

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SOLARIS OILFIELD SITE SERVICES OPERATING, LLC, and SOLARIS
OILFIELD SITE SERVICES PERSONNEL, LLC,

Petitioners

v.

MASABA, INC.,

Patent Owner

Case No. 2024-01179

Patent No. 11,780,689

AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST

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Even after finding a strong *prima facie* case of obviousness, the Board went above and beyond its duty to consider Patent Owner Masaba Inc.’s (“Masaba”) evidence of secondary considerations. First, the Board properly found that Masaba failed to carry its burden to establish nexus of any secondary considerations to the ‘689 Patent claims. Paper 41 at 43. Based on that failure, the Board was not required to consider secondary considerations evidence at all, which should end this inquiry. Nevertheless, the Board considered *all* of the “real-world evidence”—not only the evidence Masaba cites, but also evidence *confirming* the Board’s conclusion of obviousness that Masaba ignores. Namely, the Board found that Petitioners (“Solaris”) worked with Masaba to come up with the design based on commonly-known conveyors like those in *Dynatek* and, within a few months, Masaba proposed putting an articulated conveyor “like [*Dynatek*’s] Econoloader at the top of the bucket elevator” like *Waldner*’s. EX1120; EX1119; EX1112, ¶¶20-22; *see* Paper 41 at 33. Consistent with Federal Circuit law, the Board weighed all of this evidence and found it did not overcome the strong *prima facie* case based on *Waldner* and *Dynatek*. Masaba’s disagreement with that weighing does not mean the Board erred.

Also, the Board properly found that Solaris’ expert Dr. Robert Durham was a person of ordinary skill in the art (“POSITA”) for the ‘689 Patent. As the Board found, the ‘689 Patent relates to transferring aggregate material, and the only application it discusses is the transfer of sand for use in “hydraulic fracturing in

connection with subterranean petroleum drilling”. Paper 41 at 3 (citing EX1001, 4:12-18). It is undisputed that Dr. Durham has designed control systems for aggregate conveyor systems and has more than 30 years of real-world experience in oilfield fracturing and other areas related to engineering of aggregate handling equipment. Therefore, Dr. Durham was qualified to testify about how POSITAs would have made a simple combination of well-known mechanical components.

I. Masaba’s One-Sided Version of Secondary Considerations Evidence Cannot Rebut Solaris’ Strong Prima Facie Case of Obviousness.

The Board emphasizes that Solaris established a strong *prima facie* case of obviousness based on *Waldner* and *Dynatek*. *See, e.g.*, Paper 41 at 13 (discussing references’ disclosures that “indicate[] the overall strength of the combination”) & 45 (mentioning Solaris’ “strong evidence of obviousness”). But even proper secondary considerations evidence is not necessarily sufficient to overcome a strong *prima facie* case. *See, e.g., Becton Dickinson & Co. v. Baxter Corp.*, 998 F.3d 1337, 1345 (Fed. Cir. 2021); *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (collecting cases); *see also Cable Electric Prods. v. Genmark, Inc.*, 770 F.2d 1015, 1028 (Fed. Cir. 1985) (“more than the mere fact of copying by an accused infringer is needed to make that action significant”). Therefore, even if the Board failed to consider proper secondary considerations evidence—and it did not—that would not necessarily justify overturning the Board’s decision.

Also, whether secondary considerations rebut obviousness is a holistic, fact-

intensive inquiry that requires weighing all relevant evidence both for and against obviousness. *See Fleming v. Cirrus Design Corp.*, 28 F.4th 1214, 1224 (Fed. Cir. 2022); *Ecolochem, Inc. v. Southern California Edison Co.*, 227 F.3d 1361, 1380-81 (Fed. Cir. 2000). Masaba cites “real-world evidence” supposedly supporting its theory that Solaris copied its invention, and complains the Board must have ignored that evidence. But Masaba doesn’t tell the whole story; it ignores other “real-world evidence” that weighed ***against*** Masaba’s cherry-picked version. In particular:

- The Board credited testimony from Solaris Senior Principal Engineer Jeremy Weinstein that “‘the original idea for the top fill system started at Solaris during the spring and summer of 2020,’ before ‘any contact with Masaba’” and well before the ‘689 Patent’s July 2021 priority date. Paper 41 at 44 (citing EX1112, ¶8). Mr. Weinstein explained that in May of 2020 he described “the basic elements of the system that Solaris wanted: a series of conveyors to fill silos from an outlet at the top of the silo.” EX1112, ¶8.
- The Board found that Solaris thereafter “‘work[ed] with Masaba and Anchor to assemble the features that Solaris had requested into a design drawing,’ including the use of ‘Dynatek’s articulated airslide systems’ that ‘were a commonly-used type of conveyor....’”. Paper 41 at 44 (citing EX1112, ¶¶8-9 and EX1102); *see also* Paper 41 at 33-34.
- The Board found that “despite their initial thoughts” about *Dynatek*’s

EconoLoader conveyor, Masaba “nonetheless returned to the very design taught by Dynatek.” Paper 41 at 33. Indeed, in January 2021, ‘689 Patent inventor Jason Brenden told Solaris that he planned “to put something like the Econoloader at the top of the bucket elevator and make it long enough to reach all six silos...” EX1120; *see also* EX1112, ¶22.

Masaba never disputed these facts and now omits them from its request. The Board considered this full development history and found it supported of obviousness. Even if bits and pieces of the story could support Masaba’s theory, that is insufficient to set aside the Board’s well-reasoned decision.

II. Masaba Failed to Establish Nexus of Solaris’ Successful and Praised System to the ‘689 Patent Claims.

Contrary to Masaba’s request, the Board *did* consider its briefing and evidence regarding nexus. The Board simply found it too conclusory to carry Masaba’s burden. Paper 41 at 41-42. Masaba cites pages 15-17 of its Response (Paper 13) as purportedly establishing a presumption of nexus to Solaris’ systems. Two of those 3 pages contain only unannotated images of Masaba’s and Solaris’ design drawings that do not explain *how* either system practices the ‘689 Patent claims. Exhibits 2007, 2008, 2011, and 2025-2030 similarly include only photos and screenshots of Solaris’ systems—amongst other unrelated technologies—that do not establish nexus. Paragraphs 17-21 of Mr. Brinkman’s declaration (EX2005) contain more of the same—unannotated photos and drawings of Solaris’ and Masaba’s systems.

Beyond that, Mr. Brinkman concluded in two sentences that Solaris' system "is substantially identical" to the unit Masaba built, and that "most of the dimensions [of Solaris'] unit are within a few inches of the dimensions of Masaba's first unit." EX2005 at ¶24. But he never compared either unit to the '689 Patent claims.

The only other document Masaba cites is Exhibit 2037—Masaba's 95-page infringement complaint from the district court that contains a 20+ page claim chart and images of Solaris' systems. However, the Board was not required to divine nexus from that document. In response to Solaris' motion to exclude Exhibit 2037, ***Masaba asserted that it was not evidence***, but rather was "used as a demonstrative". Paper 35 at 2. But the Board's rules and well-established precedent prohibit Masaba from incorporating demonstratives into its briefing. *See* 37 C.F.R. 42.6(a)(3); *Endo Pharms., Inc. v. Depomed, Inc.*, IPR2014-00652, Paper 68, pgs. 36-37 (Sept. 16, 2015) ("merely citing to a claim chart ... is insufficient to demonstrate a nexus and violates our rule against incorporation by reference"); *Cisco Sys. v. C-Cation Techs. LLC*, IPR2014-00454, Paper 12, pgs. 8-9 (Aug. 29, 2014); *see also* Paper 34 at 4-5; Paper 36 at 3; *Mianyang BOE Optoelectronics Tech. Co., Ltd. v. Samsung Display Co., Ltd.*, IPR2023-00988, Paper 6, pgs. 36 & 90-92 (Jan. 6, 2025) (excluding standalone claim chart). Indeed, the Board declined to rely on Solaris' demonstratives because "demonstratives are not evidence" (Paper 41 at 34 n.12), so it would be unfair to consider Masaba's demonstratives as such. Contrary to

Masaba's citation (Paper 43 at 9 n.1), nor does the Trial Practice Guide allow this practice for claim charts from another proceeding. *See* Paper 36 at 3-5.

Therefore, the Board properly declined to scour Masaba's evidence and "discern for [itself] whether Masaba meets its burden of proving nexus." Paper 41 at 42 (citing *Volvo Penta v. Brunswick*, 81 F.4th 1202, 1210-11 (Fed. Cir. 2023)). *Centripetal Networks LLC v. Palo Alto Networks, Inc.*, 156 F.4th 1368 (Fed. Cir. 2025) does not indicate that the Board erred in doing so. In that case, the Board improperly refused to consider factual testimony regarding the petitioners' meetings with the patentee and the petitioners' study of its patents and expert testimony explaining how the petitioners had copied. *Id.* at 1380. Masaba would have the Board do far more than consider testimony. Masaba ***would require the Board to do its own analysis*** comparing images of Solaris' units to the '689 Patent claims and determining whether those units meet each element of claims spanning more than 4 pages of the '689 Patent. There is no basis for requiring the Board to perform such an onerous analysis on an issue where Masaba undisputably bears the burden.

Creating such a requirement at this stage would unfairly prejudice Solaris and petitioners generally. To establish a *prima facie* obviousness case, 37 C.F.R. 42.204(b)(4) required Solaris' petition to "specify where each element of the claim is found in the prior art" within the applicable word limits. If Solaris had attempted to rely on a claim chart in an exhibit (*e.g.*, a copy of invalidity contentions from

underlying district court litigation) to meet that requirement, Masaba certainly would have objected and the Board likely would have declined to consider it. The Board rightfully required a similar showing on nexus in Masaba's brief since Masaba bears the burden. Moreover, based on the Board's rules and precedent noted above, Solaris could not have anticipated that it would have to respond to Exhibit 2037's contents in detail within the word limit for its reply. Forcing the Board to consider Exhibit 2037 now would deprive Solaris of the ability to respond to it since briefing is closed.

Even if Masaba had established nexus of its secondary considerations to the '689 Patent claims, the Board also properly found that Masaba's own arguments rebutted any such nexus. For example, Masaba touted its use of slider-belt conveyors as a unique feature that distinguished prior art and reduced the system's weight and height. Paper 41 at 42 (citing Paper 13 at 7). But neither slider belt conveyors nor their benefits are claimed in the '689 Patent, and thus Masaba's emphasis on their benefits rebuts nexus. *Id.* Masaba's request completely ignores this finding.

Finally, Masaba argues that the Board's finding of no nexus "is irreconcilable" with its finding in the *prima facie* case that POSITAs would have seen benefits in combining *Waldner* with *Dynatek*. Paper 43 at 11. In other words, Masaba asserts that the Board's rationale to combine those references somehow ***requires*** that success and praise of Solaris' system has nexus to the '689 Patent claims. Of course, nexus must be based on evidence, and Masaba cites no authority

that the Board’s findings are evidence. More importantly, the rationale to combine prior art is a completely different inquiry (whether POSITAs before the ‘689 Patent’s filing date had any reason to improve *Waldner* with *Dynatek*’s teachings) from the inquiry to find nexus (what features of Solaris’ systems subsequently caused praise or success), and thus cannot require a finding of nexus.¹ The *only* evidence relating to success or praise of Solaris’ system touts belly-dumping capabilities that were well-known in the prior art. *See* Paper 41 at 43; Paper 20 at 23-24.

III. The Board Considered All Evidence of Secondary Considerations.

Because Masaba failed to establish nexus of its alleged secondary considerations to the ‘689 Patent claims, the Board wasn’t obligated to consider that evidence at all, and the Director isn’t either. But the Board already went further. Despite Masaba’s failure, the Board “review[ed] Masaba’s evidence of secondary considerations” and found that “it further illustrates the weakness of Masaba’s contentions.” Paper 41 at 43.

Masaba first argues that the Board failed to consider evidence of alleged

¹ Masaba’s argument is also nonsensical. If Masaba were correct, nexus would always exist if there was a rationale to combine or modify the prior art, because the patentee could always argue that that same rationale produced any success or praise. Unsurprisingly, Masaba cites no authority for such a circular argument.

skepticism because it showed “that a POSITA would have resisted using *Waldner* as a starting point—because it uses a bucket elevator”. Paper 43 at 12. Unsurprisingly, Masaba cites no case law to support this “starting point” theory.² To the contrary, the Board considered and properly discounted any skepticism of bucket elevators, following well-established law that secondary considerations such as skepticism must relate to the claimed combination, and skepticism of prior art features cannot rebut obviousness.³ See Paper 41 at 43-44 (citing *ClassCo, Inc. v. Apple, Inc.*, 838 F.3d 1214, 1220 (Fed. Cir. 2016)); see also *SynQor, Inc. v. Vicor Corp.*, No. 2021-2211, 2023 WL 234186, at *4 (Fed. Cir. Jan. 18, 2023) (disregarding skepticism that patentee failed to show was a “direct result of the unique characteristics of the claimed invention”); *Auris Health, Inc. v. Intuitive Surgical Operations, Inc.*, 32 F.4th 1154, 1159 (Fed. Cir. 2022) (“skepticism must

² Even if Masaba’s theory could be relevant to the *prima facie* case—and it is not—Masaba has not raised that issue in its request.

³ For skepticism, Masaba cannot—and did not purport to—rely on any presumption of nexus. Therefore, Masaba bore the burden to prove that any skepticism was “attributable to the claimed combination” in the ‘689 Patent, “as opposed to, for example, prior art features in isolation or unclaimed features.” *Fox Factory Inc. v. SRAM, LLC*, 944 F.3d 1366, 1378 (Fed. Cir. 2019).

be specific to the invention, not generic to the field”). The alleged skepticism of bucket elevators doesn’t rebut obviousness anyway. Solaris engineers only noted that bucket elevators required significant maintenance and did not dissipate heat well. *See* Paper 20 at 5 n.3; EX1112, ¶¶19-20. They were not skeptical that bucket elevators could transfer aggregate, which is all the ‘689 Patent claims require.

Masaba next complains that the Board erroneously found that “Masaba did not invent and design” the claimed invention, “finding instead that Solaris designed the machine and Masaba merely assembled it”. Paper 43 at 12. But the Board made no such finding. The Board only found that ““the original idea for the top fill system started at Solaris during the spring and summer of 2020,’ before ‘any contact with Masaba,’” and that Solaris thereafter ““work[ed] with Masaba and Anchor to assemble the features *that Solaris had requested* into a design drawing,’ including the use of ‘Dynatek’s articulated airslide systems’ that ‘were a commonly-used type of conveyor....’” Paper 41 at 44. Masaba cites no evidence that would contradict those findings. Based on those findings, the Board determined that Solaris’ “indisputable involvement in the design” undermined Masaba’s narrative that Solaris copied it. *Id.* Given these facts, that was a reasonable conclusion for the Board to make. Whether “ownership and inventorship are two different things” (Paper 43 at 13) makes no difference, because the Board did not make or rely on any legal conclusion that Solaris owned the design. The Board only found that Solaris

engineers decided to use the design because they were involved in coming up with it, not because they recognized the design's benefits and therefore copied it. *See* Paper 41 at 44; *see also id.* at 45 (noting Mr. Weinstein's testimony "as discussed above" on page 44). It was within the Board's discretion to make that finding on the facts presented. *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1336-37 (Fed. Cir. 2016) ("Copying is a question of fact.... [T]he fact-finder ... was entitled to credit [one side's] evidence over [the other side's]. And we will not substitute our view of conflicting evidence for that of [the fact-finder]").

Finally, Masaba complains that the Board ignored Solaris' separate patent as secondary considerations evidence. But, even worse than its failure to establish nexus for Solaris' systems, Masaba cites nothing that compares any portion of Solaris' patent *to the '689 Patent's claims* as required. *See Fox Factory*, 944 F.3d at 1373. Masaba's reference to claim 6 of Solaris' patent is irrelevant, since it did not compare claim 6 to any of the '689 Patent's claims. Paper 41 at 44 ("That is because Masaba fails to compare the claims of Solaris' patent *to those of the '689 Patent.*" (emphasis added)). Masaba attempts to circumvent that analysis by comparing the two patents' figures and citing claim construction law about preferred embodiments. Paper 43 at 10 (citing *Vitronics*). But that unrelated law does not supplant the Federal Circuit's well-established law on nexus or permit Masaba to avoid comparing Solaris' allegedly-copying patent *to the '689 Patent's claims.*

Despite that glaring failure, the Board in fact still considered Solaris' patent as secondary considerations evidence, and simply found that even if it "was somehow relevant, that alone would not outweigh Solaris' otherwise strong evidence of obviousness." Paper 43 at 45. Masaba identifies no error in that finding.

IV. The Board Did Not Err in Crediting Solaris' Expert's Testimony.

Masaba proposed, and the Board adopted, a finding that POSITAs with an electrical engineering degree must have "approximately 4-6 years of *hands-on experience specifically related to* engineering aggregate handling equipment". Paper 41 at 8. Masaba does not dispute that Dr. Durham has at least some amount of hands-on experience in engineering aggregate handling equipment. Paper 43 at 14-15 (discussing Dr. Durham's work designing control systems for coal conveyors).

Instead, Masaba argues that Dr. Durham does not have sufficient "hands-on experience specifically related to engineering aggregate handling equipment" because he spent less than 4 years designing or building conveyor systems. *Id.* at 14-15. But the Board did not require experience designing or building such equipment. Rather, the Board correctly observed that Dr. Durham's 30+ years of experience with oilfield fracturing operations, "which invariably involve[d] handling aggregate material" was "hands-on experience specifically related to engineering aggregate handling equipment". Paper 41 at 11. Contrary to Masaba's arguments, Dr. Durham's experience was not merely "seeing" or "witnessing" the use of such

equipment. Paper 43 at 15. Dr. Durham explained that, in his work on fracturing operations, he had to clearly “understand how [conveyors] operate in the field,” and interface with the service companies operating them. Paper 41 at 10 (citing EX2003, 9:15 – 12:12). And the Board confirmed—which Masaba doesn’t dispute—that Dr. Durham’s expertise related to the engineering of electrical controls for such equipment is relevant to his qualifications as a POSITA. Paper 41 at 11. Therefore, the Board properly found these activities “related to engineering aggregate handling equipment.” *Id.* The Board also found that the ‘689 Patent relates to “an assembly of *known* types of conveyors”, so POSITAs need not have experience building or designing the mechanical aspects of conveyors. *Id.* at 9 (emphasis added).

Masaba accuses Dr. Durham of “multiple factual errors” but none of them are relevant to the Board’s decision. The first alleged error—whether *Waldner’s* chute was open or closed—only related to an alternative rationale to combine *Waldner* and *Dynatek* to control dust (Paper 13 at 31) that the Board did not use. The second alleged error involved the disclosure of a secondary reference in alternate grounds of unpatentability (*Sleeman*). The third alleged error related to *McIver’s* disclosure of an articulated rocker arm, which Masaba’s own expert Travis Anderson admitted *McIver* disclosed. *See* Paper 41 at 61 (citing EX1113, Mr. Anderson’s deposition). Indeed, the Board noted Mr. Anderson and other witnesses *repeatedly confirmed* Dr. Durham’s opinions that were relevant to its obviousness findings. *See, e.g.*, Paper

41 at 34-35 (citing Anderson testimony that POSITAs would have recognized *Waldner*'s limited range of motion); *id.* at 35 (citing Anderson testimony confirming why POSITAs "would have rejected" alternatives to combining *Waldner* and *Dynatek*); *id.* at 57 (citing Anderson testimony that kingpin connections were standard for heavy load and reduce wear); *id.* at 33-34 (discussing Mr. Brinkman's and Mr. Weinstein's testimony that articulated conveyors were well known). Masaba cannot credibly claim that Dr. Durham was unqualified to testify when its own witnesses repeatedly agreed with him on the key issues.⁴

Even if Dr. Durham did not meet every qualification for a POSITA, that does not mean the Board had to completely disregard his testimony. First, an expert's education and experience need not exactly match a POSITA's. Rather, under Federal Rule of Evidence 702, an expert need only have sufficient experience for his testimony to be reliable and helpful to the factfinder. *See SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1373 (Fed. Cir. 2010). Based on his 30+ years of

⁴ This distinguishes *Interactive Communications Int'l Inc. v. Blackhawk Network Inc.*, IPR2024-00465, Paper 40 (Oct. 9, 2025), in which the Director vacated a board decision relying on expert testimony with "multiple material contradictions" that were "central to [p]etitioner's analysis". *Id.* at 3-4. Indeed, the Board expressly considered that case at the oral hearing. Paper 40 at 78-79.

experience, the Board properly found that “[w]ithout doubt, Dr. Durham has enough education and experience to *reliably* opine on the combination of known parts.” Paper 41 at 9 (emphasis added). Since the ‘689 Patent claims “an assembly of *known* types of conveyors,” that was all that was required for Dr. Durham’s testimony to be useful. *Id.*⁵ Moreover, Masaba argues that POSITAs would have more experience and therefore be more skilled than Dr. Durham. If so, that would only confirm the ‘689 Patent claims’ obviousness because, if Dr. Durham found them obvious, POSITAs with more skill than Dr. Durham also would. *See Innovention Toys LLC v. MGA Entm’t, Inc.*, 637 F.3d 1314, 1324 (Fed Cir. 2011) (less sophisticated level of skill favors non-obviousness “while a higher level of skill favors the reverse”).

Finally, even if the Director finds the Board erred in relying on Dr. Durham, the Director should not reverse the Board’s decision but instead vacate it and remand for further consideration. Because the Board found Dr. Durham is a POSITA, the Board did not consider Exhibit 1111—a declaration of expert David Smith proffered by Solaris confirming Dr. Durham’s opinions. Paper 41 at 7 n.7. Masaba did not dispute that Mr. Smith is a POSITA, so if Dr. Durham’s testimony is disregarded, the Board should consider Exhibit 1111.

⁵ Masaba never moved to exclude Dr. Durham’s testimony under Fed. R. Evid. 702, and thus waived any objection that he was not qualified to testify.

Dated: March 4, 2026

Respectfully submitted,

/Elizabeth Durham Flannery/

Elizabeth Durham Flannery

(Reg. No. 59,509)

Baker Botts L.L.P.

910 Louisiana Street

Houston, Texas 77002

Tel: (713) 229-2104

Fax: (713) 229-7704

Email: Liz.flannery@bakerbotts.com

Lead Attorney for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 4th day of March, 2026,
AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST was served
by email to:

Chad E. Nydegger
Registration No. 61,020
cnydegger@wnlaw.com

David R. Todd
Registration No. 41,348
dtodd@wnlaw.com

Brian N. Platt
Registration No. 62,249
bplatt@wnlaw.com

Dated: March 4, 2026

/Elizabeth Durham Flannery/
Elizabeth Durham Flannery
(Reg. No. 59,509)
Lead Attorney for Petitioners