

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Skywalker Holdings, LLC
Petitioner

v.

Board & Batten International Inc.
Patent Owner

Patent No. 7,854,687
Issued: December 21, 2010
Filed: December 9, 2004

Title: TRAMPOLINE AND ENCLOSURE SYSTEM

Inter Partes Review No. IPR2023-00350

**PATENT OWNER'S PRELIMINARY RESPONSE TO
PETITION FOR *INTER PARTES* REVIEW
OF U.S. PATENT NO. 7,854,687**

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Table of Exhibits

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EX2001	U.S. Patent No. 7,854,687 to Alexander
EX2002	U.S. Patent No. 6,053,845 to Publicover et al
EX2003	U.S. Patent No. 5,941,798 to Coan et al
EX2004	Tencom from 1998 (Petitioner's EX1014)
EX2005	U.S. Patent No. 6,319,174 to Alexander
EX2006	Prosecution History of U.S. Patent No. 7,854,687

I. INTRODUCTION

The Patent Owner Board & Batten International Inc. (“Patent Owner”) respectfully requests that the Board deny the Petition for *Inter Partes* Review filed by Skywalker Holdings, LLC (“Petitioner”) related to U.S. Patent No. 7,854,687 (“the ’687 Patent”) for two independent reasons.

First, the Board should exercise its discretion and deny the Petition under 35 U.S.C. § 325(d) because the USPTO has already considered the same or substantially the same prior art, and the Petition has failed to show the Examiner materially erred during prosecution. In fact, overwhelming evidence directly refutes the Petition’s fundamental premise that the Examiner materially erred by failing to properly consider Publicover (EX2002) and Coan (EX2003), including but not limited to:

- Publicover (EX2002)—the primary reference in all three grounds asserted in the Petition—was expressly called out by the Patent Owner in the Background to the Invention in the specification of the ’687 Patent;
- The very same Examiner who examined the ’687 Patent (Jerome W. Donnelly) was also the Primary Examiner for both the Publicover (EX2002) and Coan (EX2003) references relied

on by the Petition, and thus was well-versed in the entirety of both relied-upon references; and

- Both Publicover (EX2002) and Coan (EX2003) were exhaustively cited to and by the Examiner starting as early as the filing date of the U.S. national stage application that matured into the '687 Patent and throughout prosecution of the '687 Patent.

Notwithstanding the above, the Petition: (a) summarily and without evidence concludes that “the examiner could not have possibly considered the entirety of Publicover’s disclosure ...”; and (b) fails to even acknowledge that the Coan (EX2003) reference was cited and considered by the Examiner. As to the third prior art reference, Tencom (EX2004), the Petition fails to acknowledge that similar disclosure from substantially similar prior art was previously considered by the Examiner during prosecution of the '687 Patent (indeed, the similar prior art was Patent Owner’s own earlier issued patent expressly called out in the Background to the Invention in the specification of the '687 Patent). The Petition therefore fails to demonstrate that the Examiner erred in any manner, much less in a material manner as required by Section 325(d).

Second, the Petition should be denied on the merits for failure to demonstrate a reasonable likelihood the Petitioner would prevail as to at least one of the challenged claims, as required under 35 U.S.C. § 314(a). All challenged claims recite that a plurality of resiliently flexible enclosure support members “are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat” and that, upon impact, the barrier and enclosure support members on the impacted side “resiliently deform away from the mat” while those on the other side are “resiliently deformed towards the center of the mat.” The high degree of flexibility and configuration of the enclosure rods makes possible these claim limitations.

As to the first ground of the Petition, Publicover (EX2002) does not anticipate because it does not disclose the combination of resiliently flexible enclosure support members connected “only at or near an upper peripheral part” while “hold[ing] the net in tension,” and also does not disclose the “deform away” limitation. Instead, the posts in Publicover (EX2002) flex (to a minimal extent) only downwardly and inwardly (not away from the mat) and include multiple adjustable elastic components up and down the vertical length thereof to hold the net in tension and to permit desired flex of the fence/wall—removal of these adjustable elastic components would

reduce rather than increase tension in the fence/wall. Publicover (EX2002) thus does not anticipate claims 1-8, and the Petition's first ground fails (as do the second and third grounds that rely upon Publicover (EX2002) as the primary reference because neither satisfies the missing limitations).

As to the second ground of the Petition, Coan (EX2003) also fails to disclose resiliently flexible enclosure support members connected "only at or near an upper peripheral part" while "hold[ing] the net in tension," and also does not disclose the "deform away" limitation. In fact, Coan (EX2003) teaches away by emphasizing throughout its disclosure the linear and rigid nature of its supports and bars. The Petition does not and cannot explain why a person of ordinary skill in the art would have combined the teachings of Publicover (EX2002) and Coan (EX2003) to reach the claimed invention of the '687 Patent—even assuming the claimed limitations were present in either of these references, which they are not. Publicover (EX2002) and Coan (EX2003) thus do not render obvious claims 3 and 4, and the Petition's second ground fails.

As to the third ground of the Petition, Tencom (EX2004) is entirely cumulative of previously-considered prior art as it is relied upon for the sole proposition that fiberglass rods could be manufactured using a pultrusion

process. Publicover (EX2002) and Tencom (EX2004) thus do not render obvious claims 2 and 4, and the Petition's third ground fails.

For all of the above independent reasons, institution should be denied.

II. THE '687 PATENT

A. Overview of the '687 Patent

The challenged claims of the '687 Patent (claims 1-8) are directed to a novel trampoline and enclosure system, whereby the claimed enclosure system functions as both a play and a safety addition to a trampoline.

One novel aspect of the '687 Patent is the configuration of the resiliently flexible enclosure rods that connect and support the enclosure net relative to the trampoline, providing an enclosure system having a high degree of flexibility or deformability:

“[T]he enclosure rods are preferably retained by the trampoline frame at their lower ends so that in the natural rest state of the enclosure rods, when connected only at their lower ends to the frame of the trampoline and before fitting of the barrier net, the enclosure rods will extend at an angle away from the mat of the trampoline as shown. Thus, when the net is fitted to connect the upper ends of the enclosure rods, ... this will draw the upper ends of the enclosure rods away from their natural state of rest and towards the center of the mat, to the position generally as

shown in FIG. 1, to pre-tension the enclosure rods. The enclosure support rods act like fishing rods, and are set to hold up and tension the enclosure net adequately for the play or safety function. The higher is such pre-tension in the support rods the stronger rebound capability the enclosure net has.”

EX2001 at col. 4, lines 24-40. The novel configuration is clearly illustrated in Figure 1, whereby it is seen that “a plurality of resiliently deformable generally upright enclosure support members 5 which in the preferred form are deformable or flexible fiberglass rods ... provide the required degree of flexibility in accordance with the invention.” EX2001 at col. 3, lines 37-49.

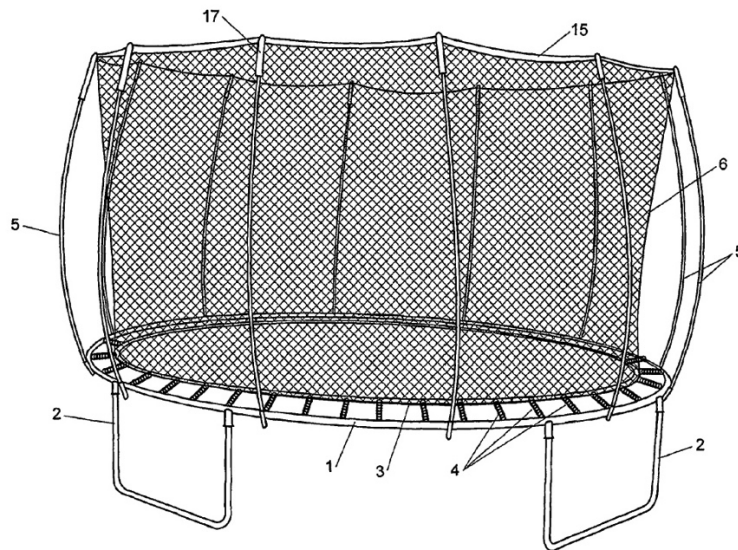


FIGURE 1

EX2001 at FIG. 1.

“The resulting enclosure system has a high degree of flexibility or deformability. This is illustrated in FIG. 4, which shows a user impacting against the barrier net 6 and one enclosure rod 5, and it can be seen that the enclosure rod freely deforms away from the trampoline. At the same time the lower edge of the net remains coupled to the trampoline mat. Typically when an average sized or weight user hits the enclosure so that the enclosure deforms to this extent or more, the impact energy absorbed by the enclosure will gently rebound the user back onto the trampoline mat. The upper ends of all of the enclosure rods are connected together so that all of the enclosure rods and net form a dynamic rebound surface. That is, a user impacting any side of the enclosure will cause all of the rods to deform to some extent.”

EX2001 at col. 5, lines 9-22.

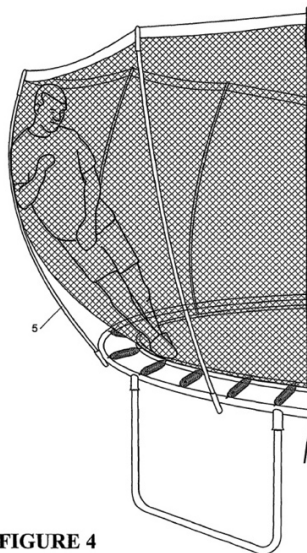


FIGURE 4

EX2001 at FIG. 4.

Of the claims challenged in the Petition, the only independent claims are claims 1 and 3, with all of the other challenged claims depending therefrom:

1. A trampoline and enclosure system comprising:

a trampoline comprising a flexible mat and a plurality of coil springs holding the mat in tension within a peripheral frame of the trampoline which surrounds the mat; and

an enclosure system comprising a barrier of a flexible net material surrounding the mat above the mat and having a lower peripheral part coupled directly or indirectly to a periphery of the mat and a plurality of resiliently flexible generally upright enclosure support members outside of the barrier relative to the mat and which are connected at or towards the lower ends of the enclosure support members to the frame of the trampoline and which are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat, and which enclosure support members are also connected together at or towards the uppers [*sic*, upper] ends of the enclosure support members to draw the upper ends of the enclosure support members away from their natural rest state and towards the center of the mat, so that when impacted by a user against the barrier on one side of the enclosure causing the barrier and

enclosure support members on that side of the enclosure to resiliently deform away from the mat, the enclosure support members and barrier on the opposite side of the enclosure will be resiliently deformed towards the center of the mat.

EX2001 at claim 1.

3. A trampoline and enclosure system comprising:

a trampoline comprising a flexible mat and a plurality of coil springs holding the mat in tension within a peripheral frame of the trampoline which surrounds the mat; and

an enclosure system comprising a barrier of a flexible net material surrounding the mat above the mat and having a lower peripheral part coupled directly or indirectly to a periphery of the mat and a plurality of resiliently flexible generally upright enclosure support members outside of the barrier relative to the mat and which are connected at or towards the lower ends of the enclosure support members to the frame of the trampoline so that in their natural rest state the enclosure support members extend away from the mat, and which are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat, and which enclosure support members are also connected together at or towards the upper ends of the enclosure

support member to draw the upper ends of the enclosure support members away from their natural rest state and towards the center of the mat, so that when impacted by a user against the barrier on one side of the enclosure causing the barrier and enclosure support member on that side of the enclosure to resiliently deform away from the mat, the enclosure support members and barrier on the opposite side of the enclosure will be resiliently deformed towards the center of the mat.

EX2001 at claim 3.

B. Summary of the prosecution of the '687 Patent

The application that matured into the '687 Patent was filed on June 9, 2006, as a U.S. national stage application claiming priority to International Application No. PCT/NZ2004/000318 ("the PCT Application"). The PCT Application, in turn, claimed priority to New Zealand Patent Application No. 530271 filed on December 19, 2003 ("the New Zealand Application"). The '687 Patent thus claims a priority date at least as early as December 19, 2003.

The below review of the prosecution history first highlights the repeated and thorough manner in which the references relied upon by the

Petition were cited to and considered by the Examiner, and then reviews the substantive prosecution history involving those references.

i. Citations to Publicover (EX2002) and Coan (EX2003)

Following is a listing of the numerous instances in which both Publicover (EX2002) and Coan (EX2003), the primary references relied upon by the Petition, were cited to and/or by the Examiner during prosecution of the '687 Patent.

In an International Search Report dated March 11, 2005 for the PCT Application, the Australian Patent Office identified several prior art references allegedly relevant to all claims of the PCT Application. EX2006 at 154. Those prior art references included, *inter alia*, the Publicover (EX2002) reference and the Coan (EX2003) reference relied upon by the Petition. In fact, the International Search Report categorized both the Publicover (EX2002) and Coan (EX2003) references with the letter “X,” which indicates a “document of particular relevance; the claimed invention cannot be considered novel or cannot be considered to involve an inventive step when the document is taken alone.” EX2006 at 154. Notably, this International Search Report identifying Publicover (EX2002) and Coan (EX2003) was included with the U.S. national stage application filed on June 9, 2006, thus the Examiner was made aware of both references and

their “particular relevance” on the very day the application for the ’687 Patent was filed.

In the Background to the Invention of the U.S. national stage application filed on June 9, 2006, the Patent Owner expressly identified Publicover (EX2002):

“US patent 6,053,845 describes an enclosure for a trampoline consisting of a net fence or barrier which surrounds the trampoline and is supported by upright poles spaced around the periphery of the trampoline and fixed to the trampoline frame.”

EX2006 at 135.

In an Information Disclosure Statement by Applicant filed on June 20, 2007, the Patent Owner again expressly called the Examiner’s attention to the International Search Report previously filed and “respectfully request[ed] full and proper consideration of the listed information during examination of the application, and that the listed information be printed on any patent which issues therefrom.” EX2006 at 117. The Information Disclosure Statement then identified several U.S. Patent Documents, including both Publicover (EX2002) and Coan (EX2003). EX2006 at 118.

In an Information Disclosure Statement by Applicant filed on September 30, 2008, the Patent Owner yet again expressly called the

Examiner's attention to Publicover (EX2002) and Coan (EX2003), as well as several other references. EX2006 at 77. In fact, included in this Information Disclosure Statement was another Publicover reference, namely, U.S. Patent No. 6,261,207, which is a continuation of Publicover (EX2002) and therefore includes the same disclosure relied upon by the Petition. EX2006 at 77.

In a Non-Final Office Action dated February 10, 2009, the Examiner rejected at least one application claim under Section 103(a) as being unpatentable over a combination of Publicover (EX2002) with another alleged prior art reference, and expressly noted Publicover (EX2002) in the Notice of References Cited. EX2006 at 65; 67. Moreover, on the Information Disclosure Statements previously filed by the Patent Owner, the Examiner initialed Publicover (EX2002) (and its continuation) and Coan (EX2003). EX2006 at 68; 71. By initialing, the Examiner was expressly confirming his direct consideration of both references pursuant to the instruction “*EXAMINER: Initial if reference considered ...” EX2006 at 71.

In a Non-Final Office Action dated December 28, 2009, the Examiner rejected sixteen (16) different application claims under Section 102(b) as being anticipated by Publicover (EX2002) and rejected four (4) additional application claims under Section 103(a) as being unpatentable over a

combination of Publicover (EX2002) with Alexander (EX2005). EX2006 at 44-45.

In a Response to Non-Final Action dated June 24, 2010, the Patent Owner cancelled sixteen (16) different application claims, thus rendering moot the Examiner's Section 102(b) and 103(a) rejections based on Publicover (EX2002). EX2006 at 33-34.

In view of the above multitude of citations of Publicover (EX2002) and Coan (EX2003) during prosecution of the '687 Patent, there can be no doubt that the Examiner was fully aware of and fully considered the entirety of both references.

ii. Citations to Alexander US 6319174 (EX2005)
(Substantially Similar to Tencom (EX2004))

Following is a listing of the numerous instances in which U.S. Patent No. 6,319,174 to Alexander (EX2005)—a reference containing disclosure substantially similar to that for which Tencom (EX2004) is relied—was cited to and/or by the Examiner during prosecution of the '687 Patent.

In the Background to the Invention of the U.S. national stage application filed on June 9, 2006, the Patent Owner expressly identified Alexander (EX2005):

“US patent 6,319,174 discloses a form of soft-edged trampoline in which the mat of the trampoline is supported by a plurality of resiliently flexible rods received in a frame of the trampoline at the lower ends of the rods and coupled to the periphery of the bouncing mat of the trampoline at their upper ends, and which avoids the need for a solid frame about the exterior of the bouncing mat and exposed springs between the frame and periphery of the mat.”

EX2006 at 135.

In an Information Disclosure Statement by Applicant filed on September 30, 2008, the Patent Owner expressly called the Examiner’s attention to Alexander (EX2005), as well as several other references. EX2006 at 77. Moreover, the International Search Report for a Foreign Patent Document disclosed by the Patent Owner also referenced Alexander (EX2005). EX2006 at 99.

In a Non-Final Office Action dated February 10, 2009, the Examiner rejected multiple application claims under Section 103(a) as being unpatentable over a combination of Alexander (EX2005) with another alleged prior art reference. EX2006 at 66. In particular, the Examiner noted that “Alexander discloses his device including pultruded rods.”

In a Non-Final Office Action dated December 28, 2009, the Examiner rejected four (4) application claims under Section 103(a) as being unpatentable over a combination of Publicover (EX2002) with Alexander (EX2005). EX2006 at 44-45.

In a Response to Non-Final Action dated June 24, 2010, the Patent Owner cancelled three (3) different application claims, thus rendering moot the Examiner's Section 103(a) rejections based on Alexander (EX2005). EX2006 at 34.

In view of the numerous citations of Alexander (EX2005) and the Examiner's express acknowledgment that it "discloses his device including pultruded rods," there can be no doubt that the Petition's citation to Tencom (EX2004) "only to show that pultrusion was a known process for manufacturing fiberglass rods" is cumulative and substantially similar.

iii. Substantive Claim Amendments and Arguments

In a Non-Final Office Action dated February 10, 2009, the Examiner rejected all original application claims 1-12. EX2006 at 64. In particular, application claims 1-3, 5, 6, 7, 9 and 11 were rejected under Section 102(e) as anticipated by Colling (U.S. Patent Application Publication No. US-2006/0270525), application claim 8 was rejected under 103(a) over Colling in view of Publicover (EX2002), and application claims 4, 10 and 12 were

rejected under 103(a) over Colling in view of Alexander (EX2005). EX2006 at 65-66.

In a Response to Non-Final Action dated June 10, 2009, the Patent Owner added new application claims 13-24 and responded to the pending rejections. EX2006 at 48-57. As to the rejections, Patent Owner noted that the Colling reference was not properly citable as prior art under Section 102(e) because its earliest effective U.S. filing date was after the international filing date of the '687 Patent, thus all of the pending rejections were improper. EX2006 at 56-57.

In a Non-Final Office Action dated December 28, 2009, the Examiner rejected all then-pending application claims 1-23. EX2006 at 43. The Examiner first withdrew reliance on the Colling reference in view of the Patent Owner's prior response. EX2006 at 44. The Examiner then substituted Publicover (EX2002) as the primary reference, rejecting application claims 1-3, 5-8, 13-15, 17-21 and 23 under Section 102 as anticipated by Publicover (EX2002), and rejecting applications claims 4, 10, 16 and 22 under Section 103(a) over Publicover (EX2002) in view of Alexander (EX2005). EX2006 at 44-45. The Examiner further rejected application claims 1-12, 23 and 24 under Section 112, first paragraph, as failing to comply with the written description requirement based on

inclusion of the allegedly indefinite parenthetical “(when connected only at their lower ends to the frame of the trampoline).” EX2006 at 44-45. The Examiner did, however, find application claims 11 and 12 to be allowable and that application claim 9 would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. EX2006 at 44. Of particular note, the application claims found to be allowable by the Examiner are the only then-pending application claims that included the claim limitations “enclosure support members ... which are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat” and “so that when impacted by a user against the barrier on one side of the enclosure causing the barrier and enclosure support members on that side of the enclosure to resiliently deform away from the mat, the enclosure support members and barrier on the opposite side of the enclosure will be resiliently deformed towards the centre of the mat.” EX2006 at 49-55.

In a Response to Non-Final Action dated June 24, 2010, the Patent Owner cancelled application claims 1-8, 13-16, and 21-24, deleted the allegedly indefinite parenthetical “(when connected only at their lower ends to the frame of the trampoline)” from application claims 9 and 11, and amended claim dependency in application claims 10, 17, 18 and 20. EX2006

at 30-32. By cancelling application claims 1-3, 5-8, 13-15, 17-21 and 23, the Examiner's Section 102 rejection based on Publicover (EX2002) was rendered moot. EX2006 at 33. Moreover, by deleting the allegedly indefinite parenthetical in application claims 9 and 11 and changing dependency of application claims 17, 18 and 20, application claims 17-20 were rendered allowable by depending from allowed application claim 11. EX2006 at 33. By cancelling application claims 4, 16 and 22, the Examiner's Section 103(a) rejection based on Publicover (EX2002) in view of Alexander (EX2005) was also rendered moot. EX2006 at 34. Finally, the Patent Owner clarified that as-amended application claim 10 depends from application claim 9, and that application claim 9 had always been an independent claim, thus both application claims 9 and 10 should be allowable in their amended forms. EX2006 at 34.

In a Notice of Allowability dated October 13, 2010, the Examiner concluded that as-amended application claims 9-12 and 17-20 were allowable in view of the latest amendment filed by the Patent Owner. EX2006 at 24. The Notice of Allowability mistakenly refers to the "Amendment dated 9-21-2010" but the Patent Owner subsequently noted for the record that "no amendment was submitted on September 21, 2010. The last amendment by the applicant in this case was submitted on June 24,

2010.” EX2006 at 16. Of note, the application claims were renumbered in the ’687 Patent such that application claims 11-12 became issued claims 1-2, application claims 9-10 became issued claims 3-4, and application claims 17-20 became issued claims 5-8. EX2006 at 25.

III. LEVEL OF ORDINARY SKILL IN THE ART

The Petition proposes that a person of ordinary skill in the art (“POSITA”) in the field of the ’687 Patent “would have been very familiar with trampolines having enclosures.” Pet. at 5. The descriptor “very familiar” is entirely vague and ambiguous, and completely unhelpful. Nevertheless, at this stage and solely for purposes of this Preliminary Response, Patent Owner does not challenge the definition—a more accurate assessment of a POSITA is not necessary to deny institution based on the relevant facts and law.

IV. CLAIM CONSTRUCTION

The Federal Circuit has held that “only those terms need be construed that are in controversy, 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). This principle applies equally to IPR proceedings. *See*,

e.g., Apple Inc. v. Uniloc Luxembourg S.A., Case IPR2018-00420, Paper No. 7 at 8 (PTAB Aug. 6, 2018).

The Petition posits that “[t]he claims of the ’687 Patent are easily understood and do not include any terms that require special construction, at least for purposes of this Petition.” Pet. at 14. At this stage and solely for purposes of this Preliminary Response, Patent Owner agrees that the ordinary and customary meaning can be applied to all claim terms without the need to expressly construe any individual terms in the challenged claims.

Notwithstanding the Petitioner’s repeated statement that claim construction “does not matter” for purposes of the Petition, the Petition identifies two “possible ambiguities in the claim language” (“to the frame of the trampoline” and “in their natural rest state the enclosure support members extend away from the mat”). Pet. at 14-15. To be clear, the Patent Owner disagrees with the Petition’s suggestion that there is any ambiguity in the claim language and reserves its right to address any claim construction issues related to the claim language “to the frame of the trampoline” and “in their natural rest state the enclosure support members extend away from the mat.” Moreover, Patent Owner reserves its right to identify terms requiring construction in the event that this IPR is instituted.

As mentioned, at this Preliminary Response stage, the ordinary and customary meaning is sufficient and appropriate to deny institution based on the relevant facts and law.

**V. THE BOARD SHOULD EXERCISE ITS DISCRETION UNDER
35 U.S.C. § 325(d) TO DENY INSTITUTION**

The Board “may take into account whether, and reject the Petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.” 35 U.S.C. § 325(d). As the Board explained in *Advanced Biomedics, LLC v. Med-El Elektromedizinische Gerate GmbH* (“*Advanced Biomedics*”):

[U]nder § 325(d), the Board uses the following two-part framework: (1) whether the same or substantially similar art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and (2) if either condition of the first part of the framework is satisfied, whether the Petition has demonstrated that the Office erred in a manner material to the patentability of the challenged claims. If a condition in the first part of the framework is satisfied and the Petition fails to make a showing of material error, the Director generally will exercise discretion not to institute inter partes review.

Case IPR2019-01469, Paper No. 6 at 8-9 (PTAB Feb. 13, 2020) (precedential) (footnote omitted). “At bottom, this framework reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown.” *Id.* at 9.

“In evaluating whether to exercise our discretion when the same or substantially the same prior art or arguments previously were presented to the Office under section 325(d), we have weighed some common *non-exclusive* factors:

- (a) The similarities and material differences between the asserted art and the prior art involved during examination;
- (b) The cumulative nature of the asserted art and the prior art evaluated during examination;
- (c) The extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;
- (d) The extent of the overlap between the arguments made during examination and the manner in which Petitioner relied on the prior art or Patent Owner distinguishes the prior art;
- (e) Whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and

(f) The extent to which additional evidence and facts presented in the petition warrant reconsideration of the prior art or arguments.”

Becton, Dickinson & Co. v. B. Braun Melsungen AG, Case IPR2017-01586, Paper No. 8 at 17-18 (§ III.C.5) (PTAB Dec. 15, 2017) (informative, precedential as to § III.C.5) (emphasis in original). “If, after review of factors (a), (b), and (d), it is determined that the same or substantially the same art or arguments previously were presented to the Office, then factors (c), (e), and (f) relate to whether the petitioner has demonstrated a material error by the Office.” *Advanced Bionics* at 10.

A. *Advanced Bionics* Step 1 (*Becton, Dickinson* Factors (a), (b), and (d)): The same or substantially the same prior art was previously presented to the USPTO

The Petition contains three alleged grounds of invalidity:

- Ground 1 - Anticipation by Publicover (EX2002) as to claims 1 through 8;
- Ground 2 - Obviousness in view of Publicover (EX2002) and Coan (EX2003) as to independent claim 3 and dependent claim 4; and

- Ground 3 - Obviousness in view of Publicover (EX2002) and Tencom (EX2004) as to dependent claims 2 and 4.

Pet. at 22. Publicover (EX2002) and Coan (EX2003) are thus the only references that the Petition relies on for alleged disclosure of claim elements of the challenged independent claims (claims 1 and 3) under any ground. Pet. at 22-43.

The Petition expressly admits that the Examiner cited and considered its lead reference Publicover (EX2002) during prosecution. *See* Pet. at 12 (“U.S. Patent No. 6,053,845 to Publicover (‘Publicover’) (EX1002) was considered during prosecution of the ’687 Patent.”). Indeed, a review of the prosecution history of the ’687 Patent reveals that the lead reference Publicover (EX2002) was not simply “considered,” but was frequently and exhaustively cited to, cited by, and relied upon as a primary reference by the Examiner. *See supra* §§ II.B.i and II.B.iii.

The secondary reference Coan (EX2003) was also cited to and considered by the Examiner during prosecution; however, the Petition completely fails to acknowledge this fact. *See* Pet. at 20-21. As with Publicover (EX2002), Coan (EX2003) was repeatedly cited to the Examiner starting as early as the original filing date of the application for the ’687

Patent. *See supra* § II.B.i. During prosecution, the Examiner expressly confirmed his consideration of the Coan (EX2003) reference. *See id.*; *Biocon Pharma Ltd. v. Novartis Pharms. Corp.*, Case IPR2020-01263, Paper No. 12 at 9 (PTAB Feb. 16, 2021) (“*Biocon*”) (“[W]e accept that the Examiner considered [the prior art reference] because it is listed on the IDS and the Examiner signed the IDS with the statement ‘all references considered except where lined through.’”); *see also Palo Alto Networks, Inc. v. Centripetal Networks, Inc.*, Case IPR2021-01156, Paper No. 10 at 13-14 (PTAB Jan. 24, 2022) (rejecting argument that “the first part of the *Advance Bionics* framework is not met because [the prior art was] not substantively discussed or applied in a rejection during prosecution” because “[u]nder the Board’s precedent in *Advanced Bionics*, however, ‘[p]reviously presented art includes ... art provided to the Office by an applicant, such as on an [IDS]’”) (quoting *Advanced Bionics* at 7-8) (alterations in original); *BMW of N. Am., LLC v. Stragent, LLC*, Case IPR2021-00419, Paper No. 14 at 12-13 (PTAB July 19, 2021) (exercising discretion to deny institution under § 325(d) in part because relied-upon prior art was cited on an IDS), *reh’g denied*, Paper No. 21 at 5 (PTAB Mar. 21, 2022).

It is important to note that the Examiner was directly informed of the potential relevance of both Publicover (EX2002) and Coan (EX2003) by the

Patent Owner’s submission of the International Search Report dated March 11, 2005 for the PCT Application, which categorized both the Publicover (EX2002) and Coan (EX2003) references with the letter “X”—indicating a “document of particular relevance; the claimed invention cannot be considered novel or cannot be considered to involve an inventive step when the document is taken alone.” EX2006 at 154. This International Search Report was submitted with the U.S. national stage application for the ’687 Patent filed on June 9, 2006. There can be no legitimate dispute that the Examiner was aware of both references (note that the exact same Examiner also examined both such references) and their alleged relevance through the entire prosecution history of the ’687 Patent.

Because Publicover (EX2002) and Coan (EX2003) are the only references relied upon in the Petition’s analysis of independent claims 1 and 3, whether or not the secondary reference Tencom (EX2004) discloses certain limitations of dependent claims 2 and 4 (as the Petition alleges in Ground 3) would have made no difference to the Examiner’s analysis, and it is therefore unnecessary to evaluate the questions of what Tencom (EX2004) discloses or whether Tencom (EX2004) was of record. *See, e.g., Miltenyi Biomed, GmbH v. Trs. of Univ. of Pa.*, Case IPR2022-00853, Paper No. 11 at 45 (PTAB Oct. 11, 2022) (“Petitions’ citation of references not considered

by Examiner solely for ‘additional subject matter of certain dependent claims[] is insufficient to persuade us that exercising our discretion under 35 U.S.C. §325(d) is inappropriate.’”) (quoting *Kayak Software Corp. v. Int’l Bus. Machs. Corp.*, Case CBM2016-00075, Paper No. 16 at 10 (PTAB Dec. 15, 2016) (informative)) (alteration in original).

Nevertheless, despite “ha[ving] the burden of proof to establish that it is entitled to the relief requested,” the Petition does not present any evidence or argument addressing why Tencom (EX2004) is not substantially the same as the prior art considered by the Examiner during prosecution. *See* Pet. at 22, 42-43; *EcoFasten Solar, LLC v. Unirac, Inc.*, Case IPR2021-01379, Paper No. 11 at 38-39 (PTAB Feb. 8, 2022) (“*EcoFasten*”). “[T]he issue of § 325(d) is *not* limited to whether the Examiner ‘considered’ a reference or grounds during the original prosecution leading to the issuance of the ’[687] patent, but whether the same or *substantially the same* prior art or arguments ‘*previously were presented to the Office.*’” *EcoFasten* at 36 (emphases in original). As illustrated below, Tencom (EX2004) is cumulative of, and thus substantially the same as, art considered during prosecution of the ’687 Patent.

The Petition relies on Tencom (EX2004) in Ground 3 (dependent claims 2 and 4) “only to show that pultrusion was a known process for

manufacturing fiberglass rods before the effective filing date of the '687 Patent.” Pet. at 22. Notably, however, the Examiner considered similar disclosures showing pultrusion of fiberglass rods during prosecution of the '687 Patent, including U.S. Patent No. 6,319,174 to Alexander (EX2005)—“Alexander discloses his devices including pultruded rods. Given the above teaching the examiner notes that it would be obvious to one of ordinary skill in the art to provide pultruded rods ...” EX2006 at 45. Of course, Alexander (EX2005) was even disclosed and discussed in the Background to the Invention of the '687 Patent (“U.S. Pat. No. 6,319,174 discloses a form of soft-edged trampoline in which the mat of the trampoline is supported by a plurality of resiliently flexible rods received in a frame of the trampoline at the lower ends of the rods ...”). EX2001 at col. 1, lines 15-18.

Because the Examiner considered during prosecution disclosure from at least Alexander (EX2005) that is similar to the disclosure from Tencom (EX2004) on which the Petition now relies, Tencom (EX2004) is cumulative of, and thus substantially the same as, art that was previously considered by the Examiner. Tencom (EX2004) therefore “do[es] not provide any additional information relevant to the claim limitations at issue that was not already presented to, and considered by, the Office.” *See Biocon* at 11.

Because the Petition relies on only three references—two references (Publicover and Coan) which were previously considered by the Examiner and another reference (Tencom) which has substantially the same relevant disclosure as a reference previously considered by the Examiner (Alexander)—the first part of the *Advanced Bionics* framework is satisfied. *See Advanced Bionics* at 20 (“As discussed above, we determine that the ‘same or substantially the same prior art’ was previously presented to the Office. Accordingly, the first condition of the first part of the framework is satisfied, and we need not reach whether the ‘same or substantially the same arguments’ previously were presented to the Office.”).

B. *Advanced Bionics* Step 2 (*Becton, Dickinson* Factors (c), (e), and (f)): Petitioner has made no showing of material Examiner error

Nowhere in the Petition does the Petitioner ever directly state that the Examiner made an “error,” much less a “material error” as required by *Advanced Bionics*. In fact, the Examiner was indisputably fully aware of the entire disclosure of both Publicover (EX2002) and Coan (EX2003) as he (Jerome W. Donnelly) was the Primary Examiner for both cited patents, and was therefore uniquely qualified to understand and assess the entire disclosures of both Publicover (EX2002) and Coan (EX2003). At its core,

the Petition is nothing more than the Petitioner disagreeing with the Examiner's reasonable interpretation of the same references—this is not “material error,” but merely the Petitioner suggesting that the Board should afford no deference to the Examiner, which is directly contrary to the law.

As to Publicover (EX2002), the Petition expressly admits that the Examiner “considered [Publicover (EX2002)] during prosecution of the ’687 Patent,” but fails to directly claim that the Examiner made a material error in his consideration of Publicover (EX2002). *See* Pet. at 12. The closest the Petition comes to satisfying this requirement is a conclusory statement that “the examiner could not have possibly considered the entirety of Publicover’s disclosure in determining to grant the ’687 Patent.” Pet. at 12. The Petition offers the Petitioner’s characterization of Publicover (EX2002), but never specifies exactly how the Examiner allegedly made a “material error.” As specified below, the Examiner did not commit “material error” but instead performed a reasonable and correct review of Publicover (EX2002). Petitioner has therefore not met its burden of showing material error by the USPTO as to Publicover (EX2002).

As to Coan (EX2003), the Petition fails to even acknowledge that the Examiner expressly considered such reference during prosecution. *See* Pet. at 20-21, 40-42. The Petition does not allege that the Examiner erred (let

alone erred in a material way) in his consideration of Coan (EX2003). Again, the discussion below demonstrates that the Examiner correctly evaluated and applied Coan (EX2003). Petitioner has therefore not met its burden of showing material error by the USPTO as to Coan (EX2003).

Finally, the Petition does not offer any explanation of why Tencom (EX2004) and its pultrusion disclosure is not “substantially the same” as that contained in art previously presented to the USPTO, let alone how or why the Examiner materially erred in considering that art to not be invalidating. *See* Pet. at 22, 42-43. Petitioner has therefore not met its burden of showing material error by the USPTO as to Tencom (EX2004).

Because the Petition presents only the same and substantially the same prior art as previously presented during prosecution, and because Petitioner has failed to make any showing of material error by the USPTO, the Board should exercise its discretion and deny institution under 35 U.S.C. § 325(d). *See Advanced Bionics* at 9 (“If a condition in the first part of the framework is satisfied and the petitioner fails to make a showing of material error, the Director generally will exercise discretion not to institute *inter partes* review.”).

VI. INSTITUTION SHOULD BE DENIED ON THE MERITS

The Board need not address the merits of the Petition because the Petition entirely fails to satisfy the *Advanced Bionics* framework, thus the Patent Owner respectfully submits that the Board should exercise its discretion and deny institution under 35 U.S.C. § 325(d). Nevertheless, a review of the merits set forth in the Petition demonstrates that the Petition's proposed grounds also fail under 35 U.S.C. § 314(a) because there is not a reasonable likelihood that the Petitioner would prevail with respect to any one of the claims challenged in the Petition.¹

¹ For the avoidance of doubt, the discussion in this § VI is not intended to be an exhaustive discussion of all bases why the Petition should be denied on the merits. Instead, the Patent Owner is simply noting that at least one substantive reason exists for denying all grounds asserted in the Petition. The Patent expressly reserves its right to assert additional substantive bases if desired later in this proceeding.

**A. Ground 1 - Claims 1-8 Are Not Anticipated by Publicover
(EX2002)**

**i. Claims 1-8 include a combination of “only at or
near” and “resiliently deform away ... resiliently
deformed towards” claim limitations**

One fatal error in the Petition appears in its mischaracterization of the prosecution history of the '687 Patent—specifically, in its misleading attempt to explain why the Examiner found application claims 11 and 12 allowable in view of Publicover (EX2002) but rejected application claims 1 and 2 as anticipated by Publicover (EX2002). Pet. at 12. The Petition identifies two individual potential bases for the Examiner’s conclusions, but then inexplicably ignores one of those bases.

Following is the Petition’s explanation of *two* possible reasons for the Examiner’s Non-Final Office Action dated December 28, 2009 (EX2006 at 43-45):

“[A] comparison between anticipated claim 1 and allowed claim 11 reveals that the examiner’s findings must have been based on the concluding clause of claim 11 which reads: ‘so that when impacted by a user against the barrier on one side of the enclosure causing the barrier and enclosure support members on that side of the enclosure to resiliently deform

away from the mat, the enclosure support members and barrier on the opposite side of the enclosure will be resiliently deformed towards the center of the mat.’ ... The only other possible reason why the examiner found claim 1 anticipated and claim 11 allowable is claim 11’s requirement that the enclosure support members ‘are connected to the barrier net only at or near an upper peripheral part of the barrier’ because anticipated claim 1 omitted ‘only’ from this limitation.”

Pet. at 12-14 (emphasis in original). Without further explanation, however, the very next paragraph in the Petition summarily concludes that only the first reason is relevant:

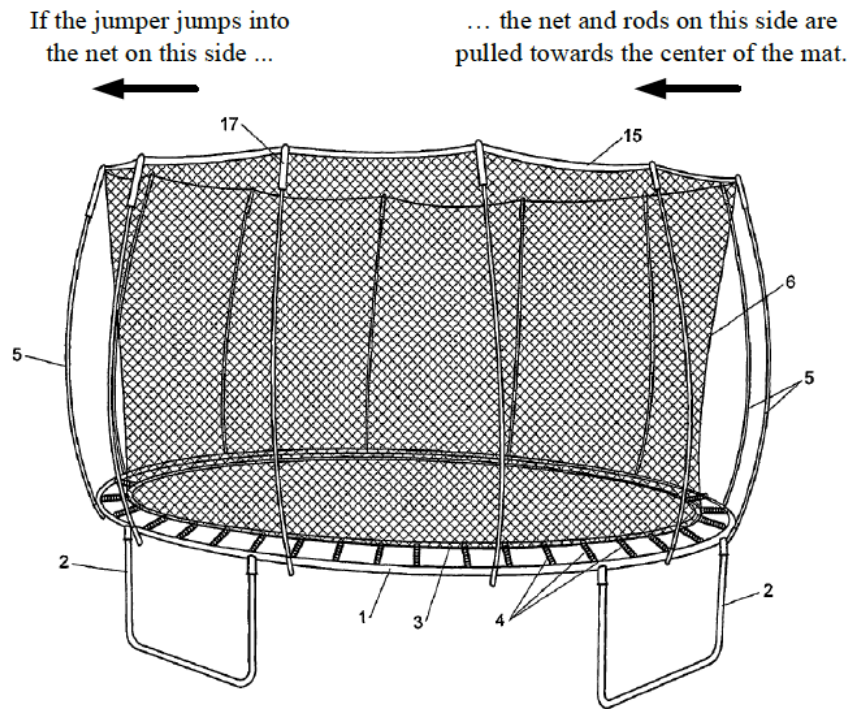
“Therefore, the question to be answered in this petition is whether a trampoline was patentable in 2003 because it included an enclosure that is configured ‘so that when impacted by a user against the barrier on one side of the enclosure causing the barrier and enclosure support members on that side of the enclosure to resiliently deform away from the mat, the enclosure support members and barrier on the opposite side of the enclosure will be resiliently deformed towards the center of the mat.’”

Pet. at 14. This narrow “question to be answered” is incomplete, and mischaracterizes the issues at hand.

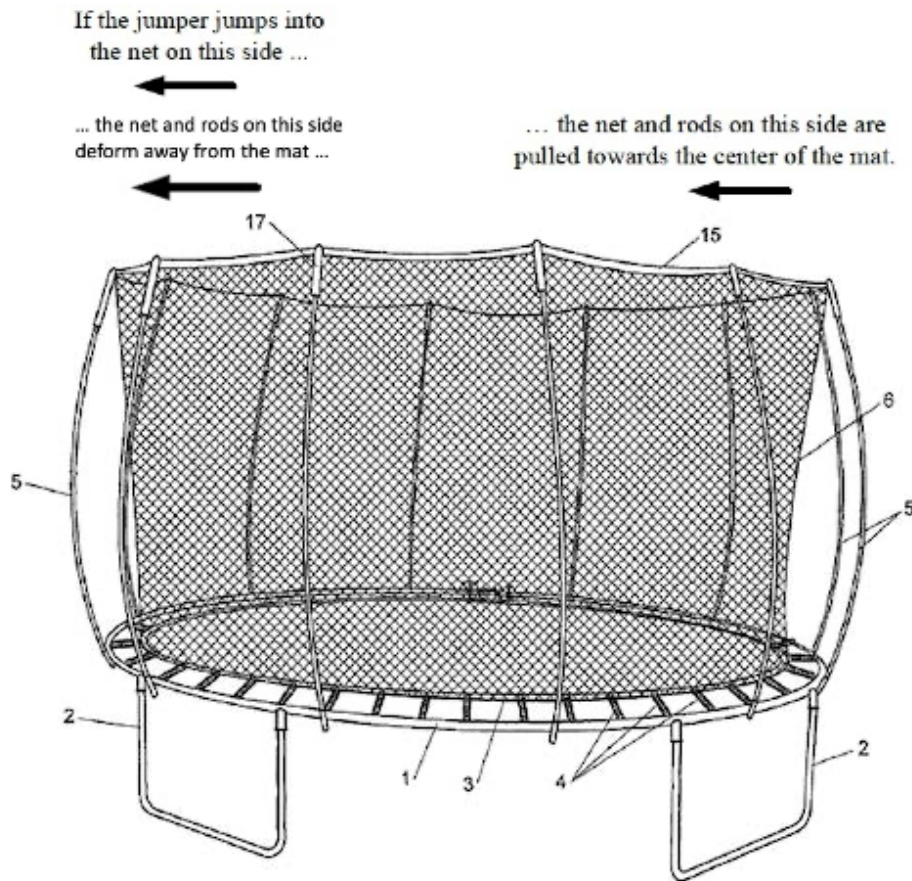
All of challenged claims 1-8 include the claim limitation that the Petition seeks to minimize, namely, that a plurality of resiliently flexible enclosure support members “are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat.” In particular, independent claims 1 and 3 include this limitation, and dependent claims 2 and 4-8 depend therefrom. It is this combination of both the “only at or near” and the “resiliently deform away ... resiliently deformed towards” claim limitations that Publicover (EX2002) fails to anticipate.

**ii. Publicover (EX2002) does not disclose “resiliently
deform away ... resiliently deformed towards” claim
limitation**

Regarding the “resiliently deform away ... resiliently deformed towards” claim limitation, a Petitioner-annotated version of Figure 1 of the '687 Patent is provided as follows:



Pet. at 13. This annotation is not incorrect, but it is certainly incomplete. What the annotation fails to include is that impact by a user on one side of the enclosure causes “the barrier and enclosure support members on that side of the enclosure to resiliently deform away from the mat.” In other words, a complete annotation of Figure 1 of the ’687 Patent would appear as follows:



The claim language requiring “enclosure support members on that side of the enclosure to resiliently deform away from the mat” is clearly demonstrated by Figure 4 of the '687 Patent:

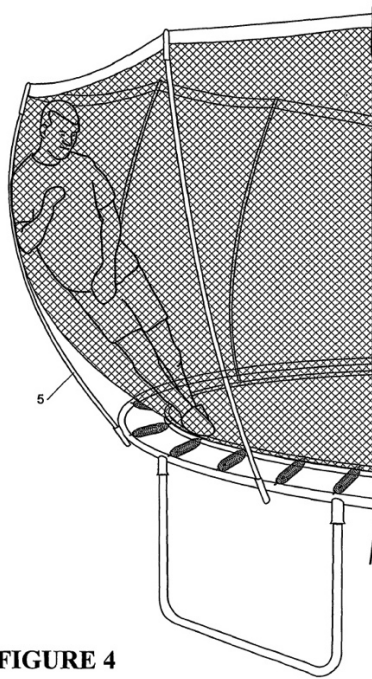


FIGURE 4

The Petition's characterization of Publicover (EX2002) fails to address this key distinction and confuses movement of the wall 100 versus movement of the posts 44. In other words, while the wall 100 of Publicover (EX2002) may move away from the mat when a person hits the wall, the posts 44 themselves flex downwardly, inwardly, and toward the impacted wall panel (to the limited extent they flex since they are only "somewhat flexible" as opposed to the "resiliently flexible" claimed by Patent Owner). Following are relevant excerpts:

"An impact anywhere on the fence causes the posts to **flex inwardly**, absorbing the force."

* * *

“When a person jumps from the trampoline surface 40 and [h]its the wall 100 of the enclosure, **the wall** moves a short distance in the direction of the force applied by the user and thereby absorbs energy and cushions the shock. The **tops of all the posts 44** in the illustrated embodiment—because they are linked together at the top by the top line 108—**flex toward the impacted portion of the wall panel.**”

* * *

“The tubular springs (posts) can be loaded by tightening line 108, **pulling the tops of the tubular springs downwardly and inwardly.** Such arrangement makes the system tighter/less flexible, so that impact forces from a focused strike point transfer more quickly to the entire system than would be the case if the top line were loosened.”

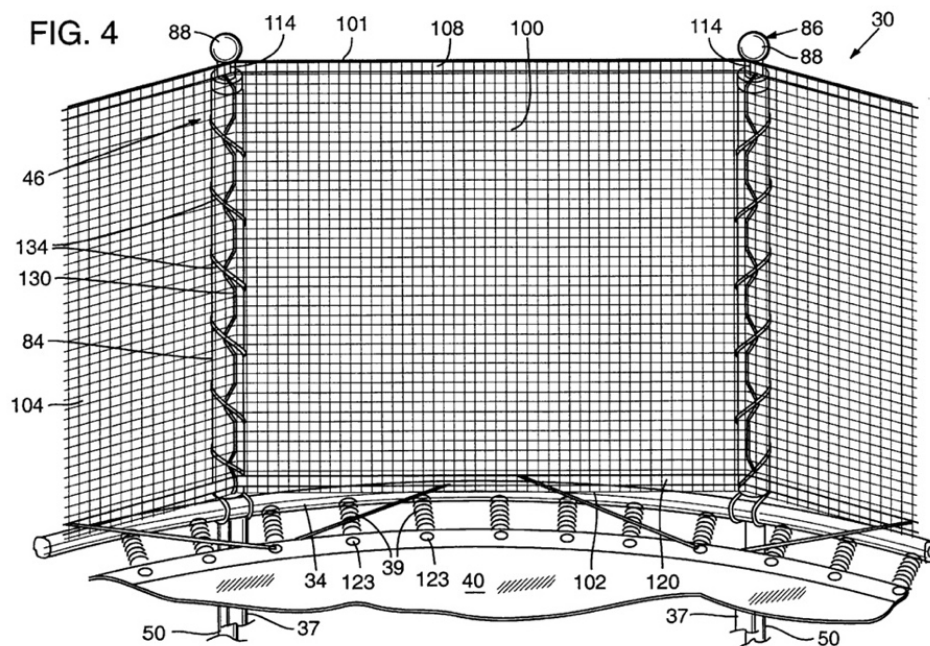
* * *

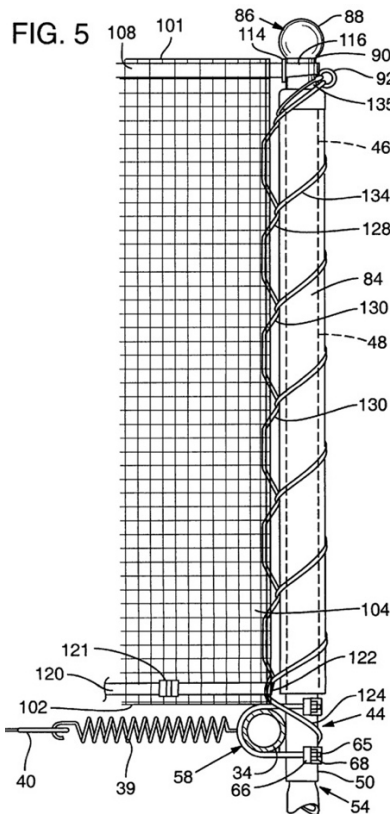
“It will be recognized that the illustrated fence responds to such mid-span horizontal impacts in a manner different than prior art safety fences. In particular, **the tops of the posts flex downwardly towards each other and towards the area of impact** (just like loading a bow for shooting arrows, as noted earlier).”

EX2002 at Abstract; Col. 9, lines 7-13; Col. 9, lines 37-42; Col. 10, lines 58-63 (emphasis added).

iii. Publicover (EX2002) does not disclose “only at or near ... to hold the net in tension” claim limitation

Figures 4 and 5 of Publicover (EX2002) show that posts 44 include multiple points of contact up and down the vertical length thereof, including at least elastic cord 128 and webbing 134.





EX2002 at FIGS. 4 and 5. Publicover (EX2002) repeatedly emphasizes the importance of this cord 128 and webbing 134 extending up and down each post 44:

“Another novel aspect of the preferred embodiment is the fastening of fence netting material to the support structure by continuous lengths of elastic cording. ... In a particular embodiment, the elastic cording is threaded in and out of openings in fence netting. This embodiment further includes a flexible member (e.g. nylon webbing) helically wrapped around an adjacent upright support member to couple the cord thereto at plural intermediate points therealong.”

* * *

“Desirably, wall 100 is secured to each post 44 along its vertical length by an arrangement that includes one or more elastic components. As best seen in FIG. 5, an elastic cord 128—of the type sometimes referred to as a bungee cord or shock cord—is secured at each end so that it extends vertically along the wall support portion 48 of a post 44.”

* * *

“Between its ends, cord 128 extends in serpentine fashion through openings 104 in the wall material so that loops of the cord 128 are alternately provided on the inside and the outside of the wall 100. Outside loops 130 of each cord extend towards the post 44. Also extending along the wall support portion 48 of each post 44 is a helical wrap of webbing 134. ... Webbing 134 extends helically around the outside of the padding 84 and through loops 130 in the elastic cord 128 to hold the cord against the padding 84. The strap 134 is wrapped sufficiently tightly to hold the cord 128 against the padding 84, but not so tightly that the padding is substantially deformed.”

EX2002 at col. 2, lines 1-10; col. 7, lines 57-62; col. 8, lines 4-21.

Moreover, Publicover (EX2002) explains that it is this specific arrangement of elements that provides the desired flexibility and energy impact characteristics:

“Cord loops 130 are stretched on those posts 44 that are near the region of impact. And, those loops 130 pull and tension the associated strapping 134 into the padding 84 so the padding compresses. These actions allow the fence 100 to flex and conform to the body of the person who impacted the fence. The conformance of the fence distributes the resistive force on the person’s body to provide enhanced cushioning. Also, because of this arrangement of elements, a portion of the impact energy is stored in the flexed posts 44, in the elongated cords 130, in straps 108 and 120, and in the padding 84.”

EX2002 at col. 9, lines 13-24.

The Petition admits that “[i]n the depicted embodiments, Publicover’s net is connected along the length of the post 44.” Pet. at 27. The Petition cites a short excerpt purportedly supporting its position that Publicover (EX2002) discloses a plurality of resiliently flexible enclosure support members that “are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat.” This short excerpt, of course, is contrary to the entire remaining disclosure of Publicover (EX2002), which repeatedly emphasizes that the wall/fence 100 is held in tension by virtue of the various adjustable members (e.g., elastic cord 128, cord loops 130, straps 108 and 120, webbing 134, etc.). *See, e.g.*, EX2002 at col. 9, lines 15-18; col. 10, lines 24-35; col. 10, lines

54-57. Moreover, as detailed *supra*, the disclosure of Publicover (EX2002) specifies that any flex of the posts 44 is downward and inward during use, and even during any pre-loading of the system by tightening line 108. *See* EX2002 at col. 9, lines 37-42. Because any flex of posts 44 is “downwardly and inwardly,” removing the various adjustable members along the vertical length of post 44 would necessarily reduce rather than increase tension in the fence/wall 100. Accordingly, the short excerpt cited by the Petition does not constitute enabling disclosure of the claimed combination of elements, namely, a plurality of resiliently flexible enclosure support members “are connected to the barrier net only at or near an upper peripheral part of the barrier to hold the net in tension above the mat.”

**iv. Publicover (EX2002) does not disclose combination of
“only at or near” and “resiliently deform away ...
resiliently deformed towards” claim limitations**

As detailed above, the Petition’s sole focus on the “resiliently deform away ... resiliently deformed towards” claim limitation is improper and, in fact, Publicover (EX2002) does not anticipate. In fact, when the “only at or near” claim limitation is properly considered in combination with the “resiliently deform away ... resiliently deformed towards” claim limitation, the lack of anticipation by Publicover (EX2002) becomes even more clear.

The importance of this combination of claim limitations is emphasized by the claim language “a plurality of **resiliently flexible** generally upright enclosure support members ... which are connected to the barrier net **only** at or near an upper peripheral part of the barrier to hold the net in tension above the mat.” Throughout the specification of the '687 Patent, the high degree of flexibility or deformability of the enclosure support members is repeatedly explained and emphasized:

“The enclosure support members are free to resiliently deform away from the mat when impacted by a user against the barrier. They are also connected together at the upper ends of the enclosure support members away from their natural rest state and towards the center of the mat.”

* * *

“Hereinafter the enclosure support members 5 will be referred to as enclosure rods for convenience, but it is to be understood that this term is non-limiting ... provided that they provide the required degree of flexibility in accordance with the invention.”

* * *

“[W]hen the net is fitted to connect the upper ends of the enclosure rods, ... this will draw the upper ends of the enclosure rods away from their natural state of rest and towards the center of the mat, to the position generally as shown in FIG.

1, to pre-tension the enclosure rods. The enclosure support rods act like fishing rods, and are set to hold up and tension the enclosure net adequately for the play or safety function.”

* * *

“Because the enclosure rods are coupled to the trampoline and mat only at or towards their lower ends they are free to move relative to the mat as shown in FIG. 4. The enclosure rods are highly flexible or deformable.”

* * *

“The resulting enclosure system has a high degree of flexibility or deformability. This is illustrated in FIG. 4, which shows a user impacting against the barrier net 6 and one enclosure rod 5, and it can be seen that the enclosure rod freely deforms away from the trampoline.”

EX2002 at Abstract; col. 3, lines 43-49; col. 4, lines 30-44; col. 4, lines 60-63; col. 5, lines 9-13.

By connecting only at or near the upper peripheral part of the barrier and not up and down the vertical length, this high degree of flexibility of the enclosure rods is what makes possible the “resiliently deform away ... resiliently deformed towards” claim limitation.

Publicover (EX2002) does not disclose either the “only at or near” or the “resiliently deform away ... resiliently deformed towards” claim limitations, and thus certainly does not disclose this combination of claim limitations. Instead, Publicover (EX2002) explains that its posts 44, while not rigid, are “made of tubular steel” that only “flex to some extent.” EX2002 at col. 9, lines 52-58. It is this very limited post flexibility that requires Publicover (EX2002) to include elastic components extending up and down the vertical length of the posts. To provide the bulk of the flexibility, Publicover (EX2002) specifies that “wall 100 is secured to each post 44 along its vertical length by an arrangement that includes one or more elastic components. As best seen in FIG. 5, an elastic cord 128—of the type sometimes referred to as a bungee cord or shock cord—is secured at each end so that it extends vertically along the wall support portion 48 of a post 44.” EX2002 at col. 7, lines 57-62. Accordingly, it is these “elastic components” that provide the increased flexibility that is not possible with tubular steel (and other semi-flexible) posts.

* * *

In view of the above, Publicover (EX2002) fails to disclose one or more claim limitations of every challenged claim, and therefore does not

anticipate any of the challenged claims 1-8. Moreover, because the remaining two obviousness grounds asserted in the Petition rely upon Publicover (EX2002) as a primary reference, those two grounds must also fail. Accordingly, none of the Petition's grounds are likely to succeed, and the Petition should be denied.

B. *Ground 2 - Claims 3 and 4 Are Not Rendered Obvious in*

View of Publicover (EX2002) and Coan (EX2003)

As to the Petition's second ground asserting obviousness of claims 3 and 4 based on Publicover (EX2002) in view of Coan (EX2003), the sole basis for this combination seems to be that "Coan's enclosure includes supports 34 (or posts/rods) that are angled outwardly relative to the mat" and "in Coan's figures, the net is connected to the supports 34 only at the top of the supports." Pet. at 21. This ground must also fail.

The Petition asserts that Coan discloses supports 34 "that are angled outwardly relative to the mat," but this is inapposite to the claim language of the '687 Patent. One portion of claim 3 (and dependent claim 4) does require "that in their natural rest state the enclosure support members extend away from the mat"; however, in stark contrast to Coan, claim 3 further requires that "[resiliently flexible] enclosure support members are also connected together ... to draw the upper ends of the enclosure support

members away from their natural rest state and towards the center of the mat.” Thus, relative to the center of the mat, the resiliently flexible enclosure support members bow outward at the bottom but then bow inward at the top. Neither Publicover (EX2002) nor Coan (EX2003) disclose such a configuration.

Contrary to the “resiliently flexible enclosure support members” of all claims of the ’687 Patent, Coan discloses “supports 34” that are substantially rigid in that they are attached to “linear bars” at one end and “stanchions” at another end:

“[I]t is imperative that an area enclosed by the linear bars of the trampoline net assembly be substantially larger than that enclosed by the linear members of the trampoline frame. The trampoline net assembly further includes a plurality of supports 34. Each of the supports has a first end connected to an associated one of a plurality of interconnections between the linear bars and a second end coupled to a bottom end of an associated one of the stanchions of the trampoline frame. The coupling with the bottom edge of the stanchions is facilitated by a bracket including a pair of O-rings 36 each coupled about the corresponding stanchion and to the support.”

* * *

“With reference to FIGS. 3 & 4, it can be seen that the linear bars and supports of the trampoline net assembly are releasably interconnected by way of a plurality of T-shaped interconnects 48.”

EX2003 at col. 4, lines 36-47; col. 5, lines 6-9.

Over and over through its disclosure, Coan (EX2003) emphasizes the “linear” and rigid nature of the supports and bars, which is reinforced by Figures 2, 4 and 5 showing such linear configurations are secured using rigid T-shaped interconnects 48 at the top and O-rings 36 at the bottom.

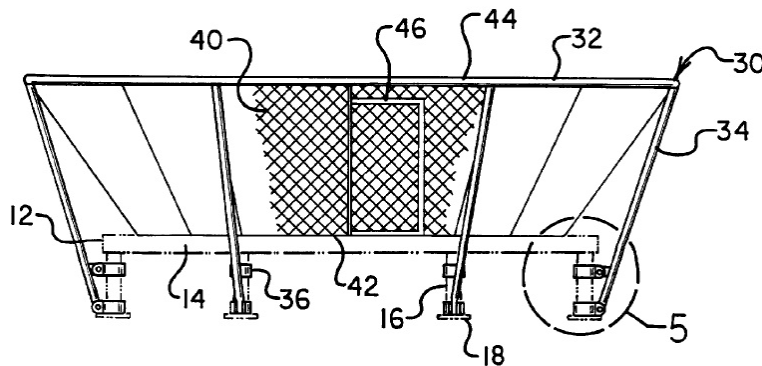
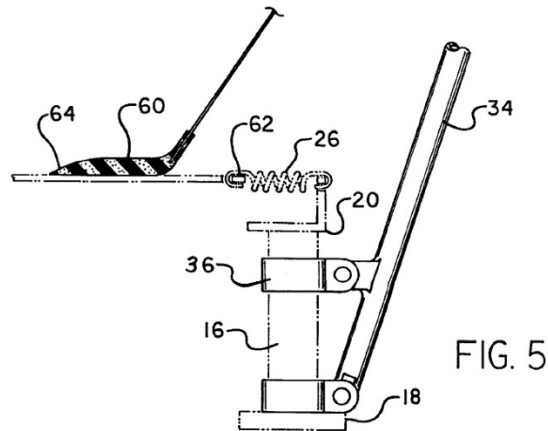
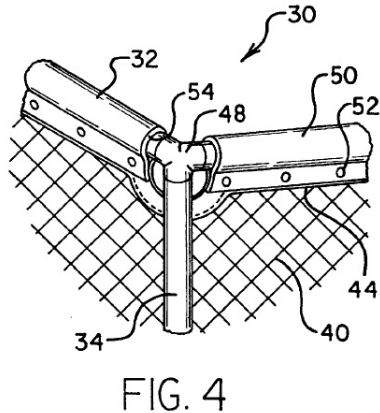


FIG. 2



Accordingly, Coan (EX2003) provides no support for (and in fact teaches away from) the limitations of claims 3 and 4. While supports 34 may angle outwardly from the mat, they are rigidly enclosed in a configuration that forces them to stay angled outwardly rather than being drawn “away from their natural rest state and towards the center of the mat” at the upper ends. In fact, the disclosure of Coan (EX2003) makes clear that it is “imperative” that an area enclosed by the linear bars to which supports 34 are attached at the top be “be substantially larger than” the area enclosed by the linear members of the trampoline frame at the bottom. So Coan (EX2003) teaches away from resilient flexible support members that bow outward at the bottom and inward at the top.

The Petition offers only mere conclusory statements and fails to offer any “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *See KSR International Co. v. Teleflex Inc.*,

550 U.S. 398, 418 (2007). In other words, the Petition fails to explain why a person of ordinary skill in the art would have proceeded to combine the teachings of Publicover (EX2002) and Coan (EX2003) in a way that would reach the claimed invention of the '687 Patent. “[O]bviousness concerns whether a skilled artisan not only could have made but would have been motivated to make the combinations or modifications of prior art to arrive at the claimed invention.” *See Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1073 (Fed. Cir. 2015). As the Board has previously explained, “[a]n assertion that something could be done does not articulate a reason why something would be done by one of ordinary skill in the art at the time of the invention and, therefore, raises a specter of impermissible hindsight bias in an obviousness analysis.” *See Nautilus Hyosung Inc. v. Diebold Self-service Systems division of Diebold*, Case IPR2016-00633, Paper No. 9 at 21 (PTAB Aug. 22, 2016). Here, the rigid structure of Coan (EX2003) could not be used to achieve the claim limitations of claims 3 and 4; however, even if it could, the Petition offers no basis as to why one of ordinary skill in the art at the time of the invention would do so.

In view of the above, the proposed combination of Publicover (EX2002) and Coan (EX2003) fails to render obvious challenged claims 3

and 4. Accordingly, the Petition's second ground is not likely to succeed, and the Petition should be denied.

**C. Ground 3 - Claims 2 and 4 Are Not Rendered Obvious in
View of Publicover (EX2002) and Tencom (EX2004)**

As to the Petition's third ground asserting obviousness of claims 2 and 4 based on Publicover (EX2002) in view of Tencom (EX2004), the sole basis for this combination seems to be "[i]f Publicover is determined not to teach fiberglass rods that are 'pultruded' [*sic*]." Pet. at 42. This ground fails because, as discussed *supra*, Publicover (EX2002) does not disclose all claim limitations of claims 2 and 4 other than fiberglass rods that are pultruded. Moreover, as previously noted, Alexander (EX2005) was cited during prosecution of the '687 Patent for the proposition that fiberglass rods could be manufactured using a pultrusion process, thus the Petition's reliance on Tencom (EX1013) is entirely cumulative.

In view of the above, the proposed combination of Publicover (EX2002) and Tencom (EX2004) fails to render obvious challenged claims 2 and 4. Accordingly, the Petition's third ground is not likely to succeed, and the Petition should be denied.

VII. CONCLUSION

Patent Owner respectfully requests that the Board deny institution for either or both of two independent reasons. *First*, the Board should deny institution because the same or substantially the same prior art was presented to the USPTO during prosecution, and the Petition has failed to show any material error by the Examiner. *Second*, all three of the Petition's grounds fail on the merits for failure to anticipate or render obvious one or more claim limitations in each of the challenged claims.

Date: April 20, 2023

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CERTIFICATION REGARDING WORD COUNT

Pursuant to 37 C.F.R. § 42.24(d), Patent Owner certifies that there are 10,151 words in the paper excluding the portions exempted under 37 C.F.R. § 42.24(a)(1).

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CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e)(1))

The undersigned hereby certifies that the above document was served on April 20, 2023, by filing this document through the Patent Trial and Appeal Case Tracking System, as well as delivering a copy via electronic mail upon the following attorneys of record for the Petitioner:

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