

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

Case IPR2024-00042
U.S. Patent No. RE 44,884

PATENT OWNER'S PRELIMINARY RESPONSE

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PATENT OWNER’S EXHIBITS

Exhibit Number	Patent Owner’s Exhibits
2001	Plaintiffs Stryker Corporation and Stryker Sales, LLC’s First Amended Complaint For Patent Infringement
2002	Defendant Ferno-Washington, Inc. and Ferno Group, Inc.’s, Third Amended Answer to Plaintiffs’ Amended Complaint and Counterclaim Against Plaintiffs
2003	Defendants’ Preliminary Invalidity Contentions
2004	Joint Claim Construction and Prehearing Statement
2005	Joint Disputed Claim Terms Chart
2006	USPTO Memo re: Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation dated June 21, 2022 (“Vidal Memo”)

Stryker Corporation (“Patent Owner” or “Stryker”) submits this Preliminary Response to the Petition for *Inter Partes* Review (“Petition”) of Claims 3 and 4 (“Challenged Claims”) of U.S. Reissue Patent No. 44,884 (the “884 Reissue”).

I. INTRODUCTION

The Petition alleges obviousness based on two grounds, however, the arguments and references relied upon are identical to (or substantially the same as) and cumulative of arguments and references previously considered by the Office during prosecution of the 884 Reissue. Ferno makes no attempt in its Petition to establish that the Examiner erred in evaluating the previously-presented arguments and references, thus Ferno should not be entitled to a second bite at the apple. Therefore, the Petition should not be instituted because of at least the following deficiencies:

First, the Petition should be denied under 35 U.S.C. § 325(d) because—for all grounds—the same or substantially the same prior art and arguments were previously presented to the Office. For example, two of the three references upon which Ferno relies were previously cited and considered by the Office, while the third reference is cumulative.

Second, the Petition should be denied because it does not establish obviousness. For example, Ferno relies heavily on the conclusory testimony of Glen

Stevick, Ph.D, P.E., whose unsigned and undated declaration at Exhibit 1002 (“Stevick Declaration”) attempts to address missing claim limitations, yet fails to address why the missing limitations would have been necessarily present or obvious in light of the references’ disclosures.¹

Third, the Petition should be denied under 35 U.S.C. § 314(a) because the Petition does not present a “compelling” meritorious challenge and the *Fintiv*² factors favor discretionary denial.

For all of the reasons described herein, institution should be denied.

II. BACKGROUND

A. Background of the Invention

Emergency Medical Services (EMS) personnel face numerous challenges on a daily basis, particularly during emergency responses. (Ex. 1001, at Col. 1:40-47.) For example, in addition to maneuvering the combined weight of the cot and patient,

¹The Stevick Declaration is unsigned and, therefore, does not comply with statutory requirements. *See* 37 C.F.R. §42.11(b) (“Every petition, response, written motion, and other paper filed in a proceeding must comply with the signature requirements set forth in § 11.18(a) of this chapter.”)

² *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential).

EMS personnel are often required to raise and lower a patient relative to the ground during transport. (*Id.*) When a patient support surface (e.g., litter) is lowered, EMS personnel are exposed to an increased risk of being caught or pinched between the cot's base frame and litter frame as they move closer together. (*Id.*, at Cover (INID 54 & 57); Col. 19:49-55.) For example, fingers or clothes can become caught between "pinch points," thus potentially resulting in injury and interference with the cot's operation.

Accordingly, it is beneficial to provide an ambulance cot with features to omit or mitigate pinch points to thereby obviate or minimize the risk of pinching.

B. The 884 Reissue

The 884 Reissue is a reissue of U.S. Patent No. 7,540,047 (the "047 Patent") which, in turn, is a divisional of U.S. Patent No. 7,398,571 (the "571 Patent") and ultimately claims priority to U.S. Provisional Patent Application No. 60/613,151. (Ex. 1001, at Cover (INID 60, 62, & 64).)

1. Overview

The 884 Reissue generally relates to and claims an ambulance cot with one or more mounts to eliminate or mitigate pinch points between the litter frame and the base frame. (*Id.*, at Cover (INID 54 & 57); Col. 19:49-55.) The Challenged Claims recite, among other things, an ambulance cot having a base frame, a litter frame, and

an X-frame support mechanism interconnecting the base frame and the litter frame via a pair of frame members. (*Id.*, at Col. 22:22-33; and 22:45).

The Challenged Claims recite that at least one of said pair of frame members of the claimed X-frame support mechanism has “a first mount oriented *between said mid-length thereof and said litter frame* . . . configured to engage said base frame in response to said litter frame becoming proximate said base frame; and 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.” (“Pinch Safety Feature”) (*Id.*, at Col. 22:33-44).

When in the lowered position, for example, the first mount engages and rests on the at least one crosswise member between the side rails of the base frame. (*Id.*, at Col. 22:45-49.)

2. Brief Overview of Prosecution History

The Challenged Claims were, in effect, subject to two separate examinations before the Office—originally in connection with the 047 Patent and then again in connection with the 884 Reissue (collectively, the “884 Prosecutions”). *See generally* Exhibits 1004 & 1005.

During the 884 Prosecutions, various references were cited and considered by the Office, including two of the three references upon which Ferno relies in its Petition, i.e., U.S. Patent No. 4,192,541 (“Ferneau B”) and U.S. Patent No. 3,644,944 (“Bourgraf”). (Ex. 1001 at PAGE0001 (INID 56); Ex. 1004, at PAGE0170 (INID 56) and PAGE0181; Ex. 1005, at PAGE0028-0030.)³ During prosecution of the 047 Patent, the Office expressly stated that “[Bourgraf shows] gurneys that use scissors type lifting linkages which are of interest [and Ferneau B] shows a mobile cart with *bumpers 94* which are of general interest.” (Ex. 1005, at PAGE0028) (Emphasis added.)

The Office ultimately allowed the claims over the prior art once amended to recite the Pinch Safety Feature. (Ex. 1005, at PAGE0018-0021, PAGE0006; Ex. 1004, at PAGE0023-0026.) In fact, during prosecution of the 047 Patent, the Office found the subject matter pertaining to the Pinch Safety Feature (in then dependent claim 6) allowable in the first office action. (Ex. 1005, at PAGE0028.) In response, Stryker amended the independent claim (then independent claim 4) to incorporate

³ While not reflected on a *Notice of References Cited*, the third reference, i.e., U.S. Patent No. 6,701,545 (“Ferneau A”) is listed in the Examiner’s EAST Search History. (Ex. 1004, at PAGE0181-0182; Ex. 1005, at PAGE0033-0035.)

the Pinch Safety Feature. (*See* Ex. 1005, at PAGE0018-0021) (amending the claim to recite “at least one crosswise member . . . 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 Office subsequently allowed the claims of the 047 Patent. (Ex. 1005, at PAGE0003-0008; Ex. 1004, at PAGE0007-0013). Likewise, during prosecution of the 884 Reissue, the Office allowed the 884 Reissue after Stryker amended Claim 3 to remedy a defect relating to the location of the “first mount” of the Pinch Safety Feature (Ex. 1004, at PAGE0007-0013 and PAGE0023-0026).

Thus, the Pinch Safety Feature is an inventive feature of the Challenged Claims.

III. RELATED LITIGATION AND CLAIM CONSTRUCTION

In October 2022, Stryker filed a complaint against Ferno-Washington, Inc. and Ferno Group, Inc. (“Ferno”) in a case captioned *Stryker Corporation and Stryker Sales, LLC v. Ferno-Washington, Inc. and Ferno Group, Inc.*, 1:22-cv-00588 (S.D.O.H.) (“Underlying Litigation”). Stryker alleges infringement of nine of its patents against Ferno, including the 884 Reissue. (Ex. 2001, at Pages 38-47.) Stryker alleges, *inter alia*, that Ferno’s X1 Cot infringes at least the Challenged Claims. (*Id.*) Ferno, in response, filed counterclaims against Stryker alleging infringement of U.S.

Patent Nos. 10,568,787 and 11,458,050 (collectively the “Ferno Patents”).⁴ (*See* Ex. 2002, at 47-81).

The parties exchanged invalidity contentions on June 13, 2023 where Ferno presented the same prior-art based invalidity positions as it set forth in the Petition. (Ex. 2003, at Pages 90-104.)

As of this filing, the Underlying Litigation remains active and the parties are in the midst of claim construction briefing. Ferno has formulated and provided constructions for numerous claim terms and phrases of each of Stryker's asserted utility patents, *except* for the 884 Reissue. (*See* Ex. 2004, at Pages 1-4; Ex. 2005, at Pages 2-47.) In the Petition, Ferno contends that no claim construction is necessary and that no claim terms “require construction other than their plain and ordinary meaning.” (Pet. at 11.) Ferno instead “reserve[ed] the right to propose alternative constructions in the event that PO proposes constructions for any terms that vary from such plain and ordinary meaning.” (*Id.*)

As such, consistent with Ferno's positions taken in the Underlying Litigation, it seems that Ferno intends to apply the plain and ordinary meaning to the Challenged

⁴ The Ferno Patents are not subject to any *inter partes* review petitions and the deadline for Stryker to institute such petitions passed on December 5, 2023.

Claims because it fails to construe any claim terms in the Petition. Stryker, nevertheless, believes that, even under the plain and ordinary meaning, the Challenged Claims are valid and that the Board should deny the Petition.

IV. LEVEL OF ORDINARY SKILL IN THE ART

Stryker does not believe that the particular definition of a person of ordinary skill in the art (“POSA”) is determinative at this stage because the Petition can be denied under Ferno’s own proposed skill level. (Pet. at 10.) Nevertheless, Stryker submits that a POSA relating to the subject matter of the 884 Reissue would have an engineering or design background and significant experience designing, developing, manufacturing, and studying the types of mechanisms found on patient supports, cots, cot fasteners, or other similar mechanisms. More particularly, a hypothetical POSA would be a person with a Bachelor’s degree in engineering or a similar technical degree or equivalent work experience and at least about 3-5 years’ experience designing, developing, manufacturing, or studying the types of mechanisms found on patient supports, cots, cot fasteners, or other similar mechanisms.

Ferno’s proposed definition of a POSA merely requires that an individual have “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.” (Pet. at 10.)

While Stryker maintains that the definition of a POSA—including if Ferno's definition were to be applied—is not determinative, Stryker submits that Ferno's definition lacks sufficient specificity to the subject matter of the 884 Reissue and is inconsistent with itself. Namely, Ferno's definition of a POSA does not require experience in the types of mechanisms found on patient supports, ambulance cots, cot fasteners, or other similar mechanisms. Additionally, Ferno's definition is vague and inconsistent because it includes a person who has (1) “a bachelor's degree in mechanical engineering,” or (2) “related field or equivalent coursework or experience, and two years of industry experience.” (Pet. at 10.) Yet, then states that “lack of work experience can be remedied by additional education, and vice versa.” (*Id.*) Thus, it is unclear if any work experience or educational component is required, as they are seemingly interchangeable to Ferno. Consequently, the Board should apply Patent Owner's definition of a POSA.

V. THE BOARD SHOULD EXERCISE ITS DISCRETION UNDER 35 U.S.C. § 325(D) AND DENY INSTITUTION

Under *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, the Petition should be “reject[ed] . . . because[] the same or substantially the same prior art or arguments previously were presented to the Office.” IPR2019-

01469, Paper 6 at 7 (PTAB Feb. 13, 2020) (“*Advanced Bionics*”) (precedential) (citing 35 U.S.C. § 325(d)). The Board applies a two-part framework to analyze discretionary denial under § 325(d): “(1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and (2) if either condition of [the] first part of the framework is satisfied, whether the Petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.” *Advanced Bionics*, Paper 6 at 8 (precedential as to § III.C.5, first paragraph). “Previously presented art includes art made of record by the Examiner, and art provided to the Office by an applicant, such as on an Information Disclosure Statement (IDS), in the prosecution history of the challenged patent.” *Advanced Bionics*, Paper 6 at 7–8.

The Board in *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, set forth the following non-exhaustive list of factors in considering the § 325(d) framework (each a “BD Factor”):

- a) the similarities and material differences between the asserted art and the prior art involved during examination;
- b) the cumulative nature of the asserted art and the prior art evaluated during examination;

c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;

d) the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or patent owner distinguishes the prior art;

e) whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and

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

Becton, Dickinson & Co. v. B. Braun Melsungen AG, IPR2017-01586, Paper 8 at 17-18 (PTAB Dec. 15, 2017) (“*Becton, Dickinson*”). Patent Owner addresses the BD Factors herein; in contrast, Ferno failed to address the BD Factors in the Petition.

BD Factors (a), (b), and (d) relate to the first part of the *Advanced Bionics* framework (i.e., whether the art or arguments presented in the Petition are the same or substantially the same as those previously presented to the Office), and BD Factors (c), (e), and (f) relate to the second part (i.e., “whether the Petitioner has demonstrated a material error by the Office” in its prior consideration of the prior art or arguments). *Advanced Bionics*, Paper 6 at 10-11. “If a condition in the first part

of the framework is satisfied and the Petitioner fails to make a showing of material error, the Director generally will exercise discretion not to institute *inter partes* review.” *Id.* at 8–9. “[T]his framework reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown.” *Id.* at 9. Discretionary denial is appropriate here because Ferno’s asserted art and arguments have already been considered and overcome during examination. *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8, slip op. at 11-12 (PTAB Sept. 12, 2018) (“*NHK*”).

Here, as set forth in the following sections, the references relied upon in Grounds 1 and 2 of the Petition are identical to (or substantially the same as), and cumulative of, references considered during prosecution of the 884 Reissue and the original 047 Patent. Despite two of the three references being expressly cited and considered during both prosecutions and the third reference being cumulative, Ferno makes no attempt to establish that the Examiner “erred in evaluating the art or arguments” previously presented to the Office on either of the two occasions, as has “generally [been] required” for such cumulative petitions to be instituted under §325(d). *Advanced Bionics*, Paper 6 at 8. Therefore, the Board should deny institution.

A. Ground 1 Relies On the Same or Substantially the Same Art Previously Considered By the Office

Ground 1 is based on Ferneau A in view of previously-considered Ferneau B. (Pet. at 12.) Ferno argues that all challenged claims are obvious over Ferneau A, which relates to cots having a pair of side supports for accommodating persons with large bodies (Ex. 1008, at Col. 2:9-20), in view of Ferneau B, which relates to carts having an operator mounted to a frame permitting legs to swing rearwardly to a folded position beneath the frame. (Ex. 1009, at Abstract; Pet. at 12.)

As indicated in Section II.B.2, the Challenged Claims were ultimately allowed once amended to recite the Pinch Safety Feature (e.g., the “first mount” and how the “first mount engages and rests upon said at least one crosswise member”).

Ferneau A is directed to an elevating cot adapted to be rolled into emergency vehicles and is, at best, cumulative of the other art of record (including Ferneau B) because it simply discloses the same major components of a cot (e.g., litter, base, X-frame, etc.), but not the inventive Pinch Safety Feature. In fact, Ferno admits that Ferneau A fails to disclose the Pinch Safety Feature recited by the Challenged Claims. (Pet. at 13) (admitting that “[t]he ‘545 Patent does not disclose at least one pair of frame members having a first mount oriented between said mid-length thereof and said litter frame.”)

Ferno also admits that Ferneau B fails to disclose the inventive Pinch Safety Feature, but, citing the Stevick Declaration, concludes that it would nevertheless have been obvious. (Pet. at 14) (alleging that “[a]lthough the [bumpers 94] in [Ferneau B] are not situated between the mid-length of the X-frame members and the litter frame, it would have been obvious to a POSITA . . .”). As discussed in Section II.B.2, Ferneau B—the only reference cited as allegedly rendering obvious the Pinch Safety Feature—was previously cited and considered by the Examiner during prosecution of both the 884 Reissue (*See* Ex. 1004 at PAGE0170, 0181, 0185) and the 047 Patent (*See* Ex. 1004 at PAGE0197, and Ex. 1005 at PAGE0030, 0033, 0035). The Office even previously acknowledged the cited “bumpers 94” of Ferneau B as being “of general interest,” yet still found the claims allowable based on, for example, the Pinch Safety Feature. (Ex. 1005, at PAGE0028) (Emphasis added.)

Therefore, putting aside the fact that Ferneau A and Ferneau B fail to disclose the Pinch Safety Feature as-claimed as discussed below in Section VI, Ferno's Ground I argument is cumulative of the art and arguments previously considered by the Office. For at least this reason, the Board should deny institution.

1. Part 1 (BD Factors (a), (b), & (d)): The Office Considered the Same or Substantially the Same Art during Prosecution

Ferneau A is cumulative and Ferneau B was previously considered by the Office during the 884 Prosecutions. In addition, as set forth in Section V.A, Ferno

admits that Ferneau A and Ferneau B each fail to disclose the Pinch Safety Feature (instead citing to conclusory statements set forth in the Stevick Declaration).

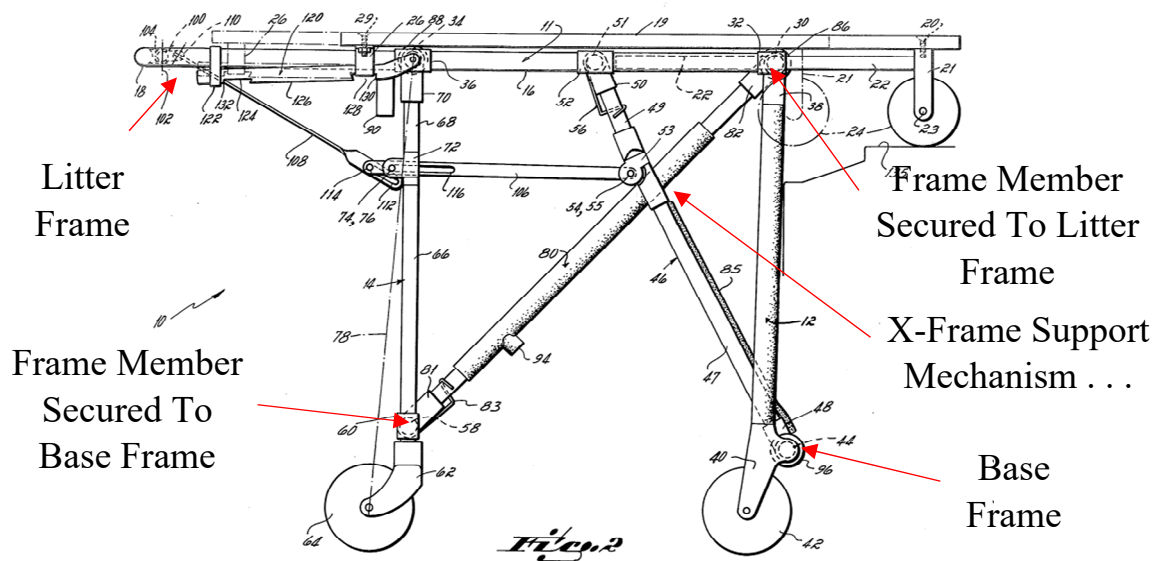
a. Ferneau A is Cumulative and Immaterial

Ferneau A is cumulative of the art of record (including Ferneau B) because, as it relates to the Challenged Claims, it discloses nothing more than the same major components of a cot that are already present in Ferneau B, but fails to disclose the inventive Pinch Safety Feature.

The Challenged Claims recite an ambulance cot with a base frame, a litter frame, and an X-frame support mechanism interconnecting the base frame and litter frame. (Ex. 1001 at Col. 21:48-52; Pet. at 12-13.) Ferno uses Ferneau A to disclose the features of (a) “an ambulance cot,” (b) “a base frame,” (c) “a litter frame,” and (d) “an X-frame support mechanism . . . including at least one pair of frame member having opposite ends respectively secured to one of said base frame and said litter frame.” (See Pet. at 12-13.)

While Ferneau A may not have been discussed before the Office during the 884 Prosecutions, Ferneau A is cumulative of art already before the USPTO (e.g.,

Ferneau B).⁵ Ferneau B, for example, discloses a “cart” configured to roll “up to the rear of [an] ambulance.” (Ex. 1009 at 1:18-20.) With reference to Figure 1, below, Ferneau B discloses elements (a)-(d).



(Ex. 1009 at Fig. 2.)

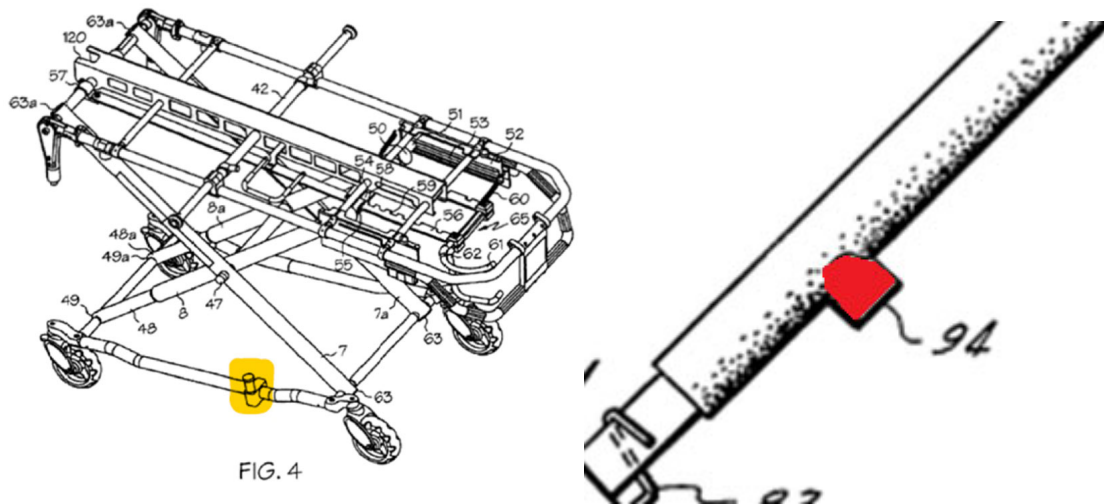
A reference is “merely cumulative because patents disclosing the ‘relevant limitations of the claims’ were already before the examiner.” *Larson Mfg. Co. of S. Dakota v. Aluminart Prod. Ltd.*, 559 F.3d 1317, 1332 (Fed. Cir. 2009). “As per 37 C.F.R. § 1.56, cumulative evidence is definitionally not material evidence.” *Eisai Co. v. Dr. Reddy's Lab'ys, Ltd.*, 533 F.3d 1353, 1361 (Fed. Cir. 2008). “Prior art was

⁵ Stryker notes that the Office’s search record lists Patent No. “6701545” (i.e., Ferneau A) in the EAST Search History (Ex. 1004, at PAGE0181; Ex. 1005, at PAGE0033-0035.)

not material because it failed to show several relevant claim limitations that were disclosed in art already before the PTO.” *Larson Mfg. Co. of S. Dakota*, 559 F.3d at 1332.

The Challenged Claims further recite that the support mechanism has a pair of frame members having a first mount oriented between the mid-length of the frame members and the litter frame. (Ex. 1001, at Col. 22:33-38.) The first mount is configured to engage the base frame when the litter frame becomes proximate to the base frame [to prevent pinching]. *Id.* Ferno highlights (in yellow) Figure 4 of Ferneau A (below) as disclosing a “unnumbered and undiscussed post,” but this “unnumbered and undiscussed post” does not disclose the Pinch Safety Feature and is merely cumulative of the “bumpers 94” of Ferneau B (red). (Pet. at 6-7.)⁶

⁶ The “unnumbered and undiscussed post” of Ferneau A is also cumulative of, *inter alia*, the “corner posts 41” of Bourgraf. *See* Section V.B.



(compare Ex. 1008 at Fig 4 (left) with Ex. 1009 at Fig. 2 (cropped) (right))

Ferno seemingly agrees and admits that “[Ferneau A] 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.”⁷ (Pet. at 13.) Additionally, Ferno states that “the post in [Ferneau A] serves largely the same function as the mounts [rubber bumpers 94] in [Ferneau B].” (*Id.* at 14.) Ferneau A is, therefore, also immaterial because it fails to teach the Pinch Safety Feature and the conclusory statements of the Stevick Declaration fail to meaningfully articulate how Ferneau A is not cumulative over, for example, Ferneau B.

Thus, it is clear that Ferneau A is cumulative and immaterial.

⁷ All emphasis added unless otherwise noted.

b. Ferneau B was Cited and Considered by the Office

In an attempt to cure the deficiencies of Ferneau A (the only “newly” cited reference), Ferno relies on previously-considered Ferneau B to allegedly teach the inventive Pinch Safety Feature. (Pet. at 14-15.)

Ferneau B was considered by the Office on multiple occasions and the claims were nevertheless allowed over the “bumpers 94” of Ferneau B; therefore, yet another examination in reliance on Ferneau B is an unnecessary waste of the Office’s resources. For example, Ferneau B is listed in the “References Cited” section on the face of the 047 Patent and the 884 Reissue. (Ex. 1001 at PAGE0001-0002 (INID 56); Ex. 1004, at PAGE0170.) Further, Ferneau B was expressly considered during prosecution of the 047 Patent. (*Id.*, *see also* Ex. 1005, at PAGE0028-0035; Ex. 1004, at PAGE0197.) During prosecution of the 047 Patent, the Office expressly stated that “[Bourgraf shows] gurneys that use scissors type lifting linkages which are of interest [and Ferneau B] shows a mobile cart with **bumpers 94** which are of general interest.” (Ex. 1005, at PAGE0028) (Emphasis added.) Additionally, the Office’s search record lists Patent No. “4192541” (i.e., Ferneau B) in the EAST Search History (Ex. 1004, at PAGE0181, PAGE0185; Ex. 1005, at PAGE0033, PAGE 0035.)

The Board has held that showing that a prior art reference is listed in the Notice of References Cited by Examiner is sufficient to prove that the reference was previously considered. *See Sony Interactive Ent. LLC v. Terminal Reality, Inc.*, IPR2020-00710, Paper 15 at 11 (PTAB Oct. 13, 2020) (“Sony”) (“We agree with *Infernal* that Lee was considered by the Examiner because Lee is listed in the Examiner’s Notice of References Cited Accordingly, Lee was previously considered by the Office.”) (denying institution (*Id.* at 13).); *see also, Adt LLC v. Vivint, Inc.*, IPR2022-00612, Paper 8 at 19 (PTAB Aug. 22, 2022) (holding that it was undisputed that the primary reference (Saylor ‘265) was before the Office though “the examiner did not expressly apply Saylor ‘265 in analyzing the claims, but the official ‘Notice of References Cited’ lists Saylor ‘265 as a reference that the examiner identified as relevant and material.”) (denying institution (*Id.* at 25)); *Alarm.com v. Vivint, Inc.*, IPR2022-00728, Paper 6 at 20 (PTAB Nov. 1, 2022) (“*Alarm.com*”) (holding that Notice of References Cited was sufficient to show that the reference was before the Office during prosecution and that “examiner identified [the reference] as relevant and material.”) (denying institution (*Id.* at 24)); *Yotrio Corp. v. LakeSouth Holdings*, IPR2017-00299, Paper 7 at 11 (PTAB May 15, 2017) (holding that a reference listed in a Notice of References Cited was considered by the Office and that the petition fell “squarely within the boundaries of ‘requests . . .

that are cumulative to or substantially overlap with issues previously considered by the Office with respect to the patent’.”) (denying institution (*Id.* at 14)). *See Fellowes, Inc. v. Treefrog Devs., Inc.*, IPR2020-01509, Paper 11 at 7-9, 17-18 (PTAB Feb. 22, 2021) (“Fellowes”) (denying institution based on § 325(d) because prior art reference was considered by Examiner, as it was listed on the face of the patent).

Thus, it is clear that Ferneau B was previously considered by the Office on multiple occasions.

2. Part 2 (BD Factors (c), (e), & (f)): Ferno Has Failed to Established That the Office Materially Erred

Ferno has not met its burden of showing the Office erred in a manner material to patentability of the challenged claims. *Advanced Bionics*, Paper 6 at 8. “An example of a material error may include misapprehending or overlooking specific teachings of the relevant prior art where those teachings impact patentability of the challenged claims.” *Id.* at 8 n.9. “If reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.” *Id.* at 9. Moreover, where, as here, the same or substantially overlapping disclosures were before the Office, it is incumbent on Ferno to offer a particularized explanation of how the Office erred, and Ferno failed to carry this burden. *See Google LLC v. Uniloc 2017 LLC*, IPR2019-01584, Paper 7

at 15 (PTAB Mar. 24, 2020) (“[T]here is an overlap in authorship/inventorship between the references here and the references in the two prior petitions, which makes even more important an explanation by Petitioner here of the distinction between references”) (denying institution (*Id.* at 16).)

Regarding BD Factors (c) and (e), Ferno's statements regarding the references relied on in the Petition fail to show how Ferneau A is not cumulative, omit key details, and are thus insufficient to carry the burden of showing material error. Notably, when describing Ferneau A, Ferno merely states “Ferneau A was not of record before the Patent Office during prosecution of the ‘884 Patent.” (Pet. at 7.) Ferno fails to argue that Ferneau A is not cumulative. (Pet. at 5-7.) Ferno's failure to address Ferneau A's cumulativeness is a glaring omission because, as proven above in Section V.A.1, Ferneau A is cumulative over, for example, Ferneau B.

As discussed in Section V.A.1, in addition to being cumulative, Ferneau A does not disclose the Pinch Safety Feature (Pet. at 13); rather, Ferno relies on Ferneau B, which also fails to disclose the Pinch Safety Feature and was previously considered by the Office on multiple occasions. Ferno does not assert that Ferneau B was not of record before the Office during the 884 prosecutions, presumably because Ferno was well-aware that Ferneau B was before and expressly considered

by the Office. (*See* Pet. at 7-8.) Thus, the Petition implicitly reflects Ferno's recognition that Ferneau B was already before the Office.

Regarding BD Factor (f), the Petition does not present new evidence that warrants reconsideration of the same prior art. The Stevick Declaration is not enough; the declaration parrots arguments in the Petition and is not supported with objective evidence. For example, the declaration acknowledges that Ferneau A fails to disclose the first mount and erroneously states that Ferneau B's rubber bumpers allegedly teach the missing first mount, but, as discussed in Section VI.A.2 does not articulate why one would move the rubber bumper of Ferneau B to the location specified and required by the Challenged Claim. *See* Stevick Declaration, at Paras. 60-62a; *see also, NHK*, Paper 8 at 16-17 (“[T]he declaration does not persuade us that we should reconsider Braunheim, the AAPA, or Petitioner's arguments because the declaration is substantially similar to the petition (i.e., contains the same arguments that we find substantially overlap the Examiner's findings) and [the expert] fails to support his testimony with objective evidence.” (footnote omitted)). Ferno failed to meet their burden of showing material error and are foreclosed from raising new arguments concerning error in a reply. *Koa Corp. v. Vishay Dale Elecs.*, IPR2019-00201, Paper 30 at 77 (PTAB May 7, 2020) (“A reply that raises a new issue or belatedly presents evidence may not be considered.”).

This Petition is precisely the type that § 325(d) was designed to weed out—i.e., one that relies on wholly cumulative art that asks the Board to second-guess the Examiner's decision on patentability without any showing of error. Where, as here, the first part of the *Advanced Bionics* framework has been satisfied, “the Board's decisions generally have required a showing that the Office erred in evaluating the art”—and that showing has not been made. *Advanced Bionics*, at 8.

The Board should therefore exercise its discretion under § 325(d) to deny institution of Ground 1.

B. Ground 2 Relies On the Same or Substantially the Same Art Previously Considered By the Office

Ground 2 in the Petition is based on Ferneau A in view of previously-considered Bourgraf and further in view of previously-considered Ferneau B.

Ferneau A and Ferneau B are discussed above at Section V.A. As discussed above, Ferneau A is cumulative and does not disclose the Pinch Safety Feature of the Challenged Claims, and Ferneau B was previously considered by the Office on multiple occasions (and also does not disclose the Pinch Safety Feature of the Challenged Claims).

Bourgraf relates to an adjustable ambulance cot with a patient-supporting frame capable of being adjusted such that a patient's feet are elevated relative to the head. *See* Ex. 1010, at Abstract (INID 57) and Col. 1:4-9. Like Ferneau B, Bourgraf

was also before the Examiner during prosecution of the 047 Patent and the 884 Reissue. Thus, for the same or similar reasons as presented for Ground 1, the Board should deny institution because Ferno's arguments in Ground 2 are rendered cumulative.

1. Part 1 (BD Factors (a), (b), & (d)): The Office Considered the Same or Substantially the Same Art during Prosecution

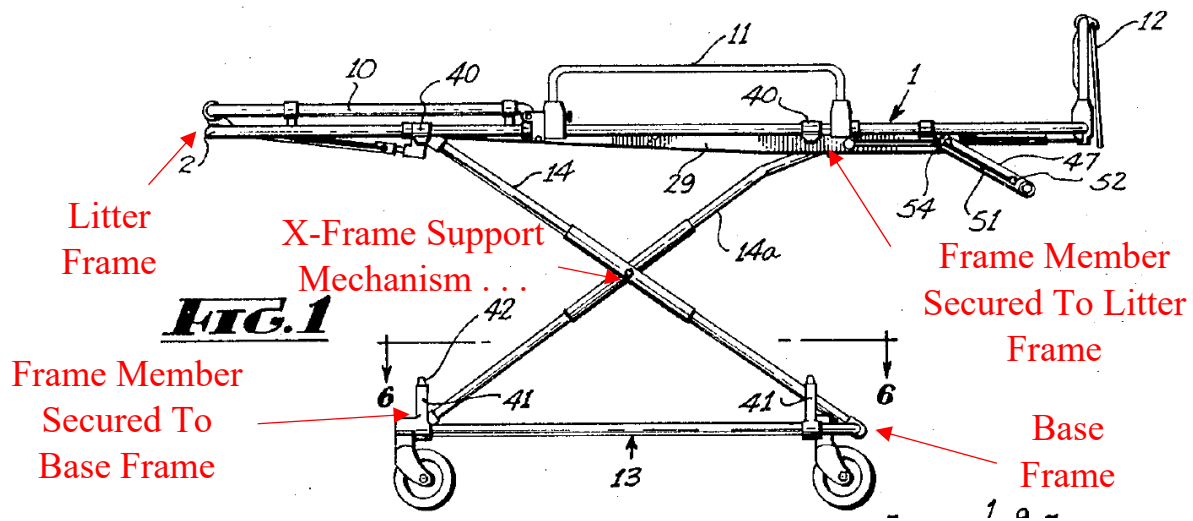
Ground 2 alleges obviousness over Ferneau A in view of Bourgraf and further in view of Ferneau B. Bourgraf, like Ferneau B, was previously considered during prosecution of the 884 Reissue.

a. Ferneau A and Ferneau B are Cumulative, Immaterial, and/or Previously Considered by the Office

Ferneau A is cumulative of the art of record (including Ferneau B and Bourgraf) because, as it relates to the Challenged Claims, it discloses nothing more than the same major components of a cot that are already present in cited art and fails to disclose the inventive Pinch Safety Feature.

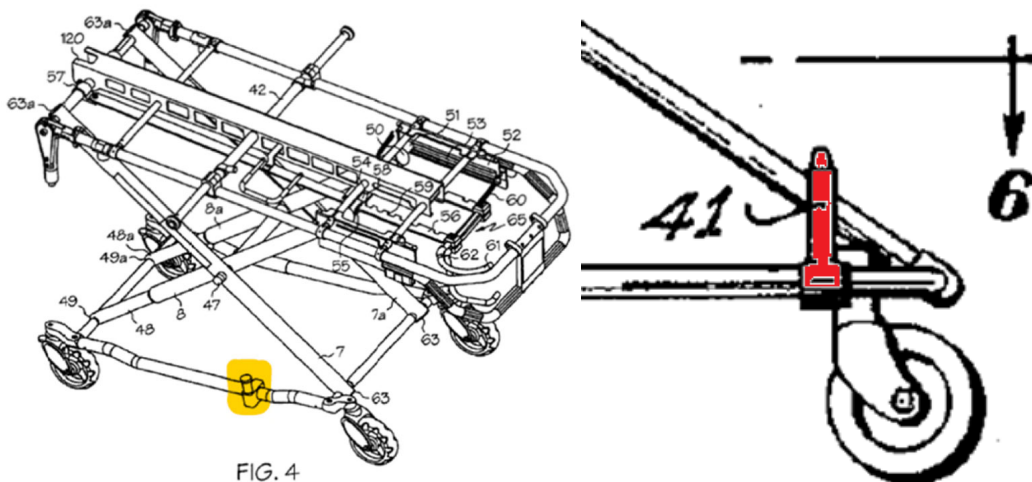
Initially, Ferneau A is cumulative over Ferneau B. *See* Section V.A.1.a. Additionally, Ferneau A is also cumulative over Bourgraf, which similarly discloses (a) "an ambulance cot," (b) "a base frame," (c) "a litter frame," and (d) "an X-frame support mechanism" Bourgraf discloses "portable cots of the type used in

ambulance[s]” (Ex. 1010, Bourgraf, at Col. 1:4-5.) With reference to Figure 1, below, Bourgraf discloses elements (a)-(d).



(Ex. 1010 at Fig. 1.)

The cited “unnumbered and undiscussed post” (yellow) of Ferneau A at Figure 4 is also cumulative of the “corner posts 41” (red) of Bourgraf.



(compare Ex. 1008 at Fig 4 with Ex. 1010 at Fig. 1 (cropped))

Ferneau B was considered by the Office on multiple occasions and the claims were nevertheless allowed over the “bumpers 94” of Ferneau B; therefore, yet another examination in reliance on Ferneau B is an unnecessary waste of the Office's resources. *See* Section V.A.1.b.

Thus, Ferneau A is cumulative over Bourgraf and Ferneau B, which was previously considered by the Office on multiple occasions.

b. Bourgraf was Cited and Considered by the Office

In an attempt to cure the deficiencies of Ferneau A and Ferneau B, Ferno relies on previously-considered Bourgraf to allegedly teach the inventive Pinch Safety Feature. (Pet. at 18-19.) Like Ferneau B, Bourgraf was also considered by the Office on multiple occasions and the claims were nevertheless allowed over the “corner posts 41” of Bourgraf. (Ex. 1005, at PAGE0028, 0030; Ex. 1004, at PAGE0170-0171, 0197, 0296.)

First, during the prosecution of the 884 Reissue, Bourgraf was cited by the Examiner in a Notice of References Cited. (Ex. 1004, at PAGE0170.) Bourgraf was also considered during prosecution of the 047 Patent. (*See* Ex. 1005, at PAGE0028, 0030 (“[Bourgraf shows] gurneys that use scissors type lifting linkages which are of interest [and Ferneau B] shows a mobile cart with *bumpers 94* which are of general

interest.” (Emphasis added).) Therefore, further review of Bourgraf by the Office is cumulative, as discussed in Section V.A.1.

Second, Bourgraf was listed in an Information Disclosure Statement (“IDS”) by the Applicant. (Ex. 1004, at PAGE0171.) During prosecution, the Examiner electronically signed the IDS, made the notation “ALL REFERENCES CONSIDERED EXCEPT WHERE LINED THROUGH,” and did not line through Bourgraf. *Id.* The Board often holds that an IDS citation alone is deemed previously presented to, and considered by, the Office. *See Advanced Bionics*, Paper 6 at 7-8 (stating that previously presented art includes art cited in an IDS); *see also Microsoft Corp. v. Koninklijke Philips N.V.*, IPR2018-00279, Paper 11 at 12, 14-15 (PTAB June 8, 2018) (denying institution (*Id.* at 19)); *Ocado Grp. PLC v. Autostore Tech. AS*, IPR2021-00412, Paper 9 at 34-35 (PTAB July 21, 2021) (denying institution (*Id.* at 40)); *Eyenovia, Inc. v. Sydnexis*, IPR2022-00963, Paper 7 at 10-11 (PTAB Nov. 8, 2022) (denying institution (*Id.* at 21)); *Palo Alto Networks, Inc. v. Centripetal Networks, Inc.*, IPR2021-01155, Paper 12 at 14 (PTAB Jan. 20, 2022) (reference that “Examiner acknowledged having considered . . . by signing the IDS” and that was listed as a cited reference in the patent “is beyond dispute” before the Office during prosecution) (denying institution (*Id.* at 20)).

Finally, Bourgraf and Ferneau B are also listed in the “References Cited” section on the face of the 047 Patent, which reissued into the 884 Reissue. (Ex. 1004 at PAGE0197 (INID 56).) *See Fellowes*, IPR2020-01509, Paper 11 at 7-9, 17-18 (denying institution based on § 325(d) because prior art reference was considered by Examiner, as it was cited in IDS and listed on the face of the patent).

2. Part 2 (BD Factors (c), (e), & (f)): Ferno Has Failed to Established That the Office Materially Erred

As with Ground I, Ferno has not met its burden of showing the Office erred in a manner material to patentability of the challenged claims. *Advanced Bionics*, Paper 6 at 8. For the same reasons presented above in Section A.2, Ferno does not show any evidence of Office error when considering Bourgraf and gives no affirmative reasons for the Office to re-examine Bourgraf yet again. Again, Ferno's statements regarding the references relied on in the Petition fail to show how Ferneau A is not cumulative, omit key details, and are thus insufficient to carry the burden of showing material error. Furthermore, as with Ferneau B, discussed in Section V.A.2, there is no affirmative declaration that Bourgraf was not of record before the Office during the 884 Reissue's prosecution. (*See* Pet. at 9-10.) Thus, the Petition implicitly reflects Ferno's recognition that Bourgraf was already before the Office. As in Section V.A.2, regarding BD Factor (f), the Petition does not present new evidence that warrants reconsideration of the same prior art.

Each part of the *Advanced Bionics* framework weighs in favor of denying institution of Ground 2 under § 325(d) because the art supporting proposed Ground 2 was either considered during examination of the 884 Reissue or the 047 Patent (Ferneau B and Bourgraf) or cumulative of the art cited (Ferneau A), and Ferno does not show that the Office materially erred.

VI. THE PETITION DOES NOT ESTABLISH OBVIOUSNESS

A. Ground 1: The Challenged Claims Are Not Obvious over Ferneau A in view of Ferneau B

1. Ferno's Combination of Ferneau A in view of Ferneau B Does Not Disclose All Elements of the Challenged Claims

In Ground 1, Ferno argues that Ferneau A in combination with Ferneau B (a reference previously considered by the Office on multiple occasions, as discussed in Section V.A), would render the Challenged Claims obvious. Specifically, with regard to Claim 3, Ferno relies on Ferneau A only for limitations of: (a) “an ambulance cot,” (b) “a base frame,” (c) “a litter frame,” and (d) “an X-frame support mechanism . . . including at least one pair of frame members having opposite ends respectively secured to one of said base frame and said litter frame.” (Pet. at 12-13.) As Ferno admits, however, Ferneau A does not disclose the Pinch Safety Feature (Pet. at 13) (“The ‘545 Patent [Ferneau A] 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.”)

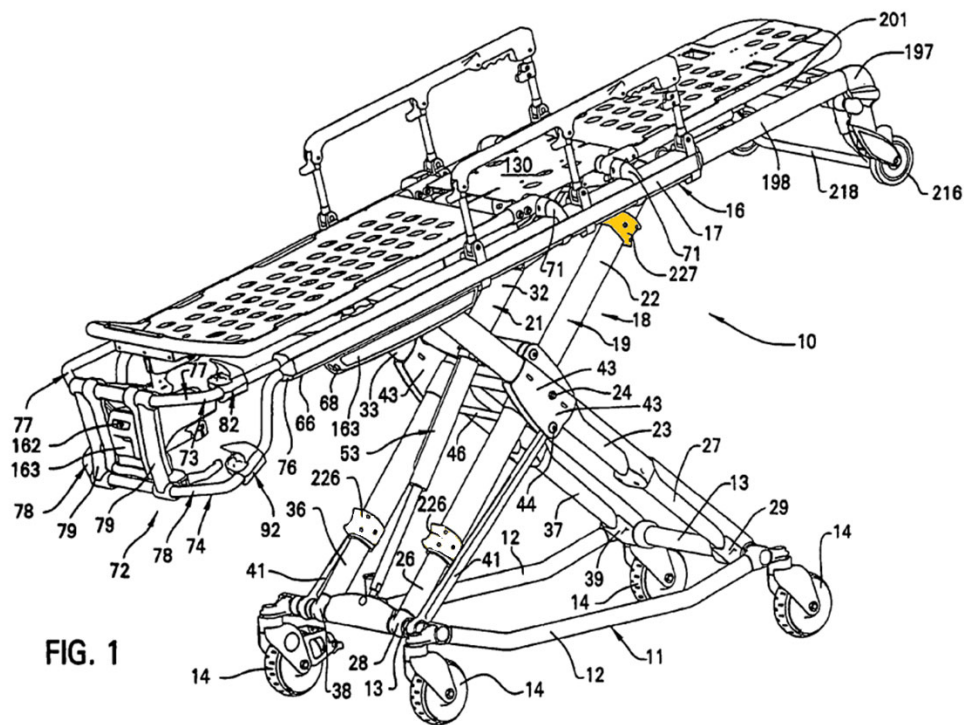
Ferno also admits that Ferneau B fails to disclose bumpers situated between the mid-length of the X-frame members and the litter frame but, citing the Stevick Declaration, concludes that it would have nevertheless been obvious. (Pet. at 14-15) (alleging that “[a]lthough the [bumpers 94] in [Ferneau B] are not situated between the mid-length of the X-frame members and the litter frame, it would have been obvious to a POSITA . . .”) Ferno also relies on Ferneau B to address limitation of Claim 4 (“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”). (Pet. at 16.)

The challenger must “carr[y] its burden to prove that all claimed limitations are disclosed in the prior art.” *PAR Pharm., Inc. v. TWi Pharm., Inc.*, 773 F.3d 1186, 1194 (Fed. Cir. 2014). Even if the Office was to re-examine Ferneau B, there are significant differences between Ferneau B and Challenged Claims.

First, as Ferno admits the rubber bumpers of Ferneau B “are not situated *between the mid-length of the X-frame members and the litter frame*,” as expressly recited by the Challenged Claims. (Pet. at 14) (Emphasis added.) As indicated in Section II.B.2, the Office allowed the claims of the 047 Patent once Stryker amended the independent claim to incorporate the Pinch Safety Feature. (*See* Ex. 1005, at PAGE0018-21) (amending the claim to recite “at least one crosswise member . . .

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”). Accordingly, Ferno cannot simply gloss over this claim limitation.

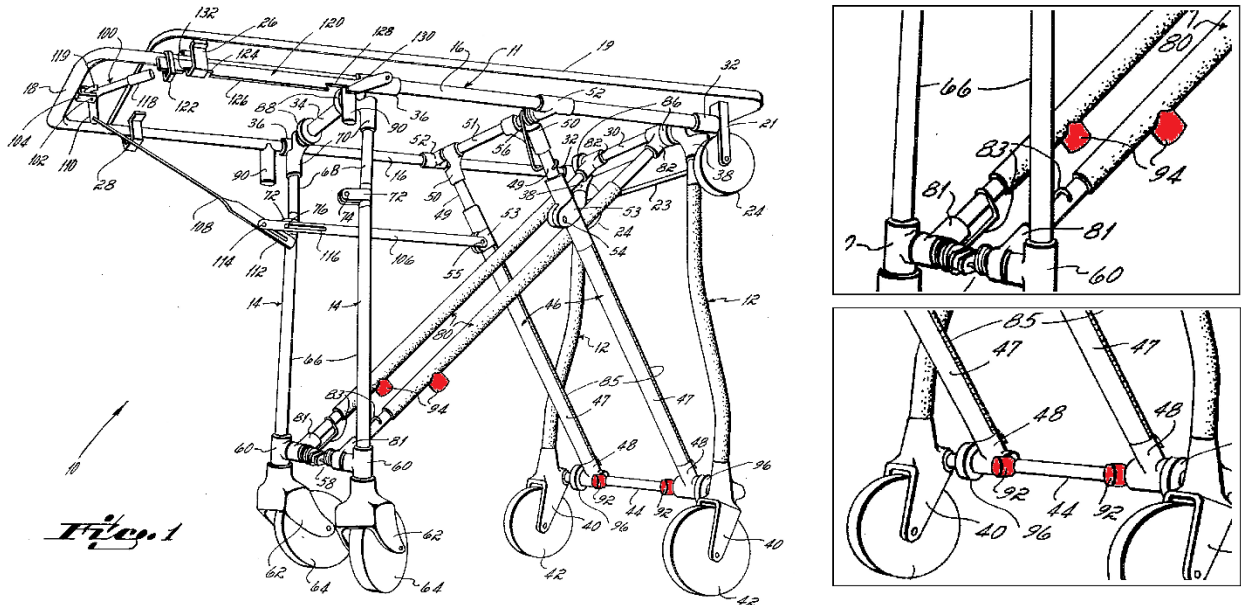
The Challenged Claims recite mounts situated *between the mid-length of the X-frame members and the litter frame* - an example of which is illustrated in Fig. 1. (Ex. 1001, at Fig. 1 (reproduced below).)



(Ex. 1001, at Fig. 1)

Ferneau B, instead, discloses a pair of the rubber bumpers 92 that sit on the cross bar 44 between the wheels and another pair 94 is situated between the mid-length of the braces 80 and the bottom of the cot, i.e., *not between the mid-length*

of the X-frame members and the litter frame as-claimed. (Ex. 1009 at Fig. 1, reproduced below.)



(Ferneau B (Ex. 1009) at Fig. 1)

Ferno simply argues “it would have been obvious to a POSITA given the teaching of the [Ferneau A] in view of the [Ferneau B] to situate mounts between the mid-length of the X frame members and the litter frame of the [Ferneau A].” (Pet. at 14, citing the Stevick Declaration at para. 48-52 & 62.) The Stevick Declaration, however, mimics the Petition and fails to address why the missing limitations would have been necessarily present or obvious in light of the references’ disclosures. *See Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 9 at 15 (PTAB Aug. 24, 2022) (Finding Petitioner’s Declarant simply repeated verbatim the conclusory statements found in the petition and did not offer any support for his

conclusions, nor cite any additional evidence. The Board reiterated that unsupported expert testimony that does not disclose the underlying facts or data on which it is based is entitled to little weight.) (denying institution (*Id.* at 18).)

Second, the mounts of the 884 Reissue do not engage each other. Instead, when the litter 16 is lowered, the “mounts 226 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. 19:49-52.) The mounts are specifically oriented to engage the cross rails “so that they are not readily accessible by attendants in the region of the ambulance cot and, therefore, pinching issues are avoided.” (Ex. 1001, at Col. 19:49-55.) In contrast, Ferneau B describes that its rubber bumpers 92 on the cross-bar 44 are “aligned to engage a like pair of rubber bumpers 94 mounted on the braces 80 when the legs are collapsed.” (Ex. 1009 at Col. 4:15-18.) Thus, the claimed mounts of the 884 Reissue are both different in structure and function from the rubber bumpers of Ferneau B. Therefore, Ferneau B (like Ferneau A) fails to teach the mounts recited by claims 3 and 4 of the 884 Reissue, and fails to cure the deficiencies of Ferneau A. Consequently, claims 3 and 4 are not rendered obvious by Ferneau A in view of Ferneau B.

2. Ferno Failed To Address Motivation to Combine and Reasonable Expectation of Success

One considers “motivation to combine and reasonable expectation of success only ‘if all the elements of an invention are found in a combination of prior art references.’” *PAR Pharm.*, 773 F.3d at 1194 (quoting *Medichem v. Rolabo*, 437 F.3d 1157, 1164 (Fed. Cir. 2006).) Here, while Ferno failed to present evidence that all the elements were present, Ferno also failed to present any cogent reason why a POSA would have been motivated to combine Ferneau A and Ferneau B or why there would be a reasonable expectation of success.

Claim 3 of the 884 Reissue requires “at least one of said pair of frame members having a first mount oriented *between said mid-length thereof and said litter frame.*” First, Ferno admits that “[Ferneau A] 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.” (Pet. at 13.) Ferno also acknowledges that “the [rubber bumpers] in [Ferneau B] are not situated between the mid-length of the X-frame members and the litter frame.” (Pet. at 14.) Additionally, Ferno states that “the post in [Ferneau A] serves largely the same function as the mounts [rubber bumpers 94] in [Ferneau B].” *Id.* The post in Ferneau A is located on the undercarriage 1 of the cot (as highlighted in Ferneau A, Fig. 1A, reproduced below).

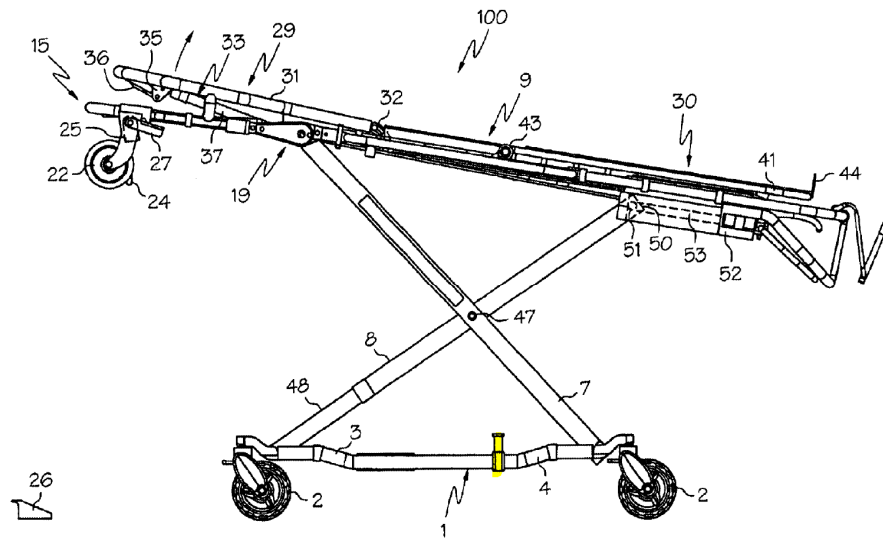


FIG. 1a

(Ex. 1008, at Fig. 1a)

Given that neither Ferneau A nor Ferneau B teaches a rubber bumper or a post oriented between the mid-length of the X-frame members and the litter frame, there is no cogent reason why a POSA would be motivated by these references to orient a mount between the mid-length of a frame member and the litter frame, as required by Claim 3 of the 884 Reissue.

Nevertheless, Ferno argues that “it would have been obvious to a POSITA given the teaching of [Ferneau A] in view of [Ferneau B] to situate mounts between the mid-length of the X frame members and the litter frame of [Ferneau A].” (Pet. at 14.) Citing the Stevick Declaration, Ferno concludes that a POSA would be motivated to relocate the mounts as-claimed to prevent “metal-to-metal contact” and to soften the impact when legs or frame members come into contact with each other;

however, the Stevick Declaration provides no additional basis or context to this conclusory opinion and adds no reason why a POSA would modify the teachings of the references and then also combine the references. (Ex. 1002 at Paras. 62, 49-50.)

Notably, while the Stevick Declaration claims a POSA would be motivated to prevent “metal-to-metal contact,” the Stevick Declaration fails to address the locational requirements of the mount in the Challenged Claims (e.g., reciting “a first mount oriented between said mid-length thereof and said base litter [and] at least one crosswise member . . . 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 . . .”). Ferno admits these limitations are lacking in both references. (*See* Pet. at 13 (admitting that “[Ferneau A] does not disclose . . . a first mount oriented between said mid-length thereof and said litter frame.”) and Pet. at 14 (“[a]lthough the [bumpers 94] in [Ferneau B] are not situated between the mid-length of the X-frame members and the litter frame . . .”).)

Thus, Ferno fails to adequately address any motivation for combining Ferneau A and Ferneau B to arrive at the mounts recited by the Challenged Claim and Ferno's failure alone is fatal to Ferno's arguments. *See Health Care Logistics, Inc. v. Kit Check, Inc.*, IPR2019-00376, Paper 7 at 13 (PTAB June 4, 2019) (“Absent such evidence [of a motivation to combine], Petitioner fails to show a reasonable

likelihood of prevailing in showing that claim 14 would have been obvious over the combination”) (denying institution (*Id.* at 17).)

Thus, because Ferno has failed to establish obviousness of the Challenged Claims under Ground 1, the Petition should be denied.

B. Ground 2: The Challenged Claims Are Not Obvious over Ferneau A in view of Bourgraf and Further in View of Ferneau B

1. Ferno's Combination of Ferneau A in view of Bourgraf and Further in View of Ferneau B Does Not Disclose All Elements of the Challenged Claims

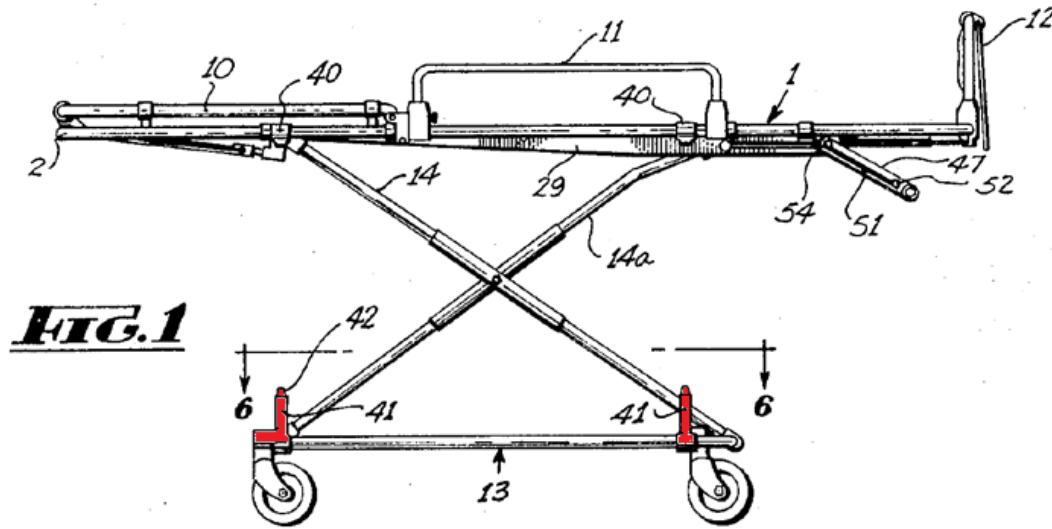
In Ground 2, Ferno argues that Ferneau A (Ex. 1008), in combination with Bourgraf (Ex. 1010) and Ferneau B (Ex. 1009)—references previously considered by the Office on two separate occasions (as discussed in Section V.A)—would render 884 Reissue claims 3 and 4 obvious. (Pet. at 17.)

As outlined above in Section VI.A.1, regarding Claim 3, Ferno again relies on Ferneau A for (a) “an ambulance cot,” (b) “a base frame,” (c) “a litter frame,” and (d) “an X-frame support mechanism” (Pet. at 17-18.) Ferno again admits that Ferneau A does not disclose the Pinch Safety Feature of Claim 3. (Pet. at 18.) Consequently, Ferno relies on Bourgraf and Ferneau B in an attempt to cure the deficiencies of Ferneau A to address the Pinch Safety Feature (Pet. at 18-20.) In addressing Claim 4, Ferno merely incorporates the discussion regarding Claim 3 by

reference; thus, again relying on previously-considered Bourgraf and Ferneau B. (Pet. at 21.)

The challenger must “carr[y] its burden to prove that all claimed limitations are disclosed in the prior art.” *PAR Pharm.*, 773 F.3d at 1194. Regarding Ferneau B, the same arguments proving non-obviousness made above in Section VI.A also apply here. For example, as Ferno admits, the rubber bumpers of Ferneau B “are not situated between the mid-length of the X-frame members and the litter frame” as expressly recited by the Challenged Claims. (Pet. at 14.) In apparent recognition of Ferneau B’s lack of disclosure of the Pinch Safety Feature, Ferno further cites to Bourgraf, which, as discussed above in Section V.B.1.b, has also been before the Patent Office multiple times. Even if the Office was to re-examine Bourgraf, there are significant differences between Bourgraf and Challenged Claims.

First, Ferno claims that the corner posts 41 of Bourgraf correspond to mounts 226 and 227 of the 884 Reissue. (Pet. at 19.) But as Ferno admits, the corner posts 41 of Bourgraf “are not situated between the mid-length of the X-frame members and the litter frame” (Pet. at 19), as required by claims 3 and 4 of the 884 Reissue. Instead, Bourgraf’s “posts 41 [] project upwardly from the rectangular frame 13 of the undercarriage. (Ex. 1010, at Col. 4:21-22; and Fig. 1, reproduced below.)



(Ex. 1010, at Fig. 1)

Conversely, claims 3 and 4 of the 884 Reissue recite mounts situated *between the mid-length of the X-frame members and the litter frame* - an example of which is illustrated in Fig. 1. (Ex. 1001, at Fig. 1 (reproduced below).)

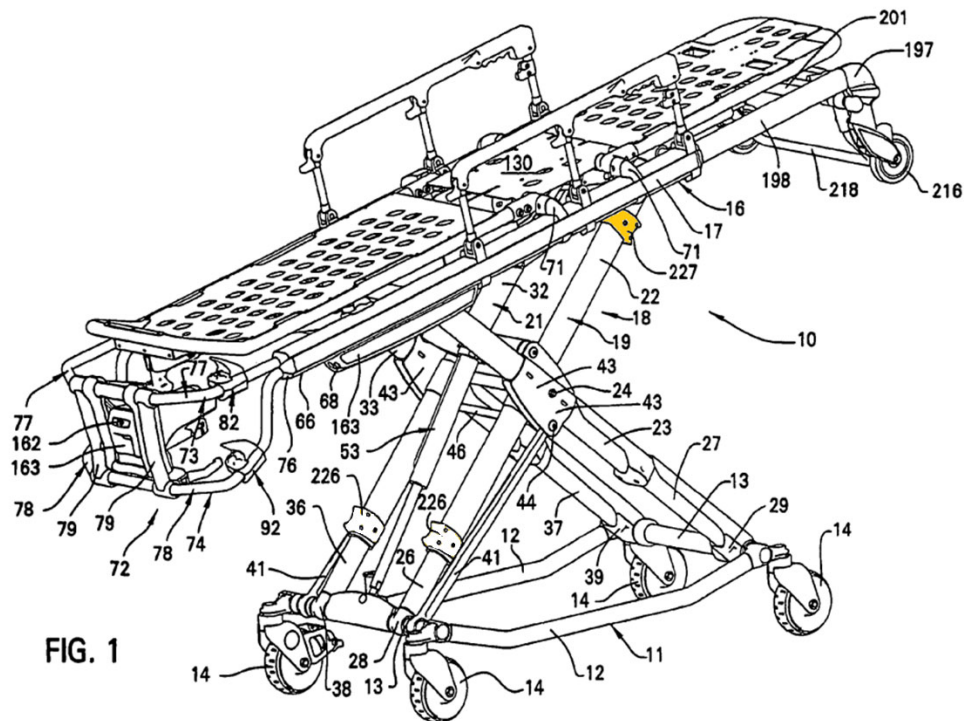
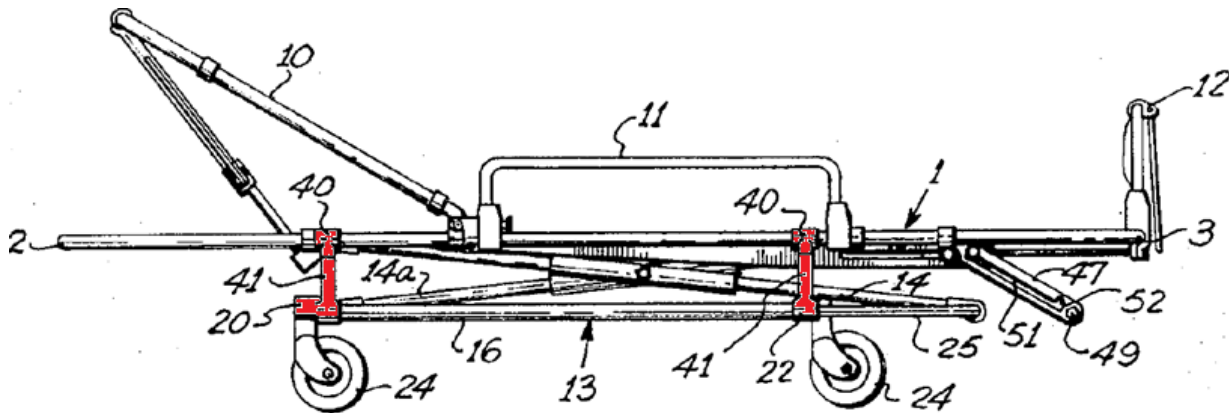


FIG. 1

(Ex. 1001, at Fig. 1)

Second, as recited by Bourgraf, “[w]hen the cot is in its fully lowered position, as shown in Fig. 4 [reproduced below], the sockets 40 mounted on the opposite sides of the cot frame are adapted to seat on the upper ends of the corner posts 41 which project upwardly from the rectangular frame 13 of the undercarriage.” (Ex. 1010 at Col. 4:18-22.)



(Ex. 1010, at Fig. 4)

In contrast, the claimed mounts of the 884 Reissue do not engage each other like the post and socket mechanism of Bourgraf. Instead, when the litter 16 is lowered, the “mounts 226 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. 19:49-52.) The mounts are specifically oriented to engage the cross rails “so that they are not readily accessible by attendants in the region of the ambulance cot and, therefore, pinching issues are avoided.” (Ex. 1001, at Col. 19:49-55.)

As explained in Section A.2, Ferno failed to articulate a reason to combine Ferneau A and Ferneau B. Similarly, Ferno failed to articulate a reason to further combine Ferneau A and Ferneau B with Bourgraf. (Pet. at 17-21.)

Ferno alleges that it would have been obvious to situate the “corner posts 41” of Bourgraf between the mid-length of the X frame members and the litter frame of the Ferneau A. (Pet. at 19.) Citing the Stevick Declaration, Ferno concludes that the

corner posts 41 of Bourgraf correspond to mounts 226 and 227 of the 884 Reissue.

Id. In fact, the proposed modification would render the prior art unsatisfactory for its intended purpose. If a POSA were to position the post and socket mechanism of Bourgraf on the X-frame member of Ferneau A at the location claimed in the 884 Reissue, the cot would not be able to close all the way. For example, the posts of Bourgraf stand straight up. If put in place of the mounts, the posts of Bourgraf would not allow the X-frame members of the 884 Reissue to function properly. *See In re Urbanski*, 809 F.3d 1237, 1243 (Fed. Cir. 2016) (“[i]f references taken in combination would produce a ‘seemingly inoperative device,’ . . . such references teach away from the combination and thus cannot serve as predicates for a prima facie case of obviousness.”).

Thus, the claimed mounts of the 884 Reissue are both different in structure and function from the post and socket mechanism of Bourgraf. Therefore, Bourgraf fails to teach the mounts recited by claims 3 and 4 of the 884 Reissue, and fails to cure the deficiencies of Ferneau A and Ferneau B. Consequently, claims 3 and 4 are not rendered obvious by Ferneau A in view of Bourgraf and further in view of Ferneau B.

2. Ferno Failed To Address Motivation to Combine and Reasonable Expectation of Success

One considers “motivation to combine and reasonable expectation of success only ‘if all the elements of an invention are found in a combination of prior art references.’” *PAR Pharm.*, 773 F.3d at 1194 (quoting *Medichem*, 437 F.3d at 1164.) Here, while Ferno failed to present evidence that all the elements were present and this Preliminary Response has addressed that all elements are indeed not present in the asserted prior art, Ferno also failed to present any cogent reason why a POSA would have been motivated to combine Ferneau A, Bourgraf, and Ferneau B or why there would be a reasonable expectation of success.

Section VI.A.2 above shows that a POSA would not be motivated to combine Ferneau A and Ferneau B. Turning to the proposed combination of Bourgraf with Ferneau A, Claim 3 of the 884 Reissue requires that “at least one of said pair of frame members having a first mount oriented between said mid-length thereof and said frame.” Ferno acknowledges that “the posts in [Ferneau A] and Bourgraf are not situated between the mid-length of the X-frame members and the litter frame.” (Pet. at 19.) Ferno then states, without further explanation that “it would have been obvious to a POSITA given the teaching of [Ferneau A] in view of Bourgraf and [Ferneau B] to situate mounts between the mid-length of the X frame members and the litter frame of [Ferneau A].” *Id.* Ferno also cites the Stevick Declaration to

support this argument. *Id.* The Stevick Declaration, as discussed above in Section VI.A, merely parrots the unsupported language of the Petition (Ex. 1002 at Para. 78), and adds no reason why a POSA would combine the references beyond preventing “metal-to-metal contact,” (but failing to address the locational requirements of the mount). Thus, Ferno provides no cogent reasoning why a POSA would have been motivated to combine Ferneau A, Bourgraf, and Ferneau B. In fact, a POSA would not be motivated to combine Bourgraf, Ferneau A, and Ferneau B, because in Bourgraf “[w]hen the cot is in its fully lowered position, the sockets 40 mounted on the opposite sides of the cot frame are adapted to seat on the upper ends of the corner posts 41 which project upwardly from the rectangular frame of the undercarriage.” (Ex. 1010 at Col. 4:18-22.) Consequently, moving the posts of Bourgraf between the mid-length of the X-frame members and the litter frame of Ferneau A, as suggested by Ferno, would prevent the cot of Ferneau A from closing properly because the posts would mate with the sockets too soon—when the cot is not in the fully lowered position. Therefore, a POSA would understand that the posts of Bourgraf must be on the rectangular frame of the undercarriage (base frame) and not on the X-frame to function properly. Thus, Ferno fails to adequately address any motivation for combining Ferneau A and Bourgraf, in view of Ferneau B.

Ferno's failure to adequately address any motivation for the combination alone is fatal to Ferno's arguments. *See Health Care Logistics, Inc.*, IPR2019-00376, Paper 7 at 13 (PTAB June 4, 2019) ("Absent such evidence [of a motivation to combine], Petitioner fails to show a reasonable likelihood of prevailing in showing that claim 14 would have been obvious over the combination") (denying institution (*Id.* at 17).)

Thus, because Ferno has failed to establish obviousness of claims 3 and 4 under Ground 2, the Petition should be denied.

VII. THE BOARD SHOULD DENY INSTITUTION OF ALL GROUNDS UNDER 35 U.S.C. §314(A)

The Board should deny institution pursuant to § 314(a) because the Petition does not present a "compelling" meritorious challenge and the factors addressed in *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential) (referred to as "*Fintiv* factors") favor discretionary denial. *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential).

The decision whether to exercise discretion to deny institution under §314(a) is based on "a balanced assessment of all relevant circumstances in the case, including the merits." PTAB Consolidated Trial Practice Guide at 58 (Nov. 2019). The Vidal Memo explains that "[c]ompelling, meritorious challenges are those in which the evidence, if unrebutted in trial, would plainly lead to a conclusion that one

or more claims are unpatentable by a preponderance of the evidence.” (Ex. 2006, at 4.) Here, Ferno fails to demonstrate even a reasonable likelihood of prevailing on their challenges to the ’482 patent claims.

The Board should deny institution because the *Fintiv* Factors collectively weigh in favor of discretionary denial under § 314(a). The parties have invested substantial time and resources into the Underlying Litigation where the same arguments and references are being presented along with a number of other patents. Accordingly, as set forth in the following sections, five of the six *Fintiv* Factors favor denying institution, while the remaining *Fintiv* Factor is neutral.

A. *Fintiv* Factor 1 (Likelihood of a Stay): Favors Denying Institution

The likelihood that the Underlying Litigation will be stayed in deference to *inter partes* review is extremely low. In fact, neither Ferno nor Stryker intends to request a stay in the pending litigation. Ferno even indicated in its Petition that it does “not at present intend to seek a stay of the pending district court litigation.” (Pet. at 22.) Moreover, Stryker has not filed any *inter partes* review petitions challenging the Ferno Patents and the deadline to do so passed on December 5, 2023. As a result, *Fintiv* Factor 1 favors denying institution.

B. *Fintiv* Factor 2 (Trial Date Proximity): Neutral

While not yet scheduled, the trial date is expected to be after the statutory deadline for the Final Written Decision in this case. As a result, *Fintiv* Factor 2 is neutral.

**C. *Fintiv* Factor 3 (Investment in District Court Proceedings):
Favors Denying Institution**

The parties and the Court will have invested substantial time and resources into the district court proceeding prior to any institution decision. Ferno miscasts the Underlying Litigation as being at “a relatively early stage.” (Pet. at 23.) The litigation is well underway as infringement and invalidity contentions were filed over seven months ago, Ferno has already conducted one expert deposition and discovery relating to claim construction closes on February 2, 2024, and opening claim construction briefs have been filed. (Pet. at 23; Ex. 1015 at PAGE0001-0002.) Additionally, a claim construction hearing is scheduled for March 20, 2024 (Ex. 1015 at PAGE0002) and Patent Owner has already invested significant time in preparing for the hearing, including consulting with experts. Moreover, fact discovery is set to close on July 29, 2024 (Ex. 1015 at PAGE0003), over eight months prior to the deadline for an anticipated decision on the Petition. (Pet. at 23.)

Additionally, Ferno states that “no depositions have been taken and expert discovery has not yet begun” and “the parties’ investment in the litigation is limited”

(Pet. at 23.) Ferno's statements are false because Patent Owner has already invested substantial resources in expert discovery and a deposition of Stryker's expert already happened on January 17, 2024. Furthermore, as of today, tens of thousands of documents have been produced and reviewed by the parties, which includes documents related the 884 Reissue and products accused of infringing the 884 Reissue. As explained below, discovery will address Ferno's arguments regarding the patentability of the claims at issue in the Petition. Thus, significant time has already been invested in the district court proceeding and the proceeding is moving at a brisk pace. As a result, *Fintiv* Factor 3 favors denying institution.

D. *Fintiv* Factor 4 (Overlap of Issues): Favors Denying Institution

The Petition includes the same claims, grounds, arguments, and evidence presented in the district court, and therefore this factor weighs in favor of denial. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 12 (PTAB May 13, 2020) (informative) (*Fintiv II*). Moreover, here, resolution of an instituted IPR against Ferno will not eliminate the Underlying Litigation. That is because, in addition to the 884 Reissue, there are *ten* other patents at issue in the Underlying Litigation (*see, e.g.,* Ex. 2001, at Pages 1-2; Ex. 2002, Defendant Ferno-Washington, Inc. and Ferno Group, Inc.'s, Third Amended Answer to Plaintiffs' Amended Complaint and Counterclaim Against Plaintiffs, at Pages 30-31.)

The 884 Reissue is merely one of eleven patents at issue in the Underlying Litigation, of which three patents are related to and also share a specification and a priority date with the 884 Reissue. Accordingly, the Board should not invest its time or resources, especially when the art brought before the Board is cumulative and/or has already been raised and considered. *See* Section V. Notably, Ferno has already cited Ferneau A, Ferneau B, and Bourgraf in its invalidity contentions in the Underlying Litigation. (Ex. 2003.) Specifically, Ferneau A is already cited by Ferno, alone and in combination with Ferneau B, to argue invalidity of the 884 Reissue (*see* Ex. 2003, at Pages 3-5; *see also* Ex. 2003 at Pages 90-104.) Additionally, Bourgraf is already cited by Ferno to argue invalidity of the 884 Reissue (*see* Ex. 2003, at Page 90), as well as invalidity of two other patents asserted in the Underlying Litigation that are related to the 884 Reissue. (Ex. 2003, at Page 29 & 73; *see also* Ex. 2003 at Pages 3-4. Thus, although Ferno agrees not to pursue the “same grounds” presented in this Petition in the district court (Pet. at 24), both parties will have to litigate in the district court regardless of whether this IPR is instituted.

Simply put, if Patent Owner prevails in this IPR, it will have to address significantly overlapping arguments again in the district court. The potential for a second bite at the apple for Ferno and such duplicative proceedings strongly favors denial. *See, e.g. Intel Corp. v. VLSI Tech. LLC*, IPR2019-01192, Paper 15 at 11

(PTAB Jan. 9, 2020) (“When considering the impact of parallel litigation in a decision to institute, the Board seeks, among other things, to minimize the duplication of work by two tribunals to resolve the same issue.”); *Medtronic, Inc. v. Avanos Med. Sales, LLC*, IPR2020-00895, Paper 6 at 29-30 (PTAB Oct. 23, 2020) (where product prior art asserted in the litigation, “[t]he challenges [in IPR] are a subset of Petitioner’s defenses in the related district court litigation” and therefore this “factor weighs in favor of exercising discretion to deny institution under 35 U.S.C. §314(a)”).

E. *Fintiv* Factor 5 (Same Parties): Favors Denying Institution

Ferno acknowledges that it is the defendant in the Underlying Litigation, which weighs in favor of denial of institution. *See Fintiv II*, 2020 WL 2486683, at *6. As a result, *Fintiv* Factor 5 favors denying institution.

F. *Fintiv* Factor 6 (Other Considerations): Favors Denying Institution

If “the evidence shows that the Petitioner did not file the petition expeditiously, such as at or around the same time that the patent owner responds to the Petitioner’s invalidity contentions, or even if the Petitioner cannot explain the delay in filing its petition, these facts have favored denial.” *Mylan Labs. Ltd. v. Janssen Pharm. NV*, IPR2020-00440, Paper 17 at 16 (PTAB Sept. 16, 2020) (quoting *Fintiv II*). Here, the Complaint in the district court was filed on October 12,

2022 (Ex. 1014 at PAGE0006), but Ferno did not file its Petition for IPR until over a year later on October 13, 2023. (Pet. at 25.)

Ferno waited until the eleventh hour under the statutory deadline (and four months after serving its invalidity contentions, *see* Ex. 2003 at Page 207) to file its Petition. Because “Petitioner was aware of the claims asserted and presented invalidity contentions against those claims, and then waited a significant amount of time until learning of Patent Owner’s claim constructions before filing the Petition,” these facts favor denial. *Google LLC v. Personalized Media Commc’ns, LLC*, IPR2020-00720, Paper 20 at 6-7 (PTAB Nov. 5, 2020) (denying rehearing of discretionary denial (*Id.* at 12-13)); *Next Caller Inc. v. TRUSTID, Inc.*, IPR2019-00961, Paper 10 at 16 (P.T.A.B. Oct. 16, 2019) (“Had [Petitioner] filed this Petition . . . around the same time as the service of the initial invalidity contentions [two months earlier], the proceeding in this case may have resolved the issues prior to the Parallel District Court Proceeding” and concluding that “delay in filing” favored denial of institution). Additionally, the positions set forth in the invalidity contentions presented by Ferno are the same as those positions presented by Ferno in the Petition. (*See* Ex. 2003 at Pages 90-104.)

In addition to Ferno’s delay, the Petition suffers from other defects that favor denial. As discussed above in sections V.A and V.B., the grounds of the Petition are

cumulative of the art and arguments considered during prosecution. Furthermore, as shown above in Section VI, Ferno has failed to present persuasive new arguments for why a combination of Ferneau A, Ferneau B, and Bourgraf render claims 3 and 4 of the 884 Reissue invalid as obvious. Moreover, Ferno submitted an unsigned expert declaration in violation of 37 C.F.R. §42.11(b) (*see* Footnote 3, *supra*). Ferno has created a situation in which institution of *inter partes* review will result in inefficiencies and undue burdens on the Patent Owner and the Office. Overall, *Fintiv* Factor 6 weighs against institution because the totality of the circumstances surrounding the district court litigation and this proceeding support an inference that the Office's time would be wasted on this proceeding.

Thus, for the foregoing reasons, the Board should exercise its discretion under Section 314 and deny the Petition because the *Fintiv* Factors collectively strongly favor denying institution.

VIII. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

Ferno has not shown that it has a reasonable likelihood of prevailing on any of Grounds 1 or 2. The Board should deny the Petition and decline to institute *inter partes* review because Ferno has failed to meet its burden of proving that there is a reasonable likelihood that at least one challenged claim is unpatentable. The Board should also exercise its discretion and deny the Petition.

Patent Owner's Preliminary Response
IPR2024-00042
U.S. Patent No. RE 44,884

Dated: January 18, 2024

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CERTIFICATE OF COMPLIANCE WITH 37 C.F.R. §42.24

I hereby certify that this Preliminary Response complies with the word count limit of 37 CFR § 42.24. The argument sections of this Preliminary Response (Sections I-VIII) have a total of 11,006 words, less than 14,000 words, as measured by Microsoft Word™.

Dated: January 18, 2024

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Patent Owner's Preliminary Response
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U.S. Patent No. RE 44,884

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Patent Owner's Preliminary Response and Exhibits 2001-2006** were served on January 18, 2024, via email to the following counsel of record for Ferno:

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