

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,
Petitioner,

v.

SHERRYWEAR LLC,
Patent Owner.

IPR2024-01128
Patent 10,244,800 B1

Before MEREDITH C. PETRAVICK, LYNNE H. BROWNE, and JON
JURGOVAN, *Administrative Patent Judges*.

BROWNE, *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 1–3, 5, 7, and 10 of U.S. Patent No. 10,244,800 B1 (Ex. 1015, “the ’800 patent”). Paper 1 (“Pet.”). SherryWear, LLC (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”).

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, 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 ’800 patent. Accordingly, we institute an *inter partes* review of claims 1–3, 5, 7, and 10 of the ’800 patent on the grounds asserted in the Petition.

B. *Real Parties in Interest*

Petitioner identifies Nike, Inc. as the real party-in-interest. Pet. 4. Patent Owner identifies SherryWear, LLC as the real party-in-interest. Paper 3, 1.

C. *Related Matters*

The parties identify *SherryWear, LLC, v. Nike, Inc.*, No. 1:23-cv-11599 (D. Mass), filed July 17, 2023, as a related proceeding. Pet. 4; Paper 3, 1. Petitioner also notes that it has filed *inter partes* review petitions on every patent (in addition to the ’800 patent) asserted in the related litigation, identifying IPR2024-01122 (challenging U.S. Patent No. 9,289,016),

IPR2024-01128
Patent 10,244,800 B1

IPR2024-01123 (challenging U.S. Patent No. 9,295,288), IPR2024-01125 (challenging U.S. Patent No. 9,808,036), 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), and IPR2024-01129 (challenging U.S. Patent No. 10,869,510) as the filed *inter partes* review petitions. Paper 6, 1.

Patent Owner also identifies pending U.S. Patent Application No. 18/223,363, which is a continuation application claiming priority to the '800 patent. Paper 3, 1.

D. The '800 patent

The '800 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. 1013, 1:7–12.

Figure 13, reproduced below, shows an embodiment of a bra that has a back pocket. Ex. 1013, 3:31–33.

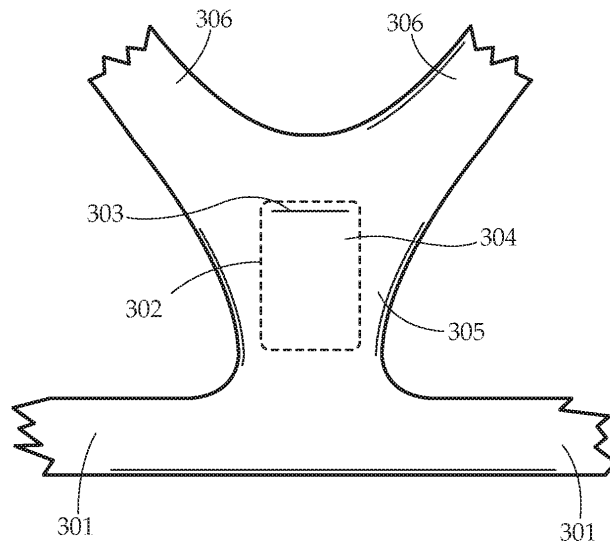


Fig. 13

As depicted in Figure 13, two shoulder straps 306 and two sides of chest strap 301 extend away from central area 305 having pocket 304. *Id.* at 6:4–7. The '800 patent states that pocket 304 “may be formed in any manner and may be defined at its boundary 302 by stitching, a separate pocket material behind the central area 305 material, or by any other structure.” *Id.* at 6:7–9.

E. Illustrative Claim

Petitioner challenges claims 1–3, 5, 7, and 10 of the '800 patent. Claim 1 is independent. Claims 2, 3, 5, 7, and 10 depend directly or indirectly from claim 1.

Claim 1 is reproduced below with element labels added.

1.¹ [1A] A pocket bra assembly comprising:

[1B] a strap assembly including a chest strap and shoulder straps, [1C] the chest strap having a front portion configured to be positioned on a front of a user, and a back portion configured to be positioned on a back of the user, [1D] the shoulder straps each having a front portion configured to be positioned on the front of the user, and a back portion configured to be positioned on the back of the user;

[1E] a bra portion, the bra portion configured to provide support and shape breasts of the user, [1F] the strap assembly being attached to the bra portion whereby the strap assembly holds the bra portion to the user, with the chest strap extending from a first side of the bra portion towards the user's back and extending from a second opposite side of the bra portion towards the user's back;

[1G] a back pocket formed entirely of stretchable fabric positioned on the back portion of at least one of the chest strap and shoulder straps, [1H] the back pocket having an opening formed that is biased in a closed position at rest, providing access to a pocket interior; and

[1I] an item positioned within the back pocket.

Ex. 1013, 6:54–7:8.

F. Asserted Grounds

Petitioner asserts that claims 1–3, 5, 7, and 10 would have been unpatentable on the following grounds:

Ground	Claim(s) Challenged	35 U.S.C. §	Basis
1	1–3, 5, 7, 10	103	Spagna ²

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

² U.S. Patent Application Publication No. 2007/0298684 A1, published Dec. 27, 2007 (Ex. 1028).

Ground	Claim(s) Challenged	35 U.S.C. §	Basis
2	1–3, 5, 7, 10	103	Rose ³
3	1–3, 5, 7, 10	103	Glass ⁴

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

Patent Owner submits an Affidavit (Ex. 2001) of Sharon Goff, who is the inventor of the '800 patent.

II. ANALYSIS

A. 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,

³ U.S. Patent Application Publication No. 2011/0223832 A1, published Sept. 15, 2011 (Ex. 1030).

⁴ U.S. Design Patent No. D641,954 S, published Jul. 26, 2011 (Ex. 1029).

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).⁵ *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)).

“Whether an ordinarily skilled artisan would have been motivated to modify the teachings of a reference is a question of fact.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1327 (Fed. Cir. 2016) (citations omitted).

“[W]here a party argues a skilled artisan would have been motivated to combine references, it must show the artisan ‘would have had a reasonable expectation of success from doing so.’” *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1360–61 (Fed. Cir. 2017) (quoting

⁵ Patent Owner presents evidence of secondary considerations. See Prelim. Resp. 1–12, 23–29, 32–33.

In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig., 676 F.3d 1063, 1068–69 (Fed. Cir. 2012)).

B. Level of Ordinary Skill in the Art

Petitioner asserts that a person of skill in the art “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.” Pet. 17–18 (citing Ex. 1001 ¶ 155). Petitioner asserts further that “[f]ormal education in a relevant field, such as fashion and textile design, may compensate for less experience.” *Id.* Patent Owner does not address the 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 ’800 patent and the asserted prior art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

C. 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 formal 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.’”)

D. Prior Art

1. Summary of Spagna

Spagna is a U.S. patent application publication titled “Integrated Brassiere Pouch To Be Utilized with Medication Dispenser” and published December 27, 2007. Ex. 1028, codes [43], [54]. Spagna’s disclosed brassiere includes “an integrated pouch to accommodate an automated medication dispensing device” such as “an insulin pump.” *Id.* ¶ 8. Spagna’s Figure 2, reproduced below, illustrates a front view of the brassiere, Figure 3, reproduced below, illustrates the interior of the front of the brassiere of Figure 2 including an integrated pouch for supporting an automated medication dispensing device, and Figure 4, reproduced below, illustrates the interior view of the rear of the brassiere of Figure 2. *Id.* ¶¶ 13–15.

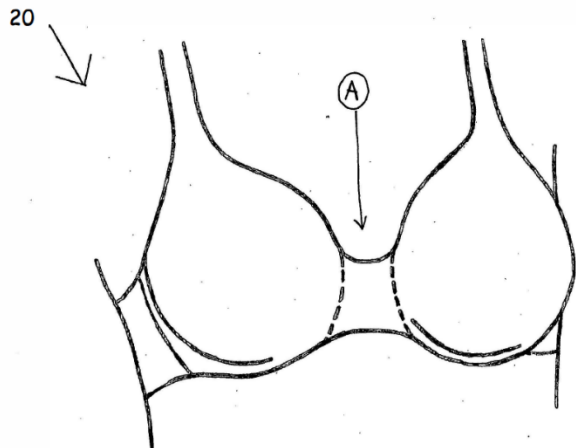


Fig. 2

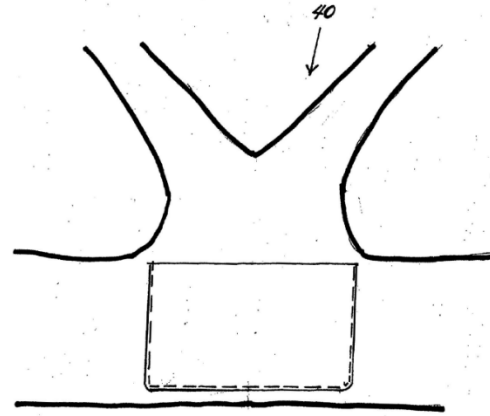


Fig. 4

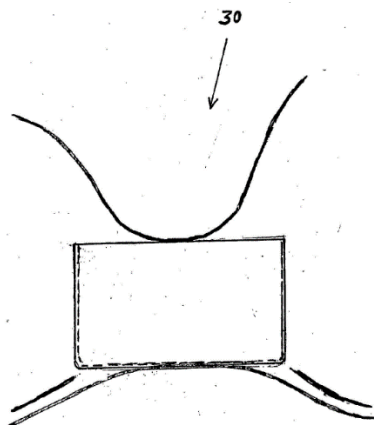


Fig. 3

Figures 2–4 illustrate brassieres including an integrated pouch for supporting an automated medication dispensing device. *Id.* ¶¶ 13–15. Specifically, Figure 2 illustrates a brassiere 20 where an optimal location for the dispensing device is at the center front A of the brassiere. *Id.* ¶ 17. Figure 3 illustrates the interior surface of the center front A of brassiere 20 of Figure 2, with a pouch 30 integrated into the interior surface of the brassiere. *Id.* ¶ 18. Figure 4 illustrates another embodiment in which an integrated pouch 40 similar to that of Figure 3 is placed on the interior surface of the back of brassiere 20, such that the integrated pouch may

include a larger surface area than that of Figure 3 while having a lower profile. *Id.* ¶ 20.

2. *Summary of Rose*

Rose “relates to a ladies’ brassiere with interchangeable coverings.” purposed to change the visual appearance of the brassiere.” Ex. 1030 ¶ 1. Figure 7, reproduced below, shows a rear view of a brassiere with latex pockets. Ex. 1030 ¶ 29.

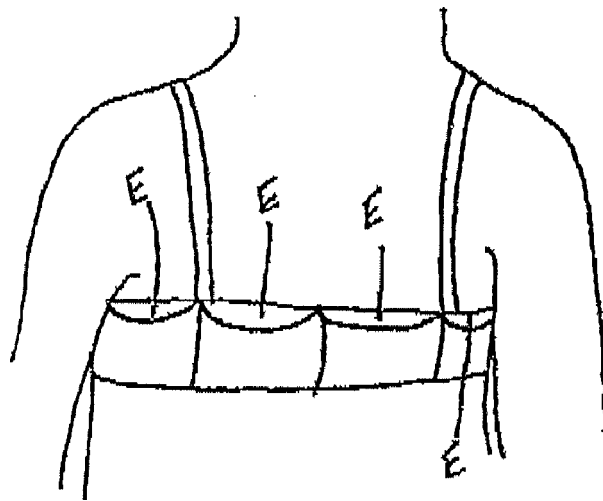


Fig #7

Rose explains that Figure 7 depicts an embodiment “in which the bra is provided with clear latex pockets on . . . the back band of the brassiere.” *Id.* ¶ 37. Rose states that “[t]he outer layer of the pockets is be made of clear, transparent material” and “[t]he pockets have slits E on the upper side.” *Id.* According to Rose, “[v]arious inserts made of, but not limited to, plastic, fabric, can be inserted into the pockets through the openings E” and such “inserts can be of different colours or patterns so as to change the appearance of the bra.” *Id.*

3. *Summary of Glass*

Glass is a U.S. Design Patent that relates to a “sports bra with [a] water bottle pocket on back.” Ex. 1029, code (54). Figure 2, reproduced below, illustrates a rear-elevational view of a sports bra having a water bottle pocket. *Id.*

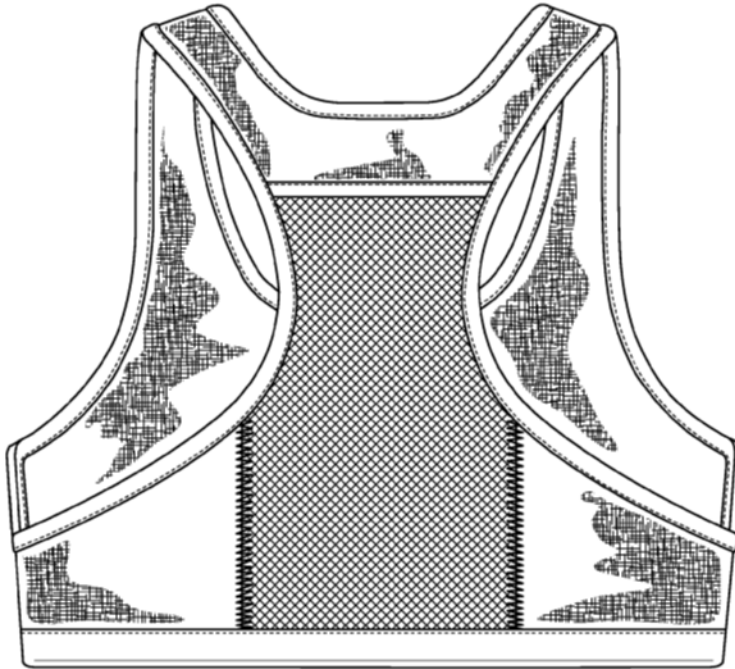


FIG. 2

E. Ground 1: Alleged Unpatentability of Claims 1–3, 5, 7, and 10 Over Spagna

Petitioner asserts that claims 1–3, 5, 7, and 10 are unpatentable over Spagna. Pet. 16–33. Patent Owner disagrees. Prelim. Resp. 13–23.

1. Claim 1

We have reviewed Petitioner’s assertions, and the evidence, arguments, and testimony in support thereof, for all of the limitations of claim 1 for this ground. As Patent Owner only disputes Petitioner’s

assertions regarding limitations [1G] and [1H], we focus our discussion on these limitations.

- a) [1G]: “a back pocket formed entirely of stretchable fabric positioned on the back portion of at least one of the chest strap and shoulder straps,”

Petitioner asserts that “Spagna discloses a pocket on the back portion of the chest strap.” Pet. 22 (citing Ex. 1028 ¶ 20, Fig. 4). Petitioner asserts further that “Spagna indicates that the bra may be constructed of ‘traditional materials’ such as ‘cotton, polyester, or synthetic and natural fiber blend.’” *Id.* Petitioner asserts that a person of skill in the art “would have understood that the pocket in addition to the bra itself, could likewise be made out of stretchable material” and that a person of skill in the art “would have understood that polyester and other synthetic fabrics, such as spandex or elastane, can be ‘stretchable fabric.’” *Id.* at 22–23 (Ex. 1001 ¶ 906).

Patent Owner responds that Petitioner’s “arguments for obviousness amount to stating that a POSA *could* choose a pocket of stretchable material from the various fabric types potentially available, without suggesting that Spagna motivates such a choice.” Prelim. Resp. 14–15. According to Patent Owner, “[t]his is an exercise in reasoning through [improper] hindsight.” *Id.* at 15.

We agree with Petitioner that the record demonstrates that Spagna suggests limitation [1G]. First, Spagna explicitly suggests the use of synthetic materials for the construction of the bra. Ex. 1028 ¶ 17. We agree with Petitioner that a person of skill in the art, and for that matter anyone who has worn a bra, would have found it obvious make Spagna’s bra from a stretchable synthetic fabric. Indeed, we posit that it would have been hard in 2007 to find a bra that was not made of a stretchable synthetic fabric.

Second, Spagna gives no indication that it contemplates making its pouch (i.e., the claimed pocket) from a different material than the bra. Rather, in describing a similar pocket in the front of the brassiere (Ex. 1028 ¶ 18), Spagna states that “the brassiere 20 and pouch may be manufactured during a single manufacturing process” which at least suggests making the bra and pouch from the same material.

Further, Patent Owner’s arguments requiring an explicit motivation are unconvincing. Rather, all that is required is “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”⁶ *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). For purposes of institution, Petitioner’s reasoning is sufficient.

In addition, Patent Owner’s allegations of improper hindsight reasoning are unconvincing.

Any judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill in the art at the time the claimed invention was made and does not include knowledge gleaned only from applicant's disclosure, such a reconstruction is proper. *In re McLaughlin*, 443 F.2d 1392, 1295 (CCPA 1971).⁷ Here, Petitioner’s reasoning takes into account only knowledge which was within the level of ordinary skill in the art at the time of the claimed invention (such as the fact

⁶ Patent Owner makes similar arguments requiring that Petitioner set forth explicit motivation in support of its position for the other limitations and grounds at issue and discussed below. These arguments are unconvincing for the same reasons and we do not discuss them further.

⁷ Patent Owner makes similar arguments about improper hindsight reasoning for the other limitations and grounds at issue and discussed below. These arguments are unconvincing for the same reasons and we do not discuss them further.

that bras made from “stretchable fabric” were the prevalent type of bra at the time of the invention).

For these reasons, we agree with Petitioner that Spagna suggests “a back pocket formed entirely of stretchable fabric” as required by limitation [1G] of claim 1.

b) [1H]: “*the back pocket having an opening formed that is biased in a closed position at rest, providing access to a pocket interior;*”

Petitioner asserts that “Spagna discloses that its pocket is ‘for holding an automated medication dispensing device,’ indicating that the wearer has access to the pocket’s interior in order to place such device in the pocket.” Pet. 24 (citing Ex. 1028, code (57)). Petitioner asserts further that “Spagna discloses that the device ‘can be safely maintained [in the pocket], even while the wearer is active’” and that this indicates to a person of skill in the art “that the pocket is biased in a closed position at rest, to ensure the objects inside the pocket remain there.” *Id.* at 24–25 (citing Ex. 1028, code (57); Ex. 1001 ¶ 912). Petitioner asserts further that a person of skill in the art “would have understood that designing the pocket to be biased in a closed position at rest would increase the likelihood that the device remains ‘safely maintained’ in the pocket during physical activity.” *Id.* at 25 (citing Ex. 1001 ¶ 913, Pet. 11–12).

Patent Owner responds that Petitioner’s expert’s reasoning “implies that there are other ways to maintain items in a pocket during physical activity aside from” bias to hold the pocket in a closed position.” Prelim. Resp. 15–16.

We agree with Petitioner that the record demonstrates that Spagna suggests limitation [1H]. Patent Owner’s argument that there are other ways

to maintain an object in Spagna's pouch besides biasing it in a closed position is inapposite as Spagna does not disclose any other method for doing this. We agree with Ms. Baran that a person of ordinary skill "would have understood that designing the pocket to be biased in a closed position at rest would increase the likelihood that the device remains 'safely maintained' in the pocket during physical activity" and that "pockets designed to remain closed at rest were known at the time of the alleged invention." Ex. 1001 ¶ 913 (citing Ex. 1033, 3:22–23; Ex. 1032 ¶ 20).

For these reasons, we agree with Petitioner that Spagna suggests a "back pocket having an opening formed that is biased in a closed position at rest" as required by limitation [1H] of claim 1.

c) Summary for Claim 1

Based on the evidence, arguments, and testimony 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 Spagna.

2. Claims 2, 3, 5, 7, and 10

Claims 2, 3, 5, 7, and 10 depend from claim 1. Ex. 1013, 7:9–12, 7:16–18, 7:21–27, 7:36–37. Petitioner sets forth its assertions for claims 2, 3, 5, 7, and 10 on pages 26–33 of the Petition. Patent Owner does not present separate arguments for the patentability of any of these challenged dependent claims. Prelim. Resp. 16. Rather, Patent Owner contends that "because the Petition cannot demonstrate that claim 1 is obvious over Spagna, Ground 1 fails on claims 2–10 as well."⁸ *Id.*

⁸ We note that claims 4, 6, 8, and 9 are not challenged in the instant Petition. Pet. 1.

We have reviewed Petitioner’s assertions for claims 2, 3, 5, 7, and 10, as well as the evidence, arguments, and testimony in support thereof. We determine that the record sufficiently demonstrates that Spagna discloses or suggest the limitations of claims 2, 3, 5, 7, and 10. We determine that Petitioner has demonstrated a reasonably likelihood of prevailing on its assertion that dependent claims 2, 3, 5, 7, and 10 would have been obvious in view of Spagna.

F. Ground 2: Alleged Unpatentability of Claims 1–3, 5, 7, and 10 Over Rose

Petitioner asserts that claims 1–3, 5, 7, and 10 are unpatentable over Rose. Pet. 33–48. Patent Owner disagrees. Prelim. Resp. 23–27.

1. Claim 1

We have reviewed Petitioner’s assertions, and the evidence, arguments, and testimony in support thereof, for all of the limitations of claim 1 for this ground. As Patent Owner only disputes Petitioner’s assertions regarding limitation [1H], we focus our discussion on these limitations.

Limitation [1H] requires a “back pocket having an opening formed that is biased in a closed position at rest, providing access to a pocket interior.” Ex. 1013, 7:5–7. Petitioner asserts that “Rose discloses pockets with openings E to provide access to a pocket interior.” Pet. 39–40 (citing Ex. 1030 ¶ 37). Petitioner asserts further that “in designing a bra with storage pockets, a [person of skill in the art] would have been motivated to look for known solutions in the art, such as methods of keeping items stored in the pocket secure.” *Id.* at 40 (citing Ex. 1001 ¶ 956, Pet. 11–12). In addition, Petitioner asserts that “pockets designed to remain closed at rest were known long before the alleged invention” and a person of skill in the

art “would have found it obvious to modify Rose to make the pockets biased closed at rest based on their own knowledge and been motivated to do so to keep items stored in the pocket more secure.” *Id.* (citing Ex. 1033, 3:22–23; Ex. 1032 ¶ 20; Pet. 11–12).

Patent Owner responds that Petitioner “does not propose any motivation specifically to design a pocket” to be biased in a closed position. Prelim. Reply 24. Patent Owner responds further that a person of skill in the art “would have other options to consider besides biasing, such as a fastener.” *Id.* In addition, Patent Owner argues that Rose “in addition to being silent on the desire to keep objects secure” and has pockets that are depicted as “hanging open loosely.” *Id.*

We agree with Petitioner that the record demonstrates that Rose suggests limitation [1H]. Rose describes its pockets as having slits E on the upper side to allow inserts to be inserted into the pockets through openings E. Ex. 1030 ¶ 37. Given this description, we do not agree that the pockets depicted in Figure 7 of Rose are “hanging open.” Rather, we understand the pockets to not extend the entire way from the bottom of the back strap to the top thereof. As such Figure 7 illustrates that slits E are located below the top of the back strap, not that the pockets are “hanging open.”

Patent Owner’s argument that a skill artisan has other options to consider such as a fastener is inapposite as Rose does not disclose or suggest the use of a fastener. Further, we credit Ms. Baran’s testimony that a person of ordinary skill “would have found it obvious to modify Rose to make the pockets biased closed at rest based on their own knowledge and been motivated to do so to keep items stored in the pocket more secure.” Ex. 1001 ¶ 956.

For these reasons, we agree with Petitioner that Rose suggests a “back pocket having an opening formed that is biased in a closed position at rest” as required by limitation [1H] of claim 1. Based on the evidence, arguments, and testimony 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 Rose.

2. Claims 2, 3, 5, 7, and 10

Petitioner sets forth its assertions for claims 2, 3, 5, 7, and 10 on pages 41–48 of the Petition. Patent Owner does not present separate arguments for the patentability of any of these challenged dependent claims. Prelim. Resp. 25–26. Rather, Patent Owner contends that “because the Petition cannot demonstrate that claim 1 is obvious over Rose, Ground 1 fails on claims 2–10 as well.”⁹ *Id.* Based on the evidence, arguments, and testimony of record at this stage of the proceeding, we determine that Petitioner has demonstrated a reasonably likelihood of prevailing on its assertion that dependent claims 2, 3, 5, 7, and 10 would have been obvious in view of Rose.

G. Ground 3: Alleged Unpatentability of Claims 1–3, 5, 7, and 10 Over Glass

Petitioner asserts that claims 1–3, 5, 7, and 10 are unpatentable over Glass. Pet. 48–68. Patent Owner disagrees. Prelim. Resp. 27–30.

⁹ We note that claims 4, 6, 8, and 9 are not challenged in the instant Petition. Pet. 1.

1. Claim 1

We have reviewed Petitioner’s assertions, and the evidence, arguments, and testimony in support thereof, for all of the limitations of claim 1 for this ground. As Patent Owner only disputes Petitioner’s assertions regarding limitations [1G] and [1H], we focus our discussion on these limitations.

- a) [1G]: “a back pocket formed entirely of stretchable fabric positioned on the back portion of at least one of the chest strap and shoulder straps,”*

Petitioner asserts that “Glass discloses a pocket on the back of the chest strap and the shoulder straps for holding a water bottle.” Pet. 56 (citing Ex. 1029, Fig. 2). Petitioner asserts further that “in the closed configuration, the pocket opening lies flat against the back surface of the bra.” *Id.* According to Petitioner, a person of skill in the art “would have understood this to indicate the pocket is formed of ‘stretchable material’ so the pocket opening can stretch to accommodate the storage of a water bottle.” *Id.* at 57–58 (citing Ex. 1001 ¶ 998).

In addition, Petitioner asserts that a person of skill in the art “would have understood that the shape of such objects may not easily conform to the shape of a rigid bra,” and thus, “would have found it obvious to manufacture the pocket with ‘stretchable’ material, such that the pocket may stretch or expand to accommodate the placement of objects for storage.” Pet. 58 (citing Ex. 1001 ¶ 999). Petitioner asserts that “sports bras comprised of stretchable material were well-known and popular at the time of the alleged invention” and that a person of skill in the art “would have understood that stretchable fabric was a design choice available to be applied to the bra pocket disclosed in Glass.” *Id.* (citing Ex. 1022, 3:5–14; Ex. 1039).

Patent Owner responds that “Glass does not teach or suggest a pocket made of ‘stretchable material.’” Prelim. Resp. 27. Patent Owner contends that Figure 2 of Glass suggests that “the formerly flat material of the back of the garment . . . has bent into a rough half-cylinder around the bottle, implying that the back of the garment bent to accommodate the new volume, while the pocket bent in approximately equal measure.” *Id.* at 28. According to Patent Owner, Petitioner’s reasoning “neglects to discuss the possibility, visible in the above-displayed drawing, of a bra and/or pocket made of flexible inelastic material.” *Id.*

We agree with Petitioner that the record demonstrates that Glass suggests limitation [1G]. Although, Glass, being a design patent, does not address the material from which its sports bra is fabricated, Petitioner has sufficiently demonstrated that the use of a stretchable fabric was well known at the time of the invention. Moreover, we agree that the choice of fabric for the pocket is a design choice and note that it is one of only two finite number of choices (stretchable or non-stretchable) and

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.

KSR Int’l Co. V. Teleflex Inc., 550 U.S. 398, 418 (2007).

For these reasons, we agree with Petitioner that Glass suggests “a back pocket formed entirely of stretchable fabric” as required by limitation [1G] of claim 1.

- b) [1H]: “the back pocket having an opening formed that is biased in a closed position at rest, providing access to a pocket interior;”

Petitioner asserts that “in the closed configuration, [Glass’] pocket opening lies flat against the back surface of the bra.” Pet. 60. According to Petitioner, a person of skill in the art “would have understood this to indicate the pocket is ‘biased in a closed position at rest’ when it is not holding the intended water bottle.” *Id.* at 60–61 (citing Ex. 1001 ¶ 1004).

Patent Owner responds that “nothing in these two drawings of Glass actually demonstrates how or why the pocket is flat in the latter picture, and although the Petitioner’s expert avers that a POSA would assume the flattening to have been caused by a bias, the expert neglects to say why.” Prelim. Resp. 30.

We agree with Petitioner that the record demonstrates that Glass suggests limitation [1H]. Although, Glass, being a design patent, does not state that its pocket is biased in a closed position, the fact that Glass shows the pocket in a flat position when empty suggests that this is the case.

For these reasons, we agree with Petitioner that Glass suggests a “back pocket having an opening formed that is biased in a closed position at rest” as required by limitation [1H] of claim 1.

c) *Summary for Claim 1*

Based on the evidence, arguments, and testimony 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 Glass.

2. *Claims 2–3, 5, 7, and 10*

Petitioner sets forth its assertions for claims 2, 3, 5, 7, and 10 on pages 62–67 of the Petition. Patent Owner does not present separate arguments for the patentability of any of these challenged dependent claims. Prelim. Resp. 30. Rather, Patent Owner contends that “because the Petition cannot demonstrate that claim 1 is obvious over Glass, Ground 1 fails on claims 2–10 as well.”¹⁰ *Id.* Based on the evidence, arguments, and testimony of record at this stage of the proceeding, we determine that Petitioner has demonstrated a reasonably likelihood of prevailing on its assertion that dependent claims 2, 3, 5, 7, and 10 would have been obvious in view of Glass.

H. *Objective Indicia of Non-Obviousness*

Patent Owner submits evidence of objective indicia to support its argument that the claims of the ’800 patent would not have been obvious. Prelim. Resp. 3–12, 16–23, 26–27, 31–32.

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.

¹⁰ We note that claims 4, 6, 8, and 9 are not challenged in the instant Petition. Pet. 1.

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 1336, 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))).

In comparing the claims to Nike’s Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run (collectively, Nike Products) Patent Owner asserts that the Nike Products are co-extensive with the claims of the ’551 patent. *See generally* Prelim. Resp. 20–21 (citing Exs. 2043–2053; Exs. 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 ’800 patent’s claimed invention. For example, many of the claim charts do not relate to the ’800 patent and demonstrate that the Nike Products include many features not claimed by the ’800 patent. *See e.g.*, Ex. 2043 (discussing a pocket on the bra strap).

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 ’800 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. 19–20. Sharon Goff testifies that she corresponded with Nike about her Pocket Bra 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 ’800 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 ’800 patent’s claimed invention, which includes the back pocket having an opening formed that is biased in a closed position at rest. *See, e.g.*, Ex. 2035, 3.

Patent Owner also relies upon infringement claim charts as allegedly showing that Nike copied the ’800 patent’s claimed invention. Prelim. Resp. 20–21 (citing Exs. 2043–2052, 2054–3057). 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

As discussed above, we understand Patent Owner to contend that Sharon Goff’s Pocket Bra is co-extensive with the claims of the ’800 patent. *See generally* Prelim. Resp. 3–12, 16–23, 26–27, 31–32. 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 indications relate to variations of the Pocket Bra that do not include the ’800 patent’s claimed invention, which includes the back pocket having an opening formed that is biased in a closed position at rest. *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 ’800 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, 27–28 (citing Exs. 2004, 2006, 2007).¹¹ In particular, Patent Owner

¹¹ Ex. 2005 which is cited at page 3 has been expunged from the record.

points to licenses to Urban Savage, LLC, Rabbit LLC, and Senita. *Id.* at 3¹², 27. Patent Owner asserts that a nexus exists because the licensees agree to mark their products with the licensed patents. *Id.* at 28.

Although, the '800 patent is in these licenses the evidence of record does not demonstrate that it is a unique feature of the '800 patent's claimed invention which prompted Urban Savage, LLC, Rabbit LLC, and Senita to license three or more of Ms. Goff's. Exs. 2004, 2006, 2007.

We, thus, are not persuaded that there is a nexus between the alleged licenses and a unique feature of the '800 patent's claimed invention and that the evidence of licensing demonstrates non-obviousness of the '800 patent's claimed invention.

(3) Commercial Success

Relying upon the same licenses, Patent Owner argues that “there is some evidence of commercial success of products linked to the '800 patent and the other Disputed Patents.” Prelim. Resp. 22. 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, Patent Owner has presented no evidence of commercial success linked to a unique feature of the '800 patent's claimed invention. *See* Exs. 2004, Ex. 2006, 2007. We, thus, are not persuaded that there is a nexus between the alleged commercial success and a unique feature of the

¹² Patent Owner points to another license 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.

'800 patent's claimed invention and that the evidence of commercial success demonstrates non-obviousness of the '800 patent's claimed invention.

(4) Industry Praise

Patent Owner asserts that there is “industry praise for products linked to the '800 patent and the other Disputed Patents.” Prelim. Resp. 23.

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 '800 patent's claimed invention, which includes a back pocket having an opening formed that is biased in a closed position at rest.

We, thus, are not persuaded that there is a nexus between this alleged industry praise and a unique feature of the '800 patent's claimed invention and that this evidence of industry praise demonstrates non-obviousness of the '800 patent's claimed invention.

As further evidence of industry praise, Patent Owner submits the testimony of the inventor of the '800 patent Sharon Goff. Prelim. Resp. 23 (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 '800 patent's claimed invention and that this evidence of alleged industry praise demonstrates non-obviousness of the '800 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 and Preliminary Response, we determine that the information presented shows a reasonable likelihood that Petitioner would prevail in establishing that claims 1–3, 5, 7, and 10 are unpatentable based on the grounds set forth 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 1–3, 5, 7, and 10 of the '800 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.

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