

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BOWMAR ARCHERY LLC., Petitioner,

v.

VETERAN'S INNOVATIVE PRODUCTS, LLC, Patent Owner

Inter Parties Review No.: IPR2024-00401

Patent No.: 8,043,177

Filing Date: July 7, 2008

Issue Date: October 25, 2011

PATENT OWNER'S PRELIMINARY RESPONSE

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I. INTRODUCTION

Examiner John Ricci examined the '177 Patent and found it patentable. Of particular importance, Examiner Ricci examined multiple patents at issue in this IPR to include Petitioner's Vandewater and Liechty II references now utilized by Petitioner to assert invalidity of the '177 Patent. Examiner Ricci, through prosecution of Liechty II and other patents referenced in this IPR expressly knew about the Lint reference. In other words, Examiner John Ricci knows this filed, knows these patents, and still concluded the '177 Patent is patentable.

To overcome the work of Examiner Ricci, Petitioner relies on incorrect definitions and ignores the plain language of the '177 Patent and the references relied on. For example, Petitioner continually fails to understand the structural differences between a blade member, as required in all independent claims of the '177 Patent, and a barb, as used in Petitioner's references. The structural differences between the terms are not only structurally different but functionally different. As a result, Petitioner fails to meet its burden in showing it is likely to prove any of the '177 Patent claims are invalid. The Petition should be denied.

II. BACKGROUND

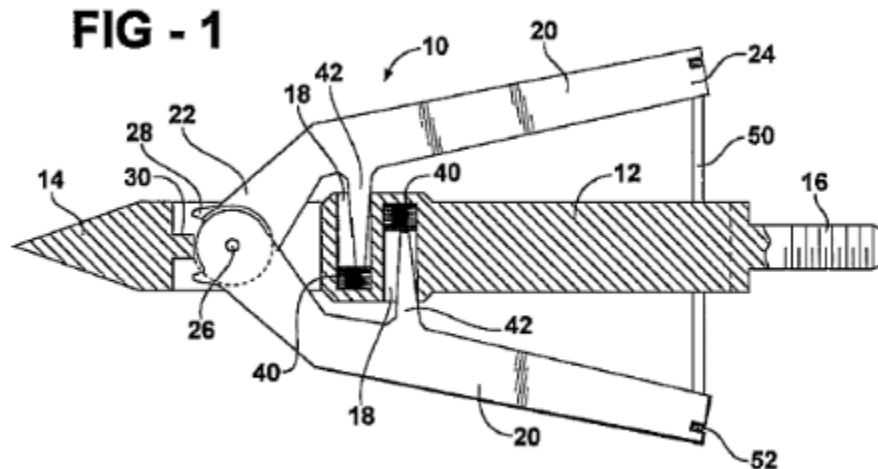
A. The '177 Patent

The purpose of the invention underlying the '177 Patent is to make an improved arrowhead having outwardly biasing collapsible blade members that

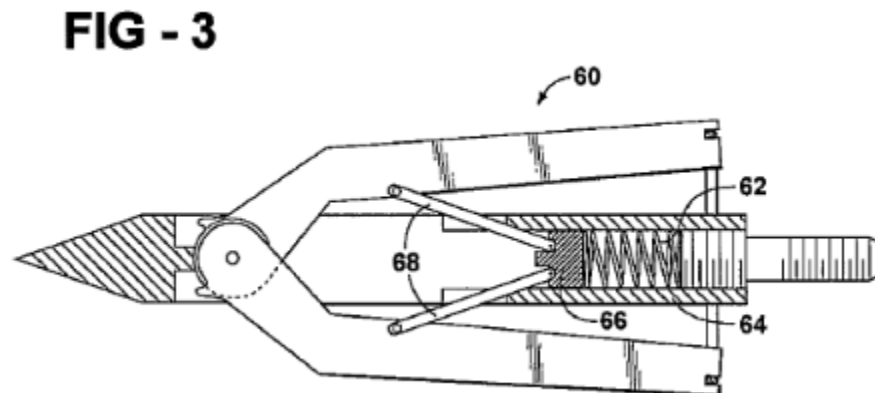
retract, or held in retracted position, as the arrowhead passes through bone and then expand once the arrowhead reenters flesh to maximize cutting. Ex. 1001 at 1:7-10. The '177 Patent discloses four embodiments. All four embodiments share similar structure to include a ferrule body with a pointed tip on the forward end and an attachment portion at the rearward end, at least two blade members having a first end pivotally connected to the ferrule and a second end, a retracted position in which the second end of the blade member is positioned close to the ferrule, an extended position in which the second end of the blade member is positioned further away from ferrule, a biasing structure, and a retaining element. The differences in the embodiments generally relate to the biasing structure to move the at least one blade member from the retracted position to the extended position.

The first embodiment discloses a retaining element to hold the blade members in the retracted position and a spring that biases the blade member outward. Each blade member has an arm 42 that extends into bores 18 of the ferrule 12 and is biased outward by a spring 40 within the bore 18. The retaining element 50 is removed when the broadhead punctures a target causing the blade members to move into the expanded position. Ex. 0001 at 3:54-57; 4:5-11. If the arrowhead encounters bone, such as a shoulder blade, the blade members move into the retracted position as the force against the bone is greater than the biasing force of the spring. Ex. 0001 at 4:11-13. Once the broadhead emerges from the bone, the blade members move to

the extended position as the biasing force of the spring is greater than the force against the blade members thus “maximiz[ing] the cutting surface of the arrowhead 10 through the soft flesh of the animal.” Ex. 1001 at 4:13-24. Fig. 1 shown below details the first embodiment in the retracted position:

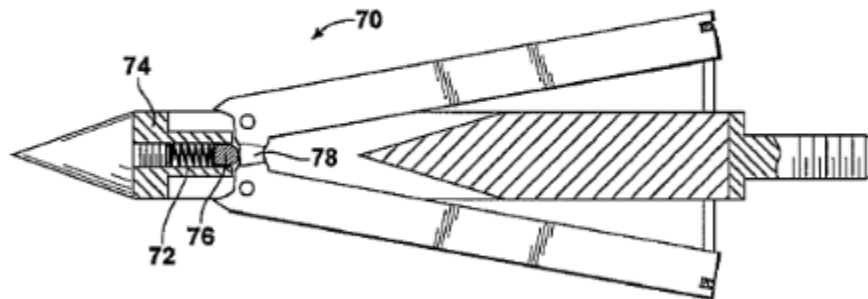


The second embodiment operates generally the same as the first embodiment but articulating arms are instead connected to a sliding element 66 that is biased by a singular spring. Ex. 0001 at 4:25-35. Fig. 3 shown below details the second embodiment in the retracted position:



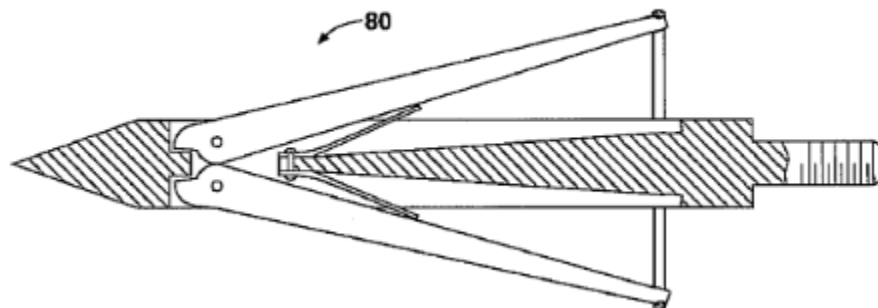
The third embodiment has the same components discussed above but utilized a biasing member (spring) adjacent the front end of the ferrule that engages a sliding element that physically interacts with tabs on the blade members. Ex. 0001 at 4:36-52. As the sliding member is biased away from the front of the ferrule, it engages the tabs which rotated the blade members into the extended position. *Id.* Fig. 5 shown below details the third embodiment in the retracted position:

FIG - 5



The fourth embodiment operates similar to the first embodiment but uses leaf springs instead of arms that are biased within bores. Ex. 0001 at 4:53-58. Fig. 7 shown below details the fourth embodiment in the retracted position:

FIG - 7



The blade member may take multiple shapes as disclosed in Figs. 1-8.

B. Ownership of the '177 Patent

Petitioner asserts Veteran's Innovative Products, LLC is the owner of the '177 Patent. This is not true. Matthew Futtere purchased the '177 Patent from the original owner Flanagan. The assignment is recorded reel/frame 066212/0122. Futtere is the sole owner of Veteran Innovative Products, LLC ("VIP").¹ Petitioner entered into negotiations with Futtere and VIP in 2023 for purchase the '177 Patent. Petitioner sought to purchase the '177 Patent in 2023 before electing to file this petition instead. Ex. 2001, Declaration of Matthew Futtere at ¶ 8.

C. Prosecution History of the '177 Patent

The application for the '177 Patent was filed on July 7, 2008 with 17 original claims. On February 9, 2011, the Examiner rejected claims 1-7, 9, 11-15 and 17 under 35 U.S.C. § 102 as anticipated by U.S. Pat. No. 7,713,152 to Tentler and rejected claims 8 and 16 under 35 U.S.C. § 103 as obvious over Tentler in view of U.S. Pat. No. 6,554,727 to Armstrong.

In the rejection, the Examiner indicated Tentler disclosed "a ferrule 104, blades 168 pivotably connected to the ferrule at fixed points 146; and a spring 116 for biasing the blades to an extended position (Figure 1D)." Ex. 2002, Prosecution

¹ Petitioner identifies the patent owner as Veteran's Innovative Products, LLC but that is incorrect.

History of the '177 Patent at 37. Examiner went on to state Tentler disclosed a travel limit on the blades and a retaining element. *Id.*

Examiner rejected claims 8 and 16 as obvious as those claims require the retaining element to be a ring. *Id.* According to Examiner, Armstrong discloses a retention ring to hold blades in a retracted position and stated it would have been obvious to use the ring of Armstrong with the other elements of Tentler. *Id.*

After a telephonic conference with the Examiner, applicant submitted remarks and an amendment to claim 11. Ex. 2002 at 29. In reference to claim 1, Applicant argued “the blade members [of the present invention] are free to move back to the retracted position when the arrowhead encounters a dense material, such as bone” whereas Tentler discloses locking the blades in an extended position once they deploy. *Id.* In reference to independent claim 11 and dependent claim 2, Applicant indicated the claims require the tip of the ferrule to be in a fixed position relative to the remainder of the ferrule body whereas Tentler expressly discloses a tip that moves relative to the body and causes the blades to move to the extended position. Examiner did not respond to the arguments and amendment but did issue a notice of an allowance. Both independent claims of the '177 Patent require two blade members and a biasing member.

The prosecution history is relevant in several regards. First, the '177 Patent, Liechty II, Vandewater, Tentler, and Armstrong, were all examined by the same

examiner John Ricci. Ex. 1001; Ex. 2003 U.S. Pat. No. 7,713,152 “Tentler”; Ex. 2004 U.S. Pat. No. 6,554,727 to Armstrong. Second, the Lint, Liechty II, and Hendricks references cited by Petitioner were cited directly on the face of Tentler as considered by Ricci during prosecution. Finally, Tentler passed through without a single office action with Examiner Ricci noting “the prior art does not disclose an arrow head including a tip; a body; blade(s) pivotally mounted to the body and pivotable between an open and closed state; and an actuating member moveable along the length of the arrowhead” Ex 2005. In other words, *blades* are a distinguishable element from *barbs* in the eyes of Examiner Ricci,

D. Person of Ordinary Skill in the Art

A person of ordinary skill in the art (“POSITA”) around the time of the filing of the ’177 Patent would have either 1) minimum of five years’ experience with developing broadheads or 2) a combination of formal mechanical engineering and experience with developing broadheads.

E. Claim Construction

Claims should be construed “in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 CFR § 42.100(b).

1. “blade member”

Claims 1-17 utilize the term “blade member.” A person of ordinary skill in the art would understand the plain and ordinary meaning of blade member to have a cutting edge or flat sharp part. *See e.g.*, Ex. 1003 at 3: 37-38; Ex. 2006. The specification supports this meaning as it routinely references cutting the flesh with the blade member:

- “to increase the amount of flesh cut by the blade members” [Ex. 0001 at 1:9-10].
- “As the tip 14 and blade members 20 penetrate the skin of the animal . . .” Ex. 0001 at 4:5-6].
- “Thus, the blade members 20 are in the extended position on either side of the bone to maximize the cutting surface of the arrowhead 10 through the soft flesh of the animal.” [Ex. 0001 at 4:21-24].
- FIGS 1-8 showing cross sections of the embodiments which reveals a cutting edge of blade members.

2. “biasing member”

Claims 1-17 utilize the term “biasing member.” A person of ordinary skill in the art would understand the plain and ordinary meaning of a biasing member to mean a structure that pushes against another structure. *See e.g.*, Ex. 1003 at 3:63-66. The specification supports this meaning as it routinely references the biasing

member as “coil springs” that “push” the arms of the blade members out or as a leaf spring. Ex. 1001 at 3:35-44; 4:58-62. A biasing member is not simply a retaining element.

III. PETITIONER FAILS TO CARRY ITS BURDEN THAT THERE IS A LIKELIHOOD ANY CHALLENGED CLAIM IS UNPATENTABLE

Pursuant to 37 C.F.R. §42.108(c), Petitioner must demonstrate that there is a reasonable likelihood that each claim is unpatentable to warrant institution of an *inter partes* review for that claim. Petitioner has not done so. Accordingly, Patent Owner respectfully requests that institution of inter partes review be denied.

A. Petitioner asserts anticipation for invalidation in Grounds 1, 2, and 5

1. Standard for Anticipation for Invalidation

An anticipatory reference must disclose every limitation of the claimed invention. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997). We must analyze prior art references as a skilled artisan would. To anticipate “[t]here must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention” *Scripps Clinic & Res. Found. v. Genentech, Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991) overruled on other grounds by *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282 (Fed. Cir. 2009).

2. Lint Does Not Anticipate Claims 1-4, 7, 9, 11-12, 15, or 17 (Ground 1)

(i) Lint does not disclose “blade members”

Petitioner fails to explain how Lint’s blunt barbs qualify as “blade members.” The common ordinary meaning of a blade member to a POSITA requires a sharp edge. The ’177 Patent expressly agrees with the common understanding as it states the blade member cuts the flesh, maximizes cutting, etc. The entire purpose of the ’177 Patent is to allow the blade members to retract when passing through a dense material such as bone but then expand to maximize cutting the flesh after it passes through the bone. Thus, the blade member is exactly as it sounds, a blade.

In contrast, Lint discloses barbs that have no intention to cut and are in fact designed to do the opposite of cutting. A barb is “a sharp point that sticks out and backward from the point of an arrow, a fishhook, etc.” Ex. 2007. As explained in Lint, “[a]fter the arrowhead 10 has completely penetrated the flesh of an animal, the spring 24 forces the barbs 19 outwardly so as to retain the arrowhead within the animal.” Ex. 1002 at 2:67-70. As a structural matter, a “point” is not the same as a blade. See Ex. 2006. As a functional matter, Lint’s disclosure of a barb is a completely different element from a blade member.

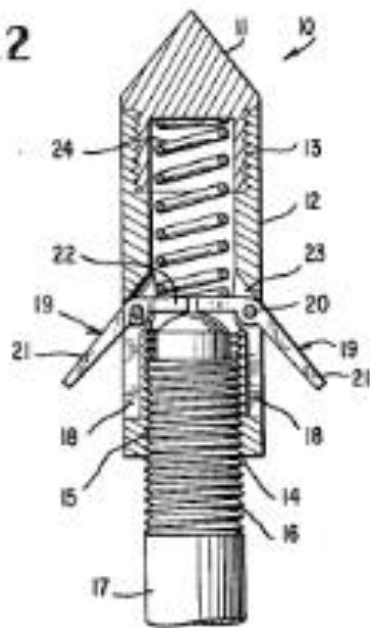
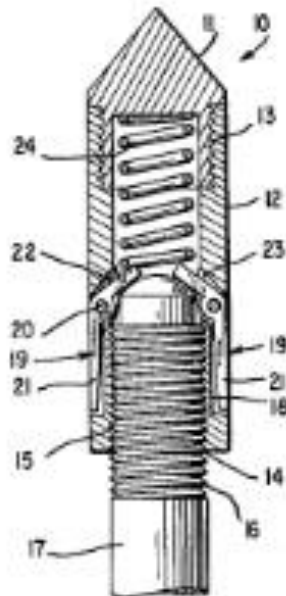
The Kuhn declaration does not support changing the definition of a barb. The ’177 Patent expressly states what the blade member is and what it does. Similarly, Lint expressly states what the barb is and what it does. There is simply no overlap

and Lint cannot satisfy the blade member element regardless of Kuhn's attempt to do so. Thus, claims 1-4, 7, 9, 11-12, 15, and 17 are not anticipated by Lint.

(ii) *Lint does not disclose a “blade member having a first [forward] end pivotably interconnected with the ferrule body”*

Independent claims 1 and 11 require the blade member to have a first end as described in claim 1, or a forward end as described in claim 11, “pivotably interconnected with the ferrule body.” Dependent claims disclose “tabs” extending from the first end or forward end that act as a travel restriction. The claim elements are reflected in operation of the claims because the biasing member engages with the blade member causing it rotate from the first end or forward end. As described in the dependent claims, tabs help restrict travel access.

In contrast, Lint clearly describes a two-arm lever with the connection point disposed between the first end and second end. As shown in Figs 2 and 3 below, Lint describes the barb as having an “outer barb portion 21 an inner barb ends 22 and a pivot pin 20 disposed in between the arms. Ex. 1002 at 2:40-53.

FIG 2**FIG 3**

In operation, the biasing element engages with the inner arms 21 of Lint causing it to rotate around the pivot point which is disposed between the two arms. Not only is this a structural difference, but a functional one as well due to the differing nature of how the blade member rotates as compared to the rotation of the outer barb portion of Lint.

Thus, claims 1-4, 7, 9, 11-12, 15, and 17 are not anticipated by Lint.

(iii) *Lint does not disclose “the biasing member being the only element operable to hold the blade members in the extended position”*

Independent claim 1 expressly requires the biasing member to be the only element that holds the blade member in the extended position. As disclosed in the '177 Patent, the biasing member holds the blade members in the extended positions.

In contrast, Lint requires two elements to maintain the barbs in the extended position: 1) the spring and 2) the arrow shaft. In Lint, the arrow shaft is moveable in

relation to the ferrule and must be screwed into an out position for the barbs to be in the extended position. The arrow shaft 17 is instrumental in holding the barbs in the extended position as evident by comparing Figure 2 with Figure 3 as disclosed above. Petitioner's conclusory allegation is simply not correct.

Thus, claims 1-4, 7, and 9 are not anticipated by Lint.

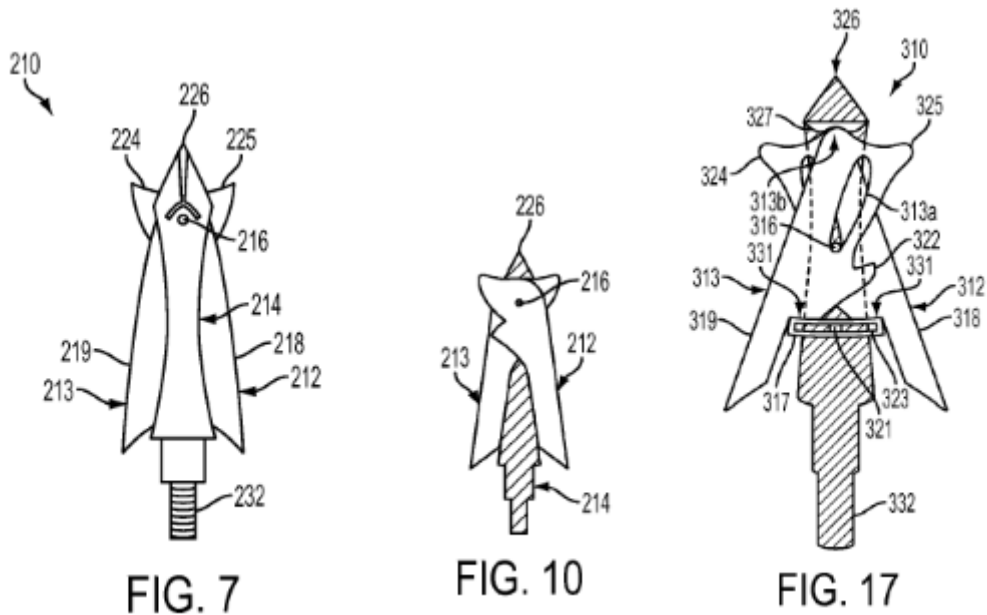
3. Vandewater Does Not Anticipate Claims 11-12, 15, or 17 (Ground 2)

- (i) *Vandewater does not disclose a "blade member having a forward end pivotably interconnected with the ferrule body"*

Independent claim 11 requires each blade member to have a forward end "pivotally interconnected with the ferrule body." Dependent claims disclose "tabs" extending from the forward end that act as a travel restriction. The claimed elements are reflected in operation because the biasing member engages with the blade member causing it rotate from the first end or forward end. As described in the dependent claims, tabs help restrict travel access.

In contrast and similar to Lint above, Vanderwater clearly describes a two-arm lever with the connection point disposed between the first end and second end. Petitioner ignores this fact as it only showed Vandewater figures in an expanded deployed state that failed to show the two-lever system. For example, as shown in Figs. 7, 10, and 17 below, Vandewater discloses "a first blade 212 has a first opening lever 224 configured to convert the force of impact with an object, such as an animal,

into pivotal motion of first blade 212 toward its open position.” [Ex. 100_ at 7:9-12].



The first opening lever 224 is positioned on one side of the pivot pin 216 with the sharp edge of the blade on the other side. In other words, Vandewater, like Lint, discloses a two-arm lever with a pivot point in between, not a pivot point at the forward end. Vandewater does not disclose a biasing member that moves the blade members to an extended position; instead, it discloses use of “an opening lever” to accomplish such a task. These are structural differences that lead to functional differences.

Vandewater does not teach a “blade member having a forward end pivotably interconnected with the ferrule body” thus claims 11-12, 15, and 17 are not anticipated by Vandewater.

- (ii) *Vandewater fails to disclose “at least one biasing member biasing the first and second blade members towards the extended positions.”*

Independent claim 11 requires the biasing member to bias, or move, the blade member to the extended position. Vandewater discloses use of a biasing member in reference to the first two embodiments as shown in Figs. 1-6. Ex. 1003 at 3:55-4:13. However, the disclosed biasing member is not related to deployment of the blades or biasing them to the extended position. *Id.* Importantly, the first two embodiments of Vandewater disclose a single bladed member that does not have a retracted or deployed position. *Id.* at 3:37-48 “blade 12 has two substantially symmetrical sharpened side portions or wings”] Instead, these embodiments concern maintaining the single blade member in a centered position and uses a biasing member to keep it in that centered position. [*Id.* at 4:3-13]. In operation, if one side of the blade strikes a denser material than the other side of the blade, then the biasing member will be released allowing the blade to rotated and preferably navigate away from the denser tissue (*i.e.* deflect off a rib). [*Id.* at 5:5-29]. This expressly disclosed retaining member has nothing to do with keeping a blade member deployed and cannot satisfy the limitations of independent claim 11.

Additionally, Petitioner’s reliance on Fig. 16 of Vandewater, specifically reference numeral 317, is simply wrong. Element 317 is not a biasing member, as alleged, but instead a “pivot limiter.” Ex. 1003 at 10:3-5. The pivot limiter, as

referenced in Fig. 16, acts as a static retaining element as it engages with locking tabs on both blade members. Ex. 1003 at 10:13-21. Once locked to the pivot limiter, the blades “act[] as a unitary whole with the pivot limiter” and then rotate as a unit around the guide pin. [*Id.*]. In this embodiment, the pivot limiter is not a biasing member at all but merely a structural element to lock the tabs of the blade members. There is no discussion within Vandewater in which item 317 acts as a biasing member and Petitioner/Kuhn’s reliance is wrong.

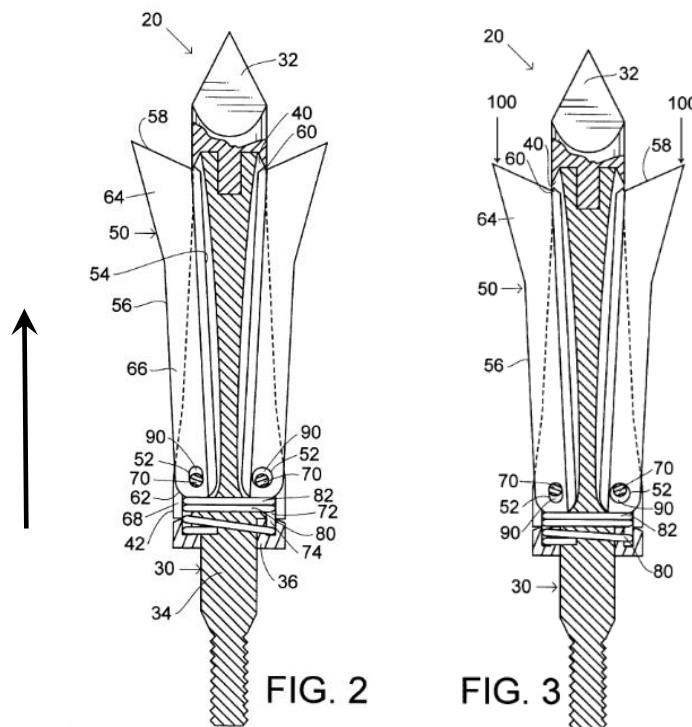
Petitioner does reference a generic paragraph in Vandewater in which a biasing member is discussed to deploy the blade members. However, Vandewater fails to provide any enablement of such an idea as the text fails to clarify and the figures, as admitted by Vandewater, fail to disclose such an embodiment. It seems as if Petitioner and Kuhn are relying on inherency for the enablement, but this is improper. “Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” *In re Oelrich*, 666 F.2d 578, 581 (CCPA 1981) (emphasis added) (citation omitted).

Vandewater fails to disclose a biasing member that bias the first and second blade member towards the extended position. Thus, Vandewater fails to anticipate claims 11-12, 15, and 17.

4. Liechty II Does Not Anticipate Claims 1-4, 9, 11-12, or 17 (Ground 5)

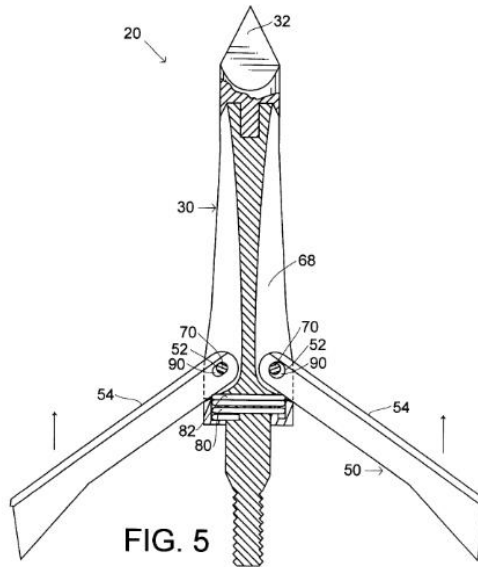
- (i) *Liechty II does not disclose “at least one biasing member biasing the first and second blade members towards the extended positions”*

Independent claims 1 and 11 both require the biasing member to bias, or move, the blade members to the extended positions. Liechty II does not disclose such a structure. As seen in Fig. 2, reproduced below with annotated force direction of the spring, Liechty II utilizes a biasing member, an annular spring 80, to push the catch lip 60 of each blade member 50 into a notch 40 within the ferrule 30 to keep the blade member in a retracted position. Ex. 1012 at 11:50-12:2. This force causes the hinge pin 70 to be at the bottom of the aperture 52 in the blade member creating gap 90. *Id.*



As seen in Fig. 4, when the arrow hits the flesh of the animal, the force pushes the blade member down causing the aperture 52 to slide down in relation to the hinge pin 70 reversing the orientation of the gap 90. *Id.* at 12:7-11. With the blades no longer retained in the notches, the blades are positioned into an open position due to the force of the flesh. *See id.* at 12:11-14 (“As shown in FIG. 4, while penetrating the animal or object after initial impact, blades 50 begin to rotate away from arrowhead body 30, towards the fully open position.”). However, the biasing force of the annular spring 80 continues to urge the blade forward, *i.e.* the retracted position, to create further slicing and penetration of the tissue. *Id.* at 12:14-18.

It is uncertain as to why Petitioner believes moving the blade into the forward position means it is in the retracted position. The plain language of Liechty II states the forward position puts the blade in a retracted position and the urging, as seen by the arrows in Fig.5 reproduced below, clearly pushes the blades, (if anything) towards the retracted position. *Id.* at 8:53-56; 12:14-18. Liechty II discloses this urging because it is acting as an opposing force against the flesh allowing it to cut better; in other words, a knife works better when you use active force versus a passive force.



Petitioner’s motivation to include a “modified” drawing of Fig. 5 is uncertain. What is certain, nothing in Liechty II supports the modified figure on page 76 of the petition. Claims 1 and 11 indisputably require the biasing element to push the blade member to the extended position. Liechty II does the exact opposite. As such, Liechty II does not disclose a biasing member that “bias[es] the first and second blade members towards the extended positions,” thus Liechty II does not anticipate claims 1-4, 9, 11-12, or 17.

(ii) *Liechty II does not disclose “the biasing member being the only element operable to hold the blade members in the extended position”*

Assuming *arguendo* the biasing member of Liechty II does bias the blade members outward to the extended position, Liechty II still does not satisfy the limitation of claim 1 which requires the biasing member to be the “only element operable to hold the blade members in the extended position.” Liechty II expressly

discloses the spring pushes the blade into the forward position. In order for it to be retained in a position, there must be an opposite force of equal or greater than the force created by the spring. Thus, the resistance force from the animal flesh is required to hold the blade members in the fully extended position. Petitioner and Kuhn fail to explain why physics doesn't apply to the disclosure of Liechty II or why the blades are inexplicably stopped in the location disclosed in the modified Fig 5. Nevertheless, there is obviously another element (i.e. flesh) acting to hold the blades in the extended positions. Thus Liechty II does not anticipate claims 1-4, 9, 11-12, or 17.

B. Petitioner asserts the '177 Patent is obvious in Grounds 3 and 4

1. Standard for Obviousness for Invalidation

To determine obviousness under 35 U.S.C. § 103(a), the prior art must be compared to the claimed subject matter and determined if the differences would have been obvious to a person having ordinary skill in the art. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). An invention “composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 550 U.S. at 418. A determination of obviousness must include “articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

2. Claims 1-4, 7, 9, 11-12, 15, or 17 are not obvious by Lint alone or in further view of Minisini or Krieger (Ground 3)

- (i) *Petitioner fails to explain why a POSITA would have added a sharp edge to the barb of Lint*

Petitioner's argument that a POSITA would add a sharp edge to the barb of Lint is a classic example of hindsight bias. Lint expressly teaches the purpose of the barbs is to "retain the arrowhead within the animal." Ex. 1002 at 2:69-70. Retaining is the opposite of cutting. The blade members of the '177 Patent are intended to improve aerodynamics by having the blade members in a retracted position during flight, deploy within the flesh with the intent of making larger wounds, selectively retract upon going through denser material like bone, and then redeploy once it passes through the denser material. The broadhead of the '177 Patent is designed to make a large wound through use of the blades, not to be retained within the animal as barb may do. In this instance, the barbs of Lint are not "reasonably pertinent to the particular problem with which the inventor is involved." *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1375 (Fed. Cir. 2012). Considering Lint is not relevant to the problem solved by the '177 Patent, there is no reason for a POSITA to look to Lint to make a retractable double bladed broadhead.

Impermissibly, Petitioner utilizes hindsight bias to read into Lint what Petitioner wants it to teach. "A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon ex post

reasoning” *KSR*, 550 U.S. 398 at 421. The barbs of Lint do not deploy until the broadhead has stopped within the animal. There is no reason, nor any teaching of Lint, that would suggest the “barbs” 1) should be deployed while the broadhead is moving through flesh or 2) that the barbs should contain a blade member to assist in cutting to make the wound larger. Adding a blade to the non-deployed barbs of Lint is not logical. Similarly, making a larger wound with blades is counterproductive to Lint’s stated goal of keeping the arrowhead within the flesh. In other words, there is no reason to change the barbs of Lint to blade members other than for the purpose of the ’177 Patent. “The inventor’s own path itself never leads to a conclusion of obviousness; that is hindsight. What matters is the path that the person of ordinary skill in the art would have followed, as evidenced by the pertinent prior art.” *Otsuka Pharmaceutical Co. v. Sandoz*, 678 F.3d 1280, 1296 (Fed. Cir. 2012). Here, Petitioner uses the claim language to twist the prior art into an obviousness reference.

Petitioner fails to establish the requirements for obviousness. Specifically, Petitioner failed to provide sufficient rationale as to why a POSITA would change the barb of Lint to blade members of claims 1-4, 7, 9, 11-12, 15, and 17. Petitioner’s conclusory allegations of obviousness fail to meet the standards necessary to institute the petition for *Inter Partes* Review. Petitioner cannot establish claims 1-4, 7, 9, 11-12, 15, or 17 are obvious.

(ii) *Petitioner fails to explain how a POSITA would add the other missing elements of Lint*

As explained *supra*, Lint fails to disclose structure that satisfy the claimed elements 1) “blade member having a first [forward] end pivotably interconnected with the ferrule body” or 2) “the biasing member being the only element operable to hold the blade members in the extended position.” Petitioner concedes it may have a problem showing anticipation as it relates to the barb versus blade member distinction but fails to consider it has issues with the above referenced elements. As such, Petitioner fails to explain how a POSITA would modify Lint to add the above referenced elements.

(iii) *Addition of Minisini or Krieger do not overcome missing elements of Lint*

There is no rationale provided for substituting the barbs of Lint for the blades of Minisini or Krieger. “It is impermissible within the framework of section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art.” *See In re Wesslau*, 353 F.2d 238, 241 (C.C.P.A. 1965). As stated *supra*, there is no reason to modify the function, and thus structure of Lint, to change the barbs to blades. Petitioner’s reliance on conclusory statements is insufficient to satisfy the requirements of obviousness which require more than just identifying the existence of the elements

in the prior art. See *KSR*, 550 U.S. at 418 (instructing “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art”).

Finally, as discussed *supra*, Petitioner fails to address how Lint discloses, or a POSITA would deem obvious, the elements of 1) “blade member having a first [forward] end pivotably interconnected with the ferrule body” or 2) “the biasing member being the only element operable to hold the blade members in the extended position.” Petitioner does not argue Minisini or Krieger supply these missing elements or that a POSITA would add the elements based on Minisini or Krieger. Thus, Petitioner cannot satisfy its burden.

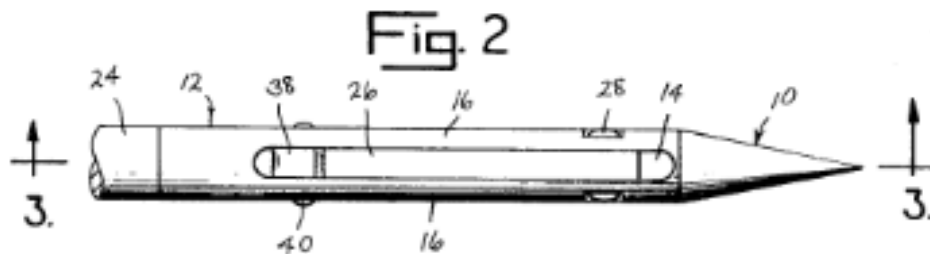
3. Claims 11-12, 15, and 17 are not obvious by Hendricks (Ground 4)

(i) Petitioner fails to show how the barb of Hendricks qualifies as a blade member

Petitioner fails to explain how Hendricks’ disclosure of a single “barb” satisfies the claimed element of a blade member. As discussed *supra*, a barb and blade member are two different physical structures. A barb is not designed to cut but instead retain the head within the tissue. In contrast, a blade member is expressly made and designed to cut. As a result of the two different functions, a barb has different physical characteristics from a blade member and the two terms are not synonymous.

The express teachings of Hendricks support the commonly understood meaning of the term barb because Hendricks' invention is to help retain a spearhead within the tissue. The patent states it "has particular application to underwater spears which are utilized to catch game fish." Ex. 1013 at 1:26-27. In other words, once the spear enters the fish, the single barb is deployed to keep the fish on the spear so the user can retrieve the fish. Thus, Hendricks clearly uses the commonly understood meaning of the term barb.

The barb of Hendricks does not have a cutting edge or flat sharp part. There is nothing in the specification that would support any disclosure of such a sharp cutting edge. Instead, Fig. 2, reproduced below, clearly shows a barb (numeral 26) having a blunt front edge. The blunt front edge clearly does not meet the definition of a blade which is a required element of independent claim 11.



Petitioner fails to put forth any explanation as to how Hendricks' barb satisfies the claimed element of a blade member. As a result, Petitioner has not met its burden showing it is likely to prevail that claims 11-12, 15, and 17 are obvious in view of Hendricks.

- (ii) *Petitioner fails to meet its burden to claim the additional second blade member would be obvious*

Claim 11 requires two blade members. Petitioner acknowledges Hendricks only discloses one barb. Taking aside the above argument regarding barb versus blade member, Petitioner's argument concerning obviousness fails. Petitioner impermissibly uses hindsight bias.

As an initial matter, Hendricks' express purpose of the single barb is to retain the spearhead within the animal to assist in retrieval. The single barb deploys after it is in the animal. There is no disclosure of an intent to use the barb to cut, to make the wound bigger, to make the spearhead more aerodynamic, or any structure that would facilitate those intentions. Instead, Hendricks' disclosure should be given effect that it discloses a barb for use a barb; not as a blade member.

Petitioner uses claim 11 as a roadmap to explain why a second blade member may be added. "It is inappropriate to use the template provided by the inventor, to render the inventor's contribution obvious." *Orexo AB, v. Actavis Elizabeth LLC*, 903 F.3d 1265, 1271 (Fed. Cir. 2018). As discussed *supra*, Hendricks has no disclosure about cutting or aerodynamics. Thus, Petitioner's conclusory statements changing the structure to create a different function of Hendricks is impermissible hindsight. There is simply no basis for POSITA to add a second blade based on the function and disclosure of Hendricks. Petitioner clearly utilized the claimed element as a roadmap to simply "add a second blade." Petitioner has not met its burden

showing it is likely to prevail that claims 11-12, 15, and 17 are obvious in view of Hendricks.

C. Petitioner's Expert Fails to meet the Person of Ordinary Skill in the Art

Petitioner relies heavily on Todd Kuhn to support its untenable and inexplicable positions regarding the cited references. However, Kuhn does not meet his own definition of a person of ordinary skill in the art and is biased against the patent owner. Kuhn's declaration should be disregarded in its entirety.

Kuhn states a person of ordinary skill in the art would have either "(1) a bachelor's degree in the field of mechanical engineering and/or related field, and at least two years of work experience in the development of broadheads; or (2) any education and experience equivalent to (1)." Ex. 1019 at ¶ 22. Kuhn does not have any education that would support either of his categories. Kuhn has a bachelor of arts in audiology, a master of arts in audiology, and Ph.D. in environmental engineering. His education background does not have any relevance to broadheads or mechanical engineering. Petitioner routinely refers to Kuhn as "Dr. Kuhn" but it should be noted his advanced degree has no relevance to the technology at issue. Kuhn cannot meet his own definition of a person of ordinary skill in the art because he has no education that is relevant. While he has experience in the broadhead industry, Kuhn offered no qualifications of a person of ordinary skill in the art solely related to experience. Since Kuhn fails to qualify as a person of ordinary skill in the

art, and does not even exceed those qualifications, his declaration should be disregarded.

Furthermore, Kuhn is biased against Futtere and VIP. In 2005, Kuhn claimed Futtere was infringing on one of Kuhn's broadhead patents. Ex. 2001 at ¶ 5-6. Kuhn was mistaken as to claim construction and Futtere responded to the allegation of infringement by correcting Kuhn's flawed claim construction and indicated the allegedly infringing product did not read on the Kuhn's claims. *Id.* Kuhn never filed a lawsuit against Futtere or Veteran Innovative Products, LLC for infringement and the matter is presumed resolved. *Id.* Additionally, Kuhn through his companies, directly competed in the marketplace against Futtere and VIP. *Id.* ¶ 7. Based on information and belief, Kuhn likely still has a financial interest in broadheads and would benefit if the '177 Patent is invalidated. As a result, Kuhn has a bias against Futtere as the patent owner which cannot be overlooked or disregarded.

IV. CONCLUSION

For the foregoing reasons, Petitioner's challenge is not likely to succeed on invalidating any claim of the '177 Patent and no *inter partes* review should be instituted.

Dated: April 8, 2024

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CERTIFICATE OF WORD COUNT

The undersigned certifies that the foregoing PATENT OWNER'S PRELIMINARY RESPONSE complies with the type-volume limitation in 37 C.F.R. § 42.24(b)(1). According to the word count tool in Microsoft Word, the brief contains 6035 words, excluding the parts of the document that are exempted by 37 C.F.R. § 42.24(a).

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE** is being served on counsel of record by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS), with a copy served via electronic mail to the following email address, as authorized in the Petition:

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