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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.

IPR2024-01129
Patent 10,869,510 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, 2, 4, 5, 7, 9, and 11 (“the challenged claims”) of U.S. Patent No. 10,869,510 B1 (Ex. 1017, “the ’510 patent”).

Patent Owner SherryWear LLC filed a Preliminary Response (Paper 8, “Prelim. Resp.”¹) arguing that the Petition fails to satisfy the requisite threshold for instituting review on the merits in light of alleged distinctions between the claimed invention and asserted prior art as well as 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).

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”).

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 11. In this Institution Decision, we refer only to Paper 8.

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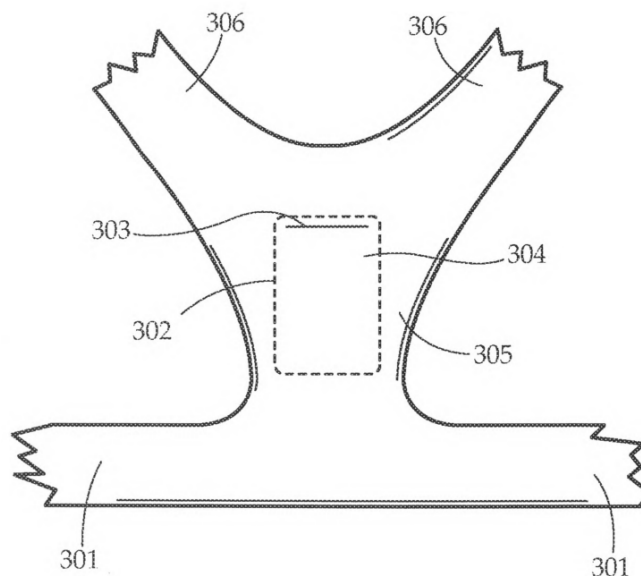
Petitioner and Patent Owner (“the parties”) identify the following district court litigation as related to this proceeding: *SherryWear LLC. v. Nike, Inc.*, Case No. 1:23-cv-11599 (D. Mass.). Pet. 4; Paper 3, 1. According to Petitioner, this litigation was stayed. Paper 5, 1.

Petitioner also filed petitions in IPR2024-01122, IPR2024-01123, IPR2024-01124, IPR2024-01125, IPR2024-01126, IPR2024-01127 and IPR2024-01128, 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 ’510 patent. Paper 3, 1.

B. The ’510 Patent (Ex. 1017)

The ’510 patent is titled “Bra Pocket System.” Ex. 1017², code (54). Figure 13 of the ’510 patent is shown below.



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 13 above shows an embodiment of a bra having a back pocket. *Id.* at 3:31–32, 5:65–66. The bra has shoulder straps 306 and chest strap 301. *Id.* at 6:4–5. The two sides of chest strap 301 extend away from central area 305. *Id.* at 6:5–6. Pocket 304 is positioned on central area 305. *Id.* at 6:6–7.

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 6:7–10. “An opening 303 to the pocket 304 is shown at a top, but . . . may be on the sides, middle, bottom, or anywhere on the pocket, depending upon the embodiment.” *Id.* at 6:10–13. “A closure (not shown) may be used to hold the pocket in a closed position.” *Id.* at 6:13–14. “The closure may be any structure capable of holding the pocket opening 303 in a closed position.” *Id.* at 6:13–16. “In a particular embodiment, the closure may bias the opening of the back pocket in a closed position at rest.” *Id.* at 6:16–18.

The materials forming the bra may include “any material capable of being used as bra” including “elastic materials.” *Id.* at 2:21–29.

C. Overview of Challenged Claims

Petitioner challenges claims 1, 2, 4, 5, 7, 9, and 11 of the ’510 patent in this proceeding. Pet. 1. Of the challenged claims, only claim 1 is independent and the remaining claims depend from claim 1.

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Claim 1 is shown below with Petitioner’s limitation identifiers indicated in brackets.

1. [1A] A pocket bra comprising:
[1B] a strap assembly including a chest strap and shoulder straps, [1C] the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn;
[1D] a bra portion comprising left and right cups, each cup being an area to receive a breast of the wearer, the strap assembly attached to the bra portion; [1E] and
a back pocket formed entirely of stretchable fabric positioned on the central area, [1F] the back pocket having an opening that is biased in a closed position at rest.

Ex. 1017, 6:65–7:8.

D. Asserted Prior Art

Petitioner relies on the following three references as prior art against claims 1, 2, 4, 5, 7, 9, and 11 of the ’550 patent. Pet. 6.

Name	Reference	Exhibit No.
Spagna	US 2007/0298684 A1	1028
Rose	US 2011/0223832 A1	1030
Glass	US Design 641,954	1029

Patent Owner does not dispute that these references are prior art against claims 1, 2, 4, 5, 7, 9, and 11 of the ’550 patent. *See generally* Prelim. Resp.

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E. Asserted Grounds

Petitioner asserts the following grounds of unpatentability. Pet. 6.

Ground	Reference(s)/Basis	35 U.S.C. § ³	Claim(s) Challenged
1	Spagna	103	1, 2, 4, 5, 7, 9, 11
2	Rose	103	1, 2, 4, 5, 7, 9, 11
3	Glass	103	1, 2, 4, 5, 7, 9, 11

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 ’510 patent was filed as U.S. Application No. 16/260,246, on Jan. 29, 2019. Ex. 1017, codes (21, 22). It is a continuation of U.S. Application No. 15/835,851, filed Dec. 8, 2017, now U.S. Patent No. 10,219,551 (“the ’551 patent”), which is a continuation of U.S. Application No. 15/647,784, filed Jul. 12, 2017, now U.S. Patent No. 10,244,800 (“the ’800 patent”), which is a continuation of U.S. Application No. 15/045,592, filed Feb. 17, 2016, now U.S. Patent No. 9,723,878 (“the ’878 patent”), which is a continuation of U.S. Application No. 14/614,873, filed Feb. 5, 2015, now U.S. Patent No. 9,289,016 (“the ’016 patent”), which is a continuation-in-part of U.S. Application No. 14/082,777, filed Nov. 18, 2013, now Pat. No. 9,295,288 (“the ’288 patent”), which is a continuation-in-part of U.S. Application No. 13/066,822, filed Apr. 26, 2011, now U.S. Patent No. 8,597,072 (“the ’072 patent”). Ex. 1017, code (63). The ’510 patent also claims priority to U.S. Provisional Application No. 61/976,379 filed Apr. 7, 2014. *Id.* at code (60). Petitioner asserts that Patent Owner admitted that the earliest priority date of the ’510 patent is February 5, 2015, a contention that Patent Owner does not dispute. Pet. 8. Therefore, because the earliest priority date is after March 16, 2013, we apply the AIA version of § 103. The outcome of this Institution Decision, however, would not be different if the pre-AIA version applied.

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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. 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.

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

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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 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 POSA⁴ 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. 15 (citing Ex. 1001 ¶ 155).

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

⁴ We understand “POSA” to mean “Person of Ordinary Skill in the Art.”

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Petitioner’s proposed level of skill in the art is consistent with the ’510 patent and the asserted prior art. We agree with and will use Petitioner’s proposed level for this Institution Decision.

C. Claim Construction

We interpret the ’510 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 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 Spagna

Petitioner contends that claims 1, 2, 4, 5, 7, 9, and 11 of the ’510 patent would have been obvious over Spagna. Pet. 24–31. Patent Owner argues that the challenged claims would not have been obvious. Prelim. Resp. 13–23.

After reviewing the parties’ contentions, we conclude that the record demonstrates a reasonable likelihood that Petitioner would prevail with respect to challenged claim 1 for the following reasons.

1. Overview of Spagna (Ex. 1028)

Spagna is titled “Integrated Brassiere Pouch to Be Utilized with Medication Dispenser.” Ex. 1028, code (54). Spagna is directed to a brassiere that includes an integrated pouch for folding an automated

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medication dispensing device, such as an insulin pump. *Id.* at code (57).

The integrated pouch may be located in the center back of the brassiere. *Id.*

Spagna's Figure 2 is reproduced below.

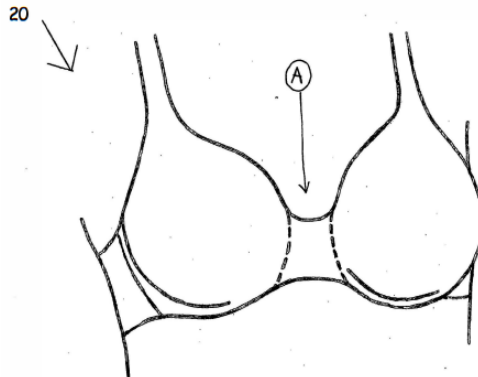


Fig. 2

Spagna's Figure 2 is a front view of a brassiere 20 for holding a dispensing device 10 (not shown). "The brassiere . . . of traditional materials such as cotton, polyester, or synthetic and natural fiber blend." *Id.* ¶ 17.

Spagna's Figure 4 embodiment is shown below.

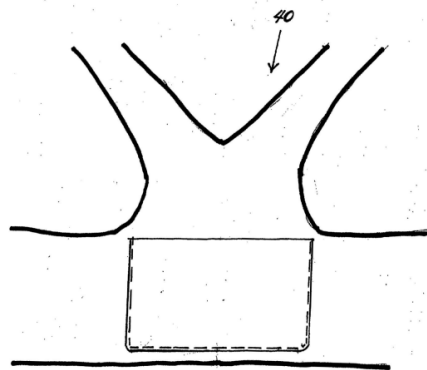


Fig. 4

In Spagna's Figure 4 above, an integrated pouch 40 is placed on the interior surface of the back of brassiere 20. *Id.* ¶ 20.

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2. *Claim 1*

We now address Petitioner’s contentions for claim 1. Pet. 24–37. Patent Owner argues that certain limitations of claim 1 are not taught or suggested by Spagna, and that objective indicia supports nonobviousness of the claims. We discuss these arguments in §§ III.D.2.v–vii, *infra*.

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 Spagna. 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, Spagna discloses “an integrated pouch located in a woman’s brassiere.” Pet. 15–16 (citing Ex. 1028 ¶¶ 17–20, Figs. 2–4).

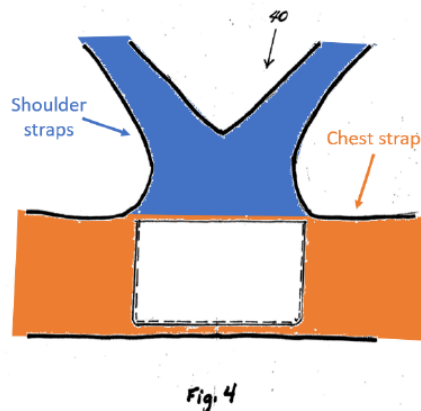
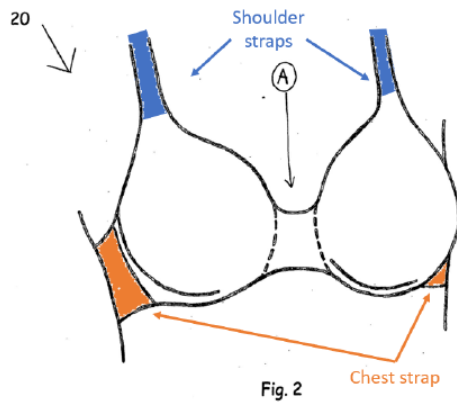
Petitioner shows sufficiently for institution that Spagna discloses the preamble, and consequently, we need not decide whether the preamble is limiting.

(ii) *Limitation 1B: Strap Assembly Including Chest Strap and Shoulder Straps*

Claim 1’s limitation 1B recites “a strap assembly including a chest strap and shoulder straps.”

Petitioner provides annotated versions of Spagna’s Figures 2 and 4 as shown below.

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Petitioner's annotated versions of Spagna's Figures 2 and 4 above shows that brassiere 20 has a chest strap (orange) and shoulder straps (dark blue). Pet. 16–17 (citing Ex. 1028 ¶¶ 17–20).

Petitioner shows sufficiently for institution that Spagna discloses claim 1's limitation 1B.

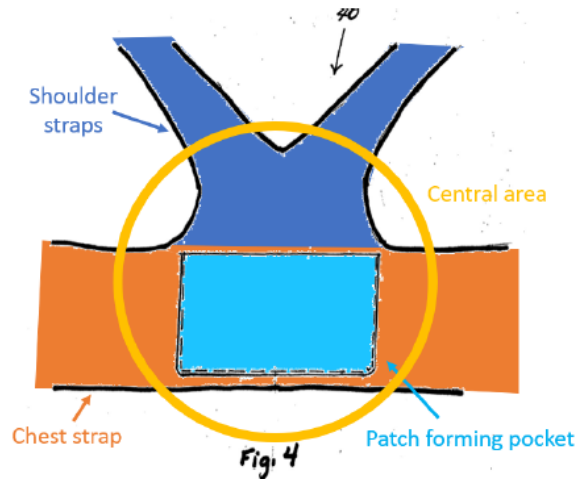
(iii) Limitation 1C: Central Area Positioned at Back

Claim 1's limitation 1C recites "the strap assembly joining the chest strap and shoulder straps at a central area adapted to be positioned on a back of a wearer when worn."

Petitioner contends that "Spagna discloses a 'central area' formed where the back portion of the shoulder straps and chest strap join together."

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Pet. 17. Petitioner provides an annotated version of Spagna's Figure 4 below.



Petitioner's annotated version of Spagna's Figure 4 above shows the central area (circled in yellow) "located at the center back of the women's brassiere" where the strap assembly joins the chest strap and shoulder straps. *Id.* at 18 (citing Ex. 1028 ¶¶ 9, 20, Fig. 4).

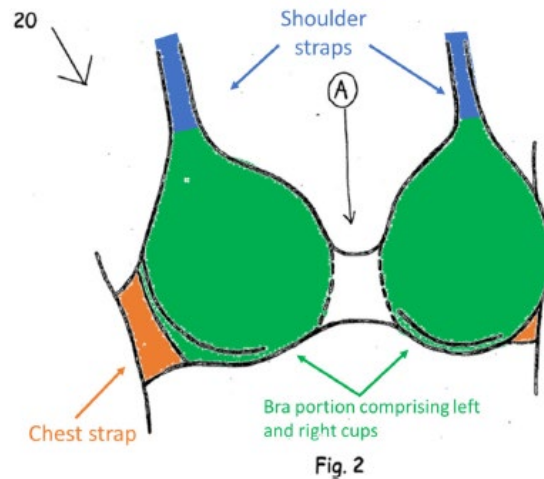
Petitioner shows sufficiently for institution that Spagna discloses claim 1's limitation 1C.

(iv) Limitation 1D: Bra Portion with Right and Left Cups

Claim 1's limitation 1D recites "a bra portion comprising left and right cups, each cup being an area to receive a breast of wearer, the strap assembly attached to the bra portion."

Petitioner contends that Spagna discloses this feature. Pet. 18–19. Petitioner provides an annotated version of Spagna's Figure 2 as shown below.

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Petitioner’s annotated version of Spagna’s Figure 2 above shows a bra portion with left and right cups (green), and Spagna’s strap assembly including chest strap (orange) and shoulder straps (dark blue) attached to the bra portion. Pet. 19 (citing Ex. 1028 ¶¶ 17–20, Fig. 2).

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

(v) *Limitation 1E: Back Pocket of Stretchable Fabric on Central Area*

Claim 1’s limitation 1E recites “a back pocket formed entirely of stretchable fabric positioned on the central area.”

Referring to the same annotated version of Spagna’s Figure 4 as depicted in § III.D.2.iii, *supra*, Petitioner contends that Spagna discloses a pocket (light blue) on the central area. Pet. 19–20 (citing Ex. 1028 ¶¶ 9, 20). Petitioner notes that “Spagna also discloses that the bra may be constructed of ‘traditional materials’ such as ‘cotton, polyester, or synthetic and natural fiber blend.’” *Id.* at 20. Petitioner asserts that a “POSA would have understood that the pocket, in addition to the bra itself, could likewise be

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made out of stretchable material” and “that polyester and other synthetic fabrics, such as spandex or elastane, can be ‘stretchable fabric.’” *Id.* (citing Ex. 1001 ¶ 1137).

Petitioner further contends that “[t]o the extent [Patent Owner] argues this limitation is not disclosed by Spagna, Spagna in combination with the knowledge of a POSA renders this limitation obvious.” Pet. 20. According to Petitioner, “Spagna expressly discloses that the purpose of a pocket on a bra or other garment is to hold personal items.” *Id.* (citing Ex. 1001 ¶ 1138; Ex. 1028, code (57), ¶¶ 2, 9). Petitioner asserts that a “POSA would have understood that the shape of such objects may not easily conform to the shape of a rigid pocket” and “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.” *Id.* at 21–22 (Ex. 1001 ¶ 1138).

Petitioner further alleges that “bras comprised of stretchable material were well-known and popular at the time of the alleged invention.” *Id.* (citing Ex. 1022, 3:5–14; Ex. 1028 Ex. 1039; Ex. 1001 ¶ 1138).

Petitioner concludes that “[t]hus, if not expressly disclosed, a POSA would have found it obvious to modify Spagna based on their own knowledge to include “a back pocket formed entirely of stretchable fabric.” *Id.* at 22 (citing Ex. 1001 ¶ 1138).

Patent Owner argues that “Spagna does not teach or render obvious a pocket made from stretchable material.” Prelim. Resp. 14. Patent Owner asserts that while Petitioner contends that a POSA would have been aware of stretchable fabric, the POSA would also have been aware of fabrics that are

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not stretchable, and, according to Patent Owner, Spagna teaches neither. *Id.* Patent Owner further argues that while Petitioner argues that stretchable material would allow the fabric to conform to the shape of an object, a POSA might have understood the opposite—that the shape of the object could conform to a rigid pocket. *Id.*

Patent Owner argues that Petitioner’s arguments amount to stating that a POSA could choose a pocket of stretchable material without suggesting that Spagna motivates such a choice, and hence, Petitioner is engaging in hindsight. *Id.* at 15. Petitioner argues that “given the crowded nature of this inventive field and the relatively simple technology, any assumptions about the motivations of a POSA must be rigorously set against objective criteria to avoid the danger of hindsight.” *Id.* (citing *Cont’l Can Co. USA v. Monsanto Co.*, 948 F.2d 1264, 1273 (Fed. Cir. 1991); *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1379 (Fed. Cir. 2012)).

On the present record, Petitioner presents evidence (1) that Spagna discloses bra materials that a POSA would have understood to be stretchable; (2) that stretchable materials for bras were general knowledge and well known to the POSA; and (3) that a POSA would have been motivated to use stretchable materials to allow the bra pocket to conform to the object’s shape. Ex. 1001 ¶ 1138. In response to Petitioner’s evidence, Patent Owner relies on attorney arguments, which are not evidence. *Icon Health and Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017). Patent Owner’s attorney arguments do not undermine Petitioner’s evidence.

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Petitioner shows sufficiently for institution that Spagna suggests claim 1's limitation 1E.

(vi) *Limitation 1F: Back Pocket Opening Biased in Closed Position at Rest*

Claim 1's limitation 1F recites "the back pocket having an opening that is biased in a closed position at rest."⁵

Petitioner contends that Spagna discloses that the purpose of its back pocket is "for holding an automated medication dispensing device" and that the device "can be safely maintained [in the pocket], even while the wearer is active," "indicating to a POSA that the pocket is biased in a closed position at rest, to ensure that the objects inside the pocket remain there." Pet. 22 (citing Ex. 1001 ¶ 1139). Petitioner asserts that in the prosecution of the '800 patent, which is related to the '510 patent, Patent Owner argued that "the use of a pocket biased in a closed position is ideal for 'keep[ing] items held safe within the pocket during exercise.'" *Id.* (citing Ex. 1014, 82, 119–120).

Petitioner further contends that to the extent Patent Owner "argues Spagna does not disclose this limitation, Spagna in combination with the knowledge of a POSA renders this limitation obvious." Pet. 22. Specifically, Petitioner asserts that "[a] POSA would have understood that designing the pocket to be biased in a closed position at rest would increase

⁵ The parties should consider submitting constructions for the meaning of "an opening that is biased in a closed position at rest" and whether this requires a structure like an elastic band around the opening.

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the likelihood that the device remains ‘safely maintained’ in the pocket during physical activity.” *Id.* at 22–23 (citing Ex. 1001 ¶ 1140).

Moreover, Petitioner asserts that “pockets designed to remain closed at rest were known at the time of the alleged invention” and that “a POSA would have found it obvious to modify Spagna based on their own knowledge.” *Id.* at 23 (citing Ex. 1032 ¶ 20; Ex. 1033 at 3:22–23).

Patent Owner argues that “Spagna . . . does not teach or render obvious a pocket that is biased in a closed position.” Prelim. Resp. 15. According to Patent Owner, Petitioner’s expert’s testimony that a “POSA 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”” which “implies that there are other ways to maintain item in a pocket aside from such a bias” and that Petitioner’s expert “mentioned at least one other in the same paragraph.” *Id.* at 15–16 (citing Ex. 1001 ¶ 913) (emphasis original).

Patent Owner argues that Petitioner’s “reasoning greatly increases the risk of hindsight bias in evaluating the ‘510 claims, especially in light of the technologically simple nature of innovations in this crowded field” and that “objective indicia of obviousness are crucial for evaluation of obviousness in this context” and “those objective indicia militate against the Petitioner’s contentions.” *Id.* at 16.

On the present record, Petitioner provides evidence to establish that (1) a POSA would have recognized that biasing the opening in a closed position at rest would ensure that Spagna’s medical device is “safely maintained” within the pocket during physical activity, as Spagna teaches

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should be done; and (2) that pockets designed to remain closed at rest were known in the art and a POSA would have modified Spagna according to this knowledge. Pet. 22–23 (citing Ex. 1001 ¶¶ 1139–1140; Ex. 1032 ¶ 20; Ex. 1033 at 3:22–23).

Although Patent Owner may be correct that different ways of maintaining an object in a pocket were known in the art, Patent Owner does not provide any evidence to suggest that a biasing option is one a POSA would not have selected given Spagna’s indication that it is desirable to safely maintain the medical device within the pocket during exercise. Ex. 1001 ¶¶ 1139–1140 (citing Ex. 1028, code (57); Ex. 1033 at 3:22–3:23; Ex. 1032 ¶ 20)). Patent Owner’s assertion is based on attorney argument that does not sufficiently counter Petitioner’s evidence. *See Icon Health, supra*.

We will address Patent Owner’s arguments concerning objective indicia of nonobviousness in the next section.

Petitioner shows sufficiently for institution that Spagna suggests limitation 1F.

(vii) Objective Indicia of Nonobviousness

Patent Owner contends that various objective indicia demonstrate that the challenged claims would not have been obvious over Spagna. Prelim. Resp. 17–23. 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.

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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 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

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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.

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 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)). *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-

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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 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 1376–77.

“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

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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, 1331–32 (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 ‘510 patent read on or are highly coextensive with [Nike’s] Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run” Bra. Prelim. Resp. 20–21 (citing Exs. 2044 (Swoosh Pocket Bra), 2049 (Swoosh Bra), 2055 (Swoosh on the Run Bra)). The evidence, however, does not support a conclusion that Nike’s the Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run Bra are coextensive with the ‘510 patent’s claimed invention. Indeed, Patent Owner submits claim charts allegedly showing that Nike’s Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run Bra infringe not only the ‘510 patent (Exs. 2044, 2049, 2055), but also four other patents in the family (Exs. 2043, 2045–2048, 2050–2054, 2056–2057). Those other claim charts demonstrate that the Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run Bra include many

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features not claimed in the '510 patent. *See e.g.*, Ex. 2043 (showing Swoosh Pocket Bra has a side pocket). Thus, on this record, Patent Owner has not persuasively shown a rebuttable presumption of nexus between Nike's Swoosh Pocket Bra, Swoosh Bra, and Swoosh on the Run Bra and the challenged claims.

Patent Owner asserts that "there is significant evidence that NIKE copied the patented application in the '550 patent." Prelim. Resp. 19–20. According to Patent Owner, "NIKE received copies of patents and sample products from [the named inventor of the '510 patent] Ms. Goff prior to filing its patents or marketing any of the allegedly infringing products." *Id.* at 20. Patent Owner alleges that "each of the Swoosh Pocket Bra, the Swoosh Bra, and the Swoosh on the Run [Bra] 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." *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 Pocket Bra, Swoosh Bra, and Swoosh on the Run Bra infringement claim charts as allegedly showing that Nike copied the '510 patent's claimed invention. Prelim. Resp. 20–21 (citing Exs. 2044, 2049, 2055).

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 '510 patent's

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claimed invention. *See generally* Exs. 2001, 2044, 2049, 2055. For example, none of the pictures in the Nike Idea Submission sufficiently shows certain features of the '510 patent's claimed invention, which includes a "back pocket formed entirely of stretchable fabric positioned on the central area, the back pocket having an opening that is biased in a closed position at rest." *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 '510 patent's claimed invention. *See generally* Prelim. Resp. 20–21. Patent 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 appears to relate to variations of the Pocket Bra that do not include the '510 patent's claim invention. *See* Prelim. Resp. iv (showing Exhibits 2008–2010 and 2021–2034 do not relate to the '510 patent). Thus, based on the record at this stage of the proceeding, we do not apply a presumption of nexus between the '510 patent's claimed invention and Ms. Goff's Pocket Bra.

Patent Owner argues that "[f]urther support for the nonobviousness of the '510 patent is found in the licenses to competitors of the '510 patent and other patents in its family." Prelim. Resp. 3, 21–22 (citing Exs. 2001, 2004–2007). In particular, Patent Owner points to licenses to Urban Savage LLC (Ex. 2004), Rabbit LLC (Ex. 2006), and Senita LLC (Ex. 2007). *Id.* at 2–3,

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21–22. Patent Owner asserts that a nexus exists because the licensees agree to mark their products with the licensed patents. *Id.* at 22.

Although, the '510 patent is included in these licenses, the evidence of record does not demonstrate that it is a unique feature of the '510 patent's claimed invention which prompted Urban Savage, LLC, Rabbit LLC, and Senita LLC to take licenses under this patent. Exs. 2004, 2006, 2007. Moreover, other patents are listed in these licenses.

Relying on the same licenses, Patent Owner argues that “there is some evidence of commercial success of products linked to the '510 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 alleges that Rabbit, LLC “earned gross revenue in sales of at least 2.25 million dollars with respect to [the] licensed products.” *Id.* at 22–23 (citing Ex. 2006, terms 4.2, 5.1). Patent Owner has not shown, however, that this revenue relates to the '510 patent.

Patent Owner asserts that “there is evidence of industry praise for products linked to the '510 patent and the other Disputed Patents.” Prelim. Resp. 23. As support, 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 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

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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 ’510 patent’s claimed invention. Thus, on this record, we are not persuaded that there is a nexus between this alleged industry praise and a unique feature of the ’510 patent’s claimed invention and that this evidence of industry praise demonstrates nonobviousness of the ’510 patent’s claimed invention.

As further evidence of industry praise, Patent Owner submits the testimony of Ms. Goff. Prelim. Resp. 23 (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

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unique feature of the '510 patent's claimed invention and that this evidence of alleged industry praise demonstrates nonobviousness of the '510 patent's claimed invention.

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 '510 patent.

(viii) 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 '510 patent is disclosed or suggested by Spagna. 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 Spagna.

3. Remaining Dependent Claims

Claims 2, 4, 5, 7, 9, and 11 depend from claim 1. Patent Owner does not dispute Petitioner's contentions specific to these claims. *See generally* Prelim. Resp. We find that Petitioner shows sufficiently for institution that Spagna discloses the specific limitations of dependent claims 2, 4, 5, 7, 9, and 11. Pet. 23–31.

E. Ground 2: Obviousness over Rose

Petitioner contends that claims 1, 2, 4, 5, 7, 9, and 11 of the '510 patent would have been obvious over Rose. Pet. 31–45. Patent Owner asserts that Rose does not disclose a back pocket biased in the closed

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position at rest, and asserts that the claims are not unpatentable in view of objective indicia of nonobviousness. Prelim. Resp. 24–27.

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 the full record.

F. Ground 3: Obviousness over Glass

Petitioner contends that claims 1, 2, 4, 5, 7, 9, and 11 of the '510 patent would have been obvious over Glass. Pet. 45–60. Patent Owner asserts that Glass does not teach or suggest a pocket made of stretchable material, nor a pocket that is biased in a closed position, and further asserts that the claims are not unpatentable in view of objective indicia of nonobviousness. Prelim. Resp. 27–32.

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 3 when we consider the full record.

IV. 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).

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V. 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, 2, 4, 5, 7, 9, and 11 of the '510 patent is *granted*;

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.

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⁶ 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 4, 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.