

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DBR FINANCE, INC.,
Petitioner,

v.

RUGGED CROSS HUNTING BLINDS, LLC,
Patent Owner.

IPR2024-00291
Patent 11,399,535 B2

Before KEVIN W. CHERRY, CYNTHIA L. MURPHY, and
JASON W. MELVIN, *Administrative Patent Judges*.

MURPHY, *Administrative Patent Judge*.

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

I. INTRODUCTION

DBR Finance, Inc., (“Petitioner”) filed a Petition to institute *inter partes* review of claims 1–19 of U.S. Patent No. 11,399,535 (Ex. 1001, “the ’535 Patent”). Paper 1. (“Pet.”). Rugged Cross Hunting Blinds, LLC, (“Patent Owner”) filed a Preliminary Response. Paper 10 (“Prelim. Resp”).

Petitioner did not address discretionary-denial issues in the Petition. *See* Pet. 22–86. Patent Owner argued in its Preliminary Response that we should discretionarily deny the Petition under 35 U.S.C. § 314(a) and/or 35 U.S.C. § 325(d). *See* Prelim. Resp. 9–56. With our authorization, Petitioner filed a reply addressing Patent Owner’s discretionary-denial arguments (Paper 11 (“Prelim. Reply”)) and Patent Owner filed a reply thereto (Paper 12 (“Prelim. Sur-Reply”).

II. SUMMARY

Based on the papers filed by the parties, and the evidence of record, we determine that there is a reasonable likelihood that Petitioner would prevail with respect to at least one claim (i.e., independent claim 1) of the ’535 Patent.¹ We also determine that discretionary denial is not warranted in the present circumstances. Thus, we institute review on all challenged claims on all grounds set forth in the Petition.²

¹ An *inter partes* review may not be instituted unless the information presented in the petition “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a).

² In a decision to institute under 35 U.S.C. § 314(b), we may not institute review on less than all claims challenged in the petition. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1355–56 (2018). Thus, “[w]hen instituting *inter partes* review,” we “authorize the review to proceed on all of the challenged

III. RELATED MATTERS

Petitioner and Patent Owner identify the following civil actions as involving the '535 Patent:

Rugged Cross Hunting Blinds LLC v. DBR Finance, Inc., 1-23-cv-01944 (N.D. Ohio);

Rugged Cross Hunting Blinds LLC v. FeraDyne Outdoors LLC, 3:22-cv-00690 (W.D. Wisc.);

Rugged Cross Hunting Blinds LLC v. Tru-View LLC et al., 8:23-cv-02289 (M.D. Florida); and

Good Sportsman Marketing LLC v. Rugged Cross Hunting Blinds LLC, 4:23-cv-03243 (S.D. Texas).

See Pet. 6–7, Paper 5 (Patent Owner’s Mandatory Notices). These civil actions involve Patent Owner (“RCHB”), Petitioner (“DBR”), FeraDyne Outdoors, LLC (“FeraDyne”) and Tru-View LLC (“Tru-View”).

IV. REAL PARTIES IN INTEREST

Petitioner identifies itself (DBR) as the real party in interest, and Patent Owner identifies itself (RCHB) as the real party in interest. *See* Pet. 5, Paper 5, 1.

Patent Owner argues that “Petitioner DBR failed to list FeraDyne as a real party-in-interest [(RPI)] in their Petition.” Prelim. Resp. 22. Per Patent Owner, this alleged RPI-listing failure impacts discretionary-denial issues. *See id.* at 15–24. However, as discussed below, our outcome on the discretionary-denial front is the same regardless of FeraDyne’s RPI status.

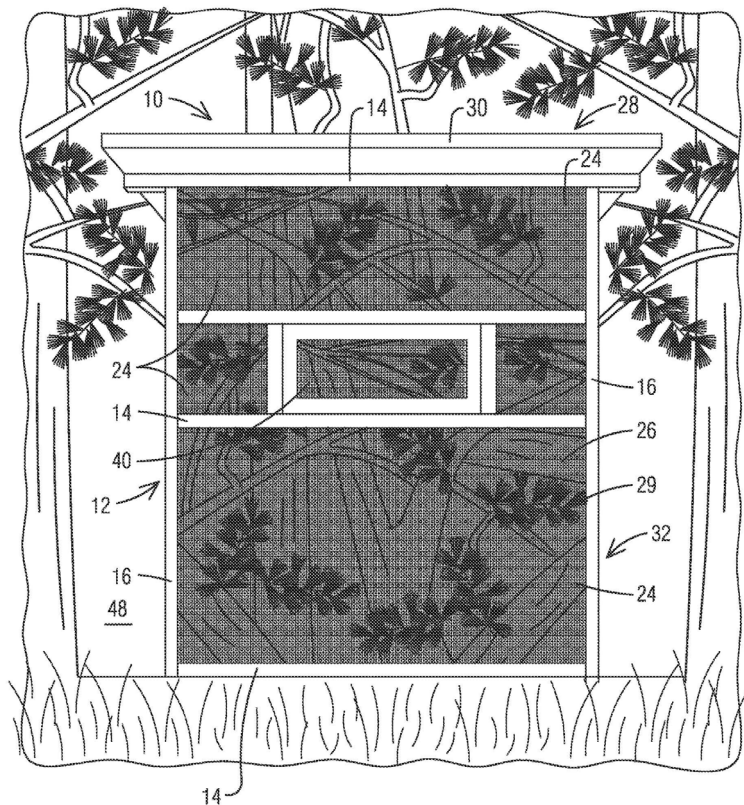
claims and on all grounds of unpatentability asserted for each claim.” 37 C.F.R. § 42.108(a) (2020).

Thus, this is a situation where an RPI determination is not necessary to resolve the proceeding.³

V. THE '535 PATENT

The '535 Patent relates to a “hunting blind” that is “used to conceal a hunter’s location as game approaches.” Ex. 1001, 1:6–7. In one embodiment, shown below, the hunting blind has a “fixed frame.” *Id.* at 9:43.

FIG. 2



³ See *SkarkNinja Operating LLC v. iRobot Corp.*, IPR2020-00734, Paper 11, 18–20 (PTAB Oct. 6, 2020) (precedential) (declining to address RPI issue where it would not create a time bar or estoppel); *Unified Patents, LLC v. MemoryWeb, LLC*, IPR2021-01413, Paper 76, 5 (PTAB May 22, 2023). Patent Owner does not contend that FeraDyne’s RPI status impacts a time bar under 35 U.S.C. § 315. See Prelim. Resp. 10.

The above drawing (Figure 2) is a “side view” of a hunting blind 10. *Id.* at 1:63. The hunting blind 10 includes a “frame 12 with one or more “frame members” (e.g., aluminum extruded members) 14 and 16 that are “interconnected together.” *Id.* at 7:31–33. The hunting blind 10 also includes panels 24 “of mesh material 26.” *Id.* at 7:52–53. The mesh material 26 may be “formed by textiles that are formed by weaving” (*id.* at 6:66–67) and/or “of interwoven fabric” (*id.* at 1:20).

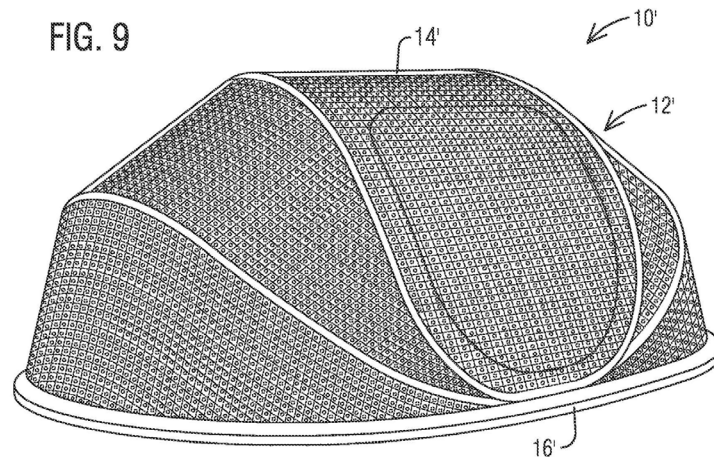
The mesh material 26 has a first side 27 that “features a camouflage pattern 29” and a second (opposite) side 31 that “includes a dark color coating, such as dark colored ink 33.” *Id.* at 3:23–33, *see also id.* at Figs. 1A, 1B. “The mesh material 26 is partially transmissive such that during daylight conditions, the exterior 48 of the hunting blind 10 is visible from the interior 50 of the hunting blind 10 yet the interior 50 of the hunting blind 10 is not visible from the exterior 48 of the hunting blind 10.” *Id.* at 9:21–25, *see also id.* at Figs. 1C, 1D, 8.

The panels 24 of the mesh material 26 “are secured between” the frame members. *Id.* at 7:52–54. “In some embodiments,” the panels 24 of the mesh material 26 are “attached to” the frame members. *Id.* at 7:54–57. In particular, “a spline 20 is provided along a perimeter of the panel 24 and the spline 20 is positioned within one of the spline grooves 18 of the extruded member 14, to secure the panel 24 along the length of the extruded member 14.” *Id.* at 7:62–66, *see also id.* at Figs. 3A, 3B, 4.

The ’535 Patent discloses that the hunting blind 10 has a “roof 28” that includes “roof panels 30.” *Id.* at 8:16. “[I]n an example embodiment, the roof panels 30 have a high density polystyrene core and are laminated on both sides by stucco textured aluminum.” *Id.* at 8:16–20. “Anchor bolts 60

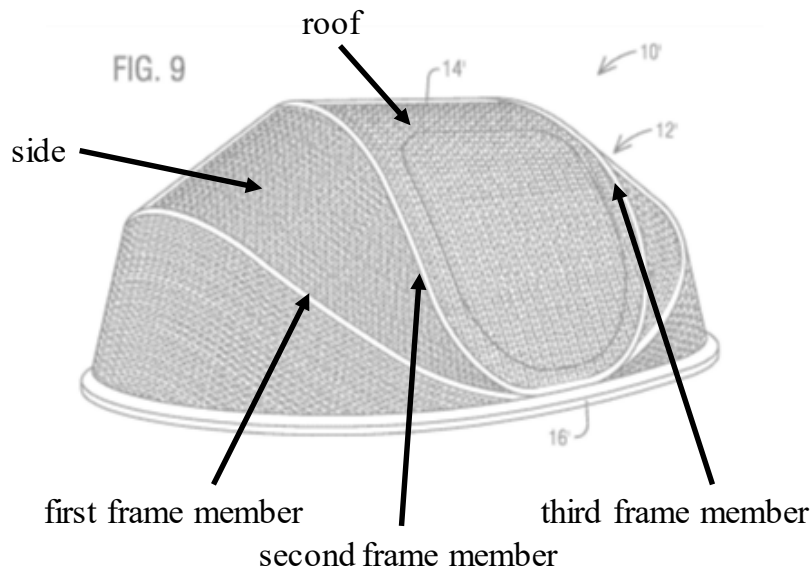
are secured through an extruded member 14 and the roof panels 30 at each corner 62 of the hunting blind 10.” *Id.* at 8:20–22, *see also id.* at Fig. 5.

In another embodiment, shown below, the hunting blind has a “pop-up frame.” *Id.* at 9:45–46.



The above drawing (Figure 9) is a “side view” of a hunting blind 10’ that has “a structure that is similar to a pop-up tent.” *Id.* at 9:30–35. The hunting blind 10’ includes “a frame 12’ that is formed of interconnected flexible frame members 14’, 16’.” *Id.* at 9:31–33. The frame members are “foldable” so that frame 12’ can be “moved from a folded position to a deployed position.” *Id.* at 9:48–50.

The ’535 Patent discloses that the fixed-frame hunting blind 10 has roof 28 that is positioned vertically over the head of an occupant 102 and a side 32 that faces approaching game 104. *See id.* at 4:1–7, 8:15–40, Figs. 1C, 1D, 2, 5. As labeled in our annotated drawing below, the pop-up-frame hunting blind 10’ can be viewed as likewise having a roof and side.



The above drawing is our annotated version of a side view of hunting blind 10' (Figure 9) labeling a roof, a side, and three spaced apart frame members (i.e., a first frame member, a second frame member, a third frame member). Our annotated drawing shows that the spaced apart first and second frame members are along the side of the hunting blind 10' and that the spaced apart second and third frame members are along the roof of the hunting blind 10'. In other words, there is an arrangement of three spaced apart frame members, with the first and second frame members being spaced along the side of the hunting blind 10' and the second and third frame members being spaced along the roof of the hunting blind 10'.

“As with the hunting blind 10, the hunting blind 10' includes panels of the mesh material 26.” *Id.* at 9:35–36. “However, the panels differ from the panels 24 of the hunting blind 10, due to a variation in the spacing between the flexible frame members 14', 16' of the frame 12', as compared to the spacing between the frame members 14, 16 of the frame 12.” *Id.* at 9:38–42.

The '535 Patent discloses that, in the pop-up-frame hunting blind 10', the panels of mesh material 26 are “secured between” the flexible frame members. *Id.* at 9:37. But the '535 Patent does not elaborate on how the mesh panels are secured. Also, as discussed above, the '535 Patent describes the panels 24 on the fixed-frame hunting blind 10 as being not only “secured between” but also, in some embodiments, being “attached to” the frame members. *See id.* at 7:52–57. The '535 Patent does not say that the panels of mesh material 26 in pop-up-frame 10' are also attached between the frame members. And the above (and only) drawing of the pop-up-frame hunting blind 10' does not depict any securement/attachment features. *See id.* at Fig. 9.

In the fixed-frame hunting blind 10, the labeled panels 24 are depicted as having a rectangular shape corresponding to the spacing between frame members 14 and 16. *See e.g., id.*, Fig. 2. In the pop-up-frame hunting blind 10', panels are not labeled in the above (and only) drawing of the pop-up-frame hunting blind 10'. *See id.* However, by discussing “panels of mesh material 26” in the context of the “spacing between” members frame members 14' and 16' (*id.* at 9:37–42), the '535 Patent conveys that a panel can be a material have a sector shape corresponding to the spacing between frame members 14' and 16'.

The '535 Patent does not mention roof panels (and/or non-mesh panels) during its discussion of hunting blind 10'. *See id.* at 8:15–28. And the above (and only) drawing of the pop-up-frame hunting blind 10' seems to show all panels having the same mesh-like texture. *See id.* at Fig. 9.

VI. INDEPENDENT CLAIM 1⁴

1. A camouflage structure comprising:

a pop-up frame including a plurality of flexible frame members, said plurality of flexible frame members comprising at least two spaced apart frame members along a side of the camouflage structure and at least two spaced apart frame members along a roof of the camouflage structure; and

one or more panels of mesh material of interwoven fabric configured to be attached between the at least two spaced apart frame members that are along the side of the camouflage structure, said one or more panels comprising:

a first side with a camouflage pattern; and

a second side with a dark color coating, said second side opposite to the first side; and

one or more panels of non-mesh material provided along the roof of the camouflage structure and configured to be attached to the at least two spaced apart frame members that are along the roof of the camouflage structure to cover an area between the at least two spaced apart frame members;

wherein the one or more panels of the mesh material define an outer surface of the camouflage structure; and

wherein the one or more panels of non-mesh material are non-transmissive such that incident radiation from an exterior of the camouflage structure is not transmitted through the non-mesh material.

⁴ The '535 Patent contains claims 1–19. *See* Ex. 1001, 9:64–12:49. Claims 1 and 19 are independent; and claims 2–18 depend directly or ultimately from independent claim 1. *See Id.*

VII. GROUNDS

Petitioner asserts claims 1–5, 8–13, and 15–18 are unpatentable under 35 U.S.C. § 103⁵ over Whybrew⁶ in view of Strength.⁷ Pet. 24.

Petitioner asserts claims 6, 7, and 9 are unpatentable under 35 U.S.C. § 103 over Whybrew in view of Strength and Ransom.⁸ Pet. 24.

Petitioner asserts claim 14 is unpatentable under 35 U.S.C. § 103 over Whybrew in view of Strength and Hazinski.⁹ Pet. 24.

VIII. ASSERTED UNPATENTABILITY OF CLAIM 1

Petitioner asserts that independent claim 1 would have been obvious over Whybrew (Ex. 1002) in view of Strength (Ex. '1003). *See* Pet. 28–54.

A. Legal Principles

A claim is unpatentable under 35 U.S.C. § 103 if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual

⁵ The Leahy-Smith America Invents Act (“AIA”) included revisions to 35 U.S.C. § 103 that became effective on March 16, 2013. We apply the POST-AIA version of § 103 here, because the earliest related-application date identified in the '535 Patent (February 29, 2016) is after the effective date of the AIA. *See* Ex. 1001, code (63); Prelim. Resp. 2.

⁶ US 8,375,968 B2, issued February 29, 2013. Ex. 1002.

⁷ US 6,709,993 B2, issued March 23, 2004. Ex. 1003.

⁸ US 7,137,399 B1, issued November 21, 2006. Ex. 1004.

⁹ US 5,385,165, issued January 31, 1995. Ex. 1005.

determinations, including (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and (4) when in evidence, objective indicia of non-obviousness (i.e., secondary considerations). *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).¹⁰

B. Level of Skill

Petitioner proposes that a person having ordinary skill in the art (PHOSITA) “would have a bachelor’s degree in physics, mechanical engineering, textile engineering, or a similar discipline, or at least two years of design experience in the field of hunting blinds.” Pet. 28. For purposes of institution, we apply this proposed level of skill because it is presently undisputed by Patent Owner (*see* Prelim. Resp. 25–26) and it is consistent with the level of skill portrayed by the ’535 Patent and the cited prior art references. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

C. Claim Construction

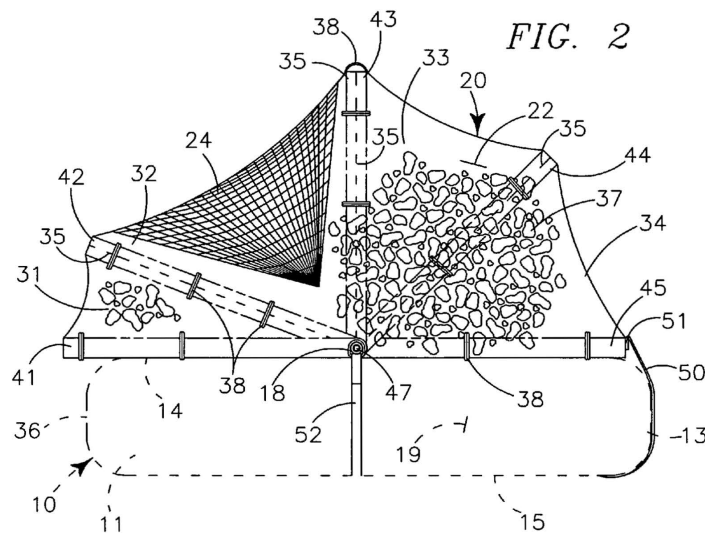
In interpreting the claims of the ’535 patent, we “us[e] the same claim construction standard that would be used to construe the claim[s] in a civil action under 35 U.S.C. [§] 282(b).” *See* 37 C.F.R. § 42.100(b) (2020). The claim construction standard includes construing claims in accordance with the ordinary and customary meaning of such claims as would have been understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. *See id.*; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–14 (Fed. Cir. 2005) (*en banc*).

¹⁰ The parties offer no evidence of objective indicia of obviousness or non-obviousness. *See* Pet. 28–86; Prelim. Resp. 56–57.

Only claims terms in controversy need to be construed, and only to the extent necessary to resolve the controversy. *See Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019). Thus, in our analysis below, we only construe the terms of independent claim 1 to the extent necessary to resolve whether to grant institution. More particularly, we only construe a claim term to the extent necessary to determine whether it at least reads on a prior art element Petitioner relies upon to show/teach this claim term.

D. Overview of Whybrew

Whybrew discloses “a retractable sportsman’s blind for hunting and wildlife observing activities” (Ex. 1002, 1:14–15), an embodiment of which is shown in the drawing below.



The above drawing (Figure 2) “is an orthographic right side view” of Whybrew’s blind. *Id.* at 3:65–66. The blind comprises “a flexible body 20” that is “imprinted with a camouflage pattern 37” and “a frame 40” that supports in the flexible body 20 in “a hemispherical shape.” *Id.* at 4:40–48. The camouflage pattern 37 “make[s] the blind difficult to distinguish from the surrounding environment.” *Id.* at 4:52–53.

Sections 31–34 (i.e., panels) “form the flexible body 20.” Ex. 1002, 4:63. Each panel “individually has the shape of a sector” and edge portions of adjacent panels are “fastened together with stitching 35” so that they “may be supported by the frame 40 in a hemispherical shape.” *Id.* at 4:64–5:1. The frame 40 is “formed of plural elongate flexibly resilient stays [41–45]” (i.e., frame members) that are “pivotally interconnected with one another at proximate end portions to support the flexible body 20 in a hemispherical shape.” *Id.* at 4:40–45.

The panels 31–34 are depicted as in contact with and stretched over frame members 41–45, and thereby secured thereto. *See* Ex. 1002, Figs. 1–6. In particular, panel 32 is secured by spaced-apart frame members 42 and 43; and panel 33 is secured by spaced-apart frame members 43 and 44. *See id.* In the illustrated orientations, panel 33 “is vertically over [an] occupant’s head.” *Id.* at 5:38–42, *see also id.* at Figs. 1–6. In other words, panel 33, and its supporting frame members 43 and 44, are along the roof of Whybrew’s blind.

“Mesh fabric window 24 is carried by the flexible body 20” over “an opening” defined in panel 32 “fastened” thereto with stitching. *Id.* at 5:3–6. As indicated just above, panel 33 is secured by spaced-apart frame members 42 and 43. Thus, mesh fabric window 24 is indirectly secured by frame members 42 and 43 via panel 32. In the illustrated orientation, the mesh window “faces ‘down wind’” to maintain “visibility of approaching game birds.” *Id.* at 5:41–43, Figs. 1–6. In other words, mesh fabric window 24, and its supporting frame members 42 and 43, are along the side of Whybrew’s hunting blind.

Whybrew discloses that the mesh fabric window has a “one-way” vision characteristic.” *Id.* at 5:16–17. Specifically, “[t]he material of the mesh fabric window 24 allows an occupant within the blind may see outwardly therethrough, but observers, including animals, outside the blind cannot see into the blind or distinguish human activity inside the blind.” *Id.* at 5:12–15.

“The mesh fabric window 24 is preferably formed of a flexible mesh-type material having a weave that is less dense than the weave of the fabric material forming the flexible body 20.” *Id.* at 5:9–12. Put another way, panels 31–34 are made of material that is denser than the window’s mesh material. Also, panels 31–34 “are formed of a material that is not as translucent, or light permeable as the mesh fabric window 24.” *Id.* at 5:19–21. Further, panels 31–34 have a “waterproof quality” that “allows an occupant inside the blind to remain relatively dry, when the blind is used in rainy conditions.” *Id.* at 5:35–37.

E. Overview of Strength

Strength discloses a “camouflage material” for applications such as “hunting,” and particularly “blinds.” Ex. 1003, 1:14–26.

Strength’s camouflage material 10 is a base textile 100 having “a camouflage pattern 110” on a first side 111 and “a coating 200” on a second side 112. *Id.* at 1:38–47. “The combination of the coating 200 and base textile 100 provides a barrier light such that shadows, such as shadows created by sunlight, are not visible on the opposite side of the camouflage material 10.” *Id.* at 1:67–2:3. In this manner, “shadows of hunters or others inside a blind of the camouflage are not visible on the opposite side of the camouflage.” *Id.* at Abstract.

The coating 200 can be an “ethylene methyl acrylate thermoplastic with a carbon black pigment.” *Id.* at 2:38–39. Strength provides four examples of its camouflage material having different light transmissions. *See id.* at 2:60–4:5. Strength also provides “a graph illustrating a plot of the light transmission” for these examples. *Id.* at 2:48–50. Per Strength, with the “knowledge” of this graph, and “details” of its examples, PHOSITA “will understand how to extrapolate the desired light transmission” to “a specific working embodiment.” *Id.* at 2:55–59.

F. Analysis

1. Camouflage Structure

Independent claim 1 sets forth a “camouflage structure.” Ex. 1001, 9:64. For the purposes of institution, we construe “camouflage structure” as at least reading on a hunting blind having a camouflage pattern (e.g., a pattern that makes a hunting blind blend in with its surroundings) associated therewith. *See id.* at 3:15–17. Petitioner adequately establishes that Whybrew discloses a camouflage structure. *See* Pet. 28–29. In Whybrew’s hunting blind, flexible body 20 is imprinted with camouflage pattern 37 that makes it difficult to distinguish from the surrounding environment. *See* Ex. 1002, 4:40–53, Figs. 1–5.

2. Roof and Side of Camouflage Structure

Independent claim 1 sets forth “a roof of the camouflage structure” and “a side of the camouflage structure.” Ex. 1001, 10:1–3. For the purposes of institution, we construe “roof” as at least reading on a region of a hunting blind that is vertically over an occupant’s head; and we construe “side” as at least reading on a region of a hunting blind that faces approaching game. *See*

id. at Figs. 1C, 1D.¹¹ Petitioner adequately establishes that Whybrew’s hunting blind has a roof and a side. *See* Pet. 30. In Whybrew’s hunting blind, panel 33 “is vertically over the occupant’s head” and panel mesh window 24 “faces ‘down wind’” to “maintain visibility of approaching game birds.” Ex. 1002, 5:35–46.

3. Frame Limitations

Independent claim 1 sets forth that the camouflage structure comprises “a pop-up frame.” Ex. 1001, 9:65. For the purposes of institution, we construe “pop-up frame” as at least reading on a frame having frame members that can be moved “from a folded position to a deployed position.” *See id.* at 9:46–54.¹² Petitioner adequately establishes that Whybrew’s frame 40 is a pop-up frame. *See* Pet. 30. In Whybrew’s frame 40, frame members 41–45 are pivotally interconnected via a pivot axle bolt 47 allowing the frame to be moved from a folded position to a deployed position. *See* Ex. 1002, 5:28–34, 8:65–9:2.

Independent claim 1 sets forth that the pop-up frame includes “a plurality of flexible frame members.” Ex. 1001, 9:65–66. Petitioner adequately establishes that Whybrew’s frame 40 includes flexible frame members. *See* Pet. 30–32. Whybrew describes frame members 41–45 as

¹¹ These figures in the ’535 Patent show a roof of the hunting blind 10 covering the head of an occupant 102 and a side of hunting blind 10 facing approaching game 104. *See* Ex. 1001, 4:1–6.

¹² Petitioner proposes that “pop-up frame” be construed to cover “any form of flexible frame arrangement that is portable and exhibits an ease of construction.” Pet. 30–31. For the purposes of institution, we need not resolve the correctness of this proposed construction.

“elongate flexibly resilient stays” that are “pivotally interconnected with one another at proximate end portions.” Ex. 1002, 4:41–43.

Independent claim 1 sets forth that the plurality of flexible frame members comprises “at least two spaced apart frame members along a side of the camouflage structure and at least two spaced apart frame members along a roof of the camouflage structure.” Ex. 1001, 9:65. For the purposes of institution, we construe these claim terms as collectively reading on three spaced-apart frame members arranged along a hunting blind’s side and roof. *See id.* at 4:1–7, 8:15–40, Figs. 1C, 1D, 2, 5, 9. Petitioner adequately establishes that Whybrew’s frame 40 includes three spaced apart frame members arranged along the hunting blind’s side and roof. *See* Pet. 30–32. Whybrew’s frame members 42 and 43 are spaced apart and Whybrew’s mesh window 24 (which faces approaching game) is situated therebetween. *See* Ex. 1002 5:38–39, Figs. 2–4. Whybrew’s frame members 43 and 44 are spaced apart and Whybrew’s panel 33 (which vertically covers the occupant’s head) is situated therebetween. *See id.*

4. Mesh Panel Limitations

Independent claim 1 sets forth that the camouflage structure comprises “one or more panels of mesh material of interwoven fabric.” Ex. 1001, 10:4. For the purposes of institution, we construe this claim term as at least reading on a sector shaped section made of a material described as a mesh fabric or a mesh-type fabric. *See id.* at 1:20, 6:66–67, 9:37–42, Fig. 9.¹³ Petitioner adequately establishes that Whybrew’s window 24 is a

¹³ Petitioner proposes we construe the term “mesh material” as “a woven material of open texture with spaced holes therein” and synonymous with “screen material” and “netting material.” Pet. 25. For the purposes of

panel made of a mesh material of interwoven fabric. *See* Pet. 32. Whybrew describes window 24 as “a mesh fabric window” that is “preferably formed of a flexible mesh-type material.” Ex. 1002, 2:9–12.

Independent claim 1 sets forth that the one or more panels of mesh material of interwoven fabric are “configured to be attached between the at least two spaced apart frame members that are along the side of the camouflage structure.” Ex. 1001, 10:5–7. For the purpose of institution, we construe this limitation as at least covering a configuration in which a mesh panel is directly attached between the relevant frame members.¹⁴ Petitioner adequately establishes that, insofar as Whybrew’s mesh fabric window 24 is not considered directly attached between frame members 42 and 43, it would have been obvious to PHOSITA to do so. *See* Pet. 32–35. Whybrew’s mesh fabric window 24 is fastened (i.e., stitched) over an opening in Whybrew’s panel 32 which results in it extending substantially between spaced apart frame members 42 and 43. *See* Ex. 1002, 5:3–9, Figs. 1–4. And Petitioner offers evidence that PHOSITA would have gleaned from Whybrew’s teachings that the mesh window 24 could instead “extend all the way between” and “attach to” the frame members 42 and 43. Ex. 1007 ¶ 101.¹⁵

institution, we need not, and do not, resolve the correctness of this proposed construction.

¹⁴ Petitioner proposes that we construe this limitation as also covering both a direct and indirect attachment of a mesh panel between the relevant frame members. *See* Pet. 25–27. For the purposes of institution, we need not and do not resolve the correctness of this proposed claim construction.

¹⁵ This is consistent with the level of skill portrayed by the ’535 Patent. As discussed above, the ’535 Patent describes/depicts how panels of mesh material are attached to frame members in the fixed-frame hunting blind 10 (e.g., with spline grooves 18 and spline 20). *See* Ex. 1001, 7:52–8: 16, Fig 4.

Independent claim 1 sets forth that “the one or more panels of the mesh material define an outer surface of the camouflage structure.”

Ex. 1001, 10:18–19. Petitioner adequately establishes that Whybrew’s mesh window 24 defines an outer surface of the hunting blind. *See* Pet. 53–54. Whybrew’s mesh window 24 defines a region of the outer surface 22 of the flexible body 20. *See* Ex. 1002, 4:46–50, 5:3–8, Figs. 1–4.

Independent claim 1 sets forth that “said one or more mesh panels” comprise “a first side with a camouflage pattern” and “a second [(opposite)] side with a dark color coating.” Ex. 1001, 10:9–10. Petitioner adequately establishes that it would have been obvious to PHOSITA to provide Whybrew’s mesh fabric window 24 with such first and second sides. *See* Pet. 35–47. Whybrew teaches that its mesh window 24 can have a one-way vision characteristic by virtue of it being made of a textile material having a desired light transmission. *See* Ex. 1002, 5:16–18. Strength teaches that a textile material having a desired light transmission can be achieved by providing it with a camouflage pattern on a first side and a dark color coating on a second (opposite) side. *See* Ex. 1003, Abstract, 1:13–20, 1:37–48, 1:66–2:3, 2:46–59, 2:62–3:19, 3:30–4:5, Figs. 1, 2. And Petitioner offers evidence explaining why PHOSITA would have been motivated to use Strength’s camouflage-coating teachings to achieve a desired light transmission in Whybrew’s mesh window 24. *See* Ex. 1007 ¶¶ 120–126.

But the ’535 Patent does not describe/depict how panels of mesh material are attached between frame members in the pop-up-frame hunting blind 10’. *See id.* at 9:30–54, Fig. 9.

5. Non-Mesh-Panel Limitations

Independent claim 1 sets forth that the camouflage structure comprises “one or more panels of non-mesh material.” Ex. 1001, 10:12. For the purposes of institution, we construe this claim term as at least reading on a sector shaped section of material having a denser-than-mesh weave, limited light permeability, and a waterproof quality.¹⁶ Petitioner adequately establishes that Whybrew’s panel 33 is made of a non-mesh material. *See* Pet. 48. Whybrew discloses that panels 31–34 are made of material that is denser than the window’s mesh material. *See* Ex. 1002, 5:9–12. Whybrew also discloses that panels 31–34 “are formed of a material that is not as translucent, or light permeable as the mesh fabric window 24 and therefore the interior of the blind is darker and less illuminated than the exterior of the blind.” *Id.* at 5:19–22. Whybrew further discloses that “[t]he waterproof quality of the material” of panels 31–34 “allow an occupant inside the blind to remain relatively dry when the blind is used in rainy conditions.” *Id.* at 5:35–37.

Independent claim 1 sets forth that the one or more panels of non-mesh material are “provided along the roof of the camouflage structure.” Ex. 1001, 10:12–13. Petitioner adequately establishes that Whybrew’s panel 33 is positioned along the roof of the hunting blind. *See* Pet. 47. Whybrew discloses that panel 33 is positioned “vertically over the occupant’s head.” Ex. 1002, 5:39, *see also id.* at Figs. 2–4.

¹⁶ As discussed above, the ’535 Patent does not mention non-mesh panels during its discussion of the pop-up-frame hunting blind 10’ and the only drawing of the pop-up-frame hunting blind 10’ seems to show all panels having the same mesh-like texture. *See* Ex. 1001, 8:15–28, Fig. 9.

Independent claim 1 sets forth that the one or more panels of non-mesh material are “configured to be attached to the at least two spaced apart frame members that are along the roof of the camouflage structure to cover an area between the at least two spaced apart frame members.”

Ex. 1001, 10:13–17. For the purposes of institution, we construe this claim term as at least reading on a configuration in which a non-mesh panel is directly attached to the two relevant frame members. Petitioner adequately establishes that, insofar as Whybrew does not expressly disclose that panel 33 is directly attached to the frame members 43 and 44, such a direct attachment would have been understood by PHOSITA. *See* Pet. 47–52.

Whybrew describes and depicts panel 33 as having a sector shape extending between frame members 43 and 44 (*see* Ex. 1002, 4:63–5:2, Figs. 2, 3) and Petitioner offers evidence that PHOSITA would have known to directly attached the edges of this sector shape to frame members 43 and 44 (*see* Ex. 1004; Ex. 1007 ¶ 133).¹⁷

Independent claim 1 sets forth that the one or more panels of non-mesh material “cover an area between the at least two spaced apart frame members.” Ex. 1001, 10:16–17. Petitioner adequately establishes that Whybrew’s panel 33 covers such an area. *See* Pet. 47–50. Whybrew discloses that an occupant “inside the blind” during “rainy conditions” can

¹⁷ This is consistent with the level of skill portrayed by the ’535 Patent. As discussed above, the ’535 Patent describes how roof (i.e., non-mesh) panels 30 are attached to the frame members in the fixed-frame hunting blind 10 (e.g., with anchor bolts 60). *See* Ex. 1001, 8:16–22, Fig 4. But the ’535 Patent does not describe/depict the pop-up-frame hunting blind 10’ as having non-mesh panels, much less non-mesh panels attached to frame members. *See id.* at 9:30–54, Fig. 9.

“remain relatively dry” when panel 33 is “vertically over the occupant’s head.” Ex. 1002, 5:36–39, Fig. 4.

Independent claim 1 sets forth that “the one or more panels of non-mesh material are non-transmissive such that incident radiation from an exterior of the camouflage structure is not transmitted through the non-mesh material.” Ex. 1001, 10:20–23. Petitioner adequately establishes that Whybrew’s panel 33 possesses such non-transmissivity. *See* Pet. 54–55. Whybrew’s panel 33 is formed of a material that is not as translucent, or light permeable as the mesh fabric window 24 so that “the interior of the blind is darker and less illuminated than the exterior of the blind.” Ex. 1002, 5:19–21.

G. Synopsis

Petitioner establishes a reasonable likelihood that it would prevail in proving that independent claim 1 of the ’535 Patent would have been obvious over Whybrew in view of Strength.

IX. DISCRETIONARY DENIAL UNDER 35 U.S.C. § 314(A)

Patent Owner argues that we should discretionarily deny institution under 35 U.S.C. § 314(a) due to parallel district court proceedings in *Rugged Cross Hunting Blinds LLC v. DBR Finance, Inc.*, 1-23-cv-01944 (N.D. Ohio) (the “DBR Case”) and *Rugged Cross Hunting Blinds LLC v. FeraDyne Outdoors LLC*, 3:22-cv-00690 (W.D. Wisc.) (the “FeraDyne Case”). *See* Prelim. Resp. 9–25; Prelim. Sur-Reply 1–4.

A. Legal Principles

Under § 314(a), we have discretion to deny institution of an *inter partes* review. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140

(2016). When considering whether to deny institution based on parallel district-court proceedings, we take into consideration the six factors set forth in *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5–6 (PTAB Mar. 20, 2020) (precedential) (“*Fintiv*”). These six factors (the “*Fintiv* Factors”) “relate to whether efficiency, fairness, and the merits support the exercise of authority to deny institution in view of parallel proceedings.” *Id.* at 6. “[T]here is some overlap among these factors,” and “[s]ome facts may be relevant to more than one factor.” *Id.* When evaluating the *Fintiv* factors, we take “a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.”¹⁸ *Id.*

B. Analysis

Fintiv Factor 1 requires us to look at whether a court in a parallel proceeding has “granted a stay” or if “evidence exists that one may be granted” if we grant the petition. *Fintiv* at 6. In the DBR Case, a stay has been granted. *See* Ex. 1013. In the FeraDyne Case, the court indicated that “[i]f PTAB grants the petition and initiates review, FeraDyne is encouraged to renew its motion for a stay.” Ex. 2010, 1. Such “guidance” from a court “suggests” that the court “may be willing to avoid duplicative efforts and await the PTAB’s final resolution of the patentability issues raised in the

¹⁸ We also consider “several clarifications” made by the Director of the United States Patent and Trademark Office (“USPTO”). *See* USPTO Memorandum, Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation, 2 (June 21, 2022), *available at* https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621.pdf.

petition before proceeding with the parallel litigation.” *Fintiv* at 7. Thus, *Fintiv* Factor 1 weighs against discretionary denial.

Fintiv Factor 2 requires us to look at the “proximity” of a trial date in a parallel proceeding with respect to our projected statutory deadline for a final written opinion. *Fintiv* at 6. In the stayed DBR Case, there is no scheduled trial date. *See* Ex. 1013. In the FeraDyne Case, the trial date is currently set for June 16, 2025 (*see* Ex 2023, 2) which Patent Owner acknowledges is not before a projected final-written-opinion deadline of June 15, 2025. *See* Prelim. Resp. 14. Moreover, this scheduled trial date does not take into account the suggested stay, and, therefore, is somewhat tentative. Thus, *Fintiv* Factor 2 weighs against discretionary denial.

Fintiv Factor 3 requires us to look at the “investment” in the parallel proceedings by the court and the parties. *Fintiv* at 6. In the DBR Case, the stay occurred prior to any significant investment by the court and the parties. *See* Ex. 1013. In the FeraDyne Case, claim-construction-related motions are not due until August 21, 2024 (*see* Ex. 2023, 1) reflecting some, but not yet significant, investment by the court and the parties. Thus, *Fintiv* Factor 3 weighs against discretionary denial.

The “timing” of the Petition timing can come into play under *Fintiv* Factor 3 if Petitioner, “faced with a prospect of a looming trial date,” waited “until the district court has progressed significantly” before filing the Petition. *Fintiv* at 11. Patent Owner contends that Petitioner “inexplicably delayed” filing the Petition after being “put on notice” of potential infringement. Prelim. Resp. 10. However, the documents that Patent Owner points to as evidence of this notice (Ex. 2001 ¶ 31; Ex. 2004, 9, 17; Ex. 2011, 2) only allege infringement in broad strokes. And we recognize

that “it is often reasonable for a petitioner to wait to file its petition until it learns which claims are being asserted against it.” *Fintiv* at 11. Moreover, neither the DBR Case nor the FeraDyne Case had progressed significantly at the time the Petition was filed. Thus, here, the timing of the Petition does not preclude *Fintiv* Factor 3 from weighing against discretionary denial.

Fintiv Factor 4 requires us to look at the “overlap” between issues raised in the Petition and the parallel proceedings. *Fintiv* at 6. Here, any overlaps between invalidity challenges presented in the Petition and those raised in the parallel proceedings are subdued by the relative timetables of the respective proceedings. Our projected final-written-opinion deadline can precede any invalidity determination in the DBR and FeraDyne Cases, even if a stay is not granted in the FeraDyne Case. As such, concerns about inefficiency and the possibility of conflicting decisions are nominal, at best. Thus, given the overlap, *Fintiv* Factor 4 may marginally support discretionary denial.

Fintiv Factor 5 requires us to look at whether Petitioner and a defendant in the parallel proceeding are the “same party.” *Fintiv* at 6. Patent Owner urges us to consider FeraDyne as the same party as DBR for the purposes of this *Fintiv* Factor. *See* Prelim. Resp. 20. Even if we do so, *Fintiv* Factor 5 still does not weigh in favor of discretionary denial, due to the relative timetables of the respective proceedings. Again, our projected final-written-opinion deadline could precede any invalidity determination in the DBR and FeraDyne Cases, even if a stay is not granted in the FeraDyne Case.

Fintiv Factor 6 requires us to look at “other circumstances” that impact our exercise of discretion. *Fintiv* at 14. Patent Owner contends that

one such circumstance is that “Petitioner DBR failed to list FeraDyne as a real-party-interest in their Petition.” Prelim. Resp. 22. Per Patent Owner, Petitioner’s alleged RPI-listing failure was done to “gain a tactical advantage” associated with “infringement allegations” and “indemnification obligations.” *Id.* at 22–23. This tactical advantage, however, has little to do with our contribution to the efficiency and integrity of the system. And Patent Owner does not contend that Petitioner has gained a tactical advantage associated with any invalidity challenges that are, or could come, before us.¹⁹ Thus, we do not consider Petitioner’s alleged failure to list FeraDyne as a real-party-in-interest as a circumstance impacting our exercise of discretion.

Patent Owner argues that other circumstances that should impact our exercise of discretion are the “numerous defenses that have been raised aside from just a narrow interpretation of the ’535 Patent under 35 U.S.C. § 103” and Petitioner’s “counterclaim of tortious interface with contact against Patent Owner.” Prelim. Resp. 24. Per Patent Owner, “litigation will be still be required” to resolve these issues, and institution of the Petition “would therefore move those cases away from full resolution.” *Id.* at 24–25. If anything, these complications sway us towards institution, as we are in the unique position of being able to focus on unpatentability challenges specific to the claims in the ’535 Patent. And the relative timetables of the respective

¹⁹ For example, “a patent owner dragged into an IPR by a petitioner, who necessarily has an interest in canceling the patent owner’s claims, should not be forced to defend against later judicial or administrative attacks on the same or related grounds by a party that is so closely related to the original petitioner as to qualify as a real party in interest.” *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1351 (Fed. Cir. 2018).

proceedings sooth any qualms that institution may delay full resolution, even if a stay is not granted in the FeraDyne Case.

Patent Owner argues that another circumstance that should impact our exercise of discretion is a “continuation application” maturing into a “new patent.” Prelim. Resp. 25. “With the issuance of that new patent,” Patent Owner intends/expects to assert “claims for patent infringement” against FeraDyne. *Id.* However, the issuance of this new patent, and/or these new assertions of patent infringement, will in no way negate our contribution to the efficiency and integrity of the system when we focus on unpatentability challenges specific to the claims of the ’535 Patent.

In *Fintiv* Factor 6, other circumstances that impact our exercise of discretion include “the merits.” *Fintiv* at 6. Petitioner asserts that “Patent Owner’s failure to even address the merits of the Petitioner establishes that there are compelling merits to the Petition.” Prelim. Reply 4. Patent Owner questions the correctness of this assertion (*see* Prelim. Sur-Reply 4), and we do not necessarily agree with Petitioner in this regard. In any event, this is not a situation where we need to rely heavily on particularly strong merits to justify institution, as *Fintiv* Factors 1–5 collectively weigh against discretionary denial. *See Fintiv* at 14–16.

Accordingly, here, when we consider the *Fintiv* Factors holistically, they cumulatively reveal that efficiency and integrity of the system are best served by institution of the Petition.

C. Synopsis

We decline to exercise our discretion to deny institution of the Petition under 35 U.S.C. § 314 (a).

X. DISCRETIONARY DENIAL UNDER 35 U.S.C. § 325(D)

Patent Owner argues we should deny institution under § 325(d) because “the same or substantially the same art” and/or “the same or substantially the same arguments” have been previously presented to the Office.” Prelim. Resp. 28.

A. Legal Principles

Under 35 U.S.C. § 325(d), we may discretionarily deny institution because the same or substantially the same prior art or arguments previously were presented to the Office. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6, 7 (PTAB Feb. 13, 2020) (precedential) (“*Advanced Bionics*”).

When assessing § 325(d), we apply a two-part framework (i.e., the *Advanced Bionics* Framework). *Advanced Bionics* at 8. In the first part of the *Advanced Bionics* Framework, we “consider whether the same or substantially the same prior art or arguments previously were presented to the Office.”²⁰ *Id.* Only if determine that same or substantially the same art or arguments were previously presented to the Office, do we consider the second part of the *Advanced Bionics* Framework — whether the petitioner has demonstrated material error by the Office. *Id.* at 8–9.

²⁰ In particular, we consider “(a) the similarities and material differences between the asserted art and the previously presented prior art; (b) the cumulative nature of the asserted art and the previously presented prior art;” and “(d) the extent of overlap between arguments previously made and the manner in which petitioner relies on the prior art.” *Advanced Bionics* at 9 n.10.

B. Analysis

During prosecution of the '535 Patent, the Examiner rejected the pending claims under 35 U.S.C. § 103 as unpatentable over a primary reference Nagata²¹ in view of a secondary reference Reis²² alone or further in view of other secondary references. *See* Ex. 1006, 121–128; *see also id.* at 64–72. Per the Examiner, the Reis teaches “one or more panels of non-mesh non-transmissive material.” *Id.* at 126. And the Examiner maintained that “[i]t would have been obvious” to PHOSITA “to modify Nagata” to include a panel of non-mesh non-transmissive material “to ensure the structure is partially impervious to implement/cold weather.

Thus, in the Examiner’s proposed combination of the prior art, the primary reference, Nagata, was modified to include “one or more panels of non-mesh non-transmissive material.” Ex. 1006, 126.

During prosecution of the '535 Patent, the applicant argued that “Nagata teaches a clear plastic roof piece so adding a non-mesh roof would block light, which Nagata does not want to do.” Ex. 1006, 112; *see also id.* at 99–13. The Examiner’s “statement of reasons for the indication of allowable subject matter” reflect that this argument was persuasive. *Id.* at 72. Per the Examiner, “Nagata teaches the one or more non-mesh panels as being transmissive, and therefore lacks the non-mesh panels being non-transmissive such that incident radiation from an exterior of the structure is not transmitted through the non-mesh material” and, therefore, “[i]t would

²¹ US 6,004,649, issued December 21, 1999. Ex. 2021.

²² US 7,565,909 B2, issued July 28, 2009. Ex. 2020.

not have been obvious to make the non-mesh panels of Nagata non-transmissive.” *Id.*

The challenged claims all require “the one or more panels of non-mesh material” to be “non-transmissive such that incident radiation from an exterior of the camouflage structure is not transmitted through the non-mesh material.” Ex. 1001, 10:20–23, 12:29–32. Petitioner relies upon the primary reference, Whybrew, to disclose such non-mesh non-transmissive panels. *See* Pet. 54, 83. Whybrew is not listed as reference that was cited during prosecution of the ’535 Patent. *See* Ex. 1001 code (56).

As discussed above, Whybrew’s panel 33 is “formed of a material that is not as translucent, or light permeable as the mesh fabric window 24 and therefore the interior of the blind is darker and less illuminated than the exterior of the blind.” Ex. 1002, 5:19–22. As also discussed above, Whybrew’s panel 33 “is vertically over the occupant’s head.” *Id.* at 5:38–39. Thus, in Petitioner’s proposed combination of the prior art (unlike the Examiner’s proposed combination of the prior art), the primary reference (Whybrew) need not be modified to include “one or more panels of non-mesh non-transmissive material.” Ex. 1006, 126. There is little overlap, therefore, between the arguments made during examination and the manner in which Petitioner relies on the prior art.

Patent Owner contends that Petitioner’s primary reference, Whybrew, “is substantially the same as, or cumulative of Reis” and that Petitioner’s secondary reference (Strength) “is substantially the same or cumulative of Nagata.” Prelim. Resp. 33, 43. And Patent Owner provides a “mapped comparison” for each pair of these references. *See id.* at 33–40, 43–46. Although such mapping might list features common to both of a pair of prior

art references, it does not address the material differences therebetween.²³
See Nokia Am. Corp. v. Soto, Paper 18, 7–8 (Mar. 28, 2024) (Vidal)
(remanding to analyze similarities and differences of art and arguments
presented). Thus, Patent Owner’s mappings do not dispositively demonstrate
the sameness or cumulateness of the compared prior art references.

Even assuming Patent Owner’s contentions about sameness/
cumulateness are accurate, Petitioner is still relying upon a different
combination of primary and secondary references than that relied upon by
the Examiner during prosecution of the ’535 Patent. Patent Owner does not
contend that Petitioner’s primary reference (Whybrew) is aligned with the
Examiner’s primary reference (Nagata), but rather with the Examiner’s
secondary reference (Reis). To wit, during prosecution of the ’535 patent,
the Examiner did not evaluate whether it would have been obvious to
modify a mesh panel in Reis to include a camouflage pattern and dark color
coating. *See* Ex. 1006, 59-74, 112, 116–129, 112.

²³ For example, Whybrew discloses that its mesh fabric window 24 defines
an outer surface of the structure (*see e.g.*, Ex. 1002, 5:40–43, Figs. 1–4),
while the applicant pointed out during prosecution that Reis does not
“disclose panels of mesh material defining an outer surface of the structure”
(Ex. 1006, 100). Also, Strength discloses that “there is a need for
camouflage material” for “applications such as hunting” (Ex. 1003, 1:24–26)
while applicant pointed out during prosecution that “Nagata discusses tents
in the context of changing clothes, sunbathing, etc.,” not “hunting”
(Ex. 1006, 100).

Thus, our review of the record indicates that the Petition does not present the same or substantially same art/arguments previously presented to the Office during prosecution of the '535 Patent.²⁴

C. Synopsis

We decline to exercise our discretion to deny institution of the Petition under 35 U.S.C. § 325 (d).

XI. CONCLUSION

As we preliminarily conclude that Petitioner demonstrates a reasonable likelihood of prevailing with respect to its challenge to independent claim 1, we institute review on all challenged claims on all grounds set forth in the Petition.²⁵ Our determinations at this stage of the proceeding are based on the evidentiary record currently before us. This decision to institute trial is not a final decision as to patentability of any claim for which we have instituted an *inter partes* review. We will base any final decision on the full record developed during trial.

²⁴ As such, we do not need to consider whether Petitioner “has demonstrated material error by the Office.” *Advanced Bionics* at 8–9.

²⁵ Patent Owner asserts that Petitioner does not adequately establish that the combination of Whybrew and Strength results in a camouflage structure having a certain limitation required by independent claim 11. *See* Prelim. Resp. 56–57. In the Petition, Petitioner contends that this limitation “is analogous to claim 18” (Pet. 84, 93–94) and Patent Owner is correct that dependent claim 18 does not recite the limitation at issue. We call Patent Owner’s attention, however, to Petitioner’s discussion of dependent claims 15–17. *See* Pet. 71–77. And Petitioner later clarifies that “the reference to claim 18 was a typographical error.” Prelim. Reply 4.

XII. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 1–19 of the '535 Patent on the unpatentability grounds asserted in the Petition; and

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

IPR2024-00291
Patent 11,399,535 B2

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