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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VECTAIR SYSTEMS INC.,
Petitioner,

v.

FRESH PRODUCTS, INC.,
Patent Owner.

Case IPR2024-00824
U.S. Patent 10,145,098

PATENT OWNER PRELIMINARY RESPONSE

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35 U.S.C. § 325	<i>passim</i>

PATENT OWNER'S EXHIBIT LIST

Exhibit No.	Description
2001	Declaration of Jeffrey Smith
2002	U.S. Patent No. 9,243,394 (the '394 Patent)
2003	U.S. Patent Publication No. 2014/0259344 (Muderlak)
2004	U.S. Patent No. 927,026 (Clayton)
2005	Complaint, <i>Vectair Systems Inc. v. Fresh Products, Inc.</i> , No. 24-cv-01454 (D. Minn. Apr. 20, 2024)
2006	Infringement Contentions, <i>Vectair Systems Inc. v. Fresh Products, Inc.</i> , No. 24-cv-01454 (D. Minn. July 30, 2024)

Pursuant to 35 U.S.C. § 313, 37 C.F.R. § 42.107 and the Notice of Filing Date Accorded to Petition, dated May 13, 2024 (*see* Paper 4), Patent Owner Fresh Products, Inc. (“Patent Owner”) hereby timely submits its Preliminary Response to the Petition for *Inter Partes* Review of claims 1, 19, and 38 of U.S. Patent No. 10,145,098 (“the ’098 Patent”) filed by Vectair Systems Inc. (“Vectair” or “Petitioner”).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Petition should be denied because, *inter alia*, it (1) fails to establish that the references raised therein are prior art, (2) relies on references that are cumulative of the art of record, warranting denial under 35 U.S.C. § 325(d), and (3) proposes combinations that, like the art of record, do not render obvious the challenged claims. Accordingly, Petitioner has failed to establish a reasonable likelihood that it will prevail for any claim in any of the three grounds raised in the Petition. *See* 35 U.S.C. § 314(a).

In more detail, ground 1, which relies upon the Wave 3D references (Exhibits 1005 and 1006), should be denied because the Wave 3D references are not prior art. Petitioner mistakenly asserts that the “Date First Available” recited on the face of 2024 printouts of Amazon listings (Exhibits 1005 and 1006) establishes the listings as prior art printed publications as of the alleged “Date First Available.” Petition, 10–11. The “Date First Available” on the 2024 listings are inadmissible hearsay.

Petitioner's reliance on this hearsay demonstrates the very problem with such a speculative approach to establishing an internet listing as prior art—the “Date First Available” recited in Exhibits 1005 and 1006, which are of unknown origin, are simply wrong. Patent Owner's Wave 3D product was not available as of the alleged dates. *See* Ex. 2001 (Declaration of Jeffrey Smith).

Petitioner has also failed to establish the prior art status of references raised in grounds 2 and 3. In ground 2, Petitioner improperly relies on the “Pearl 3D *product*.” Petition, 11, 28, 33, 41–46. As an initial matter, Petitioner's reliance on product art does not comply with 35 U.S.C. § 311(b), which limits *inter partes* review to grounds “only on the basis of prior art consisting of patents or printed publications.” Moreover, Petitioner's reliance on “renderings of the Pearl 3D product” (Ex. 1010) fares no better, as Petitioner never alleges that the “renderings” were printed publications dated before November 5, 2014. Similarly, in ground 3, Petitioner fails to identify any evidence establishing that the V-Screen references were publications available before November 5, 2014.

Additionally, grounds 2 and 3 should be denied because Petitioner relies on references that are substantially the same as those considered during examination of the challenged claims, warranting denial under 35 U.S.C. § 325(d). The prosecution history demonstrates that the Examiner considered such references and concluded that the claims were allowable because the references of record did not disclose or

suggest the specific arrangement of features claimed in the '098 Patent. Petitioner does not even attempt to explain how its references and arguments are different from those presented during examination. Nor does Petitioner attempt to explain how the Patent Office materially erred during examination of the '098 Patent. Grounds 2 and 3 should be denied institution under 35 U.S.C. § 325(d).

Moreover, like the art of record, Petitioner's proposed combinations do not render obvious the challenged claims. Seemingly recognizing that the Petition's references do not disclose all of the claim limitations, Petitioner repeatedly makes the conclusory assertion that a missing limitation "is within the ordinary knowledge of a POSITA." But deficiencies of references cannot be saved by conclusory assertions lacking evidentiary support. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1380 (Fed. Cir. 2016) ("To satisfy its burden of proving obviousness, a petitioner cannot employ mere conclusory statements. The petitioner must instead articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness.").

Petitioner also fails to identify any motivation to modify the references as Petitioner proposes. Petitioner's obviousness argument amounts to a search for each claim limitation somewhere in the prior art. To be clear, the references in the Petition do not disclose each claim limitation. Regardless, it is well established that the obviousness inquiry is not whether each limitation can be found somewhere in the

prior art. Rather, “[a] party seeking to invalidate a patent on the basis of obviousness must demonstrate by clear and convincing evidence that a skilled artisan would have been motivated to combine the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a reasonable expectation of success in doing so.” *See Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1360 (Fed. Cir. 2012) (quotation marks omitted); *see also In re Nuvasive, Inc.*, 842 F.3d 1376, 1383 (Fed. Cir. 2016) (explaining that “conclusory statements” are “insufficient articulations of motivation to combine” prior art references). When an assertion of obviousness “fails to identify any actual reason why a skilled artisan would have combined the elements in the manner claimed,” the assertion of obviousness “is inadequate.” *See In re Van Os*, 844 F.3d 1359, 1361 (Fed. Cir. 2017).

Finally, the Board should exercise its discretion under 35 U.S.C. § 314(a) to deny institution of the Petition because *inter partes* review of claims 1, 19, and 38 would not resolve the issues in the parallel district court proceeding *Vectair Systems Inc. v. Fresh Products, Inc.*, No. 24-cv-01454 (D. Minn.). Petitioner seeks *inter partes* review of claims 1, 19, and 38. In the parallel district court proceeding, Patent Owner has asserted 40 additional claims of the ’098 Patent that are not challenged in the Petition. Ex. 2006 (Infringement Contentions). Thus, not only does the

Petition fail on the merits, but even if it had merit, it would have no significant effect on the district court action.

For these reasons and as further explained below, Patent Owner respectfully requests denial of the Petition.

II. THE INVENTION OF THE '098 PATENT

The '098 Patent relates to restroom urinal screens, which are used as air fresheners, to prevent debris from being flushed down urinal drains, and to reduce splashing. The '098 Patent discloses an improved urinal screen having a frame with a first face and a second face opposite the first face. Ex. 1001, 1:25–33. Openings, which can be defined by braces, extend through the first face and second face. *Id.* The urinal screen also includes first posts extending from the first face of the frame and second posts extending from the second face of the frame. *Id.* A top view (FIG. 2) and a side view (FIG. 5) of the improved urinal screen are shown and annotated below.



The '098 Patent discloses that the “openings 18 can occupy a large percentage of the overall surface area of the frame 14 as viewed in FIG. 2.” Ex. 1001, 4:42–49.

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For example, the openings can occupy more than half of the total surface area of the frame. *Id.* The patent explains that the openings can have various shapes, including polygons and others. Ex. 1001, 4:35–39. In the preferred embodiment shown above, the openings are hexagons. The braces form the sides of the openings and intersect at corners to create a lattice-like structure making up the urinal screen.

The '098 Patent also discloses that, in some embodiments, “the posts 22 extend from the corners 46 of the frame forming openings 18.” Ex. 1001, 5:32–46. In other embodiments, the posts can extend from the sides of the openings. *Id.* The posts may alternatively extend from both corners and sides of the openings. *Id.* Additionally, the sides and/or corners of the openings can have “contoured (e.g., convex) upper and/or lower surfaces.” Ex. 1001, 5:4–9.

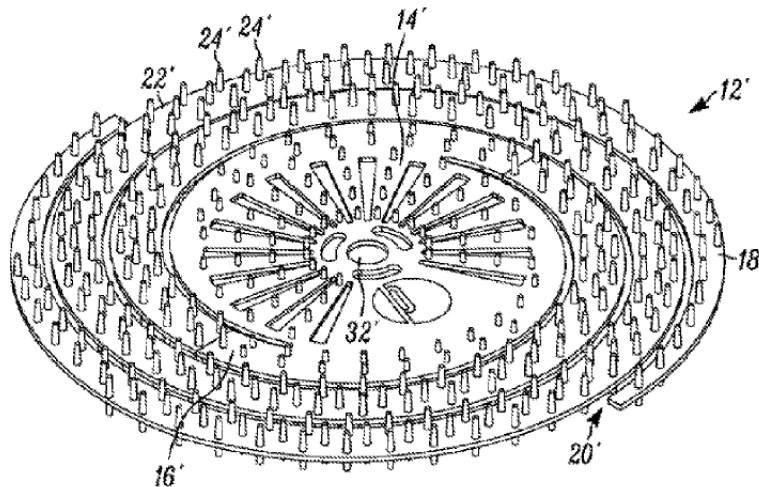
The '098 Patent further discloses that, in some embodiments, “the frame thickness 34 at a given position on the frame 14 is less than or equal to approximately $\frac{1}{2}$ of the overall screen thickness 38 as measured perpendicularly to the first surface 26 of the frame 14.” Ex. 1001, 6:46–57. The patent discloses other frame-to-screen thickness ratios and teaches that the relative thicknesses cause “the posts 22 [to] space the frame 14 from the installation surface” by at least a certain amount, such as $\frac{1}{3}$ of the overall thickness or $\frac{1}{4}$ of the overall thickness. Ex. 1001, 6:58–7:11.

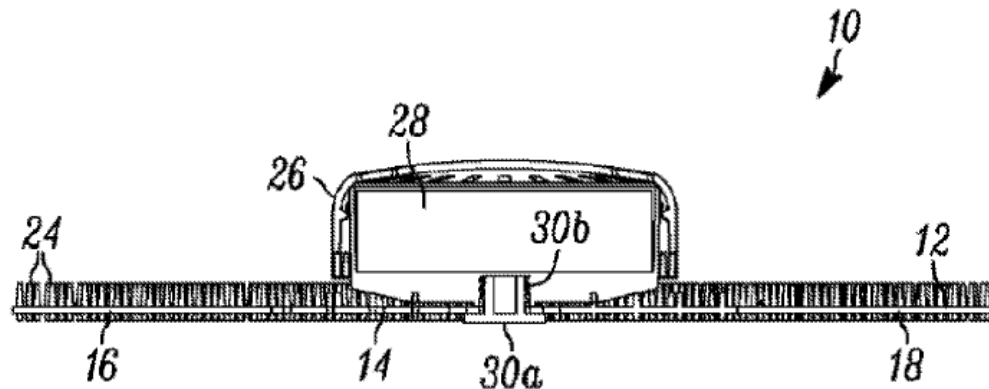
The '098 Patent's features cause the urinal screen to “reduce splashing in the urinal by deflecting urine or other fluids which pass between the frame 14 and the

installation surface (e.g., fluid that passes through the openings 18 or around the perimeter of the frame 14).” Ex. 1001, 7:12–19. These features also “reduce the likelihood that the openings 18 are clogged by debris.” *Id.* Moreover, the relative surface areas and relative thicknesses help to “reduce the overall weight of the urinal screen 10.” Ex. 1001, 4:48–49, 6:55–57.

III. PROSECUTION HISTORY OF THE '098 PATENT

During prosecution the Examiner issued an initial office action, rejecting the pending claims on multiple prior art-based grounds. Ex. 1002, pp. 311–318. Specifically, the Examiner rejected the pending claims in view of U.S. Patent Publication No. 2014/0259344 (Muderlak), among others references. FIGS. 3 and 2B of Muderlak are shown below.

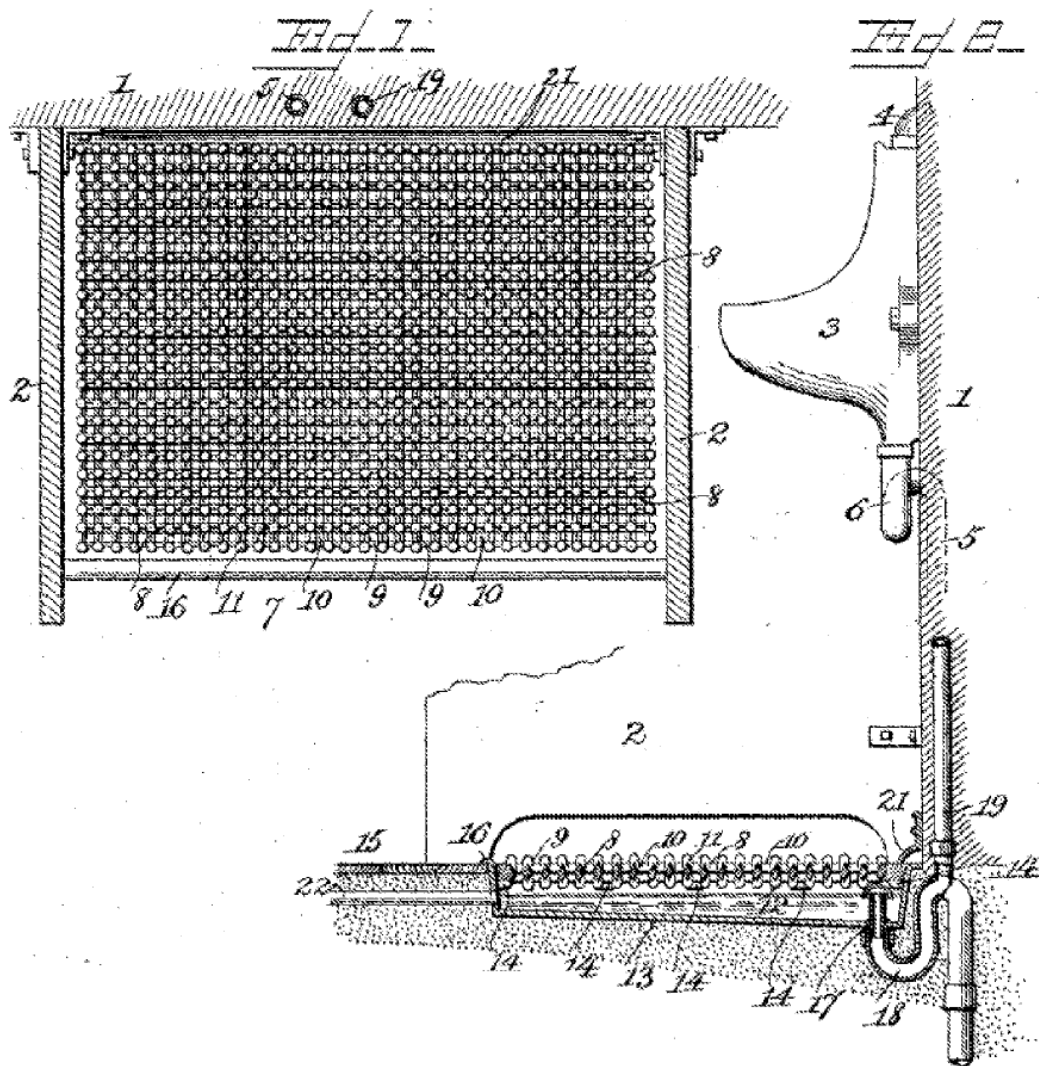




Id., pp. 199–200.

Applicant responded. *Id.*, pp. 195–202. Applicant explained that Muderlak’s “protrusions extending from the bottom side of the screen are noticeably shorter than the protrusions extending from the top side of the screen.” *Id.*, p. 199–200. Applicant also explained that Muderlak’s openings do not “occupy at least half of a surface area of the frame” as claimed, and that the Office Action did not identify any motivation to modify Muderlak to satisfy this limitation. *Id.*, p. 200–201.

The Examiner then issued another nonfinal office action. *Id.*, pp. 176–184. The Examiner rejected the pending claims in view of, *inter alia*, Muderlak and U.S. Patent No. 927,026 (Clayton). The Examiner asserted that Clayton teaches Muderlak’s deficiencies, including (1) first posts and second posts having a same size and shape and (2) openings occupying at least half of a surface area of the frame. FIGS. 1 and 8 of Clayton are shown below.



Id., p. 166.

Applicant responded. *Id.*, pp. 158–170. Applicant explained that Clayton, which discloses a sanitary floor surface to reduce soiling on footwear, is not analogous art. *Id.*, pp. 163–167. Applicant also explained that modifying Muderlak to increase the surface area of its openings improperly relies on hindsight. *Id.*, pp. 167–168.

The Examiner issued a final rejection, maintaining the rejections. *Id.*, pp. 143–155.

Applicant thereafter conducted an interview with the Examiner and proposed various claim amendments. *Id.*, p. 128. Applicant summarized the interview as follows:

Applicant and Examiner then discussed the cited references and differences between the claimed urinal screens and the cited references. With respect to the cited references, it was agreed that Clayton discloses a floor, not a urinal screen. With respect to the claims, it was agreed that Claim 13 [issued as independent claim 1], as amended above, appears to define over the art of record. In addition, the Examiner suggested that a urinal screen as claimed in Claim 42 [issued as independent claim 38], including that (1) a number of posts surround the opening and (2) the posts reduce splashing, would appear to define over the art of record. Finally, it was agreed that a urinal screen as claimed in amended Claim 17 [issued as independent claim 19], including that the first ends of the braces intersect at a corner with no more than two other braces, would appear to define over the art of record.

Id., p. 128. Applicant then amended the claims as reflected in the above summary of the interview. *Id.*, pp. 130–138.

On August 15, 2018, the Examiner issued a Notice of Allowance, which included minor clarifying examiner amendments. *Id.*, pp. 57–68. Applicant adopted the proposed amendments. *Id.*, pp. 43–54. The '098 Patent issued thereafter. *Id.*, p. 16.

IV. PERSON OF ORDINARY SKILL IN THE ART

Petitioner makes no specific proposal regarding the level of ordinary skill in the art. Petition, 7-8. Instead, Petitioner states that no specific finding of a particular level of skill in the art is needed where the “facts of record . . . found within the prior art of record . . . reflects an appropriate level.” *Id.* (citing *Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001)). But Petitioner’s assertions regarding a POSITA’s knowledge are not supported by the facts of record found within the prior art.

Petitioner also broadly asserts that “[p]ersons having ordinary skill in the art (“POSITA”) look to the common body of prior art and knowledge related to covers that can be placed over drains . . . Any POSITA would look to art that relates to the use of mats, screens, or liners that cover drainpipes (drains in kitchens, bathrooms, including drains in urinals, tubs, showers, sinks) and other ordinary drainpipes.” Petition, 8. Petitioner’s assertion is overbroad and unsupported, like its many claims of what is within the knowledge of a POSITA throughout the Petition. Petitioner cannot rely on its overbroad and conclusory assertions regarding the level of skill in the art to cure the deficiencies of Petitioner’s proposed combinations. *See Okajima*, 261 F.3d at 1355 (“Skill in the art does not act as a bridge over gaps in substantive presentation of an obviousness case, but instead supplies an important guarantee of objectivity in the process.”).

Patent Owner reserves the right to assert an alternative description of a person of ordinary skill in the art in this or another proceeding involving the '098 Patent, or another patent related thereto, where appropriate.

V. CLAIM CONSTRUCTION

While not agreeing with Petitioner's proposed constructions (or lack thereof) for certain claim terms (*see* Petition, 8–9), solely for purposes of this Preliminary Response, Patent Owner does not object to the constructions proposed by Petitioner at this time. Patent Owner reserves the right to assert alternative constructions for relevant claim terms in this or another proceeding involving the '098 Patent, or another patent related thereto, where appropriate.

VI. THE ALLEGED PRIOR ART

A. FP 3WDS60SAP Wave 3D (Ex. 1005)

Ex. 1005 is not prior art to the '098 Patent. Petitioner alleges that Ex. 1005, a 2024 printout of an Amazon listing, is “a publication in the form of a publicly available advertisement, available online through Amazon.com, for Fresh Products 3WDS60SAP Wave 3D Urinal Deodorizer Screen.” Petition, 10. Ex. 1005 lists a “Date First Available” of May 10, 2013. Petitioner thus alleges that Ex. 1005 shows Patent Owner Fresh Products' Wave 3D, a commercial embodiment of the '098 Patent, was described in a printed publication on that date, more than one year before the effective filing date of the '098 Patent. Petition, 10.

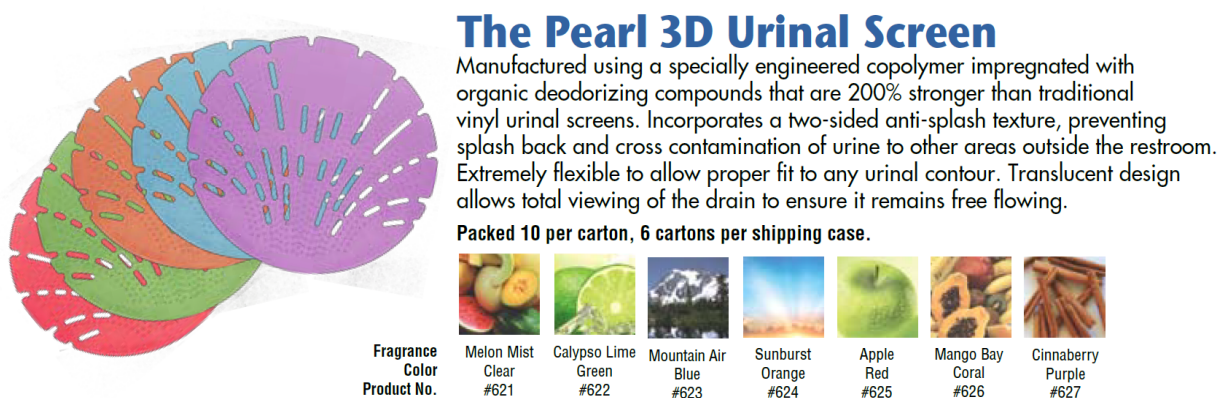
However, Petitioner’s reliance on the “Date First Available” listed in the face of Ex. 1005 is improper. *See ServiceNow, Inc. v. Hewlett Packard Co.*, IPR2015-00716, Paper 13 at 16–17 (PTAB Aug. 26, 2015) (denying institution because “Petitioner relies on the date on the face of each exhibit” and “Petitioner has not established that any hearsay exception or exclusion applies”). Indeed, Petitioner’s assumption regarding the “Date First Available” is mistaken. As explained in the declaration of Jeffrey Smith, co-inventor of the ’098 Patent and Chief Operating Officer for Fresh Products, the “Date First Available” listed on Ex. 1005 is inaccurate. Ex. 2001. The Wave 3D Urinal Screen was first publicly disclosed by Fresh Products at the ISSA Interclean North America trade show in November of 2014, which Mr. Smith attended. *Id.*

B. FP Wave 3D (Ex. 1006)

Ex. 1006 is not prior art to the ’098 Patent. Petitioner alleges that Ex. 1006 is “a publication in the form of a publicly available advertisement, available online through Amazon.com, for Fresh Products Wave 3D urinal screen.” Petition, 10–11. Ex. 1006 lists a “Date First Available” of September 3, 2013. However, as explained above with respect to Ex. 1005, the “Date First Available” listed on Ex. 1006 is (1) inadmissible hearsay and (2) inaccurate. Ex. 2001.

C. Big D Catalog (Ex. 1008)

Petitioner alleges that Ex. 1008 is “a publication produced by Big D Industries, dated for publication as January 2013.” Petition, 11. As an initial matter, Petitioner once again relies on hearsay—the date listed on the face of Ex. 1008—and does not identify any evidence substantiating that Ex. 1008 was in fact publicly available on that date. Notwithstanding Petitioner’s lack of supporting evidence, the product depicted in Ex. 1008 is significantly different from the claims of the ’098 Patent. Ex. 1008 depicts a Pearl 3D Urinal Screen, shown below.



Ex. 1008, p. 15. As shown above, the document depicts and describes a Pearl 3D Urinal Screen that includes a flat body, cutouts in the flat body, and “two-sided anti-splash texture” on the surface of the flat body.

D. Big D Pearl 3D (Ex. 1009)

Petitioner alleges that Ex. 1009 is “a publication produced and distributed by Big D Industries” in September 2013. Petition, 11. As an initial matter, Petitioner once again relies on hearsay—the date listed on the face of Ex. 1009—and does not

identify any evidence substantiating that Ex. 1009 was in fact publicly available on that date. Notwithstanding Petitioner's lack of supporting evidence, the product depicted in Ex. 1009 is significantly different from the claims of the '098 Patent. Ex. 1009, like Ex. 1008, depicts a Pearl 3D Urinal Screen, shown below.



Ex. 1009, p. 1. Again, the Pearl 3D Urinal Screen document depicts and describes a urinal screen having a flat body, cutouts in the flat body, and “2 sided anti-splash texture” on the surface of the flat body.

E. “Renderings” of a Pearl 3D Product (Ex. 1010)

By Petitioner’s own admission, the Pearl 3D Product is a product. Petition, 11–12. Because it is not a patent or publication, it is thus not within the scope of prior art that may be considered under 35 U.S.C. § 311(b).

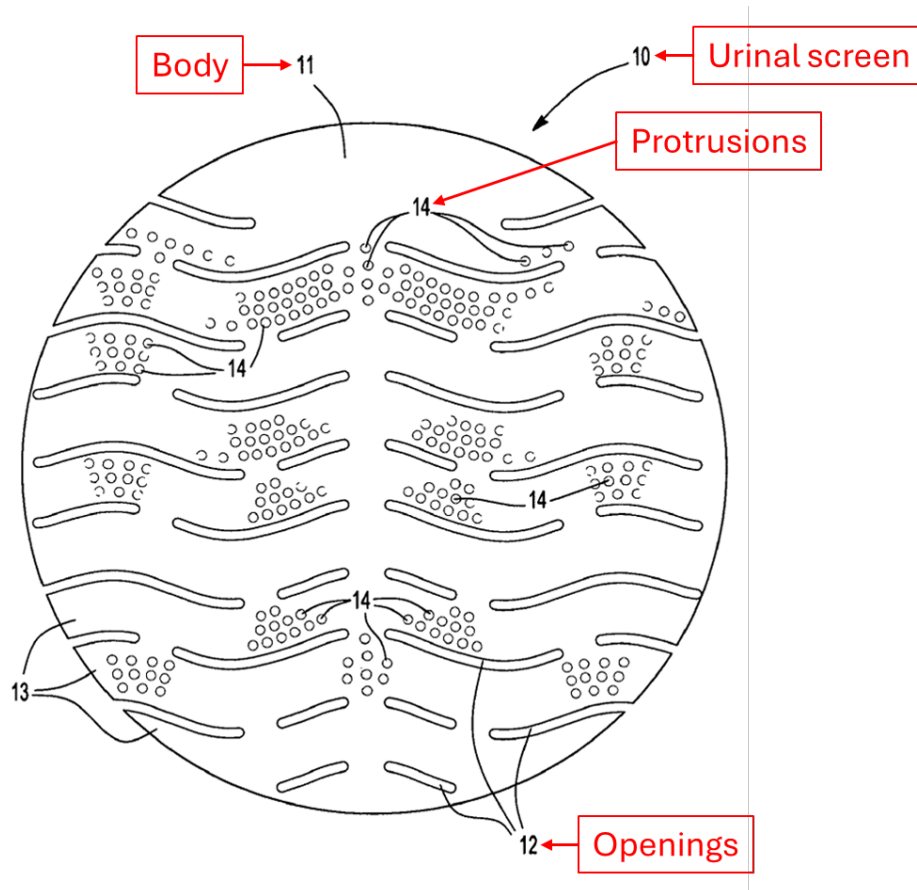
To show the Pearl 3D product’s features, Petitioner relies on what it refers to as “renderings,” which Petitioner alleges “accurately reflect the Pearl 3D product.” Petition, 11; Ex. 1010. However, Petitioner has not established, and indeed does not allege, that the renderings were a publication or were available before November 5, 2014. Accordingly, Petitioner has not established that the “renderings” are prior art to the ’098 Patent.

Moreover, as explained with respect to Exhibits 1008 and 1009, the Pearl 3D product is significantly different from the claims of the ’098 Patent. The Pearl 3D urinal screen includes a flat body, cutouts in the flat body, and anti-splash texture on the flat body.

F. U.S. Patent No. 8,007,707 B1 (the ’707 Patent, Ex. 1011)

The ’707 Patent issued on August 30, 2011, from Application No. 12/152,627, filed on May 15, 2008, titled “Method of manufacture air freshening article.” Ex. 1011, p. 1. The ’707 Patent names the same inventors as the challenged ’098 Patent, Douglas S. Brown and Jeffrey A. Smith. *Id.* The ’707 Patent is assigned to Fresh Products, Inc. *Id.*

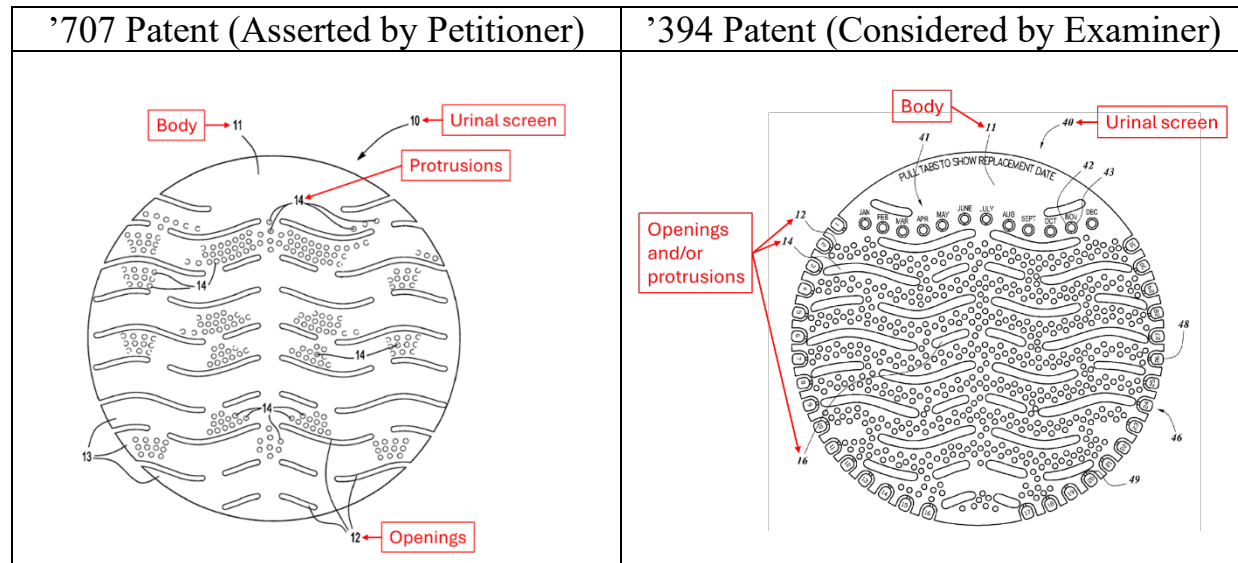
As depicted in FIG. 1 below, the '707 Patent discloses a urinal screen 10 having a body 11, openings 12, and protrusions 14.



Ex. 1011, FIG. 1. The '707 Patent explains that the body “is generally flat and circular in shape.” Ex. 1011, 2:26–28. The '707 Patent also discloses that “flat surfaces reflect back the urine.” Ex. 1011, 2:59.

The '707 Patent is cumulative of references—such as U.S. Patent No. 9,243,394 (the '394 Patent)—considered during examination of the '098 Patent. *See* Ex. 1001, p. 3 (listing the '394 Patent); Ex. 2002 (the '394 Patent). The '394 Patent

names the same inventors as the '707 Patent and the challenged '098 Patent. Below is a comparison between the '707 Patent and the '394 Patent.



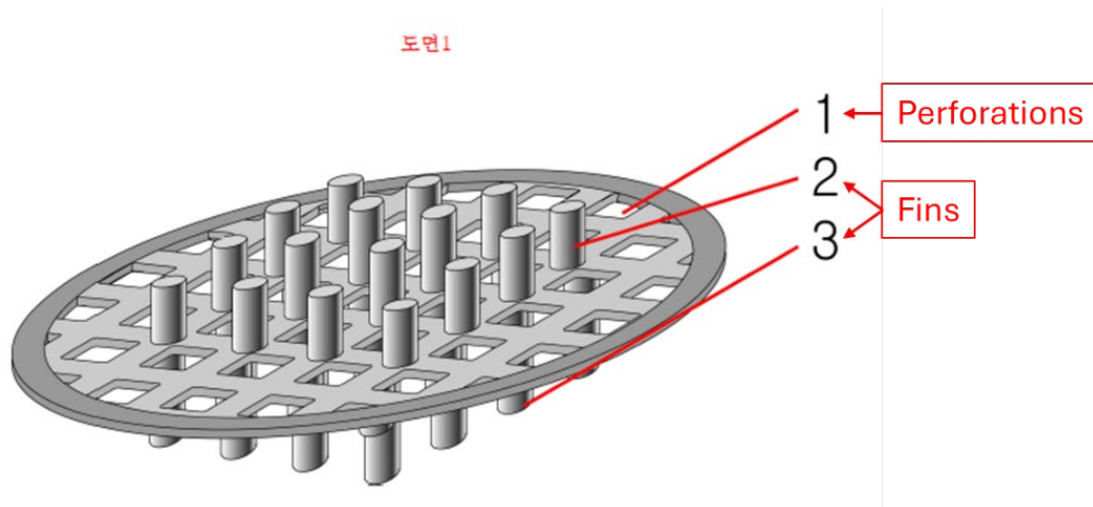
Ex. 1011, FIG. 1; Ex. 2002, FIG. 4B.

G. KR'055 (Ex. 1012)

KR'055 is a Korean Patent Publication No. 20-0395055, published on September 7, 2005. Petitioner relies on a machine translation (Ex. 1013) for the disclosure of KR'055 (Ex. 1012).

KR'055 describes a filter (“male chat hole type filter”) for reducing sewage odor. Ex. 1013, p. 1, Abstract. The filter is “inserted into the male chat hole.” *Id.* As shown below, the filter includes perforations (1) and cooling fins (2, 3). *Id.* The fins (2, 3) are configured to cool the air around the filter by dissipating heat. *Id.* KR'055 discloses that, by cooling the air around the filter, the filter may “trap some of the smell” caused by the sewage. *Id.* The fins “are short so as not to interfere

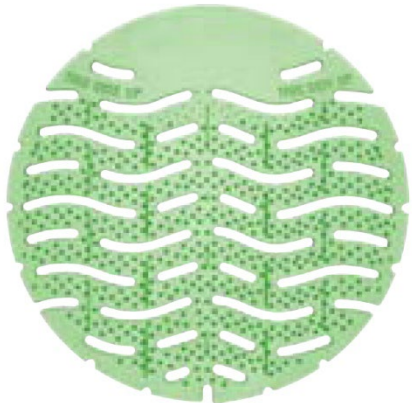
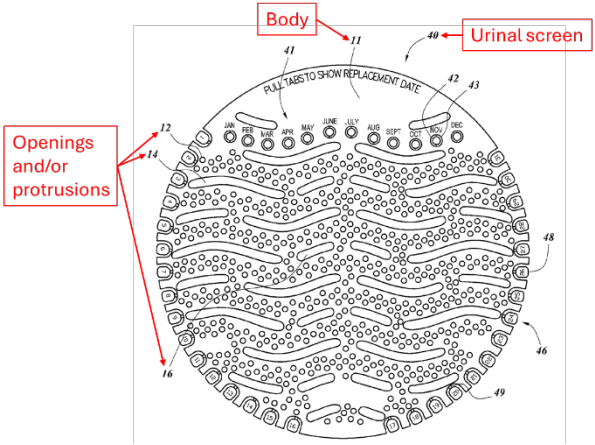
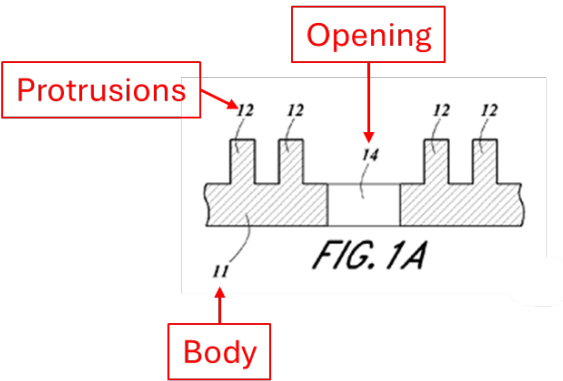
with the flow of sewage.” *Id.* The filter “is preferably made of metal so as to facilitate heat transfer.” *Id.*



Ex. 1012, p. 3.

H. FP Catalog Wave 2.0 (Ex. 1014)

The FP Catalog Wave 2.0 (“FP Catalog”) is a product catalog produced by Patent Owner, dated January 2013. The Wave 2.0 depicted in the FP Catalog is cumulative of references—such as the ’394 Patent—considered during examination of the ’098 Patent. Moreover, the Wave 2.0 depicted in the FP Catalog is significantly different from the claims of the ’098 Patent. As shown below, the FP Catalog, like the ’394 Patent, discloses a urinal screen with a flat body, cutouts in the flat body, and protrusions extending from the face of the flat body.

FP Catalog Wave 2.0 (Asserted by Petitioner)	'394 Patent (Considered by Examiner)
	
	

Ex. 1014, p. 8; Ex. 2002, FIGS. 1A, 4B.

Petitioner alleges that “the FP Catalog Wave 2.0 and Wave 2.0 are material prior art that appear to have been deliberately withheld by PO during prosecution of the '098 Patent.” Petition, 12, n.2. In making this unfounded accusation, Petitioner ignores that Patent Owner disclosed the '394 Patent during prosecution of the '098 Patent. As explained in this Response, the Wave 2.0 is cumulative of the '394 Patent and is not material to the patentability of the challenged claims.

I. Wave 2.0 (Ex. 1015)

The Wave 2.0 reference appears to be a reproduction of an archived website, freshproducts.com, depicting a Wave 2.0 Urinal Screen. As discussed above with respect to Ex. 1014, the Wave 2.0 is cumulative of references—such as the '394 Patent—considered during examination of the '098 Patent.

J. Vectair V-Screen (Ex. 1017, 1018)

Petitioner alleges that Exhibits 1017 and 1018 are a “publication showing the Vectair V-Screen publicly available as of March 13, 2013” and a “2012 information publication.” Petition, 13. As an initial matter, Petitioner once again relies on hearsay and does not identify any evidence confirming that Exhibits 1017 and 1018 were in fact publicly available on those alleged dates. Indeed, Ex. 1018 does not appear to reference any date.

Notwithstanding Petitioner’s failure to establish the prior art status of Exhibits 1017 and 1018, the product depicted in Exhibits 1017 and 1018 is cumulative of the references of record and includes the same deficiencies as such references.

VII. THE WAVE 3D (GROUND 1) DOES NOT ANTICIPATE THE CHALLENGED CLAIMS BECAUSE THE WAVE 3D IS NOT PRIOR ART TO THE '098 PATENT

Petitioner bears the burden of establishing that the Wave 3D references (Exhibits 1005 and 1006) are prior art. *See Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1350–51 (Fed. Cir. 2016) (affirming Board’s finding that Petitioner failed

to establish a reference's prior art status). Petitioner has not met that burden. Indeed, Petitioner cannot meet that burden because the Wave 3D references are not prior art. As explained in Mr. Smith's declaration, the hearsay "Date First Available" recited in Exhibits 1005 and 1006 is inaccurate. Ex. 2001. The Wave 3D Urinal Screen was first publicly disclosed by Fresh Products at the ISSA Interclean North America trade show in November of 2014, which Mr. Smith attended. *Id.*

Accordingly, because Exhibits 1005 and 1006 are not prior art, ground 1 of the Petition provides no basis to institute an IPR.

VIII. THE PROPOSED PEARL 3D-'707 PATENT-KR'055 COMBINATION (GROUND 2) SHOULD BE DENIED

A. Petitioner Improperly Relies on Product Prior Art in Ground 2

A Petition for *inter partes* review is limited to grounds "only on the basis of prior art consisting of patents or printed publications." 35 U.S.C. § 311(b). Ground 2 of the Petition does not comply with this rule.

Petitioner repeatedly relies on the "Pearl 3D product" (Ex. 1010) throughout ground 2. Petition, 28, 33, 41–46. Petitioner alleges that the "Pearl 3D product is prior art to the '098 patent claims as the Pearl 3D was on sale prior to the earliest effective filing date of the '098 patent." Petition, 33, n.4. But products "on sale" before the effective filing date are not within the scope of prior art to be considered in *inter partes* review. 35 U.S.C. § 311(b).

To show the Pearl 3D product's purported features, Petitioner relies on "renderings" that Petitioner alleges "are representative of the Pearl 3D product." Petition, 33, 41–43. However, Petitioner has not identified any evidence suggesting that the renderings were publicly available before the November 5, 2014 priority date. Petitioner has thus not established, and does not appear to even allege, that the "renderings" are prior art.

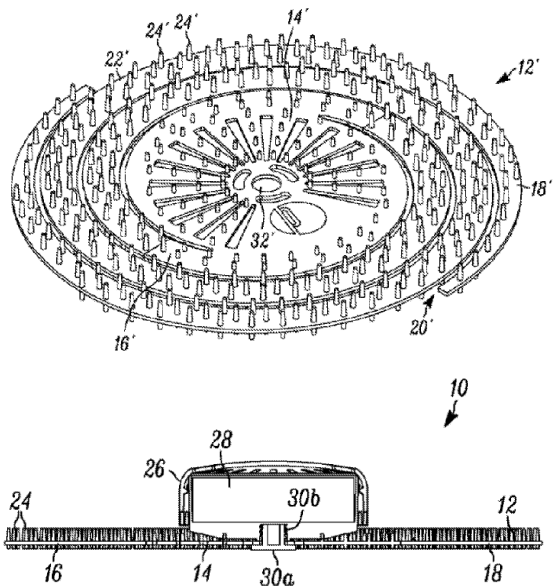
Accordingly, Petitioner improperly relies on a Pearl 3D *product* and has failed to establish that the "renderings" are prior art. Ground 2 of the Petition should be denied on that basis, independent of those set forth below.

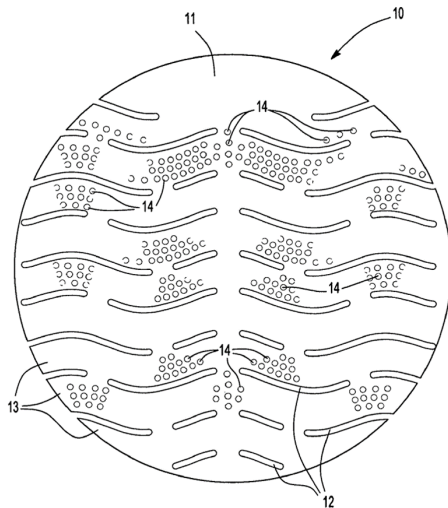
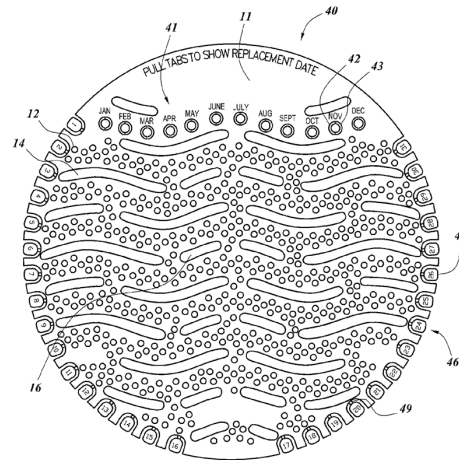
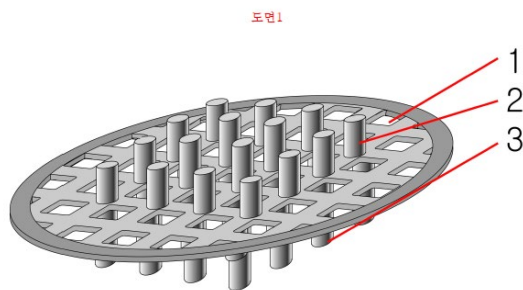
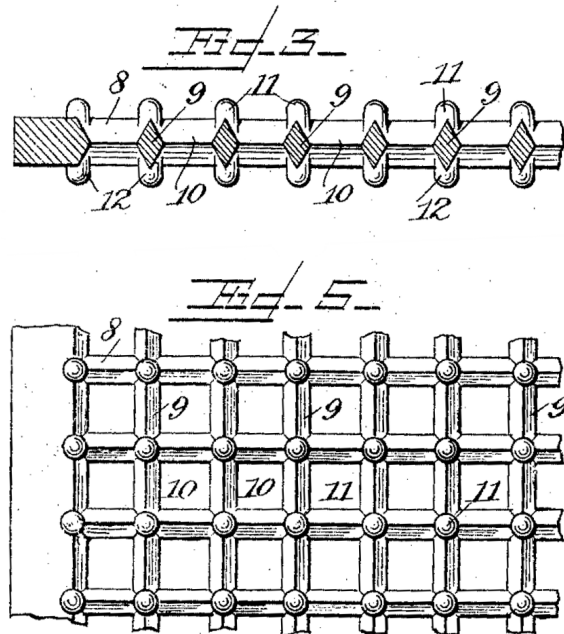
B. The Ground 2 References Are Substantially the Same as the References Considered During Examination of the Challenged Claims

The Board uses the following two-part framework to determine whether to exercise its discretion to deny institution of an inter partes review under 35 U.S.C. § 325(d): (1) whether the same or substantially the same art was previously presented to the Patent Office or whether the same or substantially the same arguments were previously presented to the Patent Office; and (2) if either condition of the first part of the framework is satisfied, whether the Petitioner has demonstrated that the Patent Office erred in a manner material to the patentability of challenged claims. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 7–9 (PTAB Feb. 13, 2020).

Here, Petitioner has failed to meet its burden under both parts of the § 325(d) framework. Indeed, Petitioner does not even address the prosecution history of the '098 Patent. Nor does Petitioner explain how its references are allegedly different from those considered by the Examiner.

Regarding the first prong, the Big D Pearl 3D, the '707 Patent, and KR'055 are substantially similar to references considered by the Examiner, including Muderlak, the '394 Patent, and Clayton. Below is a comparison of the references relied upon in ground 2 of the Petition and references considered by the Examiner during examination of the '098 Patent.

References in Ground 2 of Petition <u>Pearl 3D (Ex. 1008, 1009)</u>	References Considered by Examiner <u>Muderlak (Ex. 2003)</u>
	

'707 Patent (Ex. 1011)**'394 Patent (Ex. 2002)****KR'055 (Ex. 1012)****Clayton (Ex. 2004)**

Petitioner has not explained, and indeed does not even address, how the Big D Pearl 3D, the '707 Patent, and KR'055 are materially different from the references previously considered by the Examiner.

Regarding the second prong of the § 325(d) framework, Petitioner makes no attempt to explain how the Patent Office allegedly erred during examination of the challenged claims. For these reasons, ground 2 of the Petition should be denied under 35 U.S.C. § 325(d).

C. The Ground 2 Combination Does Render Obvious the Challenged Claims

In addition to Petitioner's reliance on product art and cumulative references, the Pearl 3D-'707 Patent-KR'055 combination² does not render obvious the challenged claims.

First, claim 1 of the '098 Patent recites "wherein the plurality of openings occupy at least half of a surface area of the frame as observed perpendicular to the first face of the frame when the frame is set on a flat surface." Ex. 1001, 8:7-10.

² Petitioner provides no explanation, and certainly no evidentiary support, for why KR'055 is appropriately considered in combination with the urinal screens. Petitioner appears to rely on the allegation that "it is well known to POSITA that elevating a screen can prevent the screen from floating, and also allow for proper draining." Petition, 34. But KR'055 does not describe a filter placed on and elevated above a surface; it is a metal filter inserted into a hole and includes fins for their cooling/evaporative effect. Ex. 1013, p. 1.

Seemingly recognizing that the Big D Pearl 3D fails to disclose this limitation, Petitioner makes the conclusory assertion that “[a] urinal screen where the plurality of openings occupy at least half of a surface area of the frame as observed perpendicular to the first face of the frame when the frame is set on a flat surface is within the ordinary knowledge of the POSITA.” Petition, 34. But Petitioner does not identify any evidence to support such a conclusory assertion.

Petitioner also claims that “[t]he ’707 patent discloses openings comprising at least half of a surface area of the frame.” Petition, 35. Not so. The ’707 Patent depicts an embodiment having a “generally flat” body and relatively few openings extending through the flat body. Ex. 1011, 2:26–28 (describing FIG. 1). The ’707 Patent then simply discloses that the “body 11 has a plurality of openings 12 formed therethrough. The body 11 may be formed having any desired number of such openings 12 or, alternatively, no openings 12 at all if desired. The openings 12 can have any desired size and shape and may be provided at any location or locations on the body 11.” Ex. 1011, 2:29–34. The ’707 Patent does not disclose that the plurality of openings occupy at least half of a surface area of the frame. Regardless, Petitioner does not identify any motivation to modify the primary reference (Pearl 3D) such that its openings occupy more surface area, particularly because the Pearl 3D and screen depicted in the ’707 Patent are similar in that each are screens comprising mostly a flat body with limited curved cutout-like openings.

Second, claim 1 of the '098 Patent recites “wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame.” Ex. 1001, 8:20–26. Claim 38 similarly recites that “the frame is positioned away from the surface by at least $\frac{1}{4}$ of a thickness of the urinal screen.” Ex. 1001, 11:20–29. Petitioner makes the conclusory—and incorrect—assertion that “[a] POSITA understands that this is a function of the length of the posts in relation to the thickness of the screen, and that *length of these posts is merely design choice*.” Petition, 36 (emphasis added). Petitioner presents no evidence in support of this assertion. Moreover, this assertion is incorrect. As the '098 Patent explains, “[s]pacing the frame 14 from the installation surface can reduce the likelihood that the openings 18 are clogged by debris” and “can reduce splashing in the urinal by deflecting urine or other fluids which pass between the frame 14 and the installation surface.” Ex. 1001, 7:12–19. Thus, the claimed spacing from the urinal surface serves functional purposes and is not merely a design choice as Petitioner alleges.

Third, claim 19 of the '098 Patent recites a urinal screen having a specific arrangement of interconnected cells and braces, including:

a plurality of interconnected cells at least partially defined
by a plurality of braces that intersect at corners, the

plurality of interconnected cells comprising at least a plurality of perimeter cells and a plurality of interior cells;

wherein the plurality of interior cells comprises a first cell, a second cell, and a third cell, said first cell and said second cell each partially defined by a first brace positioned between said first cell and said second cell, said second cell and said third cell each partially defined by a second brace positioned between said second cell and said third cell, and said first cell and said third cell each partially defined by a third brace positioned between said first cell and said third cell;

wherein each of the first brace, the second brace, and the third brace comprises a first end and a second end, and wherein:

the first end of the first brace intersects at a corner with the two other braces;

the first end of the second brace intersects at a corner with the two other braces; and

the first end of the third brace intersects at a corner with the two other braces;

Ex. 1001, 9:35–57. The references raised in ground 2 do not disclose this claimed arrangement of interconnected cells and braces. Instead, Petitioner attempts to cure the references’ deficiencies by alleging that each of the limitations listed above “is within the ordinary knowledge of a POSITA” and that “[a] POSITA would understand that the exact shape and intersection of braces defining the plurality of interconnected cells can be varied.” Petition, 38–41. But no evidence of record supports Petitioner’s blanket assertions. *See Elbit Systems of America, LLC v.*

Thales Visionix, 881 F.3d 1354, 1359 (Fed. Cir. 2018) (rejecting Petitioner’s assertions regarding a POSITA’s knowledge because “attorney argument is not evidence”). Further, even assuming *arguendo* that a POSITA would have understood that “exact shape and intersection of braces defining the plurality of interconnected cells can be varied” as Petitioner alleges, Petitioner does not identify any motivation to modify the Pearl 3D to include the specific claimed arrangement of interconnected cells and braces.

Accordingly, the proposed Pearl 3D-’707 Patent-KR’055 combination (ground 2) does not render obvious the challenged claims and Patent Owner respectfully requests denial of ground 2.

IX. THE PROPOSED WAVE 2.0-’707 PATENT-V-SCREEN COMBINATION (GROUND 3) SHOULD BE DENIED

A. Petitioner Has Not Established That the V-Screen References (Exhibits 1017, 1018) Are Prior Art to the ’098 Patent

Petitioner alleges that Exhibits 1017 and 1018 are a “publication showing the Vectair V-Screen publicly available as of March 13, 2013” and a “2012 information publication.” Petition, 13. But Petitioner does not identify any evidence authenticating that Exhibits 1017 and 1018 were in fact publicly available on those alleged dates. Indeed, Ex. 1018 does not appear to reference any date whatsoever. Petitioner has not met its burden of establishing that V-Screen references (Exhibits 1017 and 1018) are prior art. *See Blue Calypso*, 815 F.3d at 1350–51 (affirming

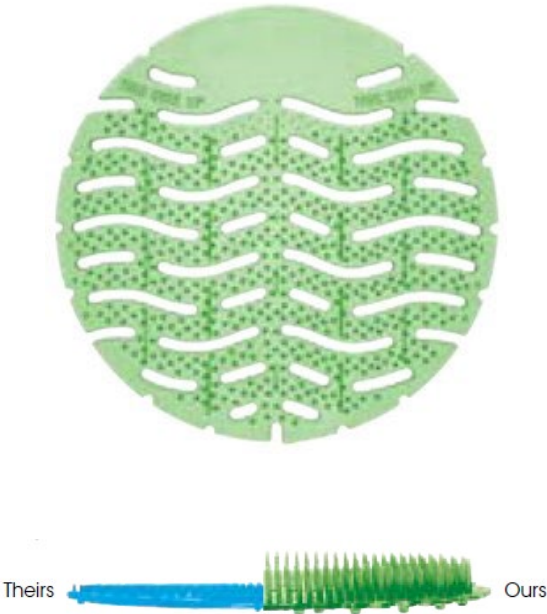
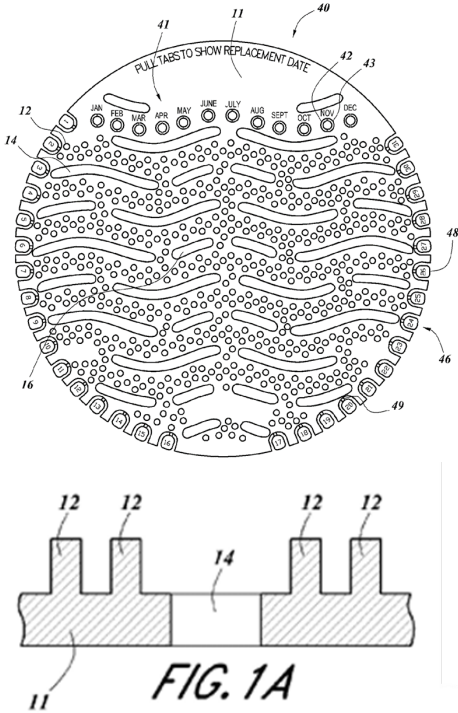
Board's finding that Petitioner failed to establish a reference's prior art status); *ServiceNow, Inc. v. Hewlett Packard Co.*, IPR2015-00716, Paper 13 at 16–17 (PTAB Aug. 26, 2015) (Petitioner's reliance on the date on the face of exhibits was insufficient to establish prior art status). Ground 3 of the Petition should be denied on that basis, independent of those set forth below.

B. The Ground 3 References Are Substantially the Same as the References Considered During Examination of the Challenged Claims

As explained above, the Board's two-part framework for discretionary denial under 35 U.S.C. § 325(d) analyzes: (1) whether the same or substantially the same art was previously presented to the Patent Office or whether the same or substantially the same arguments were previously presented to the Patent Office; and (2) if either condition of the first part of the framework is satisfied, whether the Petitioner has demonstrated that the Patent Office erred in a manner material to the patentability of challenged claims. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 7–9 (PTAB Feb. 13, 2020).

For ground 3, Petitioner has failed to meet its burden under both parts of the § 325(d) framework. Indeed, Petitioner does not even address the prosecution history of the '098 Patent. Nor does Petitioner explain how its references are allegedly different from those considered by the Examiner.

Regarding the first prong, the Wave 2.0, the '707 Patent, and the V-Screen are substantially the same as references presented to the Patent Office, including the '394 Patent and Clayton. Below is a comparison of the Wave 2.0 and the '394 Patent.

References in Ground 3 of Petition	References Considered by Examiner
<u>Wave 2.0 (Ex. 1014, 1015)</u>  The top part of the image shows a circular green mesh with white wavy lines. Below it, a cross-section comparison is shown with a blue bar labeled 'Theirs' and a green bar labeled 'Ours'.	<u>'394 Patent (Ex. 2002)</u>  The top part of the image is a technical drawing of a circular mesh with a date display at the top. The date display has tabs for each month from JAN to DEC. Below the date display is a cross-section of the mesh, labeled FIG. 1A, showing a series of rectangular openings.

Petitioner purports to rely upon the Wave 2.0 for all limitations except for “the plurality of openings occupy at least half of a surface area of the frame.”³ Petition,

³ To be clear, the Wave 2.0 does not disclose all the limitations that Petitioner alleges, as discussed in more detail below.

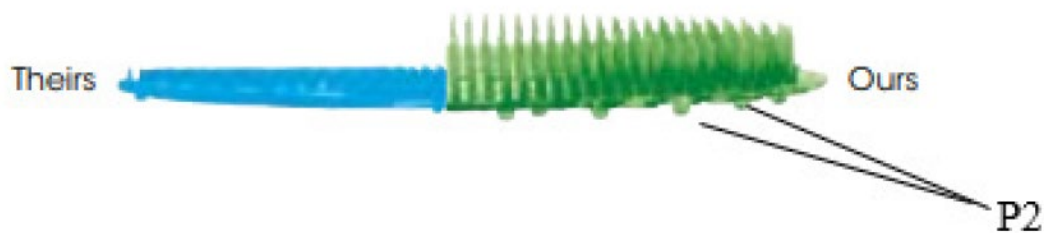
47–63. Because the Wave 2.0 does not disclose that limitation, Petitioner plucks from the V-Screen for “the plurality of openings occupy at least half of a surface area of the frame.” Petition, 51. But the Examiner previously considered references where this limitation, in isolation, can be found. *See* Ex. 1002 (’098 File History), pp. 179–180 (“Muderlak fails to show the opening occupying at least half of the frame. Clayton teaches a screen. The screen includes opens [sic] that occupy at least half of the frame, Fig. 5.”). Petitioner’s reliance on the V-Screen for its relative surface areas—of the openings and frame—is substantially the same as the Examiner’s previous consideration of Clayton’s relative surface areas. Petitioner has not explained, and indeed does not even address, how the Wave 2.0, the ’707 Patent, and the V-Screen are materially different from the references previously presented to the Patent Office.

Regarding the second prong of the § 325(d) framework, Petitioner makes no attempt to explain how the Patent Office allegedly erred during examination of the challenged claims. For these reasons, ground 3 of the Petition should be denied under 35 U.S.C. § 325(d).

C. The Ground 3 Combination Does Not Render Obvious the Challenged Claims

In addition to Petitioner’s failure to establish the V-Screen as prior art and Petitioner’s reliance on cumulative references, the Wave 2.0–’707 Patent–V-Screen combination does not render obvious the challenged claims.

First, claims 1, 19, and 38 each recite a plurality of first posts extending from the first face of the frame and a plurality of *second posts extending from the second face* of the frame. Ex. 1001, pp. 13–15. Petitioner identifies the following as the claimed “second posts (P2).”



Even accepting *arguendo* Petitioner’s identification of the Wave 2.0’s “second posts extending from the second face of the frame,” claims 1, 19, and 38 recite further details of the claimed second posts that are not met by Petitioner’s alleged second posts. For example, claim 1 recites that “at least one of the plurality of second posts extends from a perimeter around each of said plurality of openings.” Ex. 1001, 8:30–32. Claim 19 recites that the plurality of second posts are “each connected to a brace or corner of the frame and extending away from the second face of the frame.” Ex. 1001, 9:61–63. Claim 38 recites that “a number of said plurality of second posts are positioned along a perimeter of at least some of the plurality of openings, so as to surround the at least some of the plurality of openings.” Ex. 1001, 11:15–19. Claims 1 and 38 also recite a length of the second posts relative to the overall thickness of the screen. For each of those limitations, Petitioner makes the

conclusory assertion that the limitation “is within the ordinary knowledge of a POSITA.” Petition, 53, 55, 60, 62–63. But conclusory assertions lacking evidentiary support cannot cure the Petition’s deficiencies. *In re Magnum Oil*, 829 F.3d at 1380.

Second, claim 1 of the ’098 Patent recites “wherein the plurality of openings occupy at least half of a surface area of the frame as observed perpendicular to the first face of the frame when the frame is set on a flat surface.” Ex. 1001, 8:7–10. Recognizing that the Wave 2.0 does not disclose this limitation, Petitioner turns to the ’707 Patent and the V-Screen. Petition, 50–52. As discussed above with respect to ground 2, the ’707 Patent describes a urinal screen having a “generally flat” body and relatively few openings extending through the flat body. Ex. 1011, 2:26–28 (describing FIG. 1). The ’707 Patent does not disclose a plurality of openings occupying at least half of a surface area of the frame. Moreover, Petitioner does not identify any motivation to modify the primary reference (Wave 2.0) such that its openings occupy more surface area.

Third, claims 1 and 38 of the ’098 Patent recite relative thicknesses not disclosed by Petitioner’s references. Claim 1 recites “wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of

a thickness of the urinal screen as measured perpendicular to the first face of the frame.” Ex. 1001, 8:20–26. Claim 38 similarly recites that “the frame is positioned away from the surface by at least $\frac{1}{4}$ of a thickness of the urinal screen.” Ex. 1001, 11:20–29. Petitioner once again makes the conclusory—and incorrect—assertion that “[a] POSITA would understand that this is a function of the length of the posts in relation to the thickness of the screen, and that *these are merely design choices*.” Petition, 53 (emphasis added). Petitioner presents no evidence in support of this assertion. Moreover, this assertion is incorrect. As the ’098 Patent explains, “[s]pacing the frame 14 from the installation surface can reduce the likelihood that the openings 18 are clogged by debris” and “can reduce splashing in the urinal by deflecting urine or other fluids which pass between the frame 14 and the installation surface.” Ex. 1001, 7:12–19. Thus, the claimed spacing from the urinal surface serves functional purposes and is not merely a design choice as Petitioner alleges.

Fourth, as described above with respect to ground 2, claim 19 of the ’098 Patent recites a urinal screen having a specific arrangement of interconnected cells and braces, including:

a plurality of interconnected cells at least partially defined
by a plurality of braces that intersect at corners, the
plurality of interconnected cells comprising at least a
plurality of perimeter cells and a plurality of interior
cells;

wherein the plurality of interior cells comprises a first cell,
a second cell, and a third cell, said first cell and said

second cell each partially defined by a first brace positioned between said first cell and said second cell, said second cell and said third cell each partially defined by a second brace positioned between said second cell and said third cell, and said first cell and said third cell each partially defined by a third brace positioned between said first cell and said third cell;

wherein each of the first brace, the second brace, and the third brace comprises a first end and a second end, and wherein:

the first end of the first brace intersects at a corner with the two other braces;

the first end of the second brace intersects at a corner with the two other braces; and

the first end of the third brace intersects at a corner with the two other braces;

Ex. 1001, 9:35–57. The references raised in ground 3 do not disclose this claimed arrangement of interconnected cells and braces. Instead, Petitioner alleges that each of the limitations listed above “is within the ordinary knowledge of a POSITA” and that “[a] POSITA would understand that the exact shape and intersection of braces defining the plurality of interconnected cells can be varied.” Petition, 56–59. But no evidence of record supports such conclusory assertions. Additionally, Petitioner does not identify any motivation to modify the Wave 2.0 to include the specific claimed arrangement of interconnected cells and braces.

Accordingly, the proposed Wave 2.0–’707 Patent–V-Screen combination (ground 3) does not render obvious the challenged claims and Patent Owner respectfully requests denial of ground 3.

**X. DISCRETIONARY DENIAL IS FURTHER WARRANTED BECAUSE
INTER PARTES REVIEW WOULD NOT RESOLVE THE ISSUES IN
THE PARALLEL DISTRICT COURT PROCEEDING**

In addition to and independent of the above reasons, discretionary denial under 35 U.S.C. § 314(a) is warranted. In evaluating whether to discretionarily deny a Petition, “the Board takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5–6 (PTAB Mar. 20, 2020). In this case, efficiency and integrity are best served by denying review.

On April 20, 2024, Petitioner filed a Complaint for declaratory judgment in the District of Minnesota. Ex. 2005 (*Vectair Systems Inc. v. Fresh Products, Inc.*, No. 24-cv-01454, Dkt. No. 1 (D. Minn. Apr. 20, 2024)). The Complaint seeks, among other things, “a judgement declaring that the ’098 patent is invalid,” based largely on the same references raised in the Petition. *Id.* at 16–21. Patent Owner answered, asserting that Petitioner infringes one or more claims of the ’098 Patent and maintaining that the claims of the ’098 patent are valid. *Id.* at Dkt. Nos. 4, 12 (Answer and Amended Answer). Patent Owner recently served infringement

contentions, in which Patent Owner asserted that Petitioner infringes 43 claims of the '098 Patent, including claims 1, 19, and 38.

There is substantial overlap between (1) Petitioner's arguments for *inter partes* review of claims 1, 19, and 38 and (2) the invalidity arguments raised in Petitioner's district court Complaint. Ex. 2005 (Complaint). This overlap weighs in favor of denial. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 12 (PTAB Mar. 20, 2020). Moreover, *inter partes* review of claims 1, 19, and 38 would not impact the 40 additional claims of the '098 Patent asserted in the parallel district court proceeding, further favoring denial.

For these reasons, Patent Owner respectfully requests discretionary denial of the Petition under 35 U.S.C. § 314(a).

XI. RESERVATION OF RIGHTS

Should the Board decide to institute an *inter partes* review, Patent Owner Fresh Products reserves all rights to make additional arguments in and present claim constructions and evidence with its Patent Owner Response. Patent Owner's silence on any particular claim or limitation at this time is not a concession that the Petition's discussion of that claim or limitation is properly based. Accordingly, Patent Owner reserves the right to submit additional or alternative arguments of patentability, and nothing in this Preliminary Response acts or should be construed to act as an admission, acquiescence, or estoppel on the merits of the Petition.

XII. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board deny institution of the Petition.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: August 13, 2024

/Joseph F. Jennings/

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CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), Counsel for Patent Owner Fresh Products, Inc. hereby certifies that this document complies with the type-volume limitation of 37 C.F.R. § 42.24(b). According to Microsoft Office Word 2010's word count, this document contains approximately 7,854 words, including any statement of material facts to be admitted or denied in support, and excluding the table of contents, table of authorities, mandatory notices under § 42.8, exhibit list, certificate of service or word count, or appendix of exhibits or claim listing.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: August 13, 2024

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Fresh Products, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e), a true and correct copy of **PATENT OWNER PRELIMINARY RESPONSE AND EXHIBITS 2001-2006** are being served electronically on August 13, 2024, to the e-mail address shown below:

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