

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRANKLIN ELECTRIC CO., INC.,
Petitioner,

v.

LIBERTY PUMPS, INC.,
Patent Owner.

Case IPR2017-00112
Patent 8,523,532 B1

Before MICHAEL R. ZECHER, GEORGIANNA W. BRADEN, and
KIMBERLY McGRAW, *Administrative Patent Judges*.

McGRAW, *Administrative Patent Judge*.

DECISION

Denying Institution of *Inter Partes* Review
35 U.S.C. § 314(a) and 37 C.F.R. § 42.108

I. INTRODUCTION

Petitioner, Franklin Electric Co., Inc. (“Franklin”), filed a Petition (Paper 1, “Pet.”) requesting an *inter partes* review of claims 2 and 13 of U.S. Patent No. 8,523,532 B1 (Ex. 1001, “the ’532 patent”) pursuant to 35 U.S.C. § 311(a). Patent Owner, Liberty Pumps, Inc. (“Liberty”), filed Preliminary Response (Paper 7, “Prelim. Resp.”) pursuant to 35 U.S.C. § 313. Pursuant to 35 U.S.C. § 314(a), an *inter partes* review may not be instituted “unless . . . the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

Upon consideration of the information presented in the Petition and the Preliminary Response, for the reasons explained below we determine that Petitioner has not demonstrated that there is a reasonable likelihood that it would prevail in establishing the unpatentability of claims 2 and 13 of the ’532 patent. Accordingly, we do not institute an *inter partes* review of claims 2 and 13 of the ’532 patent.

A. *Related Proceedings*

The parties state the ’532 patent has been asserted by Liberty against Franklin in the Western District of New York, Case No. 6:16-CV-6123-EAW/MWP. Pet. 1–2; Paper 4, 1. Liberty also identifies Case IPR2017-00113 filed by Franklin challenging certain claims of U.S. Patent No. 8,888,465 B1 (“the ’465 patent”) as a related matter. Paper 4, 1.

B. *The ’532 Patent*

The ’532 patent, titled “Sewage Handling System, Cover, and Controls,” issued on September 3, 2013, from U.S. Patent Application No.

12/417,567, filed on April 2, 2009. Ex. 1001, at [54], [45], [21], [22]. The '532 patent is a continuation-in-part of the following two applications: (1) U.S. Patent Application No. 11/093,133 ("the '133 application"), filed on March 29, 2005—now U.S. Patent No. 7,520,736, and (2) U.S. Patent Application No. 11/111,113, filed on April 21, 2005—now U.S. Patent No. 7,563,082. *Id.* at [63]. The '133 application published as U.S. Patent Publication No. 2006/0228222 A1 ("the '222 Publication"). Ex. 1014, at [10], [21].

The '532 patent is directed to a sewage handling system, a cover assembly for a sewage basin, and control accessories disposed within a sewage basin that receives and distributes sewage via a pump housed in the basin. Ex. 1001, 1:20–23. According to the '532 patent, although conventional sewage basin assemblies may operate in a satisfactory manner with respect to the basic sewage handling functions, there is a need for better accessibility to the internal components of the sewage basin in order to simplify assembly and adjustability of certain components. *Id.* at 2:17–22.

The '532 patent purportedly addresses this need by providing a basin assembly that comprises a body, which includes a bottom wall, a side wall, an open top, a hanging feature formed in the body of the basin, and a hanging member suspended from the hanging feature within the body of the basin. Ex. 1001, 2:42–47. According to the '532 patent, the hanging feature of the basin and the hanging member may have various forms. *Id.* at 2:47–49. Figure 12 of the '532 patent, reproduced below, illustrates one embodiment of a sewage handling system that includes a level switch assembly comprising a hanging member engaged with the hanging feature of the basin. *Id.* at 4:31–34, 11:3–30.

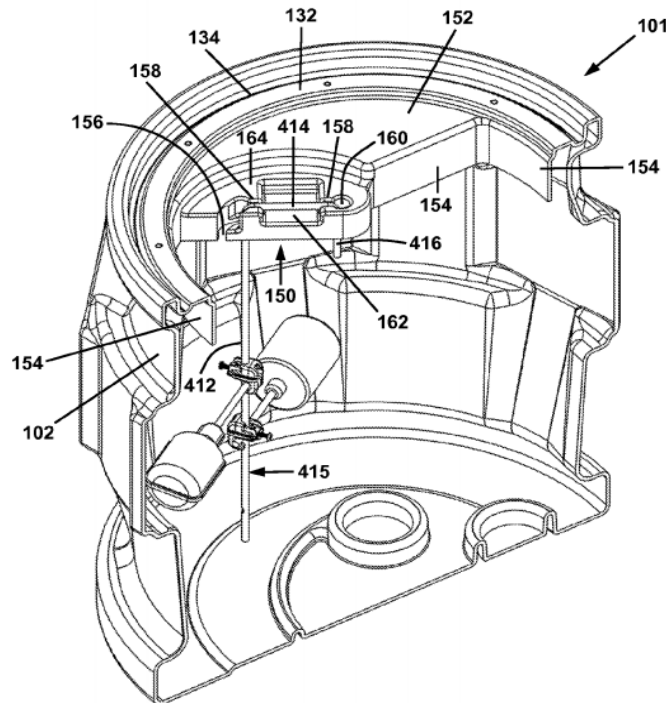


Figure 12 reproduced above, illustrates basin 101 includes hanging feature 150. *Id.* at 10:66–11:1. The open top of basin 101 includes annular flange 134, with hanging feature 150 formed in shelf 152 extending inwardly from the annular flange. *Id.* at 11:3–6. Shelf 152 and annular flange 134 further include downwardly extending lip 154 that provides structural strength to the shelf and annular flange, thereby making the shelf strong enough to support objects suspended therefrom. *Id.* at 11:6–11.

Figure 12 further illustrates that basin 101 includes hanging member 415 suspended from hanging feature 150. *Ex.* 1001, 11:15–16. The shape of hanging feature 150 and hanging member 415 are formed to match each other, such that the hanging feature receives the hanging member. *Id.* at 11:18–21. For instance, hanging feature 150 includes first vertical cavity 156, and hanging member 415 includes elongated vertical section 412 extending downwardly through the first vertical cavity. *Id.* at 11:29–33. Hanging feature 150 further includes horizontal portion 158, with elongated

vertical section 412 of hanging member 415 extending from upper horizontal section 414, such that this horizontal section is disposed in the horizontal portion of the hanging feature. *Id.* at 11:38–43. Hanging feature 150 includes second vertical cavity 160, which receives second vertical section 416 of hanging member 415. *Id.* at 11:47–50. Hanging feature 150 also includes recessed pocket 162 formed in shelf 152. *Id.* at 11:50–51. According to the '532 patent, when the user is installing or removing hanging member 415 from hanging feature 150, recessed pocket 162 provides clearance for a user's fingers in order to enable easy gripping and release of hanging member 415. *Id.* at 11:51–55.

C. Illustrative Claims

Petitioner challenges independent claims 2 and 13, which are reproduced below.

2. A basin assembly for receiving a liquid, the basin assembly comprising:
 - a) a one piece molded body comprising a bottom wall and a side wall defining a volume for receiving a liquid, the volume having an inner circumference, an open top, and a hanging feature formed in a shelf extending in an inward direction from the side wall proximate to the open top and vertically above and within the inner circumference of the volume for receiving liquid, the hanging feature comprised of a recessed pocket formed around a vertical cavity; and
 - b) a hanging member formed to match the hanging feature, suspended therefrom within the body of the basin and unsupported by the bottom wall, the hanging member comprising a flange disposed in the recessed pocket and an elongated vertical rod section extending downwardly from the hanging feature through the vertical cavity.

13. A basin assembly for receiving a liquid, the basin assembly comprising:

- a) a one piece molded body comprising a bottom wall, a side wall, an open top, and a hanging feature formed in a shelf extending in an inward direction from the side wall proximate to the open top;
- b) a hanging member formed to match the hanging feature, suspended therefrom within the body of the basin and unsupported by the bottom wall, the hanging member comprising an elongated rod extending downwardly from the hanging feature;
- c) a top cover fastenable to the open top of the body; and
- d) a pump disposed within the body.

Ex. 1001, 15:1–17, 16:21–34.

D. Asserted Grounds of Unpatentability

Franklin argues that the challenged claims are unpatentable based upon the following grounds:

Reference(s)	Basis	Challenged Claims
Retrofit ¹	§ 102(b)	2 and 13
Struthers ²	§ 102(b)	2 and 13
PowerSewer ³	§ 102(b)	2 and 13
'222 Publication ⁴ alone or in combination with any of Retrofit, PowerSewer, or Struthers	§ 103(a)	2 and 13

¹ Power Sewer Retrofitting V1 or V2 to V3F Brochure (Ex. 1015, “Retrofit”).

² U.S. Patent No. 6,059,208, iss. May 9, 2000 (Ex. 1007, “Struthers”).

³ Power Sewer Owner’s Manual (Ex. 1033, “Power Sewer”).

⁴ U.S. Patent Pub. No. 2006/0228222 A1, pub. Oct. 12, 2006 (Ex. 1014, “the ’222 Publication”).

II. ANALYSIS

A. Level of Ordinary Skill in the Art

In determining whether an invention would have been obvious at the time it was made, we consider the level of ordinary skill in the pertinent art at the time of the invention. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). “The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry.” *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718 (Fed. Cir. 1991).

Franklin defines a person having ordinary skill in the art as someone who would have had either: (i) no college degree, but at least 3 to 5 years of experience in product design and development in the field of sewage basin assemblies and pumps; or (ii) a Bachelor of Science in Mechanical Engineering. Pet. 24–25 (citing Ex. 1002 ¶ 55). Liberty provides a different definition of one skilled in the art, stating that a person of ordinary skill in the art would have had either: (i) no college education, but at least 3 to 5 years of experience in product design and development of sewage basin assemblies and pumps; or (ii) a four-year engineering degree and at least six months of experience in product design and development of sewage basin assemblies and pumps. Prelim. Resp. 3 (citing Ex. 2001 ¶ 21).

For the purposes of this decision, we adopt the definition of a person of ordinary skill in the art proposed by Franklin. We also note that the applied prior art reflects the appropriate level of skill at the time of the claimed invention. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001). We further note that our decision is not impacted by the definition of a person of ordinary skill in the art.

B. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016). Under the broadest reasonable interpretation standard and absent any special definitions, claim terms are generally given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art, in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). In addition, we may not “construe claims during [an *inter partes* review] so broadly that its constructions are unreasonable under general claim construction principles.” *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015).

Franklin and Liberty propose constructions for certain claim terms. See Pet. 18–24; Prelim. Resp. 3–20. At this time, it is only necessary to provide a construction for the term “hanging feature formed in a shelf” and only to the extent necessary to evaluate the challenges raised—namely, whether each of the grounds asserted by Franklin properly accounts for the “hanging feature” and “shelf” such that the asserted references disclose “a hanging feature formed in a shelf.” See *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (stating “only those terms need be construed that are in controversy, and only to the extent necessary to resolve the controversy”). There is a general presumption that different words in a claim should have different meanings. See *CAE Screenplates Inc. v. Heinrich Fiedler GmbH*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (“In the absence of any evidence to the contrary, we must presume that the use of

. . . different terms in the claims connotes different meanings.”). Applying this general presumption to the claim term “hanging feature formed in a shelf,” we note that the “hanging feature” and “shelf” are presumed to be different elements that have different meanings.

The plain language of claims 2 and 13 indicate that the claim terms “hanging feature” and “shelf” are separately identifiable elements wherein the hanging feature is formed in the shelf. *See Becton, Dickinson & Co. v. Tyco Healthcare Group, LP*, 616 F.3d 1249, 1254 (Fed. Cir. 2010) (“Where a claim lists elements separately, ‘clear implication of the claim language’ is that those elements are ‘distinct components’ of the patented invention.” (citation omitted)). Turning to the Specification and drawings, these claim terms consistently are treated as separate identifiable elements where, in the embodiments covered by the challenged claims, the hanging feature is formed in the shelf. *See, e.g.*, Ex. 1001, 3:3–5 (“[T]he hanging feature [is] formed in a shelf extending inwardly from the annular flange.”), 11:7–10 (“The open top of the basin 101 may include an annular flange 134, with the hanging feature 150 being formed in a shelf 152 extending inwardly from the annular flange 134.”), 11:51–52 (“The hanging feature 150 may be further comprised of a recessed pocket 162 formed in the shelf 152.”), Figs. 12–13 (illustrating that hanging feature 150 and shelf 152 are separately identifiable elements located near the top of basin 101 that may be formed together such that the hanging feature does not constitute the entire shelf). Of particular importance to this case is that the Specification never indicates that the “hanging feature” can constitute the entire “shelf.” *See generally id.* at 10:40–12:42.

In addition, neither Franklin nor Liberty offers evidence suggesting that the general presumption that different terms in the challenged claims have different meanings would not apply to the claim terms “hanging feature” and “shelf.” Indeed, both parties appear to agree with this general presumption because they propose different constructions for these claim terms. *Compare* Pet. 19 (construing “hanging feature” as “the portion of the basin that receives the hanging member”), *with id.* at 21 (construing “shelf extending in an inward direction from the side wall” as “the shelf extends, either directly or indirectly, away from the side wall toward the center of the basin”); *compare* Prelim. Resp. 6 (construing “hanging feature” as “a structure designed for attachment of, and shaped to match, a hanging member that is suspended from the hanging feature”), *with id.* at 13 (construing “shelf” as “a thin flat structure supported in a horizontal position”).

In summary, we determine that given their broadest reasonable interpretations, the claim terms “hanging feature” and “shelf” refer to two distinct and separately identifiable structures and are not construed properly as reading on the same, single structure (i.e., the hanging feature does not constitute the entire shelf, but rather is formed in the shelf).

C. Priority Date for the Challenged Claims of the '532 Patent and Whether the '222 Publication Qualifies as Prior Art

As explained previously, the '532 patent was filed on April 2, 2009, and is, *inter alia*, a continuation-in-part of the '133 application filed on March 29, 2005, which published as the '222 Publication on October 12, 2006. Ex. 1001, at [22], [63]; Ex. 1014, at [21], [43].

To support its assertion that claims 2 and 13 of the '532 patent are entitled only to claim priority to its filing date of April 2, 2009, and, therefore, the '222 Publication is prior art to these claims, Franklin, *inter alia*, directs us to “Plaintiff Liberty Pump’s Disclosure of Asserted Claims and Infringement Contentions” filed in the related district court case, in which Liberty identified “April 2, 2009” as the priority date for claims 2 and 13. Pet. 8, n.4 (citing Ex. 1027, 4).

Liberty contends that the '222 Publication does not qualify as prior art to the '532 Patent because the '532 Patent properly claims priority under 35 U.S.C. § 120 to the '133 application that was published as the '222 Publication. Prelim. Resp. 52–54.

Section 314(a) imposes a burden on Franklin to establish a reasonable likelihood of success, which includes, among other things, making a threshold showing in its Petition that the '222 Publication qualifies as prior art to all the challenged claims of the '532 patent. *See Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (“In an *inter partes* review, the burden of persuasion is on the petitioner . . . and that burden never shifts to the patentee.”). A patent that seeks the benefit of an earlier filing date as a continuation-in-part of a parent application is entitled to the benefit of the earlier filing date only if the parent application provides support for the subject matter that is claimed by the patent. *In re Chu*, 66 F.3d 292, 297 (Fed. Cir. 1995) (citing 35 U.S.C. §§ 112, 120). If that is not the case, and the claims of the patent are not supported by the parent application’s disclosure, then the patent cannot obtain the benefit of its parent application’s filing date, and the parent application may be properly relied on as prior art to the unsupported claims. *Id.*

Here, by directing us to Liberty’s infringement contentions, Franklin has provided a threshold showing in its Petition that the ’222 Publication qualifies as prior art to the subject matter of claims 2 and 13 of the ’532 patent. Liberty does not dispute that it stated in its infringement contentions in the related district court case that the subject matter of these two claims is only entitled to claim the benefit of the April 2, 2009 filing date. Moreover, Liberty also does not dispute, but rather admits, that the ’133 Application does not disclose a basin comprising a “hanging feature formed in a shelf” as required by the challenged claims. See Prelim. Resp. 13–15, 54–56. As such, we are persuaded that, on this record and for purposes of this Decision, Franklin has met its burden of demonstrating that the ’222 publication, which is the published version of the ’133 application included in the priority chain on the face of the ’532 patent, qualifies as prior art to claims 2 and 13 of the ’532 patent.

D. Whether Retrofit and PowerSewer Qualify as Prior Art

We recognize Liberty contends that Franklin has not met its burden of demonstrating that Retrofit and PowerSewer are prior art printed publications within the meaning of 35 U.S.C. § 102(b) and, therefore, these references do not qualify as prior art to the ’532 patent. Prelim. Resp. 21–31. We need not reach—and do not address—whether Retrofit and PowerSewer qualify as prior art to the ’532 patent. As we discuss below, even if we presume that Retrofit and PowerSewer are prior art to the ’532 patent, they do not account properly for “a hanging feature formed in a shelf,” as recited in independent claims 2 and 13.

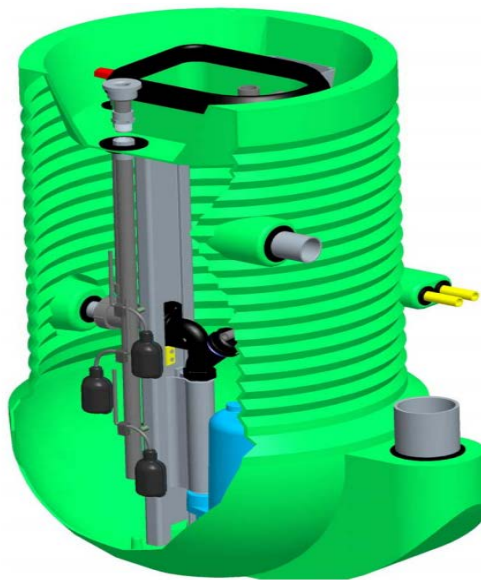
E. Anticipation of Claims 2 and 13 by Retrofit

Franklin contends claims 2 and 13 are unpatentable under 35 U.S.C.

§ 102(b) as anticipated by Retrofit. Pet. 27–41. Relying on the testimony of Dr. Joseph Beaman, Franklin explains how Retrofit purportedly discloses the limitations of the challenged claims. *Id.* For the reasons that follow, we do not institute a review based on this challenge.

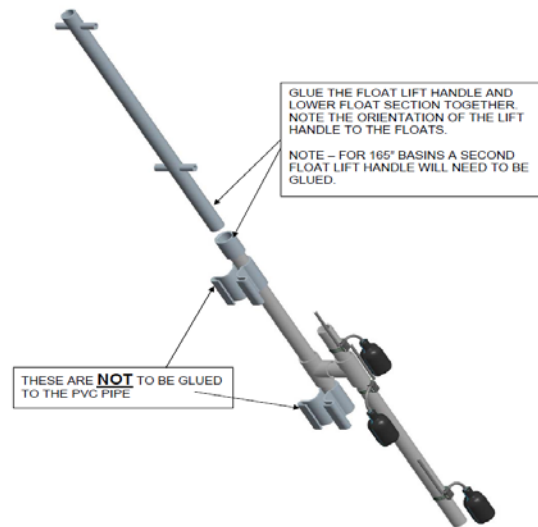
To establish anticipation, “all of the elements and limitations of the claim must be shown in a single prior reference, arranged as in the claim.” *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001). “A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

Retrofit discloses a sewage treatment product, as shown in the figure reproduced below, that includes a “float pole assembly” “where the ultrasonic sensor used to be.” Ex. 1015, 2–3; Ex. 1002 ¶ 64.



As shown in the figure of a sewage treatment product from Retrofit reproduced above, the “float pole assembly” includes an upper section

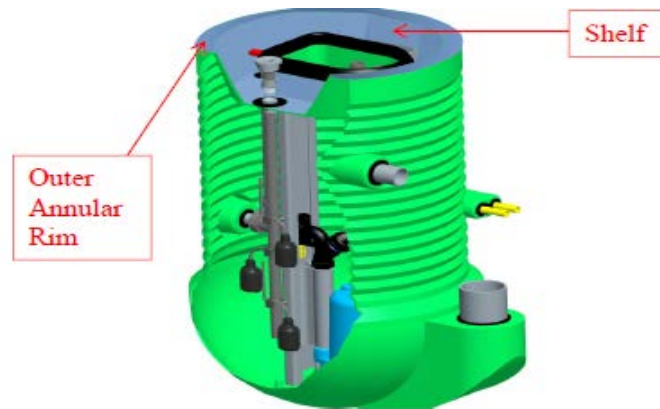
accessed through the dry well and a lower section installed through the wet well. Ex. 1015, 2–3. These two sections are screwed together and placed in a black grommet, which, in turn, is placed in a hole “where the ultrasonic sensor used to be.” *Id.* This assembly hangs down in a basin without touching the bottom of the basin. *Id.* The figure reproduced below illustrates the “float pole assembly” removed from the basin. *Id.* at 4.



As shown in the figure of a float pole assembly from Retrofit reproduced above, the float lift handle is glued to the lower float section, which, in turn, include multiple pumps. *Id.*

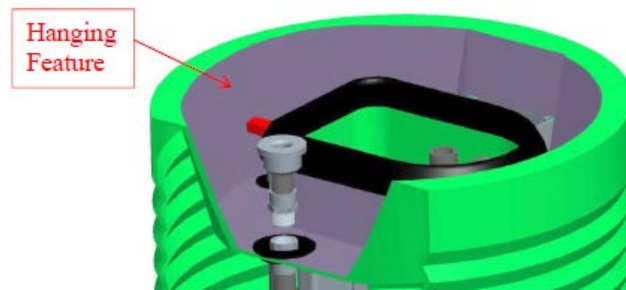
Franklin contends that Retrofit describes all the limitations recited in claims 2 and 13. Pet. 27–41. Of particular importance to this case, Franklin argues that the figure on page 3 of Retrofit describes the claimed “hanging feature formed in a shelf” because it includes a shelf, as evidenced by the annotated figure reproduced below. *Id.* at 32–34. A copy of this figure,

depicting a sewage treatment product, with annotations added by Franklin, is reproduced below.



According to Franklin, the annotated version of the figure shown on page 3 of Retrofit and reproduced above, illustrates a sewage treatment product having a shelf that extends in an inward direction from the side wall of the basin. *Id.* (citing Ex. 1015, 3).

Franklin further argues that Retrofit describes this claim limitation because it also includes a hanging feature, as evidenced by the annotated figure reproduced below depicting a sewage treatment product. Pet. 33–35.



Shown above is a cutaway perspective of the upper portion of a sewage treatment product. According to Franklin, this annotated version of the figure shown on page 3 of Retrofit emphasizes a hanging feature formed in the shelf and located proximate to the open top. *Id.* (citing Ex. 1015, 3). In footnote 20 of the Petition, Franklin argues that the '532 patent identifies

the hanging feature and shelf as overlapping structures. *Id.* at 34 n.20 (citing Ex. 1001, 12:27–29, 11:51–54, 11:41–42, 11:54–55). Franklin then asserts that a single structural feature in the prior art can satisfy multiple claim limitations. *Id.* To support this assertion, Franklin directs us to exemplary case law from the U.S. Court of Appeals for the Federal Circuit. *Id.* Franklin also argues that Retrofit includes a hanging feature that includes a recessed pocket, and further illustrates the recessed pocket as being on a different side of Retrofit’s upper section than the hanging feature and shelf. *Id.* at 35.

In response, Liberty contends that Retrofit does not describe the claimed “hanging feature formed in a shelf” because Franklin relies upon the same structure in Retrofit to account for both the “hanging feature” and “shelf.” Prelim. Resp. 32–34. According to Liberty, because Franklin identifies the same structure in Retrofit to account for these separately identifiable features, Retrofit does not anticipate the challenged claims. *Id.* Liberty also explains how the case law relied upon by Franklin to support its assertion that a single structural feature in the prior art can satisfy multiple claim limitations is inapposite to the circumstances presented here. *Id.* at 17–19.

We agree with Liberty that Franklin incorrectly relies upon a single structural element (i.e., the upper portion of Retrofit’s sewage treatment product) to describe both the claimed “hanging feature” and “shelf.” As we explain in our claim construction section above, the claimed “hanging feature” and “shelf” require distinct and separately identifiable structures and are not construed properly as reading on the same, single structure (i.e., the hanging feature does not constitute the entire shelf, but rather is formed

in the shelf). Franklin does not identify clearly how the upper section of Retrofit's sewage treatment product discloses both the claimed "hanging feature" and "shelf," but rather Franklin merely points to one side of this upper section as representing the "shelf" and another side as representing the "hanging feature." Pet. 33–35. Apart from generally alleging that these different sides of the upper section of Retrofit's sewage treatment product can satisfy both the claimed "hanging feature" and "shelf" (*id.* at 34 n.20), Franklin does not explain sufficiently how this upper section includes two separately identifiable elements that describe a hanging feature and shelf, wherein the hanging feature is formed in a shelf. In other words, although Franklin points to different sides of this upper section as representative of the "hanging feature" and "shelf," Franklin does not delineate clearly between the hanging feature and the rest of the shelf. *See id.* at 33–35. Moreover, Franklin's reference to the "hanging feature that includes a recessed pocket" does not provide further clarification because Franklin points to yet another side of the upper section of Retrofit's sewage treatment product as the "recessed horizontal portion" than Franklin previously had pointed to in order to account for the "hanging feature" and "shelf." *See id.* at 35–36.

Put simply, Franklin does not explain adequately how the sides of the upper section of Retrofit's sewage treatment product identified as the "hanging feature" and "shelf" disclose a hanging feature formed in shelf, or how these sides are separately identifiable elements that are meaningfully different from each other. Absent such an explanation, we are not persuaded that Franklin presents sufficient argument and evidence to support a finding

that Retrofit accounts for “a hanging feature formed in a shelf,” as recited in independent claims 2 and 13.⁵

Turning to Franklin’s reliance on case law from the Federal Circuit to support its assertion that a single structural feature in the prior art satisfies both the “hanging element” and “shelf,” these cases are distinguishable from the circumstances presented here. *See* Pet. 29–30 n.12. We recognize that the Federal Circuit has cautioned that a claim element should not be construed narrowly to require a separate and distinct component, when the claims or specification indicates that the claim element need not be a separate component, or the specification suggests that a single component can function as both elements. *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1231–32 (Fed. Cir. 2011) (stating that because “the specification teaches that the cutting box may also function as a ‘dust collection structure’ to collect sawdust and wood chips generated during the wood cutting process, . . . [i]t does not suggest that the claim terms [‘cutting box’ and ‘dust collection structure’] require separate structures”); *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1303 (Fed. Cir. 2011) (“The claims and the specifications indicate that the ‘needle holder’ and ‘retainer member’ need not be separately molded pieces.”); *see also Linear Tech.*

⁵ We do not understand Franklin to argue that, based on its annotated versions of the figure on page 3 of Retrofit reproduced above, the shelf includes the outer annular rim because it represents in its Petition that “the shelf may be considered to begin at the outer annular rim.” Pet. 33 n.19. To the extent Franklin asserts otherwise, we are not persuaded that it adequately develops this position in its Petition such that Liberty had sufficient notice of, and a fair opportunity to address, this theory of unpatentability. *See Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (“A patent owner . . . is undoubtedly entitled to notice and a fair opportunity to meet the grounds of [unpatentability].”).

Corp. v. ITC, 566 F.3d 1049, 1054–56 (Fed. Cir. 2009) (stating that the claim terms “second circuit” and “third circuit” need not be construed broadly to “require entirely separate and distinct circuits” because neither the claims nor the specification supported “narrowly construing the terms to require a specific structural requirement or entirely distinct ‘second’ and ‘third’ circuits”).

In contrast to these Federal Circuit cases relied upon by Franklin, independent claims 2 and 13 clearly lists the “hanging feature” and “shelf” as separately identifiable elements, wherein the hanging feature is formed in a shelf in a way that the hanging feature does not constitute the entire shelf. Ex. 1001, 14:46–47; *see Becton*, 616 F.3d at 1254. Our review of the specification and drawings of the ’532 patent reinforces that the claimed “hanging feature” and “shelf” are separately identifiable elements as they distinguish between hanging feature 150, on the one hand, and shelf 152, on the other hand. The specification and drawings consistently treat the hanging feature 150 and shelf 152 as separate elements and never contemplates that the hanging feature can constitute the entire shelf. Rather, the ’532 patent treats the hanging feature as a distinct element that is located within the shelf. *See, e.g., id.* at 3:1–3, 11:3–6, 11:50–51, Figs. 12, 13 (treating hanging feature 150 and shelf 152 a separately identifiable elements that, in some the embodiments covered by the challenged claims, are formed together such that the hanging feature does not constitute the entire shelf).

In conclusion, based on this record, Franklin does not present sufficient argument and evidence that Retrofit discloses a “hanging feature formed in a shelf” and, therefore, has not demonstrated a reasonable

likelihood that it would prevail on its assertion that claims 2 and 13 are anticipated by Retrofit.

F. Anticipation of Claims 2 and 13 by Struthers

Franklin contends that claims 2 and 13 are unpatentable under § 102(b) as anticipated by Struthers. Pet. 41–49. Franklin explains how Struthers purportedly discloses the subject matter of each challenged claim. *Id.* Franklin also relies upon the Declaration of Dr. Beaman to support its positions. Ex. 1002 ¶¶ 67–70. On this record, we are not persuaded that Franklin demonstrates that Struthers properly accounts for “a hanging feature formed in a shelf,” as recited in the challenged claims.

Struthers generally relates to an underground sump basin and, in particular, to a sewage sump basin where sewage enters the basin from a home or facility, is ground up by a sewage grinder pump, and then pumped under low pressure to a waste treatment facility or a gravity collection system. Ex. 1007, 1:6–11. Figure 1 of Struthers, reproduced below, illustrates a cut-away perspective view of the sewage basin, along with all the components of the complete system. *Id.* at 3:24–25.

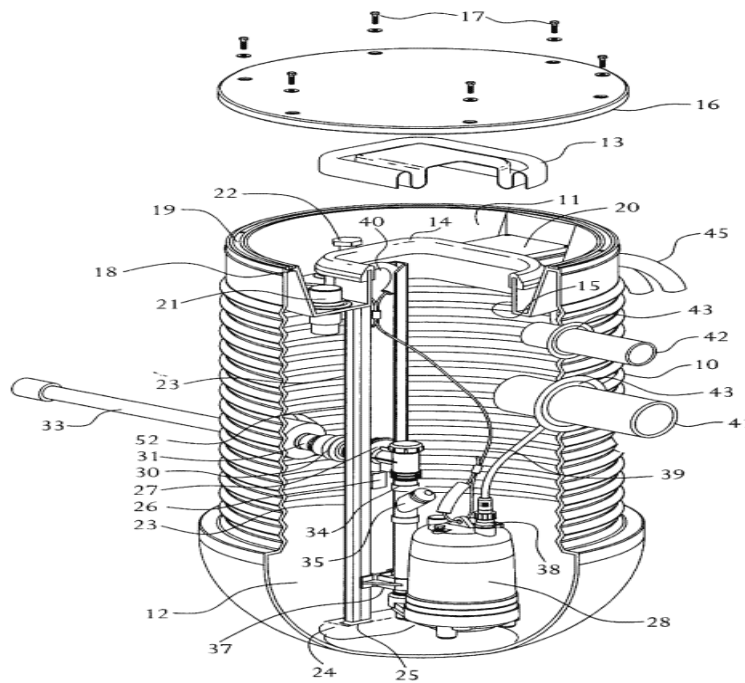


FIG. 1

As shown in Figure 1 reproduced above, molded plastic basin 10 includes, among other things, upper dry wall area 11 and lower dry wall area 12. *Id.* at 3:38–40. Upper dry wall area 11 is isolated from lower wet wall area 12 by floor 9 (illustrated in Figure 2). *Id.* at 3:40–43. Rubber gasket 19 is fitted into a shallow channel along the top edge of basin 10 to make a water-tight seal. *Id.* at 3:46–48

Franklin contends that Struthers teaches all the limitations recited in independent claims 2 and 13. Franklin argues the basin in Struthers is effectively identical to the PowerSewer basin, which is identical to the basin in Retrofit, and that Struthers discloses the claimed “hanging feature formed in a shelf” for the same reasons discussed above with respect to the ground based on anticipation by Retrofit. *Id.* at 43, 45 (citing Ex. 1007, Figs 1, 2 (numerals 9, 11, and 19)). As we explain above in our analysis of the ground based on anticipation by Retrofit, we determine that Franklin has not

shown persuasively that Retrofit discloses and “hanging feature formed in shelf.” For this same reason, we are not persuaded by Franklin’s explanation as to how Struthers teaches the claimed “hanging feature formed in a shelf.”

To the extent Franklin is relying on Figures 1 and 2 of Struthers, particularly floor 9, upper dry well area 11, and rubber gasket 19, to teach the claimed “hanging feature formed in a shelf,” Franklin does not identify which of these structures, either alone or in combination, account for claimed “hanging feature” and “shelf.” We recognize that Franklin directs us to the Examiner’s reliance on Struthers during prosecution (Pet. 42–43, 45; *see* Ex. 1028, 177–78⁶); however, Franklin does not explain how the Examiner’s mapping of Struthers onto the claims originally presented during prosecution bear on the claims that ultimately issued as independent claim 2 and 13. In fact, after Liberty made significant amendments to its claims during prosecution, the Examiner no longer relied upon Struthers in any of its subsequent rejections of the amended claims. *See* Ex. 1028, 30–40, 56–62, 90–99, 111–121, 143–150. We, therefore, are not persuaded that Franklin presents sufficient argument and evidence to support a finding that Struthers describes “a hanging feature formed in a shelf,” as recited in independent claims 2 and 13.

In summary, based on this record, Franklin has not demonstrated a reasonable likelihood that it would prevail on its assertion that claims 2 and 13 are anticipated by Struthers.

⁶ All references to the page numbers in the prosecution history are to the page numbers inserted by Franklin in the bottom, right-hand corner of each page in Exhibit 1028.

G. Anticipation of Claims 2 and 13 by PowerSewer

Franklin contends that claims 2 and 13 are unpatentable under § 102(b) as anticipated by PowerSewer. Pet. 49–52. Franklin explains how PowerSewer purportedly discloses the subject matter of each challenged claim. *Id.* Franklin also relies upon the Declaration of Dr. Beaman to support its positions. Ex. 1002 ¶¶ 71–73. On this record, we are not persuaded that Franklin demonstrates that PowerSewer properly accounts for “a hanging feature formed in a shelf,” as recited in the challenged claims.

PowerSewer discloses a low pressure sewage system, reproduced below, that collects, grinds, and pumps wastewater discharged from a home to a gravity sewer main or to a remote treatment site. Ex. 1033, 2.



As shown in the figure reproduced above, the basic structure of PowerSewer’s low pressure sewage system is essentially the same as that of Retrofit’s sewage treatment product. According to Franklin, the primary difference between these two products is that PowerSewer employs an

ultrasonic sensor, whereas Retrofit employs a float switch assembly. Pet. 50.

Franklin contends that PowerSewer teaches all the limitations recited in independent claims 2 and 13. Pet. 50–52. Franklin argues that its analysis above in the ground based on anticipation by Retrofit applies equally to every limitation that relates to the structure of the basin, including the claimed “hanging feature formed in a shelf.” *Id.* at 50–51. As we explain above in our analysis of the ground based on anticipation by Retrofit, we determine that Franklin has not provided persuasive evidence and argument to show Retrofit discloses “a hanging feature formed in a shelf” as required by independent claims 2 and 13. For this same reason, we are not persuaded that Franklin presents sufficient argument and evidence to support a finding that PowerSewer describes the claimed “hanging feature formed in a shelf.”

In summary, based on this record, Franklin has not demonstrated a reasonable likelihood that it would prevail on its assertion that claims 2 and 13 are anticipated by PowerSewer.

H. Obviousness of Claims 2 and 13 Over the '222 Publication Alone or in Combination with any of Retrofit, Power Sewer, or Struthers

Franklin contends that claims 2 and 13 are unpatentable under § 103(a) over the '222 Publication alone or in combination with any of Retrofit, PowerSewer, or Struthers. Pet. 52–71. Franklin explains how the '222 Publication alone or in combination with any of Retrofit, PowerSewer, or Struthers purportedly teaches the subject matter of each challenged claim. *Id.* Franklin also relies upon the Declaration of Dr. Beaman to support its positions. Ex. 1002 ¶¶ 74–81. On this record, we are not persuaded that

Franklin demonstrates that the teachings of the '222 Publication alone or in combination with any of Retrofit, Struthers, or PowerSewer properly account for “a hanging feature formed in a shelf,” as recited in independent claims 2 and 13.

The '222 Publication discloses a sewage handling system, a cover assembly for a sewage basin, and control accessories disposed within a sewage basin for receiving and distributing sewage via a pump housed in the basin. Ex. 1014 ¶ 3. Figure 5 of the '222 Publication, reproduced below, illustrates a cutaway perspective of the main cover and float support hanger rod engaged therewith. *Id.* ¶¶ 25, 43.

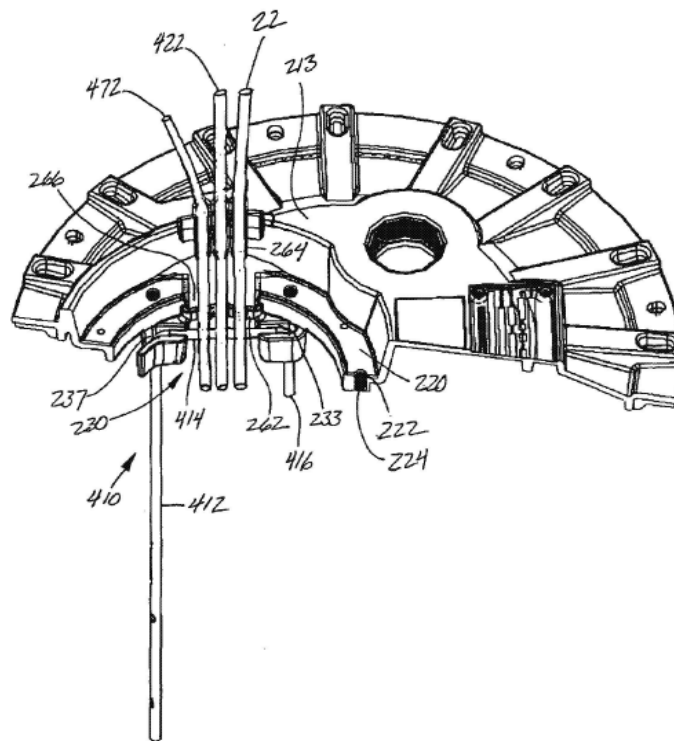


FIG. 5 PERSP XSECT CS ASSY

As shown in Figure 5 reproduced above, main cover 210 (not labeled) includes, among other things, flat flange 220 formed therein that has a plurality of holes 222 and threaded inserts 224 molded into the flat flange.

Id. ¶ 37. Main cover 210 further includes hanging rod 410 that is engaged with engagement feature 230 such that short vertical section 416 of the hanging rod is disposed in hole 232 (not labeled), elongated vertical section 412 of the hanging rod is disposed in notch 237, and cross bar 414 is disposed in channels 233 and 236. *Id.* ¶ 52.

Franklin admits that the '222 Publication did not teach or disclose installing the hanging feature in the basin itself. Pet. 53. Franklin asserts, however, that the '222 Publication teaches that the hanging feature and the hanging member could be installed in other areas, including “specifically in the ‘access cover’ portion of the cover assembly.” *Id.* (citing Ex. 1014 ¶ 56; Ex. 1002 ¶ 78). Franklin also asserts that the '222 Publication teaches that “it would also be ‘preferable’ to keep float/level switch structures “in place” when trying to access them, and that moving the location of the hanging feature into the body of the basin was simply one of a finite number of routine, common-sense design options that resulted in a product that performed the same function as the structures in the '222 Publication. *Id.* at 53–54 (citing Ex. 1002 ¶¶ 79–80). Franklin further argues that Retrofit, Struthers, and PowerSewer teach installing the hanging feature/hanging member structures in the body of the basin, as opposed to the cover assembly as in the '222 Publication, and that, based on these teachings, one of ordinary skill in the art would have considered modifying the structure of the '222 Publication to provide the hanging feature/hanging member in the body of the basin instead of in the cover to “be trivial.” *Id.* at 56–57.

We understand Franklin to argue that, although the '222 Publication's engagement feature 230 accounts for the claimed “hanging feature,” the '222 Publication does not teach specifically that engagement feature 230 may be

“formed in a shelf extending in an inward direction from the side wall” of its sewage basin 100. Franklin, therefore, relies on any one of Retrofit, Struthers, or PowerSewer to teach the claimed “shelf” positioned in this manner to accommodate the ’222 Publication’s engagement feature 230. As we explain above, in each of the asserted grounds based, in whole or in part, on Retrofit, Struthers, or PowerSewer, Franklin incorrectly relies upon a single structural feature (i.e., the upper portion of Retrofit’s sewage treatment product) to describe both the claimed “hanging feature” and “shelf.” *See supra* Section II.D. As Retrofit, Struthers, and PowerSewer do not delineate clearly between what constitutes the claimed “hanging feature” and what constitutes the claimed “shelf,” we are not persuaded that Franklin presents sufficient argument and evidence to support modifying the ’222 Publication with the teachings of any of Retrofit, Struthers, and PowerSewer to account properly for “a hanging feature formed in a shelf.”

We also are also not persuaded that Franklin presents sufficient argument and evidence that the ’222 Publication alone renders independent claims 2 and 13 obvious. Franklin contends that, “[b]y teaching that the hanging feature [(i.e., engagement feature 230)] could be moved to the access cover, the ’222 Publication provided the motivation to move its hanging feature to other locations of the sewage basin body as needed.” Pet. 55. We disagree that moving the so-called hanging feature to the access cover (which, in the ’222 Publication, is mounted to the main cover) provides sufficient motivation to one skilled in the art to add a shelf to the side wall of the basin and re-position the hanging feature off of the cover onto the shelf.

In essence, Franklin is advocating that re-positioning the '222 Publication's so-called hanging feature off of its cover onto a newly added shelf located on the side wall of the basin is nothing more than a design choice. *See* Pet. 56–57 (arguing that modifying the '222 Publication in this manner was “one of a finite number of routine, common-sense *design options*”) (emphasis added). This argument, by itself, does not explain why modifying the '222 Publication in the manner proposed by Franklin would have been obvious. *See Cutsforth, Inc. v. MotivePower, Inc.*, 636 Fed. Appx. 575, 578 (Fed. Cir. 2016) (non-precedential) (“Merely stating that a particular placement of an element is a design choice does not make it obvious. [There must be] a reason for why a person of ordinary skill in the art would have made the specific design choice.”).

In summary, based on this record, Franklin has not demonstrated a reasonable likelihood that it would prevail on its assertion that claims 2 and 13 would have been obvious over the '222 Publication alone or in combination with any of Retrofit, Struthers, or PowerSewer.

III. CONCLUSION

For the foregoing reasons, we conclude that the information presented in the Petition does not establish that there is a reasonable likelihood that Franklin will prevail in challenging claims 2 and 13 of the '532 patent as unpatentable under §§ 102(b) and 103(a).

IV. ORDER

In consideration of the foregoing, it is ORDERED that the Petition is DENIED and no trial is instituted.

For PETITIONER:

Andrew M. McCoy
Abigail M. Butler
Joel D. Sayres
Faegre Baker Daniels LLP
Andrew.McCoy.PTAB@faegrebd.com
Abigail.Butler@faegrebd.com
Joel.Sayres@faegrebd.com

For PATENT OWNER:

Neal L. Slifkin
Laura W. Smalley
Harris Beach PLLC
nslifkin@harrisbeach.com
lsmalley@harrisbeach.com