

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WENZHOU XIN XIN SANITARY WARE CO., LTD.,
Petitioner

v.

DELTA FAUCET COMPANY.
Patent Owner

Case No.: IPR2023-01332
U.S. Patent No. 11,473,277

PATENT OWNER PRELIMINARY RESPONSE

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PETITIONER’S EXHIBIT LIST

Exhibit No.	Description of Document
2001	U.S. Patent No. 8,646,476 to Thomas et al.
2002	Wenzhou Xin Xin Sanitary Ware Co., Ltd.’s Amended Complaint Against Delta Faucet Company for Declaratory Judgment of Non-Infringement and Invalidity of U.S. Patent No. 11,473,277 (D. Del. Aug. 18, 2023)

Patent Owner Delta Faucet Company (“Patent Owner”) submits its Patent Owner Preliminary Response (“POPR”) pursuant 35 U.S.C. § 313 in response to the Petition for *Inter Partes* Review (“Petition”) filed by Wenzhou Xin Xin Sanitary Ware Co., Ltd. (“Petitioner”) regarding U.S. Patent No. 11,473,277 (“the ‘277 Patent”).

I. INTRODUCTION

Petitioner has failed show there is a reasonable likelihood of establishing unpatentability on any challenged claims for at least two reasons. The Board should deny institution.¹

First, pursuant to 37 C.F.R. § 42.104(b)(3), Petitioner is required to state how the challenged claims are to be construed. In this regard, Petitioner states “[i]n an IPR, claim terms are given their broadest reasonable construction in light of the specification of the patent in which it appears.” Petition at pp. 6 (purporting to cite 37 C.F.R. § 42.100(b)) (internal quotations omitted). Petitioner, however, has applied a superseded standard. In an IPR, claims shall be construed using the same claim construction standard that would be used to construe the claims in a civil action under 35 U.S.C. § 282(b). 37 C.F.R. § 42.100(b). This is the claim construction

¹ If, however, the Board institutes trial on any of the challenged claims, pursuant to 37 C.F.R. § 42.120, Patent Owner in its Patent Owner’s response will address the numerous substantive errors and shortcomings underpinning each of Petitioner’s arguments and its purported evidence.

standard articulated in *Philips v. AWH Corp* and its progeny. *See* 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

Second, Petitioner’s Grounds 1–3 for unpatentability rely on prior art that is the same, or substantially the same, as the art considered during prosecution of the ‘277 Patent. Petitioner simply ignores this fact and does not offer *any* explanation why—as it must under the Board’s precedential decision in *Advanced Bionics*—the Office committed a material error when it previously considering the art of record (Van Der Linden and Thomas) and the remaining references cited in the Petition. Consequently, the Board should exercise its discretion under 35 U.S.C. § 325(d) and deny institution of the Petition given (1) the substantial similarity between the art asserted in the Petition and the art previously considered during prosecution and (2) Petitioner’s failure to show a material error by the Office in its previous consideration of the art.

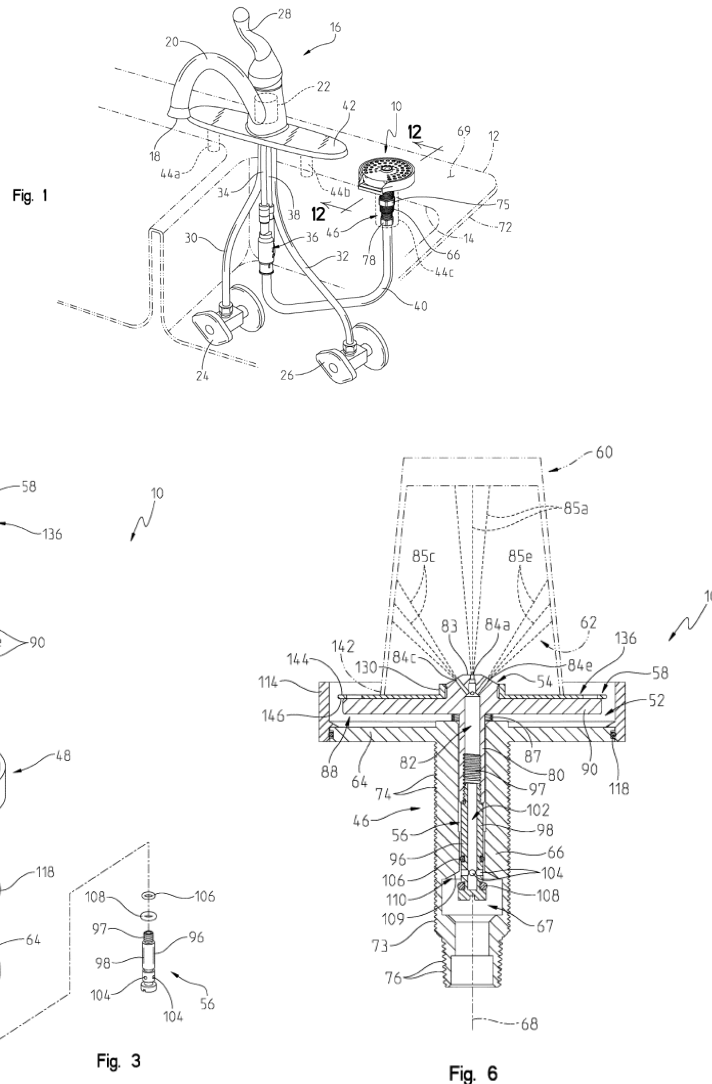
For at least these reasons, the Petitioner has failed to meet its burden. The Board should deny institution under 35 U.S.C. § 314(a).

II. THE CHALLENGED PATENT

A. The ‘277 Patent

The claimed invention addresses the need for a vessel rinsing apparatus capable of being installed in a standard opening in a sink deck or countertop, allowing for the cleaning of small vessels such as glasses and cups and the rinse

water to flow directly into the sink basin. EX1001 at 1:14–2:36. Illustrative examples are as follows:



Id., FIGS. 1, 3, 6.

Referring to FIG 1, the vessel rinsing apparatus 10 is shown supported by a conventional mounting deck, such as a sink deck 12 supporting a sink basin 14. *Id.* at 3:28–31. The vessel rinsing apparatus 10 includes a mounting base 46 configured to be coupled to the sink deck 12. *Id.* at 4:4–6.

Referring to FIG 2, escutcheon 48 cooperates with the mounting base 46 to define a contoured drain receptacle or bowl 52 for the collection and disposal of debris and wastewater. *Id.* at 4:6–9. A fluid discharge member 54 is operably coupled to the mounting base 46 and to a valve member 56. *Id.* at 4:9–11. A trigger plate 58 is supported by the fluid discharge member 54 and is configured to be engaged by a vessel 60 (*e.g.*, a cup, glass or other container) for activating water flow through the fluid discharge member 54 and into an interior 62 of the vessel 60. *Id.* at 4:11–15.

Referring to FIGS. 3 and 6, the fluid discharge member 54 cooperates with the mounting base 50 to deliver water from the dispenser tube 40. *Id.* at 4: 37–39. The fluid discharge member 54 includes a central body 80 defining a fluid passageway 82 and having a sprayface 83 supporting a plurality of nozzles 84 in fluid communication with the fluid passageway 82. *Id.* at 4:39–43. The nozzles 84 may include a center nozzle 84a and a plurality of peripheral nozzles 84b, 84c, 84d, 84c positioned radially outward from the center nozzle 84a. *Id.* at 4:43–46. The nozzles 84 may be oriented to direct water in different desired positions within an interior 86 of the vessel 60, as represented by arrows 85 in FIG. 6. *Id.* at 4:48–51.

A drain channel 116 that extends through the upwardly extending wall 114 of the escutcheon 48 provides fluid communication between the drain bowl 52 and the sink basin 14 to enable wastewater and debris to discharge from the drain bowl 52 into the sink basin 14. *Id.* at 4:4–9, 5:40–45.

B. Prosecution History

The ‘277 Patent issued from U.S. Application No. 17/167,647 (“the ‘647 application”), filed on February 4, 2021, as a continuation application of U.S. Application No. 16/131,035 (“the ‘035 application”), filed on September 14, 2018, now U.S. Patent No. 10,914,056 (“the ‘056 Patent”). Ex. 1001 at 1.

1. Prosecution history of the ‘056 Patent

A Non-Final Office Action issued on July 31, 2020 in which the examiner rejected (a) Claims 1 and 6–9 under 35 U.S.C. § 103 as being unpatentable over Thomas (U.S. 2011/0061754 cited in IDS) and further in view of FR2543426A3 (cited in IDS Espace.net translation), (b) Claims 1, 2, 4, 8–12, 22, and 25–30 under 35 U.S.C. § 103 as being unpatentable over FR2543426A3 (cited in IDS Espace.net translation), and in further view of Thomas (U.S. 2011/0061754 cited in IDS), and (c) Claims 3, 5, 7, 12–21, 23, and 28 under 35 U.S.C. § 103 as being unpatentable over FR2543426A3 (cited in IDS Espace.net translation) and Thomas (U.S. 2011/0061754 cited in IDS), and in further view of Gonzalez (U.S. 2017/0172369) and Meyer (U.S. 6,612,507), as applied to Claims 1 and 22. EX1004 at 61–69 (July 31, 2022 Non-Final Office Action).

The applicant participated in an examiner interview on September 4, 2020, concerning Claims 1, 12, and 22 and prior art FR2543426A3 (Vervenne). *Id.* at 56 (Sep. 10, 2020 Interview Summary). On September 24, 2020, the applicant filed a

Response to the Office Action amending Claims 1, 12, and 13 and adding Claims 31–36. *Id.* at 41–48 (Sep. 10, 2020 Amendment and Response to Non-Final Office Action). On October 7, 2020, a Notice of Allowance issued in which the examiner allowed Claims 1–36. *Id.* at 7, 11–13 (Oct. 7, 2020 Notice of Allowance). The examiner noted the following reasons for allowance:

The following is an Examiner’s statement of reasons for allowance: the closest prior art of record Thomas (U.S. 2011/0061754 cited in IDS) in view of FR2543426A3 (cited in IDS Espace.net translation) fails to teach or suggest an escutcheon having a drain channel configured to receive water from the drain bowl and discharge water above and into a sink basin supported by the mounting deck. Thomas in view of FR2543426A3 further fails to teach or suggest a removable plate supported by and configured to move with the trigger of the fluid discharge member.

Id. at 12.

2. Prosecution history of the ‘277 Patent

A Non-Final Office Action issued on March 3, 2022 in which the examiner issued a double-patenting rejection, stating that:

Claims 1-4, 8-11, and 20 rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1-3 and 8-10 of U.S. Patent No. 10,914,056. Although the claims at issue are not identical, they are not patentably distinct from each other because US 10,914,056 anticipates the instant application. Claims 5-7 are dependent upon claim 1. Claims 12-19 are dependent upon claim 11. Claims 21-24 are dependent upon claim 20.

Id. at 245–256, 248. The examiner went on to produce a chart that maps the correspondence between the respective claims. *Id.* at 248.

On March 15, 2022, the applicant filed a Response to the Office Action without amending the claims and submitted a terminal disclaimer over U.S. Patent No. 10,914,056. *Id.* at 167–173 (Mar. 15, 2022 Response to Office Action), 175 (Mar. 15, 2022 Terminal Disclaimer). On March 28, 2022, the applicant filed a second terminal disclaimer to obviate a rejection of the first terminal disclaimer. *Id.* at 153 (Mar. 28, 2022 Terminal Disclaimer). On April 20, 2022, a Notice of Allowance was issued in which original Claims 1–24 were allowed. *Id.* at 128, 132–134 (Apr. 20, 2022 Notice of Allowance). The examiner went on to state:

The following is an examiner’s statement of reasons for allowance: The closest prior art of record is Thomas (U.S. 2011/0061754 cited in IDS) in view of FR2543426A3 (cited in IDS Espace.net translation) fails to teach or suggest a drain channel configured to receive water from the drain bowl and discharge water above and into a sink basin support by the mounting deck.

Id. at 133.

On August 18, 2022, the applicant filed a Petition to Withdraw the Application from Issue After Payment of the Issue Fee in order to submit a Request for Continued Examination and a follow-on IDS. *Id.* at 120–121 (Aug. 18, 2022 Petition to Withdraw an Application from Issue After Payment of The Issue Fee Under 37 C.F.R. 1.313(c)), 9–10 (Aug. 18, 2022 Information Disclosure Statement). On September 8, 2022, a second Notice of Allowance issued in which original Claims 1–24 were again allowed. *Id.* at 5 (Sep. 8, 2022 Corrected Notice of Allowance).

III. THE PETITION

The Petition presents three grounds for unpatentability.

Ground	Reference(s)	Basis	Claim(s) Challenged
1	Van Der Linden (US 2008/0142095) in view of Shen Wei (CN203281567)	§ 103	1–5, 10–13, 15
2	Thomas (US 2011/0061754) in view of Van Der Linden (US 2008/0142095)	§ 103	1–7, 10–17, 20–21, 23–24
3	Thomas (US 2011/0061754) in view of Boursier (FR2606622) and Hotaling (US 2012/0204242)	§ 103	1–2, 5–7, 10–14, 16–17, 20–21, 23–24

Petitioner recognizes, as it must, that “Van Der Linden was disclosed by the Applicant in an IDS during prosecution of the ‘647 Application . . . ,” Petition at pp. 7, and that “Thomas was disclosed by the Applicant in an IDS during prosecution of the ‘035 Application, and was the primary basis of several claim rejections under 35 U.S.C. § 103,” *id.* at pp. 28.

Contrary to *Advanced Bionics*, however, Petitioner does not even mention—let alone sufficiently demonstrate—why the Board should evaluate any of Petitioner’s grounds given that the Office had considered the same art (Thomas and Van Der Linden), or substantially the same art (Shen Wei, Boursier and Hotaling), that Petitioner relied upon in the Petition. *See generally id.* at pp. 5, 7–72.

IV. INSTITUTION SHOULD BE DENIED BECAUSE PETITIONER RELIES ON THE WRONG STANDARD ON CLAIM CONSTRUCTION

37 C.F.R. § 42.104(b)(3) requires that the Petition identify how a challenged claim is to be construed. And 37 C.F.R. § 42.100(b) states that “[i]n an *inter partes* review proceeding, a claim of a patent . . . shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. § 282(b)”

The Petition, however, states that “[i]n an IPR, claim terms are given their ‘broadest reasonable construction in light of the specification of the patent in which it appears.’ 37 C.F.R. § 42.100(b).” Petition at pp. 6. There is no such quotation in 37 C.F.R. § 42.100(b) under the current version revised on November 13, 2018. *See* 83 FR 51340, 51358. The USPTO revised the claim construction standard for interpreting claims in an *inter partes* review from the broadest reasonable interpretation standard to the standard that exists today based on 35 U.S.C. § 282(b). *See* 83 FR 51340, 51340–41. The rule adopts the same claim construction used by Article 3 Federal Courts and the ITC, both of which follow *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) and its progeny. *Id.*

Simply put, Petitioner has used the wrong standard. Petitioner uses the BRI standard rather than the *Phillips* standard in identifying its claim construction position. This is a fatal error. *See, e.g., Sinjimoru v. Geneze Innovation Inc.*,

IPR2021-00493, Paper 8, 2021 Pat. App. LEXIS 4571, at *25–26 (PTAB Jul. 28, 2021) (Petitioner’s erroneous reliance on an incorrect “broadest reasonable interpretation standard” of claim construction represented an “unsound foundation” for the asserted challenges).

Further confirming Petitioner’s error is the fact that in a declaratory judgment action brought by the Petitioner concerning the ‘277 Patent, the Petitioner identified its claim construction position for each of independent Claims 1, 11, and 20, wherein the Petitioner stated that multiple limitations in each of the respective independent claims are subject to a means-plus-function treatment under 35 U.S.C. § 112(f). EX2002 at ¶¶ 32–34. The Board has previously denied institution where a petitioner failed to apply the claim construction which it adopted at the district court and should do so again here. *See OrthoPediatrics Corp. v. K2M, Inc.*, IPR20108-01548, Paper 9, at 10–12 (PTAB Mar. 1, 2019) (denying institution where petitioner proffered a means-plus-function claim construction at the district court before taking an inconsistent position before the PTAB, such that the petitioner failed to show how the challenged claims are to be construed in accordance with 37 C.F.R. § 52.104(b)(3) and, as so construed, how they are unpatentable under the statutory grounds identified in the petition: “Petitioner should have either provided reasons why these limitations are not governed by 35 U.S.C. § 112 ¶ 6, or Petitioner should have provided an explicit claim construction as required by our rules”).

The Board should deny institution of the Petition.

V. INSTITUTION SHOULD BE DENIED BECAUSE PETITIONER RELIES ON PREVIOUSLY CONSIDERED ART WITHOUT DEMONSTRATING A MATERIAL ERROR

The Board should also deny institution under 35 U.S.C. § 325(d) because the Petition is devoid of any evidence supporting Petitioner's (at best) implicit request that the Board reconsider prior art that was previously considered by the Office. *See generally* Petition at pp. 5, 7–72.

Under 35 U.S.C. § 325(d), the Board may deny institution if the petitioner challenges a patent on matters previously presented to the Office. *Advance Bionics LLC v. Med-EL Elektromedizinische Gerate GmbH*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *2, 7 (PTAB Feb. 13, 2022) (precedential Mar. 24, 2020).

Under § 325(d), the Board uses a two-part framework:

- (1) 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; and
- (2) if either condition of the first part of the framework is satisfied, whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.

Id at *8–9.

To apply this two-part framework, the Board considers six non-exclusive factors from *Becton, Dickinson & Co. v. B. Braun Melsungen AG*. *See id.* at *9–10 & n.10 (citing IPR2017-01586, Paper 8, 2017 Pat. App. LEXIS 12983 (PTAB Dec. 15, 2017)). These factors are:

- (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 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.

Id. at n. 10 (citing *Becton, Dickinson & Co.*, IPR2017-01586, 2017 Pat. App. LEXIS 12983, at *19–21).

As explained below, even though Petitioner has the burden of establishing that the Office erred in a manner material to the patentability of the challenged claims during examination of the ‘277 Patent, Petitioner is completely silent on § 325(d). *See generally* Petition. Petitioner did not identify any error (much less a material error) during the examination of the ‘277 Patent. *See generally id.* Petitioner’s omission is particularly egregious, since Petitioner acknowledges that Thomas and Van Der Linden were art of record, *see* EX1001 at 2, and, in the case of Thomas, specifically relied on by the Office as a primary reference in rejections of patentably

indistinct claims under 35 U.S.C. § 103, *see* EX1004 at 63–69 (July 31, 2020 Non-Final Office Action).

A. Petitioner Relies on Art That is Identical to—or Substantially the Same as—Art That the Office Considered During Examination

Under the first prong of the *Advanced Bionics* § 325(d) framework, the Board determines whether the prior art is the same or substantially the same by considering the similarities and material differences between the asserted art and the prior art involved during examination. *Advanced Bionics v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6, 2020 Pat. App. LEXIS 1476, at *9–10 & n. 10.

Previously presented prior art includes art made of record by the examiner, and art provided by an applicant, such as through an Information Disclosure Statement (“IDS”). *Id.* at *8. However, if the asserted art is not the same as the previously presented art, the Board evaluates whether the asserted art “discloses substantially the same information,” such that it is substantially the same as the previously presented art. *See id.* at *15–16, 18.

1. Van Der Linden and Thomas were of record and Shen Wei, Boursier, and Hotaling are substantially the same as art previously considered by the Office

a. Van Der Linden and Thomas were previously considered

Van Der Linden is cited as the primary reference in Ground 1, Thomas is cited as the primary reference in view of Van Der Linden in Ground 2, and Thomas is

cited as the primary reference in Ground 3. *See supra* Section III; Petition at pp. 5. Petitioner admits that both Van Der Linden and Thomas were of record in each of the challenged ‘277 Patent and its parent ‘056 Patent. Petition at pp. 7, 28.

During prosecution of each of the ‘056 Patent and the ‘277 Patent, Van Der Linden was presented to the Office by the applicant via an IDS. EX1003 at 317 (Feb. 4, 2021 Information Disclosure Statement for ‘277 Patent); EX1004 at 97 (Jan. 29, 2019 Information Disclosure Statement for ‘056 Patent). In the ‘277 Patent, Van Der Linden was considered by the examiner as reflected in the March 3, 2022 Non-Final Office Action presenting the double patenting rejection. *See* Ex. EX1003 at 267 (Signed Information Disclosure Statement). Additionally, Van Der Linden is listed on the face of the ‘277 Patent. EX1001 at 2.

Thomas was presented to the Office by the applicant via IDS and was considered by the examiner during prosecution of both the ‘056 Patent and the ‘277 Patent.² *See* EX1004 at 107 (Oct. 25, 2018 Information Disclosure Statement for ‘056 Patent), 85 (Signed Information Disclosure Statement for ‘056 Patent); EX1003 at 317 (Feb. 4, 2021 Information Disclosure Statement for ‘277 Patent), 267 (Signed

² During prosecution of the ‘056 Patent, Thomas was presented as U.S. Patent No. 8,646,476, EX2001, which issued from Thomas’s published application no. 2011/0061754, EX1008. *See* EX1004 at 107 (Oct. 25, 2018 Information Disclosure Statement). The examiner thereafter issued claim rejections based on Thomas’s published application. *See* EX1004 at 63–69 (July 31, 2020 Non-Final Office Action).

Information Disclosure Statement for ‘277 Patent). Thomas was specifically identified in each of the notices of allowance for the ‘056 Patent and the ‘277 Patent. EX1004 at 12 (Oct. 7, 2020 Notice of Allowance for ‘056 Patent); EX1003 at 133 (Apr. 20, 2022 Notice of Allowance for ‘277 Patent). Additionally, Thomas is listed on the face of the ‘277 Patent. EX1001 at 2.

Statements and amendments made during prosecution of the parent ‘056 Patent to overcome Thomas apply to the ‘277 Patent. *See Jonsson v. Stanley Works*, 903 F.2d 812, 818 (Fed. Cir. 1990) (interpreting a patent’s claims based on arguments and remarks made during prosecution of a related patent); *Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 265 F.3d 1294, 1305 (Fed. Cir. 2001) (“The prosecution history of a related patent can be relevant if, for example, it addresses a limitation in common with the patent in suit.”); *Google v. Kewazinga Corp.*, IPR2021-00524, Paper 17, 2021 Pat. App. LEXIS 4899, at *13–14 (PTAB Aug. 24, 2021) (acknowledging that the Board may look to the prosecution history of priority patents or applications for purposes of § 325(d)); *Google v. Kewazinga Corp.*, IPR2021-00527, Paper 16, 2021 Pat. App. LEXIS 4923, at *14 (PTAB Aug. 24, 2021) (same).

Because Van Der Linden and Thomas are the same art as previously presented and evaluated during prosecution of the parent ‘056 Patent to the ‘277 Patent (cited in IDS) (cited in notice of allowance as to Thomas)—and during prosecution of the

‘277 Patent itself—*Becton* factors (a) and (b) favor denying institution in view of the double patenting rejection and the statement made as to Thomas in the notice of allowance. In addition, the record shows that the examiner extensively evaluated and relied on Thomas as the basis for rejection of claims of the ‘056 Patent that are substantially similar to the claims of the ‘277 Patent (in view of the double patenting rejection). *Becton* factor (c) thus also favors denying institution.

Thus, the inclusion of Van Der Linden and Thomas as considered by the examiner is sufficient to meet the first part of the *Advanced Bionics* framework, *Becton* factors (a), (b) and (c) favor denying institution.

b. Shen Wei is substantially the same as Thomas

Shen Wei in Ground 1 is the same, or the same for material purposes, as art previously considered by the Office, and relied upon by the Petitioner.

Petitioner’s citation to Shen Wei in Ground 1 is directed *solely* to the following structural limitations 3, 8, and 9, highlighted in yellow by the Petitioner:

As shown in Figure 1 below, the **body 3** extends along a longitudinal axis and is secured to a sink by the **fastening nut 8**:

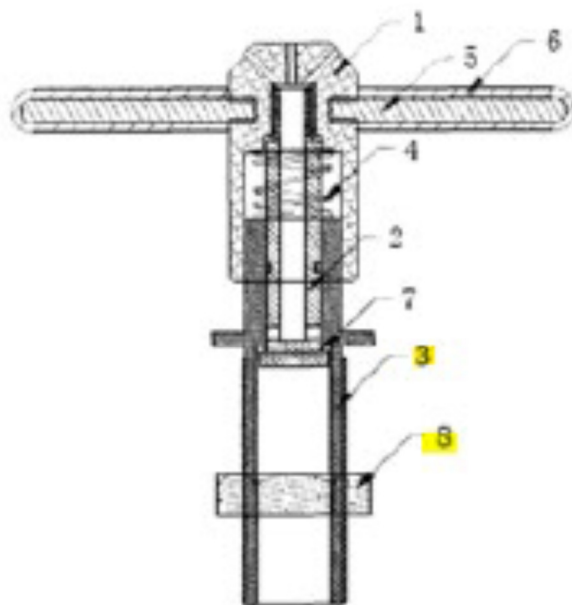


Figure 1

Petition at pp. 9 (emphasis in original).

As shown in Figures 3 & 4, Shen Wei discloses a plurality of spray nozzles (**orifices 9**):

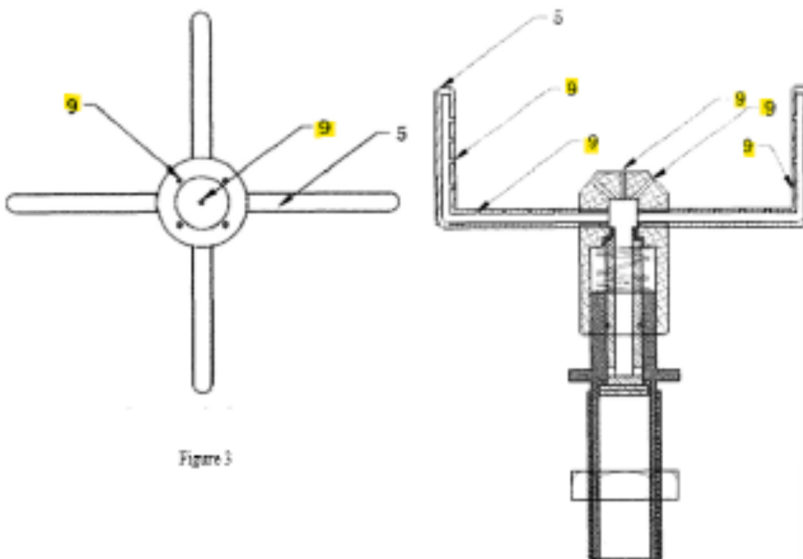


Figure 3

Figure 4

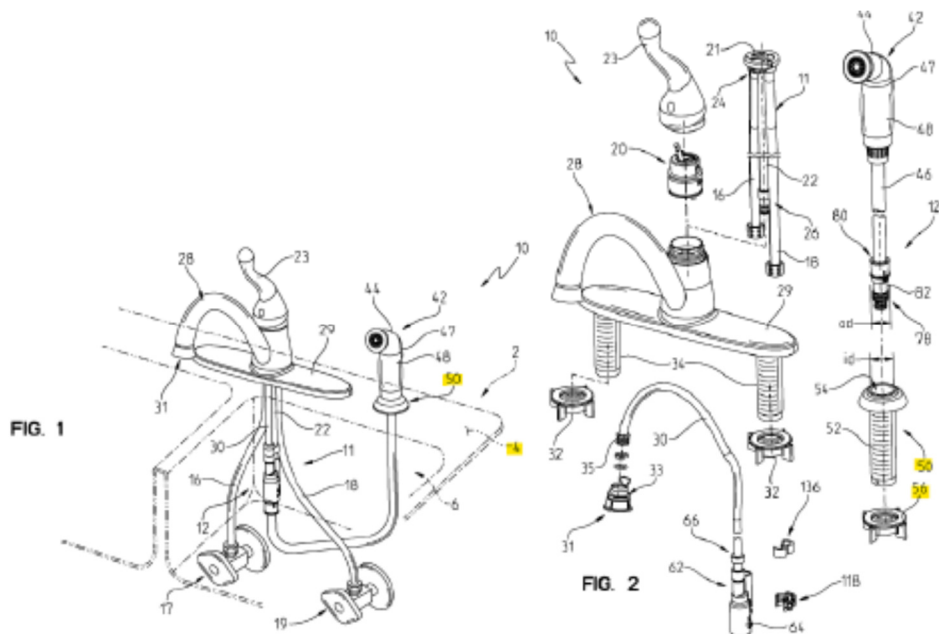
Id. at pp. 11–12 (emphasis in original).

In Ground 1, Petitioner relies on Van Der Linden in view of Shen Wei for the following claims and limitations: Claim 1, *ii* and *iii*; Claim 2, *i*; Claim 11, *iv*; Claim 12, *i*; and Claim 13, *i*. *Id.* at pp. 7–12, 17–18, 24–27.

Specifically, concerning Claims 1, 2, 12, and 13, Petitioner points to Shen Wei as allegedly showing the claimed “mounting member extending along a longitudinal axis, the mounting member configured to extend through a mounting aperture formed within a mounting deck” (*i.e.*, the body 3 and the fastening unit 8 of Figure 1) and related limitations, *id.* at pp. 8–12, 17–19, 26, and, concerning claim 11, as allegedly showing the claimed “nozzles” (*i.e.*, the orifices 9 of Figures 3 and 4), *id.* at pp. 24. Interestingly, however, Petitioner argues in Ground 2 that Thomas also shows these identical limitations in the identical claims. *Id.* at pp. 29–31, 34–35, 42–44.

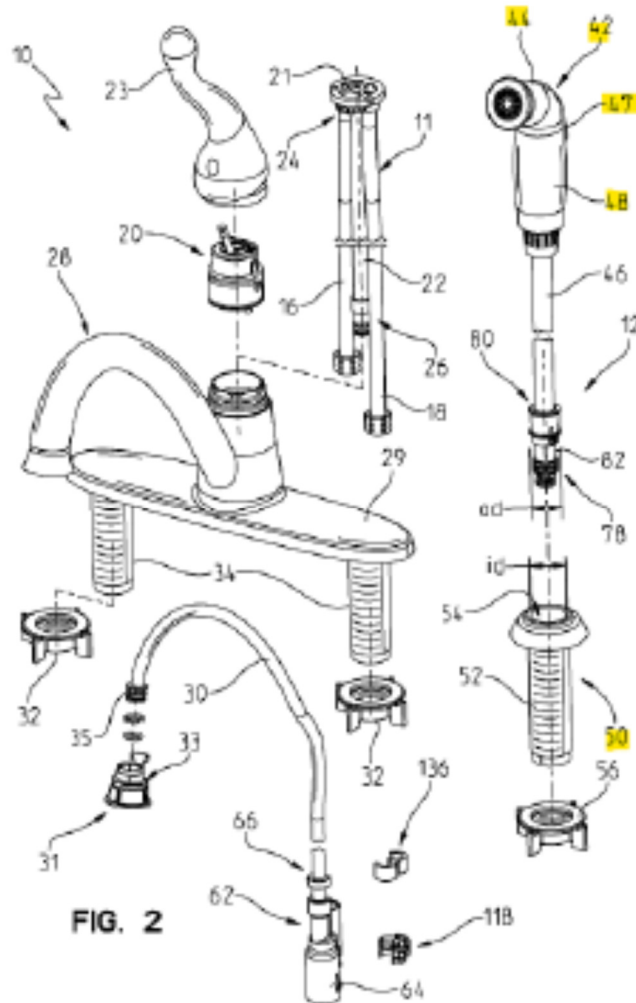
In Ground 2, Petitioner states:

Thomas discloses a mounting member (**mounting base 50**) extending along a longitudinal axis configured to extend through a mounting aperture (**nut 56**) formed within a mounting deck (**mounting deck 4**). In Thomas, a “nut 56 threadably engages the mounting post 52 and secures the **mounting base 50** to the **mounting deck 4**.” Ex. 1008 at [0033]; *see* Figs. 1 & 2 below:



Id. at 28 (emphasis in original)

Thomas discloses a fluid discharge member (**sprayer assembly 42**) with a central body (**body 48**) supporting a plurality of nozzles (**handheld sprayer 44**) and a trigger (**trigger 47**), the central body (**body 48**) being moveable relative to the mounting member (**mounting base 50**). Thomas explains that the “auxiliary fluid dispenser, illustratively a **sprayer assembly 42** includes a **handheld sprayer 44** fluidly coupled to a dispenser or **sprayer outlet tube 46**. The **sprayer 44** may be of conventional design and includes a **trigger 47** configured to activate water flow therethrough. The **sprayer 44** includes a **body 48** configured to be **removably supported** by a **mounting base 50**.” Ex. 1008 at [0033]; see Fig. 2 below:



Id. at pp. 30–31 (emphasis in original).

A side-by-side comparison of Thomas (mounting base 50, nut 56, and plurality of nozzles 44) and Shen Wei (body 3, fastening unit 8 and orifices 9) is below.

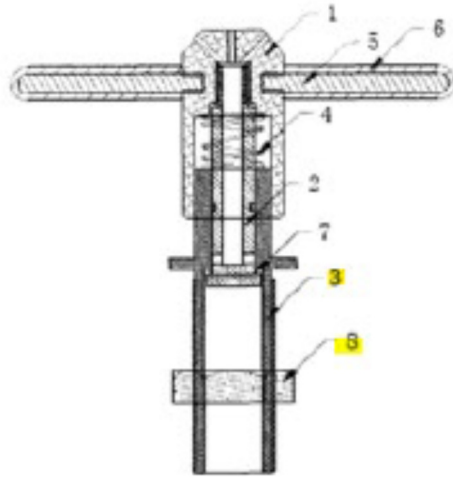


Figure 1.

Shen Wei

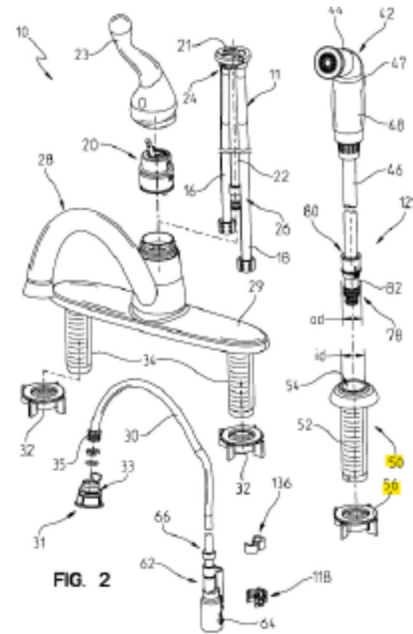


FIG. 2

Thomas

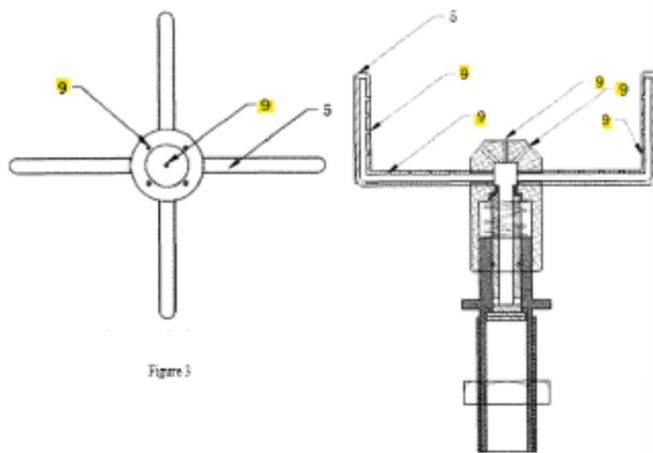


Figure 3

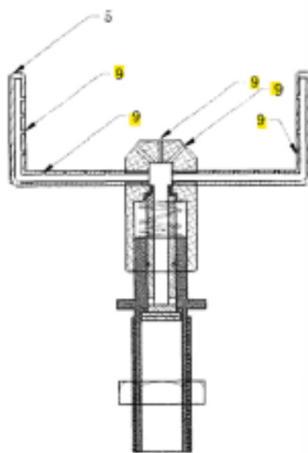


Figure 4

Shen Wei

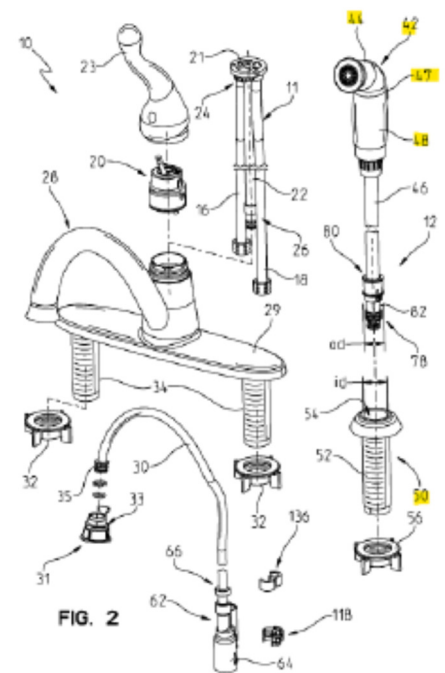


FIG. 2

Thomas

Shen Wei and Thomas are substantially the same for all purposes concerning the Petition. Petitioner's reliance on Shen Wei in Ground 1 and on Thomas in Ground

2 as disclosing the same limitations of the same claims concedes as much. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *15–18 (holding the asserted art substantially the same because it disclosed the same component shape and configuration); *see also Google*, IPR2021-00524, 2021 Pat. App. LEXIS 4899, at *14 (finding the asserted art is substantially the same, in part, because it discloses the same figures); *Google*, IPR2021-00527, 2021 Pat. App. LEXIS 4923, at *14 (same).

Because (a) Thomas is art of record; and (b) for purposes of the Petition, Shen Wei and Thomas are the same or substantially the same; then (c) Shen Wei is the same or substantially the same art that was previously presented to the Office. Accordingly, the first part of the *Advanced Bionics* framework is satisfied with respect to Shen Wei.

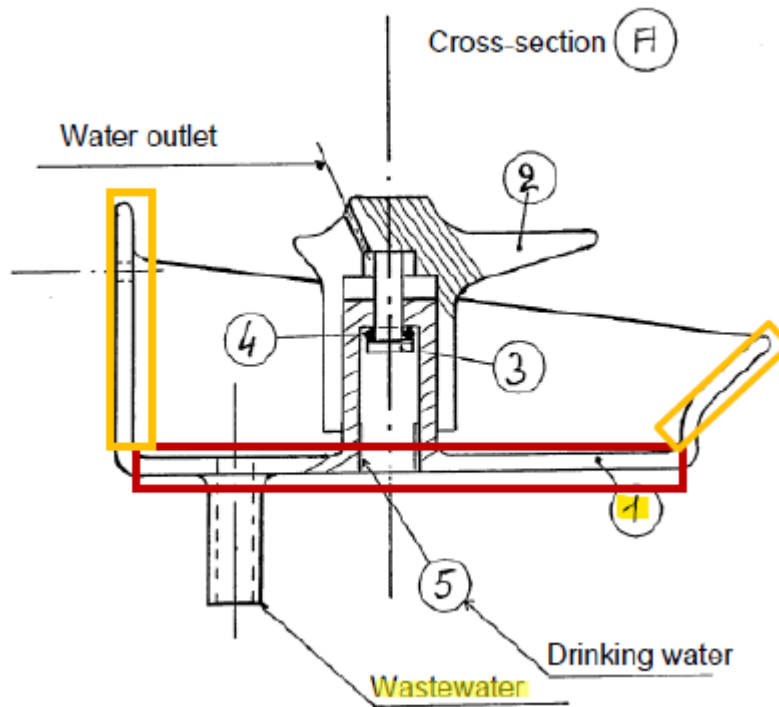
2. Boursier and Hotaling are substantially the same as art previously considered by the Office

Petitioner’s Ground 3 relies on Thomas in view of Boursier and Hotaling. *See* Petition at pp. 5, 53–72. Boursier and Hotaling, however, are the same—or for all material purposes the same—as art previously considered by the Office.

Petitioner’s citation to Boursier and Hotaling in Ground 3 is directed *solely* to the following features highlighted in yellow and red by the Petitioner:

Boursier discloses a drain bowl (**tray or reservoir 1**) including a lower wall (**shown in red below**), an upwardly extending wall (**shown in orange below**) operably coupled to the lower wall, and a drain channel

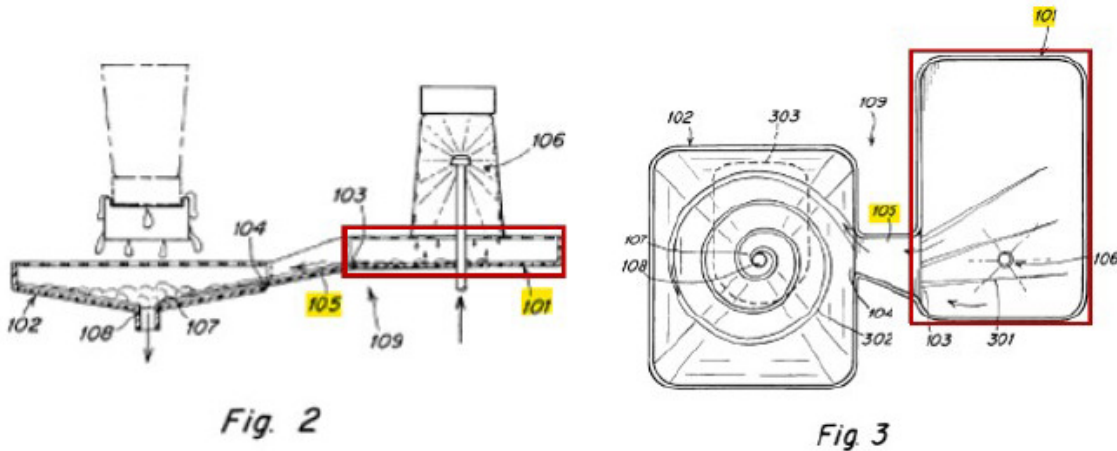
(**drain 7, wastewater outlet**) configured to receive water from the drain bowl and discharge water. Boursier explains that the “small **tray** contains the drinking water and **wastewater** connections.” Ex. 1009 at 1. The **tray/reservoir 1** of Boursier is best shown in Fig. A (annotated) below:



Boursier does not explicitly disclose mounting the tray/reservoir 1 to a mounting member. However, Boursier does teach that the tray 1 is “itself fastened to a wall or other partition by means of two screws.” *Id.* at 1. In the opinion of Mr. Cook, it would have been obvious to one having ordinary skill in the art to combine the mounting base 50 of Thomas with the tray/reservoir 1 of Boursier to provide a mounting method for deck installation with minimal and standard parts. Ex. 1005 at 142.

Boursier further does not explicitly disclose a drain channel extending through an upwardly extending wall. However, Boursier does disclose a drain 7 or wastewater: “The small tray contains the drinking water and wastewater connections.” Ex. 1009 at 1. Boursier also discloses an upwardly extending wall. *See* Fig. A (annotated) *supra*. Hotaling discloses a drain channel (**trough 105, passage**) extending through an upwardly extending wall (**shown in red below**) of a drain bowl (**water**

collection tray 101). Hotaling explains that “the rinse station water collection tray, 101, is connected to a high point, 104, in the drip tray, 102, by a **continuous trough, 105**, through which water is conducted from the rinse station, 106, to the drip tray, 102.” Ex. 1010 at [0018]. In Hotaling, the drip tray 102 is analogous to a sink basin. See Figs. 2 & 3 (annotated) below:



Id. at pp. 55–57 (emphasis in original).

In Ground 3, Petitioner relies on Thomas in view of Boursier and Hotaling for the following claims and limitations: Claim 1, *v*; Claim 5; Claim 10; Claim 11, *ii*, *iii* and *vi*; and Claim 20, *iii* and *iv*. *Id.* at pp. 55–59, 60–65, 67–69.

Petitioner points to the claim language “a drain bowl operably coupled to the mounting member, the drain bowl including a lower wall, an upwardly extending wall operably coupled to the lower wall, and a drain channel extending through the upwardly extending wall, the drain channel configured to receive water from the drain bowl and discharge water above and into a sink basin supported by the mounting deck” of Claims 1 and related features of Claim 11 and 20, and argues that Boursier purportedly discloses these limitations, pointing to an annotated Figure A

allegedly showing a drain bowl (tray or reservoir 1), a lower wall (annotated in red above), an upwardly extending wall (annotated in orange above) operably coupled to the lower wall, and a drain channel (drain 7, wastewater outlet) configured to receive water from the drain bowl and discharge water. *See id.* at pp. 55–56, 62, 67–68.

Regarding Claims 1, 11, and 20, Petitioner relies on Figures 2 and 3 of Hotaling as allegedly disclosing a drain channel (trough 105, passage) extending through an upwardly extending wall (shown in red) of a drain bowl (water collection tray 101). *See id.* at 56–58, 62–63, 68.

Again, however, these identical features for which Petitioner relies on Boursier and Hotaling are also disclosed, as argued by the Petitioner in Ground 1, in Van Der Linden. *See id.* at pp. 14–16.

Petitioner argues in Ground 1 that:

Van Der Linden discloses a drain bowl (**cup shaped container 31**) operably coupled to the mounting member (**base 28**). In Van Der Linden “[t]he washing device 21 further comprises an at least substantially **cup-shaped container 31** which joins the upper end of the **base 28**...” Ex. 1006 at [0033].

Van Der Linden further discloses a drain bowl (**cup shaped container 31**) including a lower wall (**slightly concave bottom 32**), an upwardly extending wall (**upright wall 33**) operably coupled to the lower wall, and a drain channel (**outflow opening 34**) extending through the upwardly extending wall. In Van Der Linden the “**container [31]** comprises a **slightly concave bottom 32** and an **upright wall 33** which joins the circumference of the bottom 32... At the lowermost point, the

circular wall 33 is interrupted, thereby creating an **outflow opening 34** at that location.” Ex. 1006 at [0033]; *see* Fig. 2 below:

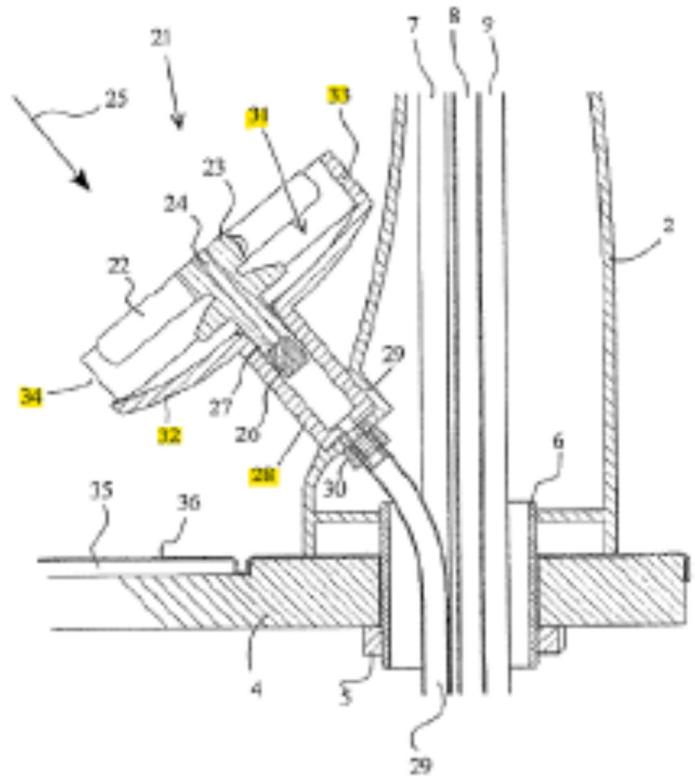


Fig. 2

Van Der Linden further discloses a drain channel (**outflow opening 34, 79**) configured to receive water from the drain bowl (**cup shaped container 31**) and discharge water above and into a sink basin (**drip tray 36, sink 77**) supported by a mounting deck (**worktop 4, column 2**). Van Der Linden explains that “[s]aid **outflow opening 34** is located above a recessed part 35 in the **worktop 4**, where a **drip tray 36** is provided.” Ex. 1006 at [0033]. Van Der Linden explains the discharge feature: “said washing liquid will flow out of the **container 31** via the **outlet opening 34** and into the recessed part 35 via holes in the **drip tray 36**...” *Id.* at [0035]. A second embodiment of Van Der Linden explicitly discloses discharging water into a sink basin: “As is apparent from FIG. 5, the **outflow opening 79** of the washing device 78 opens above the **sink 77**.” *Id.* at [0039]; *see* Fig. 5 below:

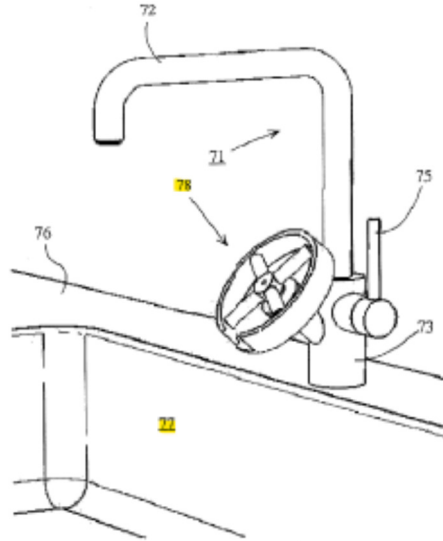


Fig. 5

Id. (emphasis in original).

A side-by-side comparison of Van Der Linden (a drain bowl (cup shaped container 31) including a lower wall (slightly concave bottom 32), an upwardly extending wall (upright wall 33) operably coupled to the lower wall, and a drain channel (outflow opening 34) extending through the upwardly extending wall) and Boursier (a drain bowl (tray or reservoir 1), lower wall (shown in red below), upwardly extending wall (shown in orange below) operably coupled to the lower wall, and a drain channel (drain 7, wastewater outlet) configured to receive water from the drain bowl and discharge water) is as follows:

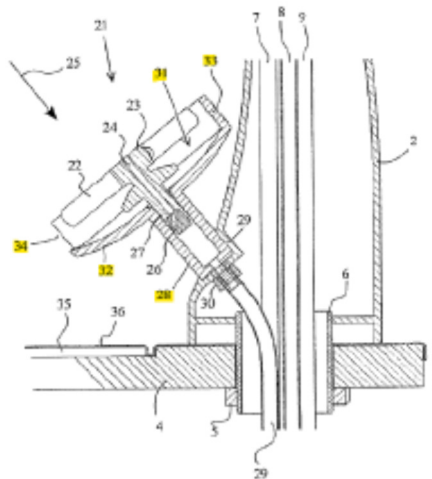
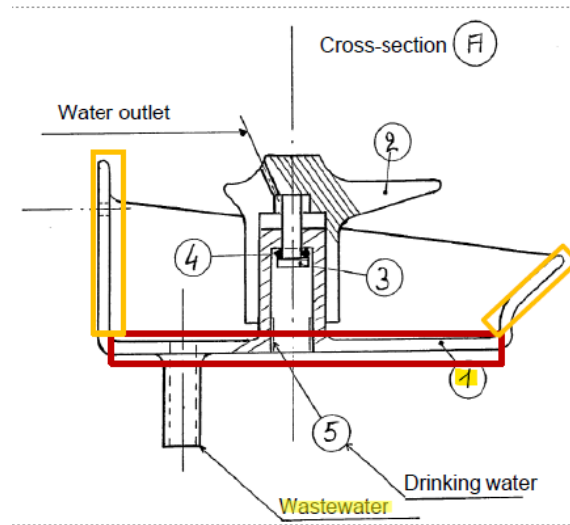


Fig. 2

Van Der Linden



Bousier

A side by side comparison of Van Der Linden (a drain channel (outflow opening 34, 79) configured to receive water from the drain bowl (cup shaped container 31) and discharge water above and into a sink basin (drip tray 36, sink 77) supported by a mounting deck (worktop 4, column 2)) and Hotaling (a drain channel (trough 105, passage) extending through an upwardly extending wall (shown in red) of a drain bowl (water collection tray 101)) is as follows:

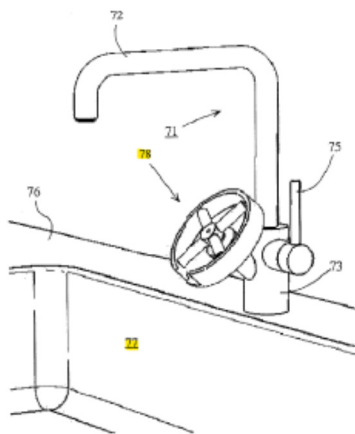


Fig. 5

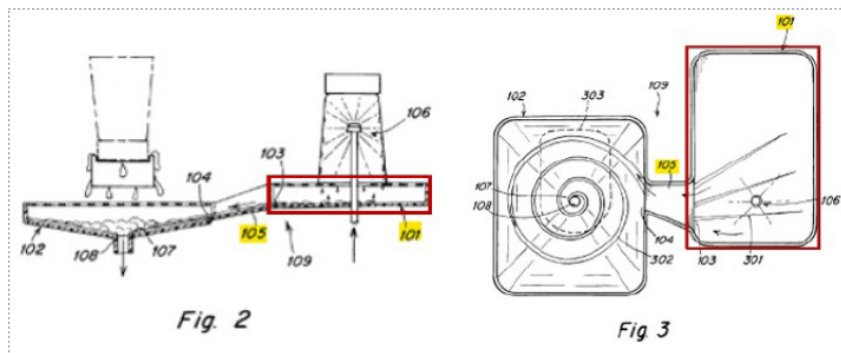


Fig. 2

Fig. 3

Van Der Linden

Hotaling

As set forth above, for all purposes concerning the Petition, Boursier and Van Der Linden are substantially the same with respect to allegedly disclosing a drain bowl including a lower wall, an upwardly extending wall operably coupled to the lower wall, and a drain channel configured to receive water from the drain bowl and discharge water. Similarly, Hotaling and Van Der Linden are substantially the same with respect to allegedly disclosing a drain channel extending through an upwardly extending wall of a drain bowl.

Therefore, Boursier and Hotaling are substantially the same as Van Der Linden. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *15–18 (holding the asserted art substantially the same because it disclosed the same component shape and configuration); *see also Google*, IPR2021-00524, 2021 Pat. App. LEXIS 4899, at *14 (finding the asserted art is substantially the same, in part,

because it discloses the same figures); *Google*, IPR2021-00527, 2021 Pat. App. LEXIS 4923, at *14 (same).

Because (a) Van Der Linden is art of record; and (b) for purposes of the Petition, Boursier and Hotaling and Van Der Linden are the same or substantially the same; then (c) Boursier and Hotaling are the same or substantially the same art that was previously presented to the Office. Accordingly, the first part of the *Advanced Bionics* framework is satisfied with respect to Boursier and Hotaling.

B. Petitioner Failed to Offer Any Evidence That the Office Erred During Prosecution in A Manner Material to The Patentability of the Challenged Claims

Under the second part of the *Advanced Bionics* framework, Petitioner must demonstrate that the Office erred during prosecution in a manner material to the patentability of the challenged claims to avoid a discretionary denial. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *8–9, 19. A threshold consideration is whether the Petitioner sufficiently described how the examiner erred in its evaluation of the asserted prior art (*Becton* factor (e)). *Id.* at *10 n. 10. If the record of the Office’s consideration is not well developed or silent, then a Petitioner may show the Office erred by overlooking something persuasive (*see Becton* factor (c), (e) and (f)). *Id.* at *11–12.

Where however a Petitioner fails to address the material-error requirement or otherwise is silent on this section 325(d) inquiry, the Petitioner fails to meet its

burden and the Board should deny institution. *See, e.g., Wolfspeed, Inc. v. Trustees of Purdue Univ.*, IPR2022-00761, Paper 9, 2022 Pat. App. LEXIS 5500, at *15–16 (PTAB Nov. 8, 2002); *Atrium Med. Corp. v. Bard Peripheral Vascular, Inc.*, IPR2021-01197, Paper 11, 2022 Pat. App. LEXIS 230, at *11 (PTAB Jan. 10, 2022); *Google*, IPR2021-00524, 2021 Pat. App. LEXIS 4899, at *19–21; *Sony Interactive Entm’t LLC v. Terminal Realty, Inc.*, IPR2020-00710, 2020 Pat. App. LEXIS 12354, *12–13 (PTAB Oct. 13, 2020).

As explained in *Atrium*, “[h]aving searched the petition, we discern no express assertion that *any* error was committed by the Office Petitioner leaves the Board to guess or develop its own theory on what error may have been committed.” IPR2021-01197, 2022 Pat. App. LEXIS 230, at *11. “[S]uch speculation [is] unwarranted.” *Id.* Moreover, mere articulation of an unpatentability ground in the Petition, without specific discussion of the purported error in the prosecution history, does not satisfy the *Advanced Bionics* prong-2 requirement that Petitioner demonstrate a material error. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *9, 11, 15–18 (Petitioner does not establish a material error simply by disagreeing with the Office’s conclusion regarding the prior art); *see also Roku, Inc. v. Universal Elec.*, IPR2019-01619, Paper 17, at 10–11 (PTAB May 25, 2021).

1. Petitioner fails to address, let alone establish, a material error by the Office when it previously considered the art

Petitioner recognized the Office’s prior consideration of Thomas and Van Der Linden, as expressly noted in the Petition, but has failed to establish a material error by the Office when the Office previously considered these references. *See* Petition at pp. 7, 28. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *9 (explaining that if “the petitioner fails to make a showing of material error, the Director generally will exercise discretion not to institute *inter partes* review”).

The Board has repeatedly denied institution when a Petitioner fails to make any showing that the examiner materially erred during prosecution. *See, e.g., Microsoft v. Almondnet, Inc.*, IPR2022-01319, Paper 9 at 10–11 (PTAB Jan. 30, 2023) (denying institution because the Petitioner did not make any substantive showing that the examiner erred); *Becton, Dickinson & Co.*, IPR2017-01586, 2017 Pat. App. LEXIS 12983, at *30, 34–35 (noting the petitioner did not point to any examiner error). Here, Petitioner does not make any allegations that the examiner erred when considering the asserted art during examination of the ‘277 Patent. *See generally* Petition. By failing to articulate how the examiner erred when evaluating the asserted art, at best the Petitioner is merely indicating that it disagrees with how the examiner treated the prior art and, therefore, falls short of establishing that institution is proper. *See Advanced Bionics*, IPR2019-01469, 2020 Pat. App. LEXIS 1476, at *9, 11, 15–18; *see also Roku, Inc.*, IPR2019-01619, Paper 17, at 10–11.

It is not enough for the Petitioner to assert that the challenged claims are obvious in light of the prior art. *See Roku, Inc.*, IPR2019-01619, Paper 17, at 10–11. Rather, a petitioner must adequately explain how any “alleged demonstration of obviousness” shows the examiner made an error material to the patentability of the claims. *Id.* at 11–12. It is within the Board’s discretion to deny institution when the petitioner had ample opportunity to discuss the *Becton* factors, “but did not adequately address the analysis.” *Id.* at 13.

It is equally insufficient for Petitioner to cite to the expert testimony of Mr. Cook. Merely pointing to expert testimony without further analysis fails to establish the examiner materially erred. *Nespresso USA, Inc. v. K-Fee System GmbH*, IPR2021-01221, Paper 9, 2022 Pat. App. LEXIS 236, *9 (PTAB Jan. 18, 2022) (merely stating an obviousness analysis supported by expert testimony without providing any further analysis is insufficient to show the Office materially erred); *see also Becton, Dickinson & Co.*, IPR2017-01586, 2017 Pat. App. LEXIS 12983, at *35 (expert testimony was entitled to little or no weight because it failed to provide probative evidence).

Consequently, the Board should exercise its discretion under 35 U.S.C. § 325(d) and deny institution of the Petition given that (i) the identical references relied on by Petitioner (Thomas and Van Der Linden) were previously considered by the Office, (ii) the substantial similarity between the previously considered references

(Thomas and Van Der Linden) and the currently considered references (Shen Wei, Boursier and Hotaling) and (iii) Petitioner's failure to show that the Office erred under its prior consideration of the references, in a manner material to patentability of the challenged claims.

VI. CONCLUSION

For the reasons stated above, the Board should decline to institute the Petition.

Dated: November 22, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 37 CFR 42.24(b)(1)

1. This brief complies with the type-volume limitation of 37 C.F.R. § 42.24(b)(1) because: this brief contains 6,692 words, excluding the parts of the brief exempted by 37 CFR § 42.24(a)(1).

2. This brief complies with the typeface and type style requirements of 37 C.F.R. § 42.6(a)(2) because: this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: November 22, 2023

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e)(4), that service of the foregoing PATENT OWNER PRELIMINARY RESPONSE, was made on the Petitioner as detailed below.

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