

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,
Petitioner,

v.

SHERRYWEAR LLC,
Patent Owner.

IPR2024-01122
Patent 9,289,016 B1

Before MEREDITH C. PETRAVICK, LYNNE H. BROWNE, and
ZHENYU YANG, *Administrative Patent Judges*.

PETRAVICK, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. *Background and Summary*

Nike, Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of claims 1, 2, 4, and 7 of U.S. Patent No. 9,289,016 B1 (Ex. 1009, “the ’016

patent”). Paper 1 (“Pet.”). SherryWear, LLC (“Patent Owner”) filed a Preliminary Response. Paper 13¹ (“Prelim. Resp.”).

With our authorization (Ex. 3002), Petitioner filed a Preliminary Reply (Paper 10, “Prelim. Reply”) and Patent Owner filed a Preliminary Sur-reply (Paper 11, “Prelim. Sur-reply”).

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

After considering the Petition, the Preliminary Response, Preliminary Reply, Preliminary Sur-reply, and the evidence of record, we determine the information presented shows a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of at least one of the challenged claims of the ’016 patent.

Accordingly, we institute an *inter partes* review of claims 1, 2, 4, and 7 of the ’016 patent on the grounds asserted in the Petition.

B. Real-Parties-in-Interest

Petitioner identifies Nike, Inc. as the real party-in-interest. Pet. 3.

Patent Owner identifies SherryWear, LLC as the real party-in-interest. Paper 4, 1.

¹ Paper 13 is a redacted version of the Corrected Preliminary Response filed as Paper 8.

C. Related Matters

The parties identify *SherryWear, LLC, v. Nike, Inc.*, No. 1:23-cv-11599 (D. Mass), filed July 17, 2023 (“the related litigation”) as a related proceeding. Pet. 3; Paper 4, 1.

Petitioner also notes that it has filed *inter partes* review petitions on every patent (in addition to the ’016 patent) asserted in the related litigation (“the Disputed Patents”). Petitioner identifies the following *inter partes* review proceedings:

IPR2024-01123 (challenging U.S. Patent No. 9,295,288)

IPR2024-01124 (challenging U.S. Patent No. 9,723,878)

IPR2024-01125 (challenging U.S. Patent No. 9,808,036)

IPR2024-01126 (challenging U.S. Patent No. 10,219,550)

IPR2024-01127 (challenging U.S. Patent No. 10,219,551)

IPR2024-01128 (challenging U.S. Patent No. 10,244,800)

IPR2024-01129 (challenging U.S. Patent No. 10,869,510).

Paper 5, 1.

Patent Owner identifies pending U.S. Patent Application No. 18/223,363, which is a continuation application claiming priority to the ’016 patent, as a related matter. Paper 4, 1.

D. The ’016 patent

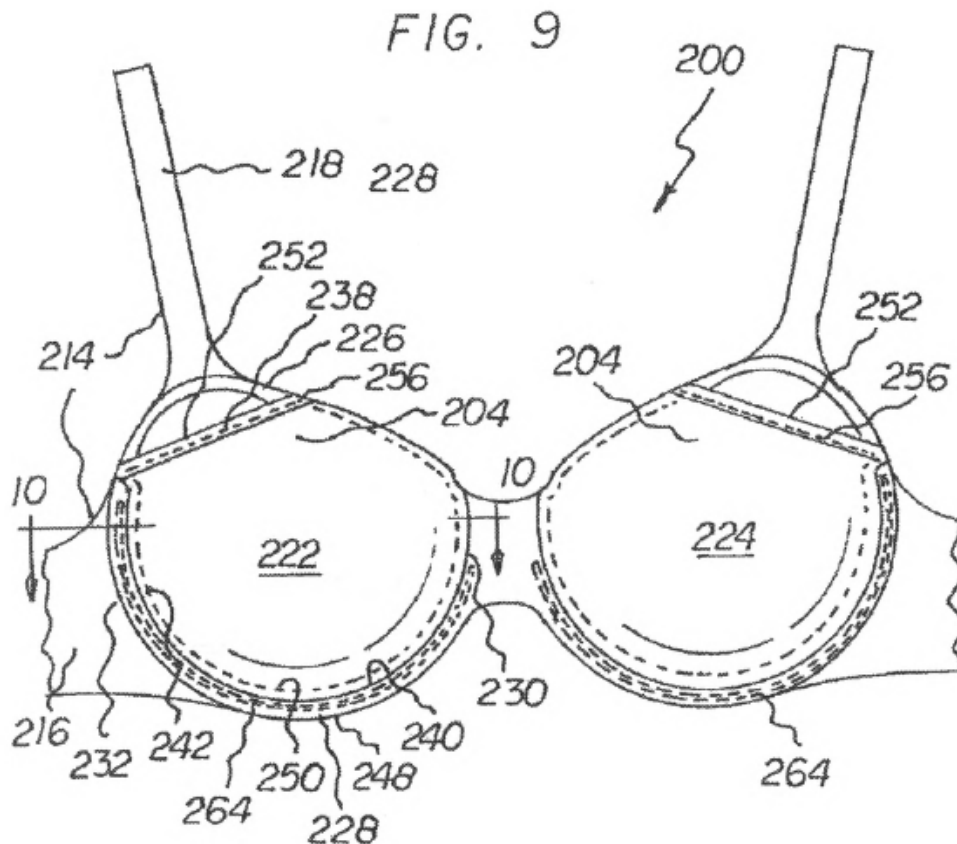
The ’016 patent is titled “Pocket Bra System” and issued from a U.S. patent application filed on February 5, 2015. Ex. 1009, code (22), (54).

On its face, the ’016 patent claims priority (as a continuation-in-part) to an application filed on November 18, 2013, which in turn is a continuation-in-part of another application filed on April 26, 2011, which

issued as U.S. Pat. No. 8,597,072. *Id.* at code (63), (60). For the purposes of this proceeding, Petitioner contends that the '016 patent is entitled only to the November 2013 priority date and not to the April 26, 2011 priority date. Pet. 8; *see also* Ex. 1049.

The '016 patent “relates to a pocket bra system and more particularly pertains to removably receiving a handheld electronic device while providing support and shape to the breasts of a wearer, the receiving and supporting and shaping being done in a safe, convenient and economical manner.” Ex. 1009, 1:7–12.

Figure 9 of the '016 patent illustrates such a pocket bra system and is reproduced below. Figures 10–12 of the '016 patent, also reproduced below, show various views of the pocket bra system of Figure 9.



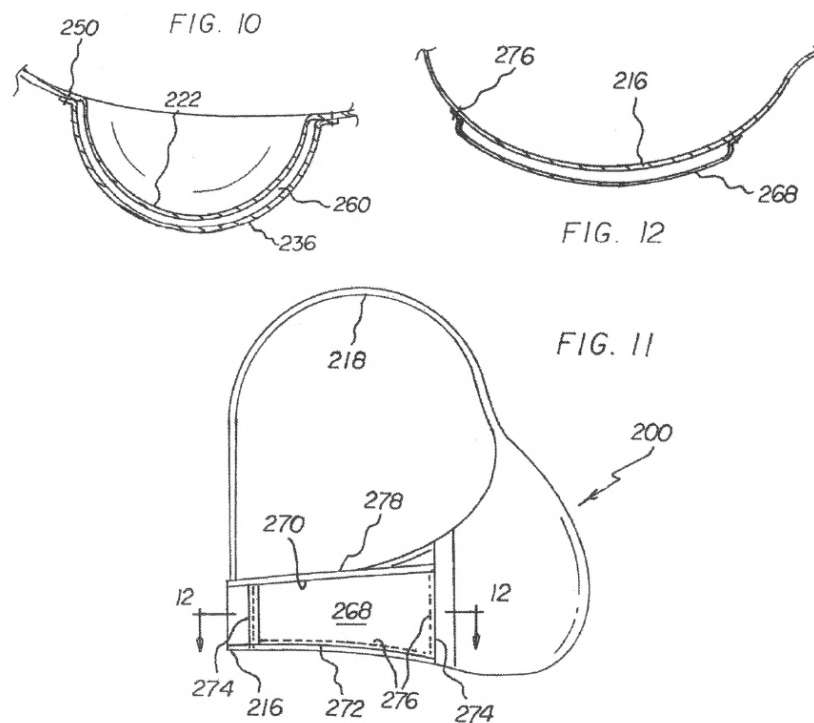


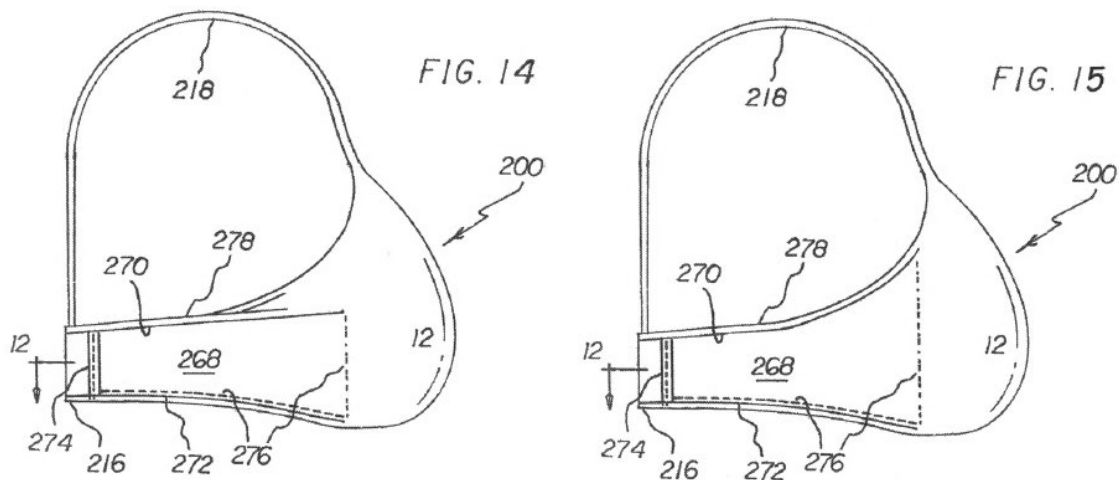
Figure 9 is a front elevational view of a pocket bra system. *Id.* at 3:16–19. Figure 10 is a cross sectional view taken along line 10-10 of Figure 9, Figure 11 is a side elevational view of the pocket bra system shown in Figures 9 and 10, and Figure 12 is a cross sectional view taken along line 12-12 of Figure 11. *Id.* at 3:19–25.

The pocket bra system illustrated in Figures 9–12 may removably receive a handheld electronic device and other objects while providing support and shape to the breasts of a wearer. *Id.* at 5:4–7. In particular, the pocket bra system has enlarged bra pockets 204/260 constructed on the cups of the bra, and side pockets 268 constructed along both sides of the bra (as illustrated in more detail in Figures 14 and 15, reproduced below). *Id.* at 4:63–5:3, 5:27–31.

The pocket bra system includes a strap assembly 214 formed of a chest strap 216 and shoulder straps 218, and left and right cups 222, 224 with each cup having a curved upper edge 226, a lower edge 228, an interior

edge 230, and an exterior edge 232. *Id.* at 5:6–15. A patch 236 is operatively associated with each cup, the patch having a linear upper edge 238 and a curved lower edge 240, an interior edge 242, and an exterior edge 248. *Id.* at 5:15–19. Stitching 250 couples the lower, interior, and exterior edges of each patch to the lower, interior, and exterior edges of an associated cup. *Id.* at 5:20–26. A linear opening 252 is thus formed along the upper edge of each patch. *Id.*

Pockets 260 are formed between the patches and the cups. *Id.* at 5:27–34. A handheld electronic device 46 is adapted to be placed within a pocket. *Id.* A side patch 268 forms a side pocket on each side of the chest strap, the side patches each having a horizontal upper edge 270 and lower edge 272, and vertical side edges 274. *Id.* at 5:37–45. The upper and lower edges of each patch are longer than the side edges. *Id.* The side patches include side stitching 276 along the lower and side edges, an upper opening 278 is formed at each side patch, and pocket 268 is formed between two layers of the chest strap and defined by stitching 276. *Id.* Side pocket 268 may be configured to have the upper edge 270 and top edge of the chest strap aligned or nearly aligned. *Id.* at 5:45–61. Side pocket 268 may also extend at least partially into, over, or beneath the cup such that the pocket, and potentially the upper opening 278 span both part of the chest strap and part of the cup. *Id.*



Figures 14 and 15 provide views of bras having a side pocket. *Id.* at 3:28–31.

E. Illustrative Claims

Petitioner challenges claims 1, 2, 4, and 7 of the '016 patent. Claim 1 is independent. Claims 2, 4, and 7 depend directly or indirectly from claim 1.

Claim 1 is illustrative and reproduced below with element labels added in brackets.²

1. [1A] A pocket bra system comprising:
 - [1B] a strap assembly including a chest strap and shoulder straps;
 - [1C] a left cup and a right cup, each cup having inside and outside surfaces, [1D] the strap assembly being attached to the cups whereby the strap assembly holds the cups to a wearer;

² For ease of reference, we include the bracketed designations provided in the Petition for the limitations of claim 1 (*see* Pet. xii (Claims Appendix)).

[1E] a side patch on one of an inside or outside surface of each side of the chest strap adjacent to each of the left cup and right cup, [1F] the side patches having upper and lower edges along at least part of a length of the strap, and side edges, [1G] each side patch having stitching along the lower and side edges thus forming an upper opening at each side patch such that each side patch forms a pocket, [1H] and wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup.

Ex. 1009, 6:51–67.

F. Asserted Grounds

Petitioner asserts that claims 1, 2, 4, and 7 would have been unpatentable on the following grounds:

Ground	Claim(s) Challenged	35 U.S.C. §	Basis
1	1, 2, 4, 7	103	Vidal ^{3,4} and Pintor ⁵
2	1, 2, 4, 7	103	Handras ⁶ and Pintor

Petitioner relies on the Declaration of Joyce Baran. Ex. 1001.

Patent Owner submits an Affidavit (Ex. 2001) of Sharon Goff, the named inventor of the '016 patent.

³ European Patent Application Publication EP 0211124 A1, published Feb. 25, 1987 (Ex. 1026), for which Petitioner submitted an official translation at Ex. 1027 (to which we cite).

⁴ As Patent Owner correctly observes, Petitioner references this document as *Vidai*—which is incorrect because the inventor's name in Exhibit 1026 is in fact *Vidal*. See Prelim. Resp 23; Ex. 1026.

⁵ U.S. Patent No. 7,753,759 B2, issued July 13, 2010 (Ex. 1022).

⁶ U.S. Patent Application Publication No. 2014/0051331 A1, published Feb. 20, 2014 (Ex. 1021).

II. ANALYSIS

A. 35 U.S.C. § 325(d)

Patent Owner requests that we discretionarily deny the Petition under 35 U.S.C. § 325(d), “because the Petition relies exclusively on art over which the Office allowed the challenged claims during prosecution, or art that adds nothing material to over the art the Office considered.” Prelim. Resp. 13–22.

In determining whether to deny institution under § 325(d) we use a two-part framework, as follows:

- (1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and
- (2) if either condition of [the] first part of the framework is satisfied, whether the petitioner has demonstrated that the 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 8 (PTAB Feb. 13, 2020) (precedential). The *Becton, Dickinson* factors provide useful insight into how to apply the framework under 35 U.S.C. § 325(d). *Id.* at 9 (referencing *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 at 17–18 (PTAB Dec. 15, 2017) (precedential as to § III.C.5, first paragraph)).

Under § 325(d), the art and arguments must have been previously presented to the Office during proceedings, such as examination of the underlying patent application, pertaining to the challenged patent. *Advanced Bionics*, Paper 6 at 7.

Turning to the first part of the *Advanced Bionics* framework, we consider “whether the same or substantially the same art previously was

presented to the Office or whether the same or substantially the same arguments previously were presented to the Office.” *Id.* at 8. We evaluate *Becton, Dickinson* factors (a), (b), and (d) to determine whether Petitioner has demonstrated material error. *Id.* at 10. Those factors are:

- (a) the similarities and material differences between the asserted art and the prior art involved during examination;
- (b) the cumulative nature of the asserted art and the prior art evaluated during examination; and
- (d) the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art.

Becton, Dickinson, Paper 8 at 17–18.

Previously presented art includes art made of record by the Examiner, and art provided to the Office by an applicant, such as on an Information Disclosure Statement (“IDS”), in the prosecution history of the challenged patent. *Id.* at 7–8.

Neither Vidal nor Handras was previously presented to the Office in connection with the ’016 patent. Pet. 52 (citing Ex. 1010 (prosecution history)). Pintor was previously presented to the Office. Pet. 52 (citing Ex. 1010, 112–113).

Patent Owner argues that Vidal and Handras are cumulative and not materially different from Sherwood (Ex. 2064) and Gentry (Ex. 2065), which were considered by the examiner during prosecution. Prelim. Resp. 13–22; Prelim. Sur-reply 1–4.

With respect to Sherwood, Patent Owner contends that Sherwood discloses a bra with a side pocket but not one that extends onto the cup. Prelim. Resp. 13–14. Patent Owner argues that, like Sherwood, neither Vidal or Handras teaches a side pocket that extends onto the cup. *Id.*

Similarly, with respect to Gentry, Patent Owner contends that Gentry discloses a bra with a side pocket but not one that extends onto the cup. Prelim. Resp. 15–16; *see also* Prelim. Sur-reply 2–4. Patent Owner again argues that, like Gentry, neither Vidal or Handras teaches a side pocket that extends onto the cup. *Id.*

Petitioner disputes that Vidal and Handras are cumulative of Sherwood or Gentry. Prelim. Reply 1–6. As to Sherwood, Petitioner contends Sherwood teaches a mastectomy bra with pockets for the permanent insert of padded prostheses (Ex. 1010, 143, Ex. 1004, 176), while the pockets disclosed in Vidal[1] and Handras are expressly directed to the removable storage of non-padding items. Prelim. Reply 3–4. As to Gentry, Petitioner argues that “Gentry discusses the benefits of reducing manufacturing costs by not extending the pockets onto the cups ([Ex. 2065, 4:60–5:3]), making Vidal[1] and Handras—which do not express such preferences—more pertinent disclosures.” Prelim. Reply 4.

We agree with Petitioner that neither Sherwood nor Gentry are cumulative of Vidal and Handras. Sherwood materially differs from and is not cumulative of Vidal and Handras in that Sherwood teaches a pocket for a padded prostheses that is permanently closed (Ex. 2064, 5:67–6:15), as opposed to an open pocket taught by Vidal and Handras (Ex. 1027 3:2–5; Ex. 1021 ¶ 28). *See* Ex. 1010, 143, Ex. 1004, 176. Gentry materially differs from and is not cumulative of Vidal in that, as discussed in our patentability analysis below, Vidal teaches a bra having a pocket that extends onto the cup. Ex. 1027, Fig. 3. Gentry materially differs and is not cumulative of Handras in that Handras lacks Gentry’s teaching of reducing manufacturing costs by not extending the pockets onto the cups (Ex. 2065, 4:60–5:3).

Accordingly, we determine that the combination of Vidal and Pintor and Handras and Pintor was not previously presented to the Office. Based on our analysis of part one of the *Advanced Bionics* framework, we find that the Petition does not implicate § 325(d) in a manner sufficient to warrant discretionary denial, and we decline to exercise discretion to deny institution.

B. Legal Standards

“In an IPR, the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d, 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)); *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (discussing the burden of proof in *inter partes* review). Although we may indicate in this Decision that certain Patent Owner arguments are not persuasive, in doing so we do not shift the ultimate burden from Petitioner.

A claim is unpatentable under § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations, including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in

the art; and (4) when in evidence, objective indicia of non-obviousness (i.e., secondary considerations).⁷ *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

The Supreme Court explained in *KSR International Co. v. Teleflex Inc.* that

[o]ften, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.

550 U.S. at 418 (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” (alteration in original)).

C. Level of Ordinary Skill in the Art

Petitioner proposes that:

A POSA at the relevant time would have had at least two years of experience working in the design and or/construction of women’s exercise apparel, intimate apparel, and/or sports bras and bras, specifically. [Ex. 1001 ¶ 155]. Formal education in a relevant field, such as fashion and textile design, may compensate for less experience. *Id.*

Pet. 15.

⁷ Patent Owner presents evidence of secondary considerations. *See* Prelim. Resp. 2–12, 22, 28–34, 37–38.

At this stage of the proceeding, Patent Owner does not dispute Petitioner’s proposed level of ordinary skill in the art. *See generally* Prelim. Resp.

For purposes of this Decision, we adopt Petitioner’s proposed definition of a person of ordinary skill in the pertinent art, as it is consistent with the ’016 patent and the asserted prior art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

D. Claim Construction

In an *inter partes* review proceeding, a patent claim shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. § 282(b). 37 C.F.R. § 42.100(b) (as amended Oct. 11, 2018). Our rule adopts the same claim construction standard used by Article III federal courts, which follow *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), and its progeny. Under this standard, the words of a claim are generally given their “ordinary and customary meaning,” which is the meaning the term would have to a person of ordinary skill at the time of the invention. *See Phillips*, 415 F.3d at 1312–13. In construing claims in accordance with their ordinary and customary meaning, we take into account the specification and prosecution history. *Id.* at 1315–17.

The parties do not present any claim constructions, and we determine that no explicit claim construction is necessary for this decision. *Realtime Data, LLC v. Iancu*, 912 F.3d 1368, 1375 (Fed. Cir. 2019) (“The Board is required to construe ‘only those terms that . . . are in controversy, and only to the extent necessary to resolve the controversy.’”)

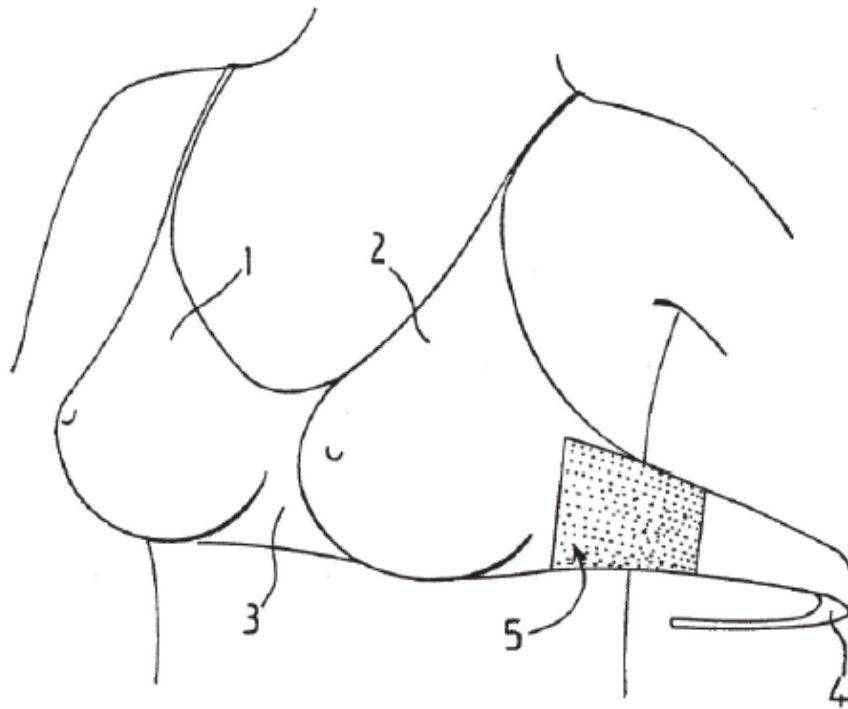
E. Ground 1 – Vidal in view of Pintor

Petitioner contends that claims 1, 2, 4, 7 are unpatentable over Vidal and Pintor. Pet. 5, 16–32.

1. Summary of Vidal

Vidal is a publication of a European Patent Application titled “Wallet bra” and published on February 25, 1987. Ex. 1027, codes [11], [43], [54].⁸

Vidal “relates to a wallet bra that allows its user to hide valuable objects such as, for example, bank notes, credit cards, or jewelry.” *Id.* at 1:1–3. Vidal’s only figure is reproduced below.



Vidal’s figure depicts a bra having two cups 1 and 2 connected together by a piece of fabric 3, and two side strips 4 that extend each cup laterally and

⁸ We cite to the official English language translation of Vidal submitted by Petitioner.

are provided at their ends with means allowing them to be hooked. *Id.* at 2:28–45. The bra includes a device for hiding valuable objects such as bank notes, credit cards, or jewelry. *Id.* This device is constituted of at least one pocket 5 that is arranged on a side strip 4. *Id.* Optionally, each side strip 4 may include a pocket 5. *Id.* This pocket 5 is arranged on the part of the side strip 4 that is located substantially under the corresponding arm of the user. *Id.*

Vidal explains that this pocket 5 may be constituted, in a first version of its invention, of the side strip 4 and of a piece of fabric of which at least three edges are combined with the side strip by sewing. *Id.* at 3:1–5. In another version of Vidal’s invention, side strip 4 is folded on itself, over a certain length, in order to manufacture this pocket 5. *Id.* at 3:8–20. Pocket 5 can be opened laterally or on its upper part. *Id.*

2. Summary of Pintor

Pintor is a U.S. patent titled “Article of Apparel for Concealing Objects” and issued July 13, 2010 from an application filed on September 29, 2008. Ex. 1022, codes [22], [45], [54].

Pintor “relates generally to the field of brassieres, in particular brassieres containing concealed pockets for storing cell phones and other objects.” *Id.* at 1:19–22.

Pintor's Figure 1 is reproduced below.

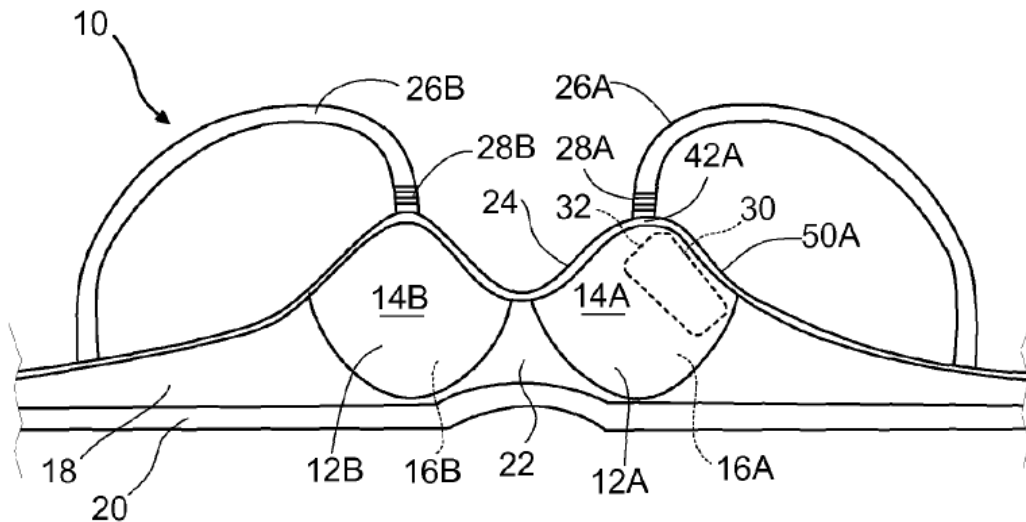


FIG. 1

Figure 1 illustrates an article of apparel 10 in the form of a bra, comprising a pocket for concealing objects. *Id.* at 5:23–25. The bra comprises two breast covers 12A and 12B (bra cups) having exposed exterior surfaces 14A and 14B and opposing interior surfaces 16A and 16B for contacting the body. *Id.* at 5:23–36. A medial portion 22 joins the two breast covers 12A, 12B, and a torso band 18 subtended by a lower torso strip 20 extends laterally outward from the breast covers 12A, 12B, terminating in S-hooks to join the two ends of torso band 18 when worn. *Id.* Shoulder straps 26A, 26B with strap adjustment means 28A, 28B, cooperate with torso band 18 in securing the bra on the body of the wearer. *Id.* A pocket 30 is provided on the interior surface 16A of a first breast cover 12A, pocket 30 having a mouth 32 near the upper boundary 24 of the breast cover 12A. *Id.* at 5:36–65. Objects may be concealed due to the placement and construction of the pocket 30. *Id.*

Figure 3 of Pintor, reproduced below, illustrates another article 10, in the form of a bra, swimsuit, or halter top. *Id.* at 6:44–47.

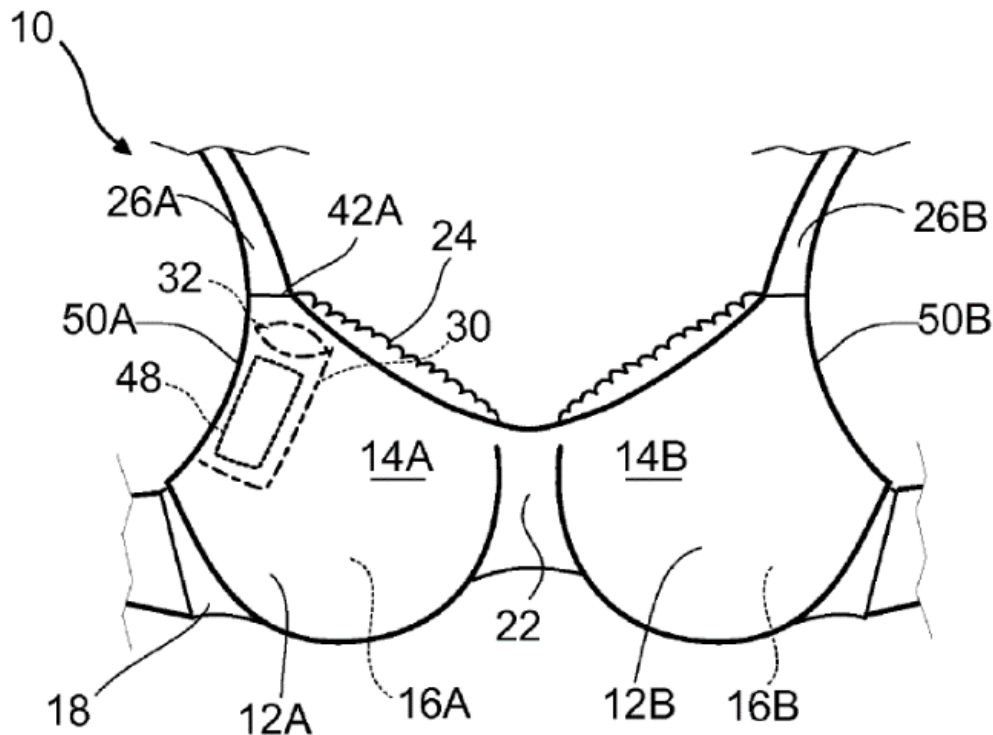


FIG. 3

Figure 3 illustrates another article 10, in the form of a bra, swimsuit, or halter top. *Id.* at 6:44–47.

The bra illustrated in Figure 3 includes two breast covers 12A, 12B joined by a medial portion 22 and attached to shoulder straps 26A, 28B and a torso band 18. *Id.* at 6:44–53. A pocket 30 is attached to the interior surface 16A of first breast cover 12A and positioned on the lateral side 50A of first breast cover 12A. *Id.* One side of the pocket is coextensive with the lateral side 50A of breast cover 12A. *Id.* Pocket 30 contains a concealed object 48. *Id.*

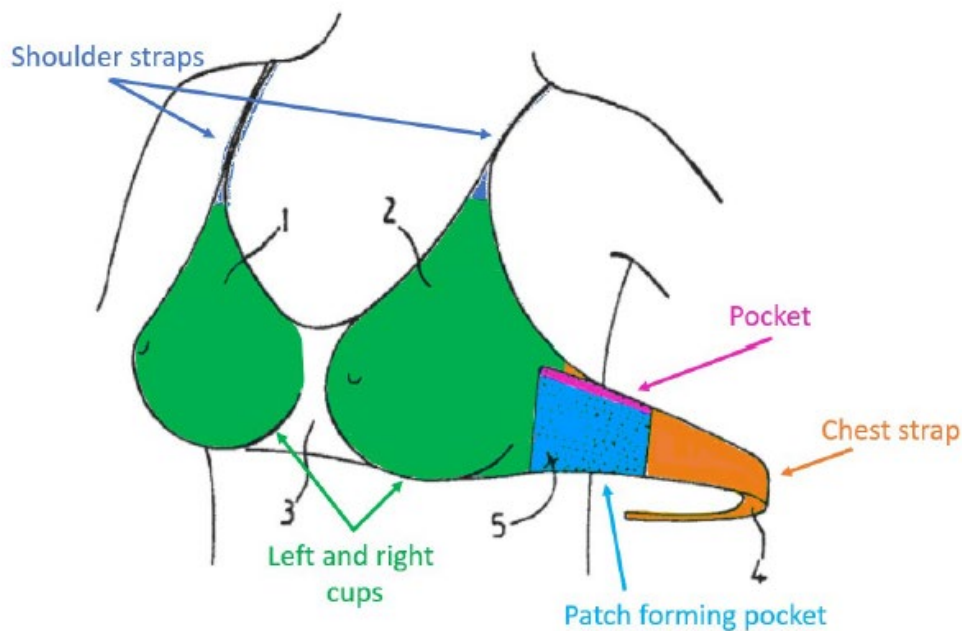
3. Analysis of Claim 1

Petitioner challenges claim 1 as unpatentable over Vidal and Pintor. Pet. 16–24. In its analysis, however, Petitioner does not rely upon Pintor to teach any element of claim 1.⁹ *See id.*

Patent Owner disputes whether element 1H is taught by Vidal and Pintor. Prelim. Resp. 23–34. We, thus, focus our analysis on element 1H.

a) Elements 1A to 1G

Petitioner contends that Vidal teaches elements 1A to 1G. Pet. 16–22. Petitioner annotated Vidal’s figure to illustrate these elements. *Id.* at 10. Petitioner’s annotated figure is reproduced below.



Petitioner’s annotated figure depicts left and right cups 1, 2 in green; shoulder straps in blue, chest strap 4 in orange; and side patch 5, forming a pocket, in blue.

⁹ Petitioner relies upon Pintor to teach the additional element of claim 4. *See* Pet. 27–28.

At this stage of the proceeding, Patent Owner does not dispute that Vidal teaches elements 1A to 1G. *See generally* Prelim. Resp.

Based on Petitioner's evidence and analysis, and absent any evidence or argument to the contrary, we determine that Petitioner has shown that Vidal teaches elements 1A to 1G.

b) *Element 1H – “and wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup”*

Pointing to Vidal's figure, Petitioner first asserts that Vidal suggests element 1H. Pet. 22–23.

Patent Owner disputes that Vidal discloses element 1H. Prelim. Resp. 24–26. Patent Owner argues that “Vidal contains no explicit teaching whatsoever regarding the relative position of the cup with the side pocket” and Vidal's figure “does not clearly delineate the boundary between the cup and the chest strap.” *Id.* at 24. Patent Owner accuses Petitioner of using impermissible hindsight by “reading a teaching that does not exist into a prior art document to complete the elements of an invention.” *Id.* at 26.

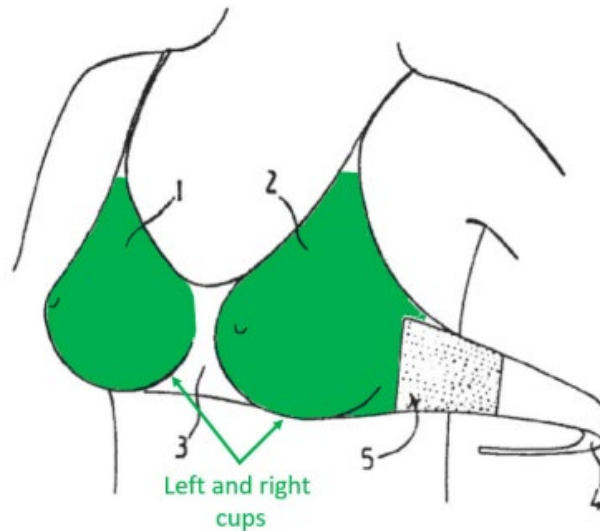
However, “a claimed invention may be anticipated or rendered obvious by a drawing in a reference.” *In re Meng*, 492 F.2d 843, 847 (CCPA 1974) (citation omitted). The drawings must be evaluated for what they reasonably disclose and suggest to one of ordinary skill in the art. *In re Aslanian*, 590 F.2d 911 (CCPA 1979).

Based upon the evidence at this stage of the proceeding, we are persuaded by Petitioner that Vidal discloses side pockets that span both a part of the chest strap and a part of the adjacent cup.

Vidal discloses that its bra includes “two side strips 4 that extend each cup laterally” and that pocket 5 is arranged on side strip 4. Ex. 1027,

2:29–30, 4:4 (claim 1). Vidal also discloses an embodiment where the pocket is on side strip 4 so as to be “located substantially under the user’s arm.” *Id.* at 2: 40–41, 4:10–11 (claim 2).

Joyce Baran, Petitioner’s declarant, testifies that Vidal discloses a bra having two cups. Ex. 1001 ¶ 643. Joyce Baran annotated Vidal’s figure to illustrate the cups. *Id.* The annotated figure is reproduced below.



Joyce Baran’s annotated figure shows the cups 1, 2 in green. Side patch 5 is shown as extending onto cup 2. Based on Vidal’s figure, Joyce Baran testifies that Vidal discloses element 1H. Ex. 1001 ¶¶ 648–649.

Based on Vidal’s disclosures and figure and the unrebutted testimony of Joyce Baran, we are persuaded that a person of ordinary skill in the art would have known that Vidal’s side patch 5 (i.e., pocket) extends onto the adjacent cup, such that the pocket spans both a part of the chest strap and a part of the adjacent cup.

At this stage of the proceeding, Patent Owner’s argument is not persuasive because it is mere attorney argument. Patent Owner has not provided any sufficient evidence to rebut Joyce Baran’s testimony as to what

a person of ordinary skill in the art would have known from Vidal's disclosure and figure.

Petitioner additionally argues that if element 1H "requires greater extension onto the cups" then Vidal renders element 1H obvious. Pet. 23–24. According to Petitioner, "it would have been obvious to a POSA in light of [Vidal] to slightly extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket" and increase ease of "access [to] the pocket without twisting the wearer's core." *Id.*

Patent Owner argues that hindsight also "infects the Petitioner's alternative contention" because:

Without patents or other printed publications containing such a suggestion or motivation, this amounts to an argument that the placement and shape of pockets—a principal area of innovation in this field—is generally obvious as long as those choice could be said to have some advantage."

Prelim. Resp. 27.

The test for obviousness is not whether the claimed invention is expressly disclosed in the references, but whether the claimed subject matter would have been obvious to those of ordinary skill in the art in light of the combined teachings of those references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). In an obviousness analysis, it is not necessary to find precise disclosure directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. *See KSR*, 550 U.S. at 418. In this regard, "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *Id.* at 421. "[I]n many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle." *Id.* As the U.S. Supreme Court has stated, obviousness requires an

“expansive and flexible” approach that asks whether the claimed improvement is more than a “predictable variation” of “prior art elements according to their established functions.” *Id.* at 415, 417. “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.” *Id.* at 421 (citing *Graham*, 383 U.S. at 36). “Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.” *KSR*, 550 U.S. at 421.

Patent Owner’s argument does not sufficiently address Petitioner’s articulated rationale, which is supported by the unrebutted testimony of Joyce Baran. Joyce Baran testifies that:

Given this knowledge, it would have been obvious to a POSA in light of Vida[I] to slightly extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket. Additionally, it is my opinion a POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer’s back, for ease of access to the pocket. Such a design would increase comfort for the wearer, because extension of the pocket onto the cup, as opposed to the wearer’s back, enables the wearer to access the pocket without uncomfortably twisting the wearer’s body. As discussed in “The art of pocket design: How to create unique and stylish pockets,” [Ex. 1052], a POSA would have known that “[c]lassically, pockets are thought out in relation to the body and the placement of the arms. The goal was to have access to the inside of the pocket, without having to twist.” *Id.* at 3.

Ex. 1001 ¶ 650. We, thus, are not persuaded by Patent Owner that Petitioner’s alternative contention is based on impermissible hindsight.

Given Vidal’s figure depicting a pocket placed on a chest strap and cup and Joyce Baran’s unrebutted testimony regarding the knowledge of a person of ordinary skill, we are persuaded that it would have been obvious to

a person of ordinary skill “to slightly extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket” and increase ease of “access [to] the pocket without twisting the wearer’s core” (Pet. 23–24).

Based on the record before us at this stage of the proceeding, we determine that Petitioner sufficiently shows that Vidal teaches element 1H.

c) Consideration of Objective Indicia of Non-obviousness

In reaching our determination on obviousness, we have taken into account Patent Owner’s evidence of objective indicia of non-obviousness. But for the reasons discussed below (*infra*, 31–42), we give Patent Owner’s evidence little weight.

d) Conclusion regarding Claim 1

Based on the evidence and arguments of record at this stage of the proceeding, we determine that Petitioner has established a reasonable likelihood of prevailing on its assertion that independent claim 1 would have been obvious in view of the combination of Vidal and Pintor.

4. Remaining Claims of Ground 1

“When instituting *inter partes* review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.” 37 C.F.R. § 42.108(a). We must “either (1) institute as to all claims challenged in the petition and on all grounds in the petition, or (2) institute on no claims and deny institution.” Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019),¹⁰ 5–6, 64; *see also* 37 C.F.R. § 42.108(a), *PGS Geophysical AS v.*

¹⁰ Available at <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=TrialPracticeGuideConsolidated>

Iancu, 891 F.3d 1354, 1359–60 (Fed. Cir. 2018) (stating a decision to institute is “a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition”).

Because we have decided to institute *inter partes* review based on claim 1, we must do the same for the remaining claims of Ground 1 as well, as institution must include all challenged claims under all asserted grounds.

Patent Owner at this stage does not raise any other arguments specifically directed to the remaining claims of Ground 1.

F. Ground 2 – Handras in view of Pintor

Petitioner contends that claims 1, 2, 4, and 7 are unpatentable over Handras and Pintor. Pet. 5, 32–48.

1. Summary of Handras

Handras is a U.S. patent application publication titled “Bra with Storage Pocket” and published February 20, 2014. Ex. 1021, codes [43], [54]. Handras’ Figure 1, reproduced below, illustrates a perspective view of an everyday bra, and Figure 2 reproduced below side-by-side illustrates a view of the inside of a multiway bra. *Id.* ¶¶ 14–15.

FIG. 1

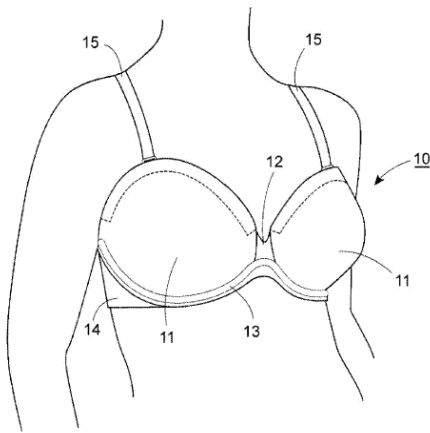


FIG. 2

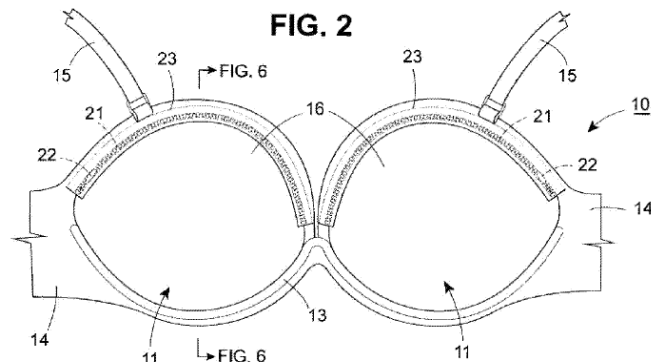


Figure 1 illustrates a perspective view of an everyday bra, and Figure 2 illustrates a view of the inside of a multiway bra. *Id.* ¶¶ 14–15.

In Figure 1, Bra 10 has a pair of cups 11 connected to a core 12 in the middle of the bra, an underwire 13, a pair of side panels 14 connectable together at the back of the bra, and a pair of shoulder straps 15. *Id.* ¶ 20.

In Figure 2, Bra 10 is constructed and styled for use as a multiway bra with each cup 11 of multi-ply construction with a built-in pocket 16. *Id.* ¶ 21.

As shown in Figure 6 of Handras (reproduced below), each cup 11 has an outer ply of material 17, an inner ply of material 18, and an intermediate ply 19 of resilient foam material disposed between outer ply 17 and inner ply 18. *Id.* ¶ 22. In addition, a fourth ply of material 20 is sewn/secured to inner ply 18 in order to form pocket 16 with an opening extending along the upper section of cup 11. *Id.*

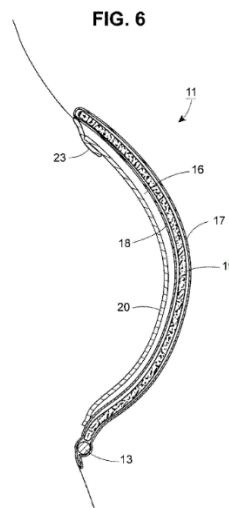


Figure 6 illustrates a cross-sectional view taken on line 6-6 of Figure 2. *Id.* ¶ 19.

Figure 3 of Handras, reproduced below, illustrates a view of a side panel of the bra of Figure 2 with a pocket. *Id.* ¶ 16.

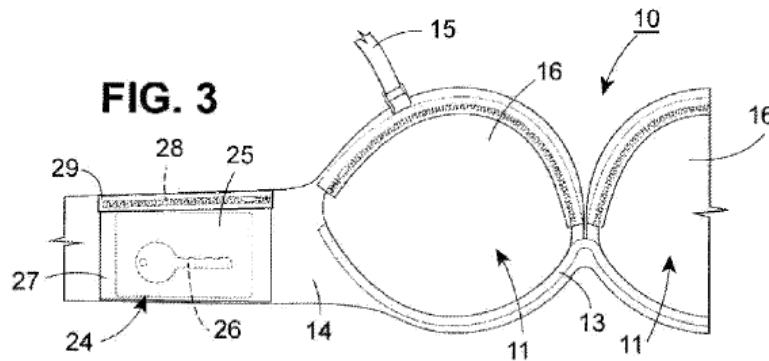


Figure 3 illustrates a view of a side panel of the bra of Figure 2 with a pocket. *Id.* ¶ 16. Each side panel 14 of bra 10 is provided with a pouch 24 for receiving a small item, such as a credit card 25 and a key 26. *Id.* ¶ 28. Pouch 24 is formed by a panel 27 of fabric sewn or otherwise secured to side panel 14, a zipper 28, and a flap 29 for covering over zipper 28. *Id.*

2. Analysis of Claim 1

Petitioner contends that claim 1 is unpatentable over Handras and Pintor. Pet. 32–42. In its analysis, however, Petitioner does not rely upon Pintor to teach any element of claim 1.¹¹ *See id.*

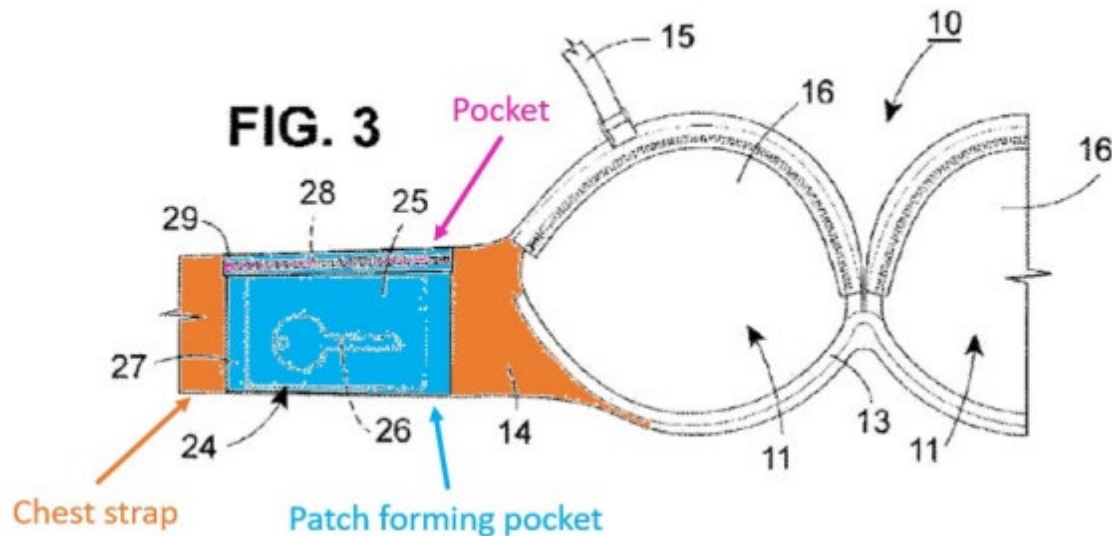
Patent Owner disputes whether element 1H is taught by Handras and Pintor. Prelim. Resp. 35–38. We, thus, focus our analysis on element 1H.

a) Elements 1A to 1G

Petitioner contends that Handras teaches elements 1A to 1G. Pet. 32–39. In particular, Petitioner argues that Handras teaches that a “patch is located on the inside of each side of the chest strap, adjacent to each of the

¹¹ Petitioner relies upon Pintor to teach the additional element of claim 4. *See* Pet. 44–45.

left and right cups.” *Id.* at 38 (citing Ex. 1021, Abstract, ¶ 11). Petitioner annotated Handras’ Figure 3 to highlight the patch (i.e., the pocket). Pet. 38. Petitioner’s annotated Figure 3 is reproduced below.



Petitioner’s annotated Figure 3 shows a patch forming a pocket in blue on an orange chest strap.

At this stage of the proceeding, Patent Owner does not dispute that Handras teaches elements 1A to 1G. *See generally* Prelim. Resp.

Based on Petitioner’s evidence and analysis, and absent any evidence or argument to the contrary, we determine that Petitioner has shown that Handras teaches elements 1A to 1G.

b) Element 1H – “and wherein each side pocket extends onto the adjacent cup, such that each pocket spans both a part of the chest strap and a part of the adjacent cup”

Relying on its annotated Figure 3, Petitioner first asserts that Handras suggests element 1H. Pet. 40–41. Alternatively, Petitioner argues that if element 1H “requires greater extension onto the cups” then Handras renders element 1H obvious. Pet. 41–42. According to Petitioner, “it would have

been obvious to a POSA in light of Handras to [slightly] extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket” and increase ease of “access [to] the pocket without twisting the wearer’s core.” *Id.*

Patent Owner argues that:

Absent any teaching of a pocket so shaped and situated, Patent Owner contends that this is impermissible hindsight, attempting to argue that any innovation in this field is obvious due to its crowded nature and low degree of technical complexity.

Prelim. Resp. 36 (citation omitted).

Patent Owner’s argument does not sufficient address Petitioner’s articulated rationale, which is supported by the unrebutted testimony of Joyce Baran. Joyce Baran testifies that

a POSA would have known that different pocket shapes, sizes, and placements have known benefits and drawbacks. Given this knowledge, it would have been obvious to a POSA in light of Handras to extend the length of the pocket onto some portion of the bra cup to increase the amount of storage in the pocket.

Ex. 1001 ¶ 694. Joyce Baran further testifies that

a POSA would have found it obvious to extend the pocket towards the front of the bra onto the cups, rather than backwards towards the wearer’s back, for the wearer’s ease of access to the pocket. Such a design would increase comfort for the wearer, because extension of the pocket onto the cup enables the wearer to access the pocket without uncomfortably twisting the wearer’s body. As discussed in “The art of pocket design: How to create unique and stylish pockets,” [Ex. 1052], a POSA would have known that “[c]lassically, pockets are thought out in relation to the body and the placement of the arms. The goal was to have access to the inside of the pocket, without having to twist.” *Id.* at 3.

Ex. 1001 ¶ 695.

We, thus, are not persuaded by Patent Owner that Petitioner's alternative contention is based on impermissible hindsight.

Given Handras' teaching of a pocket placed on a chest strap, as shown in Petitioner's annotated Figure 3, and Joyce Baran's unrebutted testimony regarding the knowledge of a person of ordinary skill, we are persuaded that it would have been obvious to a person of ordinary skill "to slightly extend the length of the pocket onto the bra cup to increase the amount of storage in the pocket" and increase ease of "access [to] the pocket without twisting the wearer's core" (Pet. 40–43).

Based on the record before us at this stage of the proceeding, we determine that Petitioner sufficiently shows that Handras teaches element 1H.

c) Consideration of Objective Indicia of Non-obviousness

In reaching our determination on obviousness, we have taken into account Patent Owner's evidence of objective indicia of non-obviousness. But for the reasons discussed below (*infra*, 31–42), we give Patent Owner's evidence little weight.

d) Conclusion regarding Claim 1

Based on the evidence and arguments of record at this stage of the proceeding, we determine that Petitioner has established a reasonable likelihood of prevailing on its assertion that independent claim 1 would have been obvious in view of the combination of Handras and Pintor.

3. Remaining Claims of Ground 2

Because we have decided to institute *inter partes* review based on claim 1, we must do the same for the remaining claims of Ground 2 as well, as institution must include all challenged claims under all asserted grounds.

Patent Owner at this stage does not raise additional arguments specifically directed to the remaining claims of Ground 2.

G. Objective Indicia of Non-Obviousness

Patent Owner submits evidence of objective indicia to support its argument that the claims of the '016 patent would not have been obvious. Prelim. Resp. 28–34.

1. Legal Standards

Objective evidence of non-obviousness “may often be the most probative and cogent evidence in the record” and “may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1349 (Fed. Cir. 2012). Thus, notwithstanding what the teachings of the prior art would have suggested to one skilled in the art, secondary considerations (objective evidence of non-obviousness) may lead to a conclusion that the challenged claims would not have been obvious. *In re Piasecki*, 745 F.2d 1468, 1471–72 (Fed. Cir. 1984). Thus, our obviousness analysis includes consideration and weighing of Patent Owner’s indicia of non-obviousness.

In order to accord substantial weight to secondary considerations in an obviousness analysis, “the evidence of secondary considerations must have a ‘nexus’ to the claims, *i.e.*, there must be ‘a legally and factually sufficient connection’ between the evidence and the patented invention.” *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1332 (Fed. Cir. 2019) (quoting *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387,

1392 (Fed. Cir. 1988)); *Quanergy Sys., Inc. v. Velodyne Lidar USA, Inc.*, 24 F.4th 1406, 1417 (Fed. Cir. 2022).

Although the patent owner bears the initial burden of proving a nexus (*WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1359 (Fed. Cir. 1999)), a presumption of nexus may be appropriate if the patent owner shows “the asserted objective evidence is tied to a specific product and that product ‘embodies the claimed features, and is coextensive with them.’” *Polaris Indus, Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072 (Fed. Cir. 2018) (quoting *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000) (emphasis added)); *Quanergy*, 24 F.4th at 1417. On the other hand, “[w]hen the [product] is not coextensive with the patented invention—for example, if the patented invention is only a component of a commercially successful machine or process,” the patent owner is not entitled to a presumption of nexus. *Demaco*, 851 F.2d at 1392.

A patent owner may establish nexus, either through (1) the use of a rebuttable presumption that arises when certain conditions are met or (2) a direct showing of nexus.

In the first, a patent owner may rely on a rebuttable presumption of nexus as follows:

As first recognized in *Demaco* . . . , a patentee is entitled to a rebuttable presumption of nexus between the asserted evidence of secondary considerations and a patent claim if the patentee shows that the asserted evidence is tied to a specific product and that the product “is the invention disclosed and claimed.” 851 F.2d at 1392 (emphasis added). That is, presuming nexus is appropriate “when the patentee shows that the asserted objective evidence is tied to a specific product and that product ‘embodies the claimed features, and is coextensive with them.’” *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072 (Fed. Cir.

2018) (quoting *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000)) . . .

. . . Whether a product is coextensive with the patented invention, and therefore whether a presumption of nexus is appropriate in a given case, is a question of fact.

Fox Factory, Inc. v. SRAM LLC, 944 F.3d 1366, 1373 (Fed. Cir. 2019).

The court in *Fox Factory* further explained, with respect to a presumption of nexus, that “the degree of correspondence between a product and a patent claim falls along a spectrum,” and that “[a]lthough we do not require the patentee to prove perfect correspondence to meet the co-extensiveness requirement, what we do require is that the patentee demonstrate that the product is essentially the claimed invention.” *Id.* at 1374. The court in *Fox Factory* rejected the patent owner’s argument that the co-extensiveness requirement is simply an inquiry into “whether the patent claims broadly cover the product that is the subject of the evidence of secondary considerations.” *Id.* at 1377. Thus, simply showing that a patent claim broadly covers the commercial product being asserted as objective evidence of non-obviousness is not enough to show they are coextensive. *Id.* That is because “[a] patent claim is not coextensive with a product that includes a ‘critical’ unclaimed feature that is claimed by a different patent and that materially impacts the product’s functionality.” *Id.* at 1375. In contrast, “if the unclaimed features amount to nothing more than additional insignificant features, presuming nexus may nevertheless be appropriate.” *Id.* at 1374. Based on the facts of the case in *Fox Factory*, the court found that “nexus may not be presumed” because “there are one or more features not claimed by the [challenged patent] that materially impact the functionality” of the products on which patent owner’s presumption

argument is based and the court rejected arguments that the patent claims broadly cover the product. *Id.* at 1376–1377.

“A finding that a presumption of nexus is inappropriate does not end the inquiry into secondary considerations,” however. *Id.* at 1373. “To the contrary, the patent owner is still afforded an opportunity to prove nexus by showing that the evidence of secondary considerations is the ‘direct result of the unique characteristics of the claimed invention.’” *Id.* at 1373–74 (quoting *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)). “Where the offered secondary consideration actually results from something other than what is both claimed and novel in the claim, there is no nexus to the merits of the claimed invention,” meaning that “there must be a nexus to some aspect of the claim not already in the prior art.” *In re Kao*, 639 F.3d 1057, 1068–69 (Fed. Cir. 2011).

Ultimately, we must weigh Patent Owner’s objective evidence in the context of whether the claimed invention as a whole would have been obvious to a skilled artisan. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1331–32 (Fed. Cir. 2016). Only if the patent owner presents a *prima facie* case of nexus does the burden of production shift to the patent challenger to adduce evidence showing that any commercial success or industry praise was due to extraneous factors other than the patented invention. *Demaco*, 851 F.2d at 1393.

a) Evidence Related to Nike Products

(1) Presumption of Nexus

“The presumption [of nexus] applies ‘when the patentee shows that the asserted objective evidence is tied to a specific product and that product ‘embodies the claimed features, and is coextensive with them.’”

TalexMedical, LLC v. Becon Medical Limited, 2022 WL 2898934, at *8 (Fed. Cir. July 22, 2022) (citing *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072 (Fed. Cir. 2018) (quoting *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000))).

Patent Owner argues that Nike’s Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run (collectively, “Nike Products”) are co-extensive with the ’016 patent’s claimed invention. *See generally* Prelim. Resp. 1–3, 32–34 (citing Exs. 2043–2052, 2054–2057).

The difficulty with the claim charts and pictures submitted by Patent Owner is that they fail to establish that the Nike Products are coextensive with the ’016 patent’s claimed invention. For example, many of the claim charts do not relate to the ’016 patent and demonstrate that the Nike Products include many features not claimed by the ’016 patent. *See e.g.*, Ex. 2044 (discussing a back pocket).

Nexus, however, may still be shown if the evidence of secondary considerations is the direct result of the unique characteristics of the claimed invention. *See Fox Factory*, 944 F.3d at 1373–74 (“[T]he patent owner is still afforded an opportunity to prove nexus by showing that the evidence of secondary considerations is *the direct result of the unique characteristics of the claimed invention.*” (emphasis added)). We, thus, turn to Patent Owner’s evidence.

(2) Copying

Patent Owner asserts that the Nike Products are copies of the ’016 patent’s claimed invention because “each of the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run has several points of similarity both to the product depicted and described in Ms. Goff’s patents as supplied

to NIKE and to the product samples Ms. Goff sent to NIKE.” Prelim. Resp. 30. Sharon Goff testifies that she corresponded with Nike about her Pocket Bar and submitted examples of her products. *See* Exs. 2001, 2035.

We have reviewed the testimony of Sharon Goff and supporting evidence but do not see sufficient evidence of copying. Neither Sharon Goff’s testimony nor the Nike Idea Submission is specific to the ’016 patent’s claimed invention. *See generally* Exs. 2001, 2035. For example, none of the Nike Idea Submission pictures sufficiently shows the unique feature of the ’016 patent’s claimed invention, which includes a pocket spanning the chest strap and cup. *See, e.g.,* Ex. 2035, 4.

Patent Owner also relies upon two infringement claim charts as allegedly showing that Nike copied the ’016 patent’s claimed invention. Prelim. Resp. 31 (citing Exs. 2043, 0248). These exhibits, however, do not provide sufficient evidence to demonstrate that a specific product was replicated. *See Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004) (“[C]opying requires the replication of a specific product.”).

b) Evidence Related to Sharon Goff’s Pocket Bra

(1) Presumption of Nexus

Patent Owner contends that Sharon Goff’s Pocket Bra is co-extensive with the ’016 patents claimed invention. *See generally* Prelim. Resp. 1–3, 32–34. Patent Owner, however, indicates that there are multiple variants of Sharon Goff’s Pocket Bra. Prelim Resp. 1 (“Ms. Goff invented several variations of bras with pockets, which are collectively referred to herein as variants of the Pocket Bra”). Much of Patent Owner’s evidence of objective indica relate to variations of the Pocket Bra that do not include the ’016

patent's claim invention, which includes a pocket spanning the chest strap and cup. *E.g., see* Ex. 2008–2034 (infringement charts for other of Sharon Goff's patents).

Based on the record at this stage of the proceeding, we do not apply a presumption of nexus between the '016 patent's claimed invention and Sharon Goff's Pocket Bra.

We next evaluate Patent Owner's evidence of secondary considerations to determine whether the evidence is the direct result of the unique characteristics of the claimed invention.

(2) Licenses

Patent Owner argues that evidence of non-obviousness “is found in the licenses to competitors of the other patents in its family.” Prelim. Resp. 3, 32–33 (citing Ex. 2004, 2007, 2011–2034). In particular, Patent Owner points to licenses to Urban Savage, LLC, Rabbit LLC, and Senita. *Id.* at 3¹², 33. Patent Owner asserts that a nexus exists because the licensees agree to mark their products with the licensed patents. *Id.* at 33.

However, none of the licenses to Urban Savage, LLC, Rabbit LLC, Senita are for the '016 patent. *See* Ex. 2004, 9; Ex. 2006, 8.; Ex. 2007, 7.

We, thus, are not persuaded that there is a nexus between the alleged licenses and a unique feature of the '016 patent's claimed invention and that the evidence of licensing demonstrates non-obviousness of the '016 patent's claimed invention.

¹² Patent Owner points to two other licenses but does not provide as evidence a copy of those license. *See* Prelim. Resp. 3; Ex. 3003. We cannot consider evidence that is not made of record.

(3) Commercial Success

Relying upon the same licenses, Patent Owner argues that “there is some evidence of commercial success of products linked to the ‘016 patent and the other Disputed Patents.” Prelim. Resp. 26. According to Patent Owner, “multiple products licensed under the Disputed Patents remain available for sale, suggesting that those products have been profitable.” *Id.* Patent Owner also alleges that Rabbit, LLC earned a gross revenue of at least 2.25 million dollars with respect to the licensed products. *Id.*

However, none of the licenses to Urban Savage, LLC, Rabbit LLC, Senita are for the ‘016 patent. *See* Ex. 2004, 9; Ex. 2006, 8.; Ex. 2007, 7.

We, thus, are not persuaded that there is a nexus between the alleged commercial success and a unique feature of the ‘016 patent’s claimed invention and that the evidence of commercial success demonstrates non-obviousness of the ‘016 patent’s claimed invention.

(4) Industry Praise

Patent Owner asserts that there is “industry praise for products linked to the ‘016 patent and the other Disputed Patents.” Prelim. Resp. 27.

As evidence of industry praise Patent Owner submits an article in which “one industry expert” described the Pocket Bra as “genius.” *Id.* (citing Ex. 2003). Exhibit 2003 is an article which describes a Pocket Bra featuring “two 10cm pockets sewn into each side panel in which to store your valuables” and pockets that “are basically two slings under each arm.” *Id.* at 2–3. In the article, Chantelle Crabb, an alleged underwear expert, states that “[t]his sounds genius, because so many of us do this anyway — albeit not as elegantly.” *Id.* at 3.

Exhibit 2003, however, does not sufficiently inform us whether Chantelle Crabb evaluated a Pocket Bra having a unique feature of the '016 patent's claimed invention, which includes a pocket spanning the chest strap and cup.

We, thus, are not persuaded that there is a nexus between this alleged industry praise and a unique feature of the '016 patent's claimed invention and that this evidence of industry praise demonstrates non-obviousness of the '016 patent's claimed invention.

As further evidence of industry praise, Patent Owner submits the testimony of the inventor of the '016 patent Sharon Goff. Prelim. Resp. 27 (citing. Ex. 2001 ¶¶ 6–7). Sharon Goff testifies that:

6. When I began marketing the Pocket Bra, I frequently spoke with women who had similar experiences to my own: a lack of useful places to stow items in their everyday clothing. Many of these women told me that the Pocket Bra had been or would be useful for resolving this issue.

7. For example, one mother contacted me to purchase one of the Pocket Bras so that her diabetic daughter could use it to store an insulin pump. I also received requests from other women asking me to produce the Pocket Bra in a wider range of sizes. These are both cases I mentioned in an interview with the Berkshire Eagle on May 12, 2014, which is provided with this affidavit as Exhibit SW-2002.

Ex. 2001 ¶¶ 6–7.

Sharon Goff's testimony, however, does not sufficiently inform us which variation of the Pocket Bra is being praised. Further, we give little weight to the testimony of Sharon Goff, who, as the inventor, is an interested party, as to alleged industry praise spoken by others.

We, thus, are not persuaded that there is a nexus between this alleged industry praise and a unique feature of the '016 patent's claimed invention

and that this evidence of alleged industry praise demonstrates non-obviousness of the '016 patent's claimed invention.

c) Conclusion as to Objective Indicia of Non-Obviousness

Given the above, on this record, we give little weight to Patent Owner's objective evidence when determining whether the claimed invention as a whole would have been obvious to a skilled artisan.

III. CONCLUSION

After considering the evidence and arguments presented in the Petition, Preliminary Response, Preliminary Reply, and Preliminary Sur-reply, we determine that the information presented in the Petition shows a reasonable likelihood that Petitioner would prevail in establishing that at least one claim of the '016 patent is unpatentable. We, thus, institute *inter partes* review of all challenged claims based on all grounds asserted in the Petition.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 1, 2, 4, and 7 of the '016 patent on the unpatentability grounds asserted in the Petition; and

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

IPR2024-01122
Patent 9,289,016 B1

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