 15, 1999 (Ex. 1020, "von Allwörden").

In re Translogic Tech., Inc., 504 F.3d 1249, 1257 (Fed. Cir. 2007). A patentee may, however, act as their own lexicographer and give a term a particular meaning in the Specification, but must do so with "reasonable clarity, deliberateness, and precision." *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). 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).

1. "continuous line of material pickup"

Claim 44 recites "each of the first, second, and third pickup assemblies being aligned side by side when each of the pickup assemblies is positioned in the extended use position such that the first, second, and third pickup assemblies provide a continuous line of material pickup." Petitioner contends that "'a continuous line of material pickup' is: 'a pickup face uninterrupted by gaps.'" Pet. 9 (citing Ex. 1009 ¶¶ 35–36). Patent Owner argues that "the claims require the pickup assemblies be aligned such that they pickup material continuously along the width of the merger," and that introducing "gaps" to the meaning of the term "adds unnecessary vagueness to an otherwise definite phrase." Prelim. Resp. 11. We agree with Patent Owner, and, for purposes of this decision, we determine no express construction is necessary for "continuous line of material pickup."

2. "conveyor"

Claim 44 recites "the first pickup assembly including a first conveyor arranged to convey material in a direction transverse to the first direction of travel." Petitioner contends that "conveyor" should be construed to mean "an apparatus that moves material." Pet. 9. Petitioner provides no

explanation for its proposed construction, and relies only on the conclusory opinion of Mr. Shirley[10] that "[a] conveyor is understood by a person of ordinary skill in the art to mean an apparatus that moves material." Ex. 1009 ¶ 33; *see also id.* ¶ 34 (stating that conveyors come in various styles including augers and continuous belts). Patent Owner argues that Petitioner's proposed construction is unreasonably broad, encompassing any apparatus that moves material, including a shovel or catapult. Prelim. Resp. 9. Patent Owner further contends that the only mechanism described in the specification of the '929 patent as a conveyor is a belt conveyor, and that "[n]o other apparatus for moving material would be suitable, especially an auger," because the conveyor must be capable of moving wet grass or hay without damaging the hay or clogging the windrow merger. *Id.* at 9–10. We agree that Petitioner's proposed construction, devoid of any discussion of the specification of the '929 patent, is unreasonably broad and unsupported. We also are not persuaded on the present record that the only conveyor capable of satisfying the claimed conveyor feature is a belt conveyor. For purposes of this decision, we determine no express construction is necessary for "conveyor" or any other claim term, and apply the ordinary and customary meaning of each term.

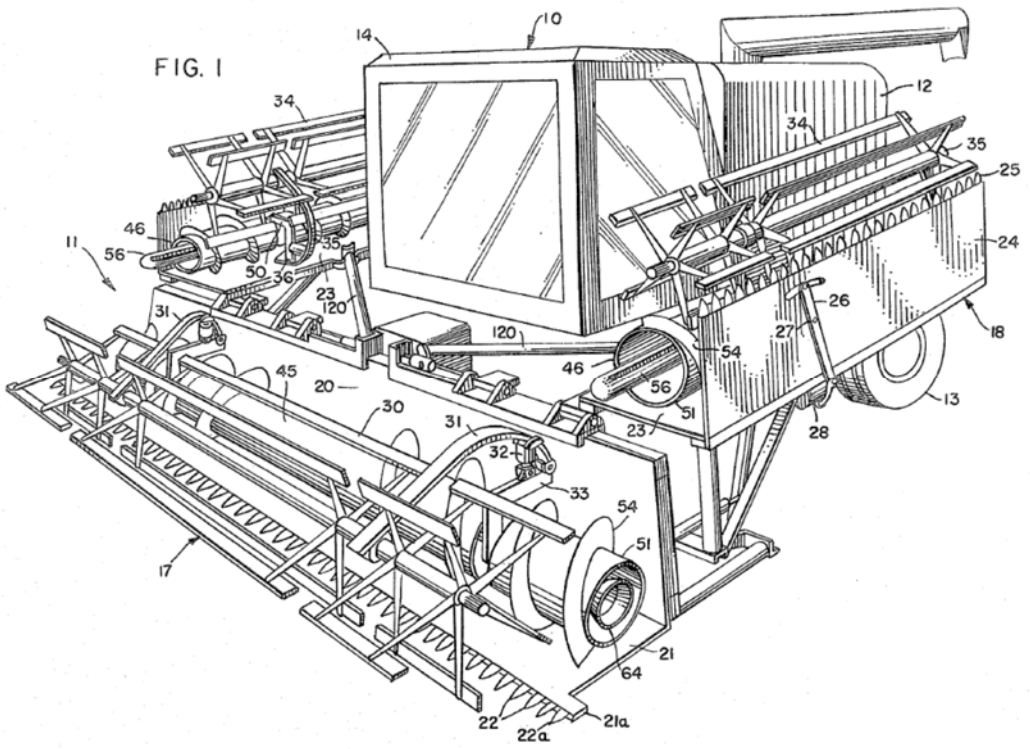
B. Anticipation by Beougher

Petitioner contends claim 44 is anticipated by Beougher. Pet. 13–19. Beougher describes "[a] folding header assembly for combine harvesters and the like," including a header with a center section and a pair of wing sections attached to the center by hinges. Ex. 1010, Abstract. Claim 44 requires,

[10] Declaration of Ralph Shirley, dated Apr. 15, 2016 (Ex. 1009).

inter alia, a "first pickup assembly including a first conveyor," a "second pickup assembly including a second conveyor," and a "third pickup assembly including a third conveyor."

Figure 1 of Beougher is reproduced below.



Beougher Figure 1 illustrates combine 10 (folded for transit) equipped with folding header assembly 11, including center section 17 and wing sections 18, which Petitioner contends correspond to the recited three pickup assemblies. Ex. 1010, 3:57–4:8, 6:5–10. As Petitioner notes, "each of the header sections carries an auger section," and more particularly, "center section 17 rotatably supports auger section 45, and wing sections 18 carry auger sections 46." Pet. 16 (quoting Ex. 1010, 5:10–13). Petitioner offers no additional explanation in support of its contention that each of the three auger sections of Beougher corresponds to one of the three conveyors recited

in claim 44. *See* Pet. 16; *see also* Ex. 1009 ¶¶ 46–53. According to Beougher, during combine operation the center and wing sections "of the auger" are in general alignment. Ex. 1010, 6:1–3. The "structure for automatically coupling and uncoupling the auger sections, and for maintaining positive driving connection in all three auger sections during upward and downward pivoting of the header's wing sections" is shown in Beougher in Figures 6–9. *Id.* at 5:31–35. Although the three auger sections permit "flexing," the "parts are nevertheless locked against relative rotational movement by means of springloaded pins 68 received within grooves or keyways 61 of shaft extension 56." *Id.* at 6:12–15.

In light of these disclosures in Beougher, we agree with Patent Owner that Petitioner has not sufficiently shown that Beougher discloses the three conveyors of claim 44, as opposed to a single auger "that can be separated into sections when the combine harvester header is retracted." *See* Prelim. Resp. 35. We have also considered Petitioner's argument that "the pertinency of Beougher as an anticipatory reference was confirmed by the Patent Office during prosecution of an application related to the '929 patent," but find Patent Owner's decision to cancel a claim during prosecution of a related application does not further support Petitioner's contentions in this case. *See* Pet. 17; *see also* Prelim. Resp. 35–36 (explaining that Patent Owner accepted the allowed claim in the related application and filed a continuing application to prosecute additional claims directed to windrow mergers rather than present arguments in response to the Examiner's rejection). Accordingly, the information presented by

Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claim 44 of the '929 patent is anticipated by Beougher.

C. Obviousness over Declementi and Lohrentz

Petitioner contends claim 44 would have been obvious over Declementi and Lohrentz. Pet. 44–49. Declementi relates to a head assembly to be mounted to a combine-harvester machine that can be folded to reduce the size during transportation. Ex. 1015, 1:3–8.

Figure 1 of Declementi is reproduced below.

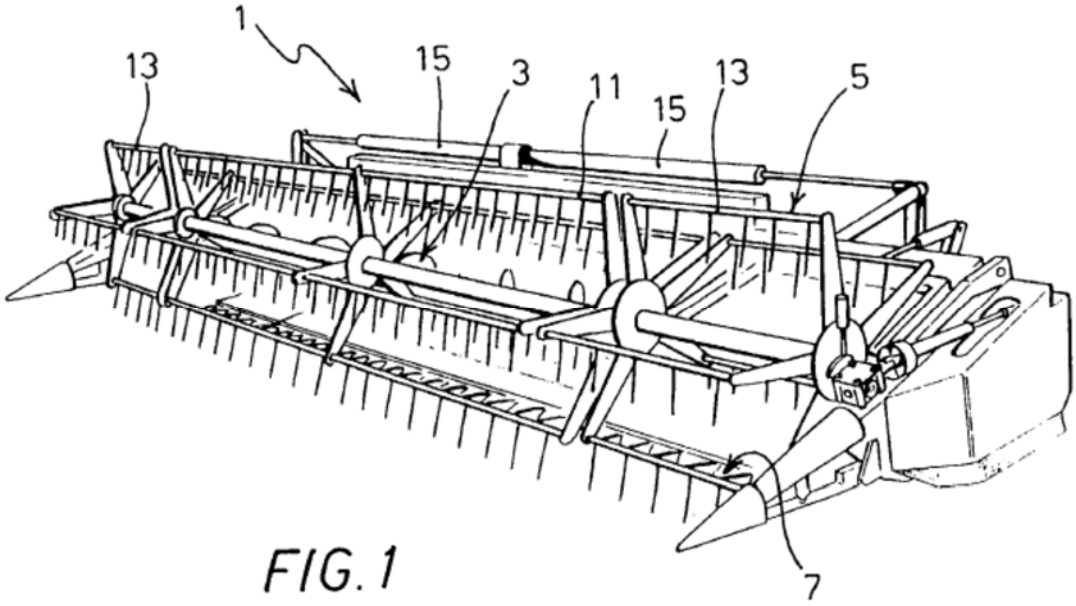


FIG. 1

Declementi Figure 1 illustrates head assembly 1, including "an auger 3, a pickup reel 5 . . ., and a cutting blade 7." *Id.* at 4:25–30. Petitioner relies only on Declementi as disclosing the first, second, and third conveyors of claim 44. Petitioner argues that "Declementi discloses each pickup assembly includes a conveyor, in the form of an auger divided into three parts corresponding to the three pickup assemblies." Pet. 48. Specifically,

Petitioner relies on the disclosure of Declementi that "also the auger 3 can be folded into three parts, namely a central stationary part 17 and two lateral parts 19." *Id.* at 45–46 (quoting Ex. 1015, 4:42–44). Petitioner offers no additional explanation in support of its contention that each of the three auger sections of Declementi corresponds to one of the three conveyors recited in claim 44. *See* Pet. 48; *see also* Ex. 1009 ¶¶ 128–135.

Patent Owner argues that Petitioner has failed to show that Declementi discloses three conveyors, as opposed to a single conveyor made up of three parts. Patent Owner explains:

> Declementi also teaches only a single auger and not second and third augers. Declementi discloses an auger 3 made up of a central stationary part 17 and two lateral parts 19. (Ex. 1015, col. 4:42–44.) A single motor couples to a shaft portion 25 at one end of the auger and causes the auger to rotate. (*Id.* at col. 4:56-59.) When the three parts 17 and 19 of the auger 3 are aligned, rotational motion is transmitted from the motor to the three auger parts. (*Id.* at col. 5:17–22.) However, when the two lateral parts 19 are raised, and the shafts 31 and 35 connecting the three parts are disengaged, the auger is not subjected to any rotation. (*Id.* at col. 5:22–24.) In other words, the auger in Declementi is divided into three sections that are functional only when connected. Therefore, Declementi discloses a single auger.

Prelim. Resp. 62. We agree with Patent Owner that Petitioner has not sufficiently shown that Declementi discloses the three conveyors of claim 44. Accordingly, the information presented by Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claim 44 of the '929 patent would have been obvious over Declementi and Lohrentz.

D. Obviousness over Schnittjer and Zhavoronkin

Petitioner contends claim 44 would have been obvious over Schnittjer and Zhavoronkin. Pet. 49–55.

Figures 1 and 2 of Schnittjer are reproduced below.

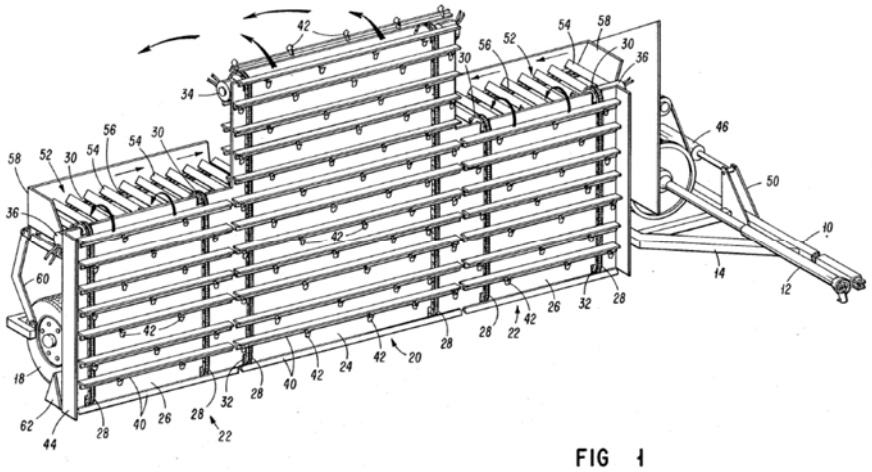


FIG 1

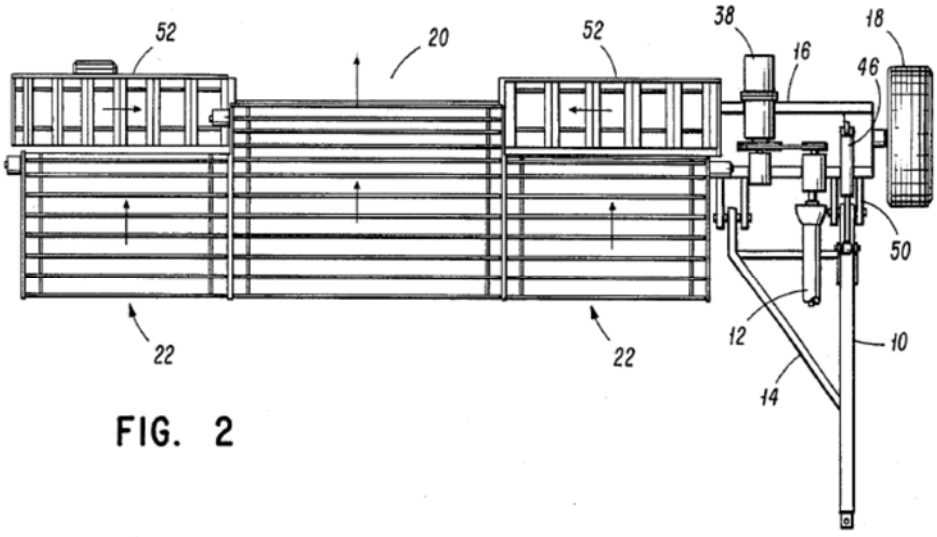


FIG. 2

Schnittjer Figures 1 and 2 illustrate an "apparatus for turning, mixing and aerating windrows of compost to convert the waste material comprising the compost into a useable material." Ex. 1011, Abstract, 2:5–9. The apparatus includes center elevating conveyor 20 and table 24 and side elevating

conveyors 22 with tables 26. *Id.* at 2:34–40. "[T]he table 24 for the center conveyor 20 is higher than the tables 26 for the side conveyors 22." *Id.* at 2:41–43. Positioned directly behind and slightly below side conveyors 22 are transverse conveyors 52. *Id.* at 3:36–46. "[C]onveyors 52 are driven so as to carry material inwardly where it is discharged in the area directly behind the center conveyor 20." *Id.* at 3:43–45. "The material at the outside edges of the windrow will be carried upwardly by the side conveyors 22 and deposited on the transverse conveyors 52 which will carry the materially inwardly toward the center and deposit it on the ground forming the lower part of the core for the new window." *Id.* at 4:18–23. "The material carried upwardly by the center conveyor 20 will then be deposited directly on top of the material already deposited by the side conveyors." *Id.* at 4:24–26. "The apparatus thus provides maximum mixing, reduction of particle size and aeration while providing positive control of the material by moving outside edges of the existing windrow inwardly and on the bottom of the new windrow while the core of the existing windrow is then deposited on top." *Id.* at 4:44–49.

Petitioner contends that the two side conveyors 22 and transverse conveyors 52 of Schnittjer correspond to two of the three pickup assemblies, including conveyors, recited by claim 44. Pet. 50–52. Petitioner also contends that center conveyor 20 of Schnittjer corresponds to a portion of an additional pickup assembly, but also acknowledges that Schnittjer does not disclose a conveyor associated with center conveyor 20. Pet. 51. For the conveyor missing from Schnittjer Petitioner relies on Zhavoronkin as disclosing an intermediate conveyor 17 as part of a hay making machine. *Id.*

(citing Ex. 1012, p. 2, l. 8, Fig. 4; *see also* additional description of Zhavoronkin in section II.E. below). Petitioner argues that "[o]ne of ordinary skill in the art would have been motivated to modify the second pickup assembly of Schnittjer to include a transverse conveyor as taught by Zhavoronkin, to provide the device with additional options for discharging the material being picked up and moved as taught by Zhavoronkin, to arrive at claim 44 of the '929 Patent." Pet. 53 (citing Ex. 1009 ¶ 75 (stating the same)). Petitioner offers no additional explanation for this asserted rationale, which we find not sufficient to support the asserted combination of Schnittjer and Zhavoronkin. As explained above, the apparatus of Schnittjer operates to mix and combine material into a windrow behind its center conveyor 20. On its face, adding a transverse conveyor behind center conveyor 20 of Schnittjer, as Petitioner proposes, would preclude the apparatus from operating as intended. Petitioner provides no sufficient explanation for why Schnittjer would be modified as proposed for the purported benefit of "provid[ing] the device with additional options for discharging the material being picked up and moved," when the modification would prevent the apparatus from discharging the material as intended. *See also* Prelim. Resp. 69 (arguing that "adding a middle conveyor would eliminate the device's ability to invert the compost core on top of that side material, thereby rendering the combined apparatus inoperable for its intended purpose.").

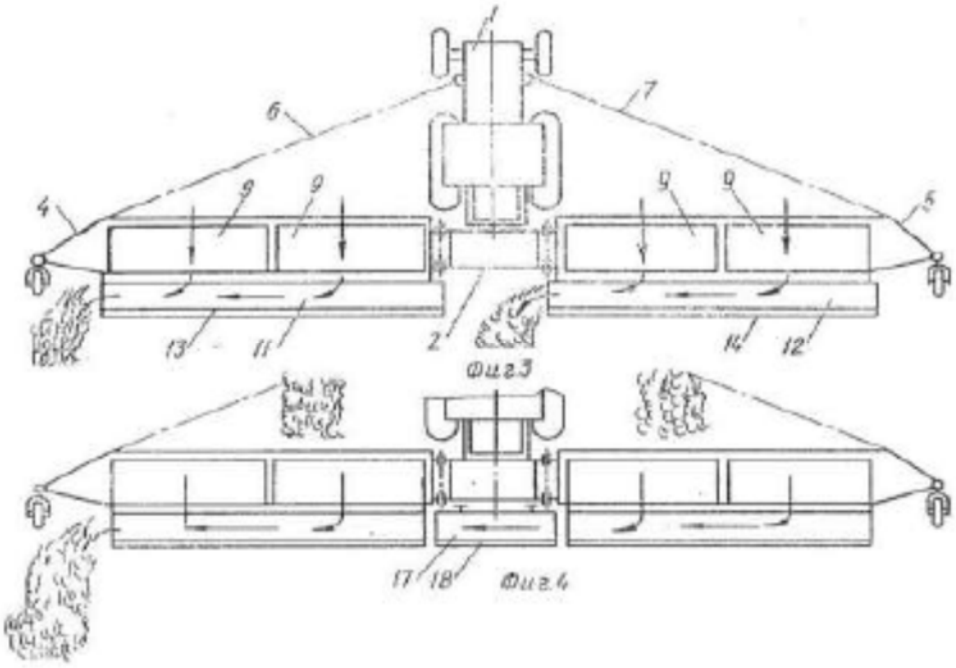
Petitioner further argues that the asserted combination "would merely involve combining prior art elements according to known methods to yield predictable results," "would have been predictable for at least the reason that

Schnittjer already discloses pickup assemblies having transverse conveyors," and "would merely involve the use of a known technique to improve a similar device in the same way." Pet. 53–54. Petitioner identifies no testimony from Mr. Shirley in support of the additional arguments. We are not persuaded that the additional generic arguments offered by Petitioner in support of the asserted combination are sufficient in this case because Petitioner has not shown that its proposed modification of Schnittjer would still permit Schnittjer to operate as intended. Petitioner has identified no persuasive predictable result or improvement corresponding to its asserted combination. Accordingly, the information presented by Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claim 44 of the '929 patent would have been obvious over Schnittjer and Zhavoronkin.

E. Obviousness over Zhavoronkin and CA Honey

Petitioner contends that claims 28, 32, and 44 would have been obvious over Zhavoronkin and CA Honey. Pet. 19–33.

Figures 3 and 4 of Zhavoronkin are reproduced below.



Zhavoronkin Figures 3 and 4 illustrate a hay making machine with two sections mounted to a tractor at hitch (or hinge) 2. Ex. 1012, 1:14–18. Pickup devices 9 are made in the form of longitudinal conveyors with teeth, behind which are transverse conveyors 11 and 12. *Id.* at 1:21–22. Figure 3 shows the machine raking two hay swaths with conveyors 11 and 12 operating from right to left. *Id.* at 1:14–15. Conveyors 11 and 12 may also be operated in directions opposite to one another to form a single hay swath behind the tractor. *Id.* at 1:13–14. Figure 4 shows the machine with an additional intermediate short conveyor 17 behind hitch (hinge) 2 such that a single hay swath is formed on the left. *Id.* at 1:15–16, 2:3–4. As noted by Patent Owner, the intermediate short conveyor 17 is operated without a corresponding pickup device. Prelim. Resp. 21. Patent Owner further explains that:

> Zhavoronkin discloses precisely the alignment problem the inventors of the '929 patent sought to overcome. Specifically, prior windrow mergers with "multiple heads…typically formed a gap between adjacent pickup heads so that some material may be missed in the field as the merger advances. Motors and other drive equipment have typically been positioned at the ends of heads providing an obstruction between the ends of the heads, requiring a gap between the end row of tines adjacent the heads." (Ex. 1001, col. 1:63–2:3.) Moreover, Zhavoronkin does not suggest three pickup assemblies in *any* alignment because its configuration of two side sections with an intermediate short conveyor discloses at most two pickup assemblies.

Id. at 37.

CA Honey describes a "self-propelled swather having a tractor unit with a central cutting head and two side cutting heads." Ex. 1018, Abstract. Figure 1 of CA honey is reproduced below.

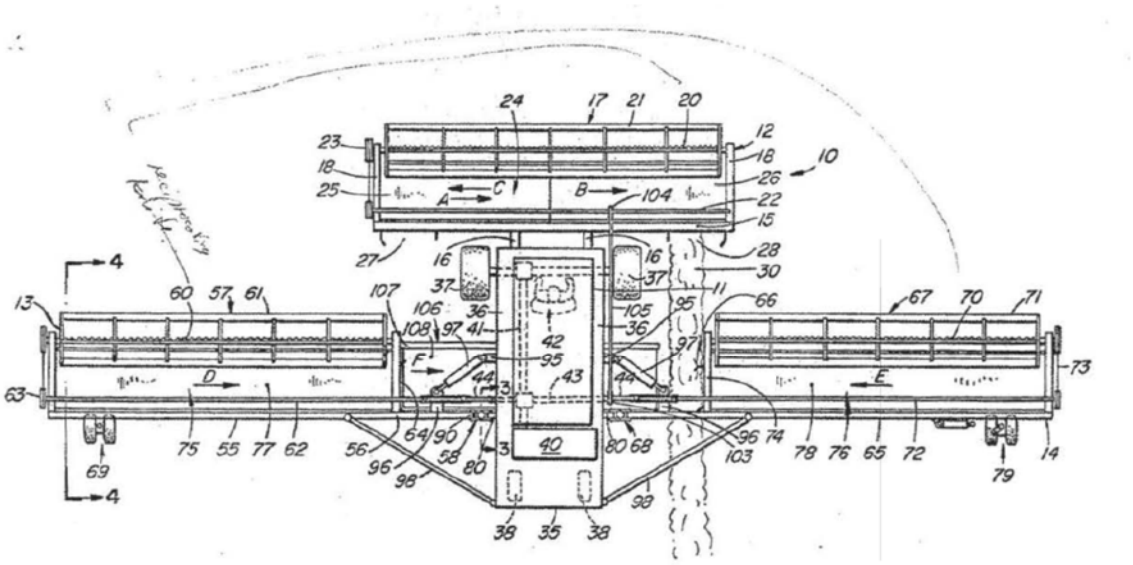


FIG. I

CA Honey Figure 1 illustrates swather 10 with central head 12 and conveying means 24 behind cutting means 17. *Id.* at 3:6–7, 3:26–30, 4:8–12.[11] The swather also includes side heads 13 and 14 with conveyor means 75 and 76 immediately behind the front edge cutting means 57 and 67. *Id.* at 5:2–16.

Petitioner argues that "Zhavoronkin and CA Honey, in combination, teach or suggest each and every limitation of claims 28, 32 and 44," but then acknowledges that "[n]either Zhavoronkin or CA Honey expressly discloses each of the center, left, and right pickup assemblies being aligned side by side when the left and right pickup assemblies are positioned in the extended use position," as required by claim 28. Pet. 21. Similarly, Petitioner acknowledges that "[n]either Zhavoronkin or CA Honey expressly discloses each of the first, second, and third pickup assemblies being aligned side by side when each of the pickup assemblies is positioned in the extended use position such that the first, second, and third pickup assemblies provide a continuous line of material pickup," as required by claim 44. *Id.* at 24.[12]

Having failed to identify any reference that teaches or suggests the "aligned side by side" feature of the '929 patent, Petitioner's obviousness

[11] Citations to CA Honey are to the original pagination and line number.
[12] After acknowledging the absence of any disclosure of the "aligned side by side" feature of the '929 patent in its claim charts, Petitioner then includes "but see" citations to twenty-three paragraphs of Mr. Shirley's declaration with no explanation in the chart. Pet 21, 24. Such efforts to incorporate arguments by reference from one document (the declaration) to another document (the Petition) constitute an improper circumvention of the limit on the length of a petition and are expressly prohibited by rule. 37 C.F.R. § 42.6; *see also* 37 C.F.R. § 42.24 (regarding word count and page limits). Accordingly, we give such implicit arguments no weight.

analysis is fundamentally flawed. Petitioner identifies a variety of reasons why the "aligned side by side" arrangement of the '929 patent is beneficial. It increases the amount of crops picked up, speeds up the harvest process, improves visibility and operability "by placing the three pickup assemblies aligned side by side," allows for bigger windrows, and reduces the amount of time required. Pet. 26.

Identifying all of the benefits of the '929 patent does not make it obvious, nor does it support a modification in a manner undisclosed by any of the asserted references. Counter to its contentions with respect to Zhavoronkin and CA Honey, Petitioner has not shown that the challenged claims of the '929 patent would have been obvious on any of the asserted generic basis, including that it would "merely involve the use of a known technique to improve a similar device in the same way" or "would have been predictable." Pet. 25–27. We agree with Patent Owner that Petitioner has not clearly identified the known technique it refers to or any known modification. *See* Prelim. Resp. 44. Suggesting that a person of ordinary skill would simply add "a pickup assembly to Zhavoronkin as taught by CA Honey, and associating the added pickup assembly with the existing middle conveyor disclosed by Zhavoronkin such that the pickup assemblies were aligned side by side," is the epitome of a hindsight analysis. *See In re Gorman*, 933 F.2d 982, 987 (Fed. Cir. 1991) ("It is impermissible [to use] applicant's structure as a template and select[] elements from references to fill the gaps."). Mr. Shirley's conclusory statement that aligning the pickup assemblies "would be within the grasp of a person of ordinary skill in the art" does not persuade us because Petitioner has not identified any disclosure

of the "aligned side by side" feature in either of the asserted references. *See* Ex. 1009 ¶ 154.[13] The only apparent source of the missing disclosure of the "aligned side by side" feature is the '929 patent itself.

Petitioner has not sufficiently identified either how each of the elements of claims 28, 32, and 44 were disclosed in Zhavoronkin and CA Honey or a persuasive rationale in support of the combination of the two references. Accordingly, the information presented by Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claims 28, 32, and 44 of the '929 patent would have been obvious over Zhavoronkin and CA Honey.

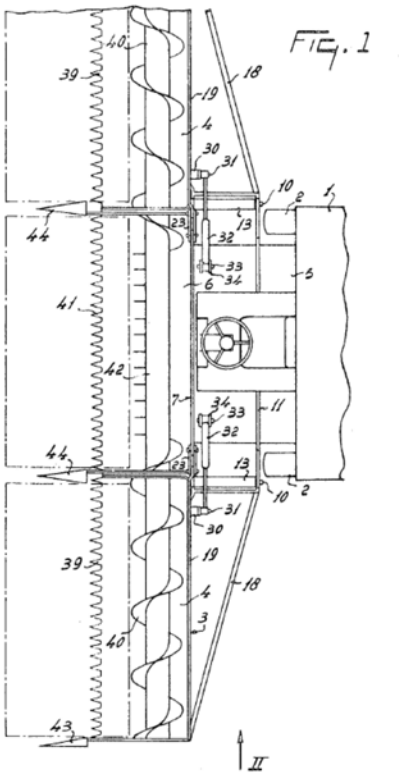
F. Obviousness over Dow, van der Lely, and von Allwörden

Petitioner contends claims 28, 32, and 44 would have been obvious over Dow, van der Lely, and von Allwörden. Pet. 33–44.

Van der Lely describes a "harvester having a mowing table with a central and two side portions, each having a forward cutter bar and an auger to move cut crop, the two side portions being foldable to a transport portion above the central portion by a pair of pivots." Ex. 1014, Abstract.

[13] Although Mr. Shirley addresses a combination of Zhavoronkin, CA Honey, and von Allwörden in his declaration, that combination was not asserted in the Petition and will not be considered for purposes of this decision. *See, e.g.*, Ex. 1009 ¶ 144; *also see generally Cisco Systems, Inc. v. C-Cation Techs., LLC*, IPR2014-00454, slip op. 7–10 (PTAB Aug. 29, 2014) (Paper 12) (informative, expanded panel) (Information contained in exhibits or portions of exhibits, but not discussed in the Petition, is not incorporated into the Petition merely by the exhibits' presence in the record.).

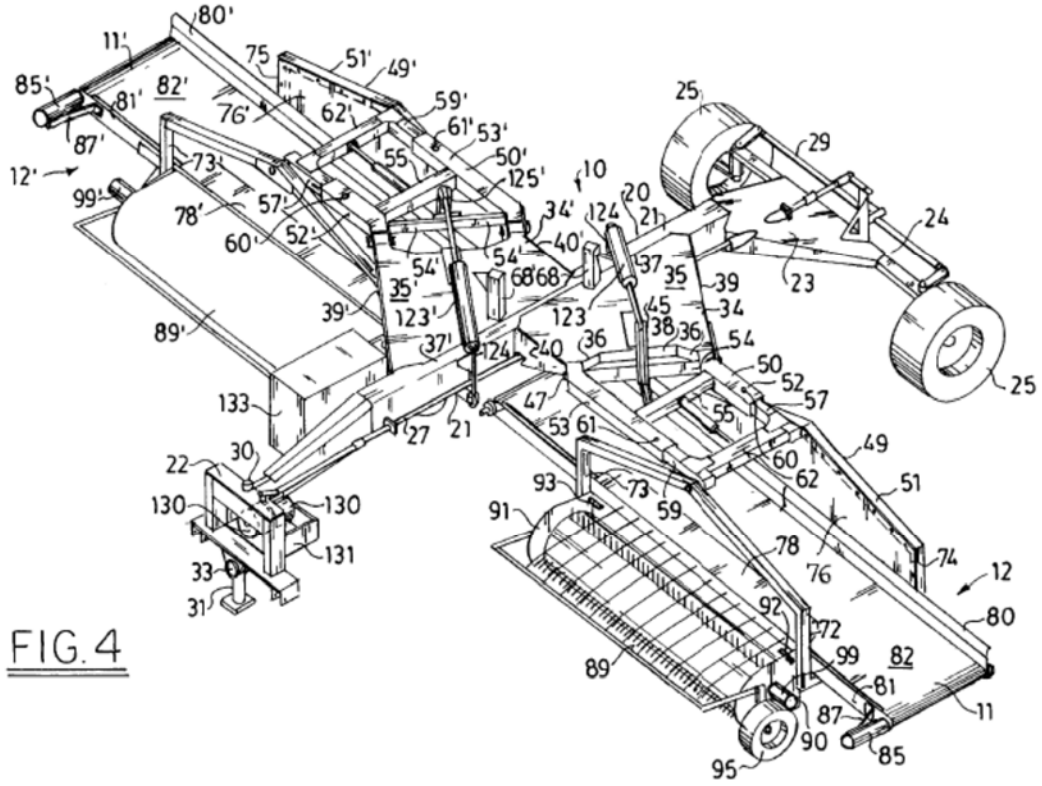
Figure 1 of van der Lely is reproduced below.



Van der Lely Figure 1 illustrates the forward part of a harvesting machine, including mowing table 3 with three adjacent portions consisting of a central portion 6 and two identical portions 4. Ex. 1014, 1:67–71. "The central portion 6 is provided with a cutter bar 41 and a tined auger 42 which is located behind the cutter bar 41, both the cutter bar 41 and the auger 42 extending perpendicular to the intended direction of operative travel." *Id.* at 3:21–25.

Dow discloses a windrow gathering machine, including first and second combined pickup and conveyor units pivotally mounted on skewed axes on opposite sides of the main frame. Ex. 1013, Abstract.

Figure 4 of Dow is reproduced below.



Dow Figure 4 illustrates merging machine 10, including combined pickup and conveyor units 12 and 12´ with conveyors 11 and 11´. Ex. 1013 3:56–59. The combined pickup and conveyor units 12 and 12´ are mounted on main frame 20 "so that they can be positioned in an aligned substantially mirror image horizontal positions for merging windrows or they can be mounted in inclined vertical stowed positions for transporting the machine 10 to its operating locations." *Id.* at 4:23–31.

1. *Claims 28 and 32*

Claim 28 of the '929 patent requires, *inter alia*, that each of the three pickup assemblies be arranged so that the merger may operate not only when the left and right assemblies are in the extended use position but also when

(1) either the left or right assembly is in the retracted travel position and (2) when both the left and right assemblies are in the travel position (such that the center assembly continues to operate). According to Petitioner, "Dow inherently disclose[s] the claimed merger operating positions." Pet. 36. Petitioner further argues:

> Dow discloses dedicated motors for each of the pickup assemblies and conveyors, as well as depicting a hydraulic circuit for operating the various motors. Ex. 1009, ¶ 89. A person of ordinary skill in the art understands this disclosure to mean the pickup assemblies and conveyors can be operated independently. *Id.* Modifying Dow to include a center pickup assembly as taught by van der Lely and controlling the center pickup assembly with dedicated motors and controls similar to the existing pickup assemblies of Dow would be within the grasp of a person of ordinary skill in the art. Ex. 1009, ¶ 98. The components necessary to accomplish such a modification are already known to persons of ordinary skill in the art. Ex. 1009, ¶¶ 100, 103.

Pet. 43. Petitioner's argument is not persuasive. "To establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999) (citations omitted) (internal quotation marks omitted).

Petitioner's arguments suggest, at best, that portions of Dow indicate the apparatus might be capable of operating with either of its two combined pickup and conveyor units in a travel position. Dow, however, expressly refutes Petitioner's contention, stating "when in their operating positions"

combined pickup and conveyor units 12 and 12´ "are substantial mirror image counterparts." Ex. 1013, 4:27–30. Thus, Dow does not contemplate an operating position with either of the two combined pickup and conveyor units in a travel position. More importantly, the claim requires operating positions relative to three assemblies, including a center assembly which Dow lacks. Even assuming it would have been obvious to add a center assembly to Dow, Petitioner fails to show any bases to conclude that Dow inherently discloses operating that missing assembly in a coordinated manner with the left and right assemblies, as required by claim 28. Petitioner does not otherwise argue van der Lely or von Allwörden disclose the claimed operating positions. Accordingly, the information presented by Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claim 28 of the '929 patent, or claim 32 which depends from claim 28, would have been obvious over Dow, van der Lely, and von Allwörden.

2. *Claim 44*

Petitioner provides a claim chart identifying how it contends Dow and van der Lely, in combination, disclose each of the features of claim 44. Pet. 37–39. Petitioner also contends that "[v]on Allwörden demonstrates that modifying a windrow merger having left and right pickup assemblies spaced apart (Dow) to include a center pickup assembly between the left and right assemblies (as taught by van der Lely) is predictable and known to person of ordinary skill in the art." *Id.* at 41 (citing Ex. 1009 ¶¶ 97, 124).

Claim 44 requires, *inter alia*, a second pickup assembly "including a second conveyor arranged to convey material in a direction transverse the

first direction of travel." Petitioner contends that van der Lely discloses this feature because its central portion 6 includes a tined auger 42. As Patent Owner notes, "the center portion of the van der Lely head assembly has a tined auger to move material *rearward* to the elevator housing, not a conveyor for moving material transversely." Prelim. Resp. 53 (citing Ex. 1014, 3:56–57). Thus, Petitioner has failed to show that center portion 6 of van der Lely discloses a "conveyor arranged to convey material in a direction transverse the first direction of travel," as claimed. Petitioner does not otherwise argue Dow or von Allwörden disclose the claimed second pickup assembly. Accordingly, the information presented by Petitioner does not show a reasonable likelihood that Petitioner would prevail in showing claim 44 of the '929 patent would have been obvious over Dow, van der Lely, and von Allwörden.

G. Secondary Considerations of Obviousness

We have also considered Petitioner's contention that obviousness of the challenged claims under all of the grounds above is supported by evidence of simultaneous invention as a secondary consideration. Pet. 55–58 (citing *Geo M. Martin Co. v. Alliance Mach. Sys. Int'l LLC*, 618 F.3d 1294, 1305 (Fed. Cir. 2010) ("Independently made, simultaneous inventions, made within a comparatively short space of time are persuasive evidence that the claimed apparatus was the product only of ordinary mechanical or engineering skill."). Petitioner refers to U.S. Patent No. 7, 628,004 (Ex. 1021, "Geiser") as purportedly disclosing the same invention. *Id*. at 56–57. As Patent Owner notes, Petitioner concedes Geiser is not prior art to the '929 patent and Geiser was cited by Patent Owner and considered during

prosecution of the ’929 patent. Prelim. Resp. 73. In light of the deficiencies in the references and combinations discussed above under Petitioner’s grounds for unpatentability, we are not persuaded that Petitioner’s additional contentions concerning Geiser, when taken into consideration, alter our determination that Petitioner has not shown a reasonable likelihood of prevailing.

III. CONCLUSION

For the foregoing reasons, the information presented in the Petition and accompanying evidence does not establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of any claim of the ’929 patent.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is *denied* and no trial is instituted.

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