

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LALTITUDE LLC, dba PICASSO TILES,
Petitioner,

v.

ALTUS HOLDINGS, INC.,
Patent Owner.

IPR2022-00155
Patent D719,138 S

Before KEN B. BARRETT, BART A. GERSTENBLITH, and
RYAN H. FLAX, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

JUDGMENT
Final Written Decision
Determining Challenged Claim Unpatentable
35 U.S.C. § 318(a)

I. INTRODUCTION

A. Background

Laltitude LLC dba Picasso Tiles (“Petitioner”) filed a Petition (Paper 2, “Pet.”) on November 9, 2021, requesting institution of *inter partes* review of the sole claim of U.S. Design Patent D719,138 S (Ex. 1001, “the ’138 patent”). Altus Holdings, Inc. (“Patent Owner”) did not file mandatory notices pursuant to 37 C.F.R. § 42.8 and did not file a preliminary response. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review as to the challenged claim of the ’138 patent. Paper 5 (“Inst. Dec.”). After institution, Petitioner informed the Board (*see* Ex. 3002 (Email from W. Holbrow, dated July 11, 2022)) that it took further action, not required by our rules, to reach Patent Owner by serving the relevant papers, including the Institution Decision, on “individuals, addresses and counsel related to Patent Owner” (*see* Ex. 3003 (Proof of Service)). Despite these additional efforts, Patent Owner did not file a response and did not otherwise participate in this proceeding.¹ Oral argument was cancelled after neither party requested argument and we did not discern an independent reason to hold an oral argument. Paper 7 (Order).

We have jurisdiction pursuant to 35 U.S.C. § 6. This Decision is a Final Written Decision under 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73 as to the patentability of the challenged claim. Petitioner bears the burden of proving unpatentability of the challenged claim. *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). To prevail,

¹ A detailed description of earlier efforts undertaken by Petitioner and the Board to notify Patent Owner is set forth in the Institution Decision. Inst. Dec. 2–3.

Petitioner must prove unpatentability by a preponderance of the evidence. *See* 35 U.S.C. § 316(e) (2018); 37 C.F.R. § 42.1(d) (2020). Having reviewed the arguments and the supporting evidence, we determine that Petitioner has shown, by a preponderance of the evidence, that the challenged claim of the '138 patent is unpatentable.

B. Related Proceedings

Petitioner indicates that there are no related matters that would affect, or be affected by, a decision in this proceeding. Pet. 35.

C. Real Parties in Interest

Petitioner identifies itself—Laltitude LLC dba Picasso Tiles—as the sole real party in interest. Pet. 35. Patent Owner has not identified a real party in interest.

D. The Asserted Grounds of Unpatentability

Petitioner raises the following grounds of unpatentability:

Claim(s) Challenged ²	35 U.S.C. § ³	Reference(s)/Basis
1	102	Zhao US ⁴
1	102	Zhao CN ⁵

² The '138 patent has a single, unnumbered claim. In the chart above, we represent that single claim with the number “1” for ease of reference.

³ The Leahy-Smith America Invents Act (“AIA”) includes revisions to 35 U.S.C. §§ 102 and 103 that became effective on March 16, 2013. Because the '138 patent has an effective filing date of January 7, 2014 (*see* Ex. 1001, code (22)), we apply the AIA-version of the statutory bases for unpatentability.

⁴ U.S. Patent No. D742,359 S, filed Dec. 25, 2013, issued Nov. 3, 2015 (Ex. 1002, “Zhao US”).

⁵ Chinese Patent No. CN 302430265 S, published May 8, 2013 (Ex. 1003, “Zhao CN”). Petitioner provides a machine-made, English-language

Claim(s) Challenged ²	35 U.S.C. § ³	Reference(s)/Basis
1	103	Zhao US, Zhao CN
1	103	Zhao US, Zhao CN, Dwyer ⁶
1	103	Zhao US, Zhao CN, Crane ⁷

Pet. 6–7.

E. The '138 Patent

The '138 patent is titled “CIRCULAR SHOWER RADIO WITH BASE,” Ex. 1001, code (54), and claims “[t]he ornamental designs for a circular shower radio with base, as shown and described,” *id.* at code (57) (claim). The '138 patent includes eight figures, reproduced below.

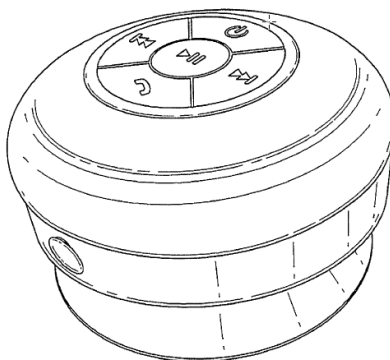


FIG. 1

Figure 1 “is a top and front perspective view of a circular shower radio with base.” Ex. 1001, DESCRIPTION.

translation of the Title and Abstract of Zhao CN as Exhibit 1004. *See* Pet. 12 (describing Exhibits 1003 and 1004).

⁶ U.S. Patent No. 6,154,929, issued Dec. 5, 2000 (Ex. 1005, “Dwyer”).

⁷ U.S. Patent No. 6,264,524 B1, issued July 24, 2001 (Ex. 1006, “Crane”).

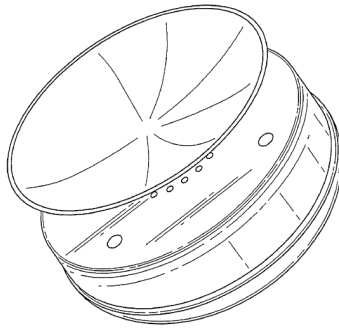


FIG. 2

Figure 2 “is a bottom perspective view” of the circular shower radio with base shown in Figure 1. *Id.*

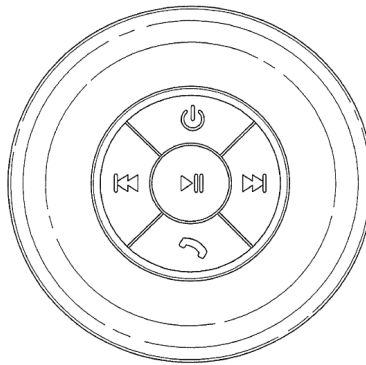


FIG. 3

Figure 3 “is a top view” of the circular shower radio with base shown in Figure 1. *Id.*

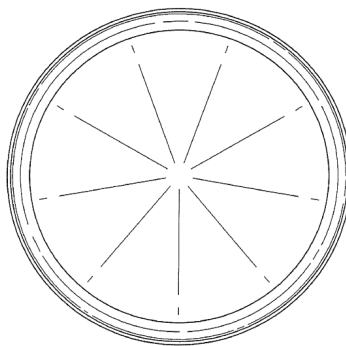


FIG. 4

Figure 4 “is a bottom view” of the circular shower radio with base shown in Figure 1. *Id.*

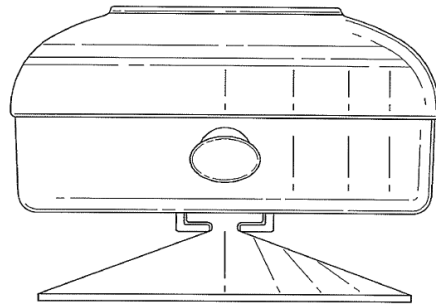


FIG. 5

Figure 5 “is a front view” of the circular shower radio with base shown in Figure 1. *Id.*

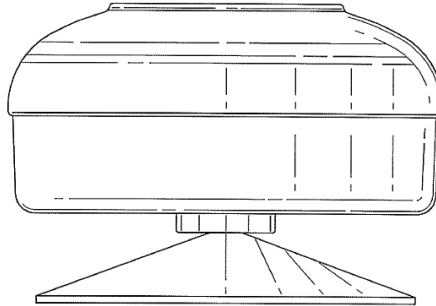


FIG. 6

Figure 6 “is a rear view” of the circular shower radio with base shown in Figure 1. *Id.*

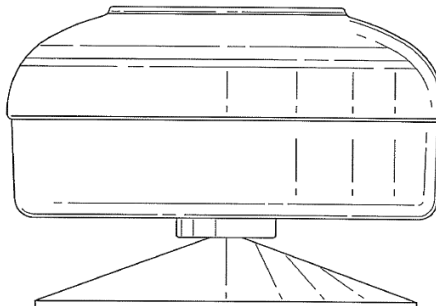


FIG. 7

Figure 7 “is a left side view” of the circular shower radio with base shown in Figure 1. *Id.*

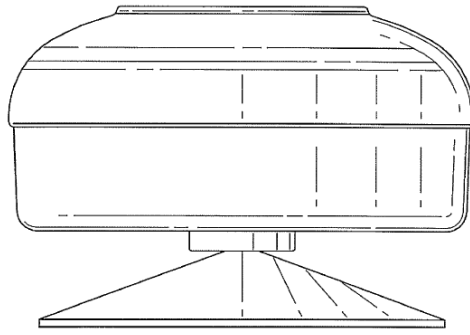


FIG. 8

Figure 8 “is a right side view” of the circular shower radio with base shown in Figure 1. *Id.*

II. CLAIM CONSTRUCTION

In this *inter partes* review, claims are construed using the same claim construction standard that would be used to construe the claims in a civil action under 35 U.S.C. § 282(b). *See* 37 C.F.R. § 42.100(b) (2020). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

On the record before us, we determine that the patented design is better represented by the figures reproduced above than a verbal description thereof.

III. ANALYSIS

A. *Principles of Law*

1. *Anticipation*

The “ordinary observer” test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented design is compared with the alleged anticipatory reference rather than an accused design. *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Id. at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the “normal use” lifetime of the accused product, i.e., “from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article.” *Int’l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior art and claimed designs,

[t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding of

infringement” . . . so too minor differences cannot prevent a finding of anticipation.

Id. at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (1984)).

2. Obviousness

“In addressing a claim of obviousness in a design patent, the ultimate inquiry . . . is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (internal quotation omitted) (ellipses in original); *see also High Point Design LLC*, 730 F.3d at 1313. *See also* MPEP § 1504.03 (II) (“the proper standard is whether the design would have been obvious to a designer of ordinary skill with the claimed type of article”).

The obviousness analysis generally involves two steps: first, “one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design”; second, “once this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design.” *High Point Design*, 730 F.3d at 1311 (internal quotation and citations omitted).

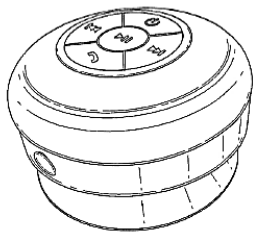
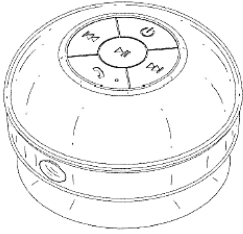
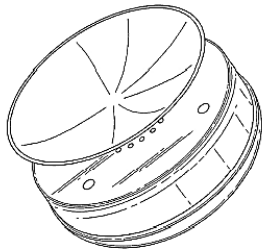
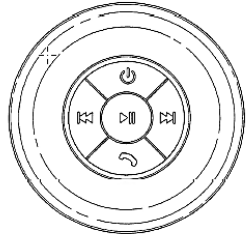
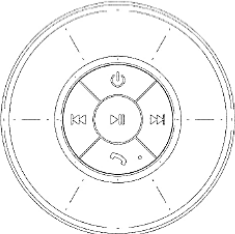
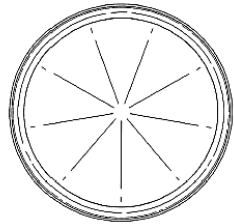
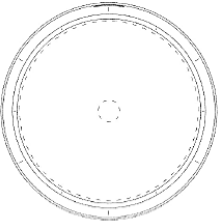
In performing the first step of the obviousness analysis, we must “(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates basically the same visual impression.” *Id.* at 1312 (internal quotation omitted).

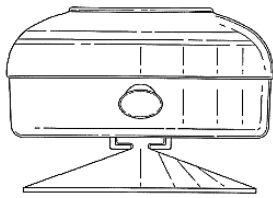
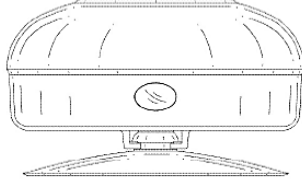
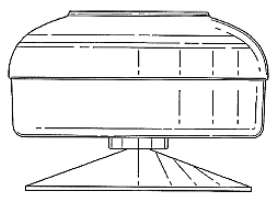
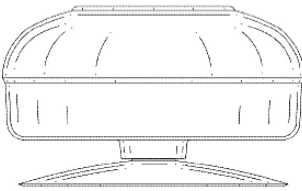
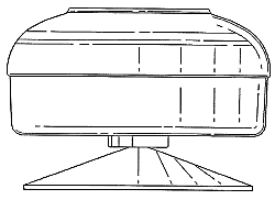
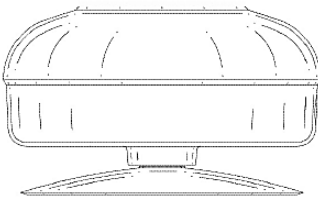
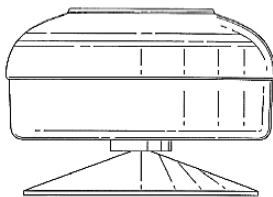
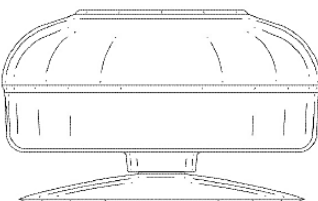
In the second step, the primary reference may be modified by secondary references “to create a design that has the same overall visual appearance as the claimed design.” *Id.* at 1311 (internal quotation omitted). However, the “secondary references may only be used to modify the primary reference if they are ‘so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.’” *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)) (alteration in original).

When evaluating prior art references for purposes of determining patentability of ornamental designs, the focus must be on actual appearances and specific design characteristics rather than design concepts. *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993); *see also Apple, Inc.*, 678 F.3d at 1332 (“Rather than looking to the ‘general concept’ of a tablet, the district court should have focused on the distinctive ‘visual appearances’ of the reference and the claimed design.”).

B. Ground 1: Anticipation by Zhao US

Petitioner contends that the design shown in Zhao US “discloses a circular shower speaker that is identical in all material respects to that of the claimed design of the ’138 Patent.” Pet. 15. Petitioner provides the following chart comparing the figures of the ’138 patent (left) with those of Zhao US (right):

<u>THE '138 PATENT</u>	<u>ZHAO US PATENT</u>
 FIG. 1	 FIG. 1
 FIG. 2	
<u>THE '138 PATENT</u>	<u>ZHAO US PATENT</u>
 FIG. 3	 FIG. 6
 FIG. 4	 FIG. 7

<u>THE '138 PATENT</u>	<u>ZHAO US PATENT</u>
 FIG. 5	 FIG. 2
 FIG. 6	 FIG. 3
<u>THE '138 PATENT</u>	<u>ZHAO US PATENT</u>
 FIG. 7	 FIG. 4
 FIG. 8	 FIG. 5

Pet. 16–19. Petitioner’s chart compares the design of the ’138 patent (left) with the design shown in Zhao US (right).

Applying the ordinary observer test, Petitioner contends that “the appearance of [Zhao US] is substantially the same as that of the claimed design.” Pet. 20. Petitioner asserts that “[b]oth designs share a common domed circular body having control buttons on top. Both designs share the same shape, order, and position of the control buttons. Both designs share the same button on a side of the cylindrical, circular body. Both designs share [a] similar suction cup bottom.” *Id.* Thus, Petitioner contends that “[t]he appearance between the two designs is substantially the same based on the ordinary observer.” *Id.*

Additionally, Petitioner asserts that “[g]iven the relatively low cost of these products, and the availability on the internet for quick and easy purchases,⁸ the ordinary observer is not likely to give attention to any [alleged] variation.” Pet. 20–21 (footnote added). Petitioner contends that any alleged variation between the two designs is, at best, “a trivial variation.” *Id.* at 21.

As noted above, Patent Owner did not file a response.

On the record before us, Petitioner has established sufficiently (*see* Pet. 15–21) that, “in the eye of an ordinary observer, giving such attention as a purchaser usually gives,” Zhao US and the claimed design are substantially the same. *See Gorham*, 81 U.S. at 528 (setting forth the “ordinary observer” test in the context of infringement); *see also Int’l Seaway*, 589 F.3d at 1238, 1240 (applying the “ordinary observer” test to anticipation). In particular,

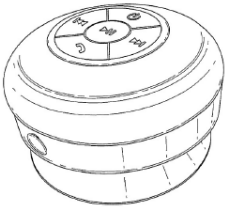
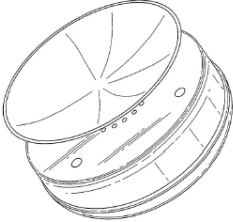
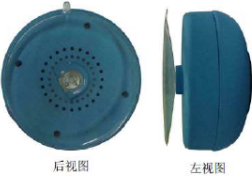
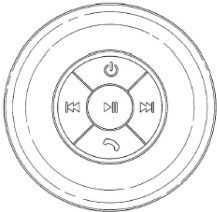
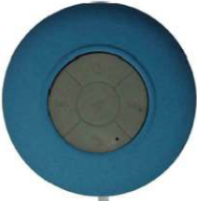
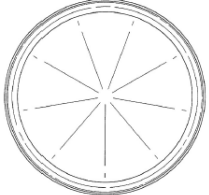
⁸ Petitioner asserts that “[a] circular shower speaker, such as covered by the ’138 Patent[,], is sold to consumers for approximately \$10 to \$20.” Pet. 14 (citing Exs. 1007 and 1008 (screen prints from Amazon.com of similar speakers)).

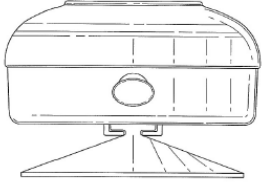
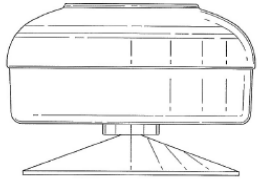
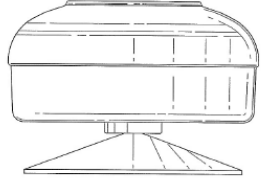
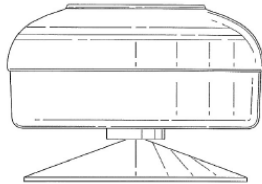
we agree with Petitioner that “[b]oth designs share a common domed circular body having control buttons on top”; “[b]oth designs share the same shape, order, and position of the control buttons”; “[b]oth designs share the same button on a side of the cylindrical, circular body”; and “[b]oth designs share [a] similar suction cup bottom.” Pet. 20. Additionally, we find that any differences in the designs (e.g., the precise shape of the suction cup) are minor differences that do not prevent a finding of anticipation. *Id.* (citing *Int’l Seaway*, 589 F.3d at 1243 (citing *Litton Sys.*, 728 F.2d at 1444)).

Thus, we find that Petitioner has established by a preponderance of the evidence that Zhao US anticipates the claimed design of the ’138 patent.

C. Ground 2: Anticipation by Zhao CN

Petitioner contends that the design shown in Zhao CN “discloses a circular shower speaker that is identical in all material respects to that of the claimed design of the ’138 Patent.” Pet. 21. Petitioner provides the following chart comparing the figures of the ’138 patent (left) with those of Zhao CN (right):

<u>THE '138 PATENT</u>	<u>ZHAO CHINESE PATENT</u>
 FIG. 1	 立体图 1
 FIG. 2	 后视图 左视图
<u>THE '138 PATENT</u>	<u>ZHAO CHINESE PATENT</u>
 FIG. 3	 主视图
 FIG. 4	

<u>THE '138 PATENT</u>	<u>ZHAO CHINESE PATENT</u>
 FIG. 5	 俯视图
 FIG. 6	 仰视图
<u>THE '138 PATENT</u>	<u>ZHAO CHINESE PATENT</u>
 FIG. 7	 左视图
 FIG. 8	 右视图

Pet. 22–25. Petitioner’s chart compares the design of the ’138 patent (left) with the design shown in Zhao CN (right).

Applying the ordinary observer test, Petitioner contends that “the appearance of [Zhao CN] is substantially the same as that of the claimed design.” Pet. 26. Petitioner asserts that “[b]oth designs share a common domed circular body having control buttons on top. Both designs share the same shape, order, and position of the control buttons. Both designs share the same button on a side of the cylindrical, circular body. Both designs share the same suction cup bottom.” *Id.* Thus, Petitioner contends that “[t]he appearance between the two designs is substantially the same based on the ordinary observer.” *Id.*

Additionally, Petitioner asserts that “[g]iven the relatively low cost of these products, and the availability on the internet for quick and easy purchases, the ordinary observer is not likely to give attention to any [alleged] variation.” Pet. 26–27. Petitioner contends that any alleged variation between the two designs is, at best, “a trivial variation.” *Id.* at 27.

As noted above, Patent Owner did not file a response.

On the record before us, Petitioner has established sufficiently (*see* Pet. 21–27) that, “in the eye of an ordinary observer, giving such attention as a purchaser usually gives,” Zhao CN and the claimed design are substantially the same. *See Gorham*, 81 U.S. at 528 (setting forth the “ordinary observer” test in the context of infringement); *see also Int’l Seaway*, 589 F.3d at 1238, 1240 (applying the “ordinary observer” test to anticipation). In particular, we agree with Petitioner that “[b]oth designs share a common domed circular body having control buttons on top”; “[b]oth designs share the same shape, order, and position of the control buttons”; “[b]oth designs share the same button on a side of the cylindrical, circular body”; and “[b]oth designs share the same suction cup bottom.”

Pet. 26. Additionally, we find that any differences in the designs (e.g., the precise shape of the suction cup) are minor differences that do not prevent a finding of anticipation. *Id.* at 26–27 (citing *Int’l Seaway*, 589 F.3d at 1243 (citing *Litton Sys.*, 728 F.2d at 1444)).

Thus, we find that Petitioner has established by a preponderance of the evidence that Zhao CN anticipates the claimed design of the ’138 patent.

D. Grounds 3–5

Petitioner raises three additional grounds pursuant to 35 U.S.C. § 103 based on the combinations of Zhao US and Zhao CN (Pet. 27–29 (Ground 3)); Zhao US, Zhao CN, and Dwyer (*id.* at 29–34 (Ground 4)); and Zhao US, Zhao CN, and Crane (*id.* (Ground 5)). Because Petitioner’s challenges based on Zhao US and Zhao CN are dispositive as to sole claim of the ’138 patent, we do not reach these additional asserted grounds. *See SAS Inst. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (holding that a petitioner “is entitled to a final written decision addressing all of the claims it has challenged”); *Boston Sci. Scimed, Inc. v. Cook Grp. Inc.*, 809 F. App’x 984, 990 (Fed. Cir. 2020) (nonprecedential) (stating that the “Board need not address issues that are not necessary to the resolution of the proceeding,” such as “alternative arguments with respect to claims [the Board] found unpatentable on other grounds”); *cf. In re Gleave*, 560 F.3d 1331, 1338 (Fed. Cir. 2009) (not reaching other grounds of unpatentability after affirming a ground based on anticipation); *see also Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984) (An administrative agency is at liberty to reach a decision based on a dispositive issue because doing so “can not only save the parties, the [agency], and [the reviewing] court unnecessary cost and effort,” but “can greatly ease the burden on [an agency] commonly faced

with a . . . proceeding involving numerous complex issues and required by statute to reach its conclusion within rigid time limits.”); *SK Hynix Inc. v. Netlist, Inc.*, IPR2017-00692, Paper 25 at 40 (PTAB July 5, 2018) (determining all challenged claims to be unpatentable and not addressing additional grounds).

IV. SUMMARY⁹

For the reasons discussed above, Petitioners have demonstrated, by a preponderance of the evidence, that the sole claim of the ’138 patent is unpatentable.

Our conclusions regarding the challenged claim are summarized below:

Claim(s) Challenged¹⁰	35 U.S.C. §	Reference(s)/ Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1	102	Zhao US	1	
1	102	Zhao CN	1	

⁹ Should Patent Owner wish to pursue amendment of the challenged claim in a reissue or reexamination proceeding subsequent to the issuance of this decision, we draw Patent Owner’s attention to the April 2019 *Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial Proceeding*. See 84 Fed. Reg. 16,654 (Apr. 22, 2019). If Patent Owner chooses to file a reissue application or a request for reexamination of the challenged patent, we remind Patent Owner of its continuing obligation to notify the Board of any such related matters in updated mandatory notices. See 37 C.F.R. § 42.8(a)(3), (b)(2).

¹⁰ The ’138 patent has a single, unnumbered claim. In the chart above, we represent that single claim with the number “1” for ease of reference.

Claim(s) Challenged ¹⁰	35 U.S.C. §	Reference(s)/ Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1	103 ¹¹	Zhao US, Zhao CN		
1	103 ¹²	Zhao US, Zhao CN, Dwyer		
1	103 ¹³	Zhao US, Zhao CN, Crane		
Overall Outcome			1	

V. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the sole claim of U.S. Patent No. D719,138 S is determined to be unpatentable; and

FURTHER ORDERED that, because this 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.

¹¹ As explained above, because Petitioner's anticipation challenges based on Zhao US and Zhao CN are dispositive as to the sole claim of the '138 patent, we do not reach this asserted ground. *See supra* § III.D.

¹² As explained above, because Petitioner's anticipation challenges based on Zhao US and Zhao CN are dispositive as to the sole claim of the '138 patent, we do not reach this asserted ground. *See supra* § III.D.

¹³ As explained above, because Petitioner's anticipation challenges based on Zhao US and Zhao CN are dispositive as to the sole claim of the '138 patent, we do not reach this asserted ground. *See supra* § III.D.

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