

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FERNO-WASHINGTON, INC. and FERNO GROUP, INC.
Petitioner,

v.

STRYKER CORPORATION
Patent Owner

U.S. Patent No. RE44,884
Issued: May 13, 2014

Title: AMBULANCE COT WITH PINCH SAFETY

Inter Partes Review No. IPR2024-00042

**PETITION FOR INTER PARTES REVIEW
OF U.S. PATENT NO. RE44,884**

Contents

I.	INTRODUCTION	1
II.	MANDATORY NOTICES	1
	A. Real Party-in-Interest	1
	B. Related Matters.....	1
	C. Lead and Back-up Counsel	1
	D. Service Information.....	2
III.	PAYMENT OF FEES	2
IV.	BRIEF OVERVIEW OF THE '884 PATENT	2
	A. Scope and Content of the '884 Patent	2
	B. Brief Overview of the Prosecution History.....	4
V.	BRIEF OVERVIEW OF THE SCOPE AND CONTENT OF THE PRIOR ART	5
	A. U.S. Patent No. 6,701,545 to Ferneau et al. ("Ferneau A").....	5
	B. U.S. Patent No. 4,192,541 to Ferneau ("Ferneau B").....	7
	C. U.S. Patent No. 3,644,944 to Bourgraf et al. ("Bourgraf").....	9
VI.	BRIEF OVERVIEW OF THE LEVEL OF SKILL IN THE ART	10
VII.	REQUIREMENTS FOR <i>INTER PARTES</i> REVIEW.....	10
	A. Grounds for Standing	10
	B. Claims Challenged	11
	C. Grounds	11
VIII.	CLAIM CONSTRUCTION	11
IX.	DETAILED EXPLANATION OF GROUNDS.....	11

A.	Ground 1: Claims 3 and 4 Are Rendered Obvious Under 35 U.S.C. § 103 (pre-AIA) by Ferneau A in View of Ferneau B	12
1.	Claim 3.....	12
2.	Claim 4.....	16
B.	Ground 2: Claims 3 and 4 Are Rendered Obvious Under 35 U.S.C. § 103 (pre-AIA) By Ferneau A in View of Bourgraf and Further in View of Ferneau B	17
1.	Claim 3.....	17
2.	Claim 4.....	20
X.	SECONDARY CONSIDERATIONS	21
XI.	TRIAL SHOULD BE INSTITUTED.....	22
A.	The <i>Fintiv</i> Factors Weigh Against Discretionary Denial.....	22
B.	The Circumstances Weigh Against Discretionary Denial	25
XII.	CONCLUSION.....	25
	CERTIFICATE OF COMPLIANCE.....	26
	CERTIFICATION OF SERVICE.....	27

TABLE OF AUTHORITIES

Cases

<i>Apple Inc. v. Fintiv, Inc.</i> , No. IPR2020-00019 (P.T.A.B. Mar. 20, 2020)	22, 23, 24, 25
<i>Commscope Technologies LLC v. Dali Wireless, Inc.</i> , IPR2022-01242 (Feb. 27, 2023)	24
<i>General Plastic. General Plastic Indus. Co., Ltd. v. Canon Kabushiki</i> , No. IPR2016-01357 (P.T.A.B. Sept. 6, 2017)	25
<i>Kranos Corp. d/b/a Schutt Sports v. Apalone, Inc.</i> , No. IPR2020-00501 (P.T.A.B. July 16, 2020)	24
<i>Petroleum Geo-Services Inc. v. Western Geco LLC</i> , IPR2014-01477 (P.T.A.B. Mar. 17, 2015)	21
<i>Sotera Wireless, Inc. v. Masimo Corp.</i> , No. IPR2020-01019 (P.T.A.B. Dec. 1, 2020)	24
<i>Stryker Corporation and Stryker Sales, LLC v. Ferno-Washington, Inc. and Ferno Group, Inc.</i> , Case No. 1:22-cv-00588 (S.D. Ohio Oct. 12, 2022)	1
<i>Vudu, Inc. v. Ideahub, Inc.</i> , No. IPR2020-01688 (P.T.A.B. Apr. 19, 2021)	24

Statutes

35 U.S.C. § 102(a)	5, 7, 9
35 U.S.C. § 103	11, 12, 17
35 U.S.C. § 314(a)	25
35 U.S.C. § 325(d)	25

Regulations

37 C.F.R. § 42.100(b)	11
37 C.F.R. § 42.24(a)(1)	26
37 C.F.R. § 42.24(d)	26

TABLE OF EXHIBITS

Exhibit No.	Description
1001	U.S. Patent No. RE 44,884 to Lambarth
1002	Declaration of Dr. Glen Stevick
1003	Curriculum Vitae of Dr. Glen Stevick
1004	File History of U.S. Patent No. RE44,884, Application No. 13/068,358, filed May 9, 2011
1005	File History of U.S. Patent No. 7,540,047, Application No. 12/002,958, filed December 19, 2007
1006	File History of Prior-Filed Parent U.S. Patent Application No. 11/172,434, filed June 30, 2005
1007	File History of Prior-Filed Parent U.S. Patent Application No. 60/613,151 filed September 24, 2004
1008	U.S. Patent No. 6,701,545 to Ferneau <i>et al.</i> (“Ferneau A”), issued March 9, 2004
1009	U.S. Patent. No. 4,192, 541 to Ferneau (“Ferneau B”), issued March 11, 1980
1010	U.S. Patent No. 3,644,944 to Bourgraf <i>et al.</i> (“Bourgraf”), issued February 29, 1972
1011	U.S. Patent No. 1,138,156 to Stroud, issued May 4, 1915
1012	U.S. Patent No. 3,262,202 to Porzky <i>et al.</i> , issued May 18, 1964
1013	U.S. Patent No. 7,017,986 to Degen <i>et al.</i> , issued March 28, 2006
1014	Docket, <i>Stryker Corporation and Stryker Sales, LLC v. Ferno-Washington, Inc. and Ferno Group, Inc.</i> , Case No. 1:22-cv-00588 (S.D. Ohio) (the “Litigation”), printed October 11, 2023

Exhibit No.	Description
1015	Scheduling Order in the Litigation, ECF No. 33, issued March 1, 2023
1016	Southern District of Ohio, Judicial Caseload Profile, June 30, 2023, excerpted from fcms_na_disprofile0630.2023.pdf and downloaded from https://www.uscourts.gov/statistics/table/na/Federal-court-management-statistics/2023/06/30-1 on October 11, 2023

I. INTRODUCTION

Ferno-Washington, Inc. and Ferno Group, Inc. (collectively, “Ferno” or “Petitioners”) request *inter partes* review (“IPR”) of Claims 3 and 4 of U.S. Patent No. RE44,884 (“the ’884 Patent”) (Ex. 1001), currently assigned to Stryker Corporation (“Patent Owner” or “PO”). Claims 3 and 4 of the ’884 Patent should be found unpatentable and canceled, for the reasons below.

II. MANDATORY NOTICES

A. Real Party-in-Interest

Ferno is the real party in interest for Petitioners.

B. Related Matters

The ’884 Patent, along with eight other patents (collectively, the “Asserted Patents”), has been asserted by PO against Petitioners in *Stryker Corporation and Stryker Sales, LLC v. Ferno-Washington, Inc. and Ferno Group, Inc.*, Case No. 1:22-cv-00588 (S.D. Ohio Oct. 12, 2022) (Ex. 1014) (the “Litigation”).

C. Lead and Back-up Counsel

Petitioner provides the following designation of counsel:

Lead Counsel	Back-up Counsel
William H. Oldach III Vorys, Sater, Seymour and Pease LLP 1909 K Street, NW, Suite 900 Washington, DC 20006 Reg. No. 42,048 wholdach@vorys.com Tel.: (202) 467-8880 Fax: (202) 533-9024	Rex W. Miller, II Vorys, Sater, Seymour and Pease LLP 52 E. Gay Street Columbus, OH 43215 Reg. No. 63,284 (614) 464-6400 (main) (614) 464-6207 (direct) rwmiller@vorys.com

	Michael M. Stojsavljevic Reg. No. 80,857 Vorys, Sater, Seymour and Pease, LLP 200 Public Square, Suite 1400 Cleveland, OH 44114 (216) 479-6100 (main) (216) 373-3437 (direct) mmstojsavljevic@vorys.com
--	---

D. Service Information

Petitioner consents to electronic service by email: wholdach@vorys.com; rwmiller@vorys.com; mmstojsavljevic@vorys.com; lmelliott@vorys.com; iplaw@vorys.com. Please address postal and hand carry correspondence to lead counsel at the above address.

III. PAYMENT OF FEES

The PTO is authorized to charge all fees due during this proceeding to Deposit Account No. 22-0585.

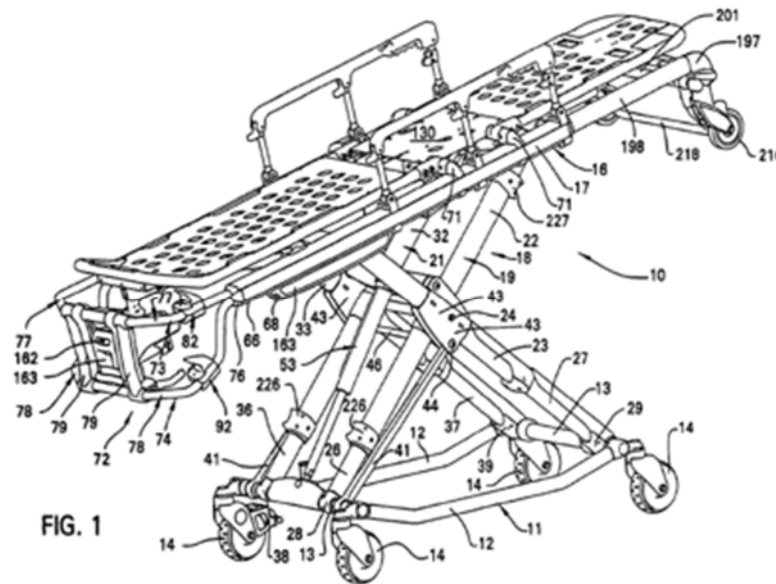
IV. BRIEF OVERVIEW OF THE '884 PATENT

A. Scope and Content of the '884 Patent

The '884 Patent relates to “to an ambulance cot and accessories.” (Ex. 1001 at col. 1, 1:25; Stevick¹ ¶34.) The cot **10** includes a base frame **11** comprising longitudinally extending side rails **12** and crosswise extending rails **13** forming a

¹ Declaration of Dr. Glen Stevick (Ex. 1002), an expert in the field of the '884 Patent. (Stevick ¶¶ 1-8.)

rectangle. (*Id.* at col. 4, ll. 23-26.) The cot further includes a litter **16** comprising a litter frame **17**. The litter frame **17** is connected to the base frame **11** by an elevating mechanism **18** which is comprised of side-by-side oriented “X” frames **19** and **21**. (*Id.* at col. 4, ll. 29-34.) See FIG. 1:



X frame **19** includes X frame members **22** and **23**, and X frame **21** includes X frame members **32** and **33**. (Ex. 1001 at col. 4, ll. 24-25, 37-38.) Each of these members is hollow and telescopingly receives a further X frame member (*Id.* at col. 4, ll. 26-28, 42-47.) As the cot moves from a fully collapsed position to a fully extended position, the X frame members **22**, **23**, **32** and **33** telescope outwardly and inwardly, respectively. (*Id.* at col. 19, ll. 40-60; see FIGS. 1, 2, 3.)

As the cot is lowered into the position shown in Figure 3, “mounts **226** (FIG. 1) will operatively engage a cross rail provided on the underside of the litter **16** and

additional mounts **227** will rest on the cross rail **13** on the base.” (Ex. 1001 at col. 19, ll. 49-52.)

The '884 Patent also discloses numerous other features and accessories, including a hydraulic circuit for controlling the extension and collapsing of the cot (Ex. 1001 at col. 8, l. 45 – col. 11, l. 33); a wireless diagnostic tool (*id.* at col. 11, l. 33 – col. 12, l. 35); and a retractable head section and latch (*id.* at col. 15, l. 66 – col. 18, l. 22.) None of these features, however, are claimed in the '884 Patent; instead, all claims of the '884 Patent are directed merely to the interaction of the X frame members, the mounts and cross rails on the litter and the base of the cot.

B. Brief Overview of the Prosecution History

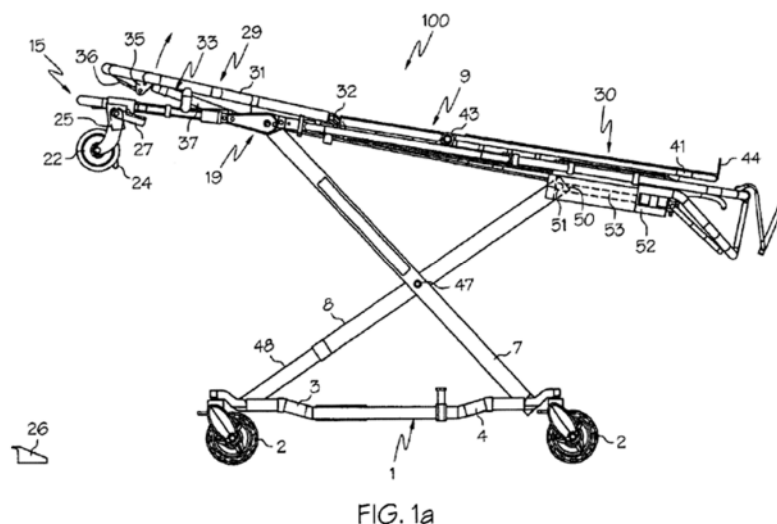
The '884 Patent issued on May 13, 2014 from application no. 13/068,358 (Ex. 1004), which was filed May 9, 2011, and is a reissue of U.S. Patent No. 7,540,047, which issued on June 2, 2009 based on application no. 12/002,958 (the “'958 Application”) (Ex. 1005), which was filed on December 19, 2007. (Ex. 1001 at face page.) The '958 Application is in turn a divisional application from application no. 11/172,434 (the “'434 Application”) (Ex. 1006) filed June 30, 2005, now U.S. Patent No. 7,398,571 (also asserted in the Litigation). The '434 Application claims priority to provisional application no. 60/613,151 (Ex. 1007), filed September 30, 2004. (*Id.* at p.1.)

V. BRIEF OVERVIEW OF THE SCOPE AND CONTENT OF THE PRIOR ART

A. U.S. Patent No. 6,701,545 to Ferneau et al. (“Ferneau A”)

Ferneau *et al.* (Ex. 1008) (“Ferneau A” or the “’545 Patent”) is titled “Multiple Level Roll-In Cot,” was issued on March 9, 2004 based on application no. 10/227,765 filed August 26, 2002 (*Id.* at p.1.), and constitutes prior art against the ’884 Patent under 35 U.S.C. § 102(a) (pre-AIA).

Ferneau A discloses an ambulance cot comprising a generally rectangular cot frame **9** and an undercarriage **1**. Undercarriage **1** includes opposing side frame members **3** and **4**, connected by transverse frame members **5** and **6**. (Ex.1008 at col. 3, ll. 45-48; FIGS. 1, 2a.) Cross-forming frame members **7**, **8**, **7a** and **8a** connect cot frame **9** and undercarriage **1**, as seen in Figures 1a and 3:



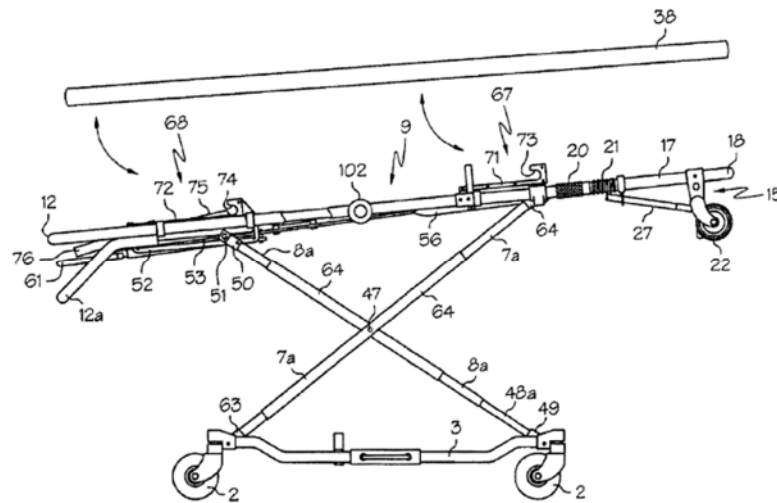
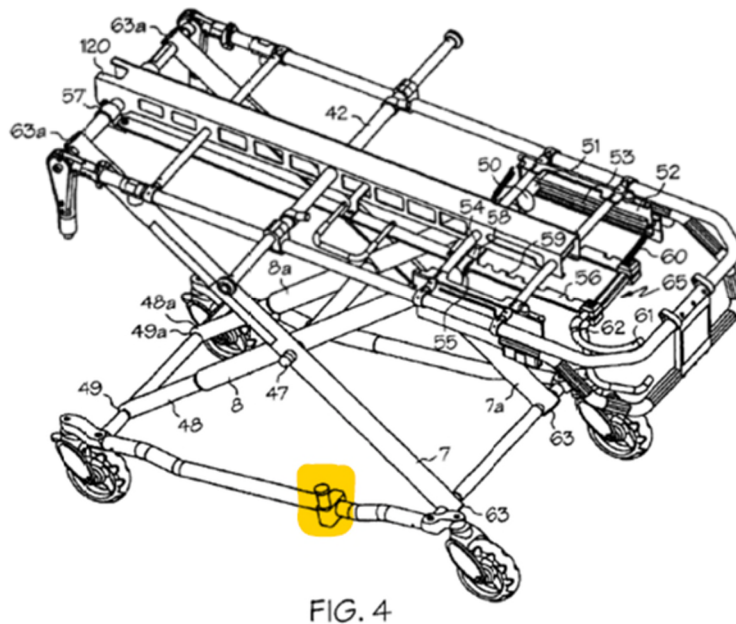


FIG. 3

(Stevick ¶38.)

The pairs of cross-forming frame members **7**, **8**, **7a** and **8a** are pivotally connected by a pivot rod **47** where the frame members intersect. Members **8** and **8a** telescopically receive extensions **48** and **48a** at their lower ends, which extensions are pivotally connected to transverse frame member **5**. (Ex. 1008 at col. 5, ll. 1-8; FIG. 1a.) (Stevick ¶39.)

Another aspect of Ferneau A, best seen in highlighted Figure 4 below, is that a side frame member of the base frame includes an unnumbered and undiscussed post:



It would be readily apparent to a POSITA that this post is for supporting the cot frame 9 when the cot is collapsed. (Stevick ¶39.)

Ferneau A was not of record before the Patent Office during prosecution of the '884 Patent.

B. U.S. Patent No. 4,192,541 to Ferneau ("Ferneau B")

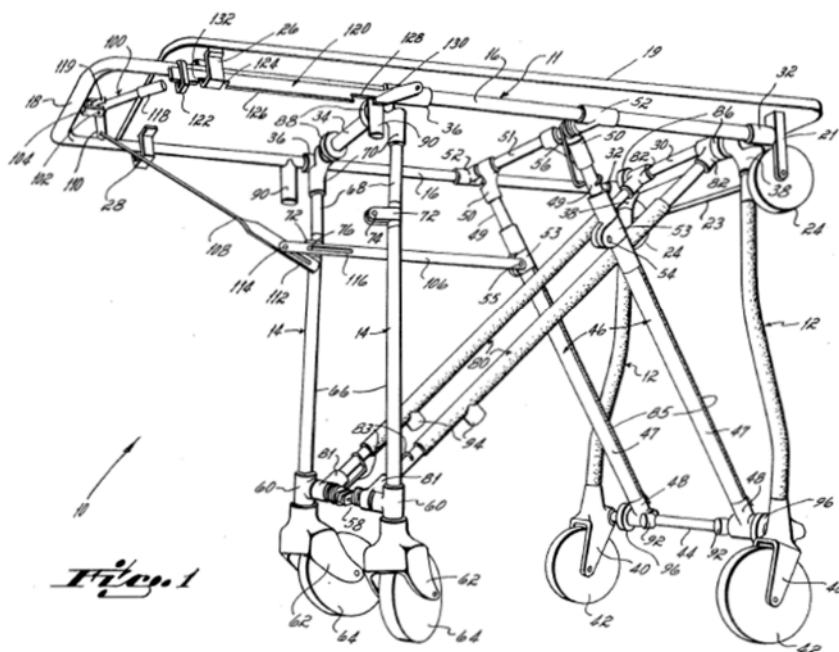
Ferneau (Ex. 1009) ("Ferneau B" or the "'541 Patent") is titled "Carts Having Extensible Auxiliary Wheels," was issued on March 11, 1980 based on application no. 875,994 dated February 8, 1978 and constitutes prior art against the '884 Patent under 35 U.S.C. § 102(a) (pre-AIA).

Ferneau B discloses a cart **10** that includes a frame **11** having depending forward legs **12** and rearward legs **14**. (Ex. 1009 at col. 2, ll. 65-66.) The forward

legs are secured at their upper ends to fittings **38**, which enable the forward legs to swing rearward. The lower ends of the legs **12** have wheel yokes **40** fixed thereto, and a lower crossbar **44** is fixed to the wheel yokes **40**. (*Id.* at col. 3, ll. 20-25.) Toggle braces **46** are also attached at their lower sections via T-fittings **48** to the lower crossbar **44**. (*Id.* at 26-27.) (Stevick ¶42.)

Rear legs **14** are interconnected by a crossbar **58** which is secured by a T-fitting **60** at the lower end of the legs. (Ex. 1009 at col. 3, ll. 41-43.) Diagonal braces **80** are secured to T-fittings **81** and are rotatably mounted to crossbar **58**. (*Id.* at col. 3, ll. 54-55.) (Stevick ¶43.)

Crossbar **44** also includes a pair of rubber bumpers **92** that are aligned so that when the legs of cart **10** are collapsed, bumpers **92** will engage a similar pair of bumpers **94** mounted on braces **80** when the legs are collapsed. (*Id.* at col. 4, ll. 15-18.) See Figure 1:



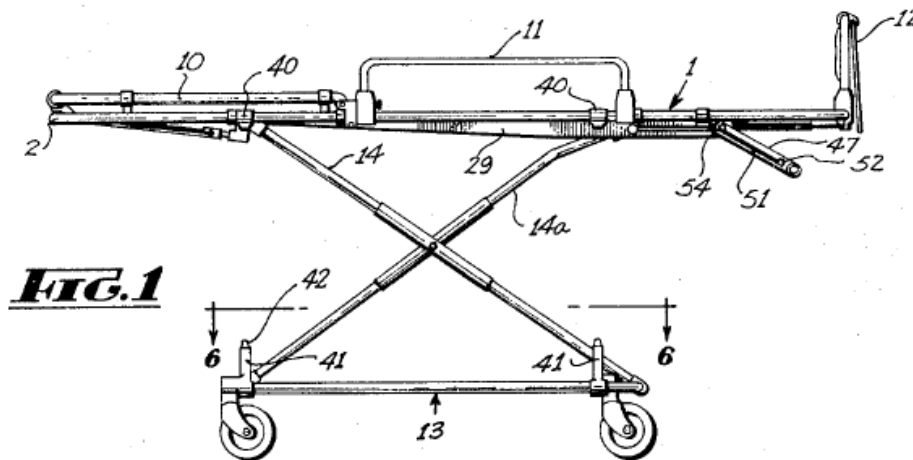
(Stevick ¶44.)

C. U.S. Patent No. 3,644,944 to Bourgraf et al. (“Bourgraf”)

Bourgraf (Ex. 1010) is titled “Ambulance Cot Construction,” was issued on February 29, 1972 and filed on May 20, 1970 and constitutes prior art against the ’884 Patent under 35 U.S.C. § 102(a) (pre-AIA).

Bourgraf discloses an elevating cot comprising a cot frame **1** and an undercarriage **13**. Undercarriage **13** comprises a generally rectangular frame having side members **16** and **17**, end frame members **18** and **19**, and cross-forming members **14**, **14a**, **15** and **15a**. (Ex. 1010 at col. 3, ll. 18-20; FIG. 6.) The lower ends of cross-forming members **14** and **15** are pivotally connected to a telescoping extension **25** (*id.* at col. 3, ll. 30-32) so that, as the cot frame **1** is lowered, extension **25** will extend. (See *id.* at FIG. 6.) (Stevick ¶46.)

Undercarriage 13 also comprises corner posts 41 mounted on fittings 20, 21, 22, and 23. The corner posts 41 support the cot frame 1 via sockets 40 when the cot is lowered. (Ex. 1010 at col. 4, ll. 18-22; FIG. 4.) See Figure 1:



(Stevick ¶47.)

VI. BRIEF OVERVIEW OF THE LEVEL OF SKILL IN THE ART

A person having ordinary skill in the art (“POSITA”) as of the claimed priority date would have had a bachelor’s degree in mechanical engineering, or a related field or equivalent coursework or experience, and two years of industry experience. Lack of work experience can be remedied by additional education, and vice versa.

(Stevick ¶ 31.)

VII. REQUIREMENTS FOR *INTER PARTES* REVIEW

A. Grounds for Standing

Petitioners certify that the ’884 Patent is available for IPR, and Petitioners are not barred or estopped from requesting IPR on the grounds herein.

Claims 3 and 4 have not been the subject of a prior IPR review or district court litigation concluded on the merits.

B. Claims Challenged

Petitioners request review and cancellation of Claims 3 and 4 (“Challenged Claims”) of the ’884 Patent.

C. Grounds

The Challenged Claims should be canceled as unpatentable based on the following grounds:

Ground 1: Claims 3 and 4 are rendered obvious under 35 U.S.C. § 103 (pre-AIA) by Ferneau A in view of Ferneau B.

Ground 2: Claims 3 and 4 are rendered obvious under 35 U.S.C. § 103 (pre-AIA) by Ferneau A in view of Bourgraf and further in view of Ferneau B.

VIII. CLAIM CONSTRUCTION

Claims in this Petition are construed by Petitioners under Rule 42.100(b) (37 C.F.R. § 42.100(b)) and in accordance with the *Phillips* claim construction standard.

Petitioners do not assert that any claim terms discussed herein require construction other than their plain and ordinary meaning to a POSITA but reserve the right to propose alternative constructions in the event that PO proposes constructions for any terms that vary from such plain and ordinary meaning.

IX. DETAILED EXPLANATION OF GROUNDS

A detailed explanation showing that there is a reasonable likelihood the Challenged Claims are unpatentable follows.

A. Ground 1: Claims 3 and 4 Are Rendered Obvious Under 35 U.S.C. § 103 (pre-AIA) by Ferneau A in View of Ferneau B

Claims 3 and 4 would have been obvious to a POSITA in view of Ferneau A in view of Ferneau B.

1. Claim 3

a. “An ambulance cot, comprising:”

The '545 Patent teaches “a multiple level elevating cot adapted to be rolled into emergency vehicles,” *i.e.*, an ambulance cot. (Ex. 1008 at Abstract, col. 1, l. 5., col. 2, ll. 21-23, 30-32, 44-46.) (Stevick ¶ 54.)

b. “a base frame;”

The '545 Patent teaches that ambulance cot **100** comprises a base frame (undercarriage **1**) (Ex. 1008 at col. 3, ll. 39-61.) (Stevick ¶ 55.)

c. “a litter frame; and”

The '545 Patent teaches that the ambulance cot has a litter frame (cot frame **9**) (Ex. 1008 at col. 4, ll. 25-30; Figs 1a, 2a, 3.) (Stevick ¶ 56.)

d. “an X-frame support mechanism interconnecting said base frame and said litter frame and being configured to support said litter frame in one of a plurality of positions relative to said base frame,

The '545 Patent teaches an X-Frame support mechanism (defined by members **7, 8, 7a** and **8a**) interconnecting the base frame (undercarriage **1**) and the litter frame

(cot frame **9**). The support mechanism interconnects the base frame and the cot frame and supports the litter frame in one of a plurality of positions: “the cot frame **9** . . . may be selectively secured in a plurality of elevational positions or collapsed against the undercarriage **1**.” (Ex. 1008 at col. 5, ll. 45-48.) (Stevick ¶ 57.)

- e. said support mechanism including at least one pair of frame members pivotally secured to each other proximate the mid-length thereof,**

The '545 Patent teaches at least one pair of frame members (cross-members **7**, **8**, **7a** and **8a**) pivotally secured to each other by way of pivot rod **47** at approximately the mid-length thereof. (Ex. 1008 at col. 3, ll. 49-60; col. 5, ll. 1-12, 35-67; Fig. 4). (Stevick ¶ 58.)

- f. said at least one pair of frame members each having opposite ends respectively secured to one of said base frame and said litter frame,**

The '545 Patent teaches that the at least one pair of frame members (cross-members **7**, **8**, **7a** and **8a**) have opposite ends respectively secured to one of the base frame (undercarriage **1**) and the litter frame (Cot frame **9**). (Ex. 1008 at col. 5, ll. 35-44; Fig. 4). (Stevick ¶ 59.)

- g. at least one of said pair of frame members having a first mount oriented between said mid-length thereof and said [base] litter frame,**

The '545 Patent does not disclose at least one of said pair of frame members having a first mount oriented between said mid-length thereof and said litter frame. (Stevick ¶ 60.)

However, the '541 Patent discloses a cart **10** having diagonal braces **46, 80** forming an X-frame support. (Ex. 1009 at col. 2, l. 65 – col. 3, l.1, col. 3, ll. 20-35, 54-65; FIG. 1.) A lower crossbar **44** is fixed to wheel yokes **40**. (*Id.* at col. 3, l.24; FIG. 1.) Rubber bumpers (i.e. mounts) **94** are mounted on the diagonal braces **80** and are configured to engage rubber bumpers **92** on the lower crossbar **44** when the legs when the legs of the car are collapsed. (Ex. 1009 at col. 4, ll. 15-18; FIG. 1.) (Stevick ¶ 61.)

Although the mounts in the '541 Patent are not situated between the mid-length of the X-frame members and the litter frame, it would have been obvious to a POSITA given the teaching of the '545 Patent in view of the '541 Patent to situate mounts between the mid-length of the X frame members and the litter frame of the '545 Patent. Doing this would prevent metal-to-metal contact between the cross-forming frame members **7** and **8** and the crossbars of the undercarriage **1** of the '545 Patent. It would have been well within the technical capabilities of a POSITA to situate the mounts in such location, would not have required undue experimentation, and would have had a high expectation of success. (Stevick ¶¶ 48-52, 62.)

To the extent that the post in the '545 Patent serves largely the same function as the mounts in the '541 Patent, a POSITA would nevertheless be motivated to use mounts such as those disclosed in the '541 Patent with the '545 Patent because doing so would remove from the base frame of the '545 Patent a protruding knob, which

could ensnarl a pant leg or shoelace. Using mounts rather than the post would also lessen the possibility that an operator's finger or other extremity could be pinched between the post and the cot frame. (Stevick ¶62a.)

- h. said first mount being configured to [respectively] engage said base frame in response to said litter frame becoming proximate said base frame; and**

Modifying the '545 Patent in view of the teachings of the '541 Patent, as discussed above, by situating at least one mount on one of cross-forming frame members **7** and **8** (or **7a** and **8a**), between the mid-length thereof and the litter frame would cause the mount to engage the base frame (undercarriage **1**) in response to the litter frame (cot frame **9**) becoming proximate to the base frame (undercarriage **1**). (See Ex. 1008 at col. 5, ll. 35-37; FIGS. 1a, 1b, 3, 4, 5.) (Stevick ¶63.)

- i. “wherein said base frame has longitudinally extending side rails and at least one crosswise member interconnecting said side rails and being oriented in a path of movement of said first mount as said litter frame becomes proximate said base frame so that said first mount engages and rests upon said at least one crosswise member.”**

The '545 Patent discloses that the base frame (undercarriage **1**) has longitudinally extending side rails (side members **3**, **4**) that are interconnected by at least one crosswise member (transverse frame members **5**, **6**). As modified by the teachings of the '541 Patent, the crosswise member (transverse frame member **5** or **6**) is oriented in a path of movement such that the mount will engage and rest upon

the at least one crosswise member. (Ex. 1008 at col. 5, ll. 1-12, 35-37; FIGS. 1a, 1b, 3, 4, 5.) (Stevick ¶ 64.)

Accordingly, claim 3 of the '884 Patent is invalid as obvious over the combination of Ferneau A and Ferneau B. (Stevick ¶ 65.)

2. Claim 4

a. “The ambulance cot according to claim 3,

Claim 4 of the '884 Patent depends from claim 3, and the discussion above regarding claim 3 is incorporated herein by reference.

b. wherein said first mount engages and rests upon said at least one crosswise member [and] between the respective said side rails of said base frame.”

When the cot disclosed in the '545 Patent is modified according to the teachings of the '541 Patent, for the reasons set forth with respect to claim 3, the mount on the modified '545 Patent cot will engage and rest upon the crosswise member (transverse frame member **5, 6**) between the side rails (side members **3, 4**) of the base frame (undercarriage **1**). (Ex. 1008 at FIG. 4; col. 5, ll. 35-37.) (Stevick ¶ 67.)

Accordingly, claim 4 of the '884 Patent is invalid as obvious over the combination of Ferneau A and Ferneau B. (Stevick ¶ 68.)

B. Ground 2: Claims 3 and 4 Are Rendered Obvious Under 35 U.S.C. § 103 (pre-AIA) By Ferneau A in View of Bourgraf and Further in View of Ferneau B

Claims 3 and 4 would have been obvious to a POSITA in view of the Ferneau A-Bourgraf-Ferneau B combination.

1. Claim 3

a. “An ambulance cot, comprising:”

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶70.)

b. “a base frame;”

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶71.)

c. “a litter frame; and”

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶72.)

d. “an X-frame support mechanism interconnecting said base frame and said litter frame and being configured to support said litter frame in one of a plurality of positions relative to said base frame,

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶73.)

- e. said support mechanism including at least one pair of frame members pivotally secured to each other proximate the mid-length thereof,**

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶74.)

- f. said at least one pair of frame members each having opposite ends respectively secured to one of said base frame and said litter frame,**

For the same reason as discussed with respect to Ground 1, above, Ferneau A discloses this element. (Stevick ¶75.)

- g. at least one of said pair of frame members having a first mount oriented between said mid-length thereof and said [base] *litter* frame,**

The '545 Patent does not disclose at least one of said pair of frame members having a first mount oriented between said mid-length thereof and said litter frame.

A POSITA would understand that the cot frame rests on the unnumbered and discussed post in Figure 4 of the '545 Patent and that this serves several functions, including avoiding pinching of an operator's fingers or other extremities if the cot frame were to contact the base frame. (Stevick ¶76a.) To the extent, however, that a POSITA would not understand this from the '545 Patent alone, the Bourgraf patent makes clear that corner posts **41** engage the sockets **40** mounted on the cot frame. Thus, to the extent Ferneau A does not disclose the posts engaging the cot frame, it would be obvious to modify Ferneau A in view of Bourgraf so that the post engages the cot frame. (Stevick ¶¶ 41, 48-52, 76b).

Bourgraf discloses an undercarriage **13** comprising side and end frame members **16, 17, 18** and **19** interconnected by fittings **20, 21, 22** and **23**, each fitting supporting a corner post **41**. The corner posts **41** support the cot frame **1** through sockets **40** when the cot frame **1** is lowered toward undercarriage **13**. (Ex. 1010 at col. 3, ll. 20-25, col. 4, ll. 20-24.) Corner posts **41** correspond to mounts **226** and **227** in the '884 Patent. (Stevick ¶¶ 41, 77.)

Although the posts in the '545 Patent and Bourgraf are not situated between the mid-length of the X-frame members and the litter frame, it would have been obvious to a POSITA given the teaching of the '545 Patent in view of Bourgraf and the '541 Patent to situate mounts between the mid-length of the X frame members and the litter frame of the '545 Patent. Doing this would prevent metal-to-metal contact between the cross-forming frame members **7** and **8** and the crossbars of the undercarriage **1** of the '545 Patent. It would have been well within the technical capabilities of a POSITA to situate the mounts in such location, would not have required undue experimentation, and would have had a high expectation of success. (Stevick ¶¶ 48-52, 78.)

- h. said first mount being configured to [respectively] engage said base frame in response to said litter frame becoming proximate said base frame; and"**

Modifying the '545 Patent in view of the teachings of Bourgraf and the '541 Patent, as discussed above, by situating at least one mount on one of cross-forming

frame members **7** and **8** (or **7a** and **8a**), between the mid-length thereof and the litter frame, would cause the mount to engage the base frame (undercarriage **1**) in response to the litter frame (cot frame **9**) becoming proximate to the base frame (undercarriage **1**). (See Ex. 1008 at col. 5, ll. 35-37; FIGS. 1a, 1b, 3, 4, 5.) (Stevick ¶79.)

- i. **“wherein said base frame has longitudinally extending side rails and at least one crosswise member interconnecting said side rails and being oriented in a path of movement of said first mount as said litter frame becomes proximate said base frame so that said first mount engages and rests upon said at least one crosswise member.”**

The '545 Patent discloses that the base frame (undercarriage **1**) has longitudinally extending side rails (side members **3**, **4**) that are interconnected by at least one crosswise member (transverse frame members **5**, **6**). As modified by the teachings of Bourgraf and the '541 Patent, the crosswise member (transverse frame member **5** or **6**) would be oriented in a path of movement such that the mount will engage and rest upon the at least one crosswise member. (Ex. 1008 at col. 5, ll. 1-12, 35-37; FIGs. 1a, 1b, 3, 4, 5.) (Stevick ¶80.)

Accordingly, claim 3 of the '884 Patent is invalid as obvious over the combination of Ferneau A and Bourgraf. (Stevick ¶81).

2. Claim 4

- a. **“The ambulance cot according to claim 3,**

Claim 4 of the '884 Patent depends from claim 3, and the discussion above regarding claim 3 is incorporated herein by reference.

- b. wherein said first mount engages and rests upon said at least one crosswise member [and] between the respective said side rails of said base frame.”**

When the cot disclosed in the '545 Patent is modified according to the teachings of Bourgraf and the '541 Patent, for the reasons set forth with respect to claim 3, the mount on the modified '545 Patent cot will engage and rest upon the crosswise member (transverse frame member 5, 6) between the side rails (side members 3, 4) of the base frame (undercarriage 1). (Ex. 1008 at FIG. 4; col. 5, ll. 35-37.) (Stevick ¶ 83.)

Accordingly, claim 4 of the '545 Patent is invalid as obvious over the combination of Ferneau A and Bourgraf and in further view of Ferneau B. (Stevick ¶84).

X. SECONDARY CONSIDERATIONS

Petitioners are not required to predict which arguments Patent Owner might make, if any, about secondary considerations. *Cf. Petroleum Geo-Services Inc. v. Western Geco LLC*, IPR2014-01477, Paper 18 at 32 (P.T.A.B. Mar. 17, 2015) (finding “at the time of filing of the present Petition, no evidence of secondary indicia of non-obviousness in the record of this proceeding” and “the evidence of secondary indicia of non-obviousness must be first developed in this proceeding by [PO]”).

Petitioners are unaware of secondary considerations, including commercial success and industry praise, relating to PO's products that PO may assert are covered by the claimed invention and that are attributable to the claimed invention.

Petitioners reserve the right to supplement their positions regarding secondary considerations to respond to any potential allegations of non-obviousness that PO may make.

XI. TRIAL SHOULD BE INSTITUTED

A. The *Fintiv* Factors Weigh Against Discretionary Denial

The *Fintiv* factors as a whole favor institution. *See Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, Paper No. 11 (P.T.A.B. Mar. 20, 2020). This Petition presents compelling evidence of unpatentability. With respect to the concurrent proceeding, Petitioners agree to a *Sotera*-like stipulation and present evidence of a median time-to-trial after the Board's projected statutory deadline for a Final Written Decision. *See* Interim Procedure Memorandum issued by Director Vidal on June 21, 2022.

With respect to the first *Fintiv* factor, Petitioners do not at present intend to seek a stay of the pending district court litigation. However, Patent Owner may seek *inter partes* review of either or both of the patents asserted by Petitioners as counterclaims, and Patent Owner may seek a stay in the event that it files for *inter partes* review. Therefore, this factor is neutral.

The second *Fintiv* factor favors institution. In the Scheduling Order in the Litigation, the district court has not set a trial date. (See Ex. 1015.) However, the median time-to-trial in the Southern District of Ohio is 42.5 months. (See Ex. 1016 (time-to-trial for the twelve-month period ending June 30, 2023.)) This means that a trial could reasonably be expected to be scheduled in or around early May 2026, which is approximately a year later than the projected statutory deadline (April 2025) for the Board to complete this review if instituted. Thus, any trial in the related litigation likely will occur after the Board's likely final written decision.

The third *Fintiv* factor weighs in favor of institution. Although filed in October 2022, the related litigation is still at a relatively early stage. The parties recently exchanged infringement and invalidity contentions. Fact discovery has just started, but no depositions have been taken and expert discovery has not yet begun. The parties' claim construction briefing is not yet due, and a hearing on claim construction is not scheduled to occur until March 20, 2024. (See Ex. 1015 (ECF 33).)

Petitioners have filed this IPR petition within four months of being served with preliminary infringement contentions which identified the asserted claims. Because Petitioners have acted diligently, and the parties' investment in the litigation is limited, discretionary denial is not warranted. See *Vudu, Inc. v. Ideahub, Inc.*, No. IPR2020-01688, Paper No. 16 at 12-13 (P.T.A.B. Apr. 19, 2021).

The fourth *Fintiv* factor weighs against denial. If trial is instituted, Petitioners stipulate that they will not argue the invalidity of the asserted claims in the case before the district court on the same grounds as in the Petition or on any grounds that could have been reasonably raised in the Petition. As the Board found in *Sotera*, this stipulation strongly weighs in favor of not exercising discretion under 35 U.S.C. § 314(a). *See Sotera Wireless, Inc. v. Masimo Corp.*, No. IPR2020-01019, Paper No. 12 at 18-19 (P.T.A.B. Dec. 1, 2020) (precedential as to § II.A).

Because Petitioners and PO are the same parties in the district court, the fifth *Fintiv* factor is neutral and should therefore be given no weight. *See Kranos Corp. d/b/a Schutt Sports v. Apalone, Inc.*, No. IPR2020-00501, Paper No. 13 at 13-14 (P.T.A.B. July 16, 2020).

To the extent that the Board might favor discretionary denial through its evaluation of factors 1 through 5 above, Petitioners respectfully submit that, consistent with the decision of Director Vidal in *Commscope Technologies LLC v. Dali Wireless, Inc.*, IPR2022-01242, Paper 23 (Feb. 27, 2023), the Board should consider the sixth *Fintiv* factor. This factor favors institution because the merits of the Petition are compelling. Prior art references render obvious independent Claim 3. Dependent Claim 4 is rendered obvious by simple combinations of references involving the same field and addressing similar problems.

Taken together, the *Fintiv* factors strongly weigh in favor of institution and against denial.

B. The Circumstances Weigh Against Discretionary Denial

In addition, this is the only IPR petition filed against the Challenged Claims and is not a serial petition under any of the factors in *General Plastic. General Plastic Indus. Co., Ltd. v. Canon Kabushiki*, No. IPR2016-01357, Paper No. 19 (P.T.A.B. Sept. 6, 2017). Petitioners' grounds rely on prior art not previously considered or applied by the Examiner and do not present the same or substantially the same arguments presented earlier to the Office. The Board should decline to exercise its discretion to deny review under 35 U.S.C. §§ 314(a) and 325(d).

XII. CONCLUSION

For the above reasons, Claims 3 and 4 of the '884 Patent should be found unpatentable, and Petitioners request review of these claims.

Respectfully submitted,

Dated: October 13, 2023

/s/ William Oldach III
William Oldach III (Reg. No. 42,048)
Lead Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), I hereby certify that the foregoing
“Petition for *Inter Partes* Review of U.S. Patent No. RE44,884” contains 5,091
words as measured by the word processing software used to prepare the document,
excluding the parts of the document exempted by 37 C.F.R. § 42.24(a)(1).

/s/ William Oldach III
William Oldach III
Reg. No. 42,048
Lead Counsel for Petitioners

CERTIFICATION OF SERVICE

The undersigned hereby certifies that the above-captioned “Petition for *Inter Partes* Review of U.S. Patent No. RE 44,884,” including its supporting evidence (Exhibits 1001-1016) and Power of Attorney, was served on October 13, 2023, upon the following via FedEx:

FLYNN, THIEL, BOUTELL & TANIS, P.C.
2026 RAMBLING ROAD
KALAMAZOO, MI 49008-1631

As well as a courtesy copy to Patent Owner’s litigation counsel, by email:

mtomsa@mcandrews-ip.com

bsurette@mcandrews-ip.com

dlaughton@mcandrews-ip.com

mweil@mcandrews-ip.com

jesse.jenike-godshalk@thompsonhine.com

VORYS, SATER, SEYMOUR AND PEASE LLP

/s/ William Oldach III
William Oldach
Attorney for Petitioners
Registration No. 42,048