

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.

Patent 11,399,535
Filing Date: June 11, 2021
Issue Date: August 2, 2022
Title: CAMOUFLAGE MATERIAL, FOR A HUNTING BLIND

Inter Partes Review No.: IPR2024-00291

**PETITIONER'S REPLY TO PATENT OWNER'S RESPONSE
UNDER 37 C.F.R. § 42.23**

TABLE OF CONTENTS

PETITIONER’S EXHIBIT LIST	3
I. SUMMARY OF ARGUMENTS	6
II. PO’S ARGUMENTS FOR NON-OBVIOUSNESS ARE NOT PERSUASIVE	7
A. PO INCORRECTLY ASSERTS A PHOSITA WOULD NOT MODIFY WHYBREW TO EMPLOY A CAMOUFLAGE PATTERN ON THE MESH	7
B. PO INCORRECTLY ASSERTS THAT STRENGTH DOES NOT DISCLOSE A MESH	8
C. THE ’535 PATENT CLAIMS DO NOT REQUIRE THE PANELS TO BE A MESH	12
III. THE DATE OF INVENTION FOR THE ’535 CLAIMS IS FEBRUARY 28, 2017, RENDERING MUCH OF PO’S EVIDENCE OF SECONDARY CONSIDERATIONS PRIOR ART	13
A. PROVISIONAL APPLICATION 62/301,007 DOES NOT PROVIDE WRITTEN DESCRIPTION SUPPORT FOR THE ’535 CLAIMS	14
B. THE FEBRUARY 28, 2017 DATE OF INVENTION AFFECTS THE SECONDARY CONSIDERATIONS AND OBVIOUSNESS ANALYSIS.....	18
IV. PO’S EVIDENCE OF SECONDARY CONSIDERATIONS DOES NOT ESTABLISH NON-OBVIOUSNESS	18
A. Rugged Cross Fails To Establish A Nexus	18
B. No Evidence of Unexpected Results.....	20
C. No Evidence of Commercial Success	21
D. No Evidence of Copying	22

E.	No Evidence Of Licensing	23
F.	No Evidence of Long-Felt Need	24
G.	No Evidence of Industry Praise.....	26
V.	EXHIBITS 2032-E, 2032-F AND 1014 ARE AVAILABLE PRIOR ART, EVIDENCE OF THE GENERAL KNOWLEDGE OF A PHOSITA, AND SUPPORT PETITIONER’S CONTENTION THAT A MODIFICATION OF WHYBREW IN VIEW OF STRENGTH INVALIDATES THE CLAIMS OF GROUND ONE	27
VI.	CONCLUSION.....	32
	CERTIFICATE OF COMPLIANCE WITH WORD COUNT	33
	CERTIFICATE OF SERVICE.....	34

PETITIONER'S EXHIBIT LIST

Exhibit	Description
Ex.1001	U.S. Patent No. 11,399,535
Ex.1002	U.S. Patent No. 8,375,968 (Whybrew)
Ex.1003	U.S. Patent No. 6,709,993 (Strength)
Ex.1004	U.S. Patent No. 7,137,399 (Ransom)
Ex.1005	U.S. Patent No. 5,385,165 (Hazinski)
Ex.1006	File wrapper of U.S. Patent No. 11,399,535
Ex.1007	Declaration of Michael Ellison, Ph.D.
Ex.1008	Dictionary of Fiber and Textile Technology, Hoechst Celanese Corporation, 1990
Ex.1009	Textile Science, Kathryn L Hatch, West Publishing, 1993
Ex.1010	Pitman, Donald, Many Uses of PVC Coated Polyester Yarns, J Coated Fabrics, vol 9, Oct 1979, p. 138
Ex.1011	Maureen M Grasso, Effect of Textile Properties on the Bidirectional Solar-Optical Properties of Shading Fabrics, Textile Research Journal, 62(5), pp. 247-257, May 1992
Ex.1012	Walczak, Zbigniew K., Formation of Synthetic Fibers, pp. 53-54, 1977
Ex.1013	Steward et al., "An Overview of Polymer Latex Film Formation and Properties", Advances in Colloid and Interface Science, p. 195, 2000
Ex. 1014	Ameristep® Quality Hunting, Penthouse TSC™ Blind, Instruction Manual, Rev. 4/05, April 2005

Ex. 1015	U.S. Patent No. 9,140,030 (Jin)
Ex. 1016	U.S. Provisional Application No. 62/301,007
Ex. 1017	https://grahamsg.com/polyester-porthole-mesh-practice-football-jersey-by-champro-sports-style-number-fj2.html?srsltid=AfmBOoo_vDMPyGvj_9N_q0gAJ8oQwrijxfwuArbeD_zJozjdceb6hGLJ
Ex. 1018	Kalloniatis et al., Webvision, The Organization of the Retina and Visual System, Part VIII, Psychophysics of Vision, Visual Acuity, Nov. 2013
Ex. 1019	Transcript of the Deposition of Mr. Christopher Seaton, taken on October 29, 2024
Ex. 1020	Transcript of the Deposition of Mr. Jason Harris, taken on October 31, 2024
Ex. 1021	Transcript of the Deposition of Mr. Jay Scholes, taken on November 1, 2024
Ex. 1022	Transcript of the Deposition of Mr. Robert Ransom, taken on October 30, 2024
Ex. 1023	Transcript of the Deposition of Dr. Kimberly Cameron, Vol. I, taken on November 5, 2024
Ex. 1024	Transcript of the Deposition of Dr. Kimberly Cameron, Vol. II, taken on November 6, 2024
Ex. 1025	Supplemental Declaration of Michael Ellison, Ph.D.
Ex. 1026	U.S. Patent No. 10,765,108 (Seaton)

Ex. 1027	Nondestructive Evaluation Techniques, Visual Acuity of the Human Eye, Iowa State University, Center for Nondestructive Evaluation, https://www.nde-ed.org/NDETechniques/PenetrantTest/index.xhtml
----------	---

I. SUMMARY OF ARGUMENTS

Patent Owner (PO) submits arguments for non-obviousness, namely: (1) a PHOSITA would not modify Whybrew's mesh to contain a camouflage pattern, and (2) Strength doesn't disclose elements [1C]-[1E], [19C]-[19E] because the Strength fabric allegedly is not a mesh. Paper 17, at 15-16,18-21. Petitioner provides arguments, supported by extrinsic evidence, showing PO admits meshes such as Whybrew have patterns printed thereon, and Strength discloses a mesh, and in combination with other references of record, renders all claims of the '535 Patent obvious.

In PO's POR, it submits declarations in support of secondary considerations of non-obviousness. Paper 17, at 39. In doing so, the date of the invention is critical, as an earlier date (the provisional filing date) makes evidence available for consideration in the secondary considerations, while a later date makes such evidence unavailable for secondary considerations and available prior art under 35 U.S.C. § 311(b) for purposes of obviousness.

Independent claims 1 and 19 of the '535 Patent do not have written description support in U.S. provisional 62/301,007. Consequently, the priority date for claims of the '535 patent is February 28, 2017, not February 29, 2016.

Lastly, the declarations submitted as evidence of secondary considerations of non-obviousness are entitled to little/no weight and thus unpersuasive due to a lack of nexus, and fail for reliance upon evidence that is prior art.

II. PO'S ARGUMENTS FOR NON-OBVIOUSNESS ARE NOT PERSUASIVE

A. PO INCORRECTLY ASSERTS A PHOSITA WOULD NOT MODIFY WHYBREW TO EMPLOY A CAMOUFLAGE PATTERN ON THE MESH

PO argues a PHOSITA would not modify Whybrew's mesh to include a camouflage pattern thereon. Paper 17, at 16. This is incorrect. PO argues Whybrew's porthole mesh has large holes that discourages a pattern thereon, yet states in contradictory fashion that porthole meshes are used for practice football jerseys, *id.*, that have patterns printed thereon. Ex.1017;Ex.2031,¶70. Thus, a PHOSITA, knowing Whybrew contemplates a porthole mesh for its mesh window, appreciates that porthole mesh could have a pattern printed thereon, and the pattern would advantageously be a camouflage pattern (as taught in Strength) to be consistent with the camouflage body of the hunting blind, as Whybrew states that an object of the blind is to blend into its environmental setting. Ex.1002;3:34-36;Ex.1003, Fig.1;Ex.1025,¶49.

As PO's declarants admit, prior art hunting blinds used camouflage mesh. Ex.1020,55;Ex.1022,37-38. This undermines the assertion a PHOSITA would not modify Whybrew's mesh to add a camouflage pattern.

B. PO INCORRECTLY ASSERTS THAT STRENGTH DOES NOT DISCLOSE A MESH

PO argues Strength doesn't disclose a mesh for the following reasons: (1) no visible holes are shown in Fig. 1 of Strength (Paper 17, at 18 (citing Ex.2031,¶¶74-75)), (2) even if there are holes, the black coating on Strength's fabric fills the holes and creates a solid barrier, and (3) despite an openness of 50%, Strength's fabric has a "very high" hole density compared to the mesh of the '535 Patent, making it unsuitable. *Id.*, at 18-21; Ex.1025,¶50. None withstand scrutiny.

First, reliance on visual inspection of a patent drawing as evidence of a dimensional aspect such as holes is improper where the specification is silent on the issue. *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*, 222 F.3d 951, 956 (Fed. Cir. 2000)(holding patent drawings may not be relied on to show particular sizes if the specification is silent). PO's expert admits nothing in the specification establishes Strength's material has no holes; therefore the drawings may not be relied upon to fill that gap. Ex.1023, at 90-91. Strength is silent on whether visible holes exist in the fabric. Thus, PO's assertion Strength's material does not have holes based on visual inspection of Fig. 1 is improper. Ex.1025,¶51.

Further, PO's expert did not rely on extrinsic evidence or conduct analysis in support of her assertion that Strength's fabric has no visible holes. Ex.2031,¶75. These conclusory assertions are entitled to no weight.

Indeed, the conclusory assertions of PO's expert are inconsistent with her other testimony. Dr. Cameron asserts Strength exhibits a hole density of 85-90 holes/inch. Id., §§ 77-78. At 90 holes/inch, the hole size of Strength's mesh is 0.011 inches, approximately 11X larger than the smallest visible hole size of 0.001 inches. Ex.1018, 7-8; Ex.1025, § 52; Ex.1027. PO's argument that Strength has no visible holes and is not a mesh is wrong.

Second, PO argues that if Strength has holes, those holes are covered, but the evidence does not support that assertion. Specifically, PO and its expert assert Strength's mesh prevents passage of water/air therethrough because a 3mil thick coating covers the holes and creates a solid barrier. Paper 17, at 19, Ex.2031, § 75. The expert's conclusion in this regard is conclusory; she provides no supporting analysis or extrinsic evidence to support this assertion. Cameron admitted Strength's disclosure of a 3mil coating on the second side of the mesh was the sole evidence relied upon for her opinion that all holes of the mesh are covered, and that she did no analysis to support this theory. Ex.1024, at 121-126, 140; Ex.1025, §§ 53-54. But Cameron's theory does not hold up. She admitted molecular weight of Strength's polymer coating is relevant in determining film coverage over the mesh holes, yet her report fails to consider this property. Ex.1024, at 140-141.

A PHOSITA understands molecular weight is low, holes form in the film. Exs.1012,1013,1025,¶¶54-55. When a film forms on a mesh, when the molecular weight is below a threshold value (conditions about which Strength is silent) the film will not cover the holes in the fabric. Ex.1025,¶¶54-56. Thus, a PHOSITA knows a range of molecular weight exists for the film, and that for molecular weights below a threshold, the critical stress is larger, and holes will exist in the resultant film. Ex.1025,¶¶¶55-56. Given Strength's silence on molecular weight, a PHOSITA concludes that Strength's coating may cover the mesh holes under some circumstances, **but would not cover the holes under other, ordinary circumstances.** *Id.* Thus, Strength's mesh fabric has holes.

Further, Strength states the 3mil coating is one example, and states the thickness is "about 3mil." Ex.1003,3:4. PO's expert provides no evaluation of what "about" means in this context. Even a slight change in coating thickness could have significant impact on whether the coating covers holes. Ex.1025,¶56.

For the reasons above, Cameron's opinion that Strength has no holes—where Strength is silent—is unreliable and should be given no weight.

Third, PO asserts Strength's mesh is not a mesh because it doesn't exhibit sufficient airflow. Paper 17, at 20-21. This is wrong.

To start, the '535 claim language does not limit the mesh material element [1C] and [19C] to an airflow range; the argument attempts to import limitations

improperly into the claims. *Superguide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004)(holding an embodiment in the description may not be read into a claim when the claim is broader than the embodiment).

Importing a limitation into the claims is problematic here because PO chose not to limit the '535 claims in that regard. PO has another patent in this patent family that expressly recites the mesh material has “an aperture density that corresponds to an airflow between 30% and 40%.” Ex.1026,claim 1. When filing/prosecuting the '535 patent, PO omitted this limitation, seeking broader coverage. *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898 (Fed. Cir. 2004)(holding when a claim is broadened within a patent family by removal of a limitation, importing such limitation into the claims is improper). Consequently, PO’s attempt to restrict the scope of mesh based on an airflow requirement disclosed only in the specification but not the claims is improper; no airflow requirement exists.

Nevertheless, PO’s arguments regarding airflow still fail. PO’s expert admits Strength’s fabric exhibits an openness of 50% (Ex. 2031,¶77), which is undeniably a mesh to a PHOSITA. Ex.1025,¶59. PO argues despite an openness of 50%, the Strength mesh exhibits a “very high hole per inch ratio,” which is not a mesh. Paper 17,p.20;Ex.2031,¶78. But Dr. Cameron cites no extrinsic evidence to support her claim that Strength has any particular “hole per inch ratio” and

Strength does not disclose any. Nor does Cameron support her assertion that a hole density threshold exists, above which an otherwise open fabric is not a mesh. Ex.1025,¶60. Such statements are conclusory, and entitled to no weight. Strength discloses a mesh having an openness of 50% that a PHOSITA would understand is a mesh. Ex.1025,¶59.

C. THE '535 PATENT CLAIMS DO NOT REQUIRE THE PANELS TO BE A MESH

The above analysis presumes the '535 claims require a material with open holes after coatings are applied, but it does not. The claim language is:

[1C] panels of mesh material..., said,,, panels comprising:
[1D] a first side with a camouflage pattern; and
[1E] a second side with a dark color coating, said second side opposite to the first side....

The claim language does not state the *panels* are a mesh. Rather, the claim requires the panel comprise: (1) mesh material of interwoven fabric, (2) having a camouflage pattern on first side, and (3) having a dark color coating on the second side. Even if the 3mil coating would in all circumstances fill all holes of the mesh (which Petitioner has shown will not occur), Strength discloses the claim elements, as the claim language does not require the resultant panel be a mesh. While preferred embodiments of the '535 Patent may disclose a mesh panel, the '535 Patent requires no such property. Ex.1025,¶57.

PO's arguments all look at Strength's material after coatings are applied; but PO does not deny that Strength *starts* with a mesh, and applies coatings to that mesh. That is all the claims require.

For the above reasons, Strength discloses elements [1C]-[1E], [19C]-[19E], and combined with Whybrew discloses all claims of Ground One.

III. THE DATE OF INVENTION FOR THE '535 CLAIMS IS FEBRUARY 28, 2017, RENDERING MUCH OF PO'S EVIDENCE OF SECONDARY CONSIDERATIONS PRIOR ART

PO's secondary considerations rely heavily on the one-way mesh feature the inventors allegedly discovered in 2016. This was the only feature differentiating what PO believed it invented from what came before. Ex.1019, at 21. However, Seaton used that mesh in a blind (called "the Austin") he displayed at a trade show in early February 2016—several weeks before Rugged Cross filed its provisional patent application and more than a year before Rugged Cross filed its first non-provisional application. Ex.2032,¶¶19,23.

The Austin was a fixed shed-like structure; not a pop-up blind. *Id.*

The '535 patent claims a pop-up hunting blind incorporating mesh, and those claims are entitled to an invention date of February 28, 2017. That makes the publications about the Austin prior art for purposes of assessing validity, and for assessing what evidence qualifies as secondary indicia of non-obviousness. Ex.1025,¶¶27,38,41-42. Because the one-way mesh giving rise to all the evidence

of secondary considerations of non-obviousness was prior art, all evidence of secondary considerations relying on that feature should be disregarded.

A. PROVISIONAL APPLICATION 62/301,007 DOES NOT PROVIDE WRITTEN DESCRIPTION SUPPORT FOR THE '535 CLAIMS

PO's expert presumes the '535 patent claims are entitled to priority back to the provisional filing date. Ex.2031,¶21. But no analysis of the '535 Patent claims was performed to establish such priority claim. The provisional does not provide Section 112 support for the '535 Patent claims and thus provides no priority.

To satisfy the written description requirement, the application at issue must describe the claimed invention in sufficient detail that a PHOSITA can reasonably conclude the inventor had possession of the claimed invention at the time of filing. *Reiffin v. Microsoft Corp.*, 214 F.3d 1342,1345 (Fed. Cir. 2000). An applicant satisfies the requirement “by describing the invention, with all its claimed limitations...,” and using “such descriptive means as words, structures, figures, diagrams, formulas, etc., that set forth the claimed invention.” *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565,1572 (Fed. Cir. 1997). Under this standard, provisional 62/301,007 fails the written description requirement, ***resulting in the '535 Patent having a priority date of February 28, 2017.*** Ex.1025,¶¶25-26.

Both claims 1 and 19 recite:

a pop-up frame including ***a plurality of flexible frame members***,
said... flexible frame members comprising... two spaced apart frame

members along a side... and... two spaced apart frame members along a roof...;

Provisional 62/301,007 does not disclose a pop-up frame having: (1) flexible frame members, (2) two flexible frame members spaced apart along a side, and (3) two flexible frame members spaced apart along a roof. The sole disclosure in 62/301,007 relating to a pop-up frame is paragraph [0032] and claim 12 thereof.

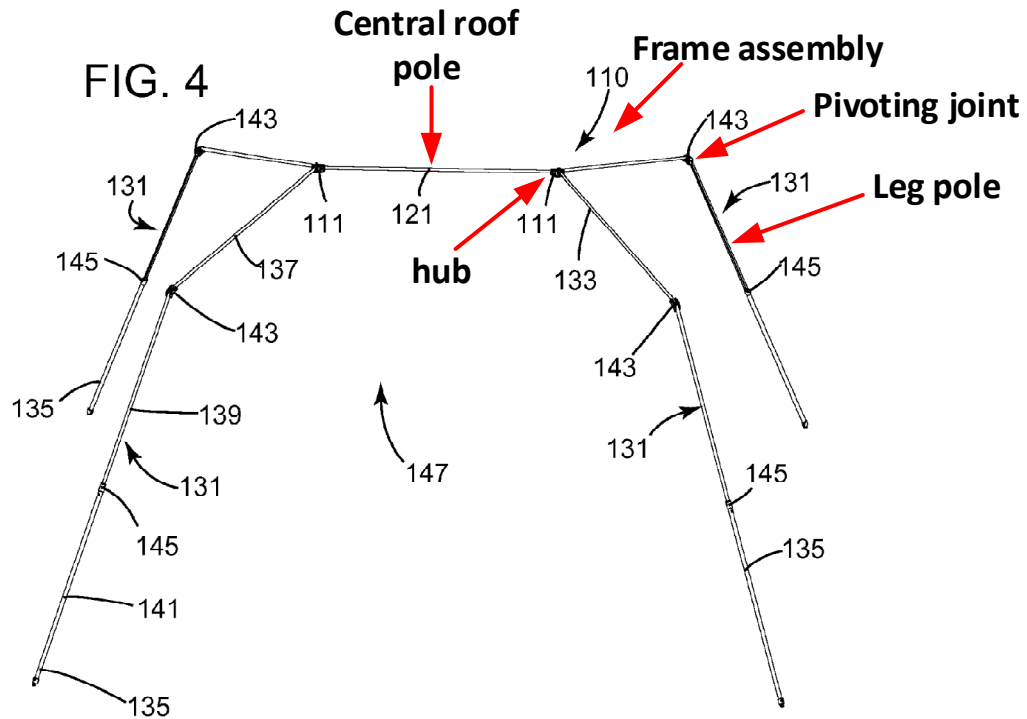
Paragraph [0032] recites:

Although the frame 12 of the hunting blind 10 is a fixed frame..., the frame 12... may include ***a pop-up frame with foldable frame members***.... [T]he pop-up frame includes panels 24 of the camouflage material 26 secured between the foldable frame members such that when the frame is moved from a folded position to a deployed position.... Ex.1016, at 29. (Emphasis added).

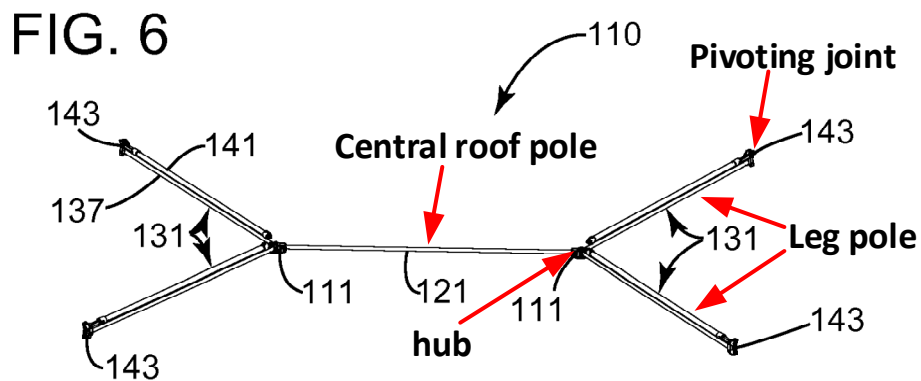
The provisional provides no teaching of ***flexible*** frame members as recited in independent claims 1 and 19; it discloses only ***foldable*** frame members. The terms “foldable” and “flexible” are distinct, not synonymous. Ex.1025,¶¶28-30. A foldable frame member does not disclose, either expressly or implicitly, a flexible member to a PHOSITA. *Id.* Rather, it indicates the frame member can fold about a pivot point to move or extend the member between two positions, a folded position and a deployed position. *Id.*

This characteristic of a foldable frame member as distinct from a flexible frame member is seen in Ex.1015, which shows a tent with rigid, foldable frame members. Ex.1015,6:19-20. Fig. 4 shows a frame assembly 110 with a roof pole

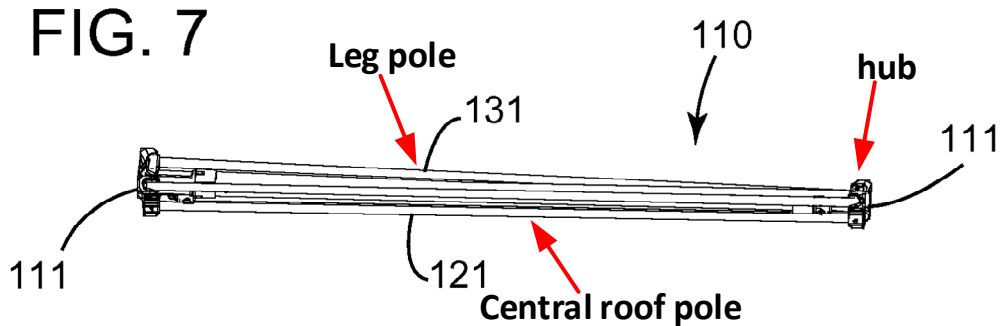
121 having attached hubs 111, to which leg poles 131 are attached via pivoting joints 143.



The rigid leg poles/frame members 131 fold about their respective pivoting joints 143.



Then, the folded leg poles 131 fold over their roof pole 121 via their respective hubs 111 to form a folded frame assembly of rigid frame members.



As seen in Ex.1015, a PHOSITA appreciates a folded frame member is not a flexible frame member, and would not reasonably conclude the inventor had possession of the claimed invention (i.e., a pop-up frame having a plurality of flexible frame members) at the time of the provisional filing. Ex.1025,¶¶30-35.

Regarding the claim features: flexible frame members spaced apart along a side, and flexible frame members spaced apart along a roof, provisional 62/301,007 does not provide written description support. Ex.1025,¶¶35-38.

As the provisional 62/301,007 fails to satisfy the written description requirement under Section 112(a) for the above claim features, no '535 Patent claim has a priority date of February 29, 2016. Rather, the proper priority date is February 28, 2017.

B. THE FEBRUARY 28, 2017 DATE OF INVENTION AFFECTS THE SECONDARY CONSIDERATIONS AND OBVIOUSNESS ANALYSIS

Because the date of invention of the '535 Patent is not February 29, 2016, select evidence employed by PO in its secondary considerations analysis is prior art, and thus not available. Ex.2032. Section III, A, B. Further, the proper date of invention makes evidence in Exs. 2032-E and 2032-F available prior art that informs the general knowledge of a PHOSITA in the obviousness analysis. *Id.*

IV. PO'S EVIDENCE OF SECONDARY CONSIDERATIONS DOES NOT ESTABLISH NON-OBVIOUSNESS

PO's attempt to establish secondary considerations of non-obviousness fails, and should be given little to no weight. Even if weight is given to this evidence, it cannot overcome the strong case of obviousness on the merits. *Wyers v. Master Lock Co.*, 616 F.3d 1231,1246 (Fed. Cir. 2010) (“[S]econdary considerations...cannot overcome a strong prima facie case of obviousness”).

A. Rugged Cross Fails To Establish A Nexus

To be given weight, “evidence of secondary considerations must have a ‘nexus’ to the claims, i.e., there must be... ‘sufficient connection’ between the evidence and the patented invention.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366 (Fed. Cir. 2019). A nexus is presumed only when the product embodying the claims is coextensive with the claimed invention. *Id.* This requirement is not satisfied for any of the secondary considerations. Ex.1025,¶61.

PO ties its secondary consideration evidence to the one-way mesh. There is no nexus for multiple reasons.

First, the mesh features in the '535 Patent claims are the mesh having a camouflage pattern on a first side, and a dark color on a second side. These elements are all known prior art: (1) using mesh in a blind is known (Ex.1002, Fig.4; Ex.1004, 5:9-13; Ex.1014, Fig.A), (2) printing a camouflage pattern on a mesh fabric in a blind is known (Ex.1003, Fig.1, 1:59-62; Ex.1004, 5:9-13; Ex.1014, Fig.A), (3) employing a black lining on a mesh within a blind is known (Ex.1003, 2:26-29, 34-37, Ex.1014, Fig.C, p.4; Exs.2032-E and 2032-F). This mesh was also disclosed in publications (i.e., Exs. 2032-E and 2032-F) immediately after the 2016 NWTf trade show, more than one year prior to the priority date of February 28, 2017. See Section V *infra*. Thus reliance on the one-way mesh is reliance on prior art. *Yita LLC v. MacNeil IP LLC*, 69 F.4th 1356, 1363–65 (Fed. Cir. 2023) (“[O]ur case law makes clear that ‘objective evidence of nonobviousness lacks a nexus if it exclusively relates to a feature that was ‘known in the prior art.’”). Ex.1025, ¶62.

Further, the one-way viewing is a function of mesh characteristics not found in the '535 Patent claims. Critically, Seaton, Cameron, and others admitted that the one-way viewing depends on the selected mesh hole-size. Ex.1019, at 57-58; Ex.1023, at 68-71. However, the '535 patent claims mesh generically and does not

recite a specific hole size. The claims are thus broader, and capture mesh that provides one-way viewing, but also mesh that does not. Thus, the claims are not commensurate in scope with the proffered evidence of secondary considerations. PO has other related patents that contain claim limitations reciting mesh airflow characteristics that give rise to one-way viewing. Ex.1026,claim 1. Thus, none of the secondary consideration evidence that focuses on the benefit of one-way viewing should be afforded weight. Ex.1025,¶63.

B. No Evidence of Unexpected Results

PO argues discovery of one-way mesh was unexpected to Seaton in 2016. Paper 17, at 37-38;Ex.2032,¶¶13,15;Ex.2031,¶122.

Such evidence is only relevant if the results are unexpected to *a PHOSITA*. *In re Soni*, 54 F.3d 746,750 (Fed. Cir. 1995). At the time of Seaton’s “unexpected” discovery in 2016, he was not a PHOSITA, as he himself admits. Ex.1019, at 11-14. He had neither the educational nor experiential qualifications at that time, and admits he was unaware of commercial blind offerings at the time. *Id.* Thus, Seaton’s subjective surprise is not legally relevant evidence of non-obviousness. Ex.1025,¶64.

PO’s expert did not conduct any analysis of unexpected results, but merely opined that Seaton’s subjective feeling was “reasonable.” Ex.2031,¶122. This conclusory statement should be given no weight. Dr. Cameron wrongly assumed

that Seaton was a PHOSITA, but during cross-examination, admitted she never analyzed whether Seaton qualified as a PHOSITA in 2016. Ex.1024, at 169-171; Ex.1025, ¶¶65.

Further, the starting point for considering evidence of “unexpected results” must be the closest prior art. *Kao Corp. v. Unilever U.S., Inc.*, 441 F.3d 963, 970 (Fed. Cir. 2006). Cameron admits she did not consider the closest prior art in connection with “unexpected results.” Ex.1024, at 172-174. Seaton was not aware of *any* prior art, Ex.1019, at 26-28, let alone the closest, which highlights why reliance on his purely subjective surprise is not evidence of non-obviousness. Ex.1025, ¶¶66-67.

Further, no evidence exists of nexus between what was “unexpected” and the claimed invention. The blind Seaton built in 2016, the “Austin blind,” is not a pop-up blind and is not covered by the claims of the ’535 patent. Ex.1019, at 35-37.

C. No Evidence of Commercial Success

Rugged Cross relies on “commercial success” of the Primos SurroundView hunting blind. Primos had long been selling its Double Bull blinds, and the SurroundView was the first version that included one-way mesh. Ex.1020, at 30-32. PO does not offer evidence of unit sales, prices, profit, revenues, market share, or any other financial information indicative of commercial success. It relies

solely on the claim that Primos increased sales of its hunting blinds due to the SurroundView blinds. Paper 17, at 52; Ex.2033,¶28. This evidence fails because these statements are unsubstantiated and conclusory. They lack context—sales volumes, pricing, profit, market share, etc.—for actually assessing the supposed commercial success. Ex.1025,¶¶68-69.

Moreover, PO relies on a presumption of nexus, but evidence exists that increased sales were due to Primos’s marketing strategy, not to the merits of the claimed invention. Jason Harris of Primos admitted that 100% of Primos’s marketing spend at that time went to the new SurroundView blind that employed the one-way mesh. Ex.1020, at 69. Thus, the SurroundView blind likely drove new sales in view of this advertising blitz. PO does not attempt to rebut this; but instead omit this critical fact. Ex.1025,¶70.

D. No Evidence of Copying

That a competing product arguably falls within the scope of a patent is not per se evidence of copying. *Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317,1325 (Fed.Cir. 2004); see also *Wyers v. Master Lock Co.*, 616 F.3d 1231,1246 (Fed.Cir. 2010)(holding patentee failed to prove copying as a secondary consideration since it failed to show any evidence that the accused infringer attempted to replicate the patentee's product). No evidence of product replication

was submitted by PO; instead, PO relies on allegations of infringement of the '535 Patent. Paper 17, at 52-55. This is insufficient. Ex.1025,¶¶71-72.

Even still, PO did not submit evidence comparing alleged infringing products to the claims of the '535 Patent.

E. No Evidence Of Licensing

PO asserts existence of licenses that include the '535 Patent weigh in favor of non-obviousness. Paper 17, at 56-57. But the licenses should be given no weight as PO failed to disclose the license terms. Specifically, the licenses have not been entered into the record of this matter, and the declarations discussing these licenses omit the terms upon which they could be evaluated. Ex.1025,¶73.

Under such circumstances, the existence of licenses should be given little or no weight. *In re Affinity Labs of Texas, LLC*, 856 F.3d 883,901-02 (Fed.Cir. 2017). In this case, Affinity did not enter the licenses into the record, but submitted an unsupported declaration that revenue was generated for licensing the patent at issue. *Id.* Affinity did not explain what percentage of the licensing revenue—if any—was attributed to its patent instead of the related patents, the terms of the licenses, the nature/number of other patents at issue in the licenses, or circumstances under which they were granted. *Id.* The court held, “[w]hen... licenses are not in the record, it is difficult... to determine if the licensing program was successful either because of the merits of the claimed invention or because

they were entered into as business decisions to avoid litigation, because of prior business relationships, or for other economic reasons.” Accordingly, the court afforded this evidence little weight. This Panel should do the same.

Ex.1025,¶¶73-74.

From what has been discovered via depositions, the license terms show the licensing is not evidence of non-obviousness. For example: (1) the licenses cover multiple patents, but have no apportionment therebetween, Ex.1024, at 156-157, (2) licenses were taken before the ’535 Patent issued, Ex.1022, at 21,46 and (3) the only reason for the licenses was for a feature of the mesh not found in the ’535 Patent (i.e., mesh having an airflow of between 30-40%). Ex.1026,claim 1.

Lastly, one licensee, Scholes, admitted during cross-examination that his company never used its license, never sold a product covered by the license, and has never made a royalty payment under the license. Ex.1021, at 33-34. Despite this, PO relies on this license as evidence of non-obviousness, but omitted this fact that implies the license is of no value. Ex.1025,¶75.

F. No Evidence of Long-Felt Need

PO argues there was a long-felt need to minimize/eliminate blind spots in a ground blind while concealing an occupant within the blind. Paper 17, at 57. Yet, the one-way mesh of the ’535 independent claims does not solve the problem of blind spots. At best, only dependent claim 14 that recites the mesh providing 360

degree viewing solves this need. Ex. 1001, claim 14. The POR points to conclusory statements within the declarations, not any extrinsic evidence of an articulated, identified problem in prior art or other evidence prior to the date of invention. Consequently, PO fails to demonstrate existence of a long-felt need. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 816 F.3d 788, 804-05 (Fed.Cir. 2016) *vacated* 839 F.3d 1034, 1057 (Fed.Cir. 2016) (*en banc*) (to demonstrate long-felt need, patentee must point to an articulated problem and evidence of efforts to solve that problem which were unsuccessful; where differences between the prior art and the claimed invention are minimal, no long-felt need was unsolved). Ex. 1025, ¶¶ 76.

Further, the scope of the relevant claim language is broad enough to cover devices that either do or do not solve the problem at issue. For example, the Ameristep Penthouse™ blind discloses a hunting blind having a mesh window that has a camouflage on the external side and a black color on the internal side to reduce shadows/silhouettes. Ex. 1014. The claim language of claims 1 and 19 do not even address the long-felt need of blind spots, and to the extent the mesh claim language addresses the need of concealing a blind occupant, such language is so broad that it covers devices like the Ameristep blind. Ex. 1025, ¶¶ 77-78. One deponent stated a mesh with camouflage on the outside and a black lining on the inside was known to improve concealment of a blind occupant as early as 2005. Ex. 1022, at 62. Thus, some other mesh feature, not in the claims, was the

dispositive factor in meeting the long-felt need at issue. Consequently, the evidence submitted by PO fails. *Therasense, Inc. v. Becton, Dickinson and Co.*, 593 F.3d 1325,1336 (Fed.Cir. 2010)(holding when claims are broad enough to cover devices that either do or do not solve the problem at issue, patentee's objective evidence of non-obviousness fails). Ex.1025,¶77.

G. No Evidence of Industry Praise

Industry praise as a secondary consideration of non-obviousness requires a nexus between the praise *and the inventive aspects of the claims*. *Apple*, 839 F.3d at 805. PO's evidence fails this standard. During prosecution, the mesh claim feature was not a point of novelty to the USPTO. Ex.1006, at 64,72-72 (Nagata discloses the mesh). In response, PO amended the claims to include allowable subject matter directed to structural features of the blind. *Id.*, at 38-47 (to include spaced apart frame members along a side and roof of the blind). Ex.1025,¶78.

In submitting evidence of industry praise, PO's evidence is praise for the mesh, which was not an inventive aspect of the claim during prosecution. Therefore PO's evidence should be given no weight. *S. Ala. Med. Sci. Found. v. Gnosis S.P.A.*, 808 F.3d 823,827 (Fed.Cir. 2015) (providing industry praise linked to an element known in the prior art or unconnected to the novel elements of the claims carries little weight in analysis).

Also, the evidence was connected to the Austin Blind in 2016 that is not a pop-up blind and is not covered by any claim of the '535 patent, making such praise legally irrelevant. Ex.1025,¶¶78-79.

V. EXHIBITS 2032-E, 2032-F AND 1014 ARE AVAILABLE PRIOR ART, EVIDENCE OF THE GENERAL KNOWLEDGE OF A PHOSITA, AND SUPPORT PETITIONER'S CONTENTION THAT A MODIFICATION OF WHYBREW IN VIEW OF STRENGTH INVALIDATES THE CLAIMS OF GROUND ONE

POR states that Ground One of the Petition is Whybrew in view of Strength, not Whybrew in view of Strength in view of the knowledge of a PHOSITA, Paper 17, p.17, implying the general knowledge of a PHOSITA is prohibited under select circumstances in an obviousness analysis. This is incorrect.

KSR rejected a formalistic approach in determining obviousness based on multiple prior art references when considering a modification of references. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398,415-22 (2007). In evaluating obviousness, the Court requires analysis that reads the prior art in context, taking into account the background knowledge possessed by a PHOSITA. *Id.* at 418. Thus, precluding use of the general knowledge of a PHOSITA in evaluating a modification of Whybrew in view of Strength is incorrect.

Each of Exhibits 2032-E, 2032-F and 1014 are evidence of the general knowledge of a PHOSITA that support Petitioner's argument that it's obvious to

modify Whybrew in view of Strength to arrive at the claimed invention of Ground One. Ex.1025,¶¶39-40.

PO displayed the “Austin” blind at the 2016 NWTF Convention in February 2016. Ex.2032,¶19. The “Austin” blind included a mesh having a camouflage pattern on a first side and a dark color on a second side. Ex.2032,¶23. The “Austin” blind was reviewed in a publication dated February 17, 2016, that discussed and showed the blind employing the mesh material. Ex. 2032,¶27 (citing Ex.2032-E). The publication states, “[t]he camo material is completely see-through from the inside, but it prevents anyone—or anything—on the outside seeing in.” Ex.2032,¶28 (citing Ex.2032-E). This disclosure reflects the general knowledge of a PHOSITA as it relates to mesh in hunting blinds more than one year prior to the priority date of the ’535 patent. Ex.1025,¶41.

Similarly, after the 2016 NWTF show, another article on February 16, 2016 discussed the mesh of the “Austin” blind, stating: “[t]he really cool feature of this material is that you can see out, but game cannot see in.” Ex. 2032,¶30 (citing to Ex.2032-F). This publication also reflects the general knowledge of a PHOSITA as it relates to mesh in hunting blinds more than one year prior to the priority date of the ’535 patent. Ex.1025,¶42.

Lastly, Ameristep is an instruction manual, published more than one year before the priority date of the ’535 patent, and is available prior art that reflects the

general knowledge of a PHOSITA in blinds. Ex.1014. It shows a camouflage blind (Fig. A), wherein an exterior has a mesh door and window having a camouflage pattern thereon.

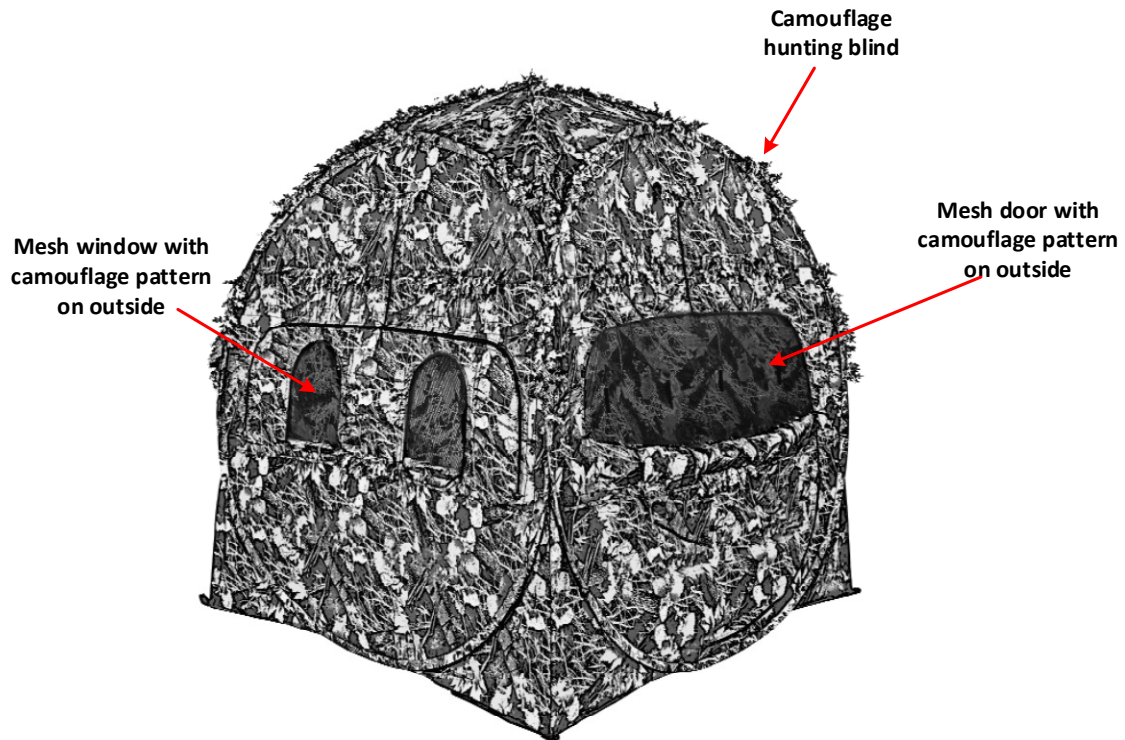


FIG. A

The Ameristep blind uses what it calls a ShadowGuard technology (Fig. C) that includes a black color lining on the inside portion of the mesh window and door to prevent shadows and silhouettes inside the blind when an occupant resides therein. Ex.1014, p.4.

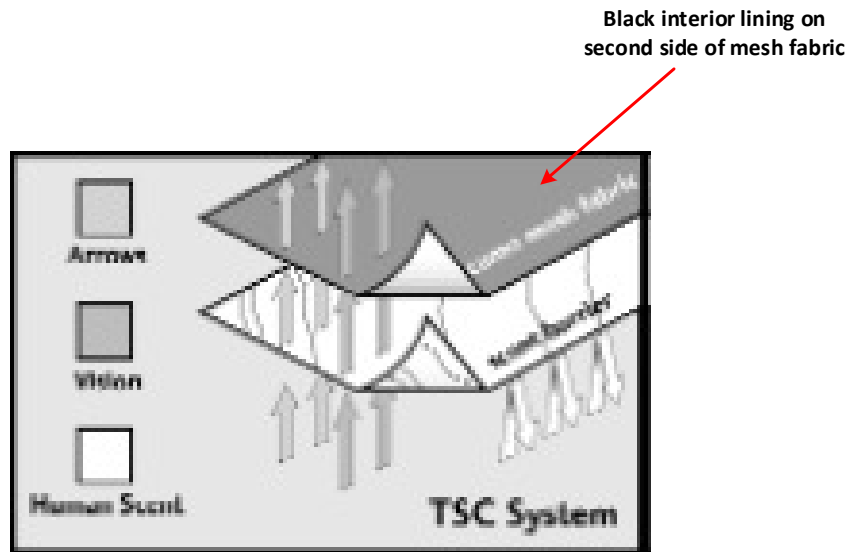


FIG. C

When asked about the mesh windows that employ the ShadowGuard technology, Robert Ransom, the President of Ameristep stated:

Q.And the mesh windows here had camouflage printed on them, correct?

A.Correct....

Q.And so it further says, "The ShadowGuard interior lining not only eliminates shadows and silhouettes, it also contains human scent within the blind," correct?

A.Correct.

Q.And it describes these windows as "see-through... windows," correct?

A.Correct.

Q.And it promotes these... as "enabling hunters to remain completely concealed within the blind while still being able to see and shoot." Do you see that?

A.Yes.

Q.And would you agree... that the concept of the black interior lining is to promote this concept of concealing the hunter within the blind, right?

A.Yes.

Ex.1022, at 61-62;Ex.1025,¶¶43-45.

Petitioner argued modification of Whybrew's mesh window in view of Strength results in features [1C]-[1E] and [19C]-[19E]. Paper 1, at 36-47.

According to *KSR*, a PHOSITA considers the general knowledge of a PHOSITA at the time of the invention. At that time (February 28, 2017), a PHOSITA was aware of a one-way mesh with camouflage on the outside and a dark color on the inside, displayed at the 2016 NWTF Convention, as evidenced by Exs. 2032-E, 2032-F and 1014, and that such mesh hid an occupant within the blind from game outside the blind. Thus, a PHOSITA, knowing Whybrew employs a one-way viewing feature with its mesh window would modify the mesh window to have a camouflage pattern on the outside and a dark color on the inside, as taught by Strength, and encouraged by Exs. 2032-E, 2032-F and Ex. 1014, thus increasing the light differential to improve the one-way viewing feature. Thus, the modification of Whybrew in view of Strength is proper and results in all the features in the claims of Ground One. Ex.1025,¶¶46-47.

Lastly, PO's argument that Whybrew and Strength "teach away" from one another is incorrect. Paper 17, at 28. Prior art references "teach away" from one another when it discourages a PHOSITA from following a particular path or from combining references in a certain way. *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994).

The purposes of Whybrew and Strength are not contrary to one another. Whybrew discloses using both the mesh and the non-translucent body in combination to create the light differential for “one-way” viewing, Ex.1002,5:12-18, while Strength uses a dark color on a mesh interior to selectively reduce the light transmission therethrough. Ex.1003, Fig.2. A PHOSITA would consider modifying Whybrew’s mesh in view of Strength to further attenuate light transmission through the mesh, thus increasing the light differential of Whybrew and improving the “one-way” viewing feature. Ex.1025, ¶48.

VI. CONCLUSION

Claims 1-19 are obvious in view of the art of record and in view of the arguments submitted herewith, and should be cancelled.

Respectfully submitted,

December 13, 2024

/Thomas G. Eschweiler/
Thomas G. Eschweiler (Reg.No.36,981)
Nathanael J. Smith (Reg.No.80,072)
Eschweiler & Potashnik, LLC
195 S. Main St., Suite 400
Akron, Ohio 44308
teschweiler@epiplaw.com
njsmith@epiplaw.com

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to 37 C.F.R. § 42.24(a)(1)(i), I certify that this paper includes 5543 words. In accordance with 37 C.F.R. § 42.24(a)(1), this word count does not include a count of the words in a table of contents, a table of authorities, mandatory notices under § 42.8, a certificate of service or word count, or appendix of exhibits or claim listing. Furthermore, in accordance with 37 C.F.R. § 42.24(d), this word count is the word count of the word-processing system used to prepare the paper.

Respectfully submitted,

December 13, 2024

/Thomas G. Eschweiler/

Thomas G. Eschweiler (Reg. No. 36,981)
Eschweiler & Potashnik, LLC
195 S. Main St., Suite 400
Akron, OH 44308
T: 216-502-0600
teschweiler@epiplaw.com

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.105, I hereby certify that I caused a true and correct copy of the Petitioner's Reply to Patent Owner's Response for *Inter Partes* Review in connection with U.S. Patent No. 11,399,535 and supporting evidence to be served electronically via email by agreement of the parties as set forth in 37 C.F.R. § 42.105(b) at the email address provided below on December 13, 2024, on the following:

WOLTER VANDYKE DAVIS

Robert L. Wolter, Esq.
1900 Summit Tower Blvd., Suite 140
Orlando, FL 32810
UNITED STATES
Email: rwolter@Savvyiplaw.com
adavis@Savvyiplaw.com

Respectfully submitted,

December 13, 2023

/Denise Huspaska/
Denise Huspaska
Patent Paralegal
Eschweiler & Potashnik, LLC
195 S. Main St., Suite 400
Akron, OH 44308
T: 216-502-0600
docketing@epiplaw.com