

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CAMPBELL SOUP COMPANY,
CAMPBELL SALES COMPANY, and
TRINITY MANUFACTURING, LLC,
Petitioner,

v.

GAMON PLUS, INC.,
Patent Owner.

Case IPR2017-00087
Patent 8,827,111 B2

Before GRACE KARAFFA OBERMANN, BART A. GERSTENBLITH,
and ROBERT L. KINDER, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

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

I. INTRODUCTION

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, LLC (collectively, “Petitioner”) filed a Petition (Paper 2, “Pet.”) requesting institution of *inter partes* review of claims 1–35 of U.S. Patent No. 8,827,111 B2 (Ex. 1001, “the ’111 patent”). Gamon Plus, Inc. (“Patent Owner”) filed a Preliminary Response (Paper 9) to the Petition. Pursuant to 35 U.S.C. § 314, we instituted this trial (“Institution Decision”) as to claims 1–16, 27, 28, and 32–35 of the ’111 patent. Paper 12 (“Inst. Dec.”). In particular, *inter partes* review was instituted to address three grounds of unpatentability, pursuant to 35 U.S.C. § 103(a), challenging the following groups of claims: (1) claims 1–16; (2) claims 27, 28, 33, and 34; and (3) claims 32 and 35. Inst. Dec. 52.

After the Institution Decision, Patent Owner filed a Patent Owner Response (Paper 15, “PO Resp.”), Petitioner filed a Reply to the Patent Owner Response (Paper 31, “Pet. Reply”), and Patent Owner filed a Sur-Reply (Paper 60, “PO Sur-Reply”). Patent Owner states in its Response that it “moves to cancel and formally disclaims claims 1 to 16 of the ’111 patent” and does not address the patentability challenge to those claims in its Response. PO Resp. 2. Petitioner acknowledges Patent Owner’s request to cancel claims 1–16 and does not address the patentability challenge to those claims in its Reply. Pet. Reply 1.

In addition to the papers noted above, Petitioner filed a Motion to Exclude Evidence (Paper 44, “Pet. Mot.”), Patent Owner filed an Opposition to Petitioner’s Motion to Exclude Evidence (Paper 52, “PO Opp.”), and Petitioner filed a Reply in support of its Motion (Paper 59, “Pet. Reply”). Patent Owner filed a Motion for Observations on Cross-Examination of

Steven C. Visser (Paper 45) and Petitioner filed a Response to Patent Owner's Observations (Paper 51). An oral argument was held January 23, 2018, the transcript of which is entered into the record (Paper 72, "Tr.").

We have jurisdiction under 35 U.S.C. § 6(c). This Decision is a final written decision under 35 U.S.C. § 318(a) as to the patentability of the challenged claims. Based on the record before us, we (1) grant Patent Owner's request to cancel claims 1–16, and (2) determine that Petitioner has not demonstrated, by a preponderance of the evidence, that claims 27, 28, and 32–35 of the '111 patent are unpatentable.

A. Related Proceedings

The parties indicate that the '111 patent is asserted in *Gamon Plus, Inc., et al. v. Campbell Soup Co., et al.*, No. 15-cv-8940-CRN-YBK (N.D. Ill.). Pet. 1–2; Paper 7, 1. Petitioner indicates that U.S. Patent Application No. 14/861,017, which is still pending before the Office, claims priority to the application that issued as the '111 patent, and may be affected by a decision in this proceeding. Pet. 2.

B. Real Parties in Interest

The Petition identifies "Campbell Soup Company," "Campbell Sales Company," and "Trinity Manufacturing, L.L.C." as real parties in interest. Pet. 1. Patent Owner identifies "Gamon Plus, Inc." and "Gamon International, Inc." as real parties in interest (collectively, "Gamon"). Paper 7, 1.

C. The References

Petitioner relies on the following references:

European Patent Application Publication No. 0490693 A2, published June 17, 1992 (Ex. 1020, “Nesso”)¹;

U.S. Patent No. 3,395,809, issued August 6, 1968 (Ex. 1021, “Mellion”); and

U.S. Patent No. 2,382,191, issued August 14, 1945 (Ex. 1023, “Weichselbaum”).

D. Instituted Grounds of Unpatentability

We instituted trial based on the following grounds of unpatentability:

References	Basis	Claims Challenged
'751 publication and Deffner	§ 103(a)	1–16
Weichselbaum and Nesso	§ 103(a)	27, 28, 33, and 34
Weichselbaum, Nesso, and Mellion	§ 103(a)	32 and 35

Petitioner relies upon two declarations by Mr. Steven Visser, one filed with the Petition and dated October 14, 2016 (Ex. 1002, the “Visser Declaration”), and another filed with Petitioner’s Reply dated October 13, 2017 (Ex. 1065, the “Visser Reply Declaration”). Patent Owner relies upon two declarations by Mr. Terry Johnson, a first declaration dated July 12,

¹ This reference identifies James Roderick Oattes as the named inventor and “NESSO (ENGINEERS) LIMITED” as the applicant. Ex. 1020, 1. The parties refer to this reference as “Nesso,” and we do the same for consistency.

2017 (Paper 16, the “Johnson Declaration”), and a supplemental declaration, dated August 2, 2017 (Paper 53, “the “Johnson Supplemental Declaration”).²

E. The '111 Patent

The '111 patent is directed to “dispenser racks and displays” and “to a compact, easy to assemble, easy to load and unload multiple chute dispenser with an integrated display.” Ex. 1001, 1:15–18. The dispenser includes “[a] set of panels having chutes therebetween. The chutes being defined by curvilinear rails on such panels. The curvilinear rails having stops thereon for stopping the products for viewing.” *Id.* at 1:58–61.

Figures 1 and 2 of the '111 patent are shown below:

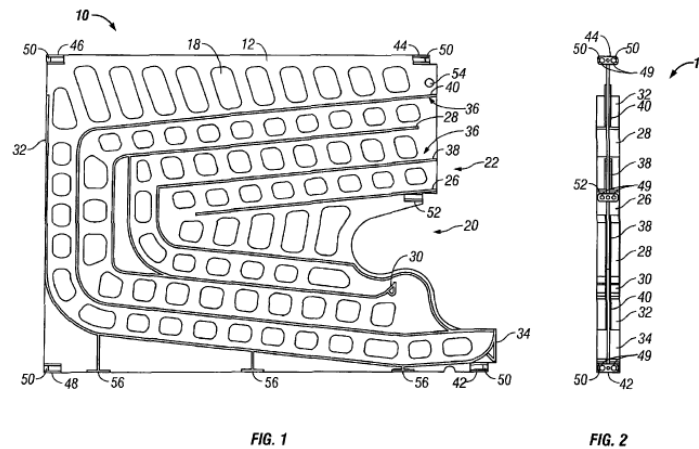


Figure 1 of the '111 patent “is a side view of a panel” (*id.* at 1:66–67), and Figure 2 is “an edge on view of a panel” (*id.* at 2:1–2). As shown, panel 10 is the “main element of the multi-chute gravity feed dispenser display” and

² Paper 16 is erroneously identified in our filing system as “EXHIBIT 2001 Declaration of Terry Johnson.” Patent Owner, however, did not file an exhibit 2001 in this case. Paper 53 is Bates stamped erroneously with the phrase “Gamon Exhibit no. 2027.” Paper 53, 1. Exhibit 2027 appears to be a copy of Exhibit 1065 marked during Mr. Visser’s deposition as “Exhibit 2.” See Ex. 2027, 1. Therefore, we cite to each of Mr. Johnson’s declarations by the paper number under which it was filed.

“is generally formed as a vertical upright panel.” *Id.* at 4:8–10. Panel 10 is “preferably configured to be used in connection with conventional store shelving in place at a retailer.” *Id.* at 4:9–10.

The ’111 patent explains:

The panel 10 includes at least one set of rails 20 which are formed as ribs extending normal to a side 12 of the panel 10 to cooperatively define a plurality of chutes 22, 24 for product which have a boustrophedonic or C-shaped configuration. A first rail 26 is disposed in the generally medial portion of the side 12 inclined to the horizontal, angled generally downwardly, and having a linear configuration. The second rail 28 is disposed about the first rail 26 and has a curvilinear configuration which is substantially C-shaped. The first and second rails 26 and 28 each having a minimum incline to the horizontal such that product is capable of continuous movement along such rails in response to a normal gravitational force, and where as shown in FIG. 1, can be a substantially slight angle. A first product travel stop or stop 30 is formed at a lowest extent of the second rail 28 as an enlarged portion thereof. The first stop 30 engages the product to prevent unwanted further movement down chute 22 and positions the product for viewing and selection by a customer. A third rail 32 has a curvilinear configuration which is substantially L-shaped and has a second stop 34, formed as an enlarged portion thereof at a lower end adjacent first stop 30, and prevents further downward motion down chute 24.

Ex. 1001, 4:19–41.

Figure 3A of the '111 patent is shown below:

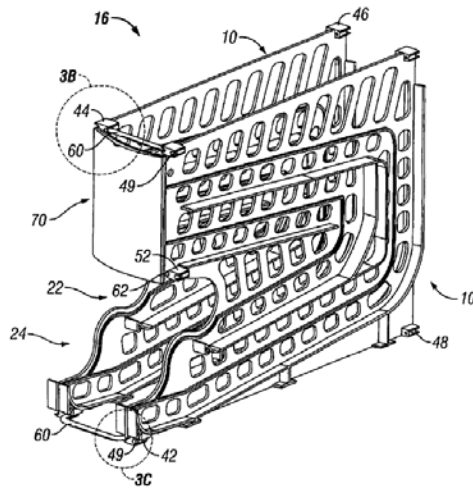


FIG. 3A

Figure 3A of the '111 patent “is a side perspective view of a display module.” *Id.* at 2:3–4. The '111 patent explains:

FIG. 3A shows a pair of panels, a display module 16 . . . connected by a pair of retention pins to define a dispenser module 16, one or more such dispenser modules 16 making up a multi-chute gravity feed dispenser display. The chutes 22, 24 are defined between adjacent pairs of panels 10 and are of a width slightly greater than the width of products 90 and which allow the products to be stored and dispensed therefrom.

Id. at 5:9–17.

Figure 6A of the '111 patent is shown below:

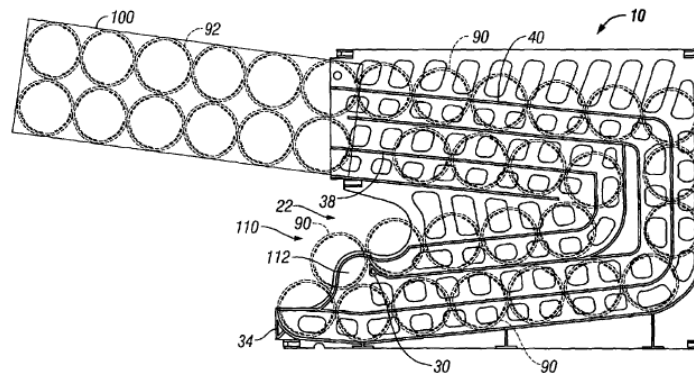


FIG. 6A

Figure 6A of the '111 patent “is a side view of both a display module with a loading magazine in a loading position.” *Id.* at 2:26–27. The '111 patent explains that “[w]hen loaded, the new product 92 simply rolls into the chute 22 or 24 whichever is empty and available.” *Id.* at 7:43–44.

The '111 patent describes, as an advantage of the invention, “the return area or replace stall 110 which is defined between the first and second stops 30 and 34 and a cradle member or ear 112 formed on the panel 10.” *Id.* at 7:49–52. In particular, “[t]he replace stall 110 is further defined as an area in which a product 90 may be replaced if the consumer decides not to purchase.” *Id.* at 7:52–54. Figure 6A shows the location of product 90, in replace stall 110, after being replaced by a consumer. *Id.* at 7:55–56.

F. Illustrative Claim

Claims 1, 8, and 27 are the independent claims challenged in this proceeding. Claims 2–7 depend from claim 1, claims 9–16 depend from claim 8, and claims 28 and 32–35 depend from claim 27. Claim 27 is illustrative of the claimed subject matter and is reproduced below:

27. A display rack comprising:

- a plurality of generally cylindrical products all having substantially equal diameters and heights;

- a pair of laterally spaced vertical panels;

- first and second product support structures supported between said panels and defining respectively first and second chutes configured for the products to pass therethrough, each chute having a respective forward-facing product loading opening in a generally vertically disposed forward side of the display rack and configured to receive the products loaded into the chutes through the forward side, and a respective dispensing end below the product loading opening such that the cylindrical products when placed in the product loading opening proceed by

force of gravity through the associated chute to the dispensing end;

the loading opening and dispensing end of the second chute being situated between the loading opening and dispensing end of the first chute;

wherein the chutes each have a stop structure supported adjacent the respective dispensing end and blocking movement of the products in the chute beyond said stop structure such that the products must be elevated above the stop structure to be removed from the chute; and

wherein the stop structure of the first chute is located at a horizontal distance forward of, and at a vertical distance lower than, the stop structure of the second chute such that when a user removes one of the products against said stop structure of the first chute, the product must be lifted vertically out of the first chute to a withdrawal height wherein the product is at least partly horizontally in front of the stop structure of the second chute;

wherein the horizontal distance that the stop structure of the second chute is offset rearwardly from the stop structure of the first chute is sufficient that one of the products removed by a user from the rack can be replaced on the rack and supported by resting directly on a rearward portion of a forwardmost product in the first chute; and

said panels having a forward edge portion extending vertically adjacent the loading openings of the chutes, the forward edge portion defining a rearward recess therein adjacent the dispensing ends extending a rearward distance toward the stop structure of the second chute at least a diameter of the products and exposing at least a portion of a generally circular end surface of the forwardmost product in the first chute, and at least a portion of a generally circular end portion of the replaced product when resting thereon.

Ex. 1001, 19:36–20:16.

G. Background

Mr. Johnson³ came up with the initial design idea underlying the patent after visiting a store and having a difficult time finding the home-style chicken noodle soup. Ex. 1066, 27:13–28:24. Unable to find the type of soup he was looking for, he ended up buying a plain noodle soup that did not go over well at home. *Id.* Mr. Johnson recognized that if he was having a problem finding a particular type of soup, others were likely having the same problem, and so he came up with a display rack that would visually help purchasers of canned soup. *Id.* at 28:10–16.

After coming up with an initial concept, Mr. Johnson, on behalf of Gamon,⁴ reached out to Campbell Soup Company’s CEO, David Johnson (no relation to Terry), to pitch the idea of putting Campbell’s soup cans on their side and then having them roll down an inclined plane, and also having “a big convex sign on the front of it to talk to the consumer.” *Id.* at 27:13–16, 29:11–30:10. Mr. Johnson testified that David Johnson quickly hung up because “[n]o one wanted me to turn the can on its side” at that time. *Id.*

In later discussions with Campbell around 2002, Mr. Johnson pitched his concept to an executive board at Campbell, including Carl Johnson (no relation to Terry). *Id.* at 30:11–32:18. During this time, Campbell

³ There are several individuals with the last name Johnson mentioned in this Decision. For clarity, we refer to Terry Johnson as “Mr. Johnson” and refer to each of the other Johnsons by using their first and last names.

⁴ Mr. Johnson is the “CEO of Patent Owner Gamon Plus, Inc.” and also a named inventor on the challenged patent. Paper 16 ¶ 1. Mr. Johnson states that Gamon International is a corporate affiliate of Patent Owner Gamon Plus, Inc., and Gamon International is the entity responsible for delivering display racks to Campbell. *Id.* ¶ 8; *see also* Ex. 2032, 12. We refer to the Gamon entities collectively as “Gamon,” unless otherwise noted.

sponsored a project by a research company called Cannondale. *See, e.g.*, Ex. 2032. According to statements attributed to Campbell's Mr. Finnel, the consumer research indicated that the soup category was one of the most difficult to shop in supermarkets. Ex. 2013, 1 (POP TIMES article from February 2004 discussing an interview with Jacques Finnel, Campbell's marketing manager for retail development). The initial Cannondale survey, as conveyed to Mr. Johnson, suggested that sales may be lost if Campbell put its soup cans on their sides at the point of sale. Ex. 1066, 32:19–33:10. Campbell agreed, however, to run a test of Gamon's display rack in a small number of stores. *Id.* at 32:3–33:20; *see also* Ex. 2031, 5, 6, 10–12, 14–17, 26–29 (Cannondale report in 2002 noting that the Gamon display shelving would be tested). Soon after, Campbell allowed Gamon's gravity feed display rack to be tested in 25 stores selling Campbell's condensed soup. Ex. 1066, 32:3–33:20. Mr. Johnson testified that the tested embodiment of the gravity feed display rack meets the limitations of at least claim 27 of the '111 patent.⁵ Paper 16 ¶ 14; *see* Ex. 2032, 4–10 (displaying Gamon's gravity feed display rack at various test stores); *see also* Paper 16 (discussing Exs. 2009–2012, which show photographs of different views of the display rack).

Gamon's commercial embodiment of the patented design was tested in a select number of stores and referred to as the iQ-Shelf Maximizer or iQ Maximizer. Ex. 1066, 32:3–33:20, 35:13–15; Ex. 2013, 1. Considering the outcome of the test market using the Gamon gravity feed display rack to

⁵ Petitioner does not contend otherwise. Tr. 46:20–47:1 (Petitioner acknowledging that it provided no evidence to contest that the IQ Maximizer is a commercial embodiment of claim 27).

sell Campbell soup products, Campbell concluded that the display rack⁶ increased its soup sales volume by 5.5–13.6% depending on the type of soup and brand. Ex. 2032, 4.⁷ Mr. Johnson similarly testified based on his involvement in the project that “use of the Gamon display rack produced increased soup sales by 9 to 14% according to [a] market study conducted by Cannondale Consulting Inc.” Paper 53 ¶ 20; *see* Paper 16 ¶ 10. Campbell’s internal presentation discussing the results of this study was titled: “iQ SHELF MAXIMIZER The Power to Transform the Soup Section.” Ex. 2032, 1. The Gamon gravity feed display rack was described as “Breakthrough Gravity Feed Shelving,” that “Encourages purchase of additional varieties,” and resulted in positive consumer responses in every test market. *Id.* at 4–10.

From 2002 until 2009, Campbell purchased from Gamon approximately \$31 million-worth of gravity feed display racks⁸ and installed them in about 30,000 stores. PO Resp. 32; Paper 16 ¶ 17; Tr. 43:14–25. The display racks sold by Gamon to Campbell fall within the scope of at least claim 27 of the ’111 patent when Campbell soup cans are added to the

⁶ As suggested in the Cannondale report (Ex. 2031) other variables were controlled so that a determination could be made on the impact of Gamon’s iQ Maximizer – single variable testing. Ex. 2031, 26–27.

⁷ Exhibits 2031 and 2032 are each considered by Campbell to be “internal Campbell presentations.” Paper 64, 1. Campbell describes these documents as representing “a broad range of consumer research that Campbell had undertaken to better understand consumer shopping experiences in the soup aisle and develop strategies to improve that experience.” *Id.* These documents were produced based on our Order (Paper 37) directing Campbell to produce the 2002 study referenced by Mr. Johnson.

⁸ Petitioner does not contest that Campbell purchased approximately \$31 million in display racks from Gamon. Tr. 51:8–13.

display – claim 27 requires a plurality of generally cylindrical products.⁹
See PO Resp. 30; Ex. 2032, 4–10; Paper 16 ¶¶ 11, 12, 19, 20; see also
Tr. 46:20–47:1.

In February 2004, after placing the display racks in 2800 stores, Campbell’s Mr. Finnel noted in a news publication “three key benefits” of the iQ Maximizer: (1) a positive sales lift in Campbell’s condensed-soup brand, versus the category in general being down in the same period (2) that the program enhances the shopping experience for the consumer and also “makes it easier for consumers to find desired products while giving visibility to others”; and (3) retailers gaining more sales and a labor benefit. Ex. 2013, 1. The news article explains that the system “keeps the products neatly faced at all times, eliminating the need to have the facing crew work on them each night” and ensures the products stay in their location rather than spread out or get lost at the back of a shelf. *Id.* As an additional benefit to retailers, Mr. Finnel explains that the system maintains the same level of product variety, but reduces inventory by 15%. *Id.* Further, Mr. Finnel comments that “[r]etailers are seeing the benefits to this system, and it’s really selling itself because they see the sales lift and ease of stocking.” *Id.*

In 2005, Campbell issued its Annual Report to investors stating that the Gamon iQ Maximizer was available in 14,000 stores. Ex. 2024, 10.¹⁰ Campbell described the impact of the Gamon iQ Maximizer, noting “[t]he

⁹ Petitioner has not contested that the display racks sold to Campbell fall within the scope of at least claim 27 of the ’111 patent when cans are added.

¹⁰ Patent Owner filed two documents identified as “Exhibit 2024,” two documents identified as “Exhibit 2025,” and two documents identified as “Exhibit 2026.” The Exhibits 2024–2026 that we rely on here were filed on December 13, 2017, and are second exhibits filed with each of these numbers.

strong performance of Campbell's condensed soup business demonstrates the value of the *iQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup." *Id.* The 2005 Annual Report described the *iQ Maximizer* as "making the soup aisle dramatically easier for consumers to shop." *Id.* The 2005 Annual Report also shows a graphic example of the use of the *iQ Maximizer* gravity feed shelf and on the same page states "[o]ur breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop." *Id.* at 17. Campbell reported that condensed soup sales increased 8% and that those sales "also benefited from gravity-feed shelving systems installed in retail stores." *Id.* at 31.

Campbell's 2006 and 2007 Annual Reports indicate that Campbell continued to add Gamon's *iQ Maximizer* to stores and praised the *iQ Maximizer* as a powerful tool and breakthrough in soup merchandizing. Campbell's 2006 Annual Report describes Gamon's *iQ Maximizer* as "available in 16,000 stores," and similarly states that it "continues to be a powerful tool to merchandise Campbell's condensed soups." Ex. 2025, 8. Campbell described the *iQ Maximizer* as a "tool to deliver impactful consumer messages at the point of purchase" (*id.*), and as "Making Shopping Even Simpler" (*id.* at 22). Campbell again stated that the *iQ Maximizer* was a "breakthrough in soup merchandising." *Id.* Campbell reported that condensed soup sales increased 5%, primarily driven by higher prices, but "also benefited from the additional installation of gravity-feed shelving systems and increased advertising." *Id.* at 39. Campbell's 2007 Annual Report describes Gamon's *iQ Maximizer* as available in nearly 17,400 stores

in the U.S. and similarly states that it is “a powerful tool for merchandising *Campbell’s* condensed soups.” Ex. 2026, 14.

In late 2008, Campbell began purchasing gravity feed display racks from Petitioner Trinity. PO Resp. 35. Trinity’s display racks include the limitations of at least claim 27 of the ’111 patent.¹¹ *Id.* at 36–39 (Patent Owner’s claim chart mapping claim 27 to Trinity’s display rack).

II. CLAIM CONSTRUCTION

In an *inter partes* review, claim terms in an unexpired patent are construed according to their broadest reasonable interpretation in light of the specification of the patent in which they appear. *See* 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016). Only terms that are in controversy need to be construed, and these need be construed 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).

In our Institution Decision, we construed several claim terms recited in claims 1–17. Inst. Dec. 13–20. Patent Owner requests cancellation of claims 1–16 and we did not institute *inter partes* review of claim 17. Thus, none of the claim terms we construed previously are at issue in the trial. Additionally, Patent Owner’s Response and Sur-Reply and Petitioner’s Reply do not request that we construe any additional claim terms. Accordingly, we need not construe expressly any claim terms to resolve the controversy before us. *See Vivid Techs.*, 200 F.3d at 803.

¹¹ Petitioner does not contest that Trinity’s display racks include the limitations of claim 27 of the ’111 patent.

III. ANALYSIS

A. Patentability Challenges

We instituted *inter partes* review on three grounds of unpatentability based on 35 U.S.C. § 103(a):

1. Claims 1–16 as obvious over the '751 publication and Deffner;
2. Claims 27, 28, 33, and 34 as obvious over Weichselbaum and Nesso; and
3. Claims 32 and 35 as obvious over Weichselbaum, Nesso, and Mellion.

Inst. Dec. 52. As noted above, Patent Owner states in its Response that it “moves to cancel and formally disclaims claims 1 to 16 of the ‘111 patent” and does not address the patentability challenge to those claims in its Response. PO Resp. 2; *see id.* at 4–5 (reiterating that claims 1–16 “are here disclaimed or requested canceled”). Petitioner acknowledges Patent Owner’s request to cancel claims 1–16 and does not address the patentability challenge to those claims in its Reply. Pet. Reply 1. Patent Owner’s request to cancel claims 1–16 is *granted* and those claims shall be cancelled. Accordingly, we need not address the merits of Petitioner’s challenge to claims 1–16 based on the '751 publication and Deffner.¹² Therefore, our analysis below pertains to the latter two grounds of unpatentability that remain in contention.

¹² Patent Owner also has waived any arguments for the patentability of those claims. *See* Paper 13, 3 (“The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.”).

B. Obviousness

The U.S. Supreme Court set forth the framework for applying the statutory language of 35 U.S.C. § 103 in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966):

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

As explained by the Supreme Court in *KSR Int’l Co. v. Teleflex Inc.*:

Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit.

550 U.S. 398, 418 (2007) (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with rational underpinning to support the legal conclusion of obviousness.”)).

“Whether an ordinarily skilled artisan would have been motivated to modify the teachings of a reference is a question of fact.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1327 (Fed. Cir. 2016) (citations omitted). We must consider a reference in its entirety. *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1360 (Fed. Cir. 2017) (citation

omitted). As the U.S. Court of Appeals for the Federal Circuit explained, “the Supreme Court has long held that ‘known disadvantages in old devices which would naturally *discourage* the search for new inventions may be taken into account in determining obviousness.” *Id.* (quoting *United States v. Adams*, 383 U.S. 39, 52 (1966)). Further, a single reference can include statements suggesting a combination as well as statements discouraging the same. *Id.* “[W]here a party argues a skilled artisan would have been motivated to combine references, it must show the artisan ‘would have had a reasonable expectation of success from doing so.’” *Id.* at 10 (quoting *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1068–69 (Fed. Cir. 2012)).

1. Level of Ordinary Skill in the Art

Petitioner contends that a person of ordinary skill in the art, as of the earliest priority date of the claims, would have had either: “(1) a Bachelor’s Degree in Industrial Design and at least 1-2 years of experience in designing gravity feed display dispensers, or (2) 5-10 years of experience in designing gravity feed display dispensers.” Pet. 7 (citing Ex. 1002 ¶ 36). Patent Owner does not propose an explicit level of ordinary skill in the art in its Response. Consistent with the level of ordinary skill in the art reflected by the prior art of record, *see Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995); *In re Oelrich*, 579 F.2d 86, 91 (CCPA 1978), we adopt Petitioner’s unopposed position as to the level of ordinary skill in the art.

2. Scope and Content of the Prior Art

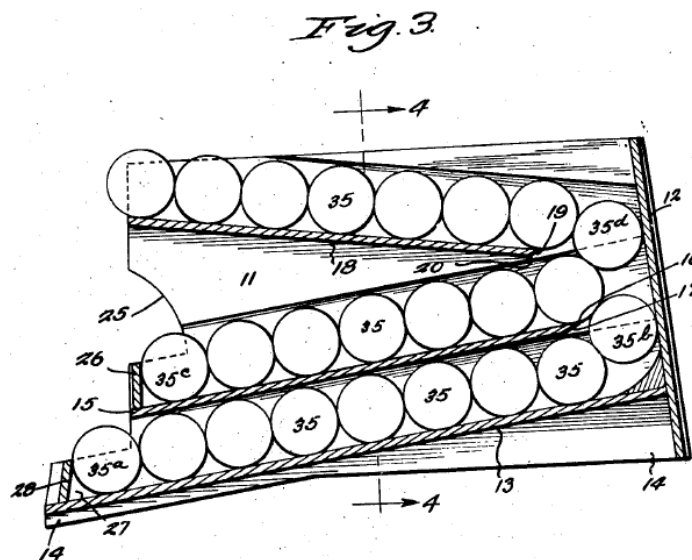
Petitioner contends that the combination of Weichselbaum and Nesso would have rendered the subject matter of claims 27, 28, 33, and 34 obvious

Petitioner also contends that the combination of Weichselbaum, Nesso, and Mellion would have rendered the subject matter of claims 32 and 35 obvious to one of ordinary skill in the art at the time of the invention. *Id.* at 69–70.

a) *Weichselbaum*

Weichselbaum is directed to “a dispensing device and more particularly to a device for dispensing cylindrical objects such, for example, as canned goods.” Ex. 1023, 1:1–4.¹³ Weichselbaum teaches that the dispenser is “so dimensioned as to fit normally between shelves of customary height in a grocery store or the like.” *Id.* at 1:15–18.

Weichselbaum's Figure 3 is shown below:



Weichselbaum’s Figure 3 “is a sectional view taken along the line 3—3 of Figure 2 as viewed in the direction of the arrows.” *Id.* at 2:5–7.

Weichselbaum explains:

¹³ Weichselbaum contains three pages of text, each page containing two columns. Ex. 1023. Citations are to the column and line numbers of the reference.

The dispensing device . . . is comprised of a pair of side walls 11 and rear wall 12, a shelf 13, inclined forwardly downwardly from rear wall 12, serving as a base therefor. . . . A second shelf 15 is secured between side walls 11 in parallel relation to base shelf 13 but terminates at a point 16 spaced from rear wall 12 by a distance slightly in excess of the diameter of an individual can. . . . A third shelf 18 is also positioned between side walls 11 but is inclined downwardly toward rear wall 12 thereof in a direction opposite to the angle of inclination of shelves 13 and 15, and terminates at a point 19 spaced from rear wall 12

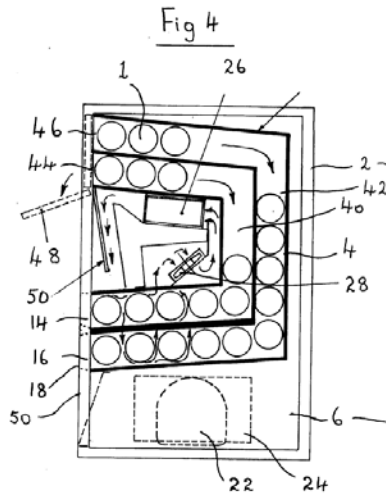
Side walls 11 are provided with aligned notches 25 adjacent but positioned above shelf 15, a stop member 26 being positioned between the side walls at the end of the shelf and extending upwardly to the bottoms of notches 25, thus providing a recessed aperture through which the can at the end of shelf 15 adjacent stop member 26 may be readily grasped for removal. . . .

A stop 28 of a height substantially equal to the height of portions 27 is positioned adjacent the end of shelf 13 to prevent the cans from rolling out of the receptacle.

Id. at 2:13–3:1.

b) Nesso

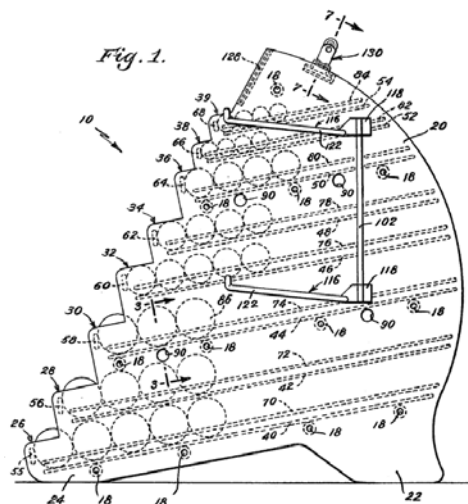
Nesso is directed to “a compact refrigerated dispenser for dispensing cooled articles, such as soft drink cans.” Ex. 1020, 1:1–3. Figure 4 of Nesso is shown below:



Nesso's Figure 4 "is a cross-sectional side view" of an embodiment. *Id.* at 2:8–9. Figure 4 shows, *inter alia*, two chutes, 40 and 42, which are filled by inserting cans through entrances 44 and 46. *Id.* at 3:25–29. Cans are dispensed by removing them from apertures 14 and 16. *Id.* at 3:37–38.

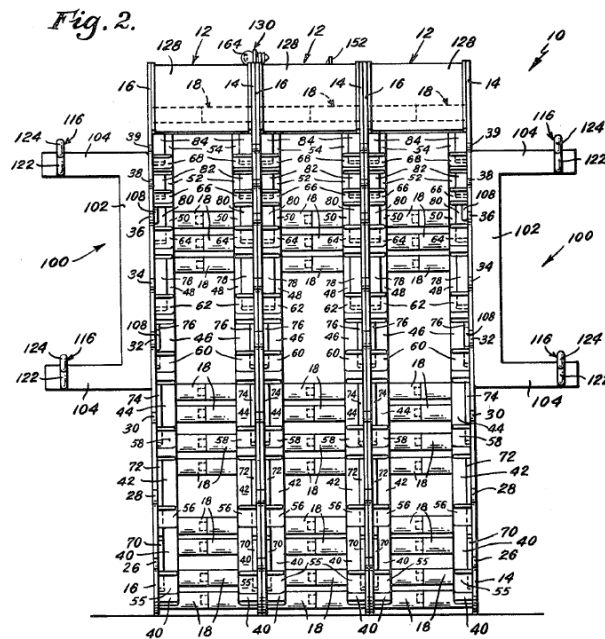
c) *Mellion*

Mellion is directed to a battery dispensing assembly "that includes a plurality of dispensing units that are adapted to be interconnected, [and] bracket assemblies being joined to the outer walls of said dispensing units for mounting packaged articles for display thereon." Ex. 1021, 1:19–24. Figure 1 of Mellion is reproduced below:



Mellion's Figure 1 "is a side elevational view of the dispensing assembly."

Id. at 2:9–10. Figure 2 of Mellion is shown below:



Mellion's Figure 2 "is a front elevational view of the dispensing assembly" of Figure 1. *Id.* at 2:11–12. Mellion explains:

The magazines 26–39 of each unit and as located between the walls 14 and 16 are defined by spaced inclined tracks indicated at 40, 42, 44, 46, 48, 50, 52 and 54. The spaced tracks 40–54 are each formed on a side wall of each unit and are adapted to receive batteries for rolling relation thereon, the inclined formation of the tracks providing for movement of the batteries to the forward dispensing station of each magazine. . . . As also shown in FIG. 1, each of the dispensing stations also includes spaced forward stops 54–68 that are located on each of the walls 14 and 16 and forwardly of the tracks 40 through 54, respectively, the stops 54–68 being adapted to restrain forward movement of the batteries as they are moved downwardly in their respective magazines.

Id. at 3:8–25.

3. *Weichselbaum and Nesso: Differences Between the Prior Art and the Claims; Motivation to Modify*

Petitioner contends that the combination of Weichselbaum and Nesso would have rendered the subject matter of claims 27, 28, 33, and 34 obvious to one of ordinary skill in the art at the time of the invention. Pet. 54–63.

Petitioner identifies eleven (11) limitations of claim 27 as follows:

27. A display rack comprising:

[1] a plurality of generally cylindrical products all having substantially equal diameters and heights;

[2] a pair of laterally spaced vertical panels;

[3] first and second product support structures supported between said panels and defining respectively first and second chutes configured for the products to pass therethrough,

[4] each chute having a respective forward-facing product loading opening in a generally vertically disposed forward side of the display rack and configured to receive the products loaded into the chutes through the forward side, and

[5] a respective dispensing end below the product loading opening such that the cylindrical products when placed in the product loading opening proceed by force of gravity through the associated chute to the dispensing end;

[6] the loading opening and dispensing end of the second chute being situated between the loading opening and dispensing end of the first chute;

[7] wherein the chutes each have a stop structure supported adjacent the respective dispensing end and blocking movement of the products in the chute beyond said stop structure such that the products must be elevated above the stop structure to be removed from the chute; and

[8] wherein the stop structure of the first chute is located at a horizontal distance forward of, and at a vertical distance lower than, the stop structure of the second chute such that when a user removes one of the products against said stop structure of the first chute, the product must be lifted vertically out of the first chute

to a withdrawal height wherein the product is at least partly horizontally in front of the stop structure of the second chute;

[9] wherein the horizontal distance that the stop structure of the second chute is offset rearwardly from the stop structure of the first chute is sufficient that one of the products removed by a user from the rack can be replaced on the rack and supported by resting directly on a rearward portion of a forwardmost product in the first chute; and

[10] said panels having a forward edge portion extending vertically adjacent the loading openings of the chutes, the forward edge portion defining a rearward recess therein adjacent the dispensing ends extending a rearward distance toward the stop structure of the second chute at least a diameter of the products and exposing at least a portion of a generally circular end surface of the forwardmost product in the first chute, and

[11] at least a portion of a generally circular end portion of the replaced product when resting thereon.

Id. at 54–56

Petitioner contends the following:

- (a) Limitations [1] and [3]–[8] of claim 27 are “substantively the same as limitations in claim 17”;
- (b) Limitations [2] and [10] of claim 27 are “substantively the same as limitations in claim 20”;
- (c) Limitation [9] of claim 27 is “substantively the same as a limitation in claim 18” (*id.*); and
- (d) Limitation [11] is “the only limitation that appears for the first time in claim 27.”

Id. at 56–57. In light of the similarity of claim 27 and claims 17, 18, and 20, Petitioner’s discussion of claim 27 refers to and incorporates Petitioner’s positions with respect to limitations common to those claims. *See id.* (referring to previous arguments).

a) *Limitations [1]–[8] of Claim 27*

Petitioner contends that limitations [1] and [3]–[8] are substantively the same as limitations in claim 17 and that limitation [2] is substantively the same as a limitation in claim 20. *Id.* at 56–57. Below is a chart prepared by Petitioner directed to claim 17, which we have modified to illustrate where Petitioner contends limitations [1] and [3]–[8] of claim 27 are taught by Weichselbaum and Nesso. *See id.* at 28–31 (chart mapping claim 17 to Weichselbaum and Nesso). We also include citations to where Petitioner contends Weichselbaum discloses limitation [2]. *See id.* at 42 (discussing claim 20).

Claim 27	Weichselbaum	Nesso
[1] a plurality of generally cylindrical products all having substantially equal diameters and heights	Fig. 3; cans (35) are a plurality of generally cylindrical products all having substantially equal diameters	Fig. 4, cans (1) are a plurality of generally cylindrical products all having substantially equal diameters
[2] a pair of laterally spaced vertical panels;	Figs. 2 and 3 show a pair of laterally spaced vertical panels (11) (Pet. 42)	
[3] first and second product support structures supported between said panels and defining respectively first and second chutes configured for the products to pass therethrough	Fig. 3; first and second product support structures (13) and (15) define first and second chutes configured for cans (35) to pass therethrough	Fig. 4; unnumbered surfaces above (46), between (44) and (46), and below (44) define first and second product support structures defining chutes configured for cans (1) to pass therethrough

Claim 27	Weichselbaum	Nesso
[4] each chute having a respective forward-facing product loading opening in a generally vertically disposed forward side of the display rack and configured to receive the products loaded into the chutes through the forward side, and	Fig. 3; products are loaded into the forward-facing product loading opening (located at the upper left hand portion of Fig. 3) in a generally vertically disposed forward side of the display rack and configured to receive the products loaded into the chutes through the forward side	Figs. 4 and 5; each chute has a forward-facing loading opening (44, 46) in a generally vertically disposed forward side of the display rack, with the openings (44, 46) configured to receive cans (1) loaded into the chutes through the forward side
[5] a respective dispensing end below the product loading opening such that the cylindrical products when placed in the product loading opening proceed by force of gravity through the associated chute to the dispensing end;	Fig. 3; dispensing openings (openings adjacent to cans 35a and 35c) are below the product loading opening such that the cylindrical products when placed in the product loading opening proceed by force of gravity through the associated chute to the dispensing opening	Figs. 4 and 5; each chute has a respective dispensing opening (14, 16) such that the cans (1) when placed in a product loading opening (44, 46) proceed by force of gravity through the associated chute to the dispensing opening
[6] the loading opening and dispensing end of the second chute being situated between the loading opening and dispensing end of the first chute;		In Figs. 4 and 5, the loading and dispensing openings (44, 14) of the second chute are situated between the loading and dispensing openings (46, 16) of the first chute

Claim 27	Weichselbaum	Nesso
[7] wherein the chutes each have a stop structure supported adjacent the respective dispensing end and blocking movement of the products in the chute beyond said stop structure such that the products must be elevated above the stop structure to be removed from the chute; and	Fig. 3; stop structure (26) is adjacent the dispensing opening of the second chute and stop structure (28) is adjacent the dispensing opening of the first chute. The stop structures block movement of the products in the chute beyond said stop structures such that the products must be elevated above the respective stop structures to be removed from the dispensing openings of the chutes.	Fig. 4; the retaining lips (18) comprise stop structures adjacent the respective dispensing openings (14, 16) that block forward movement of the cans (1 in the respective chutes beyond the lips (18) such that cans (1) must be elevated above the lips (18) to be removed from the respective dispensing openings (14, 16) of the chutes.
[8] wherein the stop structure of the first chute is located at a horizontal distance forward of, and at a vertical distance lower than, the stop structure of the second chute such that when a user removes one of the products against said	Fig. 3; the stop structure (28) of the first chute (lower chute) is located at a horizontal distance forward of (to the left in Fig. 3), and at a vertical distance lower than (down in Fig. 3), the stop structure (26) of the second chute	[omitted] ¹⁵

¹⁵ Limitation [8] of claim 27 is recited slightly differently in claim 17. Although we have assembled Petitioner's citations to Weichselbaum, Petitioner does not rely upon Nesso as teaching limitation [8]. Therefore, we need not attempt to assemble Petitioner's citations to Nesso for this limitation.

Claim 27	Weichselbaum	Nesso
stop structure of the first chute, the product must be lifted vertically out of the first chute to a withdrawal height wherein the product is at least partly horizontally in front of the stop structure of the second chute;	(upper chute) such that when a user removes one of the products (cans 35) against said stop structure (28) of the first chute (lower chute), the product (cans 35) must be lifted vertically out of the first chute (lower chute) to a withdrawal height wherein the product is at least partly horizontally in front of the stop structure (26) of the second chute (upper chute) ¹⁴	

Petitioner relies upon Weichselbaum as teaching each of limitations [1]–[8] with the exception of limitation [6] for which Petitioner relies on Nesso. With respect to limitation [6] of claim 27, Petitioner contends that one of ordinary skill in the art “would have been motivated to add a second upper chute section to Weichselbaum to allow for two different canned products to be dispensed and/or to increase the capacity of the dispenser using roughly the same amount of shelf space.” Pet. 32 (citing

¹⁴ Limitation [8] of claim 27 is similar to several limitations of claim 17, although not aligned as precisely as limitations [1] and [3]–[7]. The information in the chart above illustrating where Weichselbaum teaches limitation [8] is drawn from Petitioner’s chart addressing the similar limitations of claim 17. See Pet. 28–31.

Ex. 1002 ¶ 168).¹⁶ Petitioner also contends that combining the teachings of Weichselbaum and Nesso as stated above is:

- (a) the combination of prior art elements according to known methods to yield predictable results;
- (b) the simple substitution of known elements for one another to obtain predictable results;
- (c) the use of known techniques to improve similar device in the same way;
- (d) the application of known techniques to known devices ready for improvement to yield predictable results;
- (e) obvious to try; and/or
- (f) known to work in one field of endeavor prompting variations for use in the same field based on design incentives or other market forces since the variations are predictable to one of ordinary skill in the art.

Id. (citing *KSR*, 550 U.S. at 416–18; Ex. 1002 ¶ 170).

Petitioner has not established or explained persuasively how the facts of this case support any of Petitioner’s positions (a)–(f) above. *See* Pet. 32 (citing *KSR*, 550 U.S. at 416–18; Ex. 1002 ¶ 170). Petitioner simply lists these six general propositions set forth in *KSR* without tying any of them to the specific facts of this case. The Visser Declaration simply states the same six general bases without tying any of them to the facts before us. Ex. 1002 ¶ 170. For example, (b) states “the simple substitution of known elements for one another to obtain predictable results.” *Id.* We understand Petitioner’s position to be based on modifying Weichselbaum to include a second upper chute, but Petitioner does not propose that the upper chute is a substitute for an element existing in Weichselbaum. Thus, we reject

¹⁶ The Visser Declaration includes the identical statement without any additional reason or explanation. Ex. 1002 ¶ 168.

Petitioner’s attempt to include every general basis provided by *KSR* as a reason for the specific modification to Weichselbaum. Petitioner should not expect the Board to search the record and piece together the evidence that may support Petitioner’s arguments. *See* 37 C.F.R. § 42.22(a)(2) (the “petition . . . must include . . . [a] full statement of the reasons for the relief requested”); *see DeSilva v. DiLeonardi*, 181 F.3d 865, 866–67 (7th Cir. 1999) (“A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record.”).

Our discussion below focuses on the two specific reasons proffered by Petitioner—that one of ordinary skill in the art would have been prompted to modify Weichselbaum to include the second chute feature of Nesso to allow for two different canned products to be dispensed or to increase the capacity of the dispenser using roughly the same amount of shelf space. *See* Pet. 32.

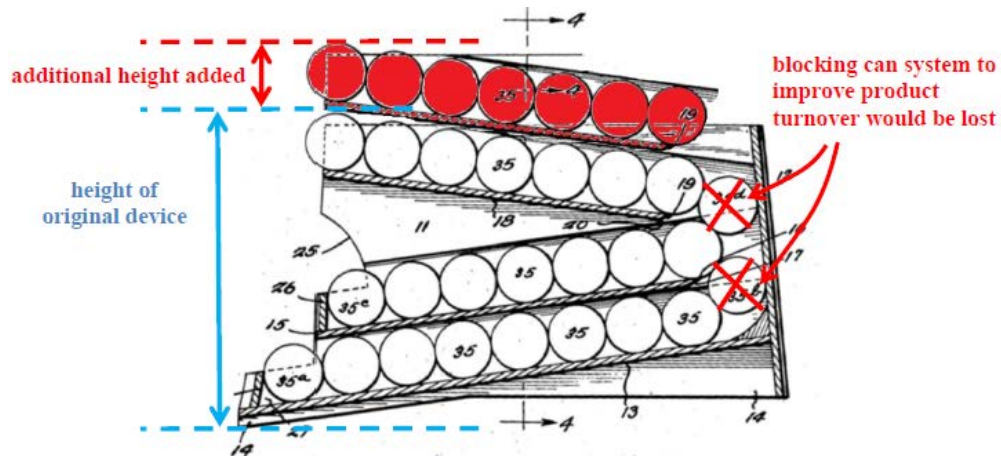
Patent Owner does not challenge whether Weichselbaum and Nesso disclose each of limitations [1]–[8] of claim 27. *See, e.g.*, PO Resp. 7–27 (discussing limitations [9]–[11] only). We have reviewed the information provided by Petitioner and the arguments made in light thereof and we agree that Petitioner has shown that limitations [1]–[5], [7], and [8] of claim 27 are taught by Weichselbaum and that limitation [6] is taught by Nesso.

Patent Owner, however, raises several arguments challenging Petitioner’s position that one of ordinary skill in the art would have been prompted to modify Weichselbaum to include the second chute feature of Nesso. *Id.* at 24–27. Initially, Patent Owner asserts that it is unclear whether Weichselbaum or Nesso is the “posited base reference” and, thus, Patent Owner raises arguments directed to both possibilities. *Id.* at 23. Patent Owner’s first argument is directed to the latter option, where Nesso is

the primary reference and is modified in light of Weichselbaum. *Id.* at 23–24. Patent Owner contends that modifying the lower chutes of Nesso in light of Weichselbaum would render Nesso inoperative. *Id.* at 24.

As discussed above, Petitioner’s argument and the position on which we instituted trial is whether it would have been obvious to modify Weichselbaum in light of Nesso, not whether it would have been obvious to modify Nesso. *See* Inst. Dec. 35 (“With respect to Patent Owner’s first argument, Petitioner’s proposed combination modifies Weichselbaum by adding features from Nesso. Pet. 32. Thus, Patent Owner’s argument directed to modifying Nesso to include an open-air feature[] is inapposite as it is not directed to the combination proposed by Petitioner.”). Accordingly, as we explained in our Institution Decision, Patent Owner’s argument regarding modifying Nesso is inapposite as it does not respond to the combination proposed by Petitioner.

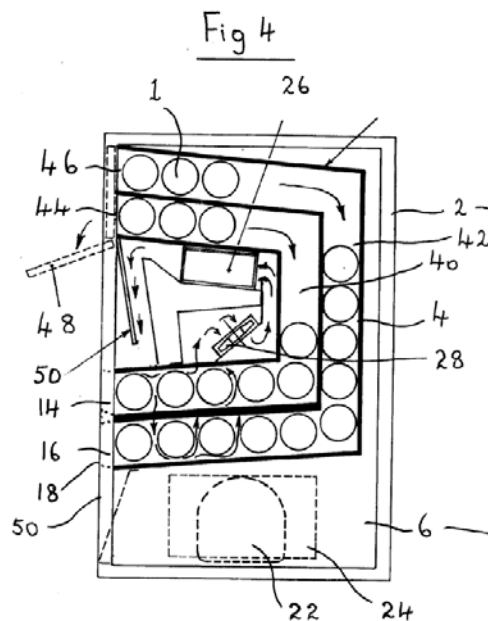
Further, with respect to modifying Weichselbaum to include a second chute as taught by Nesso, Patent Owner contends that such modification “is improper because it would be inconsistent with the operation and stated objective of Weichselbaum.” PO Resp. 24 (emphasis omitted). In particular, Patent Owner argues that “adding the large chutes of Nesso would go against the object of Weichselbaum to provide a vertically compact display.” *Id.* (citing Ex. 1023, 1:15–17). Patent Owner provides the following illustration of the hypothetical combination allegedly proposed by Petitioner:



Patent Owner’s illustration of the hypothetical combination of Weichselbaum and Nesso shows a second chute placed on top of Weichselbaum’s loading chute with additional annotations indicating the alleged height changes of the device as well as the alleged loss of Weichselbaum’s blocking feature. *Id.* at 26. Patent Owner also contends that adding a second chute to Weichselbaum would “run contrary to the structure of Weichselbaum, which arranges the cans on its sloping shelves so that the cans in the device function to guide the cans loaded onto the single upper shelf 18 into appropriate places on the two lower shelves 13 and 15,” i.e., the guiding function discussed *supra*. *Id.* at 25 (citing Ex. 1023, 3:33–65). Patent Owner argues that the additional chute would also negate Weichselbaum’s locking function, also discussed *supra*.

In its Reply, Petitioner contends that the addition of a second loading chute would not render Weichselbaum inoperable. Pet. Reply 18. Petitioner points to Patent Owner’s hypothetical figure showing the alleged combined features, and asserts that the addition of a second loading chute to Weichselbaum “would not interfere with the locking or guiding systems of Weichselbaum.” *Id.*

We agree with Patent Owner that Petitioner's proposed "combination of the two devices is not clear structurally," but for different reasons. PO Resp. 23. Petitioner's modification is to add a second upper chute section. Pet. 32. Nesso's double chute arrangement, shown in Figure 4 below, however, includes two separate chutes from the loading end to the dispensing end. Ex. 1020, Fig. 4. Nesso's arrangement does not allow products loaded into one chute to dispense through the other chute.



Nesso's Figure 4 is a cross-sectional side view of one embodiment disclosed. Ex. 1020, 2:8–9.

Petitioner does not explain how the additional chute would be joined with the chute structure previously existing in Weichselbaum. Nor does Petitioner explain adequately why one would have undertaken this modification, which appears, on the full trial record, to represent an impermissible exercise of hindsight reconstruction. Pet. 32 (citing Ex. 1002 ¶ 168). When we first considered Petitioner's modification to Weichselbaum, on the preliminary record developed prior to institution of

trial, we understood Petitioner to propose adding a second chute as taught by Nesso to the top, loading area of Weichselbaum resulting in a separate, two-chute structure as shown by Nesso. In other words, we did not understand Petitioner's combination to permit a product loaded in one chute to dispense from the other chute. Patent Owner's hypothetical combined figure, however, appears to permit a product to traverse between chutes, as shown above. On the one hand, Petitioner appears to accept Patent Owner's rendition of the hypothetical combination. *See* Pet. Reply 18 ("Even Patent Owner's hypothetical combination . . ."). On the other hand, Mr. Visser appears to apply the structure of Nesso's chutes as we initially understood. Ex. 1065 ¶ 63 ("The addition of a second chute, as taught by Nesso, would similarly not affect the operability of a Weichselbaum dispenser. Nesso's two chutes do not need or use a locking feature and thus would not defeat the gravity-fed, first-in first-out feature."). We agree with Mr. Visser that Nesso's two chutes do not use a locking feature, and the chutes maintain separate passageways from loading to dispensing as shown in Nesso's Figure 4.

Petitioner's first stated reason for modifying Weichselbaum is to allow for two different canned products to be dispensed. Pet. 32 (citing Ex. 1002 ¶ 168). It is unclear why one would need a second loading chute in order to dispense two different cans when Weichselbaum's existing structure permits this result. One would simply load one type of can to fill up the lower dispensing chute and then load up a second type of can to fill up the other dispensing chute. In other words, Petitioner does not show that one of ordinary skill in the art needs to modify Weichselbaum to dispense two different canned products.

Additionally, if Patent Owner's hypothetical combination were correct, cans loaded into one chute could cross into the other chute. Thus, such arrangement would not provide any benefit directed toward dispensing two different canned products. If, however, Petitioner intended some other hypothetical combination to result from its proposed modification to Weichselbaum, Petitioner has not explained sufficiently what that combined structure is such that we can evaluate whether one of ordinary skill in the art would have had a reason with a rational underpinning for making the modification.¹⁷

Petitioner's second stated reason for modifying Weichselbaum is to increase the capacity of the dispenser using roughly the same amount of shelf space. Pet. 32 (citing Ex. 1002 ¶ 168). Patent Owner contends that one of Weichselbaum's objectives is to size the dispenser "to fit normally between shelves of customary height in a grocery store or the like," and that this objective would have been frustrated if a second upper chute were added. Ex. 1023, 1:15–18; PO Resp. 24.

As with Petitioner's first argument, Petitioner does not provide persuasive support for its position; specifically, here again, that position is based on Mr. Visser's unsupported opinion testimony that a second chute would increase the capacity of the dispenser. Pet. 32 (citing Ex. 1002

¹⁷ Some additional confusion exists because Petitioner proposes adding a "second upper chute section" (Pet. 32), whereas Mr. Visser opines on adding a "second upper chute set." Ex. 1002 ¶ 168. Neither Petitioner nor Mr. Visser explains adequately whether the lower portion of the second chute would be configured as in Weichselbaum or Nesso. Here again, Petitioner's position, including the supporting opinion, appears to be based on an impermissible hindsight reconstruction of the claimed apparatus, rather than a reason with a rational underpinning to combine.

¶ 168). We find particularly telling that Petitioner does not explain, or provide any details of, how one of ordinary skill in the art would add a second chute without increasing shelf space. Adding a second chute without increasing shelf space most likely would require modifying (e.g., by shortening) Weichselbaum's existing chutes to accommodate the addition of the second chute. Petitioner fails to provide any factual support that such change would result in an increased capacity, and, if so, by how much.

The Petition does not direct us to evidence that shows persuasively how or why an ordinarily skilled artisan would have been led to combine Weichselbaum and Nesso in the manner claimed. On that point, the Petition rests on bare opinion testimony that is not tethered to any disclosure in the prior art or other objective proof. Pet. 32 (citing Ex. 1002 ¶¶ 168–170). We are mindful that a reason to combine prior art may exist “in the content of the public prior art, in the nature of the problem addressed by the invention, or even in the knowledge of one of ordinary skill in the art.” *Princeton Biochemicals Inc. v. Beckman Coulter Inc.*, 411 F.3d 1332, 1338-39 (Fed. Cir. 2005). But when we turn to the opinion testimony that undergirds Petitioner's argument on the reasons to combine, we find no objective proof and inadequate reasoning. *Id.*

Ultimately, Petitioner presents two very weak reasons based on unstated and unexplained factual assumptions in support of its view that one of ordinary skill in the art would have been prompted to modify Weichselbaum. Additionally, as explained above, Petitioner takes conflicting positions as to how Nesso's second chute would be incorporated in Weichselbaum's device and the record remains unclear as to the precise structure resulting from Petitioner's combination. Accordingly, Petitioner

fails to provide sufficient clarity regarding the specific modifications to Weichselbaum, fails to provide a sufficient reason with rational underpinning as to why and how one of ordinary skill in the art would have modified Weichselbaum in light of Nesso, and appears, on this record, to engage in an impermissible exercise of hindsight reconstruction to make out a reason to combine the applied references in the manner claimed. Further, in light of the full trial record, including Patent Owner's evidence of secondary considerations discussed below, we are persuaded that the bare opinions set forth in the Visser Declaration (Ex. 1002 ¶¶ 168–170) are entitled to little weight. *See Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985) (“Lack of factual support for” opinion testimony “going to factual determinations” may be of little probative value in validity determination.”).

b) Limitation [9] of Claim 27

Limitation [9] recites:

wherein the horizontal distance that the stop structure of the second chute is offset rearwardly from the stop structure of the first chute is sufficient that one of the products removed by a user from the rack can be replaced on the rack and supported by resting directly on a rearward portion of a forwardmost product in the first chute[.]

Ex. 1001, 20:1–6. Petitioner contends that limitation [9] of claim 27 is substantively the same as a limitation in claim 18.¹⁸ Pet. 57. Petitioner contends that Weichselbaum teaches the structural limitations regarding the horizontal distance between the stop structures of the two chutes, as recited

¹⁸ Because of Petitioner's position, Petitioner's arguments directed to limitation [9] of claim 27 appear in Petitioner's discussion of claim 18. Pet. 33–38.

in limitation [9]. *Id.* at 34. Petitioner asserts that “[i]t would be obvious . . . that if slightly smaller cans were used in the Weichselbaum dispenser, the replaced can would rest on the rearward portion of the forwardmost can” *Id.* at 35 (citing Ex. 1002 ¶ 176).

In our Institution Decision we focused on the language of limitation [9], which recites a horizontal distance between the stop structures of the first and second chute. We noted that the distance is not recited as a specific value. Rather, the distance is recited in terms of a functional result to be achieved—“that one of the products removed by a user from the rack can be replaced on the rack and supported by resting directly on a rearward portion of a forwardmost product in the first chute.” Inst. Dec. 37 (citing Ex. 1001, 20:3–6). We found and maintain the finding that limitation [9] does not recite replacing a product and does not require a replaced product. Rather, this limitation recites a distance between structural components of the display rack.¹⁹ *Id.*

Patent Owner’s Response focuses less on the structural recitation of the horizontal distance between the stop structures, and more on the interaction between limitation [1], which recites “a plurality of generally cylindrical products all having substantially equal diameters and heights,” and limitation [9]. In particular, Patent Owner contends that the cylindrical products are a structural requirement of limitation [1] and

are used to define a number of aspects of the display rack combination, including the operation of the chutes and stop structures, as well as other aspects of the spatial and dimensional relationships of the stop structures and between the cylindrical

¹⁹ The recited distance, however, is in relation to, *inter alia*, the size of the cylindrical products.

objects, e.g., that a returned product can rest on a rearward portion of a forwardmost product in the lower dispensing end.

PO Resp. 13. Patent Owner argues that, because claim 27 requires cylindrical products and because the horizontal distance between the stop structures is defined in relation to those products, Weichselbaum, without modification, does not teach limitation [9] of claim 27. *Id.* at 9–10.

We agree with Patent Owner that Weichselbaum does not disclose the interplay between limitations [1] and [9] without modification.²⁰ In other words, Weichselbaum’s display and cans do not satisfy the language of limitation [9] because a replaced can would not rest on a rearward portion of a forwardmost product in the first chute. We recognized this as a deficiency of Weichselbaum in our Institution Decision, but relied upon a modification to Weichselbaum in order to reach this structural requirement of the claim. Inst. Dec. 38. In particular, on the record then before us, we found that Petitioner persuasively explained “[w]hen a can of smaller diameter is used in the Weichselbaum display, one of ordinary skill in the art would understand that a replaced can would rest directly on a rearward portion of a forwardmost product in the first chute.” *Id.*

Patent Owner challenges Petitioner’s argument and our preliminary finding from the Institution Decision on this issue. PO Resp. 15–17. Patent Owner contends that none of the references suggest “the desirability or need to replace a removed article in their respective devices.” *Id.* at 15.

²⁰ Petitioner’s challenge to limitation [9] of claim 27 was based on modifying the can size of Weichselbaum implicating limitation [1]. See Pet. 35. Petitioner did not assert, and we did not institute this trial based on, a theory that Weichselbaum, in an unmodified form, teaches limitations [1] and [9]. See Tr. 13:1–9 (Petitioner agreeing that Weichselbaum’s can size requires modification to meet limitation [9] of claim 27.).

Additionally, Patent Owner asserts that no evidence, besides Mr. Visser's "hindsight-guided analysis" contained in his unsupported declaration testimony, supports Petitioner's argument that it would have been obvious to use a smaller can in Weichselbaum's device. *Id.* at 15; *see id.* at 1617 (for further reasons that Mr. Visser's testimony lacks objective support).

In our Institution Decision, we overlooked the failure of Petitioner to provide any persuasive reason to modify the size of Weichselbaum's cans.²¹ We focused on Patent Owner's arguments, at the time, which appeared to argue a need to modify Weichselbaum's display as opposed to challenging Petitioner's argument regarding modifying Weichselbaum's can size. *See, e.g.,* Inst. Dec. 38 ("Contrary to Patent Owner's arguments, no modification of Weichselbaum's stop structures is required."). Additionally, we cited to a statement in Weichselbaum that appeared to provide support for Petitioner's modification to Weichselbaum's can size. In particular, we commented that "Weichselbaum contemplates varying the size of the display to accommodate differently sized cans." *Id.* at 38 n.16 (citing Ex. 1023, 4:29–32). For support, we went outside of the Petition and relied on the following statement from Weichselbaum: "Obviously, the device may be made of any desired type of material or in any desired size to accommodate varying sizes of cans to facilitate the dispensing thereof." Ex. 1023, 4:29–32; Tr. 54:13–16 (Petitioner explaining that it did not cite to this statement of

²¹ Weichselbaum does not disclose a replaced can and does not inform one of ordinary skill in the art as to how to replace a can removed from its display if desired to be returned to the display. Thus, the potential benefits attributed to having a location to replace a can cannot be used as motivation to modify Weichselbaum's can size as those benefits are attributed solely to the '111 patent and reliance thereon would constitute impermissible hindsight.

Weichselbaum in its Petition in support of its argument that it would have been obvious to modify Weichselbaum’s can size.). Petitioner’s Reply seizes on our citation to Weichselbaum, focusing entirely on that statement in support of its argument to modify Weichselbaum’s can size. Pet. Reply 6 (“One need look no further than Weichselbaum itself to see why a [person of ordinary skill in the art] would have tried smaller cans in a Weichselbaum dispenser.”) (citing Ex. 1023, 4:29–32).²²

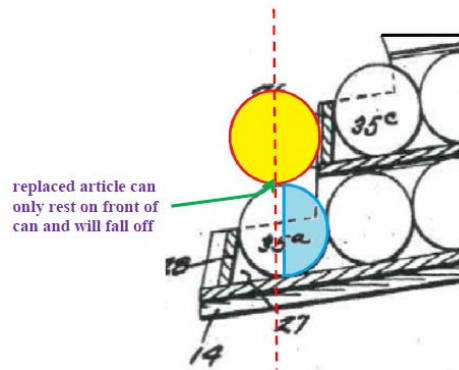
In light of the arguments developed during the trial, we reviewed Weichselbaum again to determine whether we appropriately relied upon its teaching to support Petitioner’s proposed modification. After consideration of the full record before us, we find that the statement in Weichselbaum does not teach expressly altering the can size or provide a reason for one of ordinary skill in the art to do so. Rather, the statement is directed to altering the size of *the display device*—“the device may be made . . . in any desired size”—if one sought to accommodate different can sizes—“to accommodate varying sizes of cans to facilitate the dispensing thereof.” Ex. 1023:4:29–32.

²² Petitioner also cites to Mr. Visser’s declaration testimony. Pet. Reply 6 (citing Ex. 1002 ¶¶ 174–180, 229). Paragraphs 172–176 of the Visser Declaration are word-for-word identical to pages 33–35 of the Petition, the exception being that the Petition includes citations to these paragraphs. Mr. Visser does not provide any reason why one of ordinary skill in the art would have modified Weichselbaum’s can size. Paragraphs 177–180 of the Visser Declaration pertain to a reference, Rogers, that is not relied upon in this trial. Paragraph 229 of the Visser Declaration simply states that “Limitation [9] is substantively the same as a limitation in claim 18. For reasons explained above for claim 18, this limitation is taught by Weichselbaum or Rogers.” Ex. 1002 ¶ 229. Accordingly, Petitioner’s citations to the Visser Declaration fail to provide any objective support for Petitioner’s argument regarding modifying Weichselbaum’s can size.

We recognize now that our initial determination, made without the benefit of a full trial record, was based on a misunderstanding of Weichselbaum.

Weichselbaum does not teach expressly *how* one would change the size of the device to accommodate different sizes of cans. In other words, if a smaller can were sought to be accommodated, how small must the can be before the size of the device is altered? Ultimately, we find that the most reasonable interpretation of Weichselbaum is that one would modify the device size in proportion to changes in the can size. In particular, a smaller size can would result in a proportionally smaller device, and a larger can would result in a proportionally larger device. Thus, were one of ordinary skill in the art to follow the most reasonable interpretation of Weichselbaum when using a smaller can as proposed by Petitioner, one would use a proportionally smaller display. The import of changing the size of Weichselbaum's display to accommodate a smaller can is that the horizontal distance, that the stop structure of the second chute is offset from the stop structure of the first chute, will change. Thus, just as Weichselbaum, in its unmodified form fails to teach limitation [9] of claim 27, a proportionally scaled down version of Weichselbaum (display and cans) would similarly fail to teach limitation [9].

Patent Owner annotates Figure 3 of Weichselbaum in its unmodified state, as shown below:



Patent Owner annotated Figure 3 of Weichselbaum by including the position of a replaced can (yellow) atop a can in the lower chute and a dashed vertical red line illustrating where the center of the replaced can aligns with the can on which it sits. PO Resp. 10. As illustrated, in its unmodified state, Weichselbaum fails to teach limitation [9] because a replaced can (shown in yellow) does not rest directly on a rearward portion of a forwardmost product in the first (lower) chute. Were Weichselbaum modified in accordance with the most reasonable interpretation of its statement regarding accommodating different sized cans, the dimensions of the display would be modified such that the relative size of the display and cans would be the same as shown in Figure 3. In other words, modifying Weichselbaum in accordance with its express statement, would have failed to achieve the claimed invention—specifically, it would not result in a replaced can resting directly on a rearward portion of a forwardmost product in the first chute.

We recognize that Weichselbaum’s teaching may be misunderstood as suggesting changing the size of the cans. In fact, we failed to appreciate the nuances described herein when rendering our Institution Decision.²³

²³ In our Institution Decision, we applied *In re Schreiber*, 128 F.3d 1473 (Fed. Cir. 1997), responding to Patent Owner’s argument regarding whether Weichselbaum’s display required modification in order to meet the

Nonetheless, we take this opportunity to correct our error. We now recognize that Petitioner fails to provide any reason with a rational underpinning as to why one of ordinary skill in the art would modify Weichselbaum to use a smaller can *and not at the same time* modify Weichselbaum's display to accommodate that smaller can. In other words, no reason is provided for modifying *only the size of the cans* as opposed to the size of the display *and* the cans.

Petitioner's failure is particularly noteworthy when considering the teachings of Weichselbaum as a whole. As Patent Owner explains, Weichselbaum explicitly states the importance of the relative sizes of its display and cans. On page two of Exhibit 1023, from column 1, line 25, through column 2, line 28, Weichselbaum describes what are referred to by the parties as "guide and lock" features. *See, e.g.*, PO Resp. 18–19; Pet. Reply 9; Tr. 10:6. The parties dispute whether modifying Weichselbaum would negate the guide and lock features described therein. PO Resp. 17–19; Pet. Reply 9–12. Mr. Visser spends several paragraphs of his Reply Declaration on this issue. Ex. 1065 ¶¶ 23–49 (discussing whether

limitations of claim 27. Inst. Dec. 37–38. The point we made was that modification to Weichselbaum's display itself was not needed, just as modification to the prior art structure in *Schreiber* was not needed, in order to read on the limitations regarding said display structure. In *Schreiber*, the products to be dispensed (i.e., popcorn) were not claimed; whereas here, the products to be dispensed (i.e., cylindrical products) are claimed. Therefore, Petitioner was required to set forth a reason with rational underpinning as to why one of ordinary skill in the art would have been prompted to modify the size of Weichselbaum's cans and not proportionally modify the size of the display.

Weichselbaum’s guide and lock features would be negated by altering the size of the cans).²⁴

We need not decide whether such features would be negated in such circumstances because Petitioner has provided no reason as to why one of ordinary skill in the art would modify the can size without modifying the size of Weichselbaum’s device. The import that we give Weichselbaum’s teaching regarding the guide and lock features is that the relative sizes of the device and cans are important to achieve the functional advantages of the device—namely, “occasioning a constant turnover of the stock and precluding the possibility of any can or series of cans being passed over for a long period of time.” Ex. 1023, 4:25–28. Thus, although we do not agree with Patent Owner that Weichselbaum discourages modifying the size of the device and cans,²⁵ see PO Resp. 17–19, we find that Petitioner has not explained persuasively why one of ordinary skill in the art would have been motivated to modify the can size without also modifying the size of the device. See *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1073 (Fed. Cir.

²⁴ Mr. Visser’s Reply Declaration includes testimony pertaining to whether Mellion teaches limitation [9] of claim 27 as well as whether Weichselbaum, in an unmodified state, teaches the limitation. See, e.g., Ex. 1065 ¶¶ 24–26 (discussing Mellion), ¶ 27 (discussing a different potential replacement position in an unmodified version of Weichselbaum). The grounds instituted for this trial were not based on these positions even assuming one or the other was raised in the Petition under a different ground. Accordingly, we give no weight to paragraphs 24–27 of the Visser Reply Declaration.

²⁵ Patent Owner argues that Weichselbaum teaches away from using smaller can sizes. PO Resp. 17–19. Weichselbaum’s disclosure does not rise to the level of a teaching away; it does not discourage one of ordinary skill in the art from using smaller can sizes. Rather, as we explained above, Weichselbaum teaches altering the size of the display to accommodate changes in can size.

2015) (“obviousness concerns whether a skilled artisan not only *could have made* but *would have been motivated to make* the combinations or modifications of prior art to arrive at the claimed invention”); *see also Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1066 (Fed. Cir. 2016) (“Although the *KSR* test is flexible, the Board ‘must still be careful not to allow hindsight reconstruction of references . . . without any explanation as to *how* or *why* the references would be combined to produce the claimed invention.’”) (quoting *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1368 (Fed. Cir. 2012)).

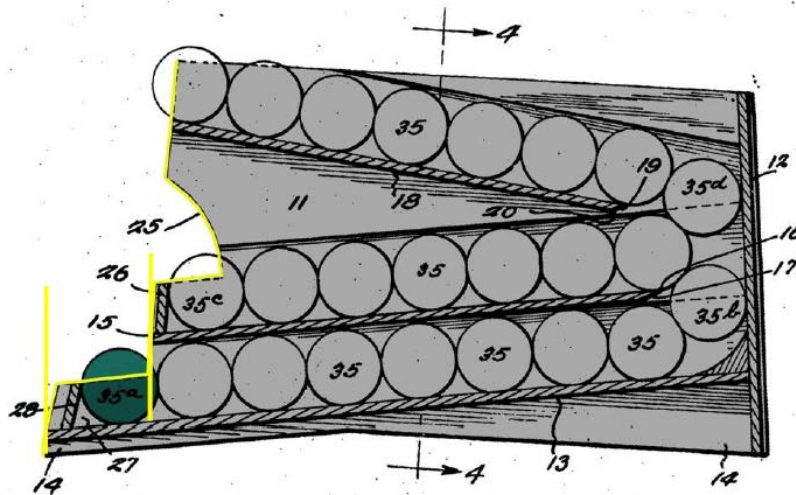
c) Limitations [10] and [11] of Claim 27

Limitations [10] and [11] of claim 27 recite:

[10] said panels having a forward edge portion extending vertically adjacent the loading openings of the chutes, the forward edge portion defining a rearward recess therein adjacent the dispensing ends extending a rearward distance toward the stop structure of the second chute at least a diameter of the products and exposing at least a portion of a generally circular end surface of the forwardmost product in the first chute, and

[11] at least a portion of a generally circular end portion of the replaced product when resting thereon.

Ex. 1001, 20:7–16. Petitioner contends that limitation [10] of claim 27 is substantively the same as a limitation in claim 20. Pet. 57. In addressing claim 20, Petitioner provides an annotated version of Weichselbaum’s Figure 3, reproduced below, highlighting the alleged forward edge portion of the panels and rearward recess. *Id.* at 41–42.

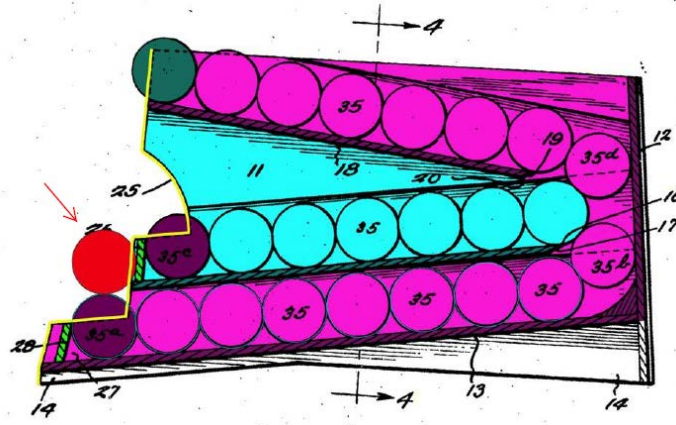


Petitioner's annotated version of Weichselbaum's Figure 3 is reproduced above, including yellow highlighting along a forward edge portion of the display panels, yellow lines extending vertically upward to illustrate rearward distance of the identified recess, and can 35a in the forwardmost position in the lower chute colored green. *Id.* at 42. Petitioner provides the following argument with respect to limitation [10]:

As is evident from Figures 2 and 3 of Weichselbaum (Figure 3 is reproduced above), the upper and lower support portions (15, 18) are supported between a pair of laterally spaced vertical panels (11), each panel (11) having a respective forward edge portion extending vertically adjacent the loading openings of the chutes (the forward edge of panels (11) are highlighted in yellow in Figure 3 above), the forward edge portions each defining a respective rearward recess therein adjacent the dispensing openings extending a rearward distance toward the stop structure of the second (upper) chute that is at least a diameter of the products (shown using vertical yellow lines in Figure 3 above) and exposing a portion of a generally circular end surface of the forwardmost product (can 35a) in the first (lower) chute.

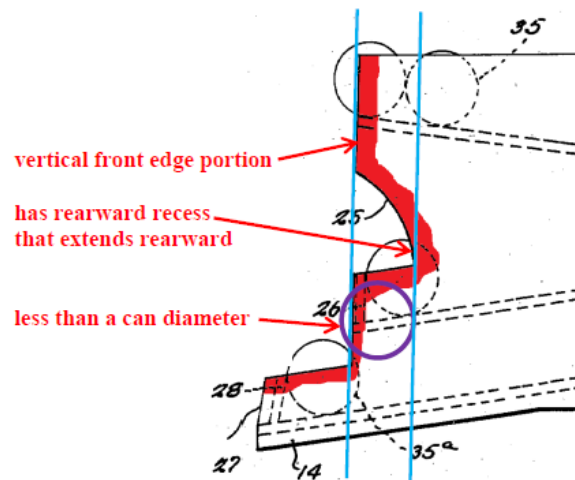
Id. at 42–43 (citing Ex. 1002 ¶ 189). With respect to limitation [11], Petitioner contends that the forward edge portions of Weichselbaum's panels have a recess that exposes a portion of a generally circular end portion of a

replaced product when resting thereon. *Id.* at 57. As shown below, Petitioner annotates Weichselbaum's Figure 3 to illustrate a replaced product in the recess. *Id.* at 58.



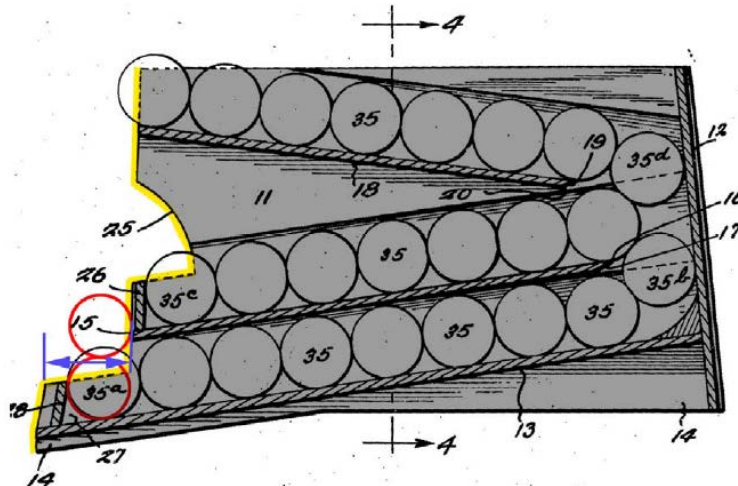
Petitioner's annotated version of Weichselbaum's Figure 3 is shown above including several different colors, notably a yellow line tracing the forward edge portion of vertical panel 11, and illustrating the position of a replaced can (added to Figure 3 in red) in what Petitioner alleges is the claimed recess. *Id.*

Patent Owner contends that Weichselbaum does not disclose the recited recess. PO Resp. 19–22. Patent Owner provides the following annotated version of Weichselbaum's Figure 1, shown below, in contrast to the annotation provided by Petitioner:



Patent Owner’s annotated version of Weichselbaum’s Figure 1 shows a red line following the forward edge portion of vertical panel 11, including two blue vertical lines, one extending through stop member 26 and the other extending through what Patent Owner identifies as the rearward portion of the recess. *Id.* at 21. Patent Owner asserts that Weichselbaum has a vertical front edge by loading shelf 18, and a recess in its vertical front edge portion, but contends that “the recess does not extend back at least the full diameter of a cylindrical article, as claim 27 requires.” *Id.* at 21–22.

In its Reply, Petitioner points to another annotated version of Weichselbaum’s Figure 3, reproduced below, and contends that the “recess extends rearward (highlighted in blue) toward the stop structure 26 of the second chute 15 at least the diameter of the products 35a when using smaller cans (shown in red).” Pet. Reply 12.

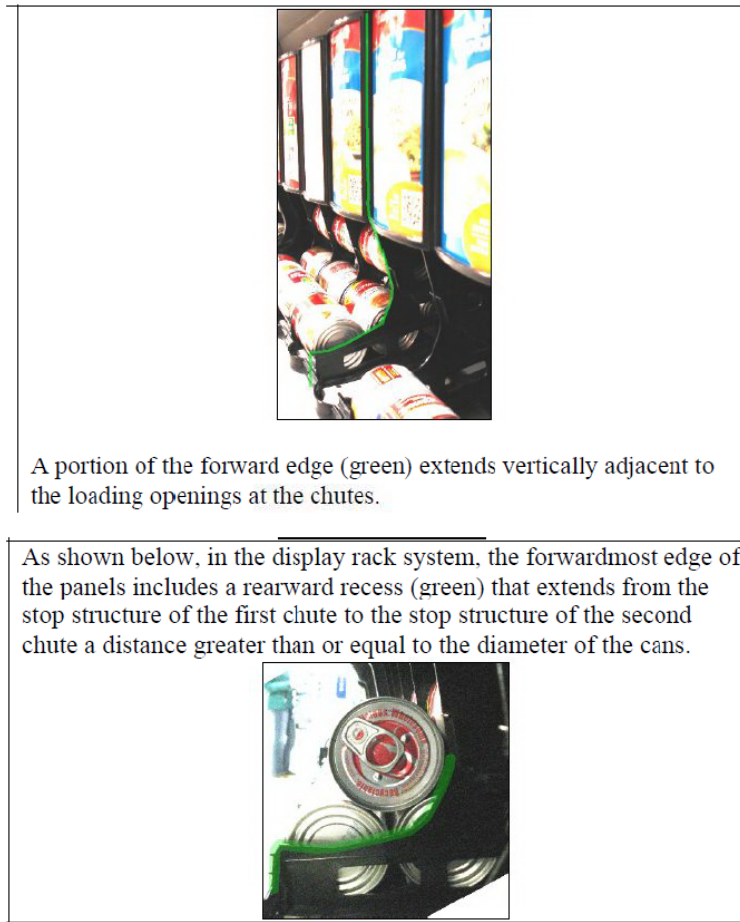


Petitioner's annotated version of Weichselbaum's Figure 3 shows a purported yellow front edge portion of panel 11 and blue arrows indicating the distance of the recess rearward. *Id.* at 13. Petitioner explains that limitations [10] and [11] of claim 27 recite a forward edge portion of the panels with three characteristics:

- (a) it "extend[s] vertically adjacent the loading openings of the chutes," (b) it "define[s] a rearward recess therein adjacent the dispensing ends extending a rearward distance toward the stop structure of the second chute at least a diameter of the products . . .," and (c) its recess "expos[es] at least a portion of" the end surface of the forwardmost can and a returned can.

Id. at 13–14.

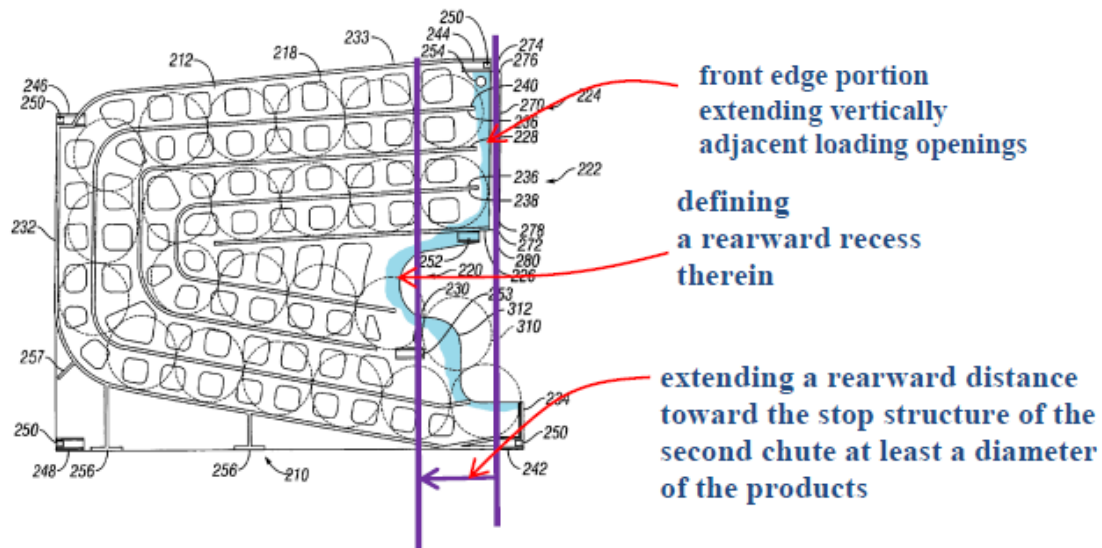
Additionally, Petitioner contends that claim 27 does not limit the forward edge portion to *only* its vertical part; rather, the forward edge portion includes the entire forward-facing edge of the panels, even the parts that are not vertical. *Id.* at 14. Petitioner includes the following discussion from Patent Owner's Initial Infringement Contentions in the related district court proceeding, in which Patent Owner identifies the forward edge portion of the allegedly infringing device:



Shown above is a portion of Patent Owner’s Initial Infringement Contentions in which the rearward recess of the forward edges of the panels of an allegedly infringing display are shown. *Id.* at 15 (citing Ex. 1067, Group Ex. A at 24/32).

To understand the parties’ positions, we first examine the claim language.²⁶ Patent Owner’s annotated version of Figure 16, reproduced below, is helpful in this regard. PO Resp. 20.

²⁶ We note that the terms “forward edge,” “forward edge portion,” and “recess” are not recited in the written description portion of the ’111 patent specification and neither party directs our attention to the prosecution history.



The above figure is Patent Owner’s annotated Figure 16 of the ’111 patent including the following claim language with red arrows pointing to where each recitation is shown in the figure: a “front edge portion extending vertically adjacent loading openings,” “defining a rearward recess therein” and “extending a rearward distance toward the stop structure of the second chute at least a diameter of the products.”

In particular, the claim language begins by describing the forward edge portion adjacent the loading openings and ends with describing the structure adjacent the dispensing openings, thus describing the forward edge portion from the top of the panel downward, as explained below.

Limitation [10] first states that the panels have “a forward edge portion extending vertically adjacent the loading openings of the chutes.” Ex. 1001, 20:7–8. As an example embodiment, Patent Owner identifies the vertically extending forward edge portion adjacent the loading openings of the chutes, and points to that area with a first red arrow toward the top of its annotated Figure 16. PO Resp. 20.

Limitation [10] then recites, “the forward edge portion defining a rearward recess therein adjacent the dispensing ends extending a rearward distance toward the stop structure of the second chute.” Ex. 1001, 20:8–11. This language recites several features: (1) the forward edge portion defines a recess therein; (2) the recess is adjacent the dispensing ends; and (3) the recess extends rearward toward the stop structure of the second chute. Patent Owner’s annotated Figure 16 illustrates the forward edge portion as defining a recess, the recess is adjacent the dispensing ends, and the recess extends rearward toward the stop structure (230) of the second chute. Additionally, Patent Owner illustrates the recess as starting from the same plane as the vertically extending forward edge portion. See PO Resp. 20 (the vertical purple line on the right of Patent Owner’s annotated Figure 16). The claim language states that the forward edge portion extends vertically and “defin[es] a rearward recess therein.” Ex. 1001, 20:9. Thus, in view of the plain language of the claim, we agree with Patent Owner that the starting point/plane for the recess is the upper vertically extending portion because that is the portion “adjacent the loading openings of the chutes.” The example recess as identified by Patent Owner also satisfies the remaining language of limitations [10] and [11] because it (a) “extend[s] a rearward distance toward the stop structure of the second chute at least a diameter of the products,” and (b) “expos[es] at least a portion of a generally circular end surface of the forwardmost product in the first chute, and at least a portion of a generally circular end portion of the replaced product when resting thereon.” *Id.* at 20:10–16. Again, we reference Figure 16 as an illustrative embodiment to better understand the claim language.

Turning to the parties' discussions of Weichselbaum, we are not persuaded that either parties' position is completely correct. In Patent Owner's annotation of Weichselbaum's Figure 1 (shown above), the forward edge portion defining the recess is in the same plane as stop member (26), identified by Petitioner as teaching the stop structure of the second chute recited in claim 27. Patent Owner identifies the recess as extending rearward (to the right in the figure) from that plane, but that direction is not *toward* the stop structure of the second chute, it is direction *away* from said stop structure. See PO Resp. 21 (Patent Owner identifies the recess as extending from the blue vertical line on the left toward the blue vertical line on the right.). Thus, because this recess does not "extend[] a *rearward* distance *toward the stop structure* of the second chute," as required by claim 27, we do not agree with Patent Owner's identification, in Weichselbaum, of the recess recited in limitation [10].

Similarly, we do not agree with Petitioner's annotations of Weichselbaum's Figure 3 (also shown above). Petitioner identifies a recess with double-facing blue arrows. Pet. Reply 13. That recess, although extending rearward *toward* the stop structure of the second chute (26), is not defined by the "forward edge portion extending vertically *adjacent the loading openings of the chutes*," as recited in claim 27.

Based on the full record, Weichselbaum fails to teach the recited forward edge portion extending vertically adjacent the loading openings of the chutes, defining a rearward recess extending a rearward distance toward the stop structure of the second chute as recited in claim 27. Weichselbaum's forward edge portion is in the same vertical plane as its second stop structure. That alignment precludes a recess from extending

rearward from the forward edge portion toward the second stop structure. Thus, Weichselbaum fails to teach limitation [10] of claim 27.²⁷

Additionally, we note that Petitioner’s position in its Reply with respect to limitations [10] and [11] is based on using smaller cans than those taught by Weichselbaum. Regarding Weichselbaum, Petitioner states: “This recess extends rearward (highlighted in blue) toward the stop structure 26 of the second chute 15 at least the diameter of the products 35a *when using smaller cans (shown in red)*.” Pet. Reply 12 (emphasis added). Thus, Petitioner ties its assertion regarding limitations [10] and [11] to the use of cans smaller than those taught by Weichselbaum. Petitioner, however, does not provide any reason as to why one of ordinary skill in the art would have modified Weichselbaum’s can size, appearing instead to link, *sub silentio*, its position regarding can size to the discussion of limitation [9]. Accordingly, even if the recess in Weichselbaum were located where Petitioner identifies, Petitioner’s argument remains deficient for the same reasons we discussed above regarding limitation [9]—namely, Petitioner fails to direct us to a persuasive reason why a person of ordinary skill in the art would have reduced the size of the can, but not the size of the display device, in Weichselbaum.

²⁷ We also have reviewed Patent Owner’s infringement contentions in the related district court litigation, but do not find that they tip the scales in one direction or another. In particular, Patent Owner identifies a recess “that extends from the stop structure of the first chute to the stop structure of the second chute.” Pet. Reply 15 (citing Ex. 1067, Group Ex. A at 24/32). A recess extending from the stop structure of the first chute to the stop structure of the second chute, however, is not recited expressly in claim 27.

d) *Claims 28, 33, and 34*

Claims 28, 33, and 34 depend directly or indirectly from claim 27. Ex. 1001, 20:17 (claim 28), 20:61 (claim 33), 21:3 (claim 34). Claim 28 recites a further modification to the distance between the stop structures of the respective chutes, and claims 33 and 34 further recite a requirement of a door covering the product loading openings of the chutes and additional limitations pertaining thereto. *See id.* at 20:17–23 (claim 28), 20:61–21:6 (claims 33 and 34). Petitioner sets forth its arguments directed to claims 28, 33, and 34 in the Petition. *See* Pet. 59–60 (claim 28), 60–62 (claim 33), 62–63 (claim 34). Patent Owner does not raise an independent argument directed to the patentability of these claims, relying instead upon its arguments asserted with respect to claim 27. PO Resp. 40. Thus, Patent Owner has waived any argument directed to independent patentability of these claims. *See* Paper 13, 3. Petitioner’s arguments are uncontested in the context of these claims and we find them supported sufficiently on the record before us and, therefore, adopt them as our findings regarding these claims. Nonetheless, Petitioner’s positions suffer from the same deficiencies noted above with respect to claim 27 and, thus, our discussion of claim 27 applies equally here.

4. *Weichselbaum, Nesso, and Mellion: Differences Between the Prior Art and the Claims; Motivation to Modify*

Claims 32 and 35 depend from claim 27. Ex. 1001, 20:58 (claim 32), 21:7 (claim 35). Claim 32 further recites “wherein the upper and lower support portions each comprise a respective rib extending laterally inward from one of the pair of panels.” *Id.* at 20:58–60. Petitioner relies upon its argument directed to claim 21 (Pet. 69), where Petitioner asserts that one of ordinary skill in the art would have been motivated to “replace the product

support surfaces of Weichselbaum/Nesso with ribs extending laterally inward from panel pairs at least because forming the support surfaces as ribs, rather than continuous surfaces, would require less plastic and would be less expensive” (*id.* at 47–48 (citing Ex. 1002 ¶ 201)). Petitioner asserts that replacing the support surfaces with ribs “is nothing more than the simple substitution of known elements for one another to obtain predictable results and/or the use of known techniques to improve similar devices in the same way.” *Id.* at 47–48 (citing *KSR*, 550 U.S. at 416–18; Ex. 1002 ¶ 201).

Claim 35 further recites

wherein the stop structure of the second chute comprises a pair of stop members each extending into the chute from a respective panel and defining therebetween a space permitting a user to grasp a one of the products resting against the stop structure of the second chute and remove it from the rack.

Ex. 1001, 21:7–12. Petitioner relies upon its argument directed to claim 22 (Pet. 70), where Petitioner asserts that it would have been obvious to one of ordinary skill in the art to modify the Weichselbaum/Nesso display rack “to incorporate the stops of Mellion that extend laterally inward from the side panels with a space therebetween to permit grasping a product adjacent the stops to remove it from the rack at least because this structure makes it easier for a user to grasp and remove a product” (*id.* at 49 (citing Ex. 1002 ¶ 208)). Petitioner asserts that incorporating the stops from Mellion “is nothing more than the simple substitution of known elements for one another to obtain predictable results and/or the use of known techniques to improve similar devices in the same way.” *Id.* (citing *KSR*, 550 U.S. at 416–18; Ex. 1002 ¶ 208).

In responding to Petitioner’s challenge to claims 32 and 35, Patent Owner relies upon its arguments asserted with respect to claim 27. PO

Resp. 41. For the same reasons discussed above, Petitioner’s positions suffer from the same deficiencies noted with respect to claim 27 and, thus, our discussion of claim 27 applies equally here.

5. *Objective Considerations*

The ultimate question of obviousness is one of law that must consider all four *Graham* factors including objective indicia, “which can be powerful, real-world indicators of what would have been obvious.” *WBIP*, 829 F.3d at 1328. As the Supreme Court explained, “[s]uch secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc. might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.” *Graham*, 383 U.S. at 17–18. Patent Owner contends that two objective indicia weigh in favor of non-obviousness: commercial success and copying. PO Resp. 29. Petitioner asserts that the objective indicia do not rebut the showing that the claims are obvious. Pet. Reply 20–25. We address each.

a) *Commercial Success*

“When ‘a product attains a high degree of commercial success, there is a basis for inferring that [attempts to solution] have been made and have failed.’” *WBIP*, 829 F.3d at 1337 (alterations in original) (quoting *Merck & Co. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1376 (Fed. Cir. 2005)). “Demonstrating that an invention has commercial value, that it is commercially successful, weighs in favor of its non-obviousness.” *Id.*

Patent Owner relies on its²⁸ sales of approximately \$31 million of gravity feed display racks to Campbell as evidence of commercial success.

²⁸ Given the corporate affiliate relationship between Gamon International and Patent Owner Gamon Plus, Inc., we consider sales made by Gamon

PO Resp. 30–32. Patent Owner also relies on the commercial success of sales of the displayed soup cans (that is, sales made by Campbell). *Id.* at 32–34. We consider each measure of commercial success below and how it relates to the claimed features of the ’111 patent.

Based on the final trial record before us, we determine that Patent Owner has established that its commercial embodiments have enjoyed commercial success and Campbell has seen increased sales volumes of soup attributable to the claimed device. Patent Owner contends, and Petitioner does not contest, that claim 27 of the ’111 patent reads on the display racks sold to Campbell once soup cans are placed in the racks. *Id.* at 30. Patent Owner relies upon Mr. Johnson’s declaration testimony and photographs showing a model of the display sold to Campbell. *Id.* (citing Paper 16 ¶¶ 8, 9; Ex. 2008–2012). The evidence reflects that Campbell tested and purchased Gamon’s display racks at least between 2002 and 2009, at a cost of approximately \$31 million. *Id.* at 32 (citing Paper 16 ¶ 17); PO Sur-Reply 1.

Additionally, Patent Owner relies upon Campbell’s increase in sales of soup as reported by Campbell in at least its 2005–2007 Annual Reports. PO Resp. 32–33 (citing Paper 16 ¶ 16; Ex. 20); PO Sur-Reply 2; Exs. 2024–2026 (Campbell’s 2005–2007 Annual Reports). As Patent Owner explains, Campbell’s Annual Reports and the interview with Mr. Finnel attribute some of the increase in sales of soup to use of Patent Owner’s display racks. PO Resp. 32–33; PO Sur-Reply 2 (discussing Exs. 2013, 2024–2026). Patent Owner contends that even if its display racks were responsible for only 1%

International attributable to Patent Owner. Petitioner does not contend to the contrary.

of the increase in soup sales, 1% equates to \$10 million per year. PO Resp. 33 (citing Paper 16 ¶ 19).

Petitioner contends that Patent Owner has not shown commercial success attributable to the '111 patent. Pet. Reply 20–23. Petitioner does not contest Patent Owner's "commercial success" generally; rather, Petitioner contends that Patent Owner fails to establish a nexus between that success and "any allegedly novel element of the '111 patent." *Id.* at 21. Additionally, because Patent Owner focused its argument on limitations [9]–[11] of claim 27 in response to Petitioner's combination of Weichselbaum and Nesso, Petitioner contends that Patent Owner was required to show a nexus directly attributable to one or more of those limitations. *Id.* at 23.

The Federal Circuit has clarified the application of nexus to combination inventions:

Where the allegedly obvious patent claim is a combination of prior art elements, we have explained that the patent owner can show that it is the claimed combination as a whole that serves as a nexus for the objective evidence; proof of nexus is not limited to only when objective evidence is tied to the supposedly "new" feature(s). In such a case, the fact that an isolated feature may be present in the prior art may not render irrelevant objective evidence of non-obviousness of that feature in the claimed combination.

WBIP, 829 F.3d at 1330–31 (citing *Rambus v. Rea*, 731 F.3d 1248, 1258 (Fed. Cir. 2013)). These are precisely the circumstances with which we are presented here. Specifically, Patent Owner does not contend that it invented an element never before seen in the art. Rather, the evidence presented by Patent Owner is directed to the claimed combination as a whole. Additionally, "there is a presumption of nexus for objective considerations when the patentee shows that the asserted objective evidence is tied to a

specific product and that product ‘is the invention disclosed and claimed in the patent.’” *WBIP*, 829 F.3d at 1329 (citation omitted). The presumption is rebuttable, but “a patent challenger cannot successfully rebut the presumption with argument alone—it must present evidence.” *Id.* (citation omitted). Patent Owner has shown that the asserted objective evidence, discussed further below, is tied to a specific product and that product “is the invention disclosed and claimed in the patent.” *Id.* (quoting *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997)). “This showing—that the specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations at issue in this case.” *Id.* at 1330. It is, therefore, Petitioner’s burden to rebut that presumption. *Id.* at 1329 (“a patent challenger cannot successfully rebut the presumption with argument alone—it must present evidence”); see Tr. 46:20–47:8 (Petitioner agreeing that nexus is presumed and that Petitioner has the burden to overcome the presumption.).

Petitioner does not rebut the presumption of nexus. First, Petitioner’s entire argument is phrased as challenging whether Patent Owner satisfied *its* burden of establishing nexus, as opposed to whether Petitioner rebuts the presumption of nexus. Pet. Reply 20–21 (“It is Patent Owner’s burden to establish a nexus.”) (citing *CaptionCall LLC v. Ultratec Inc.*, IPR2013-00540, Paper 78 at 50 (PTAB Mar. 3, 2015)). Second, Petitioner points to other factors, including higher prices and increased advertising, referred to in Campbell’s annual reports that contributed to increased soup sales. Pet. Reply 21–22. There is no dispute that other factors also contributed to the

increase in soup sales. But, there is also no dispute that Campbell's own statements, through its Annual Reports and Mr. Finnel's interview, tie increased soup sales expressly to Gamon's display racks. Additionally, Campbell's internal presentation describes Gamon's IQ Maximizer as "Breakthrough Gravity Feed Shelving" and attributes the following to the display racks based on the results of its study:

- +13.6% volume lift for Corporate Brand
- +10% volume lift for Condensed Segment
- +9.3% volume lift for Campbell's Condensed
- +5.5% volume lift for Wet Soup Category
- Encourages purchase of additional varieties
- Billboard effect improves branding: 210% larger
- Positive labor impact due to elimination of shelf conditioning

Ex. 2032, 4.

Although other factors had some degree of impact on commercial success,²⁹ we determine that Patent Owner has established that an appreciable amount of Campbell's increased commercial success of soup during the relevant time period is attributable to the display rack covered by claim 27 of the '111 patent. Accordingly, Gamon's sales to Campbell of about \$31 million from 2002–2009 as well as a portion of the increased sales of Campbell's soup using Gamon's display racks provide a strong showing of commercial success of the commercial embodiment of claim 27 of the '111 patent.

²⁹ It would be an unusual case if no other factor impacted the commercial success of a product.

b) Copying

Patent Owner alleges that copying by Petitioner Trinity is another objective indicia of the non-obviousness of the claimed invention. PO Resp. 35–40. In particular, Patent Owner provides a claim chart illustrating how the limitations of claim 27 read on Petitioner Trinity’s display rack. *Id.* at 36–39.

“[C]opying requires evidence of efforts to replicate a specific product, which may be demonstrated through internal company documents, direct evidence such as disassembling a patented prototype, photographing its features, and using the photograph as a blueprint to build a replica, *or access to the patented product combined with substantial similarity to the patented product.*” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (emphasis added); *see Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1370 (Fed. Cir. 2011); *see also* Tr. 47:25–48:6 (Petitioner agreeing to the standard for establish copying).

Petitioner does not assert that it did not copy Patent Owner’s commercial product. *See* Pet. Reply 23–24; Tr. 47:11–24 (Petitioner acknowledging that it did not put in any affirmative evidence on copying). Rather, Petitioner argues that it could not have copied limitations [9]–[11] of claim 27 of the ’111 patent because the patent issued in 2014, six years after Petitioner Trinity launched its accused display rack. Pet. Reply 24. Petitioner’s argument is unpersuasive for two reasons.

Copying in the context of secondary considerations may be established by showing replication of a “product” covered by the patent claims—even where access to the patent is not established. *See Wyers*, 616 F.3d at 1246. The final trial record before us is replete with evidence of both

Campbell's access to Gamon's product and the substantial similarity of Trinity's display racks to Gamon's display racks. Specifically, Campbell's internal presentations in 2002 demonstrate that Campbell was aware that Gamon's gravity feed display racks would increase sales volume of Campbell's soup. *See* Ex. 2032, 4. After obtaining the results of the Cannondale survey, Campbell purchased thousands of Gamon's display racks between 2002 and 2009. PO Resp. 30–31. Petitioner had access to the patented design and significant motivation to continue using the same design. Campbell's Annual Reports praise Gamon's display racks and link increased Campbell soup sales to these display racks. *See supra*. Around 2009, Campbell transitioned from purchasing Gamon's display racks to those sold by Petitioner Trinity. As discussed above, the Trinity display racks are substantially similar to the Gamon racks, especially as they relate to the limitations of claim 27. PO Resp. 36–39. Petitioner's access to the patented product combined with the substantial similarity of Trinity's product to the patented product provide unrefuted evidence that Patent Owner's display racks were copied. That evidence, combined with Petitioner's failure to deny that it copied Gamon's display racks, persuades us that Patent Owner has established that Petitioner copied Patent Owner's display racks.

6. *Weighing the Graham Factors*

“Once all relevant facts are found, the ultimate legal determination [of obviousness] involves the weighing of the fact findings to conclude whether the claimed combination would have been obvious to an ordinary artisan.” *Arctic Cat*, 876 F.3d at 1361. In weighing the facts here, we determine that the level of skill in the art does not favor either Petitioner's or Patent

Owner's case. Neither party argues that the level of skill is either so high or low as to weigh in favor of their arguments as opposed to the other's; nor do the parties argue that the level of skill specifically impacts our legal determination of obviousness in any specific manner. Turning to our findings regarding the scope and content of the prior art and the differences between the prior art and the claimed invention, we determine that they weigh in favor of Patent Owner. Although the scope and content of the prior art are in some ways similar to the claimed invention, we determine that Petitioner has not shown sufficiently that one of ordinary skill in the art would have been prompted to modify only the size of the cans (without making a corresponding change in the size of the display device) in Weichselbaum. Additionally, Petitioner's proposed modification of Weichselbaum, to include the second chute of Nesso, appears on this record to be based on a hindsight reconstruction. Further, Petitioner fails to point out with particularity how or why one of ordinary skill in the art would have been prompted to make the modification to arrive at the claimed structure. Additionally, we find that Patent Owner's objective indicia of commercial success and copying weigh heavily in favor of non-obviousness, for the reasons set forth above.

On balance, we determine that, based on the complete record before us, Patent Owner's evidence of non-obviousness outweighs Petitioner's evidence of obviousness. Accordingly, Petitioner has not demonstrated, by a preponderance of the evidence, that claims 27, 28, and 32–35 of the '111 patent are unpatentable.³⁰

³⁰ Even if we were to have found that Weichselbaum teaches or suggests altering can size independently from display size and the front edge portion

IV. PETITIONER’S MOTION TO EXCLUDE

Petitioner moves pursuant to Federal Rules of Evidence (“FRE”) 402 and 702, and 37 C.F.R. § 42.65 to exclude the portions of the Johnson Declaration (Paper 16) that are offered as expert opinion testimony by Patent Owner, including, but not limited to, paragraphs 5–7, 14, 18–21, 27, and 52. Pet. Mot. 1. Petitioner divides the testimony that it seeks to exclude into three categories: (1) testimony attributing commercial success to specific patented features of the display racks; (2) testimony that Petitioner Trinity copied its display racks directly from Gamon’s display racks; and (3) that Petitioner Campbell’s use of display racks covered by the ’111 patent resulted in hundreds of millions of dollars in increased sales and profits. *Id.* at 3. Petitioner asserts that this testimony is “not supported by sufficient facts or data, do not reflect the application of reliable principles or methods of analysis and do not bear on any relevant issues in this case.” *Id.* Thus, Petitioner contends that such testimony “should accordingly be excluded (or, alternatively, given no weight).” *Id.* at 3. Petitioner also explains that its motion is not directed to Mr. Johnson’s testimony as a fact witness. *Id.* at 1 n.1 (“To the extent Patent Owner has offered Mr. Johnson as a fact witness, his proffered testimony is questionable on many grounds but is not the subject of this motion to exclude; rather, Petitioners believe that any such testimony is entitled to little to no weight but defer that determination to the Board.”). We first consider the legal standards for a motion to exclude and then we consider the merits of each argument.

limitation of claim 27, and we had accepted Petitioner’s reasons to combine Weichselbaum and Nesso, we would still determine that the weight of Patent Owner’s evidence of non-obviousness outweighs Petitioner’s evidence of obviousness.

A. Legal Standards

A motion to exclude deals with the admissibility of evidence under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.62 (applying the Federal Rules of Evidence to *inter partes* reviews), 42.64; Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012) (“Admissibility of evidence is generally governed by the Federal Rules of Evidence.”). As stated in the Office Patent Trial Practice Guide, the parties may submit motions to exclude regarding evidence “believed to be inadmissible.” Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,758. Further, a motion to exclude “must explain why the evidence is not admissible (*e.g.*, relevance or hearsay).” *Id.* at 48,767. As the moving party, Petitioner bears the burden of proof. *See* 37 C.F.R. § 42.20(c).

1. Testimony Attributing Commercial Success to Specific Patented Features of the Display Racks

Petitioner seeks to exclude Mr. Johnson’s testimony that the “great commercial success” of display racks covered by the ’111 patent is attributable to several of its claimed features. Pet. Mot. 3, 4. Petitioner argues

[a]lthough Mr. Johnson summarily asserts that display racks purportedly covered by the ’111 patent have experienced commercial success, he cites no facts or data to show that any such success should be attributed to any particular claimed, and patentably distinct, features of the ’111 patent rather than, *e.g.*, the attributes of gravity feed racks generally and/or features of the Gamon display racks not covered by the ’111 patent.

Id. at 3–4. Petitioner contends that, absent a showing of nexus between the alleged commercial success and any particular patentably distinct feature(s) claimed in the ’111 patent, Mr. Johnson’s testimony is “irrelevant under FRE 402, lacking in the requisite reliability and ‘fit’ for expert testimony

under *Daubert* and Rule 702 and lacking in the requisite showing of supporting facts and/or data mandated by 37 C.F.R. § 42.65.

Petitioner’s argument focuses on the alleged lack of nexus between the success and the claims of the ’111 patent. As we discussed above, in addressing this objective indicia of non-obviousness, nexus is presumed based on the facts before us. *See WBIP, LLC*, 829 F.3d at 1330 (“This showing—that the specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations at issue in this case.”). Petitioner has failed to rebut that presumption. Thus, Petitioner’s challenge is without merit.³¹

2. *Testimony that Petitioner Trinity Directly Copied Gamon’s Display Racks*

Petitioner contends that Mr. Johnson’s testimony that Petitioner Trinity “copied directly” from Gamon’s display racks “is speculative, conclusory and lacking in any showing of the requisite nexus between any alleged ‘copying’ by Trinity and any alleged patentably distinct feature of the ’111 patent.” Pet. Mot. 5. Thus, according to Petitioner, this testimony should be excluded pursuant to “Federal Rules of Evidence 402 and 702, as well as 37 C.F.R. § 42.65.” *Id.*

Patent Owner contends that Mr. Johnson’s testimony as to copying is factual, not expert opinion testimony. PO Opp. 8. In particular, Patent

³¹ Even if we were to agree with Petitioner that these portions of Mr. Johnson’s testimony should be excluded, our ultimate decision would not change. The additional evidence cited in the analysis, including Campbell’s own internal documents and public disclosures discussed above, supports the same ultimate determination.

Owner asserts that no expert testimony is necessary because copying is readily apparent from comparing the patented display rack and Petitioner Trinity's display rack. *Id.*

Petitioner's argument again focuses on the alleged lack of nexus between the copying of the commercial embodiment and the claims of the '111 patent. As we discussed above, in addressing this objective indicia of non-obviousness, nexus is presumed based on the facts before us. *See WBIP, LLC*, 829 F.3d at 1330 ("This showing—that the specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations at issue in this case."). Petitioner has failed to rebut that presumption.

Additionally, Patent Owner represents that Mr. Johnson's testimony is offered as fact testimony, not expert opinion. PO Opp. 8. Because Petitioner's Motion challenges only Mr. Johnson's testimony as an expert, Petitioner has not presented a persuasive reason to exclude.³²

3. *Testimony that Petitioner Made Hundreds of Millions of Dollars in Sales and Profit*

Petitioner contends that Mr. Johnson's testimony "regarding the alleged 'hundreds of millions' of dollars in 'sales and profits' that Petitioners purportedly accrued through sales and/or use of their accused racks is similarly speculative, conclusory and lacking in any showing of the requisite

³² Even if agree with Petitioner that these portions of Mr. Johnson's testimony should be excluded, our ultimate decision would not change. The additional evidence cited in the analysis, including the overwhelming circumstantial evidence of copying discussed above, supports our finding that Petitioner copied Gamon's product.

nexus between any alleged commercial success and any alleged patentably distinct feature of the ‘111 patent” and should be excluded. Pet. Mot. 5 (quoting Paper 16 ¶ 20). Petitioner contends that this testimony should be excluded under FRE 402 and 702, as well as 37 C.F.R. § 42.65. *Id.* at 6.

Patent Owner contends that Mr. Johnson’s testimony

is simply a matter of arithmetic based on the increase in sales from the original test performed by Petitioners that indicated a 9% to 14% increase in sales from the patented display racks, some of Petitioners’ publicly available data, some information given to Mr. Johnson by Petitioner Campbell Soup, and data from a limited investigation that Patent Owner Gamon Plus, Inc. conducted.

PO Opp. 8 (citing Paper 16 ¶¶ 18, 19; Paper 53 ¶¶ 14–21).

Petitioner’s challenge in this regard is specifically directed to Mr. Johnson’s lack of qualifications related to his “economic analysis.” We agree with Petitioner that Mr. Johnson has not been shown to be an economic expert. Pet. Mot. 5. Mr. Johnson’s testimony states that “[t]he increased sales and profits that Petitioner Campbell Soup took in as a result of the use of the invention of the ‘111 patent, including that defined by claim 27, should total in the hundreds of millions by now, and constitutes massive commercial success of the patented display rack.” Paper 16 ¶ 20. This testimony is excluded because Patent Owner has not shown that Mr. Johnson has the necessary expertise to reach a conclusion that the display racks have resulted in hundreds of millions of dollars of additional sales. Although Mr. Johnson presents more detail about the factual basis for his opinion in his Supplemental Declaration (Paper 53), his opinion that Gamon’s display racks contributed to hundreds of millions of dollars in

increased soup sales and profits is testimony that ordinarily requires expert economic analysis. Therefore, we give this specific testimony no weight.

We note, however, that Mr. Johnson's testimony that the Gamon display racks have been commercially successful and that Campbell's soup products displayed in those racks had increased sales volume does not require expert economic analysis because such testimony is based on his personal knowledge and involvement with the successful sales of his company's own display racks. *See* PO Opp. 7–8.

4. Conclusion

For the reasons set forth above, we *grant-in-part* Petitioner's Motion to Exclude. Specifically, we give no weight to the quoted testimony above from paragraph 20 of Paper 16 ("hundreds of millions").

V. CONCLUSION

We *grant* Patent Owner's request to cancel claims 1–16. We determine that Petitioner has not demonstrated, by a preponderance of the evidence, that claims 27, 28, and 32–35 of the '111 patent are unpatentable. And, we *grant-in-part* Petitioner's Motion to Exclude (Paper 44).

VI. ORDER

Accordingly, it is:

ORDERED that Petitioner's Motion to Exclude Evidence (Paper 44) is *granted-in-part*;

FURTHER ORDERED that claims 1–16 of U.S. Patent No. 8,827,111 B2 ("the '111 patent") are cancelled;

FURTHER ORDERED that, based on a preponderance of the evidence, claims 27, 28, and 32–35 of the '111 patent have not been proven unpatentable;

FURTHER ORDERED that, pursuant to 35 U.S.C. § 318(b), upon expiration of the time for appeal of this Decision, or the termination of any such appeal, a certificate shall issue (1) cancelling claims 1–16 and (2) confirming the patentability of claims 27, 28, and 32–35 of the '111 patent; and

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

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