

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VAN DER HOEVEN HORTICULTURAL PROJECTS B.V.,
Petitioner,

v.

HOUWELING NURSERIES OXNARD, INC.,
Patent Owner.

Case IPR2017-00476
Patent 8,707,617 B2

Before PHILLIP J. KAUFFMAN, JEREMY M. PLENZLER, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

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

I. INTRODUCTION

We have jurisdiction to hear this *inter partes* review under 35 U.S.C. § 6, and this Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73. For the reasons that follow, we determine that Petitioner has shown by a preponderance of the evidence that claim 29 of U.S. Patent No. 8,707,617 B2 (Ex. 1001, “the ’617 patent”) is unpatentable, but has failed to establish that claims 1–28 of the ’617 patent are unpatentable.

A. Background

Van der Hoeven Horticultural Projects B.V. (“Petitioner”) filed a Petition to institute an *inter partes* review of claims 1–29 of the ’617 patent (“the challenged claims”). Paper 1 (“Pet.”). Houweling Nurseries Oxnard, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 8 (“Prelim. Resp.”).

Pursuant to 35 U.S.C. § 314, we instituted trial on all challenged claims, and on all bases set forth in the Petition. *See* Paper 10 (“Dec. to Inst.”), 14–16. After institution of trial, Patent Owner filed a Patent Owner Response (Paper 15, “PO Resp.”), to which Petitioner filed a Reply (Paper 18, “Reply”).

An oral argument was held on March 13, 2018. A transcript of the oral argument is included in the record. Paper 32 (“Tr.”).

B. Related Matters

Petitioner and Patent Owner identify a number of proceedings related to the ’617 patent. Pet. 1–2; Paper 3, 2. None of those proceedings, however, involves a proceeding at the United States Patent Office or in district court with Petitioner as a party. The parties identify two pending

patent applications claiming priority to the same application that resulted in the '617 patent. Pet. 2; Paper 3, 2.

C. Asserted Grounds of Unpatentability and Evidence of Record

Petitioner contends that the challenged claims are unpatentable under 35 U.S.C. § 103 as set forth below (Pet. 18–84).

Reference(s)	Claim(s) Challenged
Reisinger ¹	1–9, 11, 13–15, 17, 19–27, and 29
Reisinger and Jones ²	6 and 23
Reisinger and Brault ³	10
Reisinger and Kaiser ⁴	12 and 28
Reisinger and Assaf ⁵	16
Reisinger and Kinnis ⁶	18
Reisinger and Landstrom ⁷	1–9, 11, 13–15, 17, 19–27, and 29
Reisinger, Landstrom, and Jones	6 and 23
Reisinger, Landstrom, and Brault	10

¹ EP 1 464 219 A1, published Oct. 6, 2004 (Ex. 1003, “Reisinger”). Exhibit 1003 includes both the original German-language document, as well as the English translation. In our citations to Exhibit 1003, we reference the page numbers added at the bottom right of the page.

² U.S. Pat. No. 3,807,088, issued Apr. 30, 1974 (Ex. 1004, “Jones”).

³ U.S. Pat. App. No. 2005/0005510 A1, published Jan. 13, 2005 (Ex. 1005, “Brault”).

⁴ U.S. Pat. No. 4,916,642, issued Apr. 10, 1990 (Ex. 1006, “Kaiser”).

⁵ U.S. Pat. No. 4,707,995, issued Nov. 24, 1987 (Ex. 1007, “Assaf”).

⁶ U.S. Pat. App. No. 2004/0194371 A1, published Oct. 7, 2004 (Ex. 1008, “Kinnis”).

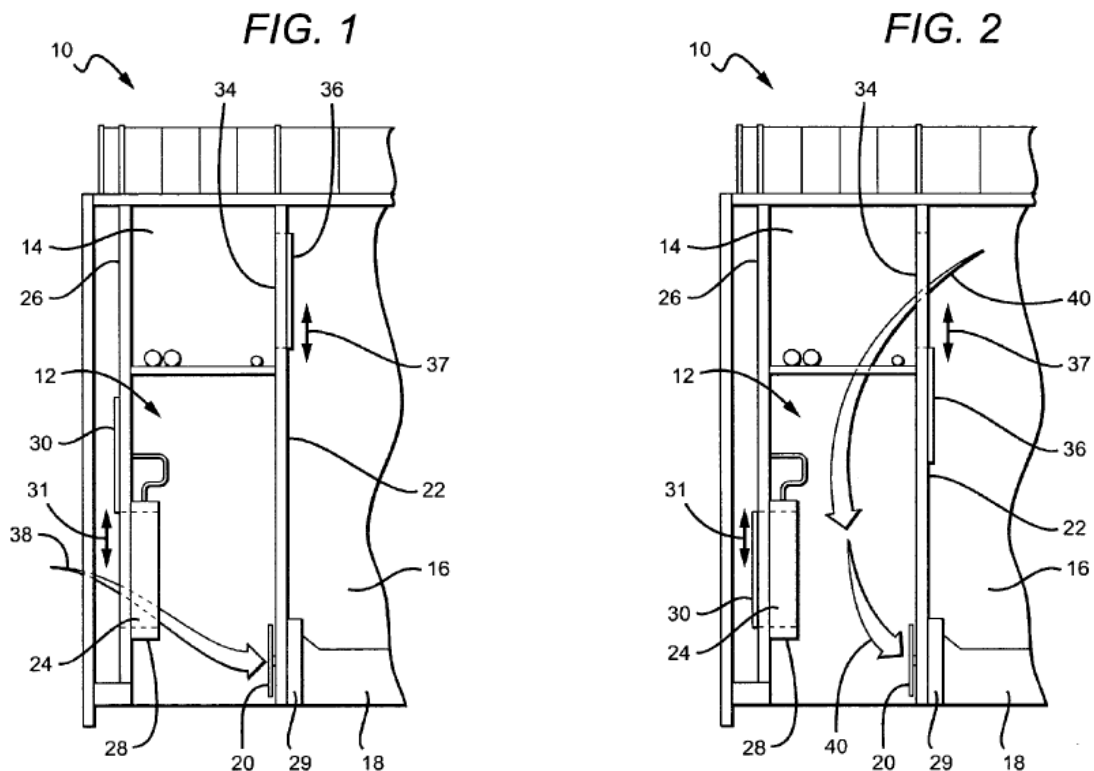
⁷ U.S. Pat. No. 4,567,732, issued Feb. 4, 1986 (Ex. 1009, “Landstrom”).

Reference(s)	Claim(s) Challenged
Reisinger, Landstrom, and Kaiser	12 and 28
Reisinger, Landstrom, and Assaf	16
Reisinger, Landstrom, and Kinnis	18

Petitioner provides testimony from Merle H. Jensen, Ph.D. Ex. 1002; Ex. 1030. Patent Owner provides testimony from Alexander Turkewitsch. Ex. 2001; Ex. 2028. Petitioner also provides deposition testimony from Mr. Turkewitsch (Ex. 1031) and Patent Owner provides deposition testimony from Dr. Jensen (Ex. 2027).

D. The '617 Patent

The '617 patent “relates to greenhouses and more particularly to climate control systems for greenhouses.” Ex. 1001, 1:12–13. Figures 1 and 2 of the '617 patent are exemplary, and are reproduced below.



Figures 1 and 2 are fragmentary sectional views of a greenhouse illustrating different operating modes of the climate control system of the greenhouse described in the '617 patent. *Id.* at 3:18–22.

The '617 patent explains that “greenhouse 10 has a gabled end 14 that is separated from the crop growing section 16 of the greenhouse by partition 22” with a “majority of the climate control system 12 . . . housed within the gabled end 14 [and] a portion of the system continuing into the crop growing section 16.” *Id.* at 5:1–6. “[F]irst vent/opening 24 (‘first vent’) [is located] in the outside gable wall 26 through which ambient air can enter the gabled end 14.” *Id.* at 5:27–29. “A first louver 30 can be included at the outside gable wall 26 that is movable in the directions of arrow 31 to control the amount of air entering the end gable 14.” *Id.* at 5:63–65. “[S]econd vent 34 . . . is located near the top of the partition 22 . . . [and] second louver 36 can be included at the partition 22 that operates similar to the first louver 30.” *Id.* at 6:10–13. “The crop section 16 of the greenhouse 10 can also comprise one or more conventional greenhouse vents (not shown) to allow excess air to be released from the greenhouse 10.” *Id.* at 6:21–23.

The '617 patent explains that “[i]n still other embodiments, the greenhouse can be arranged without a gabled end.” *Id.* at 9:33–34.

E. Illustrative Claims

As noted above, Petitioner challenges claims 1–29 of the '617 patent. Claims 1, 17, and 29 are independent, with claims 2–16 and 18–28 depending, directly or indirectly, from claim 1 or 17. Claims 1 and 29 are illustrative, and are reproduced below:

1. A greenhouse, comprising:
 - a growing section;
 - a climate control system comprising a substantially enclosed end gable adjacent to and outside said growing section, said end gable comprising one or more vents and one or more louvers selectively moveable to cooperate with said one or more vents to control air flow through said one or more vents;
- wherein said climate control system is arranged to control the environment within said growing section by flowing ambient air from outside said greenhouse into said climate control system and into said growing section, re-circulating air from said growing section back into said climate control system and into said growing section, and a combination thereof, said ambient air, re-circulating air, or combination thereof, flowing through said climate control section and into said growing section to control the climate within said growing section.

Ex. 1001, 9:50–67.

29. A greenhouse, comprising:
 - a growing section;
 - a climate control system comprising a substantially enclosed end portion adjacent to and outside said growing section, said end portion comprising one or more vents and one or more mechanisms selectively moveable to cooperate with said one or more vents to control air flow through said one or more vents;
- wherein said climate control system is arranged to control the environment within said growing section by flowing ambient air from outside said greenhouse into said climate control system and into said growing section, recirculating air from said growing section back into said climate control system and into said growing section, and a combination thereof, said ambient air, re-circulating air, or combination thereof, flowing through said climate control section and into said

growing section to control the climate within said growing section.

Id. at 12:16–33.

II. ANALYSIS

A. Claim Construction

Only those terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999). We construe the claims using the broadest reasonable construction in light of the '617 patent Specification. See 37 C.F.R. § 42.100(b). Applying that standard, we interpret the claim terms of the '617 patent according to their ordinary and customary meaning in the context of the patent's written description. See *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). An inventor is entitled to be his or her own lexicographer of patent claim terms by providing a definition of the term in the specification with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). In the absence of such a definition, however, limitations are not to be read from the specification into the claims. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993).

Petitioner and Patent Owner each propose constructions for several terms. Pet. 5–10; PO Resp. 10–29; Reply 5–14. For purposes of this decision, we determine that only those terms discussed below require express construction, and only to the extent set forth in that discussion.

1. “end gable”

Claims 1 and 17 each recite a “substantially enclosed end gable adjacent to and outside said growing section.” Initially, we note that the

parties agree that “end gable” does not require any particular roof shape. Pet. 6; PO Resp. 14. Petitioner contends that “end gable” only requires an “interior space or section at an end wall.” Pet. 6. Petitioner contends that “[t]he ’617 patent . . . treats the ‘end gable’ or ‘gabled end’ as an interior space or section at an end of a greenhouse.” Pet. 5 (citing Ex. 1001, 4:66–5:27, Figures 1–3 (reference number 14), 7:23–47, Figures 5–6 (reference number 54)); *see also* Reply 5–12.

Patent Owner responds that “end gable” requires “a chamber for mixing ambient air from outside the greenhouse with recirculated air from inside the growing section that is bounded by the outside gable wall and a structure that separates the chamber from the growing section, and that runs along the length of the outside gable wall.” PO Resp. 10. Patent Owner contends that a ducted system is not an “end gable.” *See* PO Resp. 1–2 (noting that Reisinger has a “duct system,” rather than an “end gable”); *see also id.* at 33 (distinguishing an end gable from ducting). We agree with Patent Owner that, even under the broadest reasonable interpretation, an “end gable” does not include ducting.

In the example provided in the ’617 patent, and shown in Figures 1 and 2 above, the “gabled end” is a region at an end wall of the greenhouse separated from the growing section by a partition. The ’617 patent also explains that “the greenhouse can be arranged ***without a gabled end***,” and provides an example of such an arrangement as one where “the first louver [is] arranged over the fans with the cooling mechanism located at the fans such that ambient air can be pulled directly into the tubes with the air passing the cooling mechanism for additional cooling” and “[p]ipes . . . ***provide an air passageway*** between the second vent and the fans during the

mode when air from within the crop section is to be recycled.” Ex. 1001, 9:33–41 (emphases added). As noted above, in such arrangements, a direct flow path is provided between first vent 24/first louver 30 to draw ambient air into the system and piping provides a flow path from second vent 34/second louver 36 for air recirculation from growing section 16. We find that “piping,” as used in the ’617 patent, is ducting, as that term is used in the art. Consistent with that finding, Patent Owner’s declarant Mr. Turkewitsch distinguishes ducting from structure such as a plenum or a chamber. *See, e.g.*, Ex. 1031 53:22–55:10. Accordingly, we determine that the alternate example from the ’617 patent noted above discloses use of a ducted system in place of gabled end 14 for air flow.

Based on the Specification, therefore, we find that ducting or other piping is not considered an “end gable” in the ’617 patent. As discussed further below, for purposes of this decision, we do not need to determine the precise requirements of the term “end gable” in the claims in order to determine that Petitioner has failed to establish unpatentability of the claims including that term because we at least determine that, even under the broadest reasonable interpretation, an “end gable” does not include ducting.

2. “*end portion*”

Claim 29 recites a “substantially enclosed end portion adjacent to and outside said growing section.” We note that claim 29 recites an “end portion,” rather than an “end gable.” The parties, in their individual proposed claim constructions, do not allege any meaningful difference between “end portion” and “end gable.” *See* Pet. 5–6 (proposing the same construction for each term); PO Resp. 8, 15 (construction of “end portion” differing from that of “end gable” in that an “end portion” is a “structurally

defined interior space that is defined in part by and runs along the length of an outside end wall” rather than “along the length of an outside gable wall”). We do not agree that the terms are so similar, and read “end portion” as broader than “end gable” and, consistent with Petitioner’s proposed construction noted above, as encompassing a ducted arrangement at an end wall.

Nothing in claim 29 mandates the narrow meaning of “end portion” advanced by Patent Owner. Further, it is consistent with the Specification of the ’617 patent to determine that “end portion” encompasses the example including the “gabled end,” as well as the alternate example including a ducted arrangement noted above. We are apprised of no persuasive reason to believe otherwise.

Accordingly, we determine that the “end portion” in claim 29 encompasses a ducted arrangement.

B. Challenges

1. Reisinger

Petitioner challenges claims 1–9, 11, 13–15, 17, 19–27, and 29 as unpatentable over Reisinger under 35 U.S.C. § 103. Pet. 19–65. Petitioner additionally challenges claims 6, 10, 12, 16, 18, 23, and 28 based on various combinations of Reisinger and other references. *Id.* at 65–78. As noted above in the claim construction discussion, claims 1 and 17 each recite an “end gable,” while claim 29 recites an “end portion.” In its challenges to claims 1, 17, and 29 based on Reisinger alone, Petitioner cites what Patent Owner characterizes as ducting in the various embodiments of Reisinger as corresponding to the “end gable” in claims 1 and 17. *See* Pet. 24–28, 57–60.

Petitioner cites the same structure as corresponding to the “end portion” in claim 29. *Id.* at 64–65.

Reisinger “relates to an air conditioning apparatus and an air conditioning method for plant breeding.” Ex. 1003, 23. Reisinger includes a number of different embodiments (*see id.* at 23–25), and Petitioner cites a number of those embodiments in its challenge (*see, e.g.,* Pet. 19–35). Patent Owner provides annotated versions of Reisinger’s Figures 1 and 5 (PO Resp. 51), reproduced below, which are representative of the various embodiments of Reisinger relied on by Petitioner.

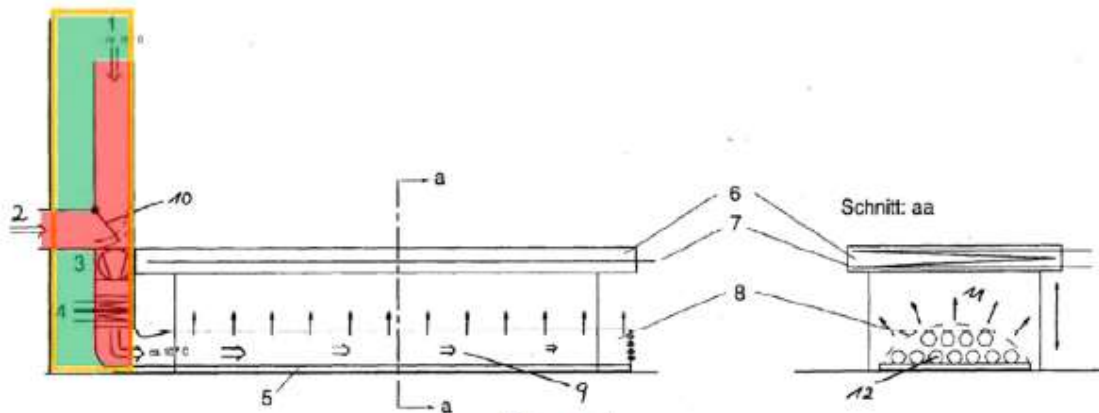
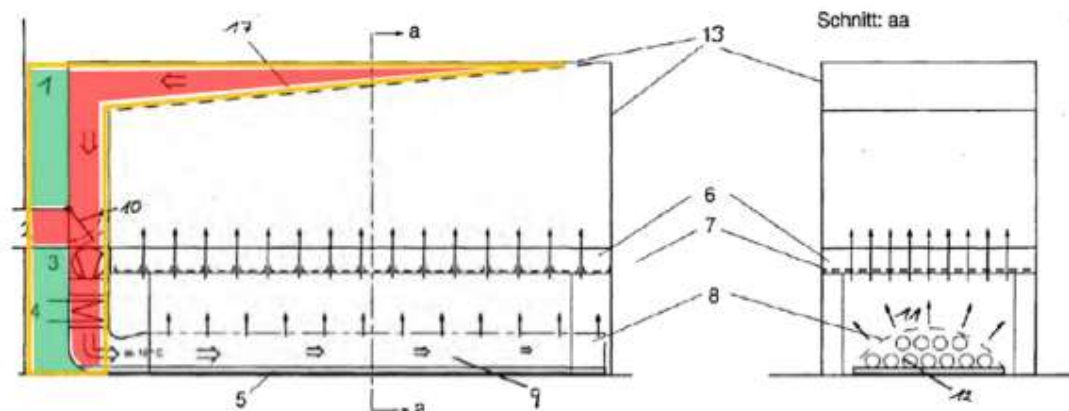


Figure 1



Reisinger, Figure 5

The annotated figures above are Reisinger’s Figures 1 and 5, which illustrate schematic section views of two different embodiments of Reisinger’s air

conditioning apparatus for plant breeding, and include air passages colored red (“the red region”) and space between the red region and end wall of the greenhouse colored green.⁸

Patent Owner explains that “[t]he dispute in this case boils down to the interpretation of Reisinger” and contends that “[a]t best, Reisinger discloses an air conditioner apparatus[] that uses a duct system—one for recirculating air, and one for introducing ambient air—with a flap at the junction of the ducts to control the ratio of recirculated and ambient air delivered to a single cultivating table or row within a greenhouse.” PO Resp. 1; *see also id.* at 33 (“Reisinger does not disclose the ‘substantially enclosed end gable adjacent to and outside said growing section’ required by the claims” and, instead, “the air apparatuses disclosed in Reisinger have a duct system that is spaced away from the greenhouse wall to bring air into the system”).

a. Claims 1–28

As noted above in our claim construction discussion, the “end gable” recited in claims 1 and 17 does not encompass ducting. There is no dispute that Reisinger, itself, fails to state explicitly whether or not the red region in the annotated figures above is a duct. Nor does Petitioner even allege, let alone support with persuasive evidence, that one skilled in the art would consider the red region something other than a duct. Rather, other than providing arguments based on its construction of “end gable,” which we do not adopt as explained above, Petitioner responds that Reisinger does not *mandate* a ducted system and that, even if it did, a ducted system does not

⁸ Colors added by Patent Owner.

differ meaningfully from the system disclosed in the “end gable” arrangement of the ’617 patent. Reply 16–25. Petitioner contends, for example, that “[d]uring his deposition, Mr. Turkewitsch alleged that an end gable must be a plenum, while Reisinger discloses a mere duct” and “Mr. Turkewitsch was unable to articulate any reason why the supposed distinction actually mattered, even if the plenum and duct were identically dimensioned and situated.” *Id.* at 21.

The distinction between Reisinger’s system and one that does not have ducting for the “end gable” region matters because the claim calls for something other than ducting, as explained in our claim construction discussion above. Petitioner’s challenge does not propose modifying Reisinger’s red region.⁹ *See, e.g.*, Pet. 19–35; *see also* Tr. 7:12–18 (explaining the ground based solely on Reisinger was set forth as obviousness rather than anticipation simply because Reisinger does not expressly disclose walls or a roof). Regardless of whether or not Reisinger *mandates* a ducted system, or whether a ducted system *differs meaningfully* from the system disclosed in the “end gable” arrangement of the ’617 patent, Petitioner’s challenge is based on Reisinger expressly teaching an “end gable.” Because our claim construction requires that an “end gable” is something other than ducting, this challenge to claims 1 and 17 fails.

Based on the record before us, Petitioner has failed to establish by a preponderance of the evidence that the red region in the annotated figures from Reisinger is anything other than ducting. For at least these reasons,

⁹ Petitioner’s discussion of closing the end wall in Reisinger in this challenge (Reply 24) is not part of the challenge presented in the Petition. We do not consider that new argument.

Petitioner's challenges to claims 1–9, 11, 13–15, 17, and 19–27 as unpatentable over Reisinger under 35 U.S.C. § 103 fail. Petitioner's challenges to claims 6, 10, 12, 16, 18, 23, and 28, which depend from claim 1 or 17, suffer from the same deficiencies noted above.

b. Claim 29

Claim 29 recites an “end portion” of the climate control system, rather than an “end gable.” Unlike “end gable,” our construction of “end portion” allows for the “end portion” to be formed from any structure, including ducting, as long as that structure meets the further limitations in the claim. Petitioner cites the red region in Reisinger's annotated figures above as teaching the “end portion” recited in claim 29. Pet. 64–65 (referencing contentions with respect to claim 1). Patent Owner acknowledges that the red region can at least be considered ducting. *See, e.g.*, PO Resp. 1 (“Reisinger discloses an air conditioner apparatuses that uses a duct system”), 51 (characterizing the red regions in Reisinger's annotated figures as ducts).

We are persuaded that Reisinger teaches the “growing section” and other features from the “climate control system” recited in claim 29. *See* Pet. 64–65 (referencing discussion with respect to claim 1 on pages 20–23 of the Petition). Reisinger's “growing section” corresponds to the portion of the annotated version of Figure 5 above, for example, that is uncolored and to the right of the red portion. Indeed, Patent Owner agrees that disclosure from Reisinger discloses a growing section. *See, e.g.*, PO Resp. 51 (describing Figure 5 of Reisinger, for example, as including an “area where ambient air from outside the greenhouse [is mixed] with recirculated air from inside the growing section”).

As for the additional features of the “climate control system,” Petitioner contends that Reisinger’s fresh air inlet 2, for example, corresponds to the “one or more vents” and flap 10 corresponds to the “one or more mechanisms selectively moveable to cooperate with said one or more vents to control air flow through said one or more vents.” Pet. 64–65 (referencing discussion of similar limitations in claim 1 discussed on pages 35–40 of the Petition). Petitioner explains that Reisinger’s climate control system also meets the additional limitations directed to operation of the “climate control system” in claim 29. *Id.* (referencing discussion of similar limitations in claim 1 discussed on pages 40–44 of the Petition). We are persuaded by those contentions, which Patent Owner does not dispute.¹⁰

With respect to any requirement that the claim has regarding a roof and sidewalls, generally, we are also persuaded by Petitioner’s contentions in connection with those features. *See, e.g.*, Pet. 32 (citing Ex. 1002 ¶¶ 86–88). Petitioner explains, for example, that “a POSA would have understood Reisinger to disclose them because a greenhouse was known to include a ceiling, and Reisinger’s disclosed function of smoothly adjusting the ratio of fresh air and recirculated air would not work unless the air inlets 1 and 2 were enclosed on the sides.” *Id.* Patent Owner does not dispute those contentions, which, as stated above, we find persuasive.

¹⁰ We note that our Scheduling Order cautions Patent Owner “that any arguments for patentability not raised in the [Patent Owner’s Response] will be deemed waived.” *See* Paper 11, 7–8; *see also See In re NuVasive, Inc.*, 842 F.3d 1376, 1380–81 (Fed. Cir. 2016).

c. Secondary Considerations

As part of our obviousness analysis, we consider the arguments and corresponding evidence submitted by Patent Owner regarding secondary considerations of non-obviousness. *See Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966). To be relevant, secondary evidence of non-obviousness must be commensurate in scope with the claimed invention. *In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011). There must be a nexus between the merits of the claimed invention and the evidence of secondary considerations. *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995). “Nexus” is a legally and factually sufficient connection between the objective evidence and the claimed invention, such that the objective evidence should be considered in determining non-obviousness. *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988).

Patent Owner provides evidence of non-obviousness directed to alleged copying, as well as industry praise. PO Resp. 76–80. We address that evidence only with respect to claim 29 because, as noted above, we determine that Petitioner has failed to establish unpatentability of claims 1–28.

Initially, we note that the discussion of secondary indicia of non-obviousness in Patent Owner’s Response fails to address any relation of the claim elements, or even any particular claim, to that evidence. *See* PO Resp. 76–80. Nevertheless, even if we were to assume some nexus, that nexus appears to be between Patent Owner’s evidence and the features of claims 1 and 17, rather than those of claim 29. For example, in its discussion of copying, Patent Owner asserts “the ModulAir design has the

same ‘corridor’ (or ‘end gable’) design as that of the Ultra Clima®.” *Id.* at 78. As noted above, claim 29 recites an “end portion,” rather than the “end gable” recited in claims 1 and 17. Moreover, Patent Owner presents evidence of similar designs, rather than actual copying. *See, e.g., id.* (“the designs are almost identical”).

“[C]opying requires the replication of a specific product.” *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004). That products are similar is not persuasive evidence of copying. *See Iron Grip*, 392 F.3d at 1325 (“Not every competing product that arguably falls within the scope of a patent is evidence of copying. Otherwise every infringement suit would automatically confirm the nonobviousness of the patent.”).

With respect to industry praise, we note that evidence, too, is only relevant when it is directed to the merits of the invention claimed. *See Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1311 (Fed. Cir. 2006). Patent Owner fails to provide any connection between the particular features of claim 29 and the alleged industry praise.

Nevertheless, even if we were to assume sufficient nexus had been established by Patent Owner, when we weigh all of the evidence, for and against patentability, we determine that the preponderance of the evidence weighs in favor of unpatentability of claim 29. As explained above, we are persuaded that Reisinger, itself, in a single embodiment, teaches each of the features found in claim 29, other than expressly describing a roof and sidewalls. As also explained above, however, we are persuaded that one skilled in the art would readily appreciate that greenhouses include a roof and sidewalls, which Patent Owner does not dispute. Accordingly, Patent Owner’s evidence does not outweigh Petitioner’s evidence of obviousness.

For the reasons set forth above, we are persuaded that Petitioner has established by a preponderance of the evidence that claim 29 is unpatentable in view of Reisinger.

2. Reisinger and Landstrom

Petitioner challenges claims 1–9, 11, 13–15, 17, 19–27, and 29 as unpatentable over Reisinger and Landstrom under 35 U.S.C. § 103. Pet. 78–82.¹¹ Petitioner additionally challenges claims 6, 10, 12, 16, 18, 23, and 28, which depend from claim 1 or 17, based on Reisinger and Landstrom in combination with various other references. *Id.* at 82–84. We have reviewed Petitioner’s challenges, as well as Patent Owner’s response to those challenges and the evidence relied on in those papers. Based on the record before us, Petitioner has failed to establish by a preponderance of the evidence that claims 1–9, 11, 13–15, 17, 19–27, and 29 are unpatentable over the combination of Reisinger and Landstrom. Petitioner’s challenges to dependent claims 6, 10, 12, 16, 18, 23, and 28 do not cure the underlying deficiencies in that challenge.

In its challenges based on the combination of Reisinger and Landstrom, Petitioner proposes modifying Reisinger in view of Landstrom’s teachings “if [end gable or end portion] are construed contrary to Petitioner’s proposed construction, such that an end wall with a pitched roof is required.” Pet. 78. Such a construction never materialized.

Petitioner additionally proposed modifying Reisinger based on Landstrom’s teachings to “incorporate Landstrom’s end gable chamber into

¹¹ Petitioner’s contentions in connection with this challenge also rely, in part, on the contentions set forth in the challenge based solely on Reisinger on pages 19–65 of the Petition.

Reisinger's greenhouse and climate control system, because . . . Landstrom is in the same field of endeavor as Reisinger," "there would have been a reasonable and predictable expectation of success to a POSA in combining the teachings of Reisinger and Landstrom to incorporate Landstrom's end gable chamber into Reisinger," and "incorporating Landstrom's end gable chamber into Reisinger's greenhouse and climate control system including vents, louver and airflow modes does not change the principle of operation of either component." *Id.* at 79–81.

Patent Owner disputes whether Landstrom teaches an "end gable" or an "end portion," and contends that Petitioner has failed to establish that one skilled in the art would have combined Landstrom's teachings asserted by Petitioner in connection with those features with Reisinger. PO Resp. 66–72, 74–75. Even accepting Petitioner's contentions that Landstrom teaches an "end gable" and an "end portion" as required by the claims, Petitioner has failed to establish sufficiently that one skilled in the art would have found it obvious to include those features from Landstrom in Reisinger's system. Sufficient rationale for combining features from multiple references requires more than those references merely being in the same field of endeavor and that the combination would have had a reasonable expectation of success and not change the principle of operation. *See Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011) ("obviousness requires the additional showing that a person of ordinary skill at the time of the invention would have selected and combined those prior art elements in the normal course of research and development to yield the claimed invention"). We are lacking any, let alone sufficient, rationale from Petitioner in this proceeding.

Accordingly, Petitioner has failed to establish by a preponderance of the evidence that claims 1–29 are unpatentable based on its challenges relying on the combined teachings of Reisinger and Landstrom.

C. SUMMARY

Based on consideration of all arguments and evidence presented, we are persuaded that Petitioner has established by a preponderance of the evidence that claim 29 is unpatentable, but has failed to establish by a preponderance of the evidence that claims 1–28 are unpatentable.

D. MOTION TO EXCLUDE

Patent Owner filed a motion to exclude Petitioner’s Exhibits 1022–1029 and 1032. Paper 23 (“MTE”). Even without excluding those exhibits, we have determined that Petitioner failed to establish unpatentability of claims 1–28. With respect to claim 29, we did not rely on any of those exhibits in reaching our determination that claim 29 is unpatentable.

Accordingly, Patent Owner’s motion to exclude is *dismissed* as moot.

E. MOTION TO STRIKE

Pursuant to our authorization, Petitioner filed a motion to strike Patent Owner’s Exhibits 2040–2043 (Paper 30, “MTS”) and Patent Owner filed an opposition to that motion (Paper 31, “MTS Opp.”). As Patent Owner notes, those exhibits were relied on by Patent Owner *only* for purposes of its Motion to Exclude (MTS Opp. 1–2), which we dismissed as moot as explained above. Petitioner’s concern appears directed to the potential that Patent Owner may attempt to rely on the exhibits noted above in some manner on appeal. Although we do not rely on those exhibits in this Decision, we find it prudent to maintain a complete record should this case be appealed. As explained above, we make clear that those exhibits are in

no way relied on by Patent Owner in its Patent Owner Response. Those exhibits are solely relied on for purposes of Patent Owner's Motion to Exclude.

For the reason set forth above, Petitioner's Motion to Strike is *denied*.

F. ORDER

For the reasons given, it is

ORDERED that claim 29 of the '617 patent is unpatentable;

FURTHER ORDERED that Patent Owner's Motion to Exclude is *dismissed*;

FURTHER ORDERED that Petitioner's Motion to Strike is *denied*;
and

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

IPR2017-00476
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