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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,
Petitioner,

v.

SHERRYWEAR LLC,
Patent Owner.

IPR2024-01126
Patent 10,219,550 B1

Before MEREDITH C. PETRAVICK, ZHENYU YANG, and
JON M. JURGOVAN, *Administrative Patent Judges*.

JURGOVAN, *Administrative Patent Judge*.

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

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I. INTRODUCTION

Petitioner Nike, Inc. filed a Petition (Paper 1, “Pet.”) pursuant to 35 U.S.C. §§ 311–319 to institute an *inter partes* review of claims 1–14 (“the challenged claims”) of U.S. Patent No. 10,219,550 B1 (Ex. 1007, “the ’550 patent”).

Patent Owner SherryWear LLC filed a Preliminary Response (Paper 8, “Prelim. Resp.”¹). Patent Owner argues that we should exercise our discretion to deny institution under § 325(d), and Petitioner filed an authorized Preliminary Reply (Paper 10, “Prelim. Reply”) to address Patent Owner’s § 325(d) arguments. Patent Owner also argues that the Petition fails to satisfy the requisite threshold for instituting review on the merits in light of alleged teaching away and objective indicia of nonobviousness.

For reasons provided below, we determine on behalf of the Director (*see* 37 C.F.R. § 42.4(a)) that the record, as developed thus far, demonstrates a reasonable likelihood that Petitioner would prevail with respect to at least one of the challenged claims on the merits, so we grant institution of the petitioned *inter partes* review. *See* 35 U.S.C. § 314(a).

¹ Paper 8 is a corrected version of the Preliminary Response filed November 14, 2024 as Paper 7. Patent Owner also filed a redacted version of the Preliminary Response as Paper 13. In this Institution Decision, we refer only to Paper 8.

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II. BACKGROUND

A. Real Parties-in-Interest and Related Proceedings

Petitioner identifies itself (i.e., Nike, Inc.) as the real party-in-interest.

Pet. 5. Patent Owner identifies itself (i.e., SherryWear LLC) as the real party-in-interest. Paper 3, 1 (“Patent Owner’s Mandatory Notices”).

Petitioner and Patent Owner (“the parties”) identify the following district court litigation as related to this proceeding: *SherryWear LLC. v. Nike, Inc.*, Case No. 1:23-cv-11599 (D. Mass.). Pet. 5; Paper 3, 1.

According to Petitioner, this litigation was stayed. Paper 5, 1; Ex. 1053.

Petitioner also filed petitions in IPR2024-01122, IPR2024-01123, IPR2024-01124, IPR2024-01125, IPR2024-01127, IPR2024-01128 and IPR2024-01129, challenging the other patents asserted in the district court. *Id.* n.1.

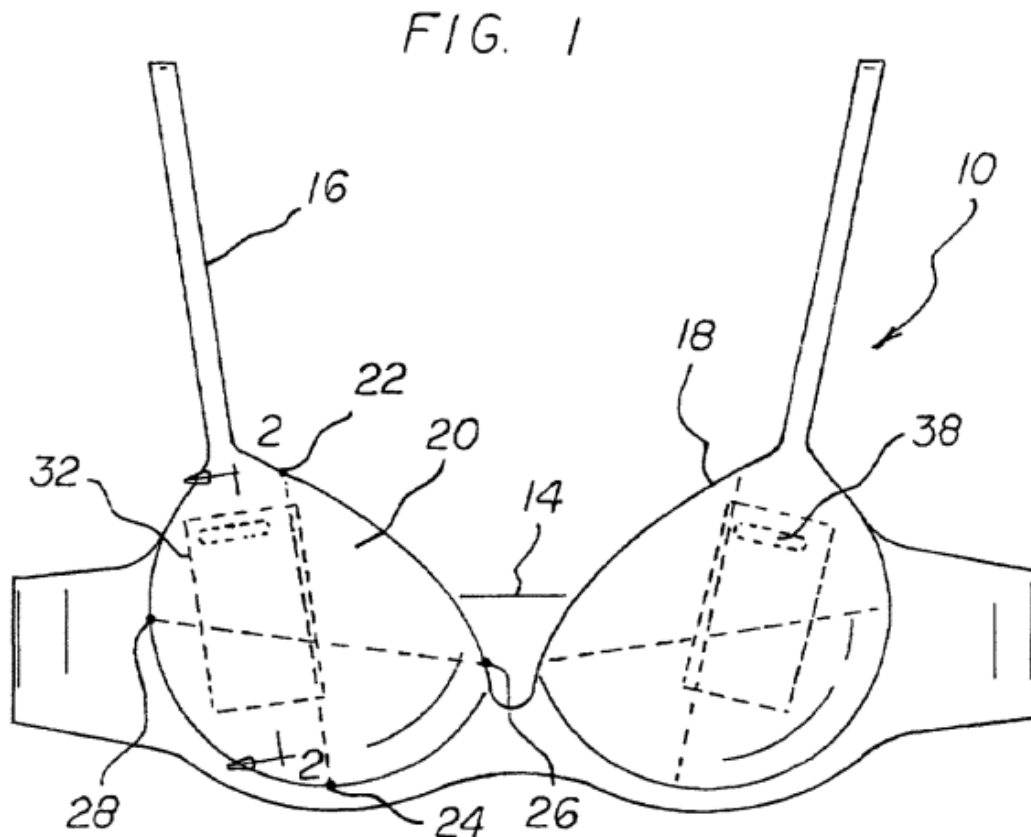
Patent Owner also identifies U.S. Patent Application No. 18/223,363 as a continuation of the ’550 patent. Paper 3, 1.

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B. The '550 Patent (Ex. 1007)

The '550 patent is titled “Pocket Bra System.” Ex. 1007², code (54).

Figure 1 of the '550 patent is shown below.



As shown in Figure 1 above, pocket bra system 10 comprises horizontal chest strap 14, shoulder straps 16, left cup 18, right cup 20, and rectangular patch 32. *Id.* at 3:15–55. Left cup 18 and right cup 20 each have upper-most point 22, lower-most point 24, inner-most point 26, and outer-most point 28. *Id.* at 3:36–46.

² In the future, the parties should clearly mark their papers and exhibits in P-TACTS so that the Board will be informed of the substance of the filing without having to open its link.

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Figure 2 of the '550 patent is shown below.

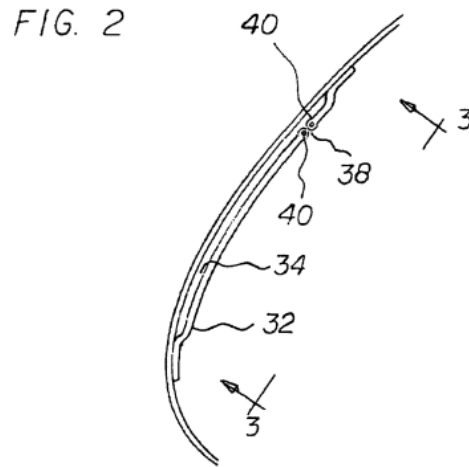


Figure 2 shows patch 32 coupled to the inside surface of an associated cup with stitching to form a rectangular chamber 34. *Id.* at 3:47–62. Patch 32 is provided with a linear slit 38 with an elastic band 40 surrounding the slit. *Id.* at 3:63–4:4.

Figure 3 of the '550 patent is shown below.

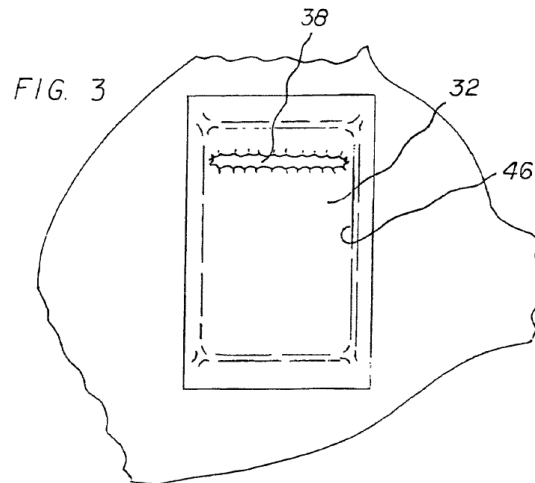


Figure 3 above shows that a handheld electronic device 46 is positionable within the chamber. *Id.* at 4:5–6. Slit 38 contracts to a closed position when the handheld device is within or without the chamber. *Id.* at 4:13–15.

CONFIDENTIAL — BOARD AND PARTIES ONLY*C. Overview of Challenged Claims*

Petitioner challenges claims 1–14 of the '550 patent in this proceeding, which are all of the claims of the patent. Pet. 1. Of the challenged claims, claims 1 and 8 are independent, claims 2–7 depend from claim 1, and claims 9–14 depend from claim 8.

Claim 1, which is representative, is shown below with Petitioner's limitation identifiers indicated in brackets.

1. [1A] A pocket bra comprising:
 - [1B] a strap assembly comprising a chest strap; [1C] and comprising left and right cups, each cup being an area to receive a breast of a wearer and having inside and outside surfaces, [1D] the strap assembly being attached to the cups whereby the strap assembly connects the cups to the wearer, [1E] each cup having upper, lower, interior body facing, and opposite exterior edges;
 - [1F] a patch forming a pocket operatively associated with at least one of the left and right cups, [1G] the patch having an upper edge, a lower edge, and an exterior edge, the patch having inside and outside surfaces;
 - [1H] the lower edge of the patch coupled to the bra adjacent to a lower edge of the at least one of the left and right cups, and the exterior edge of the patch coupled adjacent to the exterior edge of the at least one of the left and right cups, a pocket opening formed along the upper edge of the patch being unconnected to the at least one of the left and right cups;
 - [1I] the pocket opening capable of repeated receiving and removal of an item when being worn by the wearer;
 - [1J] and wherein the upper edge of the patch crosses over a surface of the cup to form the opening, the upper edge crossing such that the opening faces the exterior edge of the at least one of the left and right cup to which it is attached.

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Ex. 1007, 5:44–6:2.

Claim 8 is reproduced below with Petitioner’s limitation identifiers indicated in brackets.

8. [8A] A pocket bra comprising:

[8B] a strap assembly comprising a chest strap; [8C] and comprising left and right cups, each cup being an area to receive a breast of a wearer and having inside and outside surfaces, [8D] the strap assembly being attached to the cups whereby the strap assembly connects the cups to the wearer, [8E] each cup having upper, lower, interior body facing, and opposite exterior edges;

[8F] a patch forming a pocket operatively associated with at least one of the left and right cups, [8G] the patch having an upper edge, a lower edge, and an exterior edge, the patch having inside and outside surfaces;

[8H] the lower edge of the patch coupled to the bra adjacent to a lower edge of the at least one of the left and right cups, and the exterior edge of the patch coupled adjacent to the exterior edge of the at least one of the left and right cups, a pocket opening formed along the upper edge of the patch being unconnected to the at least one of the left and right cups;

[8I] the pocket opening capable of repeated receiving and removal of an item when being worn by the wearer; [8J] and wherein the upper edge of the patch crosses over a surface of the cup to form the opening, the upper edge crossing such that the opening faces the interior edge of the at least one of the left and right cup to which it is attached.

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D. Asserted Prior Art

Petitioner relies on the following four references as prior art against claims 1–14 of the ’550 patent. Pet. 7.

Name	Reference	Exhibit No.
Barg	US 3,518,998	1019
York	US 2,920,628	1020
Handras	US 2014/0051331 A1	1021
Pintor	US 7,753,759 B2	1022

Patent Owner does not dispute that these references are prior art against claims 1–14 of the ’550 patent. *See generally* Prelim. Resp.

E. Asserted Grounds

Petitioner asserts the following grounds of unpatentability. Pet. 7.

Ground	Reference(s)/Basis	35 U.S.C. §³	Claim(s) Challenged
1	Barg, Pintor	103	1–14

³ Amendments to 35 U.S.C. § 103 enacted by the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”) took effect on March 16, 2013. The ’550 patent was filed as US Application No. 15/679,206, on Aug. 17, 2017. The ’550 patent is a continuation of US Application No. 15/045,606 filed Feb. 17, 2016, now US Patent No. 9,808,036 (“the ’036 patent”), which is a continuation-in-part of US Application No. 14/082,777 filed Nov. 18, 2013, now US Patent No. 9,295,288 (“the ’288 patent”), which is a continuation-in-part of US Application No. 13/066,822, filed April 26, 2011, now US Patent No. 8,597,072. Petitioner asserts that Patent Owner admitted that the earliest priority date of the ’550 patent is November 18, 2013, a contention that

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Ground	Reference(s)/Basis	35 U.S.C. §³	Claim(s) Challenged
2	York, Pintor	103	1–14
3	Handras, Pintor	103	1–14

F. Testimonial Evidence

Petitioner relies on the proffered expert witness testimony of Joyce Baran (Exhibit 1001). Patent Owner does not rely on opposing expert witness testimony at this time. *See generally* Prelim. Resp.

III. PRELIMINARY MATTER

1. Discretion under 35 U.S.C. § 325(d)

Patent Owner contends that we should exercise our discretion under 35 U.S.C. § 325(d) to deny the Petition, applying our precedential decision in *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential) (“*Advanced Bionics*”). Prelim. Resp. 11–21. Specifically, Patent Owner contends that “[t]he Board should deny institution 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. 11.

Patent Owner does not dispute. Therefore, because the earliest priority date is after March 16, 2013, we apply the AIA version of § 103. The outcome of our Institution Decision, however, would not be different if the pre-AIA version applied.

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In evaluating arguments under § 325(d), we use a two-part framework to assess: (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 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*, Paper 6 at 8.

In applying the two-part framework, we consider the non-exclusive factors set forth in *Becton, Dickinson and Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017) (precedential in relevant part) (“*Becton, Dickinson*”), which “provide useful insight into how to apply the framework” under § 325(d). *Advanced Bionics*, Paper 6 at 9. Those non-exclusive factors include:

- (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;
- (c) the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;
- (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;
- (e) whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and

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(f) the extent to which additional evidence and facts presented in the Petition warrant reconsideration of the prior art or arguments. *Becton, Dickinson*, Paper 8 at 17–18. “If, after review of factors (a), (b), and (d), it is determined that the same or substantially the same art or arguments previously were presented to the Office, then factors (c), (e), and (f) relate to whether the petitioner has demonstrated a material error by the Office.” *Advanced Bionics*, IPR2019-01469, Paper 6 at 10.⁴

2. *Advanced Bionics Part I*

Applying the *Advanced Bionics* framework, we first determine whether the same or substantially the same art or arguments were presented previously to the Office. *Advanced Bionics*, IPR2019-01469, Paper 6 at 8.

Petitioner’s Contentions

Petitioner asserts that “none of the grounds here involve the same or substantially the same prior art or arguments previously before the PTO.” Pet. 98. Petitioner states that “the primary references Barg, York, and Handras were not considered during prosecution of the ’550 [patent].” *Id.* Although Pintor was considered in prosecution of the ’288 patent (the grandparent of the ’550 patent), Petitioner states that it was considered only as a secondary reference to Newman. *Id.* at 99. According to Petitioner, Newman relates to a bra for holding pads or prosthetics, and not for storing personal items; consequently, Barg, York, and Handras are more relevant than Newman such that Petitioner’s challenge grounds do not involve the

⁴ We note that the analysis underlying the exercise of discretion under 35 U.S.C. § 325(d) does not necessarily consider the merits of the challenges raised in the Petition.

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same or substantially the same prior art or arguments. *Id.* (citing *Oticon Med. AB v. Cochlear Ltd.*, IPR2019-00975, Paper No. 15 at 16–18 (PTAB Oct. 16, 2019) (precedential) (grounds did not involve the same or substantially the same prior art or arguments where the petitioner relied on the same primary reference considered in prosecution, but with the addition of a secondary reference not previously considered); *Becton, Dickinson*, IPR2017-01586, Paper No. 8 at 17–18 (“the extent of the overlap between the arguments made during examination and the manner in which [p]etitioner relies on the prior art” is a non-exclusive factor for determining whether the petition relies on the same or substantially the same art or arguments).

Petitioner further argues that Barg, York, and Handras disclosed various features that the Applicant argued distinguished the ’288 patent’s claims over the prior art. Pet. 2–3. Furthermore, Petitioner contends that Pintor along with two other references, McLaren⁵ and Lee⁶, were cited in information disclosure statements initialed by the Examiner during prosecution of the ’550 patent and the ’036 patent (the parent of the ’550 patent), but states that these references were not used in any rejections such that “it is unclear to what extent the Examiner reviewed and relied upon” these references. Pet. Reply 4. Petitioner asserts that “McLaren is directed to a pocket removably detached from the bra, and Lee—like Pintor—discloses a pocket on the cup but does not disclose a pocket shape that mimics the geometry of the bra cup, making Barg, York, and Handras more

⁵ US Patent No. 7,585,200, Ex. 1054, Ex. 2064.

⁶ US Patent No. 5,496,205, Ex. 1055.

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pertinent disclosures.” *Id.* (citing Ex. 1054, code (57); Ex. 1055, Fig. 2). Petitioner argues that Patent Owner’s “attempt to distinguish *Oticon* is thus misplaced, as Barg, York, and Handras discloses numerous ‘distinct feature[s] . . . absent from the art the Examiner’ previously considered.” *Id.* (citing Prelim. Resp. 14).

Patent Owner’s Contentions

Patent Owner argues that Petitioner’s asserted art does not materially differ from, and is cumulative to, the art disclosed during prosecution. Prelim. Resp. 12–15. Specifically, Patent Owner faults Petitioner for not explaining the differences between Barg, York, and Handras and the references considered during prosecution of the ’550 patent and its parent (the ’036 patent), including Pintor, MacLaren, Lee, and Rivers⁷. *Id.* at 13–15 (citing Ex. 1006, 2, 75, 76 (prosecution history of the ’036 patent)). Patent Owner asserts that “newly introduced art is substantially the same [] if it has no ‘probative differences’ over the art considered by the Office.” Prelim. Sur-Reply 1 (citing *Becton, Dickinson*, PR2017-01586, Paper 8 at 22). Patent Owner contends that “[t]his question of materiality is crucial here” and that “it would be trivially easy to find alternative prior art references that differ from those considered by the Examiner in inconsequential ways.” *Id.*

Patent Owner further argues that Petitioner asserts that the probative value of Barg, York, and Handras is that they are “explicitly directed to bras designed to store personal belongings,” and that the Office considered Pintor for the same teaching. Prelim. Resp. 13–14.

⁷ US Patent Appl. Publ. No. 2012/0064799. No exhibit found in record.

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Patent Owner also alleges that “Petitioner appears to imply that discretionary denial is only appropriate where the same art was considered, but none of the cases Petitioner cites stands for that proposition.” PO Sur-Reply 1.⁸ Patent Owner contends that “Petitioner does not indicate, per *Oticon*, how any feature allegedly made obvious by Barg, York, or Handras include ‘different structures that serve different purposes’ from those allegedly made obvious by Pintor” and “[o]n the contrary, Petitioner argues that the claims as amended are obvious over Pintor.” *Id.* at 2 (citing Pet. Reply 5–6; Prelim. Resp. 13).

Patent Owner further argues “there is ample evidence to conclude the Examiner was aware of the relevant teachings of Pintor” because “Pintor was in the list of references the Examiner had before her for this matter, and had been explicitly considered for its teachings in the parent application which issued as the ‘288 patent.” *Id.* at 3.

In addition, Patent Owner asserts that “the Examiner had before her multiple additional references that render Barg, York, and Handras cumulative” and that there is a “lack of material differences between Barg, York, and Handras and the Examiner’s art” including MacLaren and Lee. *Id.*

Discussion

There is no dispute that Barg, York, and Handras individually, and each in combination with Pintor, were not considered during examination of the ’550 patent, the ’036 patent (parent of the ’550 patent), and the

⁸ The parties discussed several non-precedential cases in their respective arguments, which, while helpful to consider, are not binding on this panel.

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'288 patent (grandparent of the '550 patent). Pet. 98; Prelim. Resp. 1–2. What is disputed is whether the addition of Pintor to each of Barg, York, and Handras in Petitioner's combinations renders these combinations substantially the same as or cumulative to what the Examiner considered during examination of the '550 patent. Pet. 99; Prelim. Resp. 13. Also disputed is whether Barg, York, and Handras are substantially the same as or cumulative to other references considered during examination of the '550 patent. Prelim. Reply 1; Prelim. Resp. 13–15. To address these questions, we consider the prosecution histories of the '550 patent, the '036 patent, and the '288 patent below.

As noted, the '288 patent is the grandparent of the '550 patent at issue in this proceeding. Ex. 1007, code (63). During prosecution of the '288 patent, the Examiner rejected certain claims as obvious over Newman in combination with Pintor, MacLaren, and other references. Ex. 1004, 151–156. The Examiner cited Pintor for its teaching of “a brassiere with a pocket that holds the claimed items therein as desired by the user in order to store those items on the body of the wearer when wearing the brassiere.” *Id.* at 152–156 (citing Ex. 1022 ¶ 8). MacLaren was cited for its teaching of “the pocket inner layer attached to a pocket outer layer and piping/ binding around the layers and on the upper edge of the inner pocket layer as claimed.” *Id.* at 155 (citing Ex. 1054, 2:44–66, Fig. 3).

The '036 patent is the parent of the '550 patent. Ex. 1007, code (63). During prosecution of the '036 patent, Pintor, MacLaren, and Lee were cited in an information disclosure statement by Applicant (Ex. 1006, 2) and

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initialed by the Examiner (Ex. 1006, 78). The Examiner did not address these references or use them in any rejection.

Similarly, in the prosecution of the '550 patent, Pintor, MacLaren, and Lee were cited in an information disclosure statement by Applicant (Ex. 1007, 2) and initialed by the Examiner (Ex. 1007, 107). Also, Rivers was cited by the Examiner (Ex. 1007, 75). The Examiner did not discuss these references or use them in any rejection.

Petitioner relies on Pintor for its teaching of a patch associated with only one of the right and left cups, and a pocket attached to the interior surface of the breast cover by stitching. Pet. 36 (claim 2), 38 (claim 4), 39 (claim 5), 40 (claim 7), 84–85 (claim 2). Thus, Petitioner's reliance on Pintor is for detailed features of dependent claims compared to the Examiner's more general reliance on the reference's teaching "a brassiere with a pocket that holds the claimed items therein as desired by the user in order to store those items on the body of the wearer when wearing the brassiere." Ex. 1004, 152–156 (citing Ex. 1022 ¶ 8). Hence, the teachings for which Petitioner asserts Pintor in its Petition are not the same as that for which the Examiner relied on Pintor during examination of the '288 patent.

It is also significant that Petitioner does not assert Pintor against any feature of independent claims 1 and 8 of the '550 patent. For these independent claims, the challenge grounds rely on each of Barg, York, and Handras individually. Pet. 24–35, 42–44, 46–58, 65–67, 69–84, 90–93.

Consequently, we find that Petitioner uses Pintor for materially different teachings than the Examiner did, and that Pintor is not cumulative, nor is there overlap between the statements regarding Pintor in the

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prosecution histories of the '550, '036, and '288 patents and Petitioner's contentions in this proceeding. Hence, the combinations of Barg, York, and Handras each with Pintor do not constitute substantially the same art or argument as considered during prosecution of the '550 patent.

We thus turn to address whether Barg, York, and Handras are substantially the same or cumulative to Newman, MacLaren, Lee, and Rivers. The Examiner relied on Newman for most limitations of the claims, except for certain features taught by other references. Ex. 1004, 151–156. The Applicant distinguished Newman on the basis that it was specifically designed to fit padding for a bra and not the claimed items. Ex. 1004, 173–174. Barg, York, and Handras all have pockets that are designed for holding personal items, not padding or prosthetics. Accordingly, Barg, York, and Handras are not materially the same as or cumulative to Newman.

The Examiner relied on MacLaren for its teaching “the pocket inner layer attached to a pocket outer layer and piping/ binding around the layers and on the upper edge of the inner pocket layer as claimed.” Ex. 1004, 155. Petitioner relies on each of Barg, York, and Handras for much more than this narrow MacLaren teaching, including all of the limitations of independent claims 1 and 8.

As for Lee and Rivers, there is no indication in the prosecution histories of the '550 and '036 patents what the Examiner may have thought of these references—they were merely noted as having been considered without comment. We are aware of no evidence to suggest that Barg, York, and Handras are substantially the same as or cumulative of Lee and Rivers.

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In addition, we find no exhibit for Rivers and it is thus not part of the record that we could consider in this Institution Decision.

Consequently, we determine that the combinations of Barg, York, and Handras each with Pintor do not present substantially the same art or arguments as considered during the examination of the '550, '036, and '288 patents.

3. Advanced Bionics Part 2

Advanced Bionics Part 2 concerns whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims. *Advanced Bionics*, IPR2019-01469, Paper 6 at 8.

Because we decide that the same or substantially the same art or arguments were not presented previously to the Office, we do not reach *Advanced Bionics Part 2*.

4. Conclusion

Based on our analysis within 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 our discretion to deny institution.

IV. PETITIONER'S GROUNDS OF UNPATENTABILITY

A. Legal Standards

Before considering Petitioner's and Patent Owner's contentions, we address in this section legal standards relevant to this proceeding.

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1. Petitioner's Burden

“In an [*inter partes* review], 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”)). This burden of persuasion never shifts to the patent owner. *See Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015).

2. Obviousness

A patent claim is unpatentable under 35 U.S.C. § 103 if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art (“POSITA”) 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 ordinary skill in the art; and (4) objective evidence of nonobviousness. *See Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

B. Level of Ordinary Skill in the Art

In determining the level of ordinary skill in the art, various factors may be considered, including the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are

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made; sophistication of the technology; and educational level of active workers in the field.” *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (internal quotation marks and citation omitted). The applied prior art may reflect an appropriate level of skill. *Okajima v. Bourdeau*, 261 F.3d 1350, 1354–55 (Fed. Cir. 2001).

Petitioner asserts the following:

A POSA⁹ 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. . . . Formal education in a relevant field, such as fashion and textile design, may compensate for less experience. *Id.*

Pet. 24 (citing Ex. 1001 ¶ 155).

Patent Owner does not address Petitioner’s proposed level of ordinary skill in the art. *See generally* Prelim. Resp.

Petitioner’s proposed level of skill in the art is consistent with the ’550 patent and the asserted prior art except that we set the level to “two . . . years of experience” because the qualifier “at least two” may render the level ambiguous. Otherwise, we agree with and will use Petitioner’s proposed level for this Institution Decision.

C. Claim Construction

We interpret the ’550 patent claims “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). This “includ[es] construing the claim in accordance with the ordinary and customary

⁹ We understand “POSA” to mean “Person of Ordinary Skill in the Art.”

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meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” *Id.*

Neither Petitioner nor Patent Owner propose any construction for any claim term in this proceeding. Accordingly, we apply the ordinary and customary meaning to the claim terms without special construction.

D. Ground 1: Obviousness over Barg and Pintor

Petitioner contends that claims 1–14 of the ’550 patent would have been obvious over the combination of Barg and Pintor. Pet. 24–46. Patent Owner does not provide any arguments on the merits at this time.

We conclude that the record demonstrates a reasonable likelihood that Petitioner would prevail with respect to challenged claims 1–14 for the following reasons.

1. Overview of Barg (Ex. 1019)

Barg is directed to “a brassiere equipped with an opening to provide a pocket that has access means attached thereto.” Ex. 1019, 1:13–15. The pocket is used “for storing valuables, or the like.” *Id.* at 1:18–20.

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Barg's Figure 2 is shown below.

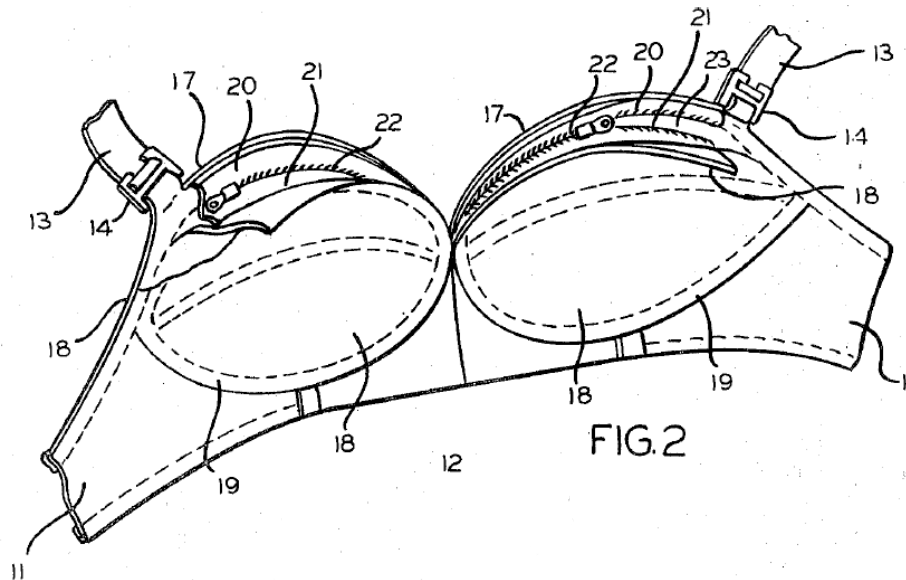


Figure 2 is a rear view of a brassiere showing a hookless fastener closed at one side and partially opened at the other side to form a pocket. *Id.* at 1:52–55. Breast cups 10 are supported by body portion 11, elastic center portion 12, and shoulder straps 13. *Id.* at 1:65–70. Breast cups 10 have an outer section 17 and inner section 18 attached to one another along the side and bottom areas “in any convenient and efficient manner.” *Id.* at 2:5–9. Breast cup sections 17 and 18 have portions 20 and 21, respectively, which support a hookless fastener 22. *Id.* at 2:10–14. The upper edges of sections 17 and 18 form a pocket 23 when the hookless fastener is opened. *Id.* at 2:15–17.

2. Overview of Pintor (Ex. 1022)

Pintor discloses “a brassiere containing concealed pockets for concealing objects such as portable electronic devices, keys, toiletries, money and other valuables.” Ex. 1022, 4:59–61.

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Pintor's Figure 3 is shown below.

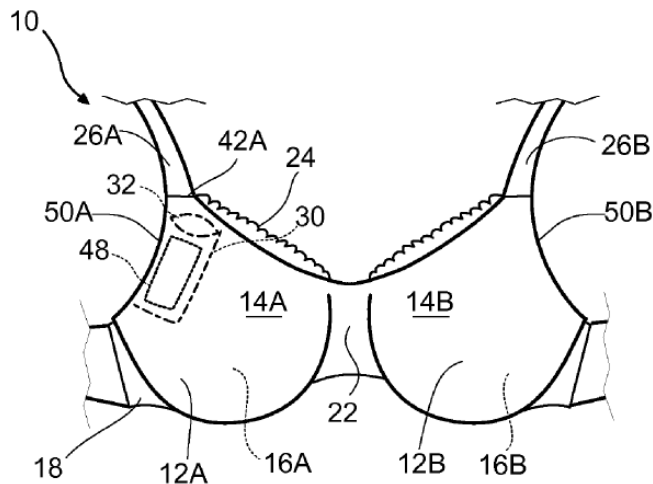


FIG. 3

Pintor's Figure 3 shows an article 10 of clothing such as a bra, swimsuit, or halter top. *Id.* at 6:44–46. Article 10 has breast covers 12A, 12B joined by medial portion 22 and attached to shoulder straps 26A, 26B and torso band 18. *Id.* at 6:46–48. Pocket 30 is attached to interior surface 16A of first breast cover 12A and positioned on lateral side 50A of breast cover 12A. *Id.* at 6:49–51. Pocket 30 is coextensive with lateral side 50A of breast cover 12A. *Id.* at 6:51–52. Pocket 30 contains concealed object 48. *Id.* at 6:52–53. The pocket may be attached to the interior of breast cover “by any known means such as stitching.” *Id.* at 3:51–53.

3. *Claim 1*

We now address Petitioner's contentions for claim 1. Pet. 24–37. Patent Owner does not dispute Petitioner's contentions at this time other than the motivation to combine Barg and Pintor and objective indicia of nonobviousness, which we discuss in later sections of this Institution Decision.

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For the reasons discussed below, we agree with Petitioner that on this preliminary record, that Petitioner has presented a reasonable likelihood that claim 1 would have been obvious over the combination of Barg and Pintor. Therefore, we institute *inter partes* 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).

(i) Limitation 1A—Preamble: Pocket Bra

The preamble of claim 1 recites “A pocket bra comprising:”

Petitioner contends that, to the extent the preamble is limiting, Barg discloses “a brassiere that has a pocket therein for storing valuables.” Pet. 24–25 (quoting Ex. 1019, 1:19–25, Figs. 1, 2).

Petitioner shows sufficiently for institution that Barg discloses the preamble, and consequently, we need not decide whether the preamble is limiting.

(ii) Limitation 1B: Strap Assembly Comprising Chest Strap

Claim 1’s limitation 1B recites “a strap assembly comprising a chest strap.”

Petitioner contends that Barg discloses a traditional bra with cups supported by a body portion 11 which constitute the claimed “chest strap.” Pet. 26 (citing Ex. 1019, 1:65–2:2). Petitioner contends that Barg’s Figure 1 discloses the “body portion” chest strap and two conventional shoulder straps. *Id.* (citing Ex. 1019, Fig. 1 (annotated)).

Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1B.

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(iii) Limitation 1C: Left and Right Cups Having Inside and Outside Surfaces

Claim 1’s limitation 1C recites “and comprising left and right cups, each cup being an area to receive a breast of a wearer and having inside and outside surfaces.”

Petitioner contends that Barg discloses a bra with right and left cups having inside and outside surfaces, which “are substantially conical to fit the form, shape and contour of the breast.” Pet. 26–28 (citing Ex. 1019, 1:62–65, 1:78–79, Figs. 1, 3, 4 (annotated); Ex. 1001 ¶ 503).

Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1C.

(iv) Limitation 1D: Strap Assembly Attached to Cups

Claim 1’s limitation 1D recites “the strap assembly being attached to the cups whereby the strap assembly connects the cups to the wearer.”

Petitioner contends that Barg discloses that the strap assembly adheres the cups to a wearer. Pet. 28 (citing Ex. 1019, 1:65–69; Ex. 1001 ¶ 504).

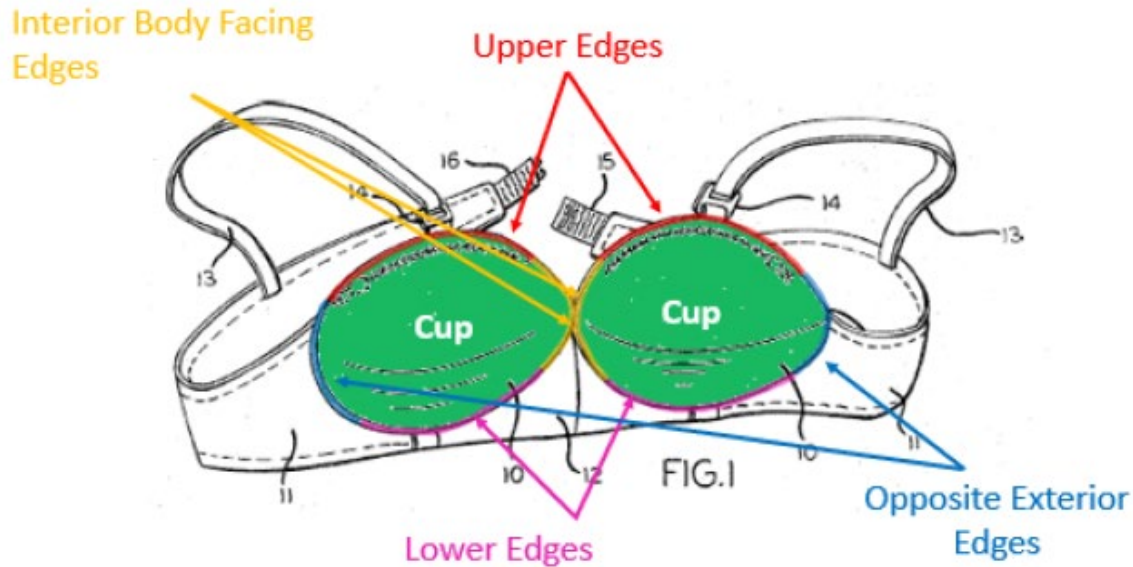
Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1D.

(v) Limitation 1E: Cup Edges

Claim 1’s limitation 1E recites “each cup having upper, lower, interior body facing, and opposite exterior edges.”

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To show that Barg discloses these features, Petitioner provides an annotated version of Barg's Figure 1 as shown below.



Pet. 29. As indicated by annotations in Barg's Figure 1 above, Petitioner shows that each cup has upper, lower, interior body facing, and opposite exterior edges.

Petitioner shows sufficiently for institution that Barg discloses claim 1's limitation 1E.

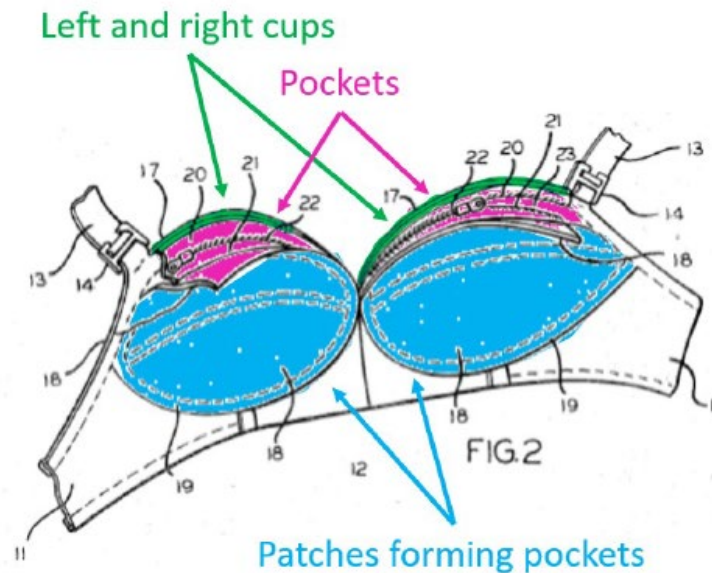
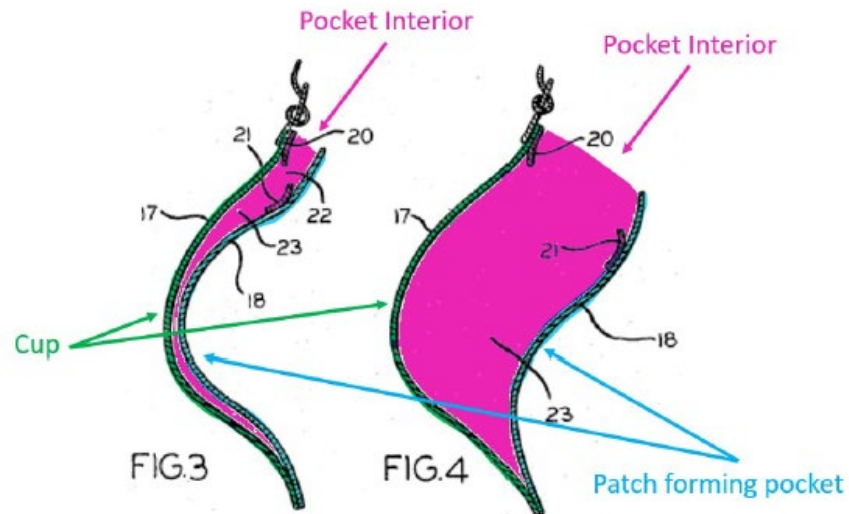
(vi) Limitation 1F: Pocket Patch

Claim 1's limitation 1F recites "a patch forming a pocket operatively associated with at least one of the left and right cups."

Petitioner contends that a "patch" is disclosed by Barg's inner section 18 attached to the inner surface of outer section 17 of the bra cups 10 to create a pocket 23 associated with each cup. Pet. 29–30 (citing Ex. 1019, 2:5–25, Figs. 2–4 (annotated); Ex. 1001 ¶ 506).

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Annotated versions of Barg's Figures 2–4 are shown below.



Pet. 30. Petitioner's annotated Figures 2–4 above show patches forming pockets on each cup. Alternatively, Petitioner contends that outer section 17 can be the patch while inner section 18 is the cup such that the pockets are on the outside of the breast cups. *Id.* (citing Ex. 1001 ¶ 506).

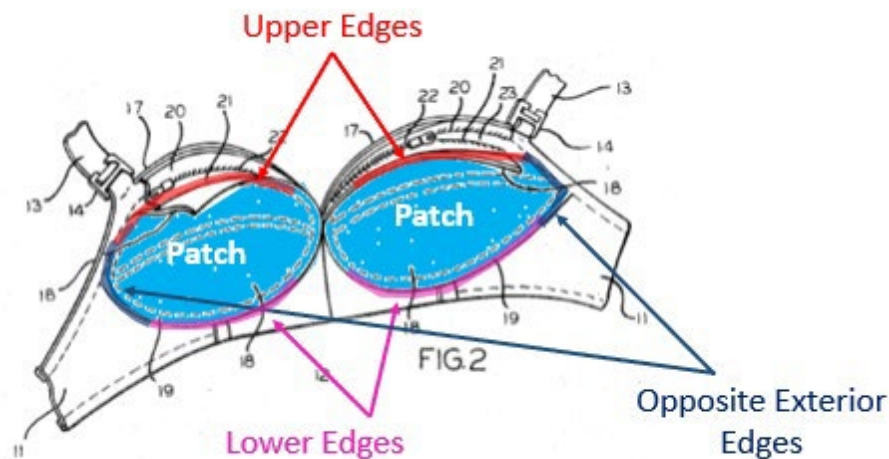
Petitioner shows sufficiently for institution that Barg discloses claim 1's limitation 1F.

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(vii) Limitation 1G: Patch Edges and Surfaces

Claim 1's limitation 1G discloses "the patch having an upper edge, a lower edge, and an exterior edge, the patch having inside and outside surfaces."

Petitioner contends that Barg discloses a patch with an upper edge, a lower edge, and an exterior edge. Pet. 31 (citing Ex. 1019, 2:5–10). Petitioner provides an annotated version of Barg's Figure 1 as shown below.

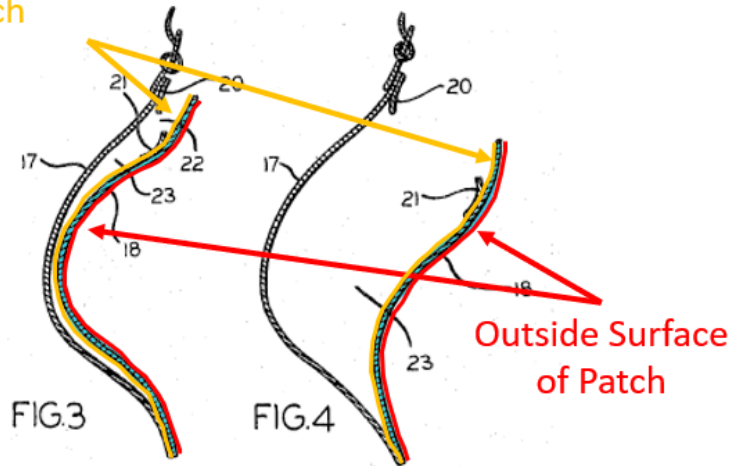


Pet. 31. Petitioner annotates Barg's Figure 1 above to show upper edges, lower edges, and exterior edges of the patch.

Petitioner further provides annotated versions of Barg's Figures 3 and 4 as depicted below.

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Inside Surface of
Patch



Petitioner’s annotations of Barg’s Figures 3 and 4 above show the patch’s inside and outside surfaces. Pet. 32 (citing Ex. 1001 ¶ 507).

Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1G.

(viii) Limitation 1H: Patch Edge Coupling and Unconnected Opening

Claim 1’s limitation 1H recites “the lower edge of the patch coupled to the bra adjacent to a lower edge of the at least one of the left and right cups, and the exterior edge of the patch coupled adjacent to the exterior edge of the at least one of the left and right cups, a pocket opening formed along the upper edge of the patch being unconnected¹⁰ to the at least one of the left and right cups.”

¹⁰ The parties should consider submitting constructions for “unconnected” during trial and addressing whether this precludes an opened zipper or snap button, for example.

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Petitioner contends that Barg discloses that cups and patches are “attached to one another along the peripheral edge at the side and bottom areas . . . in any convenient and efficient manner.” Pet. 32 (quoting Ex. 1019, 2:7–9). Petitioner further states that “Barg discloses that ‘the upper edges’ of the cups and patches ‘form an area to form a pocket 23 when the hookless fastener 22 is opened.” *Id.* at 32–33 (quoting Ex. 1019, 2:15–16, Fig. 2).

Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1H.

(ix) Limitation II: Pocket Opening

Claim 1’s limitation 1I recites “the pocket opening capable of repeated receiving and removal of an item when being worn by the wearer.”

Petitioner contends that “Barg discloses ‘a pocket therein for storing valuables, or the like.’” Pet. 33 (citing Ex. 1019, 1:19–20). Petitioner asserts that a POSA would have understood the necessity of making the opening such that items could be repeatedly received and removed so that the wearer could access, remove, and replace stored items from the pocket. *Id.* (citing Ex. 1001 ¶ 111).

Petitioner further asserts that Barg teaches that “a ‘prime object of [its] invention’ is to ‘produc[e] a pocket for valuables . . . that is easily accessible’ while in use by the wearer.” *Id.* (citing Ex. 1019, 1:36–44, 2:17–21 (“The hookless fastener . . . is concealed from view . . . so that it will not be noticeable in the general appearance of the brassier when in use and will not abut the skin of the wearer”))).

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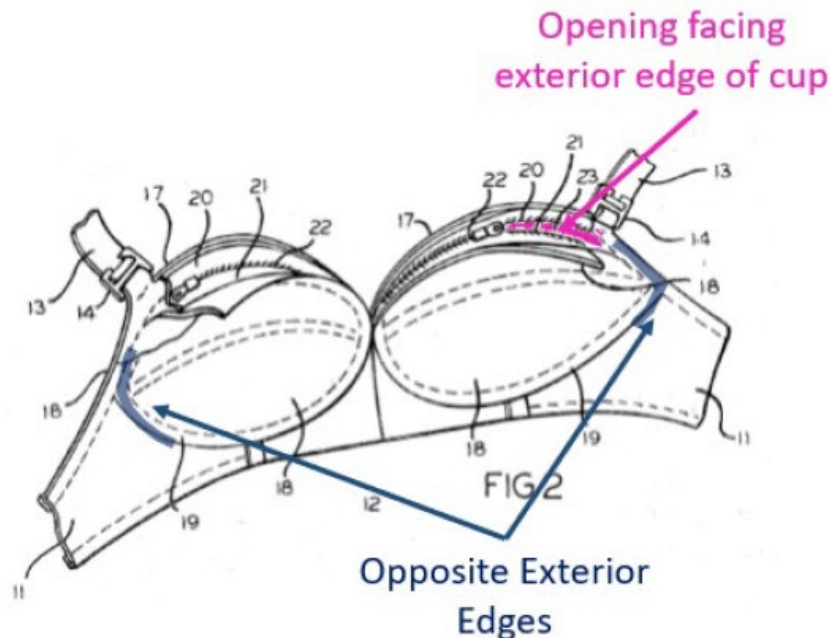
Petitioner shows sufficiently for institution that Barg discloses claim 1's limitation 1I.

(x) *Limitation 1J: Patch Crosses Over Cup Surface to Form Opening Facing Cup's Exterior Edge*

Claim 1's limitation 1J recites "wherein the upper edge of the patch crosses over a surface of the cup to form the opening, the upper edge crossing such that the opening faces¹¹ the exterior edge of the at least one of the left and right cup to which it is attached."

Petitioner contends that the "upper edges of Barg's patches cross over the surface of the cup to form the opening." Pet. 34 (citing Ex. 1019, Figs. 3–4 (annotated)).

Petitioner provides an annotated version of Barg's Figure 2 below.



¹¹ The parties should consider submitting constructions during trial to explain what it means for the pocket's opening to face a cup's exterior edge.

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Pet. 34. Barg’s Figure 2 above is annotated by Petitioner to show the opposite exterior edges of the cup and a pocket opening facing the exterior edge of a cup. *Id.* at 34–35.

Petitioner shows sufficiently for institution that Barg discloses claim 1’s limitation 1J.

(xi) Motivation to Combine with Reasonable Expectation of Success

Petitioner relied exclusively on Barg to disclose all limitations of claim 1. Pet. 24–35. Hence, we do not address Petitioner’s proposed motivation to combine Barg and Pintor with reasonable expectation of success because the combination is not relevant to Petitioner’s contentions for claim 1.

(xii) Objective Indicia of Nonobviousness

Patent Owner contends that various objective indicia demonstrate that the challenged claims would not have been obvious over the combination of Barg and Pintor. Prelim. Resp. 18–24. At this stage of the proceeding, Petitioner has not had any opportunity to address the evidence of objective indicia. On this record and for the reasons explained below, we are not persuaded by Patent Owner’s argument as it relates to claim 1.

Legal Standard

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

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what the teachings of the prior art would have suggested to one skilled in the art, objective indicia 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). Accordingly, our obviousness analysis includes consideration and weighing of Patent Owner’s evidence of objective indicia.

In order to accord substantial weight to objective indicia in an obviousness analysis, the evidence “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).

A 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, when 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.

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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. A patent owner is entitled to a rebuttable presumption of nexus 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*, 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)); *Fox Factory, Inc. v. SRAM LLC*, 944 F.3d 1336, 1373 (Fed. Cir. 2019). 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. *Id.*

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” objective indicia. *Id.* at 1377. Thus, simply showing that a patent claim broadly covers the commercial product being asserted as objective evidence

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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,” however “does not end the inquiry” into objective indicia. *Id.* at 1373. “To the contrary, the patent owner is still afforded an opportunity to prove nexus by showing that the evidence of objective indicia 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 objective indicia “actually result[] 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–

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1132 (Fed. Cir. 2016). Only if 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.

Evidence Related to Nike Products

Patent Owner argues that “the claims of the ‘550 patent read on or are highly coextensive with [Nike’s] Swoosh on the Run.” Prelim. Resp. 26 (citing Exs. 2043–2052, 2054–2057). The evidence, however, does not support a conclusion that Nike’s Swoosh on the Run is coextensive with the ‘550 patent’s claimed invention. Indeed, Patent Owner submits claim charts allegedly showing that Nike’s Swoosh on the Run infringes not only the ‘550 patent (Ex. 2056), but also four other patents in the family (Exs. 2053–2055, 2057). Those other claim charts demonstrate that Swoosh on the Run includes many features not claimed in the ‘550 patent. *See e.g.*, Ex. 2055 (showing Swoosh on the Run has a back pocket). Thus, on this record, Patent Owner has not persuasively shown a rebuttable presumption of nexus between Nike’s Swoosh on the Run and the challenged claims.

Patent Owner asserts that “there is significant evidence that NIKE copied the patented application in the ‘550 patent.” Prelim. Resp. 20. According to Patent Owner, “NIKE received copies of patents and sample products from [the named inventor of the ‘550 patent] Ms. Goff prior to filing its patents or marketing any of the allegedly infringing products.” *Id.* at 25. Patent Owner alleges that “each of the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run has several points of similarity

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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.” *Id.* Ms. Goff testifies that she corresponded with Nike about her Pocket Bra and submitted examples of her products. *See* Ex. 2001. Patent Owner also relies on the Swoosh on the Run infringement claim chart as allegedly showing that Nike copied the ’550 patent’s claimed invention. Prelim. Resp. 25 (citing Ex. 2053¹²).

Patent Owner’s evidence, however, does not sufficiently 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.”). In addition, neither Ms. Goff’s testimony nor the Nike Idea Submission is specific to the ’550 patent’s claimed invention. *See generally* Exs. 2001, 2035. For example, none of the pictures in the Nike Idea Submission sufficiently shows certain feature of the ’550 patent’s claimed invention, which includes a pocket “opening [that] faces the exterior edge of the at least one of the left and right cup to which it is attached.” *See, e.g.*, Ex. 2035, 2–4. On this record, Patent Owner has not presented sufficient evidence of copying.

Evidence Related to Ms. Goff’s Pocket Bra

Patent Owner contends that Ms. Goff’s Pocket Bra is coextensive with the ’550 patents claimed invention. *See generally* Prelim. Resp. 26. Patent

¹² Patent Owner cites Ex. 2053. Prelim. Resp. 25. That exhibit, however, is “‘036 Swoosh on the Run Chart,” and not related to the ’550 patent. For purposes of this Decision, we deem the error harmless and consider the correct exhibit, i.e., Exhibit 2056. We, however, request the parties strive to provide accurate citations in future submissions.

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Owner, however, states 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.”). Patent Owner’s evidence of objective indicia, however, appears to relate to variations of the Pocket Bra that do not include the ’550 patent’s claim invention. *See* Prelim. Resp. iv (showing Exhibits 2008–2020 and 2025–2034 do not relate to the ’550 patent). Thus, based on the record at this stage of the proceeding, we do not apply a presumption of nexus between the ’550 patent’s claimed invention and Ms. Goff’s Pocket Bra.

Patent Owner argues that “[f]urther support for the nonobviousness of the ’550 patent is found in the licenses to competitors of the ’550 patent and other patents in its family.” Prelim. Resp. 3, 27 (citing Exs. 2001, 2004–2034). In particular, Patent Owner points to licenses to Tracksmith LLC and Senita LLC. *Id.* at 2–3, 21–22. Patent Owner asserts that a nexus exists because the licensees agree to mark their products with the licensed patents. *Id.* at 22.

The Tracksmith license was expunged from the record. *See* Ex. 2005. Consequently, we cannot evaluate Patent Owner’s assertions with respect to this license, and they are ineffective to establish nexus.

The Senita license lists the ’550 patent as a licensed patent. Ex. 2007, 7. Patent Owner also provides a claim chart showing how claims 8 and 10 of the ’550 patent allegedly read on Senita’s Sculpt Support Bra. Ex. 2021. The claim chart, however, is not relevant to claim 1 of the ’550 patent.

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Relying on the same licenses, Patent Owner argues that “there is some evidence of commercial success of products linked to the ‘550 patent and the other Disputed Patents.” Prelim. Resp. 28. 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 points to the Allston Bra from Tracksmith, LLC as evidence of commercial success, but as explained above, that license was expunged from the record and thus does not support Patent Owner’s assertion. Ex. 2005. Patent Owner also alleges that Rabbit, LLC “earned gross revenue in sales of at least 2.25 million dollars with respect to [the] licensed products.” *Id.* at 29 (citing Ex. 2006, terms 4.2, 5.1). Patent Owner has not shown, however, that this revenue relates to the ’550 patent.

Patent Owner asserts that “there is some evidence of industry praise [for] products linked to the ‘550 patent and the other Disputed Patents.” Prelim. Resp. 29. As support, Patent Owner submits an article in which “one industry expert” described the Pocket Bra as “genius.” *Id.* at 29 (citing Ex. 2003). Exhibit 2003 is an article that 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.” Ex. 2003, 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 ’550 patent’s claimed invention. Thus, on this record, we are not persuaded that

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there is a nexus between this alleged industry praise and a unique feature of the '550 patent's claimed invention and that this evidence of industry praise demonstrates nonobviousness of the '550 patent's claimed invention.

As further evidence of industry praise, Patent Owner submits the testimony of Ms. Goff. Prelim. Resp. 31 (citing. Ex. 2001 ¶¶ 6–7). Ms. 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.

Ms. Goff's testimony, however, does not sufficiently inform us which variation of the Pocket Bra is being praised. Further, Ms. Goff, as the sole inventor, is an interested party. Thus, we give little weight to her testimony as to alleged industry praise spoken by others. On this record, we are not persuaded that there is a nexus between this alleged industry praise and a unique feature of the '550 patent's claimed invention and that this evidence of alleged industry praise demonstrates nonobviousness of the '550 patent's claimed invention.

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Summary of Objective Indicia Analysis

Given the above, on this record, we give little weight to Patent Owner’s evidence of a licensed product with respect to claim 1 of the ’550 patent.

(xiii) Conclusion for Claim 1

Based on the evidence and arguments of record at this stage of the proceeding, we determine that Petitioner has shown that each element of claim 1 of the ’550 patent is disclosed by the combination of Barg and Pintor. Since Petitioner did not assert that Pintor discloses any limitation of claim 1, we determined that Petitioner did not need to establish a motivation to combine Pintor or reasonable expectation of success in doing so for claim 1. Lastly, Patent Owner’s objective indicia did not relate to claim 1. Accordingly, Petitioner has shown a reasonable likelihood that claim 1 would have been obvious over the combination of Barg and Pintor.

4. Claim 8

Many of the limitations of claim 8 are similar to claim 1, and Petitioner refers back to its mapping for claim 1 for those limitations. Pet. 42–43. However, the last limitation 8J recites “wherein the upper edge of the patch crosses over a surface of the cup to form the opening, the upper edge crossing such that the opening faces the *interior* edge¹³ of the at least

¹³ The parties should consider submitting constructions during trial to explain what it means for the pocket’s opening to face a cup’s interior edge. Also, concerning limitation 8H, the parties should consider submitting constructions to address whether an “unconnected” opening precludes an opened zipper or snap button, for example

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one of the left and right cup to which it is attached” (emphasis added). Thus, claim 8 differs from claim 1 in reciting that pocket opening faces the cup’s interior edge whereas claim 1 recites that the opening faces the cup’s exterior edge.

Petitioner contends that while Barg shows that its pocket opening faces the exterior edge of a cup, it “is simply a design choice” to have the opening face the interior edge of the cup. Pet. 43 (citing Ex. 1001 ¶ 536). Petitioner asserts that the motivation to modify Barg would have been to better protect pocket contents, and would have a high likelihood of success because it “simply requires adjusting a known sewing technique.” *Id.* at 44.

Patent Owner has submitted alleged evidence of a license for this claim as objective indicia of nonobviousness. *See* § IV.D.3.xii, *supra*.

We will await development of the record before addressing claim 8 further.

5. Remaining Dependent Claims

We have reviewed Petitioner’s contentions for claims 2–7 and 9–14 and find that the combination of Barg and Pintor discloses their specific limitations. Pet. 35–41, 44–46. Patent Owner does not dispute Petitioner’s contentions specific to these claims. *See generally* Prelim. Resp.

Patent Owner does argue, however, that Pintor “teaches away” from Barg. Prelim. Resp. 16–17. Specifically, Patent Owner argues that Pintor teaches that pockets sewn into the front of cups are undesirable because they cause stored objects to be visible under clothing and “may not provide a suitable aesthetic appearance.” *Id.* at 16–17. Patent Owner thus argues that Pintor “teaches away” from Barg which has such pockets. *Id.* at 17.

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Patent Owner’s “teaching away” argument is relevant to claims 2, 4–5, 7, 9, 11–12, and 14 for which Petitioner relies on Pintor in addition to Barg. Pet. 36 (claim 2), 38 (claim 4), 39 (claim 5), 40 (claim 7), 44–46 (claims 9, 11, 12, 14). Petitioner asserts Barg alone for the remaining claims.

As explained, Patent Owner has provided alleged evidence of objective indicia of nonobviousness for claim 10 due to a license. *See* § IV.D.3.xii, *supra*.

We will await development of a full record before addressing these dependent claims further.

E. Ground 2: Obviousness over York and Pintor

Petitioner contends that claims 1–14 of the ’550 patent would have been obvious over the combination of York and Pintor. Pet. 46–69. Patent Owner presents the same or similar arguments for this ground as it did for ground 1. Prelim. Resp. 16–17 (teaching away), 21–22 (license).

We have already determined that Petitioner has shown a reasonable likelihood to prevail with respect to claim 1 in ground 1. Thus, we do not address this ground further other than to indicate that many of the issues identified in ground 1 will also apply to ground 2 when we consider it on the full record.

F. Ground 3: Obviousness over Handras and Pintor

Petitioner contends that claims 1–14 of the ’550 patent would have been obvious over the combination of Handras and Pintor. Pet. 69–94. Patent Owner presents the same or similar arguments for this ground as it did for ground 1. Prelim. Resp. 16–17 (teaching away), 21–22 (license).

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We have already determined that Petitioner has shown a reasonable likelihood to prevail with respect to claim 1 in ground 1. Thus, we do not address this ground further other than to indicate that many of the issues identified in ground 1 will also apply to ground 2 when we consider it on the full record.

V. CONCLUSION

For the above reasons, we conclude the record demonstrates a reasonable likelihood that Petitioner would prevail with respect to at least one challenged claim, so we grant institution of the petitioned *inter partes* review per 35 U.S.C. § 314(a) for all challenged claims and all grounds. *See* 37 C.F.R. § 42.108(a).

VI. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), the petitioned institution of *inter partes* review of claims 1–14 of the '550 patent is *granted*; 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 and that the trial will commence on the entry date of this decision.

CONFIDENTIAL — BOARD AND PARTIES ONLY

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¹⁴ In an *inter partes* review, “a party must designate a lead counsel and *at least one back-up counsel* who can conduct business on behalf of the lead counsel.” 37 C.F.R. § 42.10 (emphasis added). Although Patent Owner has named two back-up counsel (Paper 3, 1), we remind Patent Owner that *pro hac vice* motions have not been filed to permit the named back-up counsel to appear before the Board. *See* 37 C.F.R. § 42.10.