

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PACIFIC MARKET INTERNATIONAL, LLC,
Petitioner,

v.

IGNITE USA, LLC,
Patent Owner.

Case IPR2016-01875
Patent 8,360,267 B1

Before JOSIAH C. COCKS, MITCHELL G. WEATHERLY, and
JAMES A. WORTH, *Administrative Patent Judges*.

WEATHERLY, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. BACKGROUND

Pacific Market International, LLC (“PMI” or “Petitioner”) filed a petition (Paper 1, “Pet.”) to institute an *inter partes* review of claims 10–20 (the “challenged claims”) of U.S. Patent No. 8,360,267 B1 (Ex. 1020, “the ’267 patent”). 35 U.S.C. § 311. Petitioner supported the Petition with a Declaration from Aron D. Dahlgren. Ex. 1027. Ignite USA, LLC (“Ignite”

or “Patent Owner”) did not file a Preliminary Response. On March 29, 2017, based on the record before us at the time, we instituted an *inter partes* review of claims 10–20. Paper 7 (“Institution Decision” or “Dec.”). We instituted the review on the following challenges to the claims:

Reference(s)	Basis	Claims
U.S. Patent No. 6,601,735 B2 (Ex. 1001, “Milian”)	§ 102	10, 11, 13
Milian	§ 103	10, 11, 13
U.S. Patent No. 3,972,443 (Ex. 1002, “Albert”) and Milian	§ 103	10–20

Dec. 11.

After we instituted this review, Patent Owner filed a Corrected Patent Owner Response in opposition to the Petition (Paper 14, “PO Resp.”) that was supported by a Declaration from Jonathan S. Colton, Ph.D. (Ex. 2004). Petitioner filed a Reply in support of the Petition (Paper 18, “Reply”). Patent Owner did not move to amend any claim of the ’267 patent.

Ignite also filed a Patent Owner’s Motion for Observations on Cross-Examination of Petitioner’s Reply Declarant Mr. Dahlgren, Paper 24, to which PMI filed a response, Paper 27. Ignite also filed a Motion to Exclude to which PMI filed its Opposition, and Ignite filed its Reply. Papers 25 (“Mot.”), 26 (“Opp.”), 28 (“Mot. Reply”).

We heard oral argument on December 12, 2017. A transcript of the argument has been entered in the record (Paper 31, “Tr.”).

We have jurisdiction under 35 U.S.C. § 6(c). The evidentiary standard is a preponderance of the evidence. *See* 35 U.S.C. § 316(e); 37 C.F.R.

§ 42.1(d). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73.

For the reasons expressed below, we conclude that PMI has not demonstrated by a preponderance of evidence that claims 10–20 are unpatentable.

B. RELATED PROCEEDINGS

The parties identified as a related proceeding the co-pending district court proceeding of *Ignite USA, LLC v. Pacific Market International, LLC*, No. 1:16-cv-01929 (ND Ill. filed 2/3/16). Pet. 7; Paper 4, 1.

C. THE '267 PATENT

The '267 patent is directed to sealing mechanisms and trigger mechanisms for opening and closing apertures in a drinking container. Ex. 1020, 1:16–19. More particularly, the Specification describes a seal assembly that is actuated by a button including a locking mechanism that is locked when the button is in one position and unlocked when the button is in another position. *Id.* at 1:43–57. Claims 10 and 14 are the only independent claims among the challenged claims. *Id.* at 7:14–30 (claim 10), 8:1–22 (claim 14). Each of claims 11–13 depends directly from claim 10, *id.* at 7:31–43, and claims 15–20 depend ultimately from claim 14, *id.* at 8:23–41. Claim 10, which is illustrative of the challenged claims, recites:

10. A locking mechanism for a drinking container having a container body defining a container cavity, and a lid covering the container cavity, the locking mechanism comprising:

a stop on the lid;

a button member moveable in a first direction from a first position, where the button member is prevented from being actuated, to a second position about the lid assembly,

the button member further being moveable in a second direction when the button is disposed in the second position,

the button member having a locking portion thereto, the locking portion being adjacent the stop when the button member is disposed in the first position and,

a manifold, the button member being connected in a sliding engagement to the manifold, the manifold operably operating a seal assembly.

Id. at 7:14–30 (with added line breaks for clarity).

II. ANALYSIS

A. CLAIM INTERPRETATION

“A claim in an unexpired patent 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); *see also* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (affirming that USPTO has statutory authority to construe claims according to Rule 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, and absent any special definition, we give claim terms their ordinary and customary meaning. *See In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010); *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.” (internal quotation marks omitted)). Only terms which are in controversy need to be construed, and then only to the extent necessary to resolve the controversy. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

1. Terms for Which We Ordered Explicit Interpretation

We instructed the parties to address explicitly in their papers at trial the following claim interpretation issues:

(1) whether any items recited in the preambles of independent claims 10 and 14 are limitations of those respective claims;

(2) the meaning of “the first direction is generally about a longitudinal axis of the container body” and “the second direction is generally transverse to a longitudinal axis of the container body” as recited in dependent claim 12;

(3) the meaning of “disposed proximate a locking wall” and “disposed distal the locking wall” as recited in claim 14;

(4) the meaning of “the first direction of movement of the button member is about a generally longitudinal axis of the container body” and “the second direction of movement of the button member is generally transverse to the longitudinal axis of the container body” as recited in claim 15; and

(5) the meaning of “disposed between” as recited in claim 17.

Dec. 4–5. Based upon our review of the record and our determination as expressed below that PMI has failed to carry its burden to establish that any of the challenged claims are unpatentable based on the “button member movable” limitation analyzed in detail below, we need not resolve any of the issues listed above to resolve the dispute between the parties. *See Vivid Techs.*, 200 F.3d at 803. Accordingly, we do not expressly address any of these terms.

2. *button member moveable in a first direction from a first position, . . . to a second position about the lid assembly*

The argument and evidence presented by the parties at trial reveals that we must expressly interpret the following phrase recited in claim 10: “button member moveable in a first direction from a first position, . . . to a second position about the lid assembly.” Neither party cites portions of the Specification or prosecution history of the ’267 patent that are relevant to the meaning of this phrase. *See* Pet. 58 (not citing any intrinsic evidence while arguing that Milian describes the phrase at issue); Reply 13–15 (same); PO Resp. 32 (not citing any intrinsic evidence while arguing that Milian fails to describe the phrase at issue).

The Specification describes one embodiment of the claimed button in the form of button member 20 and illustrates the manner in which button member 20 moves from a first position to a second position in Figures 2 and 3, with relevant portions reproduced below left and right respectively.

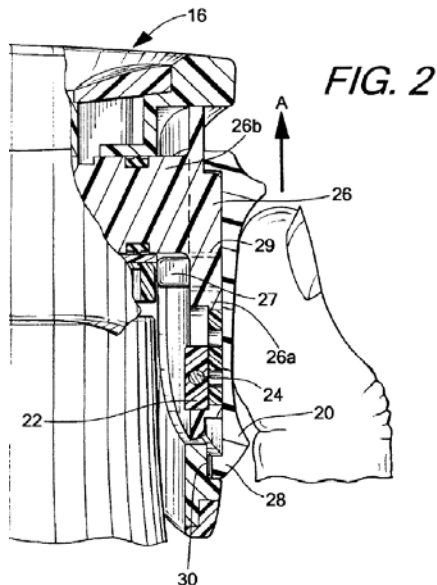


Figure 2 is a partial cross section view illustrating button member 20 in the first position.

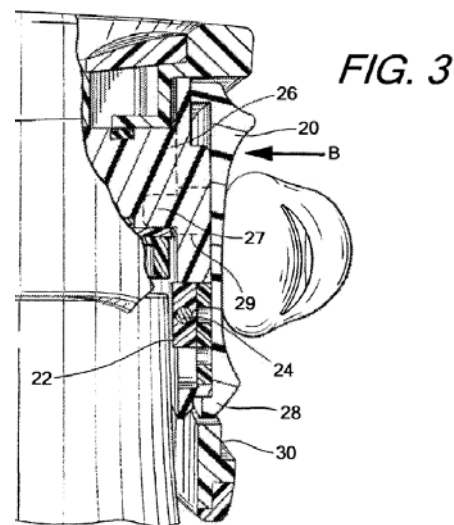


Figure 3 is a partial cross section view illustrating button member 20 in the second position.

The Specification indicates that button member 20 moves in direction A shown in Figure 2 to move from the first position (“locked”) shown in Figure 2 to the second position (“unlocked”) shown in Figure 3. Ex. 1020, 3:33–42. Once button member 20 is in the second position, it “is displaceable” in direction B, *id.* at 4:6–11, so that it “has a different location” and may be actuated to open the drinking by moving it in direction B, *id.* at 51–59. The Specification expressly describes no other types of movement in the first and second directions and no other types of first and second positions.

Nevertheless, PMI points out that the Specification most broadly describes movement of the button member as follows:

While the movement of the button member 20 in the preferred embodiment is in the direction of the longitudinal axis of the container, it is understood that the button member 20 may be moved in any direction, for example to the side, at an angle, etc., to effectuate a locking engagement between the button member 20 and a stop 30

Reply 5 (quoting Ex. 1020, 3:47–54 (emphasis by PMI)). However, even this broadest description indicates that the button member moves in its entirety in a direction. The Specification never describes simply rotating a button member in a fixed location on the lid. The claim also recites that movement of the button member from first to second positions occurs “about the lid assembly” indicating that the entire button member moves relative to the lid assembly. *Id.* at 7:19–22.

The prosecution history of the ’267 patent indicates that the Examiner concluded that the most relevant prior art failed to describe the moveable button member. The Examiner cited U.S. Patent 7,997,442 B2, Ex. 3001, as the “closest available prior art” and U.S. Patent No. 3,942,630 to Phillips,

Ex. 3002, as describing a “sliding cover safety package,” *id.* at Abstract. Ex. 1027, 32. However, the Examiner concluded that “one of ordinary skill in the art would not have been able to physically combine the references without undue experimentation.” *Id.* The Examiner considered Phillips’ sliding cover, which moves in its entirety, Ex. 3002, to be an analog for the claimed button member. Therefore, we conclude that the Examiner understood the claimed button member to move in its entirety.

Based on our review of all the relevant intrinsic evidence and the plain meaning of “button member moveable in a first direction from a first position, . . . to a second position about the lid assembly,” we determine that the phrase requires the entire button member to be moveable from a locked position to a different position.

B. LEVEL OF ORDINARY SKILL

PMI contends that a person having education, training, or experience of general mechanical engineering or a bachelor’s degree in mechanical engineering would have an ordinary level of skill in the relevant art. Reply 10 (citing Ex. 1027 ¶¶ 17–18). Ignite contends that a person with a bachelor’s degree in industrial design or mechanical engineering would have ordinary skill in the art. PO Resp. 27 (citing Ex. 2004 ¶ 45). Ignite also contends that a person having an associate’s degree in mechanical engineering technology along with certain experience that is closely related to the claimed lid would have ordinary skill in the art. *Id.* Our review of the parties’ respective positions indicates that they agree that a combination of experience and education is sufficient to obtain ordinary skill in the art. Because Ignite is the only party that provides any evidence relating to the

manner in which experience may substitute for education, we adopt Ignite's definition of the level of ordinary skill in the art.

C. THE PARTIES' POST-INSTITUTION ARGUMENTS

In our Decision on Institution, we concluded that the argument and evidence adduced by PMI demonstrated a reasonable likelihood that claims 10–20 were unpatentable as anticipated or obvious based on the challenges identified in the table in Part I.A above. Dec. 11. We must now determine whether Petitioner has established by a preponderance of the evidence that the specified claims are unpatentable over the cited prior art. 35 U.S.C. § 316(e). In this regard, we previously instructed Patent Owner that “any arguments for patentability not raised in the [Patent Owner Response] will be deemed waived.” Paper 8, 6; *see also In re Nuvasive, Inc.*, 842 F.3d 1376, 1381 (Fed. Cir. 2016) (holding that patent owner's failure to proffer argument at trial as instructed in scheduling order constitutes waiver). Additionally, the Board's Trial Practice Guide states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable and state the basis for that belief.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012).

D. LEGAL STANDARDS

PMI challenges the patentability of claims 10–20 on the grounds that the claims are either anticipated or obvious in light of various references including: Milian and Albert. To prevail in its challenges to the patentability of the claims, Petitioner must establish facts supporting its challenges by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). “In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges

is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). The burden of persuasion never shifts to Patent Owner. See *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (citing *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1326–27 (Fed. Cir. 2008)) (discussing the burden of proof in *inter partes* review).

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987). The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), reaffirmed the framework for determining obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The *KSR* Court summarized the four factual inquiries set forth in *Graham* that we apply in determining whether a claim is reasonably likely to be unpatentable as obvious under 35 U.S.C. § 103(a) as follows:

(1) determining the scope and content of the prior art, (2) ascertaining the differences between the prior art and the claims at issue, (3) resolving the level of ordinary skill in the pertinent art, and (4) considering objective evidence indicating obviousness or nonobviousness. *KSR*, 550 U.S. at 406 (citing *Graham*, 383 U.S. at 17–18). In an *inter partes* review, Petitioner cannot satisfy its burden of proving obviousness by employing “mere conclusory statements.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016). Thus, to prevail Petitioner must explain how the proposed combinations of prior art would have rendered the challenged

claims unpatentable. With these standards in mind, we address each challenge below.

E. CLAIMS 10, 11, AND 13: ANTICIPATION BY MILIAN

PMI argues that Milian anticipates claims 10, 11, and 13. Pet. 31–35, 55–72. Milian generally describes a container for dispensing fluid that includes a device with a button that a user presses to pump fluid from the container. Ex. 1001, 1:51–65. The button is part of an assembly that includes a locking mechanism in which the user can move the locking mechanism between locked and unlocked positions by twisting the button around a point located roughly near the center of the button when viewed from above. *Id.* Milian's Figures 5a and 5b, reproduced below left and right respectively, illustrate its locking button in a locked position and an unlocked position in which the button has been rotated clockwise.

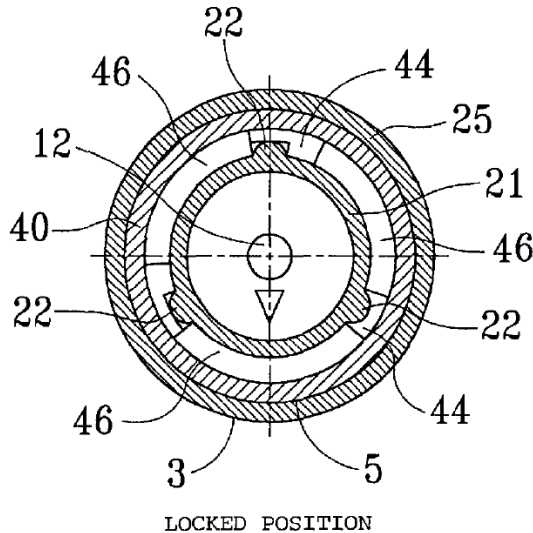


FIG. 5a

Milian's Figure 5a is a horizontal cross sectional view illustrating Milian's locked button.

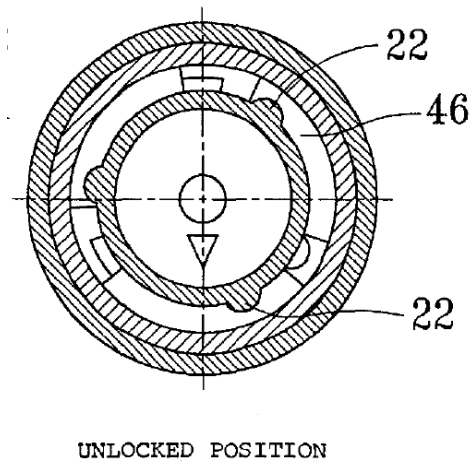


FIG. 5b

Milian's Figure 5b is a horizontal cross sectional view illustrating Milian's unlocked button.

PMI sets forth in detail the manner in which it contends that Milian describes every element recited in claims 10, 11, and 13 and cites relevant portions of Milian in support of its contentions. Pet. 31–35, 55–72 (citing Ex. 1001, 1:17–25, 1:34–36, 1:48–65, 2:63–65, 3:9–27, 3:34–43, 4:19–24, 4:27–37, 4:45–45, 4:54–5:41, 5:49–6:23, 6:36–38, Abstract, Figures 1, 2, 3, 4, 5a, 5b). PMI also relies upon Mr. Dahlgren’s testimony in which he opines that each element recited in claims 10, 11, and 13 is shown by Milian. *Id.* at 31–35 (citing Ex. 1027 ¶¶ 84–91). Mr. Dahlgren also provides claim charts that reflect his comparison of Milian to claims 10, 11, and 13 with citations to specific portions of Milian that he contends correspond to the claimed elements. Ex. 1027 ¶¶ 127, 128, 130. Generally, PMI contends that Milian describes the elements of independent claim 10 as set forth in the table below.

Claim 10	Corresponding Element(s) in Milian
container body	receptacle 6 with neck 60
lid	fastening ring 4, pusher 2, a dispenser member 1, actuator rod 12, covering cap 3 and trim 5
stop	bearing surfaces 45 and 48 of sleeve 40 of fastening ring 4
button member	pusher 2
locking portion of button member	one of the locking members 22 of pusher 2
manifold	actuator rod 12 operably operates the sealing assembly of the pump/valve 1
sealing assembly	pump/valve 1

Pet. 63 (citing Ex. 1027 ¶ 128).

Ignite contends that Milian fails to describe a button member that is moveable in a first direction “about the lid assembly.” PO Resp. 32. More specifically, Ignite argues that Milian’s button merely rotates around an axis and does not move “in a direction from one point to another ‘about the lid’” as required by claim 10. *Id.* PMI concedes that Milian’s button rotates around a center point that does not move, but argues that every other portion of Milian’s button (locking member 22) moves and “nothing requires the entire button move.” Reply 13. For the reasons expressed in Part II.A.2 above, we conclude that claim 10 requires that the entire button move from one position to another. Accordingly, we also determine that PMI has failed to establish by a preponderance of evidence that Milian anticipates claim 10.

Claims 11 and 13 depend directly from claim 10, and also require that the button member is moveable “about the lid assembly.” Ex. 1020, Therefore, PMI has also failed to establish by a preponderance of evidence that Milian anticipates dependent claims 11 and 13.

F. CLAIMS 10, 11, AND 13: OBVIOUSNESS OVER MILIAN

PMI argued in the Petition that Milian alone rendered claims 10, 11, and 13 unpatentable as obvious. Pet. 31. PMI mentions the concept of obviousness in a heading, but wholly fails to cite any evidence or provide any argument that is directed to its purported challenge to claims 10, 11, and 13 as being obvious over Milian alone. *See id.* at 31–35 (explaining only that Milian anticipates claims 10, 11, and 13). Ignite argues that PMI’s challenge to claims 10, 11, and 13 as obvious over Milian fails for the same reasons that Milian fails to anticipate these claims. PO Resp. 34. Ignite further argues that PMI failed to provide any argument or evidence for its obviousness challenge beyond that which it provided in support of its

anticipation argument and that any argument it may present in a reply would be improper. *Id.* at 35–36. We agree with Ignite.

Our Rules require a petitioner to identify in detail how a claim is unpatentable under the cited statute, 37 C.F.R. § 42.104(b)(4), and cite specific portions of evidence supporting each challenge, *id.* § 42.104(b)(5). All such arguments and citations to evidence must be supplied in the Petition. 37 C.F.R. § 42.23(b); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge, Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (“Unlike district court litigation—where parties have greater freedom to revise and develop their arguments over time and in response to newly discovered material—the expedited nature of IPRs bring with it an obligation for petitioners to make their case in their petition to institute.”); *see also* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012) (“A reply that raises a new issue or belatedly presents evidence will not be considered and may be returned.”).

As we have noted above, PMI fails to establish that Milian anticipates claims 10, 11, and 13. The Petition fails to set forth any persuasive argument or evidence independent of PMI’s challenge to claims 10, 11, and 13 as being anticipated by Milian to demonstrate that Milian renders claims 10, 11, and 13 obvious. To the extent that PMI proffers new argument and cites new evidence supporting its obviousness challenge in its Reply, Reply 16–17 (citing Ex. 1047 ¶¶ 52–55), we disregard the new argument and evidence as being beyond the scope of a proper Reply under 37 C.F.R. § 42.23(b). We also note that PMI’s entire argument in the Reply relating to obviousness of claims 10, 11, and 13 over Milian spans approximately one half of one page and concludes with a citation to paragraphs 52–55 of

Exhibit 1047, a contemporaneously filed declaration from Mr. Dahlgren. These paragraphs span more than three pages in which Mr. Dahlgren explains why he considers claims 10, 11, and 13 to be obvious over Milian alone. PMI's citation essentially attempts to incorporate by reference three pages of argument that would not fit in its Reply, which is four words shy of the 5,600-word limit.¹ Because PMI's citation to Mr. Dahlgren's testimony improperly contravenes the prohibition against incorporating arguments by reference, 37 C.F.R. § 42.6(a)(3), we disregard Mr. Dahlgren's reply testimony relating to obviousness over Milian for this additional reason. Accordingly, we conclude that PMI has failed to establish that Milian renders claims 10, 11, and 13 unpatentable as obvious.

G. CLAIMS 10–20: OBVIOUSNESS IN VIEW OF ALBERT AND MILIAN

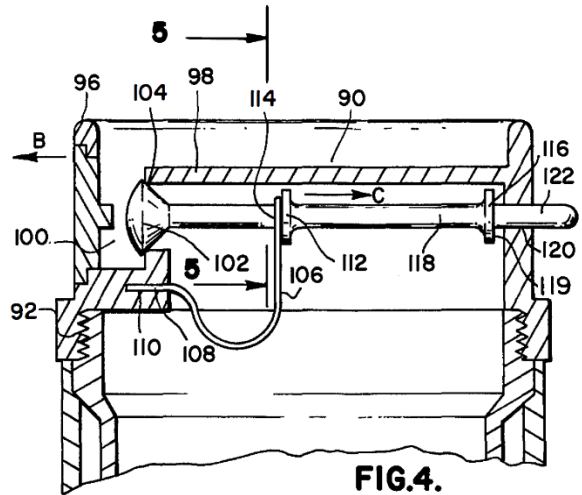
PMI argues that the combination of Albert and Milian renders claims 10–20 unpatentable as obvious. For the reasons expressed below, we conclude that PMI has failed to establish that claims 10–20 are unpatentable over the combination of Albert and Milian.

1. Overview of Albert

Albert generally describes a drinking container with a lid and a button-actuated valve for opening a drinking aperture. Ex. 1002, 1:25–44.

¹ See Reply, Certification of Word Count (certifying that Reply contains 5,596 words of the 5,600 words permitted under the Rules).

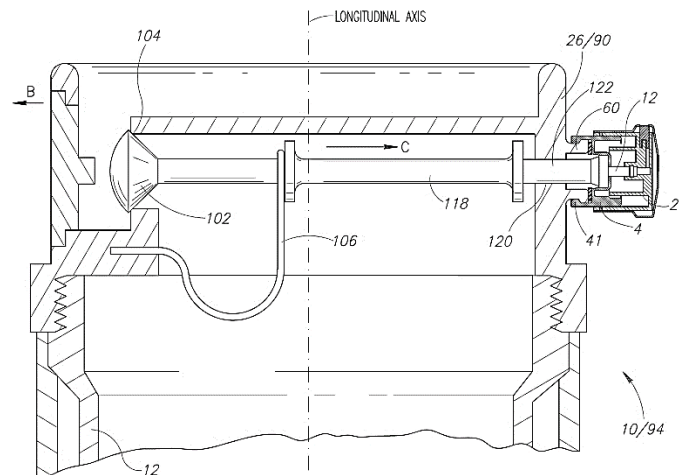
PMI focuses on the embodiment of Albert's container cover 90, which is illustrated in Albert's Figure 4, reproduced at right. Actuator 122 does not include a locking mechanism to prevent valve 102 from opening. *Id.*, Fig. 4. However, Albert indicates that spring 106 biases valve 102 closed so that when a user



releases actuator 122, valve 102 automatically closes the drinking aperture. *Id.*, see also 5:4–7, 5:17–31, Figure 4 (describing pressing actuator portion 122 to move shank 118 and open poppet valve 102 against biasing force of spring 106). In this way, Albert achieves a stated objective of preventing unintended spilling from the container. *Id.* at 2:26–29. Spring 106 applies force in a manner to permit valve 102 to open and relieve excessive steam pressure inside the container. *Id.* at 5:21–31.

2. PMI's Argument and Evidence

PMI identifies in detail the manner in which every element of claims 10–20 is described by the combination of Albert and Milian. Pet. 35–50, 64–82. PMI also contends that an ordinarily skilled artisan would have been motivated to incorporate Milian's locking mechanism onto the end of Albert's actuator to prevent accidental opening of the drinking aperture in Albert's container. *Id.* at 50–54. PMI relies upon testimony from Mr. Dahlgren in



which he considers a hypothetical drinking container incorporating Milian's locking mechanism onto the button in Albert's lid, which is shown in Exhibit 1040, reproduced at right. *Id.* at 35–50 (citing Ex. 1027 ¶¶ 92–115). Mr. Dahlgren testifies that an ordinarily skilled artisan would have been motivated to combine Milian's locking mechanism with Albert's drinking container as shown in the hypothetical container. *Id.* at 50–54 (citing Ex. 1027 ¶¶ 116–126).

PMI contends that the combination of Albert and Milian describes the elements of independent claim 10 as set forth in the table below.

Claim 10	Corresponding Element(s) in Albert/Milian
container body	container portion 12 of drinking receptacle 10/94 (Albert)
lid	receptacle cover 26/90 (Albert) fastening ring 4, pusher 2, a dispenser member 1, actuator rod 12, covering cap 3, trim 5 and receptacle 6 with neck 60 (Milian)
stop	bearing surfaces 45 and 48 of sleeve 40 of fastening ring 4 (Milian)
button member	pusher 2 (Milian)
locking portion of button member	one of the locking members 22 of pusher 2 (Milian)
manifold	valve shank 118 and its actuator portion 122 (Albert)
sealing assembly	actuator rod 12 (Milian) valve poppet 102, seat 104 and spring 106 (Albert)

Id. at 67 (citing Ex. 1027 ¶ 129). PMI also provides a similar tabular comparison of the elements of claim 14 to the disclosures of Albert and Milian. *Id.* at 76 (citing Ex. 1027 ¶ 131).

3. *Ignite's Argument and Evidence*

a) Claims 10–20: Motivation to Combine Albert and Milian

Ignite argues that PMI has failed to demonstrate that an ordinarily skilled artisan would have combined Albert and Milian to arrive at the claimed invention. PO Resp. 39–49. More specifically, Ignite persuasively argues that an ordinarily skilled artisan would not have modified Albert to add Milian's locking mechanism onto Albert's actuator 122 because doing so would have ignored Albert's manner of preventing accidental actuation of the drinking valve 102 and would have *prevented* Albert's valve 102 from automatically opening in the presence of excessive pressure within its container. *Id.* at 43–44 (citing Ex. 1002, Abstract, 2:41–53, 3:1–8, 5:17–31; Ex. 2004 ¶¶ 92–94).

PMI responds to Ignite's argument by arguing that an ordinarily skilled artisan would have known that its proposed combination of Albert and Milian could be further modified to maintain Albert's pressure-relief functionality while still incorporating Milian's locking mechanism. Reply 20–22 (citing Exs. 1053, 1054 (illustrating further modifications to the hypothetical combination of Albert and Milian shown in Exhibit 1040); Ex. 1047 ¶¶ 60–62). PMI's argument is unpersuasive because we determine that PMI has used impermissible hindsight to pick and choose elements from Albert and Milian without sufficient reasoning to construct a device according to the claims as illustrated in Exhibits 1040, 1041, 1053, and 1054 (collectively, the "hypothetical containers").

We “must avoid ‘hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.’” *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355, 1361 (Fed. Cir. 2016), *cert. denied sub nom. Google Inc. v. Arendi S. A. R. L.*, 137 S. Ct. 1329 (2017) (quoting *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)). PMI provides a number of purported reasons why an ordinarily skilled artisan would have modified Albert in view of Milian as shown in the hypothetical containers. However, none of PMI’s reasons is supported by persuasive evidence. To the extent that PMI relies upon testimony from Mr. Dahlgren, Pet. 51–54 (citing Ex. 1027 ¶¶ 116–126), we find such reliance to be unpersuasive because Mr. Dahlgren simply parrots PMI’s argument and provides little if any analysis of the evidence that he and PMI cite in support.

First, PMI contends that because both Albert and Milian use mechanisms to avoid accidental spillage an ordinarily skilled artisan would add Milian’s locking cap to Albert’s actuator. However, Albert’s actuator already being configured to avoid accidental spilling tends to indicate that an ordinarily skilled artisan would not modify Albert’s mechanism to add this feature. Additionally, we discern no reason that mere similarity in the functionality of Albert and Milian would motivate an ordinarily skilled artisan to have substituted features of Milian for preexisting features of Albert.

Second, PMI contends U.S. Patent 6,695,171 to Walters indicates that a “locking mechanism similar to Milian” is “widely used for dispensing liquid products, including food products, to prevent accidental dispensing of product.” Pet. 51 (citing Ex. 1004, 1:43–54). However, PMI provides no meaningful analysis of Walters. *Id.* We fail to discern how PMI explains

why Walters' description of a locking pump mechanism adds any credible reason for an ordinarily skilled artisan to remove features from Albert and substitute features from Milian. Albert has no pump like Walters but simply opens a valve that is biased closed by a spring so a user can pour contents from the container.

Third, PMI cites U.S. Patent 8,360,258 B2 to Gilbert as demonstrating that an ordinarily skilled artisan would "recognize the benefit of prohibiting accidental activation of the actuator portion." *Id.* (citing Ex. 1003, 5:8–31). Gilbert, like Albert describes a drinking container with a lid. Ex. 1003, 1:6–7. Gilbert also describes cover 182, which can be rotated to prevent a user from touching its button 30. *Id.* at 5:8–31. Thus, Gilbert fails to describe a moveable button member of any kind. PMI fails to explain why a completely different mechanism for preventing accidental spilling from those described in Albert or Milian provides any credible reason to remove features from Albert and substitute features from Milian. PMI's reliance on Gilbert is unpersuasive.

Fourth, PMI contends that U.S. Patent 4,057,167 to Lee "teaches the benefit of a latchable, valved closure for a drinking receptacle containing a consumable beverage to prevent spillage." Pet. 51–52 (citing Ex. 1:10–33, 2:49:54). Based on our review of the cited portions of Lee, we fail to discern how Lee's description of its latching mechanisms for preventing accidental spillage, which differ dramatically from the mechanisms of Albert and Milian, provides any credible reason for an ordinarily skilled artisan to remove features from Albert and substitute features from Milian.

Fifth, PMI cites ten prior art references as a group as "[o]ther patents teaching the same well known design principle of Milian and Walters,"

presumably preventing accidental actuation of a pump or valve. *Id.* at 52 (citing Exs. 1010 through 1019). However, PMI provides no analysis whatsoever of any of these ten references or specific citations to portions of the references that support the proposition for which PMI cites them. *See id.* 30, 52 (failing to cite any specific portion of any one of Exhibits 1010 through 1019). We find PMI's reliance on Exhibits 1010 through 1019 to provide no support for any argument or indicate any likelihood that an ordinarily skilled artisan would have had adequate reason to remove features from Albert and substitute features from Milian.

Sixth, PMI contends that an ordinarily skilled artisan would have considered the hypothetical containers to reflect a simple substitution of elements from Milian into Albert. Pet. 52. PMI relies solely upon Mr. Dahlgren's testimony for this proposition. *Id.* (citing Ex. 1027 ¶ 119). Mr. Dahlgren merely parrots PMI's argument without citing a single piece of objective evidence. Ex. 1027 ¶ 119. We consider PMI's argument to be unsupported by persuasive evidence.

Seventh, PMI contends that the hypothetical containers reflect a combination of "old elements with no change in their respective functions" and that "Albert should have a mechanism to lock the actuator in a closed position to prevent spillage." Pet. 52–53 (citing Ex. 1027 ¶¶ 121–123). The testimony from Mr. Dahlgren that PMI cites as the sole support for these arguments is unsupported by objective evidence and, at most, establishes that an ordinarily skilled artisan could have made the hypothetical containers, not that an ordinarily skilled artisan would have been motivated to do so. *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1068–69 (Fed. Cir. 2018) (citing *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751

F.3d 1327, 1352 (Fed. Cir. 2014) (concluding that a party’s expert “succumbed to hindsight bias in her obviousness analysis” where such analysis “primarily consisted of conclusory references to her belief that one of ordinary skill in the art could combine these references, not that they would have been motivated to do so”).)

Finally, PMI asserts in blanket fashion a number of rationales for combining teachings of Albert and Milian as shown in the hypothetical containers (i.e., as in the invention) for which PMI cites Mr. Dahlgren’s conclusory unsupported statements. Pet. 53–54 (citing Ex. 1027 ¶¶ 124–126). Again, Mr. Dahlgren merely parrots PMI’s attorneys’ argument without citing any objective evidence in support. We determine that this testimony is unpersuasive as unsupported.

For all these reasons, we conclude that PMI has failed to establish by a preponderance of evidence that an ordinarily skilled artisan would have had any reason to remove features from Albert and substitute features from Milian. Accordingly, we conclude that PMI has failed to establish that the combination of Albert and Milian renders claims 10–20 unpatentable as obvious.

b) Claims 10–13

Ignite also argues that the proposed combination of Albert and Milian fails to describe a button that is moveable “about the lid assembly” as recited in claims 10–13 for the same reasons that Milian fails to describe such a button. PO Resp. 49–50. PMI relies solely upon Milian as describing this requirement of claim 10. See Pet. 35–38, 64 (referring to PMI’s claim chart discussing anticipation based upon Milian). For the reasons expressed, in Part II.E above, we determine that Milian fails to describe the button of

independent claim 10, which is also true for dependent claims 11–13. Therefore, for this additional reason, we conclude that PMI has failed to establish that the combination of Albert and Milian renders claims 10–13 unpatentable as obvious.

III. IGNITE’S MOTION TO EXCLUDE

Ignite moves to exclude Exhibits 1007, 1008, 1009, 1029, 1034–1039, 1048, 1049, 1050 based upon various alleged violations of Rules of Evidence. Mot. 3–6. We deny the Motion as it relates to these Exhibits as moot because we find Ignite’s arguments for preserving the patentability of claims 10–20 to be persuasive, even after considering this evidence.

Ignite also “objects” to “PMI’s misquotation and limited introduction of transcript testimony” by Dr. Colton. *Id.* at 6–8 (citing Fed. R. Evid. 106). Ignite also objects to certain arguments made by PMI in its Reply as being improper under Rule 42.23(b). *Id.* at 8–11. We deny the Motion as it relates to these objections because the Motion fails to seek relief that is available under 37 C.F.R. § 42.64(c) because it fails to seek exclusion of evidence.

Ignite also moves to exclude Exhibits 1040, 1041, 1044, 1045, 1052–1054, and 1057–1059 as irrelevant under Fed. R. Evid. 402 and unduly prejudicial under Fed. R. Evid. 403. *Id.* at 11–12. We deny the Motion as relates to these Exhibits as moot because we find Ignite’s arguments for preserving the patentability of claims 10–20 to be persuasive, even after considering this evidence.

IV. CONCLUSION

Based on the record before us, we determine that PMI has not demonstrated by a preponderance of the evidence that claims 10–20 are unpatentable on the grounds advanced in its Petition.

V. ORDER

For the reasons given, it is:

ORDERED, based on a preponderance of evidence, that claims 10–20 of U.S. Patent 8,360,267 B1 have *not* been shown to be unpatentable;

FURTHER ORDERED that Ignite’s Motion to Exclude Evidence, Paper 25, is *denied*; and

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

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