

DBR FINANCE, INC. (Petitioner)
v.
RUGGED CROSS HUNTING BLINDS, LLC
(Patent Owner)

Petitioner Demonstratives
Case Nos. IPR2024-00291
U.S. Patent No. 11,399,535

Arguments Outline

- ▶ **Whybrew and Strength render obvious the claims of Ground A of the Petition**
 - ▶ A PHOSITA is motivated to modify Whybrew in view of Strength because of the nature of the problem to be solved.
 - ▶ Patent Owner incorrectly asserts Strength does not disclose a mesh.
 - ▶ The '535 Patent claims do not require the hunting blind panels be a mesh.
 - ▶ Patent Owner's secondary considerations of non-obviousness fail as the "one-way mesh" is prior art and other proffered evidence does not have the requisite nexus.

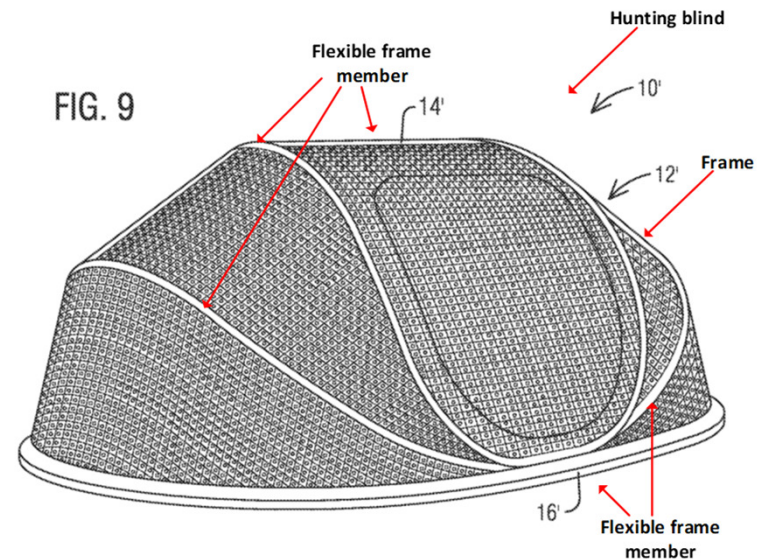
- ▶ **Whybrew, Strength and Ransom render obvious the claims of Ground B of the Petition**

- ▶ **Whybrew, Strength and Hazinski render obvious the claim of Ground C of the Petition**

The '535 Patent

The '535 Patent Overview

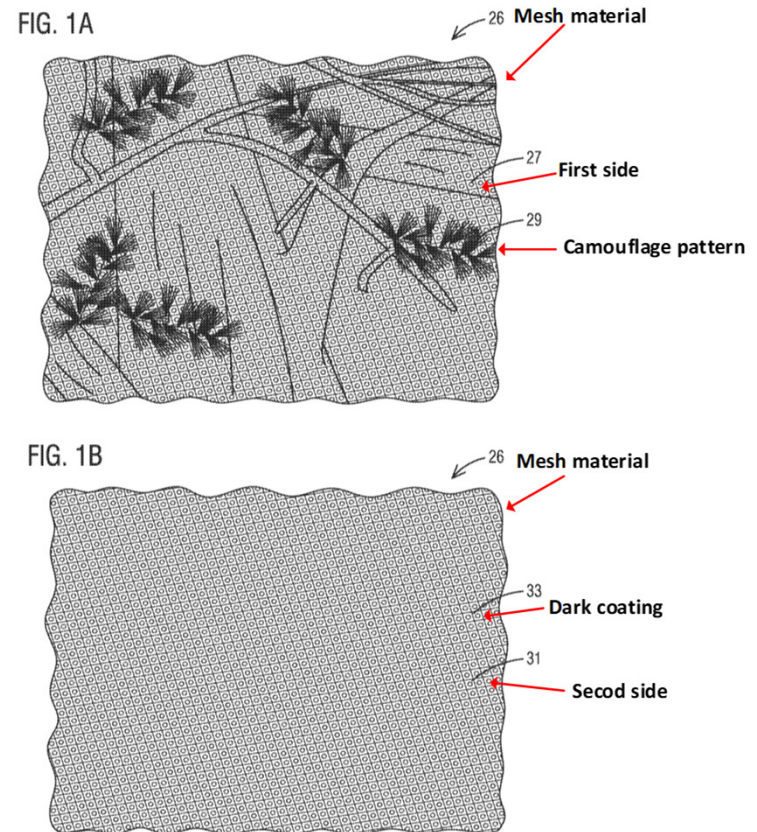
Fig. 9 shows a camouflage structure/ hunting blind 10' that comprises a pop-up frame 12' that includes a plurality of flexible frame members 14', 16'. At least two of the flexible frame members 14' are spaced apart from one another along a side of the structure, and at least two of the flexible frame members 16' are spaced apart from one another along a roof of the structure (claims 1, 19). Ex. 1001 Ex. 1007; ¶ 67. Paper 1, at 9-10.



Ex. 1001, '535 Patent, Fig. 9
(annotated)

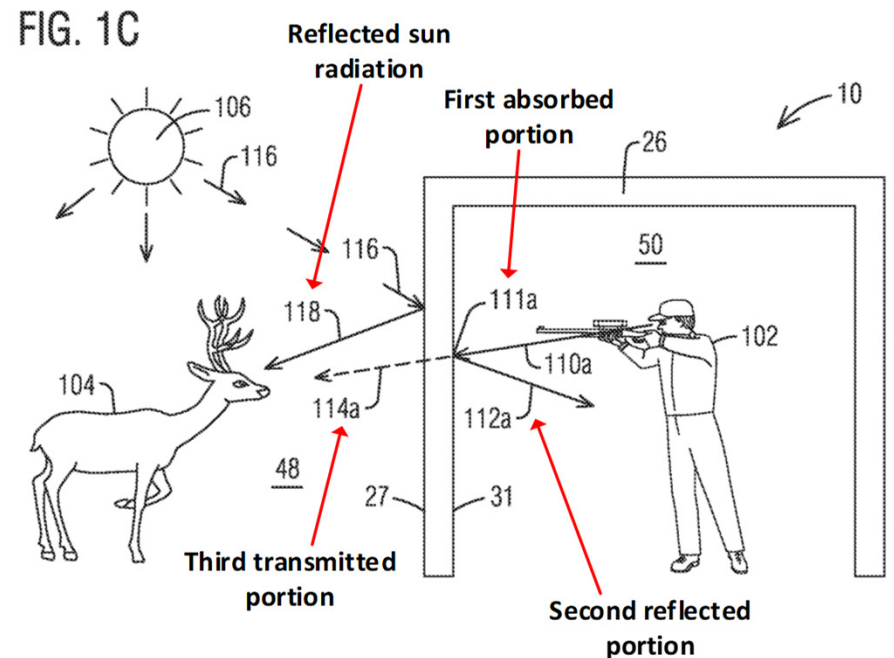
The '535 Patent Overview (cont.)

The hunting blind structure 10' shown in Figs. 1A and 1B comprises panels that include a material 26 of interwoven fabric that attaches between the flexible frame members. Ex.1001; 3:22-23; 61-65. A panel includes: (1) a mesh material 26 having (2) a first side 27 that has a camouflage pattern 29, Ex.1001, Fig.1A; 3:23-25, and (3) a second side 31, opposite the first side 27, that has a dark color coating 33. Ex.1001; Fig.1B; 3:31-33; Ex. 1007; ¶ 68. Paper 1, at 10.



The '535 Patent Overview (cont.)

The mesh material 26 provides a “one-way” viewing feature, wherein the exterior of the blind is visible from the blind interior, while the interior is not visible from the blind exterior. Ex. 1001; 3:65-4:1. In Fig. 1C, radiation 110a from a hunter 102 is incident on the second side 31 of the mesh material 26. A first portion 111a of the radiation is absorbed by the dark coating on the second side 31. Ex. 1001; 4:4-14. A second portion 112a of the radiation is reflected off the second side 31 back into the interior 50, and a third portion 114a of the radiation is transmitted through the mesh material 26. Ex. 1001; 4:20-24; Ex. 1007; ¶ 69. Paper 1, at 10-12.



The '535 Patent Overview (cont.)

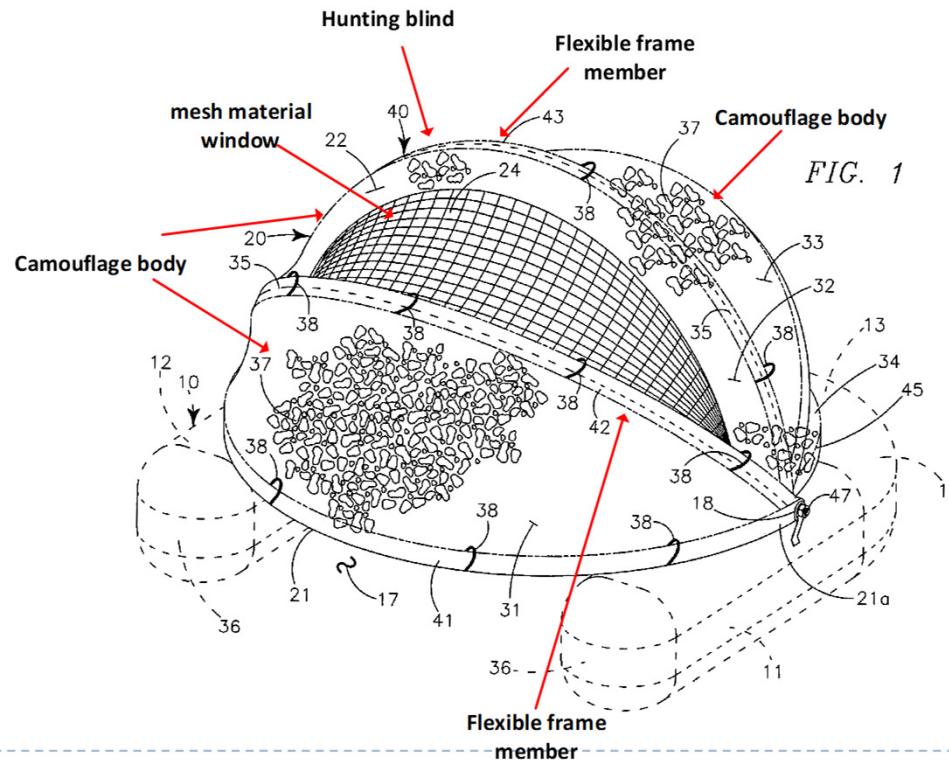
In Fig. 1C, radiation 116 from the sun 106 is incident on the first side 27 of the mesh material 26, and a portion 118 is reflected off of the camouflage pattern 29 to the game 104.

When the intensity of the reflected portion 118 of light is much greater than the transmitted portion 114a from the interior 50 (e.g., reflected portion 118 >> transmitted portion 114a), the interior 50 of the hunting blind 10 is darker than the exterior (i.e., a large light differential), and consequently the interior 50 of the hunting blind is not visible from the exterior 48. Ex. 1001; 4:28-40; Ex. 1007; ¶ 70. Paper 1, at 10-12.

Whybrew (Ex. 1002)

Whybrew Overview (Ex. 1002)

Whybrew (Ex. 1002) discloses a manually retractable, portable hunting blind that includes a flexible camouflaged body 20, 37 having a mesh fabric window 24 supported on a frame 40 composed of elongate flexible members 41-45. Ex. 1002, Fig.1; 4:40-62; Abstract; Ex. 1007; ¶ 71. Paper 1, at 13-14, 28-35.



Whybrew Overview (Ex. 1002)

The mesh window 24 allows an occupant of the blind to see the exterior, but does not block light from entering the interior. A combination of the mesh window 24 with the less translucent material of the rest of the blind body 20 provides a “one-way” vision characteristic that allows an occupant to see outwardly therethrough, but observers, including animals external to the hunting blind, to not see into the hunting blind. Ex. 1002; 5:12-16.

The “one-way” vision characteristic results from a light differential between the exterior and the interior of the blind. ***As other sections 31, 33, 34 of the frame body are less translucent than the mesh window 24, the interior of the hunting blind is darker than the exterior.*** Ex. 1002; 5:16-22. The light differential facilitates vision of an occupant through the mesh window 24 from the inside to the outside, and concurrently inhibits vision from the outside to the inside. Ex. 1002; 5:22-26; Ex.1007; ¶ 73. Paper 1, 14-15.

Strength (Ex. 1003)

Strength Overview (Ex. 1003)

Strength discloses a textile mesh material and has a camouflage pattern 110 on a first side 111, and a dark color 200 on a second side 112 that contains a carbon black pigment. The mesh material has a visible light transmission therethrough such that shadows of hunters inside a hunting blind employing the base textile as a camouflage side are not visible to the external environment. Ex. 1003; Abstract; Ex. 1007; ¶ 75. Paper 1, at 16-17.

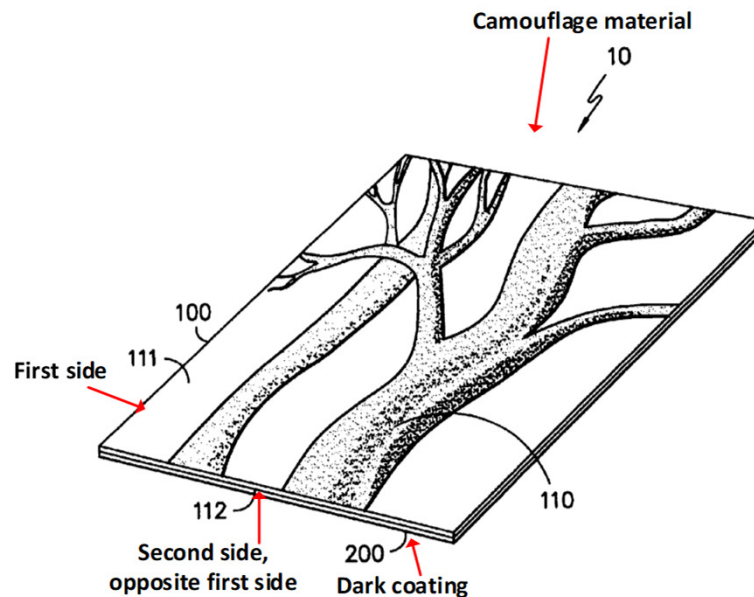


FIG. -1-

Strength Overview (Ex. 1003)

The dark color 200 provides a barrier to some light on the second side 112, causing an interior of a hunting blind using the textile 100 to be darker than the exterior, so that shadows are not visible on the opposite side (i.e., the first, exterior side 111) of the camouflage material 10. Ex. 1003; 1:67-2:3; Ex. 1007; ¶ 78. Paper 1, at 17.

Fig. 2 of Strength is a graph illustrating an amount of light transmission through the textile 100 for varying amounts of carbon black pigment in the dark color 200 on the second side 112 of the textile 100. Ex.1007;¶79.

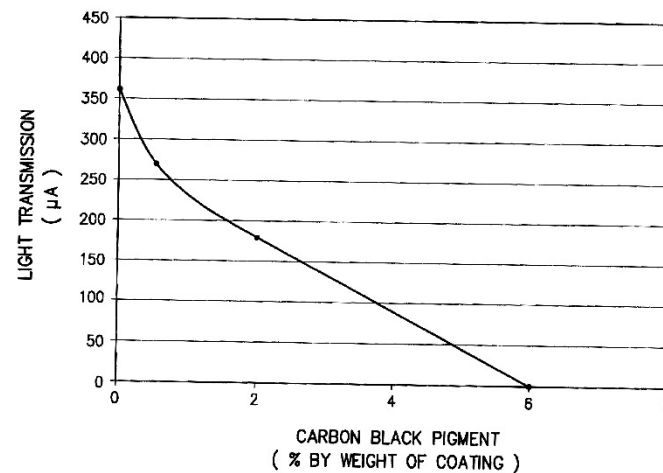


FIG. -2-

Strength Overview (Ex. 1003)

The graph shows that as the percentage of black pigment (by weight) is **increased** in the dark color 200, an amount of light transmission through the textile 100 **decreases**. Ex. 1003; 2:66-3:10, Examples 1-4; Ex. 1007; ¶¶ 80-81.

Thus, Strength discloses a mesh fabric 100 for use in hunting blinds that has a camouflage pattern 110 on a first side 111 and a dark color 200 on a second, opposite side 112. Strength teaches that by varying an amount of a carbon black pigment in the dark color 200, one can tune or adjust an amount of light transmission into an interior of the hunting blind from an exterior of the hunting blind to make an interior of the hunting blind darker than the exterior and obtain a desired “one-way” viewing feature using the woven mesh fabric 100. Ex. 1003, Figs. 1-2; Ex. 1007; ¶ 82. Paper 1, at 17-19, 35-41.

Obviousness; 35 U.S.C. § 103

Combination of Whybrew and Strength is proper

Proper rationales for combining prior art include:

- (1) combining prior art elements according to known methods to yield predictable results,
- (2) a simple substitution of one known element for another to obtain predictable results, and
- (3) some teaching, suggestion, or motivation in the prior art that would lead a PHOSITA to modify the prior art reference or to combine prior art reference teachings to arrive at the claimed invention.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007). Each of the above considerations support a modification of Whybrew in view of Strength to arrive at the claim features at issue. Paper 1, at 42-47.

Combination of Whybrew and Strength is proper

Combining elements in Whybrew and Strength may be performed according to known methods to yield predictable results.

Whybrew discloses a camouflage hunting blind having a mesh window 24. Fabric of the remaining body 20 is less translucent than the mesh, preventing some light from entering the blind, and provides for a “one-way” viewing feature. Ex. 1002; 5:12-18.

Strength discloses a mesh textile 100 for a hunting blind that has camouflage 110 on an outside surface 111 and a dark color 200 on an inside surface 112. Ex. 1003, Fig.1; 38-48. The dark color 200 reduces an amount of light transmission through the textile, thereby decreasing an amount of light into the blind interior, improving “one-way” viewing by increasing the light differential between the interior and exterior of the blind. Ex. 1003; Fig. 2; 1:66-2:3.

Combination of Whybrew and Strength is proper

Combining Whybrew and Strength involves a simple substitution of the base textile 100 of Strength for the mesh fabric window 24 of Whybrew.

Whybrew indicates the mesh window 24 is stitched to other portions of the fabric body 20. The textile 100 of Strength, which is also a mesh, can easily be stitched into the body 20 as well. (citation to expert report here). Paper 1, at 42-44.

Combination of Whybrew and Strength is proper

There is teaching, suggestion, or motivation in the prior art references at issue that leads a PHOSITA to modify Whybrew in view of Strength to arrive at the claimed invention, namely the nature of the problem to be solved. *Ruiz v. A.B. Chance Co.*, 357 F.3d 1270, 1276 (Fed. Cir. 2004)(holding that motivation to combine was found because each reference was directed to the same problem).

Whybrew indicates the light differential between the interior and the exterior of the hunting blind creates the “one-way” viewing capability, Ex. 1002; 5:16-18.

Combination of Whybrew and Strength is proper

Strength discloses a mesh material for use in hunting blinds, and teaches that conventional camouflage material used blinds that were sufficiently translucent to allow for a silhouette of a hunter inside the blind to be seen by game external to the blind. Ex. 1003; 1:13-20.

Strength addressed this problem by disclosing a mesh 100 having a camouflage pattern 110 on an exterior side 111 and a dark color 200 on an interior side. Ex. 1003; 1:38-48.

The dark color prohibited more light from transmitting through the mesh 100 to the blind interior, thereby making the interior darker, Ex. 1003; 1:66-2:3, and increasing the light differential that improves “one-way” viewing. Paper 1, at 44-47.

Combination of Whybrew and Strength is proper

Modifying Whybrew's mesh window based on Strength's teaching that a mesh with a dark color on its inside surface reduces light transmission through the mesh allows greater inhibition of light into the blind, thus increasing the light differential that improves the "one-way" viewing feature discussed in Whybrew.

Thus, a PHOSITA is motivated to make such a modification of Whybrew and would have a reasonable expectation of success in solving the problem both references address; improving the "one-way" viewing capability of the modified hunting blind. Ex. 1007; ¶¶ 120-126. Paper 1, at 44-47.

Combination of Whybrew and Strength is proper

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. The general knowledge of a PHOSITA provides further motivation to modify Whybrew to arrive at the claimed invention. Paper 28, at 27.

Ameristep PenthouseTM is an instruction manual, published in 2005, 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 hunting blinds. Ex.1014.

Combination of Whybrew and Strength is proper

Ameristep shows a camouflage blind (Fig. A), wherein an exterior has a mesh door and window having a camouflage pattern thereon.

The Ameristep blind uses what it calls a ShadowGuard technology that includes a black color lining on the inside portion of the blind to prevent shadows and silhouettes inside the blind when an occupant resides therein.
Ex. 1014, p.4. Paper 28, at 29.

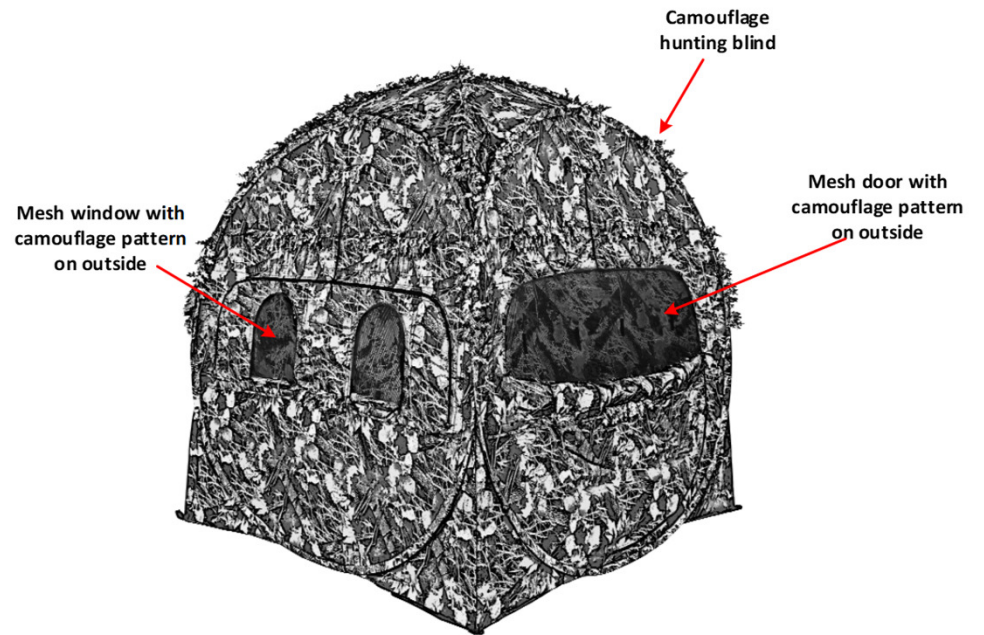


FIG. A

Combination of Whybrew and Strength is proper

According to *KSR*, a PHOSITA considers the general knowledge of a PHOSITA at the time of the invention. At that time a PHOSITA was aware of a one-way mesh with camouflage on the outside and a dark color on the inside that 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 be motivated by this general knowledge to modify Whybrew's mesh window to have a camouflage pattern on the outside and a dark color on the inside, as taught by Strength, and encouraged by Ameristep (Ex. 1014), thus increasing the light differential to improve the one-way viewing feature.

Thus, for at least this additional reason, the modification of Whybrew in view of Strength is proper and results in all the features in the claims of Ground A. Ex. 1025, ¶¶ 46-47. Paper 28, at 31.

Combination of Whybrew and Strength is proper

Summary:

(1) Both Whybrew and Strength are directed to hunting blinds and attempt to solve the same problem of avoiding a viewing of an occupant within a hunting blind from outside the hunting blind.

(2) Both address the problem with materials of the blind to increase the light differential between the interior and exterior of the blind.

(3) Strength's mesh 100 can readily substitute for the mesh window 24 of Whybrew or alternatively (alone or in view of Ameristep) motivate a PHOSITA to modify Whybrew's mesh window 24 to include camouflage on the outside and a dark color on the inside to prohibit more light from reaching the blind interior, thus increasing the light differential and improving the "one-way viewing" discussed in Whybrew.

(4) Therefore a modification of Whybrew in view of Strength is proper and results in the claimed invention. Ex. 1007; ¶¶ 120-126. Paper 1, at 42-47; Paper 28, at 27-31.

Rebutting Patent Owner's Arguments Against Combining Whybrew and Strength

Patent Owner Incorrectly Asserts a PHOSITA would not modify Whybrew to employ a camouflage pattern on the mesh

PO argues incorrectly that a PHOSITA would not modify Whybrew's mesh to include a camouflage pattern thereon. Feature [1D], Paper 17, at 16.

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; Paper 17, at 16.

Patent Owner Incorrectly Asserts a PHOSITA would not modify Whybrew to employ a camouflage pattern on the mesh

A PHOSITA, knowing Whybrew contemplates a porthole mesh for its mesh window, appreciates the mesh can have a camouflage pattern printed thereon, 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; 3:34-6; Ex. 1003, Fig.1; Ex. 1025, ¶ 49. Paper 28, at 7.

PO's declarants admit prior art hunting blinds used camouflage mesh. Ex. 1020, 55; Ex. 1022, 37-38. This buttresses Petitioner's assertion that a PHOSITA would modify Whybrew's mesh to add a camouflage pattern. Paper 28, at 7.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

PO argued Strength does not disclose a mesh for three 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 in the textile fabric, 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 of these arguments are correct.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (1):

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. Paper 28, at 8.

PO's assertion that Strength's material does not have holes based on visual inspection of Fig. 1 is incorrect. Ex. 1025, ¶ 51.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (2):

PO argues that any holes in Strength's fabric 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 is conclusory; she provides no supporting analysis or extrinsic evidence to support this assertion. Dr. 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. Paper 28, at 9.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (2) (cont.):

PO's expert admitted that the 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; Paper 28, at 10.

A PHOSITA understands that when molecular weight of the polymer coating 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.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (2) (cont.):

Thus, a PHOSITA knows that a range of molecular weight exists for the polymer film used in Strength's example, and that for molecular weights below a threshold, the critical stress is large enough to cause holes to exist in the resultant film. Ex. 1025, ¶¶ 55-56.

Strength is silent on the molecular weight of its film. Thus, 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, the Strength reference discloses a mesh fabric that has holes. Paper 28, at 10.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (2) (cont.):

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. Paper 28, at 10.

For the reasons above, Cameron’s opinion that Strength has no holes—where Strength is silent—is unreliable and should be given no weight. Paper 28, at 10.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (3):

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

The '535 claim language does not limit the mesh material element [1C] and [19C] to an airflow range. *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).

PO chose not to limit the '535 claims regarding airflow. 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. *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). Paper 28, at 10-11.

Patent Owner Incorrectly Asserts that Strength does not teach a mesh

Rebuttal of Argument (3) (cont.):

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 allegedly is not a mesh. Paper 17, p.20; Ex. 2031, ¶ 78. 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. Paper 28, at 11-12.

PTAB's Dispositive Standard Test

Rebuttal of Argument (3) (cont.):

PO's arguments 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; Paper 28, at 12.

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

The above analysis presumes the '535 claims require a panel material with open holes, but it does not.

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 it has been shown that Strength's resultant fabric will have holes, even if no holes existed in a resultant panel, Strength discloses each of the claim limitations of claims 1 and 19 of the '535 Patent. Paper 28, at 12-13.

The '535 Patent Claims Do Not Have a Priority Date of February 29, 2016 Because a Lack of Written Description in the Provisional Application

Paper 1, at 12-13, Paper 28, at 5-6, 8-9, 12-13

PO's priority claim fails, the date of invention is February 28, 2017

PO's secondary considerations rely heavily on the one-way mesh feature the inventors allegedly discovered in 2016. Paper 17, at 34-64. This was the only feature differentiating what PO believed it invented from what came before. Ex.1019, at 21.

The one-way mesh in a blind (called "the Austin") was 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.

If PO's provisional priority claim fails, the one-way mesh, relied upon as a key secondary consideration, is prior art and available evidence. Paper 28, at 13-14.

PO's priority claim fails, the date of invention is
February 28, 2017

PO's expert presumes the '535 patent claims are entitled to priority back to the provisional filing date. Ex. 2031, ¶ 21.

No analysis of the '535 Patent claims was performed by PO to establish such priority claim. Provisional application 62/301,007 does not provide Section 112 written description support for the '535 Patent claims and thus provides no priority. Paper 28, at 13-14.

PO's priority claim fails, the date of invention is February 28, 2017

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).

PO's provisional application fails this standard. Paper 28, at 14.

PO's priority claim fails, the date of invention is February 28, 2017

Both independent 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.

Paper 28, at 15.

PO's priority claim fails, the date of invention is February 28, 2017

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).

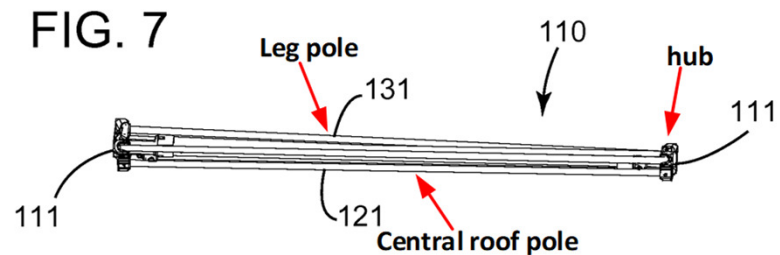
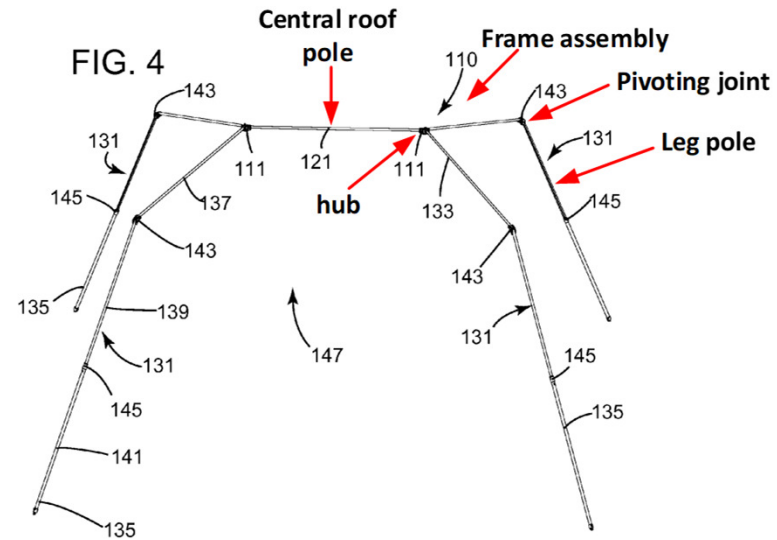
The provisional provides no teaching of **flexible** frame members as recited in independent claims 1 and 19; it discloses only **foldable** frame members. The terms “foldable” and “flexible” are distinct, not synonymous. Ex. 1025, ¶¶ 28-30. Paper 28, 15-17.

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.*

PO's priority claim fails, the date of invention is February 28, 2017

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.

In Fig. 7 the rigid leg poles/frame members 131 fold about their respective pivoting joints 143. Paper 28, at 15-17.



PO's priority claim fails, the date of invention is February 28, 2017

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 due to the lack of support for flexible frame members. Ex. 1025, ¶¶ 35-38. Paper 28, at 15-17.

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

Paper 28, at ____

Priority date affect on Secondary Considerations

Because the date of invention of the '535 Patent is not February 29, 2016, select evidence employed by PO in its POR secondary considerations analysis is prior art, and thus not available. Ex.2032. Section III, A, B. Paper 28, 6.

Specifically, all secondary evidence relating to the “one-way mesh” is prior art as the one-way mesh was displayed in the Austin blind in the February 2016 trade show and subsequently shown and described in trade show review publications more than one year before the February 28, 2017 priority date. Exs. 2032-E, 2032-F. Paper 28, at 18.

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

Secondary Considerations – No Nexus

1. 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. Paper 28, at 18.

Secondary Considerations – No Nexus

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

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). Paper 28, at 19.

Secondary Considerations – No Nexus

PO's 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. Paper 28, at 19.

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Secondary Considerations – No Nexus

The one-way viewing is a function of mesh characteristics not found in the '535 Patent claims.

The inventor, PO's expert, 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.

The '535 patent claims mesh generically and do 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.

The claims are not commensurate in scope with the proffered evidence of secondary considerations. Thus, the secondary consideration evidence that focuses on one-way viewing should be afforded no weight. Ex. 1025, ¶ 63; Paper 28, at 20.

Secondary Considerations – No Unexpected Results

PO argues discovery of one-way mesh was unexpected to Seaton, the inventor, 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. Paper 28, at 20.

Secondary Considerations – No Unexpected Results

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 of PO's expert 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. Paper 28, at 20.

Secondary Considerations – No Unexpected Results

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).

Dr. Cameron admits she did not consider the closest prior art in connection with “unexpected results.” Ex. 1024, at 172-174.

Seaton (the inventor) 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.

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. Paper 28, at 21.

Secondary Considerations – No 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. Paper 28, at 21-22.

Secondary Considerations – No Commercial Success

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. Paper 28, at 22.

Secondary Considerations – 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. Paper 28, at 22-23.

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

Secondary Considerations – No Licensing Evidence

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)(holding, “[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.”)

Under such circumstances, the court afforded this evidence little weight. This Panel should do the same. Ex. 1025, ¶¶ 73-74. Paper 28, at at 23-24.

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Secondary Considerations – No Licensing Evidence

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. Paper 28, at 24.

Secondary Considerations – No 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. Paper 28, at 24-26.

Secondary Considerations – No Long-Felt Need

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 and silhouettes. Ex. 1014.

Independent 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 Penthouse™ blind. Ex. 1025, ¶¶ 77-78. Paper 28, at 24-26.

Secondary Considerations – No Long-Felt Need

One deponent stated a hunting blind 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. Paper 28, at 25-26.

Secondary Considerations – No Industry Praise Evidence

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. Paper 28, at 26-27.

Secondary Considerations – No Industry Praise Evidence

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.

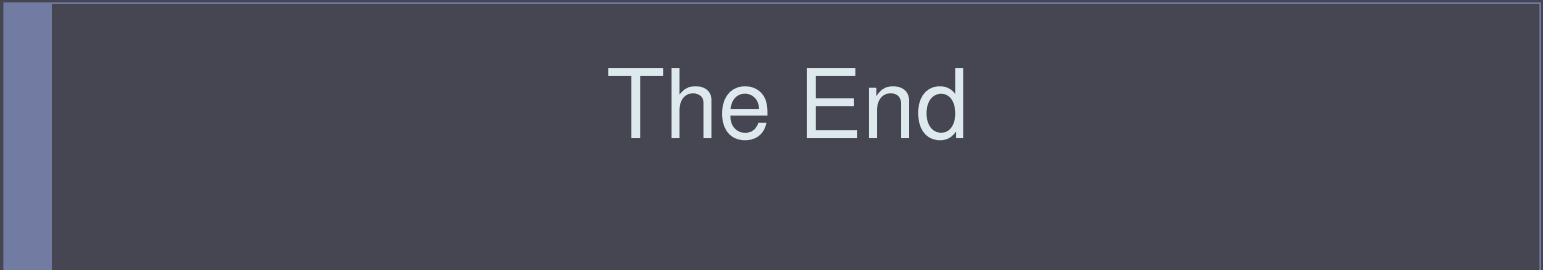
Therefore PO's evidence should be given no weight. *S. Ala. Med. Sci. Found. V. Gnosis S.P.A.*, 808 F.3d 823, 827 (Fed. Cir. 2015) (providing industry praise linked to an element known in the prior art or unconnected to the novel elements of the claims carries little weight in analysis).

Lastly, the proffered industry praise evidence was connected to the Austin Blind in 2016 shown at a trade show 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. Paper 28, at 27.

Conclusion

Conclusion

1. A modification of Whybrew in view of Strength is proper and results in a hunting blind that includes all the elements of the claims of Ground A. Patent Owner's arguments for non-obviousness fail.
2. The secondary considerations of non-obviousness fail because the primary evidence submitted therewith, the one-way mesh, is prior art. The remaining evidence fails for the reasons articulated herein.
3. The claims of Grounds B and C are obvious in view of the art submitted in the original Petition that has not been rebutted by the Patent Owner.



The End