

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RESMED LIMITED, RESMED INC., and RESMED CORP,
Petitioner,

v.

FISHER & PAYKEL HEALTHCARE LIMITED,
Patent Owner.

Case IPR2016-01735
Patent 9,265,902 B2

Before THOMAS L. GIANNETTI, RAMA G. ELLURU, and
TINA E. HULSE, *Administrative Patent Judges*.

HULSE, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

ResMed Limited, ResMed Inc., and ResMed Corp (collectively, “Petitioner”) filed a Corrected Petition requesting an *inter partes* review of claims 1–20, 26, 27, and 33 of U.S. Patent No. 9,265,902 B2 (Ex. 1001, “the ’902 patent”). Paper 9 (“Petition” or “Pet.”). Fisher & Paykel Healthcare Limited (“Patent Owner”) filed a Corrected Preliminary Response to the Petition. Paper 10 (“Preliminary Response” or “Prelim. Resp.”).

On March 10, 2017, we instituted an *inter partes* review of claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the ’902 patent on two grounds of obviousness. Patent Owner filed a Response to the Petition. Paper 16 (“PO Resp.”). Petitioner filed a Reply to Patent Owner’s Response. Paper 20 (“Pet. Reply”). With our authorization, Patent Owner filed a Surreply to Petitioner’s Reply. Paper 28 (PO Surreply).

Patent Owner filed a motion for observations on the cross-examination of Petitioner’s declarant, Andrew Bath (Paper 33), to which Petitioner filed a response (Paper 41). Petitioner filed a motion for observations on the cross-examination of Patent Owner’s declarant, Adam Darby (Paper 38), to which Patent Owner filed a response (Paper 40).

An oral hearing was held on November 17, 2017, a transcript of which has been entered in the record. Paper 48 (“Tr.”).

We have authority under 35 U.S.C. § 6(c). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73.

For the reasons that follow, we determine that Petitioner has shown by a preponderance of the evidence that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the ’902 patent are unpatentable.

A. Related Proceedings

The parties identify pending district court proceeding, *Fisher & Paykel Healthcare Limited v. ResMed Corp*, No. 3:16-cv-02068-DMS-WVG (S.D. Cal.), as potentially being affected by a decision in this proceeding. Pet. 3; Paper 6, 1–2. The parties also identify other district court proceedings that have been filed, but voluntarily dismissed. Pet. 3–4; Paper 6, 1.

Petitioner also has filed petitions for *inter partes* review of certain claims of related U.S. Patent No. 8,186,345 in IPR2016-01723 and U.S. Patent No. 8,453,641 in IPR2016-01724. Pet. 4. We denied institution in IPR2016-01723 and instituted trial in IPR2016-01724.

B. The '902 Patent

The '902 patent relates to an apparatus for measuring properties of gases supplied to a patient when the patient is undergoing treatment such as oxygen therapy or positive pressure treatment for conditions like obstructive sleep apnea or chronic obstructive pulmonary disease. Ex. 1001, Abstract. According to the specification, measuring temperature near the patient is commonly performed using a probe inserted in the breathing tube, where the probe is also connected to a humidifier. *Id.* at 1:35–37.

The '902 patent states that the prior art has several disadvantages. If the temperature probe is not correctly installed, then the humidification system may malfunction. *Id.* at 1:41–44. Running the sensor wires down the outside of the breathing tube lowers the reliability of the sensors by making them more vulnerable. *Id.* at 1:45–48. Alternatively, running the wires down the inside of the breathing tube increases the resistance to airflow and lowers the hygiene of the breathing circuit. *Id.* at 1:48–51.

Accordingly, the '902 patent specification states, "It is an object of the present invention to provide a method of measuring properties of gases supplied to a patient that goes some way to overcoming the abovementioned disadvantages in the prior art or which will at least provide the industry with a useful choice." *Id.* at 1:55–59. The specification further states that the invention seeks to measure various properties, such as temperature or humidity, at the end of a gas delivery tube or conduit using sensors mounted on a wire that resides within the delivery tube or conduit. *Id.* at 2:64–3:2. The circuit may be wired within a housing that may be a plastic molding "that protrudes from the plastic wall of the delivery tube into the gases flow through the conduit, in order to measure the gases properties." *Id.* at 4:49–53.

C. Illustrative Claim

We instituted an *inter partes* review of claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the '902 patent, of which claims 1 and 5 are the only independent claims. Claim 1 is representative and is reproduced below:

1. A conduit for supplying gases, the conduit comprising:
 - a proximal end configured to connect to a source of breathing gases;
 - a distal end configured to connect to a patient interface;
 - a wall defining a lumen for delivering a flow of gases to a patient;
 - a wire provided within or around the conduit and extending at least a portion of a length of the conduit, the length of

the conduit extending from a proximal portion of the conduit to a distal portion of the conduit; and

a gases property sensor configured to measure at least one property of the flow of gases and positioned at the distal portion of the conduit, the gases property sensor connected to the wire, and the gases property sensor disposed within a housing and within the flow of gases such that the gases property sensor is able to measure the at least one property of the flow of gases.

D. Grounds of Unpatentability Instituted for Trial

We instituted trial on the following grounds:

References	Basis	Claims challenged
Makin ¹ and Gradon ²	§ 103	1–7, 9, 10, 13–15, 19, 20, 27, and 33
Makin, Gradon, and Edirisuriya ³	§ 103	5–7, 9, 10, 13–15, 27, and 33

II. ANALYSIS

A. Person of Ordinary Skill in the Art

Petitioner asserts that a person of ordinary skill in the art would have had “a bachelor’s degree in electrical engineering or biomedical engineering or a related discipline with an understanding of circuit design principles, and a reasonable amount of relevant product design experience to develop a level

¹ Ronald Peter Makin, UK Pat. GB 2 173,274 B, issued Feb. 1, 1989 (“Makin,” Ex. 1009).

² Gradon et al., US 6,272,933 B1, issued Aug. 14, 2001 (“Gradon,” Ex. 1005).

³ Edirisuriya et al., US 2003/0236015 A1, published Dec. 25, 2003 (“Edirisuriya,” Ex. 1004).

of competence in the field of respiratory therapy, or an equivalent advanced education.” Pet. 14–15; Ex. 1003 ¶ 22. Patent Owner does not contest the level of ordinary skill in the art in its Response. PO Resp. 5.

We adopt Petitioner’s uncontested definition of the level of ordinary skill in the art. We further note that the prior art itself demonstrates the level of skill in the art at the time of the invention. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (explaining that specific findings regarding ordinary skill level are not required “where the prior art itself reflects an appropriate level and a need for testimony is not shown” (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985))).

B. Claim Construction

In an *inter partes* review, the Board interprets claim terms in an unexpired patent according to the broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (affirming applicability of broadest reasonable construction standard to *inter partes* review proceedings). Under that standard, and absent any special definitions, we generally give claim terms their ordinary and customary meaning, as would be understood by one of ordinary skill in the art at the time of the invention. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Any special definitions for claim terms must be set forth with reasonable clarity, deliberateness, and precision. *See In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

We determine that it is unnecessary to expressly construe any claim terms for purposes of this Decision. *See Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011) (“[C]laim terms need only be

construed ‘to the extent necessary to resolve the controversy.’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

C. *Obviousness over Makin and Gradon*

Petitioner asserts that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the ’902 patent are unpatentable as obvious over Makin and Gradon. Pet. 23–43. Patent Owner opposes Petitioner’s assertion. PO Resp. 13–25. Having considered the complete trial record, we determine that Petitioner has established by a preponderance of the evidence that the challenged claims are unpatentable based on the combined teachings of Makin and Gradon.

1. *Makin (Ex. 1009)*

Makin relates to hoses for delivering gases, particularly for medical humidifiers. Ex. 1009, 2.⁴ Makin addresses the “particular problem associated with medical humidifiers” referred to as “rain-out.” *Id.* Rain-out occurs because humidified gas loses heat as it passes along the delivery hose from the humidifying chamber to the patient, thereby resulting in condensation of the gas in the hose. *Id.* The prior art addresses rain-out by using a linear electrical resistance heater along the delivery hose and a temperature sensor at the delivery end of the hose. *Id.*

Makin identifies two problems with the prior art solution. *Id.* First, the linear wire together with the sensor renders the hose cumbersome. *Id.* Second, because the sensor is thermally isolated from the heater, it relies on gas flow to indicate the gas temperature. *Id.* Thus, when there is no gas

⁴ Like the parties, we cite the original page numbers provided at the top of Makin.

flow, the temperature of the gas at the sensor falls and the control unit responds by increasing the power to the heater, which, when the gas flow turns on again, causes a transient temperature overshoot. *Id.*

Accordingly, Makin states an aim of the invention is “to provide a delivery hose for use with a medical humidifier which minimi[z]es the problems referred to above and permits the medical humidifier to be controlled to safe operating temperatures during a period of no gas flow.” *Id.* at 3.

2. *Gradon (Ex. 1005)*

Gradon relates to a respiratory humidification system that provides humidified gas to a patient. Ex. 1005, 1:9–12. Gradon’s system includes a blower that provides gases to a humidification chamber, which holds a volume of water that is heated under the control of the humidifier’s controller to form water vapor that combines with the gases flowing through the humidification chamber. *Id.* at 7:50–66. The controller may receive inputs of temperature of the gases flow from temperature sensors near the patient and near the humidification chamber. *Id.* at 8:28–35. Gradon also describes a flow sensor that may be positioned anywhere along the breathing circuit, including in the same position as the temperature probe, providing two devices in one probe. *Id.* at 8:38–42. Gradon describes flow probe 19 preferably having two sensor housing means that contain sensors, such as thermistors. *Id.* at 8:56–9:9. Flow probe 19 is depicted in Figure 1, reproduced below:

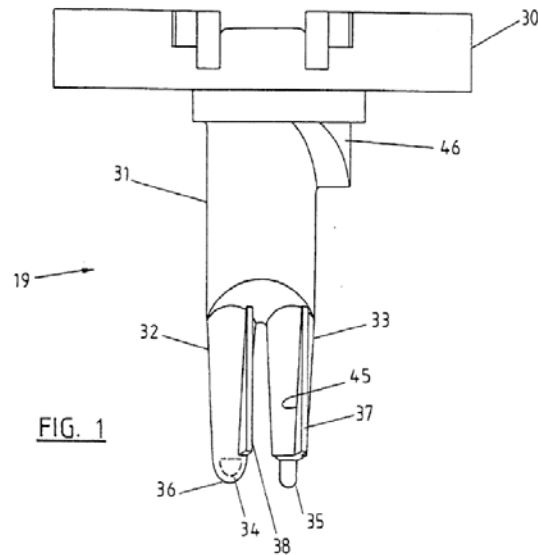


Figure 1 depicts flow probe 19, which comprises base portion 30 and stem 31 protruding from base 30. *Id.* at 8:56–61. Stem 31 has at least one sensor housing means 32 and 33 protruding from the distal end of stem 31. *Id.* at 8:61–63. According to Gradon, “[t]o protect thermistor 34, sensor housing means 32 completely encases or encapsulates the thermistor, however as there is only a thin layer of plastics material between the thermistor and the gases flow, the temperature reading obtained is still accurate.” *Id.* at 9:14–18.

3. Analysis

A patent claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations, including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3)

the level of skill in the art; and (4) objective evidence of nonobviousness. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

“[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 550 U.S. at 418. “[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine elements in the way the claimed new invention does.” *Id.* Moreover, a person of ordinary skill in the art must have had a reasonable expectation of success of doing so. *PAR Pharm., Inc. v. TWI Pharms., Inc.*, 773 F.3d 1186, 1193 (Fed. Cir. 2014).

Petitioner provides a detailed claim chart identifying where it contends each limitation of the challenged claims is described in Makin and Gradon. Pet. 18–22, 28–43. Patent Owner concedes that each limitation of the claims is taught by the combination of Makin and Gradon and that the only dispute is whether there was a reason to combine the references. Tr. 51:16–18. We agree with the parties and find that each limitation of claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 is taught by the combination of Makin and Gradon, as indicated by Petitioner in its claim chart. See Pet. 18–22, 28–43.

Our decision, therefore, turns on whether there was a reason to modify Makin’s temperature sensor by adding the sensor housing means of Gradon. Having considered the complete trial record, we find that a person of ordinary skill in the art would have had a reason to combine the temperature sensor of Makin with Gradon’s housing with a reasonable expectation of success to protect the temperature sensor from the flow of humidified gas in the system. See Ex. 1003 ¶ 42; Ex. 1032 ¶¶ 7–11.

Gradon's disclosure and the testimony of Petitioner's expert, Mr. Bath, support our finding. For example, Gradon expressly provides a reason to combine, stating that the sensor housing means completely encases the thermistor "[t]o protect [the] thermistor." Ex. 1005, 9:14–15. A person of ordinary skill in the art reading Gradon would have been motivated to apply that suggested housing to protect Makin's similar temperature sensor. Ex. 1032 ¶ 7. We credit the testimony of Mr. Bath, who explains that the housing "protect[s] the thermistor from the flow of humidified gases while providing reliable and accurate temperature measurement." Ex. 1003 ¶ 42. This testimony is consistent with Gradon's disclosure, which refers to the need "to reduce or eliminate the occurrence of liquid water accumulation on the sensors." Ex. 1005, 10:4–6. As Mr. Bath testified, protecting the thermistor "was a recognizable benefit that would have prompted a [person of ordinary skill in the art] to likewise implement a protective housing suitable for Makin's system." Ex. 1032 ¶ 8. Thus, we find that adding a housing to Makin's temperature sensor amounts to no "more than the predictable use of prior art elements according to their established functions." *KSR*, 550 U.S. at 417.

Patent Owner contends that Makin does not disclose a housing and does not suggest a reason to include a housing for its sensor. PO Resp. 13–14 (citing Ex. 2008 ¶¶ 34, 49). Patent Owner further contends that Gradon teaches a removable sensor, and that Makin's sensor wires are incompatible with the removable sensors of Gradon. *Id.* at 16 (citing Ex. 2008 ¶ 48). Accordingly, Patent Owner argues that because Makin and Gradon use incompatible designs, a person of ordinary skill in the art "would not have looked to Gradon to pluck the housing from Gradon and use it in Makin." *Id.* at 17 (citing Ex. 2008 ¶ 49).

Patent Owner also argues that a person of ordinary skill in the art would understand that sensor housings have disadvantages, as recognized by Gradon. *Id.* at 17–18. Specifically, Patent Owner cites Gradon’s teaching that “any layer of material between the thermistor 35 and the gases flow would influence the heat transfer rate from the thermistor to gases and thus reduce the accuracy of the flow rate reading.” *Id.* at 18 (citing Ex. 1005, 9:34–38). Patent Owner’s expert thus concludes that Gradon would direct a person of ordinary skill in the art not to house the gases sensor in a housing. Ex. 2008 ¶ 50.

We are not persuaded by Patent Owner’s arguments. First, that Makin’s sensor wires may be incompatible with the removable sensors of Gradon is not controlling, as the systems need not be physically combinable to render the claims obvious. *See In re Sneed*, 710 F.2d 1544, 1550 (Fed. Cir. 1983) (“[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review.”). Rather, the test is whether “a skilled artisan would have been motivated to combine the teachings of the prior art references to achieve the claimed invention.” *Allied Erecting and Dismantling Co. v. Genesis Attachments, LLC*, 825 F.3d 1373, 1381 (Fed. Cir. 2016) (citation omitted). Here, Gradon expressly states that the housing protects the thermistor, which would have motivated a person of ordinary skill to cover Makin’s temperature sensor with a housing. Ex. 1032 ¶ 8.

The parties disagree, however, on the purpose of Gradon’s housing, as Gradon simply states the sensor housing means “protect[s] thermistor 34.” Ex. 1005, 9:14–15. Petitioner’s expert, Mr. Bath, testifies that a person of ordinary skill in the art would have understood Gradon’s housing to protect the sensor “from the hot and humid environment it is exposed to within the

breathing tube at least because such an environment is not typically conducive to unprotected electrical components.” Ex. 1032 ¶ 8. Patent Owner’s expert, Mr. Darby, on the other hand, concludes that “persons of ordinary skill would understand that Gradon’s housing facilitated allowing Gradon’s flow probe to be removable by providing structures to attach sensor wires and correctly align the sensor in the entry port.” Ex. 2008 ¶ 47.

Having considered the experts’ respective testimony, we find Mr. Bath’s explanation more persuasive than Mr. Darby’s. Mr. Darby testifies that Gradon’s “housing was designed to ‘hold wire conductors’ and included a stem 31 with sensors protruding from a base.” *Id.* (citing Ex. 1005, 8:56–63). Mr. Darby seemingly refers to Gradon’s “housing” as the plastic molding encasing the entire probe, rather than sensor housing means 32 and 33. *See* Ex. 1005, 8:57–60 (“Flow probe 19 is preferably formed by moulding in a plastics material such as polycarbonate and comprises a base portion 30 adapted to hold wire conductors (48 in FIGS. 3 and 4) Protruding from base 30 is a stem 31 which has at least one sensor housing means 32 and 33 protruding from its end furthest from base 30.”). But Mr. Darby does not address Gradon’s teaching that the sensor housing means “protect[s the] thermistor.”⁵ Ex. 1005, 9:14–15. Nevertheless, protecting

⁵ We note that at oral hearing, counsel for Patent Owner suggested that “Gradon protects one [thermistor] from being inserted and removed because it can.” Tr. 47:8–9. Patent Owner, however, does not direct us to testimony from Mr. Darby, or any other evidence, that supports this assertion. We, therefore, do not give Patent Owner’s unsubstantiated attorney argument any weight. *Invitrogen Corp. v. Clontech Labs., Inc.*, 429 F.3d 1052, 1068 (Fed. Cir. 2005) (“Unsubstantiated attorney argument regarding the meaning of technical evidence is no substitute for competent, substantiated expert testimony.”).

the thermistor and facilitating alignment of the probe are not mutually exclusive concepts. In other words, even assuming the housing (i.e., the entire plastic molding) would facilitate the removability of Gradon's flow probe, that does not preclude the sensor housing means from also protecting the thermistor from the humid conditions within the breathing tube, as Mr. Bath suggests. See Ex. 1032 ¶ 7 (testifying that a housing "would have been prompted regardless of whether the temperature sensing thermistor was 'permanently' or 'removably' attached with the breathing tube").

Nor are we persuaded by Mr. Darby's testimony that Gradon would have directed one of ordinary skill away from a housing because Gradon teaches that housings reduce sensor accuracy. Ex. 2008 ¶ 50 (citing Ex. 1005, 9:34–38). Mr. Darby's testimony is not persuasive because the cited portion of Gradon refers to the flow sensing means, which both parties agree cannot be covered by a housing to function properly. Tr. 17:10–15 (Petitioner); 47:1–8 (Patent Owner). In contrast, for the temperature sensing means, Gradon teaches that a housing is appropriate because the material is thin enough such that "the temperature reading obtained is still accurate." Ex. 1005, 9:13–17. Thus, we are not persuaded that one of ordinary skill reading Gradon would have considered adding a housing to Makin's temperature sensor to be disadvantageous, as Patent Owner claims. Instead, we find that a person of ordinary skill in the art would have had a reason to combine Gradon's housing with Makin's temperature sensor because such a person would recognize the benefit of protecting the temperature sensor from the flow of humidified gases without compromising the accuracy of the temperature reading. Ex. 1003 ¶ 42; Ex. 1005, 9:14–18.

Petitioner offers several additional rationales for combining Gradon and Makin. For example, Petitioner asserts that a person of ordinary skill in

the art would have included Gradon's thermistor in the temperature sensor of Makin to provide reliable monitoring of the temperature of the gas flow through the delivery hose for feedback control, which would allow precise control of the humidification system. Pet. 26; Ex. 1003 ¶ 41. Patent Owner disagrees, arguing Makin does not teach or suggest the need to have more precise control of its humidification system. PO Resp. 20–25. It is well settled, however, that “even where references do not explicitly convey a motivation to combine, ‘any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.’” *See ABT Sys., LLC v. Emerson Elec. Co.*, 797 F.3d 1350, 1360 (Fed. Cir. 2015) (quoting *KSR*, 550 U.S. at 420). We therefore find Petitioner's additional rationale convincing and are not persuaded by Patent Owner's argument.

Petitioner also argues, as an alternative, that a person of ordinary skill in the art would have modified Makin's system by replacing the distal temperature sensor with the entire “temperature probe 19” of Gradon to facilitate more precise flow control and air delivery to the patient by providing a feedback related both to temperature and flow. Pet. 27 (citing Ex. 1003 ¶ 43). Patent Owner contends that “substituting Gradon's flow probe 19 into Makin ignores that the substitution would have rendered Makin inoperable and therefore teaches away from the combination.” PO Resp. 25 (citing Ex. 2008 ¶ 53). But given Petitioner makes this argument in the alternative, we need not reach the question of operability.

Regardless, even if we were to accept Patent Owner arguments with respect to these additional rationales for combining Gradon and Makin, we find the record evidence sufficient to support modifying Makin's temperature sensor with Gradon's thermistor housing to protect the sensor

from the flow of humidified gases with a reasonable expectation of success. *See Outdry Techs. Corp. v. Geox S.p.A.*, 859 F.3d 1364, 1370–71 (Fed. Cir. 2017) (“Any motivation to combine references, whether articulated in the references themselves or supported by evidence of the knowledge of a skilled artisan, is sufficient to combine those references to arrive at the claimed process.”).

Finally, we note that Patent Owner does not offer evidence supporting any objective indicia of nonobviousness of the invention. Accordingly, having considered the complete trial record and weighing all evidence in favor and against, we determine that Petitioner has shown by a preponderance of the evidence that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 are unpatentable as obvious over Makin and Gradon.

D. Obviousness over Makin, Gradon, and Edirisuriya

Petitioner asserts that claims 5–7, 9, 10, 13–15, 27, and 33 of the ’902 patent are unpatentable as obvious over Makin, Gradon, and Edirisuriya. Pet. 44–60. For the reasons discussed above, however, we determine that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 are unpatentable as obvious over the combination of Makin and Gradon. In light of that determination, we need not address whether a subset of those claims (i.e., claims 5–7, 9, 10, 13–15, 27, and 33) is also unpatentable as obvious over the combination of Makin, Gradon, and Edirisuriya.⁶

⁶ We note that in IPR2017-01724, Petitioner made similar arguments to those it made here regarding combining Edirisuriya with the prior art references. We determined there that Petitioner had not established by a preponderance of the evidence that a person of ordinary skill in the art would have been motivated to combine the prior art systems with Edirisuriya.

Moreover, the Petition framed this ground as effectively contingent upon a narrow interpretation of claim 5. That is, Petitioner states, “to the extent claim 5 is narrowly interpreted (e.g., if *Makin* in view of *Gradon* were considered to not expressly disclose an electrical circuit connected to a wire that is configured to provide a signal to a controller through the wire), Petitioners submit that such a feature was common in the art.” Pet. 46. Because we find that each of the limitations of the claims is taught by the combination of *Makin* and *Gradon*—and Patent Owner does not assert otherwise (Tr. 51:16–18)—we determine it is unnecessary to consider whether the claims are obvious over the combination of *Makin*, *Gradon*, and *Edirisuriya*.

III. MOTIONS TO EXCLUDE

The party moving to exclude evidence bears the burden of proving that it is entitled to the relief requested—namely, that the material sought to be excluded is inadmissible under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.20(c), 42.62(a).

Patent Owner filed a Motion to Exclude certain deposition testimony of Mr. Darby cited by Petitioner in the Reply. Paper 34, 1–6. We do not rely on any of the challenged testimony in rendering this Decision. Accordingly, we dismiss Patent Owner’s Motion to Exclude as moot.

Petitioner filed a Motion to Exclude (1) Exhibit 2016; (2) all testimony by Mr. Darby in Exhibit 1042 related to Exhibit 2016 and communication with Vishay; and (3) all testimony by Mr. Darby in Exhibit 2042 related to communication with Mr. Edirisuriya. Paper 35, 1. We do not rely on the challenged evidence in rendering this Decision. Accordingly, we dismiss Petitioner’s Motion to Exclude as moot, as well.

IV. CONCLUSION

For the foregoing reasons, we conclude that Petitioner has established by a preponderance of the evidence that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the '902 patent are unpatentable as obvious over Makin and Gradon.

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that claims 1–7, 9, 10, 13–15, 19, 20, 27, and 33 of the '902 patent are held unpatentable;

FURTHER ORDERED that Petitioner's Motion to Exclude Evidence is *denied as moot*;

FURTHER ORDERED the Patent Owner's Motion to Exclude Evidence is *denied as moot*;

FURTHER ORDERED that because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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