

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SKYWALKER HOLDINGS, LLC
Petitioner,

v.

BOARD & BATTEN INTERNATIONAL INC.
Patent Owner.

IPR2023-00350
Patent 7,854,687 B2

Before WILLIAM V. SAINDON, KEVIN W. CHERRY, and
CYNTHIAL. MURPHY, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Skywalker Holdings, LLC (“Petitioner”) filed a petition for *inter partes* review of claims 1–8 of U.S. Patent No. 7,854,687 B2 (“the ’687 Patent,” Ex. 1001). Paper 1 (“Pet.”).¹ Petitioner contends that each of the challenged claims is unpatentable over Publicover (Ex. 1002) alone and/or in combination with a secondary reference. *See* Pet. 22.

Board & Batten International Inc. (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”).² Patent Owner contends that the Board should discretionarily deny institution under 35 U.S.C. § 325(d) because Publicover was presented to the Office during prosecution of the ’687 Patent. *See id.* at 22. After careful consideration of the prosecution history of the ’687 Patent (Ex. 1012), we decline to exercise our discretion in this regard. We decline to exercise our discretion because, as explained below, the record reflects that specific teachings of Publicover were overlooked during prosecution of the ’687 Patent and these teachings are material to the patentability of the challenged claims.

Patent Owner also asserts that institution should be denied on the merits. Prelim. Resp. 33. After careful consideration of the arguments and evidence presented by the parties, we institute on the merits because, as explained below, Petitioner has shown that there is a reasonable likelihood that it would prevail with respect to at least one of the claims challenged in the Petition.

¹ Per Petitioner, “[t]he real party-in-interest of this petition is Skywalker Holdings, LLC.” Pet. 3.

² Per Patent Owner, “[t]he Patent Owner and real party-in-interest in this inter partes review is Board & Batten International, Inc.” Paper 7.

The parties both assert that the '687 patent is involved in the following related matter: *Board & Batten International Inc. v. Skywalker Holdings, LLC DBA Skywalker Trampolines*, 4:22-cv-00975 (E.D. Tex.). Pet. 45; Paper 7.

We have authority enter this decision granting institution of *inter partes* review (“Decision”) under 35 U.S.C. § 314(b) and 37 C.F.R. § 42.4(a) (2020). The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted unless “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

II. ASSERTED GROUNDS OF UNPATENTABILITY³

The Petitioner asserts that claims 1–8 are unpatentable under 35 U.S.C. § 102 as anticipated by Publicover (U.S. Patent No. 6,053,854, issued Apr. 25, 2000, Ex. 1002). *See* Pet. 22.

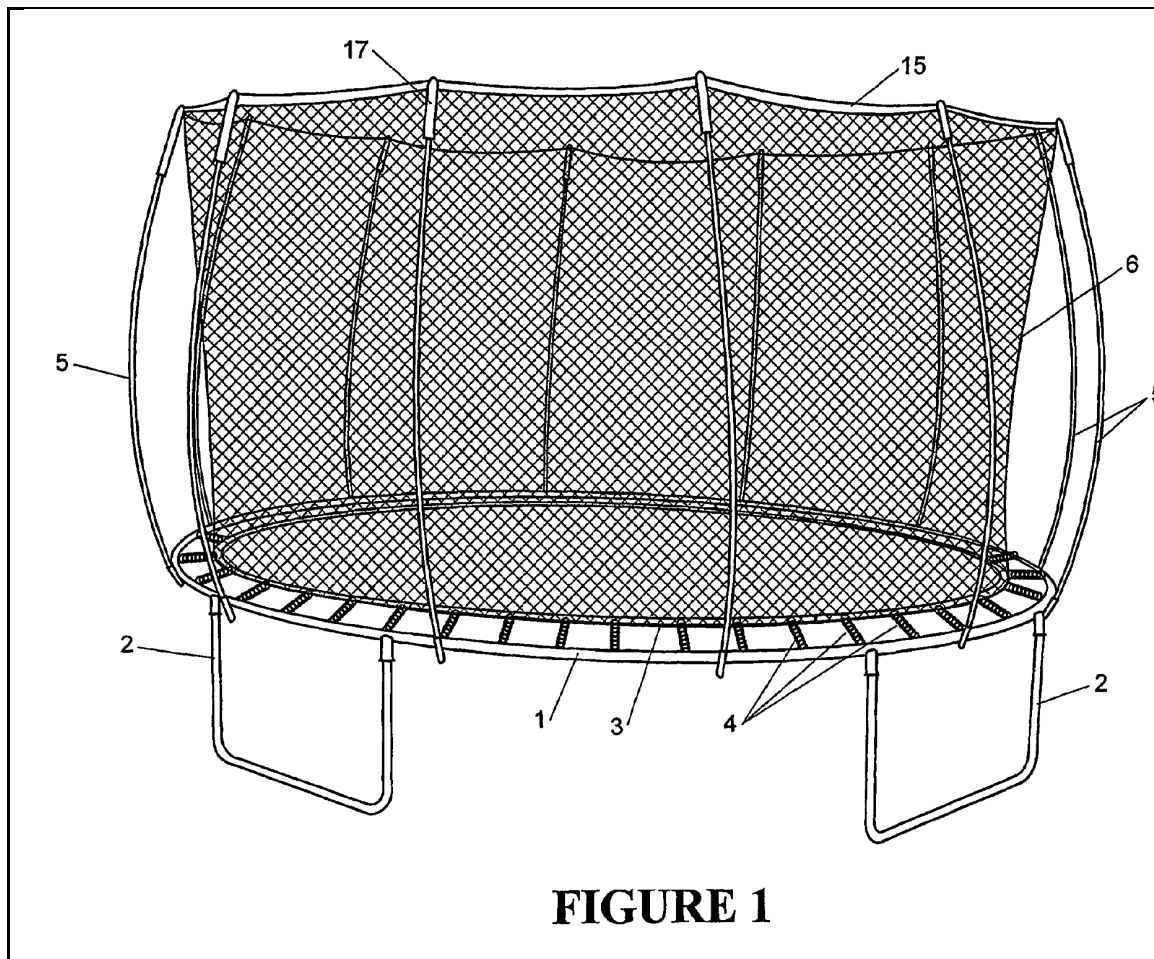
The Petitioner asserts that claims 3 and 4 are unpatentable under 35 U.S.C. § 103 as obvious in view of Publicover and Coan (U.S. Patent No. 5,941,798, issued Aug. 24, 1999, Ex. 1003). *See* Pet. 22.

³ The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. § 103. The '687 patent claims benefit of a Dec. 9, 2004, PCT filing date, which is before the effective date of the applicable AIA amendments. Ex. 1001, (22). Thus, we refer to the pre-AIA version of 35 U.S.C. § 103.

The Petitioner asserts that claims 2 and 4 are unpatentable under 35 U.S.C. § 103 as obvious in view of Publicover and Tencom⁴ (Ex. 1014). See Pet. 22.

III. THE '687 PATENT

The '687 Patent discloses an invention that “relates to an improved trampoline and enclosure system” (Ex. 1001, 1:5–6) a “side view” of which is shown in Figure 1, reproduced below (*id.* at 2:66.)



⁴ Wayback Machine Archive of Tencom Ltd., <https://web.archive.org/web/19981205050919/http://www.tencom.com:80/>

The above drawing (Figure 1) shows that improved system comprises a trampoline (peripheral frame 1, flexible mat 3, coil springs 4) and an enclosure system (support members 5, barrier 6). *See id.* at 3:24–55. Of particular interest in the present proceeding is the following connections of the trampoline/enclosure components:

(a) barrier 6 has a lower peripheral part coupled directly or indirectly to a periphery of the mat (Ex. 1001, 3:51–53);

(b) support members 5 are connected at or towards their lower ends to the trampoline’s peripheral frame (1) (*see id.* at 2:31–33, 3:55–58, 4:8–44, Figs. 2, 3);

(c) support members 5 are connected to barrier 6 **only** at or near an upper peripheral part of the barrier (*see id.* at 2:33–36, 3:55–58, 5:35–42, Figs. 5, 6); and

(d) support members 5 are connected together at or towards their upper ends (*see id.* at 2:36–43, 4:45–55, Figs. 5, 6).

With particular reference to connection (d), the ’687 Patent explains that “[t]he rods are coupled so that they are bowed or drawn away from their natural state of rest (when connected only at their lower ends to the frame of the trampoline) and towards the center of the mat.” Ex. 1001, 4:49–53. This coupling can be achieved by “a band 15” that is fixed (e.g., sewn) “to the upper peripheral edge of the barrier net 6.” *Id.* at 4:46–49. “In an alternate form,” a “separate” band with a “buckle” can be used to “couple the enclosure rods at or towards their upper ends.” *Id.* at 4:53–56. The buckle “allows for adjustment of the length of the band or line to enable the degree of pre-tension applied to the enclosure rods 5 to be varied, thus varying the strength of rebound that will be provided.” *Id.* at 4:56–60.

Also, with particular reference to connection (d), the '687 Patent explains that "[t]he 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." *Id.* at 5:18–21.⁵ "That is, a user impacting any side of the enclosure will cause all of the rods to deform to some extent." *Id.* at 5:21–22. As such, "when the enclosure is impacted by a user on one side," this will cause "the barrier on that side of the enclosure to deform away from the mat," and "the enclosure support members and barrier on the opposite side of the enclosure will be deformed inwardly towards the center of the mat." *Id.* at 5:22–28; *see also id.* at Fig. 4.

As indicated just above, support members 5 "deform to some extent" when the enclosure is impacted by a user. Ex. 1001, 5:21–22. In the preferred form, support members 5 are "deformable or flexible fiberglass rods[,] but they "may alternatively be spring steel elements." *Id.* at 3:39–44. The '687 Patent also points out that "[b]ecause 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." *Id.* at 4:60–62.

IV. ILLUSTRATIVE CLAIM

The '687 Patent issued with claims 1–8, all of which are challenged in the Petition. Claims 1 and 3 are independent claims, with the rest of the challenged claims depending therefrom. Independent claim 1 is set forth below with our annotations.

[Issued Claim 1] A trampoline and enclosure system
comprising:

⁵ The '687 Patent refers to support members 5 "as enclosure rods for convenience." Ex. 1001, 3:43–44.

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 [(a)] 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 [(b)] which are connected at or towards the lower ends of the enclosure support members to the frame of the trampoline and [(c)] 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 [(d)] which enclosure support members are also connected together at or towards the 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.

Thus, Issued Claim 1 sets forth a trampoline (comprising a peripheral frame, a flexible mat, and coil springs) and an enclosure system (support members and a barrier). Issued Claim 1 sets forth connections (a)–(d) between the trampoline/enclosure components, and, with respect to connection (c), requires the support members to be connected to the barrier net **only** at or near an upper peripheral part of the barrier (i.e., a top-only connection (c)). Issued Claim 1 sets forth that these connections are “so that” the enclosure behaves in certain manner **when impacted by a user**.

And Issued Claim 1 sets forth that this behavior involves causing sides of the enclosure to **resiliently deform** away or towards the mat.

A. Claim Construction

We apply the same claim construction standard used in district courts, namely that articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* 37 C.F.R. § 42.100(b) (2020). In applying that standard, claim terms generally are given their ordinary and customary meaning as would have been understood by a person of ordinary skill in the art at the time of the invention and in the context of the entire patent disclosure. *Phillips*, 415 F.3d at 1312–13.

Per Petitioner, “[t]he claims of the ’687 Patent are easily understood and do not include any terms that require special construction, at least for the purposes of this Petition.” Pet. 14. Per Patent Owner, at this “stage” of the proceeding, “the ordinary and customary meaning is sufficient and appropriate.” Prelim. Resp. 22. Therefore, for the purposes of this decision we do not expressly construe any claim terms.

B. Level of Ordinary Skill

Petitioner asserts that “[i]n view of the many prior art references that are directed to trampolines having enclosures. a person of ordinary skill in the art in the field of the ’687 Patent in 2003” would “have been very familiar with trampolines having enclosures.” Pet. 5. At this “stage” of the proceeding, “Patent Owner does not challenge [this] definition.” Prelim. Resp. 20. Thus, at this stage of the proceeding, we look to the prior art to reflect an appropriate skill level. *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

V. PROSECUTION HISTORY OF THE ‘687 PATENT

As outlined by Patent Owner (*see* Prelim. Resp. 10–14) and acknowledged by Petitioner (*see* Pet. 12), Publicover (Ex. 1002) was considered during prosecution of the ‘687 Patent. Fast forwarding to the Action delivered on December 28, 2009, the Examiner rejected a pending independent claim (Application Claim 1) as “anticipated by Publicover.” Ex. 1012, 37. This application claim, along with our annotations, is set forth below.

[Application Claim 1]. A trampoline and enclosure system comprising:

a trampoline comprising a flexible mat and a plurality of 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 material surrounding the mat above the mat and [(a)] having a lower peripheral part coupled directly or indirectly to the mat and a plurality of resiliently flexible generally upright enclosure support members outside of the barrier relative to the mat and [(b)] which are connected at or towards the lower ends of the enclosure support members to the frame of the trampoline and [(c)] at or towards their upper ends to the barrier at or near an upper peripheral part of the barrier to support the barrier above the mat, and which are free to **resiliently deform away** from the mat **when impacted by a user** against the barrier or an enclosure support member, and [(d)] which are also connected together at or towards the upper ends of the enclosure support members to draw and pre-tension the upper ends of the enclosure support members away from their natural rest state (when connected only at their lower ends to the frame of the trampoline) and towards the [center] of the mat.

Ex. 1012, 42. Thus, Application Claim 1 set forth a trampoline (comprising a peripheral frame, a flexible mat, and springs) and an enclosure system

(comprising support members and a barrier). Application Claim 1 set forth the following connections **(a)–(d)** between the trampoline/enclosure components:

- (a)** barrier has a lower peripheral part coupled directly or indirectly to a periphery of the mat;
- (b)** support members are connected at or towards their lower ends to the trampoline's frame;
- (c)** support members are connected at their upper ends to the barrier at or near an upper peripheral part of the barrier;
- (d)** support members are connected together at or towards their upper ends.

With respect to connection **(c)**, Application Claim 1 did not require the support members to be connected to the barrier **only** at or near an upper peripheral part of the barrier. Application Claim 1 did, however, set forth that the free to **resiliently deform** away from the mat **when impacted by a user** against the barrier or an enclosure support member.

In response to this Action, Application Claim 1 was cancelled to render the rejection “moot.” Ex. 1012, 26. No argument was made that Publicover's support members (i.e., posts 44) do not “move away from the mat when a person hits the wall.” Prelim. Resp. 39. No argument was made that Publicover's support members (i.e., posts 44) “are only ‘somewhat flexible’ as opposed to ‘resiliently flexible.’” *Id.*

In this same Action, the Examiner “allowed” another pending independent claim (Application Claim 11). Ex. 1012, 37. Application Claim 11 set forth connections **(a)–(d)** between the trampoline/enclosure components, and, with respect to connection **(c)**, requires the support

members to be connected to the barrier net **only** at or near an upper peripheral part of the barrier. *Id.* Application Claim 11 set forth these connections are “so that” the enclosure behaves in certain manner **when impacted by a user**, and that this behavior involved causing sides of the enclosure to **resiliently deform** away or towards the mat.

In response to this Action, Application Claim 11 was amended to “delete the expressions in parentheses.” Ex. 1012, 26; *see also id.* at 24. Application Claim 11 subsequently matured into Issued Claim 1.

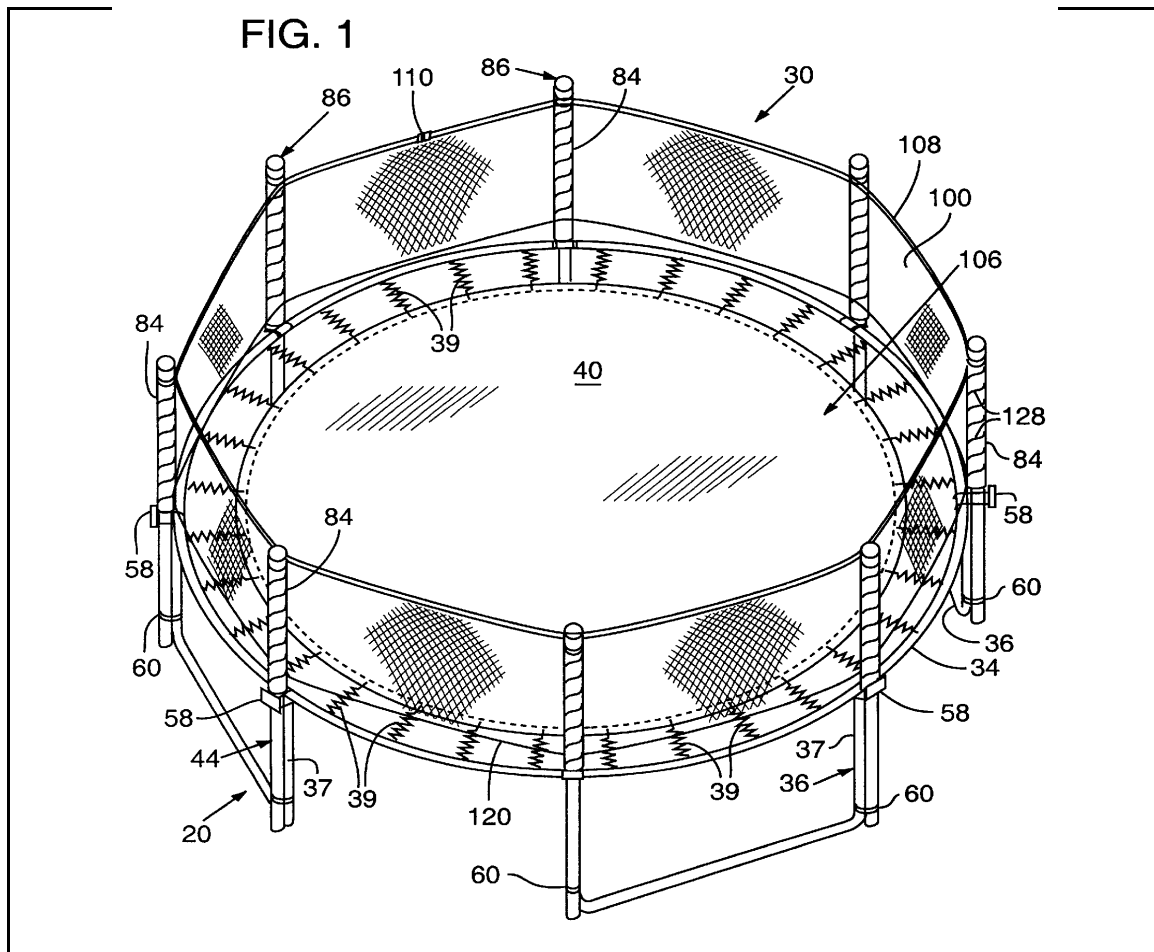
Accordingly, the different treatment of Application Claim 1 (i.e., rejected as anticipated by Publicover) and Application Claim 11 (i.e., not anticipated by Publicover) seems to rest on connection (c). Particularly, Application Claim 11 required the support members to be connected to the barrier net **only** at or near an upper peripheral part of the barrier (i.e., a top-only connection (c)), while Application Claim 1 did not.

Patent Owner argues that the different treatment of Application Claim 1 and Application Claim 11 also rested upon “[t]he claim language requiring ‘enclosure support members on that side of the enclosure to resiliently deform **away** from the mat.’” Prelim. Resp. 38. However, as indicated above, Application Claim 1 required the support members to be free to **resiliently deform away** from the mat **when impacted by a user** against the barrier or an enclosure support member, so this would not have been a distinguishing factor.

VI. PUBLICOVER

Publicover discloses an invention that “concerns wall structures used with trampolines to protect trampoline users” (Ex. 1002, 1:14–16), an

“oblique view” of which is shown in Figure 1, reproduced below (*id.* at 2:39).



The above drawing (Figure 1) shows that Publicover's illustrated apparatus comprises a trampoline 20 (circular frame 34, rebounding mat 40, coil springs 39) and an enclosure system 30 (posts 44, wall/barrier 100). *See* Ex. 1002, 3:4–34, 4:32–41, Figs. 3–5. The illustrated apparatus has the following connections of the trampoline/enclosure components:

- a) wall/barrier 100 has a lower peripheral part coupled directly or indirectly to a periphery of mat 40 (*see id.* at Fig. 4, 2:46–47);

(b) posts 44 are connected at or towards their lower ends to the trampoline's frame 34 by a fastener 58 (*see id.* at 3:62–63);⁶

(c) posts 44 are connected to wall/barrier 100 along its vertical length (*see id.* at 7:56–59); and

(d) posts 44 are connected together at or toward their upper ends by a line 108 (*see id.* at 5:66–6:24).

With particular reference to connection (c), posts 44 are not connected to wall/barrier 100 **only** at or near an upper peripheral part of the barrier. Indeed, in the illustrated embodiment, a “cord 128 extends in serpentine fashion through openings 104 in the wall material” and “a helical wrap of webbing 134” extends “along the wall support portion 48 of each post 44.” Ex. 1002, 8:4–10; *see also id.* at Fig. 5. Thus, Publicover's illustrated embodiment does not have the top-only connection (c) required by Issued Claim 1.

With particular reference to connection (d), Publicover explains that ends of line 108 can be “secured together by a buckle 110 so that the top line forms a continuous loop.” Ex. 1002, 6:19–24. In this manner, “[t]ension in the line 108 can be adjusted by using the buckle 110 to vary the circumference of the loop.” *Id.* at 6:22–24. “The tops of all the posts 44 in the illustrated embodiment—because they are linked together at the top by

⁶ “[E]ach post 44 is made in two sections” (i.e., a top section 46/48 and a bottom section 50/52) joined by “a swage joint 54.” Ex. 1002, 2:40–42. The lower end of each post's top section 46/48 is connected to trampoline 20 via fasteners 58 that “encompass the frame 34 on opposite sides of the vertically extending portion 37 of a leg 36.” *Id.* at 3:62–67, *see also* Figs. 3, 5.

the top line 108—flex toward the impacted portion of the wall panel.” *Id.* at 9:10–13.

As indicated just above, Publicover’s posts 44 “flex” when a user impacts wall/barrier 100. Ex. 1002, 9:10–13. As such, “posts 44 should not be rigid,” and “able to flex to some extent when a trampoline user impacts the wall 100.” *Id.* at 9:52–56. “For ease of construction and low cost,” posts 44 may be “made of tubular steel.” *Id.* at 9:57–58. But “[o]ther materials” (e.g., “fiberglass”) can be “selected to tailor the flexibility, elasticity, and strength of the resultant system as desired.” *Id.* at 9:58–63.

Thus, a claim that did not require a top-only connection **(c)** could be anticipated by Publicover’s illustrated embodiment, but a claim that did require a top-only connection **(c)** could not be anticipated by Publicover’s illustrated embodiment.

However, Publicover discloses that “[i]n some embodiments, the netting is not be affixed to the support posts 44 except at their tops” and “the netting extends down from the top line 108, and is secured only to the periphery of the rebounding surface 40.” Ex. 1002, 7:29–33. These non-illustrated embodiments would have the following connections of the trampoline/enclosure components:

a) wall/barrier 100 has a lower peripheral part coupled directly or indirectly to a periphery of mat 40 (*see id.* at 7:29–33);

(b) posts 44 are connected at or towards their lower ends to the trampoline’s frame 34 by a fastener 58 (*see id.* at 3:62–63);

(c) posts 44 are connected to wall/barrier 100 **only** at or near an upper peripheral part of the wall/barrier 100 (*see id.* at 7:29–33); and

(d) posts 44 are connected together at or toward their upper ends by a line 108 (*see id.* at 5:66–6:24).

With particular reference to connections (a), (c) and (d), Publicover explains

In embodiments in which the bottom of the netting is attached to the periphery of the flexible rebounding surface 40, the system can be conceptualized as an arrangement of upright long tubular springs attached to a diaphragm that helps disperse, absorb, and re-cycle impact forces directed at the poles and the net. The diaphragm also transfers these forces to the support system that maintains the diaphragm's elevation. 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.

Ex. 1002, 9:30–42. Publicover further clarifies that “[i]n order to provide the above-described spring effect, the posts 44 should not be rigid.” *Id.* at 9:52–53.

Thus, a claim that requires a top-only connection (c) could be anticipated by Publicover's non-illustrated embodiment.

VII. DISCRETIONARY DENIAL

In determining whether to institute an *inter partes* review, we “may take into account” and discretionarily deny institution because “the same or substantially the same prior art or arguments previously were presented to the Office.” 35 U.S.C. § 325(d). We use a two-part framework when determining whether to exercise our discretion to institute *inter partes* review under 35 U.S.C. § 325(d). *Advanced Bionics, LLC v. MED-El Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 8 (PTAB

Feb. 13, 2020) (precedential).⁷ “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 Part One of the *Advanced Bionics* framework, we determine “whether the same or substantially the same art previously was presented to the Office[,] or whether the same or substantially the same arguments previously were presented to the Office.” *Advanced Bionics*, Paper 6 at 10. The Petitioner challenges the patentability of Issued Claim 1 on the ground that it is anticipated by Publicover. Pet. 22. The Examiner relied upon Publicover in an Office Action to reject Application Claim 1 as anticipated thereby; in this same Office Action, the Examiner indicated that Application Claim 11 (which matured into Issued Claim 1) was allowed thereover. *See* Ex. 1012, 37. Thus, here, there is little to no room for dispute that Petitioner relies upon the “same art previously presented to the Office” in its challenge of Issued Claim 1.

⁷ *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (Dec. 15, 2017) (precedential as to § III.C.5, first paragraph) provides “useful insight into how to apply the framework under 35 U.S.C. § 325(d).” *Advanced Bionics*, Paper 6 at 9. “*Becton, Dickinson* identifies the following 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 relies on 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.” *Id.* at 9 n.10.

In Part Two of the *Advanced Bionic* framework, we determine “whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of the challenged claims.” *Advanced Bionics*, Paper 6 at 8. “An example of material error may include misapprehending or overlooking specific teachings of the relevant prior art where those teachings impact the patentability of the challenged claims.” *Id.* at 8 n.9. Here, the prosecution history of the ’687 Patent reflects that the Office materially erred by overlooking Publicover’s non-illustrated embodiments. As discussed above in Section V, the prosecution history reflects that the different treatment of Application Claim 1 (i.e., rejected as anticipated by Publicover) and Application Claim 11 (i.e., not anticipated by Publicover) seemed to rest on Application Claim 11 requiring the support members to be connected to the barrier net **only** at or near an upper peripheral part of the barrier (i.e., a top-only connection (**c**)), while Application Claim 1 did not. As discussed above in Section VI, a claim that did not required a top-only connection (**c**) could be anticipated by Publicover’s non-illustrated embodiment. And Petitioner demonstrates that when Publicover’s non-illustrated embodiment is taken into consideration, there is a reasonable likelihood that Issued Claim 1 is anticipated by Publicover. *Infra* § VIII.

Thus, we decline to exercise our discretion to deny the Petition under § 325(d).

VIII. PETITIONER DEMONSTRATES
A REASONABLE LIKELIHOOD
THAT ISSUED CLAIM 1 IS ANTICIPATED BY PUBLICOVER

In order to anticipate a claim, a prior art reference must “disclose all elements of the claim within the four corners of the document,” and it must

“disclose those elements ‘arranged as in the claim.’” *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)). “However, a reference can anticipate a claim even if it ‘d[oes] not expressly spell out’ all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would ‘at once envisage’ the claimed arrangement or combination.” *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015). “[A] reference may still anticipate if that reference teaches that the disclosed components or functionalities may be combined and one of skill in the art would be able to implement the combination.” *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1344 (Fed. Cir. 2016).

Petitioner correlates each limitation in Issued Claim 1 with a corresponding disclosure in Publicover and explains how they are arranged in the claimed manner. *See* Pet. 23–31; *see also* Ex. 1002, Fig. 1, 1:60–67, 3:4, 3:23–34, 5:32–33, 5:40, 5:66–6:1, 6:7–8, 6:48–56, 6:61–63, 7:20–29, 9:7–13, 9:30–63, 12:22–23, 12:33–35.

Specifically, Petitioner correlates the “preamble” of Issued Claim 1 to Publicover’s Title (Pet. 23, *see also* Ex. 1002 (54)), Petitioner correlates “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” to specific disclosure in Publicover (Pet. 23–24; *see also* Ex. 1002 at 3:4, 3:23–24, Fig. 1); Petitioner correlates “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” to disclosure in Publicover (Pet. 25; *see also* Ex. 1002 at 3:29-30, 5:32-34, 5:40, 6:48-56, 6:61-63, 7:23-29).

Petitioner correlates “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” to specific disclosure in Publicover (Pet. 26, *see also* Ex. 1002 at 1:60-67, 3:32-34, 5:32-34, 5:66-6:1, 6:7- 8, 7:29-33, 9:52-56, 12:22-23, 12:33-35); Petitioner correlates “which enclosure support members are also connected together at or towards the 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” to specific disclosure in Publicover (Pet. 28, *see also* Ex. 1002 at 9:7-13, 9:30-63).

Petitioner’s cited correlations to Publicover correspond to all of the elements of Issued Claim 1 and correspond to the claimed arrangement of these elements. Patent Owner does not dispute these correlations except as specifically discussed below. *See* Prelim. Resp. 34-49.

Patent Owner argues that Publicover does not disclose support members that **resiliently deform** away from the mat. *See* Prelim. Resp. 36-40. According to Patent Owner, Publicover’s wall/barrier 100

“may move away from the mat when a person hits the wall,” but “posts 44 themselves flex downwardly, inwardly, and toward the impacted wall panel.” *Id.* at 39. However, the claim language only requires “the barrier and enclosure support members” to **resiliently deform** away from the mat (Ex. 1001, 6:41–43), which would occur in a system which “can be conceptualized as an arrangement of upright long tubular springs attached to a diaphragm that helps disperse, absorb, and re-cycle impact forces directed at the poles and the net,” (Ex. 1002, 9:32–35), as disclosed by Publicover. Thus, on this record, we do not find this argument persuasive.

Patent Owner argues that Publicover’s posts 44 “are only ‘somewhat flexible’ as opposed to the ‘resiliently flexible’ claimed by Patent Owner.” Pet. 39. However, the claim language does not quantify a degree of resilience or flexibility. Moreover, Publicover teaches that the post materials “can be selected to tailor the flexibility, elasticity, and strength of the resultant system as desired.” Ex. 1002, 9:61–63. And Publicover teaches that “[t]he posts should be sufficiently strong such that impacts by trampoline users will not permanently bend the poles.” *Id.* at 9:53–55.

Patent Owner argues that Publicover does not disclose support members that are connected to the barrier net **only** at or near an upper peripheral part of the barrier. *See* Prelim. Resp. 41–45. These arguments emphasize Publicover’s illustrated embodiment in which the posts are connected to the wall/barrier 100 by elastic cord 128 and webbing 134. *See id.* at 41–44. As for Publicover’s discussion of “embodiments” in which the wall/barrier 100 is “not be affixed to the support posts 44 except at their tops” (Ex. 1002, 7:29–31), Patent Owner characterizes this as a “short excerpt” that is “contrary to the remaining disclosure of Publicover” (Prelim.

Resp. 44). We disagree with the characterization because Publicover explains that in these embodiments, “the netting extends down from the top line 108, and is secured only to the periphery of the rebounding surface 40.” Ex. 1002, 7:31–34. And Publicover explains, in detail, the transfer of forces “[i]n embodiments in which the bottom of the netting is attached to the periphery of the flexible rebounding surface 40.” *Id.* at 9:30–51.

Patent Owner argues that without elastic cord 128 and webbing 134, Publicover cannot hold the net in tension above the mat. *See* Prelim. Resp. 45. However, Publicover discloses that this tension can be accomplished, in embodiments without elastic cord 128 and webbing 134, via line 108 (*see* Ex. 1002, 9:37–39) which can “pulled to a desired tension” (*id.* at 6:31).

Patent Owner argues that without elastic cord 128 and webbing 134, Publicover cannot hold the net in tension above the mat. *See* Prelim. Resp. 45. However, Publicover discloses that this tension can be accomplished, in embodiments without elastic cord 128 and webbing 134, via line 108 (*see* Ex. 1002, 9:37–39) which can “pulled to a desired tension” (*id.* at 6:31). As such, in embodiments in which only the tops of Publicover’s posts 44 are connected to the wall/barrier 100, posts 44 would hold the net in tension above the mat.

Patent Owner argues that “[t]o provide the bulk of the flexibility,” Publicover “specifies” that its wall/barrier 100 is secured to each post 44 along its vertical length “by an arrangement that includes one or more elastic components.” Prelim. Resp. 48. At this stage of the proceeding, Patent Owner’s argument is unavailing because Publicover discloses that posts 44

act as “tubular springs” in embodiments without elastic cord and webbing 134. Ex. 1002, 9:37.

We conclude that Petitioner demonstrates a reasonable likelihood that it will prevail on its challenge to Issued Claim 1 as anticipated by Publicover. We have reviewed Petitioner’s cited evidence and explanation regarding why Publicover anticipates claims 2–8 and find them sufficient at this stage. At this stage, Patent Owner raises no other arguments regarding these claims other than those considered above with respect to claim 1. On this record, we determine that Petitioner has shown a reasonable likelihood of success that Publicover anticipates claims 2–8.

With respect to Ground 2—Obviousness of claims 3 and 4 over Publicover and Coan, Petitioner relies on Coan “[i]f Publicover is determined not to teach ‘so that in their natural rest state the enclosure support members extend away from the mat.’” Pet. 40. Patent Owner contends that Coan does not teach this limitation, and because the rigid nature of Coan’s enclosure, Coan teaches away from the combination with Publicover. Prelim. Resp. 50–53. Patent Owner further argues that Petitioner only offers a conclusory motivation to combine the references. Given our conclusion above, we do not resolve this argument, which may have some merit. The parties should address these arguments further during trial.

With respect to Ground 3—Obviousness of claims 2 and 4 over Publicover and Tencom, Petitioner relies on Tencom “[i]f Publicover is determined not to teach fiberglass rods that are pultruded [*sic.*]” Pet. 42. Patent Owner argues Tencom is cumulative of references considered during the prosecution. Prelim. Resp. 54. However, as we explained above, we

find that the Examiner erred with regard to the consideration of Publicover. Thus, we have declined to exercise our discretion to deny institution under § 325(d). *See supra* VII. We have reviewed Petitioner’s cited evidence and explanation regarding why the combination of Publicover and Tencom would have rendered obvious claims 2 and 4, and find it sufficient at this stage. *See* Pet. 42–43. At this stage, Patent Owner raises no other arguments regarding these claims other than those considered above with respect to Issued Claim 1. On this record, we determine that Petitioner has shown a reasonable likelihood of success that claims 2 and 4 would have been obvious over the combination of Publicover and Tencom.

As such, we institute review on all challenged claims on all grounds set forth in the Petition, including Petitioner’s challenge that Issued Claims 2–8 are anticipated by Publicover, the obviousness challenges to Issued Claims 3 and 4 based on Publicover and Coan, and Issued Claims 2 and 4 based on Publicover and Tencom. *PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018).

Our determinations at this stage of the proceeding are based on the evidentiary record currently before us. This decision to institute trial is not a final decision as to patentability of any claim for which we have instituted an *inter partes* review. *See Tri Vascular, Inc. v. Samuels*, 812 F.3d 1056, 1068 (Fed. Cir. 2016) (noting that “there is a significant difference between a petitioner’s burden to establish a ‘reasonable likelihood of success’ at institution, and actually proving invalidity by a preponderance of the evidence at trial”). We will base any final decision on the full record developed during trial.

IX. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 1–8 of the '687 Patent on the unpatentability grounds asserted in the Petition; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial, which commences on the entry date of this decision.

IPR2023-00350
Patent 7,854,687 B2

For PETITIONER:

Brian D. Tucker
Michael A. Eixenberger
KIRTON MCCONKIE PC
btucker@kmclaw.com
meixenberger@kmclaw.com

For PATENT OWNER:

Kelly J. Kubasta
Robert P. Lord
FERGUSON BRASWELL FRASER KUBASTA PC
kkubasta@fbfk.law
lord@oshaliang.com