

Petition for *Inter Partes* Review of U.S. Patent No. 8,371,282

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Prime Time Toys LLC, Prime Time Toys Ltd.  
and Easebon Services Ltd.  
Petitioners,

v.

Spin Master, Inc.  
Patent Owner.

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Case IPR2023-01348

**PATENT NO. 8,371,282**

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**PETITION FOR *INTER PARTES* REVIEW UNDER  
35 U.S.C. § 312 AND 37 C.F.R. § 42.104**

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**EXHIBIT LIST**

| <b><u>EXHIBIT<br/>NO.</u></b> | <b><u>DESCRIPTION</u></b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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| 1001                          | U.S. Patent No. 8,371,282                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 1002                          | Publication Declaration of Nathaniel E. Frank-White and ThinkGeek Spitballs Internet Archive Webpage (“Spitballs”)                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 1003                          | Bulgarian Patent No. BG110343 and translation (“Peev”)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 1004                          | Transcript of Hearing in ITC Case 337-TA-1325                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 1005                          | “Airsoft Guns: A Double-Edged Sword,” Bleacher Report (2008), available at <a href="https://bleacherreport.com/articles/46402-airsoft-guns-a-double-edged-sword">https://bleacherreport.com/articles/46402-airsoft-guns-a-double-edged-sword</a>                                                                                                                                                                                                                                                                                                                         |
| 1006                          | Patent Owner’s Notice of Patent Priority Dates and Dates of Conception                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 1007                          | Geeknet, Inc. Form 10-Q ( <a href="https://www.sec.gov/Archives/edgar/data/1096199/000114420409057449/v165221_10q.htm">https://www.sec.gov/Archives/edgar/data/1096199/000114420409057449/v165221_10q.htm</a> ).                                                                                                                                                                                                                                                                                                                                                         |
| 1008                          | <a href="https://www.washingtonpost.com/lifestyle/magazine/thinkgeek-the-nerd-company-at-a-crossroads/2013/12/11/c7d579ba-4b12-11e3-9890-a1e0997fb0c0_story.html">ThinkGeek: The nerd company at a crossroads - The Washington Post</a><br><a href="https://www.washingtonpost.com/lifestyle/magazine/thinkgeek-the-nerd-company-at-a-crossroads/2013/12/11/c7d579ba-4b12-11e3-9890-a1e0997fb0c0_story.html">https://www.washingtonpost.com/lifestyle/magazine/thinkgeek-the-nerd-company-at-a-crossroads/2013/12/11/c7d579ba-4b12-11e3-9890-a1e0997fb0c0_story.html</a> |

| <b><u>EXHIBIT<br/>NO.</u></b> | <b><u>DESCRIPTION</u></b>                                                                                                                                                                                                                                      |
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| 1009                          | “Not your kid brother's toy gun” – CNET (2006), available at <a href="https://www.cnet.com/culture/not-your-kid-brothers-toy-gun/">https://www.cnet.com/culture/not-your-kid-brothers-toy-gun/</a>                                                             |
| 1010                          | “Tech: Desk Toys,” Wall Street Journal (2006), available at <a href="https://www.wsj.com/articles/SB116684498725258456">https://www.wsj.com/articles/SB116684498725258456</a>                                                                                  |
| 1011                          | “USB Airsoft Turret,” Inventgeek (2006), available at <a href="http://www.inventgeek.com/usb-airsoft-turret/">www.inventgeek.com/usb-airsoft-turret/</a>                                                                                                       |
| 1012                          | “R/C Missile Launcher – Unstoppable Cube Welfare,” The Green Head (2006), available at <a href="https://www.thegreenhead.com/2006/05/rc-missilelauncher-unstoppable-cube.php">https://www.thegreenhead.com/2006/05/rc-missilelauncher-unstoppable-cube.php</a> |
| 1013                          | 3.31.2023 Deposition Transcript of Ronald Brawer                                                                                                                                                                                                               |
| 1014                          | U.S. Patent No. 6,386,293 to Bartlett                                                                                                                                                                                                                          |
| 1015                          | Order No. 28: Construing Certain Terms of the Asserted Claims                                                                                                                                                                                                  |
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| 1017                          | Declaration of Maureen Reitman, Ph.D.                                                                                                                                                                                                                          |
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| 1019                          | California Senate Office of research, May 2005 (Revised)                                                                                                                                                                                                       |

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| 1020                          | “Not Your Dad’s BB Gun,” Washington Post (2004), available at <a href="https://www.washingtonpost.com/archive/lifestyle/2004/11/26/not-yourdads-bb-gun/6ccffa5e-a5bb-45e2-9a5c-a17de827267c/">https://www.washingtonpost.com/archive/lifestyle/2004/11/26/not-yourdads-bb-gun/6ccffa5e-a5bb-45e2-9a5c-a17de827267c/</a> |
| 1021                          | 10.25.2022 Infringement Contentions Chart US8371282 for Prime Time Toys (excerpted)                                                                                                                                                                                                                                     |
| 1022                          | Korean Patent Publication No. KR 20-2010-0004855 (“Kim”)                                                                                                                                                                                                                                                                |
| 1023                          | “Spitballs Grow up to 200 times their original Size,” YouTube (2010), available at <a href="https://www.youtube.com/watch?v=n-Wje1G1wBA">https://www.youtube.com/watch?v=n-Wje1G1wBA</a>                                                                                                                                |
| 1024                          | Screenshot of “Spitballs Grow up to 200 times their original Size,” YouTube (2010)                                                                                                                                                                                                                                      |
| 1025                          | U.S. Patent No. 8,640,683                                                                                                                                                                                                                                                                                               |
| 1026                          | Translation of Bulgarian Patent Law Section 46(c)(2)                                                                                                                                                                                                                                                                    |
| 1027                          | Declaration of Velislav N. Dramov                                                                                                                                                                                                                                                                                       |
| 1028                          | Bulgarian Patent Office Bulletin Issue No. 7 dated July 31, 2009 and English translation                                                                                                                                                                                                                                |

Petitioners Prime Time Toys LLC, Prime Time Toys Ltd. and Easebon Services Ltd. (collectively “Petitioners”) request *inter partes* review (“IPR”) of claims 1-15, 17, and 19-21 (“Challenged Claims”) of U.S. Patent No. 8,371,282. (“’282 Patent”) (Ex. 1001)

## **I. INTRODUCTION**

Claim 1 is the broadest claim of the ‘282 Patent and has two basic limitations, namely, (1) a projectile launcher and (2) ammunition for that projectile launcher in the form of soft-projectiles made from hydrated super absorbent polymer (“SAP”). Ex. 1001, 9:29-33. Claim 1 is not limited to any particular projectile launcher and the specification describes numerous known launchers. Specifically, the projectile launcher can be in the “form of a gun” or “can have shapes and designs of other devices,” including, “[f]or example, . . . a bow, crossbow, sling shot, hand gun, machine gun, futuristic weapon, catapult, or shaped as any other type of weaponry.” *Id.*, 4:64-5:3.

With respect to superabsorbent polymers, the ‘282 Patent acknowledges that they were invented by the USDA and were commonly used in diapers. *Id.*, 3:37-41. The ‘282 Patent claims to be the first to use a superabsorbent polymer as ammunition in a projectile launcher. However, this is incorrect. The prior art taught “Spitballs,” a soft, spherical superabsorbent polymer ammunition for use in

a blow gun. See Ex. 1002, 14-25. As described in detail below, Spitballs anticipates Claims 1 and 4.

Dependent Claims 2-3, 5-15, 17, and 19-21 recite either additional details of the projectile launcher or the SAP projectiles. As to the projectile launcher, the claims recite known components for utilizing air pressure to launch projectiles. As to the SAP projectiles, the claims recite their shape and size. As described below, these claims are obvious over Bulgarian Patent No. BG110343 (“Peev”, Ex. 1003) in combination with Spitballs.

Specifically, all the projectile launcher limitations of the claims are disclosed in Peev, and all the ammunition limitations are disclosed in Spitballs. Further, this prior art was readily combinable. An expert (Barry Kudrowitz, Ph.D.) hired by the Patent Owner and its exclusive licensee, Hasbro Inc., gave sworn testimony regarding this same prior art and the ‘282 Patent in a proceeding in the United States International Trade Commission entitled *In the Matter of Certain Soft Projectile Launching Devices, Components Thereof, Ammunition, and Products Containing Same*, Investigation No. 337-TA-1325 (“the ITC Case”). In the ITC Case, Dr. Kudrowitz testified that, prior to the asserted patents (the ‘282 Patent and related U.S. Patent No. 8,640,683), a person of ordinary skill in the art (“POSITA”) possessed the technical skills to (i) modify Peev to launch SAP

ammunition and (ii) make the SAP ammunition any size and any softness she wanted.<sup>1</sup> Ex. 1004, 530:5-12, 532:15-23.

And there was motivation to use this prior art soft spherical ammunition with the airsoft guns described in Peev. There was a problem with airsoft guns, they were being used by children and their hard plastic ammunition was causing injuries. Ex. 1016, ¶¶76-77. This problem came to a head in the 2000s and is well documented in numerous articles from that time. In the ITC, Case Dr. Kudrowitz also admitted that this injury problem with airsoft guns was known and that a POSITA would also have known that one solution was to use softer ammunition in place of the hard plastic ammunition. Ex. 1004, 531:16-20, 531:25 -532:9.

Dr. Kudrowitz and Petitioners' expert (Joel Delman) agree, at the time of the alleged invention the POSITA (1) knew about the injury problem, (2) knew one solution was to make the ammunition softer, (3) knew about soft spherical SAP ammunition (Spit Balls) and a few other alternatives, and (4) had the technical skill to combine this ammunition with Peev. As explained by the Supreme Court, undisputed facts like these point not to innovation but to ordinary skill and common sense.

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<sup>1</sup> This testimony is admissible under FRE 801(d)(2)(C) and (D). See *Apple Inc. v. Smartflash LLC*, 2016 Pat. App. LEXIS 13334, 49 (P.T.A.B. November 10, 2016).

*When there is a design need or market pressure to **solve a problem** [injuries caused by airsoft guns] and there are a **finite number of identified, predictable solutions** [e.g., soft SAP ammo], a person of ordinary skill has good reason to **pursue the known options within his or her technical grasp** [use soft SAP ammo in an airsoft gun]. If this leads to the anticipated success, it is likely the product not of innovation but of **ordinary skill and common sense**.*

*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).<sup>2</sup>

Petitioners anticipate that Patent Owner will make four counter arguments.

The first is that the airsoft gun of Peev is not a toy, but rather is used for target practice and hunting. Thus, a POSITA would have no reason to make them more toy-like by replacing the hard plastic ammunition with soft SAP ammunition. But Dr. Kudrowitz admitted that Peev's airsoft gun is used by teens for fun in airsoft games (Ex. 1004, 526:7-12, 432:16-433:4) and this is consistent with a 2008 Bleacher Report article (Ex. 1005) stating that airsoft guns were ***fun toys being used by young boys***.

The second anticipated response is that there was another possible solution, lowering the muzzle velocity. But Dr. Kudrowitz admitted that lowering the muzzle velocity would not reduce the risk of all injuries. He admitted that there

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<sup>2</sup> All emphasis added unless otherwise noted herein.

would still be a risk of bruises, black and blue marks, welts, and eye injuries. Ex. 1004, 533:14-534:18. Even if lowering the muzzle velocity was an option, it is legally irrelevant. As explained by the Federal Circuit, “[o]ur caselaw is clear. It's not necessary to show that a combination is ‘the best option, only that it be a suitable option.’” *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 784, 800 (citing *PAR Pharm., Inc. v. TWI Pharms., Inc.*, 773 F.3d 1186, 1197-98 (Fed. Cir. 2014)).

The third anticipated response is that air guns have been around for over 100 years, and no one thought to combine airsoft guns with soft spherical SAP until the inventors of the ‘282 Patent did so. This argument ignores the fact that soft spherical SAP ammunition (Spitballs) was not invented until 2008. This argument also ignores the fact that the injury problem with airsoft guns came to a head in the 2000s. All of the articles cited by both experts are in this time frame. Ex. 1005; Ex. 1019; Ex. 1020. Thus, the proper time frame for seeking solutions to the injury problem was just the 2000s, and not the prior 100 years.

The fourth anticipated response is that Spitballs and Peev are not physically combinable. Patent Owner may argue that if a POSITA fully hydrates Spitballs, then they will grow to a size (e.g., 15mm) that is too large to fit in the airsoft gun of Peev (6mm). Alternatively, Patent Owner may argue that if a POSITA does not fully hydrate Spitballs so that they will fit in the airsoft gun of Peev, then they will be too hard and not meet the “soft” limitation. This argument is wrong legally and

factually. As to the former, the law does not require that references be physically combinable. “[I]t is ***not necessary that [prior art] be physically combinable*** to render [claims] obvious.” *Allied Erecting and Dismantling Co., Inc. v. Genesis Attachments, LLC*, 825 F.3d 1373, 1381 (Fed. Cir. 2016). “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference[.]” *Id.* As to the latter, Dr. Kudrowitz testified that a POSITA possessed the technical skills to (i) modify Peev to launch SAP ammunition and (ii) make the SAP ammunition any size and any softness she wanted. Ex. 1004, 530:5-12, 532:15-23.

Petitioners also anticipate that Patent Owner will argue that commercial success and industry praise support a finding of non-obviousness.

But the evidence, including testimony from the company who practiced the patent, is that commercial success was due to unclaimed features and features in the prior art. As the Federal Circuit’s seminal *Ormco* decision explains, there can be no nexus under these circumstances:

Evidence of commercial success, or other secondary considerations, is only significant if there is a nexus between the claimed invention and the commercial success. . . . [I]f the commercial success is due to an ***unclaimed feature*** of the device, the commercial success is irrelevant. So too if the feature that creates the

commercial success was *known in the prior art*, the success is not pertinent.

*Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1311-12 (Fed Cir. 2006) (emphasis added; footnotes omitted).

Finally, here, “the objective evidence of non-obviousness simply cannot overcome such a strong prima facie case of obviousness.” *Agrizap, Inc. v. Woodstream Corp.*, 520 F.3d 1337, 1344 (Fed. Cir. 2006).

## **II. MANDATORY NOTICES UNDER 37 C.F.R. § 42.8(a)(1)**

### **A. Real Party-In-Interest Under 37 C.F.R. § 42.8(b)(1)**

Petitioners, Prime Time Toys LLC, Prime Time Toys Ltd. and Easebon Services Ltd., are the real parties-in-interest.

### **B. Related Matters Under 37 C.F.R. § 42.8(b)(2)**

The '282 Patent is subject to an action in the United States International Trade Commission, *In the Matter of Certain Soft Projectile Launching Devices, Components Thereof, Ammunition, and Products Containing Same*, Investigation No. 337-TA-1325, to which Spin Master, Inc. (the Patent Owner), Hasbro, Inc., and Petitioners are parties. A three-day hearing in the ITC Case was held in May of 2023. Only Claims 8, 19 and 20 of the '282 Patent were the subject of the hearing. The parties have fully briefed the issues, including whether these three claims are invalid as obvious. An initial determination from the Administrative

Petition for *Inter Partes* Review of U.S. Patent No. 8,371,282

Law Judge (“ALJ”) is due by October 26, 2023, and a final determination by the Commission is due by February 26, 2024.

The ’282 Patent was also the subject of *Gel Blaster, Inc. v. Hasbro, Inc.*, Case No. 1:22-cv-00828 in the Western District of Texas (“District Court Case”), filed October 11, 2022. The District Court Case was dismissed with prejudice prior to trial. Petitioners were not parties to the District Court Case.

The ’282 Patent was also the subject of *Gel Blaster, Inc. v. Spin Master, Inc.*, IPR2023-00301, filed December 5, 2022. That IPR was terminated before institution based on a settlement between the parties in that IPR.

The ’282 Patent was also the subject of *Splat-R-Ball, LLC, Daisy Manufacturing Company, and S-Beam Precision Products Ltd. v. Spin Master, Inc.*, IPR2023-00772, filed March 24, 2024. That IPR was terminated before institution based on a settlement between the parties in that IPR.

Petitioners concurrently filed an IPR petition for Related U.S. Patent No. 8,640,683 (the “’683 Patent”) (Ex. 1025). Related ’683 Patent is (or was) also the subject of the ITC Case, the District Court Case, *Gel Blaster, Inc. v. Spin Master, Inc.*, IPR2023-00302, filed December 5, 2022 and terminated on June 5, 2023, and *Splat-R-Ball, LLC, Daisy Manufacturing Company, and S-Beam Precision Products Ltd. v. Spin Master, Inc.*, IPR2023-00773, filed March 24, 2023 and terminated on July, 17, 2023.

**C. Lead and Back-Up Counsel Under 37 C.F.R. § 42.8(b)(3)**

Pursuant to 37 C.F.R. §§ 42.8(b)(3) and 42.10(a), Petitioner provides the following designation of lead and back-up counsel, as well as their respective service information.

| Lead Counsel                                                                                                                                                                                                                                            | Back-Up Counsel                                                                                                                                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Kenneth P. George (Reg. No. 30,259)<br>Amster, Rothstein & Ebenstein LLP<br>405 Lexington Avenue<br>New York, NY 10174<br>Telephone: (212) 336-8090<br>Facsimile: (212) 336-8001<br>E-mails: <a href="mailto:kgeorge@arelaw.com">kgeorge@arelaw.com</a> | Brian A. Comack (Reg. No. 45,343)<br>Amster, Rothstein & Ebenstein LLP<br>405 Lexington Avenue<br>New York, NY 10174<br>Telephone: (212) 336-8098<br>Facsimile: (212) 336-8001<br>E-mails: <a href="mailto:bcomack@arelaw.com">bcomack@arelaw.com</a> |

Pursuant to 37 C.F.R. § 42.10(b), a Power of Attorney accompanies this Petition.

**D. Service Information Under 37 C.F.R. § 42.8(b)(4)**

Service information (by e-mail, postal mailing, or hand-delivery) for lead and back-up counsel is provided in the above designation of lead and back-up counsel. Petitioner also consents to electronic service by e-mail at [282-IPR@arelaw.com](mailto:282-IPR@arelaw.com), with cc to [kgeorge@arelaw.com](mailto:kgeorge@arelaw.com).

**III. PAYMENT OF FEES UNDER 37 C.F.R. § 42.103**

The undersigned authorizes the Office to charge the fee (see 37 C.F.R. §42.15(a)(1)) for this Petition to Deposit Account No. 01-1785. Review of 19 claims is requested. The undersigned authorizes payment for any additional fees

that may be due in connection with this Petition.

**IV. GROUNDS FOR STANDING UNDER 37 C.F.R. § 42.104(a)**

Petitioner certifies that the '282 Patent is available for IPR and the estoppel provisions of 35 U.S.C. § 315(e)(1) and 37 C.F.R. §42.104(a) do not bar or estop Petitioner from requesting IPR of any claim of the '282 Patent on the grounds raised herein.

**V. IDENTIFICATION OF CHALLENGE UNDER 37 C.F.R. § 42.104(b) AND RELIEF REQUESTED**

**A. Patent Owner's Claimed Priority Date**

The '282 Patent was filed on May 10, 2010, and Patent Owner asserts that Claims 1-4 are entitled to a February 21, 2010 priority date. Specifically, Patent Owner argued in the ITC Case that "[t]he '282 patent is entitled to a priority date of May 10, 2010" and Claims 1 and 4 "were conceived no later than February 21, 2010" and Claims 2 and 3 "were conceived no later than February 21, 2010." Ex.1006, 1-2. Patent Owner's earlier alleged priority date is irrelevant for purposes of this Petition because all references relied upon herein are prior art based on a priority date of February 21, 2010. priority date.

**B. Prior Art Printed Publications**

Petitioners' challenge is based on the following prior art references, none of which were cited or discussed during prosecution:

**ThinkGeek Spitballs (“Spitballs”)** – published by November 27, 2009, as captured by the Internet Archive, and is prior art under § 102(a)<sup>3</sup>. Spitballs is a listing describing the DuneCraft Spitballs hydrated SAP ammunition available for sale through well-known reseller ThinkGeek.com. Ex. 1002. The PTAB and the Federal Circuit have recognized archived webpages as prior art printed publications. *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374-75 (Fed. Cir. 2021) (relying on Wayback Machine to establish date of publication). *Par Pharm., Inc. v. Jazz Pharms., Inc.*, No. 7,765,107 B2, 2016 WL 7985459, at \*12 (P.T.A.B. July 27, 2016). The Internet Archive crawls webpages, archives them as they existed on a given date, and includes the year/month/day/hour/minute/second on which the webpage was archived in the URL. Ex. 1002, ¶1-7. Ex. 1016, ¶61.

In 2009, ThinkGeek was a wholly owned subsidiary of GeekNet, a publicly traded company listed on NASDAQ. In GeekNet’s September 30, 2009 quarterly report, revenue from E-commerce for the prior three months was stated as 7.104 million dollars. See Ex. 1007, 31. Moreover, a total of 110,149 orders were shipped in this timeframe. By November 2009, ThinkGeek had been in business for ten years and had established a reputation as a vendor of items aimed at “the proudly nerdy, technically savvy and pop-culture-obsessed”. Ex. 1008, 2.

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<sup>3</sup> All citations are to pre-AIA 35 U.S.C. §§ 102/103.

Prior to February 21, 2010, a POSITA (§VII, *infra*), exercising reasonable diligence, could have located Spitballs. ThinkGeek was a well-known toy retailer, in particular with respect to airsoft and nerf-type foam rocket launchers. Ex. 1016, ¶62. For example, one 2006 CNET article highlighted a ThinkGeek Airsoft gun, explaining:

Toy guns have come a long way from the days of Nerf. This one, the Airsoft Submachine Gun featured on ThinkGeek, is about as far from those neon-green pistols as they get. It has freaking LASER SIGHT. And an illuminator flashlight built in. And it's so awesome, it comes with protective goggles. ... If you're one of those types who's so hardcore that you play paintball in tanks, then yeah, maybe you'll like this.

Ex.1009, 1.

The WSJ's 2006 buying guide highlighted the ThinkGeek USB Missile launcher that could "aim and fire foam ordinance" as "one of [ThinkGeek's] top selling toys." Ex.1010, 1-3 (noting ThinkGeek's offering was one of "three popular examples" of a "growing category" of toys). An inventor used ThinkGeek missile launcher components to design a "USB AirSoft Turret." Ex.1011, 1-2. GreenHead includes a May 2006 posting for an "R/C/ Missile Launcher" for "Unstoppable

Cube Warfare” that fires foam missiles that is available “from Thinkgeek.”

Ex.1012, 1.

In October of 2009, ThinkGeek.com featured a separate category for “Cube Warfare” (cube being short for cubicle) that included 20 items, including an airsoft gun, a foam rocket launcher, a rubberband-powered launcher, a catapult, an indoor paintball simulator, an air-powered marshmallow shooter, and other launchers.

Ex.1002, 26-28. A POSITA visiting the ThinkGeek website would have understood the category “Cube Warfare” as containing warfare themed toys that could be used in an office environment. Ex. 1016, ¶63.

Once at ThinkGeek.com, a POSITA could have navigated to “geek toys” and from there to either “Cube Warfare” or “Science Toys” to find the Spitballs listing. Ex.1002, 9-18, 20-25. The page contained an image of the Spitballs packaging and text which is available by clicking an image box. Ex.1002, 20-25. A POSITA would recognize the box contains an image that is part of the Spitballs listing by virtue of the “Zoom” icon beneath the image and the image icon in the upper left corner, and “Additional Images.” Ex.1002, 17-22. Both captures are from November 30, 2009, showing these materials were published together. Ex.1002, 17-22; Ex. 1016, ¶64. The Spitballs listing and associated image are a single publication under §102(a). 3 Annotated Patent Digest §17:24; *Kyocera*

*Wireless Corp. v. International Trade Com’n*, 545 F.3d 1340, 1350-51 (Fed. Cir. 2008).

The aforementioned pages are a single publication as a collection of pages (a post and its corresponding photo) from the same article. To the extent Patent Owner argues these are not a single reference, it would be obvious to combine them because the Spitballs packaging image describes the same product and is directly accessible within the Spitballs description page and they function as a single listing—a POSITA would look to both the image of the packaging of the product and the textual description to understand the full scope of the disclosure and would apply the teachings from both.

Further, there are multiple captures of the Spitballs listing under the category of Cube Warfare, starting from November 30, 2009 and including Jan. 5, 2010 and Feb. 3, 2010. Ex.1002, 14-16, 20-25. These captures, along with the capture for the Spitballs listing in the “Science Toys” category, are all essentially identical in appearance and show that Spitballs product listing was publicly accessible over the intervening time. These four captures are multiple instances of the same publication, the Spitballs listing, and the later captures are relied upon herein for the purpose of showing the extent to which the Spitballs listing was available to the public. Further to this point, as shown at the top of the November 27, 2009 “Science Toys” listing and the top of the January 5, 2010 “Cube Warfare” listing,

the Wayback Machine recorded 166 captures for the “Science Toys” listing and 50 captures for the “Cube Warfare” listing. Ex. 1002, 14, 24.

***Bulgarian Patent No. BG110343 (“Peev”)*** published July 31, 2009 and is prior art under §102(a). Ex.1003; Ex. 1027.

### **C. Relief Requested**

Petitioner requests cancellation of the Challenged Claims as unpatentable. The specific grounds of the challenge are set forth below and supported by the declarations of Mr. Joel Delman (Ex.1016) and Dr. Maureen E. Reitman (Ex.1017).

| Ground | Basis | Claims          | Reference(s)    |
|--------|-------|-----------------|-----------------|
| 1      | §102  | 1, 4            | Spitballs       |
| 2      | §103  | 1-15, 17, 19-21 | Peev, Spitballs |

## **VI. SUMMARY OF THE ’282 PATENT**

### **A. Specification Of The ’282 Patent**

The ’282 Patent relates to “soft-projectile launching devices” for “super absorbent polymer projectiles.” Ex.1001, 1:5-9. The ’282 Patent recognizes projectile launching devices were well-known and included “a variety of different types of launching toys,” including Nerf “blasters.” *Id.*, 1:13-23. The ’282 Patent also recognizes other toy projectile launchers, like paint ball and airsoft guns, were well-known “small projectile systems for gaming and professional training purposes.” *Id.*, 1:56-60.

The '282 Patent is not directed to any particular type of launcher. It discloses “launching devices, such as toys, amateur guns and weaponry,” and states “projection device 10 can be a bow, crossbow, sling shot, hand gun, machine gun, futuristic weapon, catapult, or shaped as any other type of weaponry,” and the “firing mechanism may be based on any of the known ways of firing or launching projectiles or ammunition from a projection device.” *Id.*, 3:45-47, 4:66-5:3, 5:12-15. In the ITC Case, named inventor Ronald Brawer of the '282 Patent testified that the first projectile launcher he used was a straw (*i.e.*, a blow gun) Ex. 1013, 172:9-173:6 (“Q. The first projectile launcher that you utilized was a straw that blew the SAP out of the straw; right? A. Yeah.”) Ex. 1013, 167:18-168:5, 174:13-176:17.

The '282 Patent indicates “[s]uper absorbent polymers (SAPs) were first invented “in the 1960s and are commonly used in personal disposable hygiene products such as diapers, protective underwear, and sanitary napkins” and “are polymers that can absorb an extremely large amount of liquid relative to their own mass.” *Id.*, 1:37-44. Applicant did not inform the PTO that spherical, hydrated superabsorbent polymers were used as toy projectiles prior to the alleged invention.

During prosecution, no Office Actions issued addressing prior art. After a restriction requirement, Applicant elected the claims “drawn to ammunition”

(Ex.1018, 88, 94), and the claims issued following Examiner's amendment to the preamble of claim 1 to clarify the "projectile launcher" (which was not elected) is not part of the claim. *Id.*, 174.

Prior art references cited by the Patent Examiner in charge of the '282 Patent pertained to launching SAPs for use in firefighting. For example, the examiner cited U.S. Patent No. 6,386,293 to Bartlett, which discloses a "method for delivering a concentrated fire retardant solution to either protect the surface from fire, or extinguish the fire when it has begun. The system finds its maximum utility with superabsorbent polymers (hereinafter SAP) such as are used to absorb moisture in diapers." Ex. 1018, 175, Ex. 1014, 1:4-11.

Applicant did not disclose and the Examiner did not cite Spitballs or Peev during prosecution.

#### **B. Claims 1-15, 17, and 19-21 Of The '282 Patent**

The '282 Patent has one independent claim which is broadly directed to the ammunition in the form of hydrated super absorbent polymer that is configured for use with a projectile launcher. Independent Claim 1 is reproduced below with certain language highlighted:

Ammunition configured for use with a projectile launcher comprising: a *plurality of soft-projectiles having the same shape*, each soft projectile being *formed from hydrated super absorbent polymer*.

The dependent claims add features relating to either the ammunition and/or the projectile launcher, including:

- The projectile launcher includes a feed chamber and a magazine (Claims 2, 3, 8 and 11).
- The ammunition is substantially spherical, with a diameter of less than 10 mm or between 4mm and 9mm (Claims 4, 5, 6 and 12).
- The ammunition is formed from a SAP that has a cross linking density sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher (Claims 7 and 13).
- The projectile launcher is a toy or in the shape of a gun (Claims 9 and 10).
- The projectile launcher is designed to use air pressure to launch the soft-projectiles, has a firing mechanism that stores energy independent of a user, or a firing mechanism that directly applies a force to a soft-projectile (Claims 14, 15 and 17).
- The projectile launcher includes a piston, air compression chamber, spring and smaller diameter tube to launch the ammunition (Claims 19 and 20).
- The ammunition is formed from a SAP with an absorbency

sufficiently limited to allow the soft-projectiles to be launched from the projectile launcher without breaking apart. (Claim 21).

## **VII. PERSON OF ORDINARY SKILL IN THE ART**

In the ITC Case, the qualifications of a POSITA were discussed by the ALJ in her claim construction order. Ex. 1015 (Order No. 28: Construing Certain Terms of the Asserted Claims (Markman Claim Construction)).

Patent Owner proposed that a POSITA would have “a bachelor’s degree in mechanical engineering, industrial design, or equivalent, with at least one year of relevant experience designing projectile launching systems but would also be a member of a team, which would include an person with a bachelor’s in materials science, chemistry, or equivalent (e.g., chemical engineering), or has at least one year experience working with materials for use in consumer products.” Patent Owner also stated that “equivalent work experience may substitute for educational experience, and vice versa.” Ex. 1015, 7-8.

Petitioner proposed that a POSITA would be “(i) an individual with a Bachelor's degree in Industrial Design or Mechanical Engineering or (ii) a toy designer with at least five years' experience designing toys (including launchers), with both of (i) and (ii) having access to a chemist knowledgeable regarding super absorbent polymers.” *Id.* at 8.

The Commission Investigative Staff (“Staff”) proposed the following

definition:

A person of ordinary skill in the art would have (i) a Bachelor's degree in Mechanical Engineering, Industrial Design, or the equivalent, with at least one year of experience designing toys (including projectile launching systems), or (ii) at least five years of experience designing toys (including projectile launching systems), with both of (i) and (ii) having experience collaborating with individuals with material science or chemistry backgrounds.

*Id.*

The three definitions are similar. The ALJ held that: “Any differences among the definitions will have little, if any, effect on the claim construction analysis. Thus, all of the proposals are appropriate for a person of ordinary skill in the art for the Asserted Patents.” *Id.*

#### **VIII. CLAIM CONSTRUCTION UNDER 37 C.F.R. § 42.104(b)(3)**

Claim 1 of the ‘282 Patent includes the term “super absorbent polymer.” In the ITC Case the ALJ issued an Order giving this term “its plain and ordinary meaning, i.e., ‘polymer that can absorb an extremely large amount of liquid relative to its own mass.’” (Ex. 1015, 14). Further, the ALJ found that this term was not indefinite in view of the different ranges of absorbency taught in the prior art. (“First, these ranges are consistent with Complainants’ proposed construction

and the extrinsic evidence, that is, a SAP can absorb ‘an extremely large amount of liquid relative to its own mass,’ anywhere between 10 and 1,000 times of the polymer’s own mass.”) (Ex. 1015, 12.).

Claim 1 of the ‘282 Patent includes the preamble “Ammunition configured for use with a projectile launcher.” In the ITC Case the ALJ issued an Order finding this preamble “to be limiting.” (Ex. 1015, 19)

Claim 17 of the ‘282 Patent includes the term “a firing mechanism that directly applies a force to a soft projectile”. Claim 14 of the related ‘683 Patent includes the similar term “a firing mechanism that directly applies a force to the ammunition.” In the ITC Case the ALJ issued an Order giving this term from the ‘683 Patent “its plain and ordinary meaning, i.e., ‘a firing mechanism that directly applies a force to the ammunition.”” (Ex. 1015, 23)

## **IX. SCOPE AND CONTENT OF THE PRIOR ART**

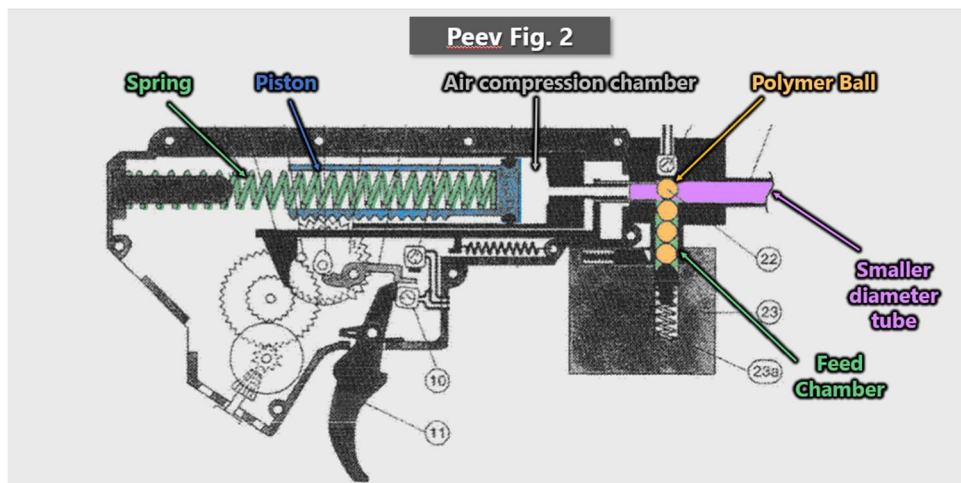
### **A. Peev**

Peev discloses electric airsoft guns that “find application in the sporting gun industry and are used for military emulations or training *or for fun [and entertainment] when conducting airsoft games.*” Ex. 1003, 23. Patent Owner may focus on the sporting gun (hunting and target practice) uses of Peev’s airsoft gun; but Peev also teaches fun uses in airsoft games. As explained by Peev, one advantage of its airsoft gun is that it improves airsoft game *play* by using

techniques that “increase[] the number of shots that can be *played* on one full battery charge.” Ex. 1003, 27; Ex. 1016, ¶53.

Figures 1-3 of Peev respectively show the airsoft gun in the different stages of firing the ammunition. Ex. 1003, 38-40. Figure 1 shows the “SAFE” mode, when the gun cannot be fired. *Id.* Figure 2 shows the trigger pulled and the ammunition 22 ready to be fired. *Id.* Figure 3 shows the ammunition launched into free flight the gun. *Id.* Ex. 1016, ¶54.

Reference is made to Figure 2 of Peev (annotated below) to illustrate the components and operation of the airsoft gun:



Ex. 1003, 39 (annotations added); Ex. 1016, ¶55.

Similar to Claim 1 of the '282 Patent, Peev's ammunition is a plurality of polymer balls 22 (see yellow shading) that are configured to be used as projectiles that are launched from an airsoft gun. Ex. 1003, 31-32. As shown in the above

drawing, each polymer ball 22 has the same shape, i.e., a substantially spherical “ball”. Ex. 1003, 23; Ex. 1016, ¶56.

As shown above, Peev’s airsoft gun is a projectile launcher that, just like Claims 19 and 20 of the ‘282 Patent, includes: (1) an air compression chamber (see the gray arrow); (2) a piston (shaded in blue) disposed within and axially aligned with the air compression chamber; and (3) a spring (shaded in green) operatively arranged to bias the piston toward a rest position (Figures 1 and 3) from a cocked position (Figure 2) within the air compression chamber. Ex. 1003, 31-32 (“ . . .the sector wheel 5 pulls back the *piston 47*, tightens *the spring 46*, pulls back the nozzle 45 . . . and allows the ball 22 . . . to enter the chamber 20 of the *barrel 21* (Fig. 2). . . . [T]he piston 47 . . . under the pressure of the spring 46 accelerates forward and *compresses the air in the cylinder 48* inserting it through the nozzle into the barrel 21 and *firing the ball 22.*”). Ex. 1016, ¶57.

As with Claim 20 of the ‘282 Patent, the airsoft gun also includes a smaller diameter tube (shaded in purple) that is in communication with the air compression chamber. *Id.* A biasing force of the spring is sufficient to cause the piston to move from the cocked position (Figure 2) to the rest position (Figure 3) to force air from the air compression chamber into the smaller diameter tube and cause a soft projectile located at the firing position to accelerate and be launched into free flight from the projectile launcher. *Id.* Ex. 1016, ¶58.

Just like Claim 17 of the ‘282 Patent, these firing mechanisms directly apply a force (i.e., air) to the ammunition. Ex. 1003, 32. As a result, in Figure 3 a polymer ball 22 has been launched from the airsoft gun into free flight. *Id.* Ex. 1016, ¶59.

And just like Claim 8 of the ‘282 Patent, Peev teaches that a plurality of the polymer ball projectiles 22 are disposed within a feed chamber (see green shading). Ex. 1003, 31, 32 and 39. Peev’s airsoft gun is adapted to load the plurality of polymer ball projectiles 22 from the feed chamber to a firing position within the projectile launcher. *Id.* Indeed, the topmost ball 22 is in the smaller diameter tube (shaded in purple), ready to be fired. *Id.* Ex. 1016, ¶60.

The launcher of Peev includes all launcher components recited in the Challenged Claims. The only relevant difference between the Peev airsoft gun and the Challenged Claims is that Peev does not disclose that its spherical bullets can be soft hydrated SAP.

## **B. Spitballs**

Spitballs are soft spherical SAP projectiles that can be launched out of projectile launchers. The picture of the Spitballs product packaging shows both un-hydrated balls (in plastic bag, lower middle) and hydrated balls (picture on packaging, bottom left, and in front of the packaging, bottom right) (Ex. 1002, 18; Ex. 1016, ¶65):



The packaging shows a projectile launcher in the form of a cylindrical tube, shown on the packaging in a background cartoon with a child launching a Spitball. Ex. 1002, 17-22, Ex. 1016, ¶¶66. The child's blue eyes are at the top with her or his nose between them and a hand in front of their nose. The hand is holding a white Spitball projectile launching tube to the child's mouth. And shown immediately behind the plastic containing the Spitballs, the tube launches a cartoon spit ball. The Spitballs product packaging also says that the balls "grow[] 200x their size,"

that they “slip, slide, bounce, and explode,” and that they are “fun to throw.” Ex. 1016, ¶66.

The description of Spitballs explains that “Spitballs start out as tiny balls and expand 200 times when stuck in water.” Ex. 1002, 21. After hydration, “[t]hey are slimy and squishy.” *Id.* Spitballs “[w]ill bounce and/or explode into mushy parts on impact (depending on the force you throw them)” and that the balls are “spherical polymers.” *Id.* “Spitballs grow to about 0.6" in diameter (the longer they absorb water, the bigger they grow).” *Id.*; Ex. 1016, ¶67.

The description of Spitballs also shows multiple Spitballs in a person’s hand and a bowl of spit balls, Ex. 1002, as reproduced below:



As shown above, the Spitballs packaging included a plastic packet that contains over 150 dehydrated SAPs. *See* Ex. 1002, 21 (packet is located directly above “They Slip, Slide, Bounce & Explode”). The Spitballs packaging teaches to hydrate the dehydrated Spit Balls by emptying them into a bowl or cup of water. *See* Ex. 1002, 21. The packaging teaches that the dehydrated Spitballs can “Grow[] 200x their size” as they absorb water—the “more water you add, the bigger your Spitballs will get!” Ex. 1002, 21; Ex. 1016, ¶68.

The packaging teaches to launch the hydrated SAP Spitballs through a tube, just like was done with conventional wadded up paper spitballs. As shown by the yellow highlighting below, the front of the packaging includes a drawing of a person holding a straw and launching a hydrated SAP Spitball from a tube. Ex. 1016, ¶69.



Ex.1002, 18 (annotated and cropped).

As to Spitballs, in the ITC Case Patent Owner's expert, Dr. Kudrowitz, admitted that the Spitballs packaging explicitly teaches and shows the use of a straw to launch the Spitballs.

Q. *Does the Spit Balls packaging* in any way, words or graphics, teach to launch the Spit Balls product through a tube?

A. The graphics indicates someone shooting a spitball.

Q. Through what?

A. Some form, I think it's some form of tube.

Ex. 1004, 500:14-20.<sup>4</sup>

Dr. Kudrowitz similarly admitted that the product name Spitballs teaches the use of a straw as a launcher:

Q. . . . What about the *name Spit Balls*, does that teach someone to use a tube?

A. I think it's invoking the traditional term "spitball" that you *shoot* a wad of paper *through a straw*.

Ex. 1004, 501:2-9.

Thus, Spitballs teaches both a projectile launcher (a tube) and to launch soft spherical SAP projectiles from a launcher.

## **X. GROUNDS FOR PETITION**

### **A. Ground 1 - Spitballs anticipates Claims 1 and 4**

#### **1. Claim 1 – “Ammunition configured for use with a projectile launcher . . .”**

Spitballs discloses this limitation, which was found to be limiting by the ALJ in the ITC Case. Spitballs’ packaging depicts a person launching a projectile (“Spitball”) using a tube-shaped projectile launcher. Ex. 1016, ¶70. Dr. Kudrowitz confirms that the name Spitballs is also a teaching to shoot the Spitballs through a tube. Ex. 1004, 501:2-9. Spitballs are ammunition configured for use with a projectile launcher (e.g., a blow gun/tube).

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<sup>4</sup> Dr. Kudrowitz was referring to the same graphics as shown on the actual product.

2. **Claim 1 – “. . . a plurality of soft-projectiles having the same shape . . .”**

Spitballs discloses this limitation. Spitballs have the same shape (i.e., substantially spherical). Ex.1002, 21 (“awesome spherical polymers.”). Spitballs’ packaging depicts numerous dehydrated Spitballs in a bag and several hydrated spherical Spitballs in the bottom-left corner of the package, and eight hydrated spherical Spitballs placed in front of the bottom right corner of the package. The ThinkGeek listing also includes images of a many hydrated SAP spheres resting in the hand of a person, and placed in a bowl. These images all show that Sptiballs are a *plurality* of small, clear beads having the *same substantially spherical shape* both when hydrated. Ex.1002, 21 (“Contains: 2g of Spitballs (about 150 or so).”). Ex. 1016, ¶71; §IX.B.



Squishy Fun



Spitballs!

Spitballs also teaches soft-projectiles. Ex.1002, 21 (“Spitballs start off as small hard little spheres. Soak them in water for about 4 hours (or overnight for best results) and they will absorb water and grow up to 200 times their original size.”). After soaking in water, Spitballs become “slimy and squishy,” and “[i]f you throw them gently, they will bounce” or “[i]f you throw them hard enough, they will explode into mushy pieces.” Ex.1002, 21. A POSITA would have understood a “squishy” sphere that bounces and can “explode into mushy pieces” when it hits a target is a “soft-projectile.” The “squishy” and “mushy” nature of the projectile and the ability to “explode” on impact will reduce the force of the impact, such that a POSITA would have understood it is softer than, e.g., a hard plastic projectile. Further, they are “soft-projectiles” by virtue of being hydrated SAPs that absorb 100x or more their weight in water. Ex. 1016, ¶72.

**3. Claim 1 – “. . . each soft projectile being formed from hydrated super absorbent polymer.”**

Spitballs discloses this limitation. Ex. 1017, ¶¶ 55-73. In the ITC Case the ALJ construed “super absorbent polymer” to mean a “polymer that can absorb an extremely large amount of liquid relative to its own mass.” First, Spitballs are “spherical *polymers*.” Ex.1002, 21. Second, Spitballs can “Grow[] 200x Their Size!” when hydrated. Ex.1002, 18, 21 (when soaked “in water for about 4 hours (or overnight for best results),” they “will absorb water and grow up to 200 times their original size.”). Ex. 1016, ¶73.

Growing “200 times” teaches “an extremely large amount of liquid relative to its own mass” and is an order of magnitude larger than the ALJ’s lower limit of “10 times.” Ex. 1017, ¶¶62-66. Whether the reference to “200 times their original size” refers to 200 times the volume or 200 times the mass is irrelevant, because if the Spitballs grow “200 times” in volume, it be understood to have grown 138 times in mass. Ex. 1017, ¶¶67-73.

Spitballs further confirms they have well-known properties associated with SAPs. Ex. 1017, ¶¶ 55-73. For example, Spitballs deform under pressure (i.e., are “squishy”) yet retain their shape without losing water when compressed (i.e., are “squishy” and “bounce”). Ex.1002, 21; Ex. 1017, ¶62. Further, Spitballs break apart (“explode into mushy pieces”) under sufficient pressure. *Id.*

Spitballs teaches all of the limitations of Claim 1 and thus anticipates Claim 1. Ex. 1016, ¶74.

**4. Claim 4 – “The ammunition of claim 1, wherein the soft-projectiles are substantially spherical.”**

Spitballs disclose the limitations of claim 1. §X.A.1-3. Spitballs also disclose the additional limitation of Claim 4. Ex.1002, 18, 21 (Spitballs are described as “spherical polymers” and are depicted in every image as being substantially spherical, see §X.A.2 above). Thus, Spitballs anticipates Claim 4. Ex. 1016, ¶75.

**B. Ground 2 – Peev in combination with Spitballs renders Claims 1-15, 17 and 19-21 obvious**

**1. Motivation to Combine Peev and Spitballs**

As explained by the Supreme Court, one rationale for combining prior references begins with the need to solve a problem:

When there is a design need or market pressure to *solve a problem* and there are a *finite number of identified, predictable solutions*, a person of ordinary skill has good reason to *pursue the known options within his or her technical grasp*. If this leads to the anticipated success, it is likely the product not of innovation but of *ordinary skill and common sense*.

*KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

Peev discloses an airsoft gun. Prior to 2010 it was known that while airsoft guns are a lot of fun to play with, they fire hard plastic ammunition, and that ammunition can hurt and even cause injury. In a 2008 article from Bleacher Report, entitled “Airsoft Guns: A Double Edge Sword”, the author acknowledges that airsoft guns are fun to play with, but at the same time there is a risk of injury because the rounds are made of hard plastic and they can “crack the skin and even cause minor bleeding.” Ex. 1005, 3; Ex. 1016, ¶76.

In the ITC Case, Patent Owner's expert, Dr. Kudrowitz agreed that prior to 2010, the POSITA knew that airsoft gun ammunition could cause harm:

Q. Okay. And do you agree that a person of ordinary skill in the art ***knew prior to 2010 that Airsoft guns could cause serious harm*** for those who get hit by the ammunition?

A. I think ***people would know*** that you could – you ***could be harmed by the ammunition.***

Ex. 1004, 531:16-20.

Dr. Kudrowitz also cited articles from the mid-2000s that discuss the injury problem caused by airsoft gun ammunition. Specifically, Dr. Kudrowitz cited the “California Senate Office of Research, May 2005 (Revised)” report which stated:

Various references largely agree that at minimum ***damage to the human eye*** can occur from gun discharging pellet or BB at muzzle velocity of 130 fps and that ***penetration of skin and bone*** can occur at 350 fps.

Ex. 1019, 9; Ex. 1004, 434:6-16.

Dr. Kudrowitz also cited a 2004 Washington Post article entitled “Not Your Dad’s BB Gun” (CX-0584), which also reported on the injury problem:

Around 350 feet per second is a figure you want to keep in mind," says Beeman. "At ***300 to 400 fps, that's where***

*penetration occurs in a human skin. Below 350 fps*, it is generally considered capable of only *limited harm*.

*Above 350* is considered *very harmful or lethal*. You go into the skull probably at around 500.

Ex. 1020, 3; Ex. 1004, 433:18-434:5.

Dr. Kudrowitz also admitted that lowering the muzzle velocity below 350 feet per second would not reduce the risk of all injuries. He admitted that there would still be a risk of bruises, black and blue marks, welts, and eye injuries.

Q. Are you saying that a muzzle velocity below 350 feet per second, there's no chance of injury?

A. No, that's not what I'm saying.

....

Q. You agree that there could be injury that's caused by a hard plastic sphere that's shot out of an Airsoft gun below 350 feet per second, correct?

A. Sure.

Q. Injury could be bruising, right?

A. Yes.

Q. There could be black and blue marks below 350 feet per second?

A. Yes.

Q. Welts?

A. Yes.

Ex. 1004, 533:14-534:18.

As to *KSR*'s question of whether there were "a finite number of identified, predictable solutions" to this problem, Dr. Kudrowitz admitted that prior to 2010, a POSITA knew that one way to make a hard projectile less likely to cause injury would be to make it softer:

Q. And a person of ordinary skill in the art would have known in 2009 that another way to make a projectile less likely to cause injury would be to make it softer, correct?

A. I believe I testified to that.

Q. So you agree that a *person of ordinary skill in the art would have known in 2009* that another way to make a projectile *less likely to cause injury* would be to *make it softer*.

A. *That's another way to do it.*

Ex. 1004, 531:25-532:9.

Spitballs were softer projectiles ("Will bounce and/or explode into mushy parts on impact" Ex. 1002, 21) that could be used in place of the hard spherical plastic ammunition. Ex. 1016, ¶77. Dr. Kudrowitz admitted several times that the Spitballs packaging taught a POSITA that Spitballs break apart when they hit a

target. Ex. 1004, 462:3-15, 475:13-15. (“Q. And, as you pointed out before, the *SAP Spit Balls also explode on contact*, correct? A. *Correct.*”).

There was a finite number of ammunition options that a POSITA could have considered that would have a reasonable expectation of success, including rubber, cork, foam, and soft plastics, such as SAPs. SAPs had a significant advantage in that SAPs were known to be easily adjustable. Ex. 1016, ¶78; Ex. 1017, ¶¶36-39, 46-48. Dr. Kudrowitz admitted that a POSITA would have known how to make a SAP projectile (like Spit Balls) that is *spherical and soft, and would fit inside a airsoft* gun as of 2010:

Q. So as of 2010, a person of ordinary skill in the art knew how to make a SAP projectile that's spherical and soft that would fit inside a Airsoft gun, correct?

A. Those didn't exist at the time, but I think *a person of ordinary skill would be able to make one*, if you asked them to.

Ex. 1004, 529:21-530:12.

As such, replacing hard plastic projectiles in an airsoft gun with soft SAP projectiles was well within the technical grasp of a POSITA as of 2009. A POSITA would have also known that airsoft guns could be easily adjusted. A POSITA could change the spring pressure to avoid any premature breakage of SAP

projectile or could change the size of the air compression chamber to regulate the amount of force that would be exerted on the SAP projectiles. Ex. 1016, ¶¶79-80.

Dr. Kudrowitz admitted that in 2009, it was within the technical grasp for a POSITA to modify airsoft guns to launch soft SAP projectiles in place of hard plastic spheres:

Q. Sure. In ***2009 was it within the technical grasp*** of a person of ordinary skill in the art to ***modify Airsoft guns such as Peev to launch soft SAP projectiles*** in place of the hard plastic spheres that the Airsoft guns used?

A. I see. If someone was asked to do so, ***they would have the ability to do that.***

Q. It was in their technical skills to do that, correct?

A. Sure.

Ex. 1004, 532:15-23.

As of the Challenged Claims' priority date, a POSITA (1) knew about the injury problem caused by airsoft guns (such as Peev), (2) knew one solution was to make the ammunition softer, (3) knew that there was prior art soft SAP ammunition available (Spit Balls) and few other alternatives, and (4) had the technical skill to combine this soft ammunition with Peev.

As of the alleged priority date, a POSITA would also have been motivated to combine Peev with Spitballs. Peev and Spitballs are in the same field of endeavor,

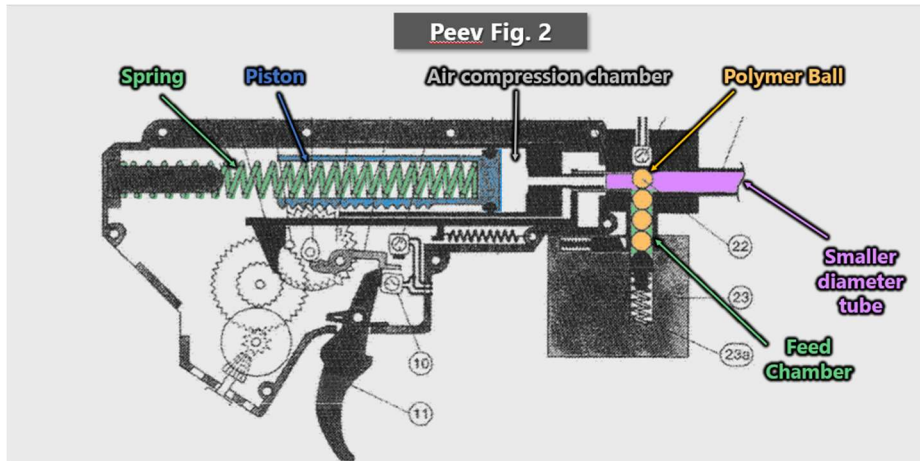
namely, launchers and ammunition used for fun. Ex. 1016, ¶81. *Tyco Healthcare Grp. LP v. Ethicon Endo- Surgery, Inc.*, 774 F.3d 968, 978 (Fed. Cir. 2014) (finding motivation to combine where two references were “clearly within a common field of endeavor”). Peev teaches an airsoft gun that can be used for fun in games that launches spherical bullets. Spitballs teaches spherical ammunition that can be launched for fun and games. In fact, airsoft guns and Spitballs were both found in the Cube Warfare section (“Cube” is short for cubicle) of the ThinkGeek website. Ex. 1016, ¶81; §V.B.

A POSITA would have recognized combining air guns, such as Peev’s toy gun with Spitballs’ hydrated SAP projectiles, is a simple substitution of one known element (spherical hydrated SAP soft-projectiles) for another known element (Peev’s spherical hard bullets) to obtain predictable results (a safer air gun that preserves the fun of the gun). Ex. 1016, ¶82.

As discussed below, not only is there a motivation to combine Peev and Spitballs, but these references combine to teach all of the elements of the Challenged Claims.

**2. Claim 1 – “Ammunition configured for use with a projectile launcher . . .”**

Peev teaches a plurality of hard polymer spheres that are ammunition configured for use with the projectile launcher of Peev. Ex. 1016, ¶83.



**3. Claim 1 – “. . . a plurality of soft-projectiles having the same shape . . .”**

Peev in combination with Spitballs renders this limitation obvious. Peev discloses a plurality of “spherical bullets” (i.e., projectiles) having the same shape (i.e., substantially spherical). §IX.A. Spitballs discloses a plurality of soft spherical projectiles having the same shape. §IX.B. A POSITA would have been motivated to use to use the plurality of soft projectiles having the same spherical shape (Spitballs) in place of the plurality of hard projectiles having the same spherical shape of Peev for the reasons set forth in § X.B.1. Ex. 1016, ¶84.

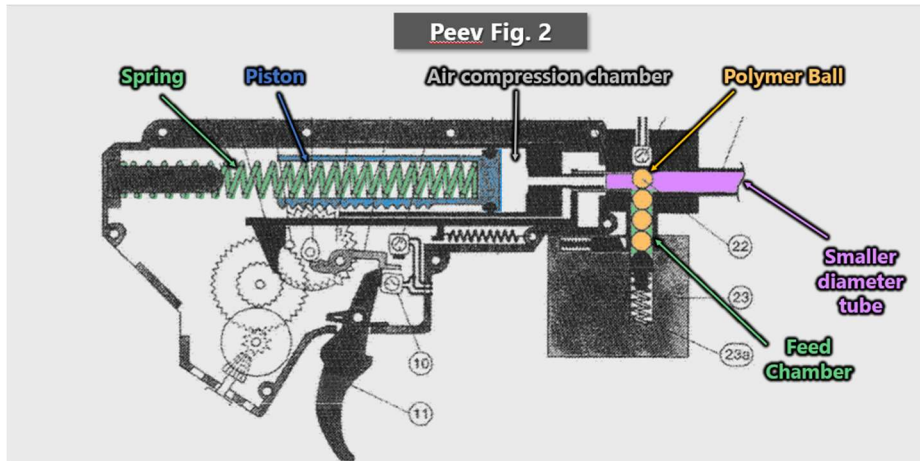
**4. Claim 1 – “. . . each soft projectile being formed from hydrated super absorbent polymer.”**

Peev in combination with Spitballs renders obvious this limitation. Spitballs discloses soft projectiles formed from hydrated SAPs. Ex. 1016, ¶85; § IX.B. A POSITA would have been motivated to use Spitballs’ hydrated SAP projectiles as ammunition in Peev’s air gun (in place of the hard ammunition) for the reasons set

forth in § X.B.1. Peev in combination with Spitballs renders Claim 1 obvious. Ex. 1016, ¶86.

**5. Claim 2: “The ammunition of claim 1, wherein the ammunition is disposed within a feed chamber of the projectile launcher.”**

Peev in combination with Spitballs renders Claim 1 obvious. §X.B.2-4. Peev discloses the limitation added by this claim. Peev discloses a projectile launcher having a feed chamber for loading a projectile from the feed chamber to a firing position. See Ex. 1003, 31-32. As shown in the annotated Peev drawing below, the feed chamber is highlighted in green and the ammunition is highlighted in yellow. At the time of the alleged conception date, it would have been obvious to a POSITA to replace the hard spherical ammunition in Peev’s feed chamber with soft-spherical SAP ammunition (Spitballs) for the reasons set forth in § X.B.1. As Mr. Delman explains and Dr. Kudrowitz admits, it would have been well within the technical grasp of a POSITA to modify Airsoft guns such as Peev to launch soft SAP projectiles. Ex. 1004, 529:21-530:12, 532:15-23. Ex. 1016, ¶87. Peev in combination with Spitballs renders Claim 2 obvious. Ex. 1016, ¶88.



**6. Claim 3: “The ammunition of claim 2, wherein the feed chamber is in selective communication with a barrel of the projectile launcher.”**

Peev in combination with Spitballs renders Claim 2 obvious. §X.B.5. Peev discloses the limitation added by this claim. Peev teaches that “the sector wheel 5 pulls back the piston 47, tightens the spring 46, pulls back the nozzle 45 through the connecting plate 44 and allows the ball 22 under the pressure of the spring 23a to enter the chamber of the barrel 21.” Subsequently, “the connecting plate ... returns forward, pushing the nozzle 45 forward, and it inserts the ball 22 into the barrel 21.” Ex. 1003, 32. Accordingly, the nozzle member sometimes blocks the feed chamber from providing ammunition into the barrel, and sometimes permits the feed chamber to provide ammunition into the barrel. Ex. 1016, ¶89. Peev in combination with Spitballs renders Claim 3 obvious. Ex. 1016, ¶90.

**7. Claim 4: “The ammunition of claim 1, wherein the soft projectiles are substantially spherical.”**

Peev in combination with Spitballs renders Claim 1 obvious. §X.B.2-4. Peev and Spitballs disclose this claim. Spitballs teaches “soft-projectiles [that] are substantially spherical.” §IX.B. Peev likewise discloses “polymer balls.” Ex. 1003, 23. A POSITA would have found it obvious to use Spitballs’ substantially spherical soft-projectiles in place of Peev’s “polymer balls,” for the reasons set forth in § X.B.1 and would have been motivated to make hydrated SAP ammo spherical to minimize modifications needed (if any) and to ensure the gun works optimally. Ex. 1016, ¶¶91; Ex. 1017, ¶¶ 36-39, 46-48, 50. Peev in combination with Spitballs renders Claim 4 obvious. Ex. 1016, ¶¶92.

**8. Claim 5: “The ammunition of claim 4, wherein the soft-projectiles have a diameter of less than about 10 millimeters.”**

Peev in combination with Spitballs renders Claim 4 obvious. §X.B.7. Peev in view of Spitballs renders obvious this claim. Peev teaches an airsoft gun, described as using polymer balls with a diameter of 6 mm. Ex. 1003, 23. A POSITA would have known how to adjust the size of hydrated Spitballs to obtain a 6mm soft-projectile. Moreover, a POSITA would have known how to adjust the hydrated size of Spitballs in order to obtain soft projectiles having a diameter of less than about 10 mm. Ex. 1016, ¶¶93; Ex. 1017, ¶¶ 36-39, 46-48, 51, 52. Peev in combination with Spitballs renders Claim 5 obvious. Ex. 1016, ¶¶94.

**9. Claim 6: “The ammunition of claim 4, wherein the soft-projectiles have a diameter greater than about 4 mm and less than about 9 mm.”**

Peev in combination with Spitballs renders Claim 4 obvious. §X.B.7. Peev in view of Spitballs renders obvious this claim. Peev teaches an airsoft gun, described as using polymer balls with a diameter of 6 mm. Ex. 1003, 23. A POSITA would have known to adjust the size of hydrated Spitballs to obtain a 6mm soft-projectile. Moreover, a POSITA would have known how to adjust the hydrated size of Spitballs in order to obtain soft projectiles having a diameter of greater than about 4 mm and less than about 9 mm. Ex. 1016, ¶¶95; Ex. 1017, ¶¶36-39, 46-48, 51, 52. Peev in combination with Spitballs renders Claim 6 obvious. Ex. 1016, ¶¶96.

**10. Claim 7: “The ammunition of claim 2, wherein the super absorbent polymer has a crosslinking density sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher.”**

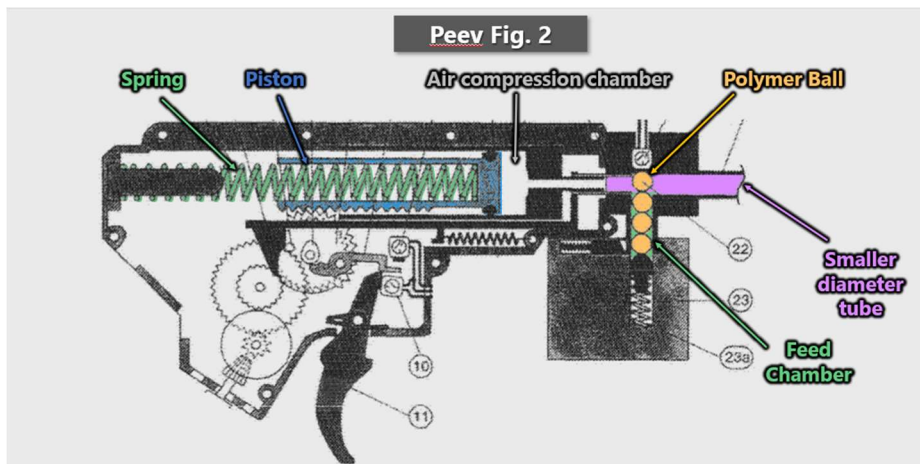
Peev in combination with Spitballs renders Claim 2 obvious. §X.B.5. Spitballs discloses the limitation added by this claim. Patent Owner contends this claim limitation is met so long as the projectile does not break apart when launched from a launcher. Ex.1021, 18-19. Spitballs can withstand compressive forces, such as bouncing. Ex.1002, 21 (“If you throw them gently, they will bounce”; “Will bounce ... on impact.”). Spitballs can “explode into mushy parts on impact” and are shown being launched by air pressure. Ex.1002, 18, 21. Because Spitballs can

withstand compressive forces associated with bouncing and can fly through the air and explode on impact, a POSITA would have understood Spitballs will not break apart when launched from a projectile launcher via air pressure and, thus, have a sufficient crosslinking density under Patent Owner's interpretation of this claim. Ex. 1016, ¶97.

Even if not explicitly taught, a POSITA would have found it obvious in view of Spitballs and the knowledge of a POSITA to design a hydrated SAP ammo that does not break apart when launched from a projectile launcher. Because Spitballs can “bounce,” a POSITA would have understood they can withstand force (e.g., air-pressure launching forces). *Id.* A POSITA would have understood if a hydrated SAP broke apart when launched, routine modifications should be made to the hydrated SAP and/or the projectile launcher to prevent the projectile from breaking apart. For example, in order to prevent the projectile from breaking apart, according to one approach, a POSITA would have adjusted the firing force of an air gun by using a lighter spring and/or reducing the difference in diameter between the air compression chamber and the barrel. Similarly, according to another approach, a POSITA would have designed hydrated SAPs to withstand greater compressive forces (e.g., air pressure supplied during firing) by increasing the crosslinking of the polymer. Ex. 1016, ¶98; Ex. 1017, ¶¶ 28-30, 36-39, 46-48, 53. Peev in combination with Spitballs renders Claim 7 obvious. Ex. 1016, ¶99.

11. **Claim 8: “A projectile launcher including the ammunition of claim 1 disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position.”**

Peev in combination with Spitballs renders obvious “the ammunition of Claim 1.” §X.B.2-4. Peev in combination with Spitballs renders obvious this claim. Peev discloses a projectile launcher having a feed chamber, wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position. See Ex. 1003, 31-32. As shown, annotated below, in Fig. 2 of Peev a feed chamber (highlighted in green) containing projectiles includes spring 23 for loading the projectiles 22 (highlighted in yellow) into a firing position within the barrel of the launcher. See Ex. 1003, 31-32, 39. Ex. 1016, ¶100.



At the time of the alleged conception date, it would have been obvious to a POSITA to replace the hard spherical ammunition in Peev’s feed chamber with soft-spherical SAP ammunition (Spitballs) for the reasons set forth in Ex. 1016,

¶101; § X.B.1. As Mr. Delman explains and Dr. Kudrowitz admits, it would have been well within the technical grasp of a POSITA to modify Airsoft guns such as Peev to launch soft SAP projectiles. Ex. 1004, 529:21-530:12, 532:15-23. Ex. 1016, ¶¶78-79. Peev in combination with Spitballs renders Claim 8 obvious. Ex. 1016, ¶102.

**12. Claim 9: “The projectile launcher of claim 8, wherein the projectile launcher is a toy.”**

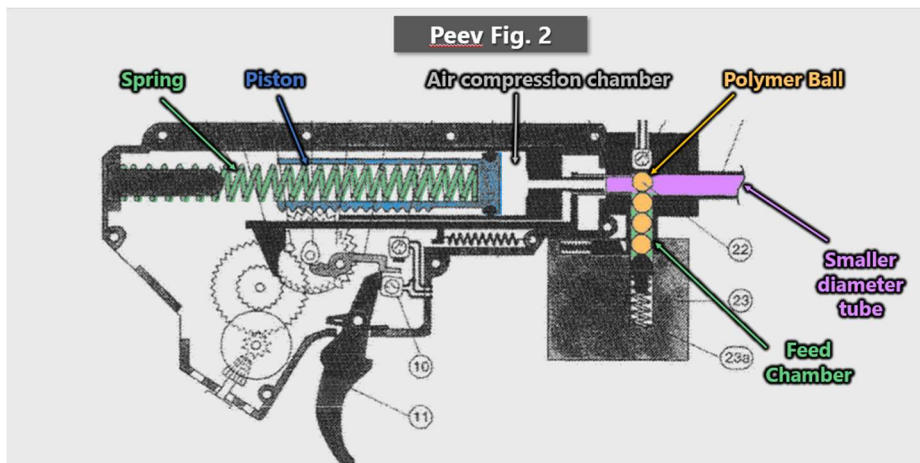
Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11. Peev in combination with Spitballs renders obvious this claim. Peev discloses that electric airsoft guns can be used for fun in airsoft games. Ex. 1003, 23. An airsoft gun used for fun and games, as described in Peev, is a toy. Ex. 1016, ¶103. Peev in combination with Spitballs renders Claim 9 obvious. Ex. 1016, ¶104.

**13. Claim 10: “The projectile launcher of claim 8, wherein the projectile launcher is in the shape of a gun.”**

Peev in combination with Spitballs renders obvious Claim 8. §X.B.11. Peev in combination with Spitballs renders obvious this claim. Peev discloses a projectile launcher in the shape of a gun Ex. 1003, 23 (“Electric airsoft guns[1] externally represent a copy of real firearms”) Further, Figures 1-3 of Peev depict a gun-shaped projectile launcher. See Ex. 1003, 39-41. Ex. 1016, ¶105. Peev in combination with Spitballs renders Claim 10 obvious. Ex. 1016, ¶106.

**14. Claim 11: “The projectile launcher of claim 8, wherein the feed chamber is provided within a magazine.”**

Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11. Peev in combination with Spitballs renders obvious this claim. As shown in Figure 2 of Peev, annotated below, Peev discloses a feed chamber that includes storage for projectiles, *i.e.* a magazine. See Ex. 1003, 39. The ‘282 Patent states that a magazine can be “any container that holds super absorbent polymer projectiles,” it can be “of any shape size or volume.” Ex. 1, 3:30-35; Ex. 1016, ¶107. Peev in combination with Spitballs renders Claim 11 obvious. Ex. 1016, ¶108.



**15. Claim 12: “The projectile launcher of claim 8, wherein the soft-projectiles are substantially spherical.”**

Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11. Peev in combination with Spitballs renders obvious this claim. §§X.B.7; Ex. 1016, ¶¶109-110.

**16. Claim 13: “The projectile launcher of claim 8, wherein the super absorbent polymer has a cross linking density sufficient to prevent the soft-projectiles from breaking apart when launched from the projectile launcher.”**

Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11.

Spitballs discloses the limitation added by this claim. Patent Owner contends this claim is met so long as the projectile does not break apart when launched from a launcher. Ex.1021, 18-19. Spitballs can withstand compressive forces, such as bouncing. Ex.1002, 21 (“If you throw them gently, they will bounce”; “Will bounce ... on impact.”). Spitballs can “explode into mushy parts on impact” and are shown being launched by air pressure. Ex.1002, 21. Because Spitballs can withstand compressive forces associated with bouncing and can fly through the air and explode on impact, a POSITA would have understood Spitballs will not break apart when launched from a projectile launcher via air pressure and, thus, have a sufficient crosslinking density under Patent Owner’s interpretation of this claim. Ex. 1016, ¶111.

Even if not explicitly taught, a POSITA would have found it obvious in view of Spitballs and the knowledge of a POSITA to design a hydrated SAP ammo that does not break apart when launched from a projectile launcher. Because Spitballs can “bounce,” a POSITA would have understood they can withstand force (e.g., air-pressure launching forces). *Id.* A POSITA would have understood if a hydrated

SAP broke apart when launched, routine modifications should be made to the hydrated SAP and/or the projectile launcher to prevent the projectile from breaking apart. For example, in order to prevent the projectile from breaking apart, according to one approach, a POSITA would have adjusted the firing force of an air gun by using a lighter spring and/or reducing the difference in diameter between the air compression chamber and the barrel. Similarly, according to another approach, a POSITA would have designed hydrated SAPs to withstand greater compressive forces (e.g., air pressure supplied during firing) by increasing the crosslinking of the polymer. Ex. 1016, ¶112; Ex. 1017, ¶¶ 28-30, 36-39, 46-48, 53. Peev in combination with Spitballs renders Claim 13 obvious. Ex. 1016, ¶113.

**17. Claim 14: “The projectile launcher of claim 8, wherein the projectile launcher is designed to use air pressure to launch the soft-projectiles.”**

Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11. Peev in combination with Spitballs renders obvious this claim. Ex. 1003, 32. Peev teaches the use of air pressure to launch a projectile. Specifically, “piston 47, under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21 and firing ball 22.” Ex. 1003, 32. A POSITA would have been motivated to use the plurality of soft projectiles having the same spherical shape (Spitballs) in place of the plurality of hard projectiles having the same spherical shape of Peev for the reasons set forth in

§ X.B.1., Ex. 1016 ¶114. Peev in combination with Spitballs renders Claim 14 obvious. Ex. 1016, ¶115.

**18. Claim 15: “The projectile launcher of claim 8, further comprising a firing mechanism that stores energy independent of a user.”**

Peev in combination with Spitballs renders Claim 8 obvious. §X.B.11. Peev in combination with Spitballs renders obvious this claim. Peev describes an electric motor 30, which drives a sector gear wheel 5. When driven by the motor, the sector wheel “pulls back the piston 47” and “tightens the spring 46”. Ex. 1003, 31. Thus, energy is stored in the firing mechanism, namely the spring 46, independently of the user. The energy is released when the trigger is pulled. This contrasts with Claim 16 which is directed to launchers that are incapable of storing energy independent of a user, examples of which are shown in Figures 1 and 2 of the ‘282 Patent. Ex. 1016 ¶116. Peev in combination with Spitballs renders Claim 15 obvious. Ex. 1016, ¶117.

**19. Claim 17: “The projectile launcher of claim 8, further comprising a firing mechanism that directly applies a force to a soft-projectile located in the firing position to launch the soft-projectile from the projectile launcher in free flight.”**

Peev in combination with Spitballs renders obvious Claim 8. §X.B.11. Peev in combination with Spitballs renders obvious this claim. Peev teaches a firing mechanism that directly applies a force to a projectile. Specifically, “piston 47,

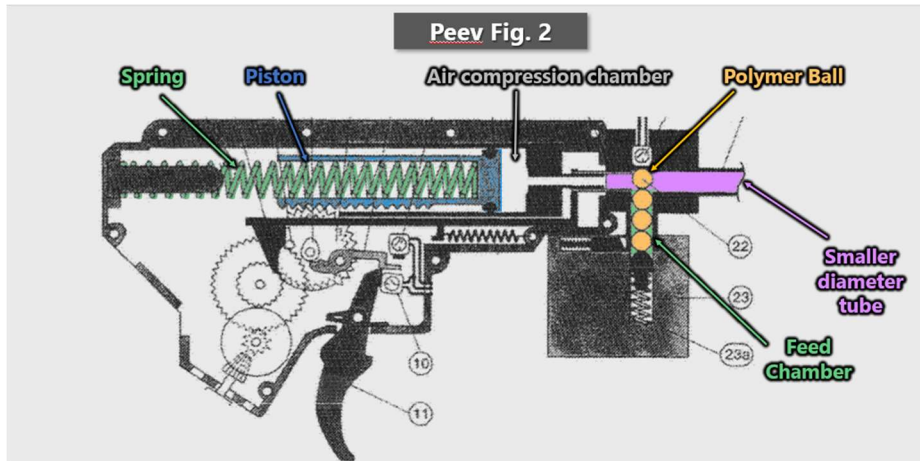
under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21 and firing ball 22.”

Ex. 1003, 32; Ex. 1016 ¶118.

Patent Owner’s position in the ITC Case is that using a spring, piston, and air compression chamber to compress air to launch a projectile constitutes a “direct” application of force. Ex.1021, 19-21, 24-26. The air pressure generated by the piston in the airsoft-type firing mechanism of Peev directly applies a force to the “spherical bullets” under Patent Owner’s interpretation. Ex. 1016 ¶119. Peev in combination with Spitballs renders Claim 17 obvious. Ex. 1016, ¶120.

**20. Claim 19: “The projectile launcher of claim 8, further comprising: an air compression chamber;”**

Peev in combination with Spitballs renders obvious Claim 8. §X.B.11. Peev discloses an air compression chamber, namely “cylinder 48”, shown below in annotated Fig. 2 of Peev. Ex. 1003, 39. Peev discloses how when firing a “piston 47, under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21 and firing ball 22.” *Id.* At 32; Ex. 1016, ¶121.



**21. Claim 19: “a piston disposed within and axially aligned with the air compression chamber;”**

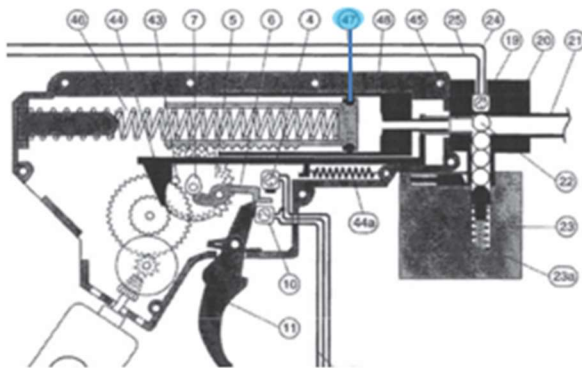
Peev discloses this limitation. Peev discloses how when firing a “piston 47, under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21 and firing ball 22.”

Ex. 1003, 32. As shown below in annotated Fig. 2 of Peev, piston 47 is disposed within and axially aligned with the air compression chamber, cylinder 48. *Id.* at 39. Ex. 1016, ¶122.

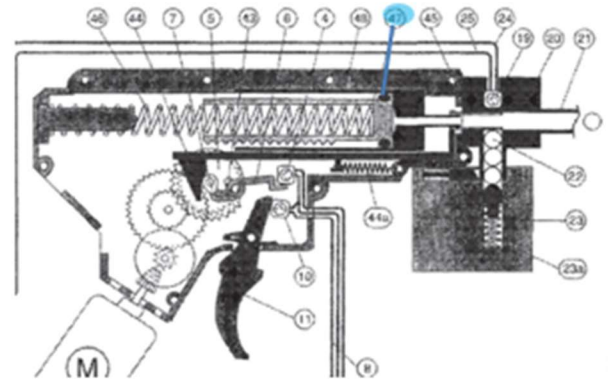
**22. Claim 19: “a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber.”**

Peev discloses this limitation. Peev discloses that a piston 47, which has been previously pulled back into a cocked position subsequently “under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48...” Ex. 1003, 31-32. Figs. 2 and 3 of Peev, shown excerpted below, illustrate

the cocked and rest position of piston 47 (shown in blue), respectively. Ex. 1003, 39-40. Ex. 1016, ¶123. Peev in combination with Spitballs renders Claim 19 obvious. Ex. 1016, ¶124.



Peev Fig. 2



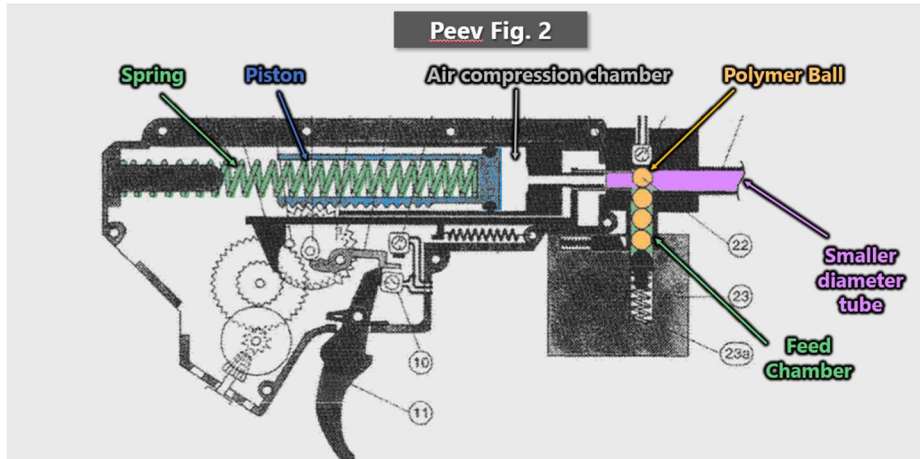
Peev Fig. 3

23. **Claim 20: “The projectile launcher of claim 19, further comprising a smaller diameter tube in communication with the air compression chamber, and”**

Peev in combination with Spitballs renders obvious claim 19. §X.B. 20-22.

As shown below, Peev discloses an air compression chamber 48 in communication with a smaller diameter tube. Specifically, during the firing stage, a piston “compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21...”. Ex. 1003, 32, 39. As shown in annotated Fig. 2 of Peev, the projectile

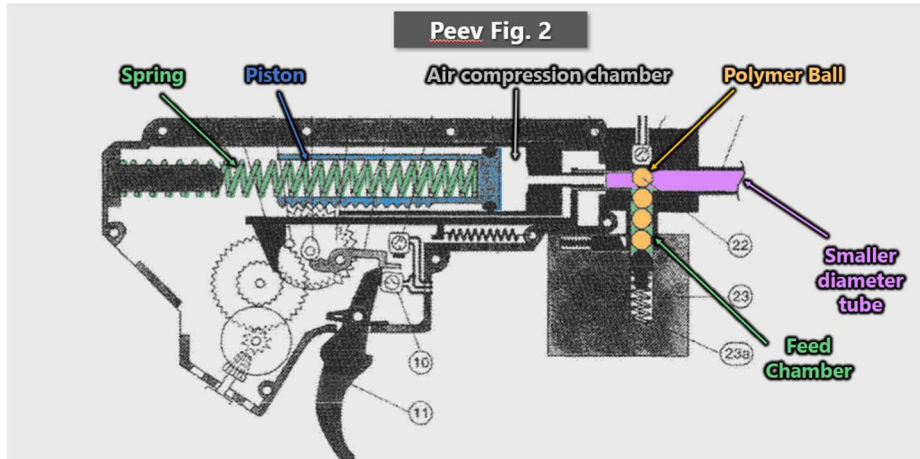
launcher of Peev includes a smaller diameter tube in communication with the air compression chamber. Ex. 1016, ¶125.



24. **Claim 20:** “wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a soft-projectile located at the firing position to accelerate and be launched from the projectile launcher.”

Peev discloses that during the firing stage, a piston 47 “under the pressure of spring 46, accelerates forward and compresses the air in the cylinder 48, inserting it through the nozzle into the barrel 21 and firing the ball 22”. Ex. 1003, 32, 39. As shown in annotated Fig. 2 of Peev, the projectile launcher of Peev includes a smaller diameter tube in communication with the air compression chamber. [Ex. 1016] A POSITA would have been motivated to use the plurality of soft projectiles having the same spherical shape (Spitballs) in place of the plurality of hard projectiles having the same spherical shape of Peev for the reasons set forth in §

X.B.1; Ex. 1016, ¶126. Peev in combination with Spitballs renders Claim 20 obvious. Ex. 1016, ¶127.



**25. Claim 21: “The projectile launcher of claim 8, wherein the absorbency of the super absorbent polymer is sufficiently limited to allow the soft-projectiles to be launched from the projectile launcher without breaking apart.”**

Peev in combination with Spitballs renders obvious claim 8. §X.B.11. Peev in combination with Spitballs renders obvious the limitation added by Claim 21. Patent Owner asserts in the ITC Case this claim is met as long as the soft-projectile does not break apart when launched from the projectile launcher. Ex.1021, 32-35. A POSITA would have understood Spitballs will not break apart when launched from a projectile launcher via air pressure, and Peev in combination with Spit Balls renders obvious a launcher with hydrated SAP ammunition that will not break apart when launched. Ex. 1016, ¶128; Ex. 1017, ¶¶ 28-39, 46-48, 54. Peev in combination with Spitballs renders Claim 21 obvious. Ex. 1016, ¶129.

**C. Secondary Considerations**

**1. Simultaneous Invention**

The secondary consideration of simultaneous invention may supply indicia of obviousness. *Geo. M. Martin Co. v. Alliance Mach. Sys. Int’l LLC*, 618 F.3d 1294, 1305 (Fed. Cir. 2010). “Independently made, simultaneous inventions, made within a comparatively short space of time, are persuasive evidence that the claimed apparatus was the product only of ordinary mechanical or engineering skill.” *Trustees of Columbia Univ. in City of New York v. Illumina, Inc.*, 620 F. App’x 916, 929-30 (Fed. Cir. 2015) (quoting *Geo. M. Martin Co.*, 618 F.3d at 1305). Evidence of simultaneous invention need not be prior art. *Id.* at 929-930. Simultaneous invention can occur a year after the invention date. *Geo M. Martin*, 618 F.3d at 1306.

Here, Korean Patent Publication No. 20-2010-0004855 to Kim (Ex. 1022) and a video posted by Vat19 to YouTube (Ex. 1023; Ex. 1024) are evidence of simultaneous invention and support a finding of obviousness. Ex. 1016, ¶¶128-133.

Kim was filed in the Korean Intellectual Property Office on November 1, 2008, before the priority date of the ‘282 Patent. Ex. 1022, 1. It was published on May 11, 2010, one day after the May 10, 2010 filing date of the ‘282 Patent. *Id.* Under the heading “Prior Art”, Kim explains that “[c]onventional bullets are made of hard materials and some people become disabled.” *Id.*, 2. Kim solves the

problem of “injury to the human body” by forming toy bullets from “gel or gel material”. *Id.*, 1. The toy gun of Kim uses air pressure to fire the gel bullet, which is “safer to use than a bullet of a conventional rigid material structure and does not cause injury to the human body.” *Id.* Claim 1 of Kim broadly covers all gel materials (*Id.*, 2), which are soft and prevent injury, just like SAP projectiles such as Clear Spheres and Spit Balls. Dependent Claim 2 specifies that gel material is made of a cleaning substance and dependent Claim 3 specifies that the gel material is luminous. *Id.*; Ex. 1016, ¶131. Because Claim 1 is broader, Kim’s teachings are not limited to gel materials that are cleaning substances or luminous.

Simultaneous invention by Kim is “persuasive evidence” that the Challenged Claims were only the product of ordinary skill. *Trustees of Columbia Univ. in City of New York*, 620 F. App’x at 929-30. “Unlike the ultimate determination of obviousness, which requires courts to answer the hypothetical question of whether an invention ‘would have been obvious,’ 35 U.S.C. § 103, simultaneous invention demonstrates what others in the field actually accomplished.” *Id.* at 930. Here, Kim recognized the same problem at the same time as the named inventors on the ‘282 Patent. Kim arrived at the same solution for the same reasons. Ex. 1016, ¶132. This un rebutted evidence of simultaneous invention supports a finding that the ‘282 Patent is obvious and therefore invalid.

By December 20, 2010, Vat19 posted a video to YouTube featuring Spitballs and depicting two men launching Spitballs at each other. Ex.1023. The video explains, “Spitballs are fascinating little projectiles perfect for launching at just about anything,” while inserting a Spitball into a straw and launching it at his colleague. Ex.1023; Ex. 1024; Ex. 1016, ¶134. The video explains how long you leave them in is up to you, and adjusts the size:



Ex. 1023. “Bigger Spit Balls will explode easily,” “while smaller Spit Balls are durable and bouncy.” *Id.* “They’re also perfect for shooting from a straw or tube.” *Id.*; Ex. 1016, ¶135.



## 2. Commercial Success

In the ITC Case, Patent Owner presented evidence of alleged commercial success and other secondary considerations. However, “[e]vidence of commercial success, or other secondary considerations, is only significant if there is a nexus between the claimed invention and the commercial success.” *Ormo Corp.*, 463 F.3d at 1311-12. “[I]f the commercial success is due to an unclaimed feature of the device, the commercial success is irrelevant. So too if the feature that creates the commercial success was known in the prior art, the success is not pertinent.” *Id.* As discussed below, here, any commercial success was due to unclaimed features or features that were known in the prior art.

Patent Owner’s expert Dr. Kudrowitz testified in the ITC Case that the Xploderz products sold by the Maya Group (the former owner of the ‘282 Patent) were commercially successful, relying on sales of the Maya Group blasters in 2011

and 2012, and certain testimony of Ron Brawer, a Maya Group executive and one of the named inventors on the ‘282 Patent. Ex. 1016, ¶136.

However, Dr. Kudrowitz ignored the legally relevant testimony of Mr. Brawer who testified that unclaimed features and features in the prior art drove the sales of the Xploderz products. Dr. Kudrowitz also ignored the testimony of Patent Owner’s marketing expert, Lynn Rosenblum, who testified “that the packaging and advertising focus of the Xploderz and Blaster Pro products was on the apparent product differentiators of these products, i.e., their firing distance, ammunition capacity, and ease of use.” Ex. 1004, 581:17-582:9.<sup>5</sup> None of the Challenged Claims cover “firing distance, ammunition capacity, and ease of use.” Ex. 1016, ¶137.

Ms. Rosenblum’s testimony is consistent with the testimony of Mr. Brawer. Mr. Brawer testified that the commercial success of the Xploderz products was the result of the ability of these products to hold more ammunition and to shoot the ammunition twice as far as competitive Nerf products, and that both of these features resulted from the use of SAP ammunition. As also discussed below, ultimately, Mr. Brawer testified that the use of SAP as ammunition was the

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<sup>5</sup> This testimony is admissible under FRE 801(d)(2)(C) and (D). See *Apple Inc. v. Smartflash LLC*, 2016 Pat. App. LEXIS 13334, at 49.

primary force driving demand and was the “foundation of the line”. Ex. 1013, 293:16-20. However, as discussed above, SAP ammunition (Spitballs) was in the prior art and therefore cannot establish a nexus. Ex. 1016, ¶138.

As to the important “more ammunition” feature, Mr. Brower testified that it was the result of using SAP as ammunition:

Q. There's a second bullet here that says, "***Holds More Rounds*** in the Magazine!" Do you see that?

A. Yes, I do.

Q. And what is this reference to being able to hold more rounds in the magazine a reference to?

A. Well, if you were to take 70 rounds and develop them for shooting in the Xploderz/Blasterz product, it was a container smaller than a soda can. And if you were to try and take 70 rounds of foam darts, you would be running around with something the size of a shoebox. And so ***the physical quality of the SAP as an ammunition, because it was much smaller, allowed for you to*** easily maneuver and hold and ***carry with you a much larger number of rounds*** of ammunition.

Q. So, again, this use of the ***SAPs as the ammunition*** was part of what ***enabled the Xploderz*** products to ***hold***

***more rounds*** in the magazine, which is one of the most important features in this focus group study?

A. ***Yes.***

Ex. 1013, 267:7-268:8.

As to the important “more distance” feature, Mr. Brawer testified that it was the result of using SAP as ammunition:

Q. What was the characteristic of the Blasterz prototype that became the Xploderz product that contributed to that important feature of being able to ***shoot twice as far*** as comparable products like NERF?

A. A ***different ammunition*** system.

\* \* \*

Q. And in your mind, the ***use of the SAPs as the ammunition*** was part of what enabled the Xploderz products to shoot ***twice as far as*** comparable NERF products?

A. ***It was by far the most important thing.***

Ex. 1013, 266:3-8; 267:2-6; 275:4-275:9; 293:16-293:20.

In fact, Mr. Brawer testified that the primary force driving demand of the Xploderz products was the use of SAPs as ammunition.

Q. Is it fair to say that *all of the features* of the [Xploderz] product that you used to create excitement in your TV advertising *were directly linked to the use of SAPs as ammunition* in your projectile launcher?

A. *Absolutely.*

Ex. 1013, 275:4-275:9; 293:16-293:20.

In summary, the testimony of the Maya Group executive, Mr. Brawer, identifies three factors that drove sales of the Xploderz products, the ability to hold more ammunition, to shoot the ammunition further, and the use of SAP ammunition. The first two features are unclaimed and thus are “irrelevant.” *See Ormco Corp.*, 463 F.3d at 1311-12. Indeed, ammunition capacity and shooting distance appear nowhere in the Challenged Claims. Ex. 1016, ¶142.

The third feature identified by Mr. Brawer as driving sales, SAP ammunition, was in the prior art (Spitballs) and thus is “not pertinent.” Ex. 1016, ¶143. *See Ormco Corp.*, 463 F.3d at 1311-12. The Federal Circuit recently reversed a finding of non-obviousness because the secondary consideration evidence was directed to a claimed feature that was known in the prior art.

Specifically, in *Yita LLC v. MacNeil IP LLC*, 2022-1373, 2022-1374 (Fed Cir. June 6, 2023), the patentee’s *Vice President* “testified that customers are willing to pay a premium for WeatherTech’s trays *primarily due to their fit* in the

vehicle, even as he acknowledged that marketing could also contribute.” The Vice President also testified that “[t]he ***biggest reason for*** the WeatherTech FloorLiner’s ***commercial success*** . . . is that they ‘***fit***’ the foot wells for which they were custom-designed”. However, ***the fit limitation was “disclosed in the prior art.”*** Thus, the patentee’s “secondary-consideration evidence is of no relevance to the obviousness inquiry.” Thus, the Board's own findings, in light of the proper application of our precedent, compel the conclusion that MacNeil's secondary-consideration [\*18] evidence is of no relevance to the obviousness inquiry in this case. *Yita LLC v. MacNeil IP LLC*, 2023 U.S. App. LEXIS 13962, \*17-18

Similarly, in the present case, ***executives from the Maya Group*** testified that the use of SAP as ammunition was the “***primary force*** driving demand” and was the “***foundation of the line.***” Ex. 1013, 275:4-275:9; 293:16-293:20. And, SAP ammunition, in the form of Spitballs, was in the prior art. Under *Yita* and *Ormco*, this “secondary consideration evidence is of no relevance to the obviousness inquiry.” *Yita LLC v. MacNeil IP LLC*, 2023 U.S. App. LEXIS 13962, \*17-18, *Ormco Corp.*, 463 F.3d at 1311-12.

Further, there are numerous unclaimed features and Patent Owner cannot show any success/praise is due to allegedly novel features as opposed to unclaimed and prior art features of the devices (e.g., full-auto shooting, large ammo capacity, ornamentation/design, advertising, business acumen). Articles discussing

Xploderz are actually marketing materials supplied by the Xploderz manufacturer, not industry participants, and are irrelevant. And any “awards” won by Xploderz are irrelevant because there is no indication of what criteria was used, the number of applicants, whether the Xploderz maker paid to win the “award,” or any other relevant information.

Here, the “weak secondary considerations [] do not overcome a strong prima facie case of obviousness.” *Genentech, Inc. v. Sandoz, Inc.*, 55 F.4th 1368, 1378 (Fed. Cir. 2022).

#### **D. The Board Should Institute the IPR**

##### **1. 35 U.S.C. §314(a)**

On June 21, 2022, Director Vidal issued an interim procedure regarding application of the *Fintiv* factors. Director Vidal, Memorandum, “Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation” (“Vidal Memo”). According to the Vidal Memo, “the PTAB will not deny institution [] under *Fintiv* (i) when a petition presents compelling evidence of unpatentability.” *Id.* at 9. The merits of this Petition are strong, Ground I is a single-reference anticipation ground based on Spitballs.

Further, there are currently no pending parallel district court or AIA proceedings; only the ITC Case is pending. See Section II.B. *supra*. With respect

to the ITC Case, “the PTAB will not deny institution of an IPR [] under *Fintiv* ... when a request for denial under *Fintiv* is based on a parallel ITC proceeding.”

Vidal Memo, 9.

## **2. 35 U.S.C. §325(d)**

Neither art nor argument advanced by the Petition is substantially similar to those previously before the office. See *Advanced Bionics, LLC. v. Med-El Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 7-9 (PTAB Feb. 13, 2020). Spitballs and Peev were not before the examiner. The arguments presented in this Petition are not the same or substantially the same as those considered during prosecution – there were no substantive arguments made during prosecution.

## **XI. CONCLUSION**

For the reasons discussed above, Petitioner has established a reasonable likelihood that it will prevail with respect to at least one of Claims 1-15, 17, and 19-21 of the '282 Patent challenged in this Petition. Therefore, this Petition should be granted, IPR should be instituted, and Claims 1-15, 17, and 19-21 should be found unpatentable and cancelled.

Respectfully submitted,

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Dated: August 23, 2023  
New York, New York

By: /Kenneth P. George No. 30,259/  
Kenneth P. George  
Registration No.: 30,259

## **CERTIFICATE OF COMPLIANCE**

Pursuant to 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the foregoing Petition complies with the type-volume limitation of 37 C.F.R. § 42.24(a)(1)(i) because, according to the “word count” function of Microsoft Word 2010 used to prepare this paper, the Petition contains 12,821 words, excluding the parts of the Petition exempted from the word count under 37 C.F.R. § 42.24(a)(1).

Dated: August 23, 2023  
New York, New York

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## **CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105, I hereby certify that on this 23d day of August, 2023, a true copy of the foregoing PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 8,371,282, together with Petitioner's Exhibit Nos. 1001-1028, and Petitioner's Power of Attorney, was served via Federal Express on the Patent Owner at the following correspondence address of record for the subject patent:

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A courtesy copy of the foregoing was also served on the counsel of record for Patent Owner in the related ITC Case via email at the following address:

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Dated: August 23, 2023  
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