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Paper 33
Date: October 8, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION and
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

PGR2020-00055
Patent D855,508 S

Before KEN B. BARRETT, SCOTT A. DANIELS, and
ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge.*

JUDGMENT
Final Written Decision
Determining No Challenged Claim Unpatentable
35 U.S.C. § 328(a)

I. INTRODUCTION

A. Background and Summary

LKQ Corporation and Keystone Automotive Industries, Inc. (collectively, "LKQ" or "Petitioner")[1] filed a Petition requesting post-grant review of U.S. Patent No. D855,508 S ("the '508 patent," Ex. 1001). Paper 2 ("Pet."). The Petition challenges the patentability of the sole design claim of the '508 patent. GM Global Technology Operations LLC ("GM" or "Patent Owner")[2] filed a Preliminary Response to the Petition. Paper 6. On October 13, 2020, we determined that the '508 patent was eligible for post-grant review and that Petitioner demonstrated that it is more likely than not that the challenged claim was unpatentable. Accordingly, we entered a Decision instituting trial. Paper 9 ("Inst. Dec." or "Institution Decision").

Following our Institution Decision, GM timely filed a Response. Paper 19 ("PO Resp."). LKQ filed a Reply. Paper 23 ("Pet. Reply"). GM subsequently filed a Sur-Reply. Paper 27 ("PO Sur-Reply"). We heard oral argument on June 29, 2021. A transcript of the argument has been entered into the record. Paper 32 ("Tr.").

We have jurisdiction under 35 U.S.C. § 6(b). This Final Written Decision is issued pursuant to 35 U.S.C. § 328(a). Having reviewed the arguments of the parties and the supporting evidence, we find that Petitioner has not demonstrated by a preponderance of the evidence that the sole claim of the '508 patent is anticipated or would have been unpatentable. *See* 35 U.S.C. § 326(e).

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[1] Petitioner identifies LKQ Corporation and Keystone Automotive Industries, Inc. as real parties-in-interest. Pet. 5.
[2] Patent Owner identifies General Motors LLC and GM Global Technology Operations LLC as real parties-in-interest. Paper 5, 2.

B. Related Proceedings

LKQ lists twenty-three allegedly related matters. Pet. 5. GM lists twenty-six distinct proceedings as related but then qualifies the list by making the statement that: "Patent Owner does not concede that any of the above-identified proceedings would affect, or be affected by, this proceeding." Paper 5, 3.

C. The '508 Patent and the Claim

In a post-grant review requested in a petition filed on or after November 13, 2018, we apply the same claim construction standard used in district courts, namely that articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* 37 C.F.R. § 42.200(b) (2019). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be "helpful to point out . . . various features of the claimed design as they relate to the . . . prior art." *Id.* at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to the district court, in part, for a "verbal description of the claimed design to evoke a visual image consonant with that design").

The '508 patent is titled "Vehicle Front Skid Bar," and issued August 6, 2019, from U.S. Application No. 29/645,849, filed April 30, 2018.[3]

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[3] Because the earliest possible effective filing date for the '508 patent is after March 16, 2013 (the effective date for the first inventor to file provisions of the America Invents Act) and this petition was filed within 9 months of its

Ex. 1001, codes (21), (22), (45), (54). The claim recites "[t]he ornamental design for a vehicle front skid bar, as shown and described." *Id.* at code (57). The '508 patent covers a single claim as set forth in four figures. The Description specifies that "[t]he broken lines in the drawings illustrate portions of the front skid bar that form no part of the claimed design." *Id.*

Figures 1–4 of the '508 patent are depicted below.

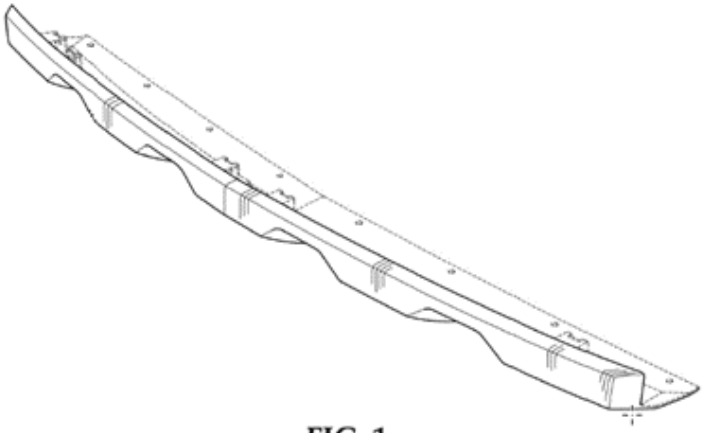

FIG. 1

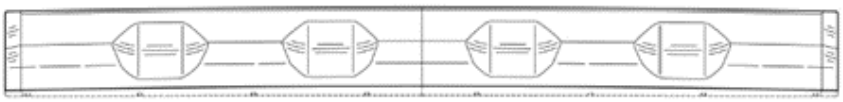

FIG. 2

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issue date, the '508 patent is eligible for post-grant review. *See* 35 U.S.C. § 321(c).

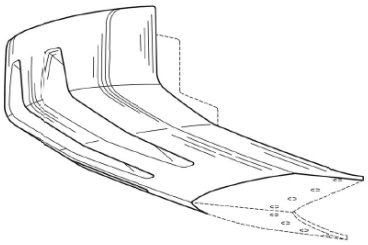


FIG. 3

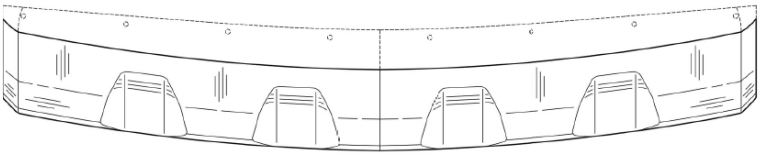


FIG. 4

Ex. 1001. Figures 1–4 above depict, respectively, the following views of the claimed vehicle front skid bar design: a perspective view of the vehicle front skid bar, a front view, a left side view, and a bottom view. *Id.* at code (57).

We determine that the following verbal descriptions provided by the parties will be helpful by pointing out "various features of the claimed design as they relate to the . . . prior art." *Egyptian Goddess*, 543 F.3d at 679–80. Petitioner offers a detailed claim construction position, identifying almost every feature that contributes to the overall appearance of the claimed design. *See* Pet. 11–20; *see also* Ex. 1004 ¶¶ 32–37 (Petitioner's declarant testifying that "images rather than words best represent the design" and "it is impractical to attempt to verbally characterize every element of the claimed design").

We discuss here some features identified by Petitioner and Patent Owner that we determine contribute to the ornamental design of the '508 patent and are relevant to our analysis.

The claimed skid bar design depicts a perimeter shape with noticeable curvature from side-to-side such that the center of the skid bar extends further forward than sides of the skid bar. *See* PO Resp. 2–3. The claimed design has a prominent substantially vertical front portion that also curves rearward from the center that terminates in a top portion and small side portions that angle backward. *See id.*; Pet. 11. GM's annotated Figure 1 of the '508 patent is reproduced below.

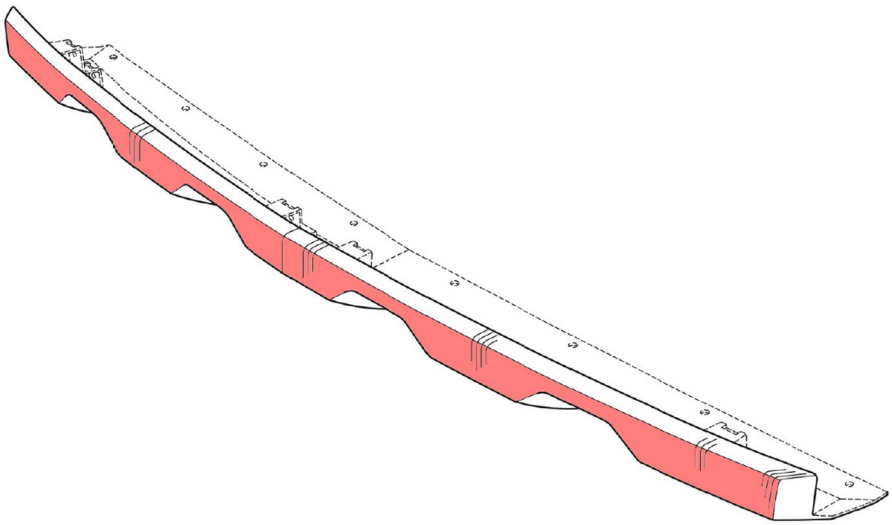


FIG. 1

GM's provides an annotated Figure 1 adding shading to the prominent front surface with a substantially vertical orientation. PO Resp. 3. The front surface is large relative to other surfaces of the skid bar, and accounts for nearly half the overall height of the skid bar. Ex. 2004 ¶ 37 (Peters declaration).

The skid bar design has top and side surfaces that project outwardly. The top surface is oriented substantially perpendicular to the front and side surfaces, making for a squared relationship and outwardly-projecting positioning of the front surface as best depicted in GM's annotated Figure 1 below.

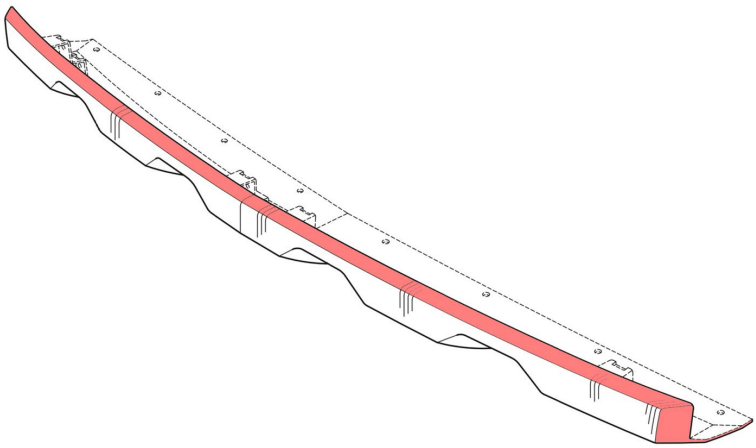
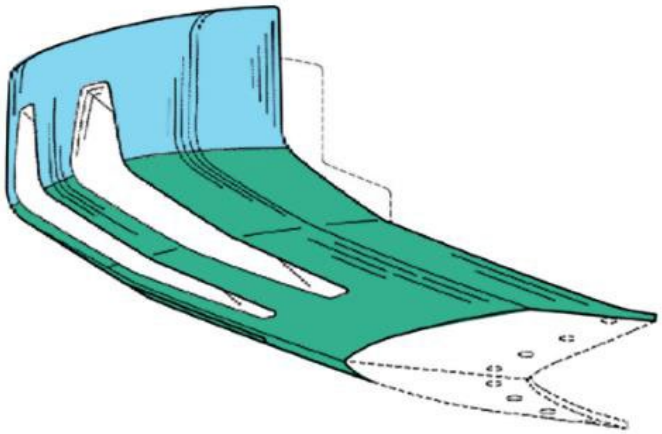


FIG. 1

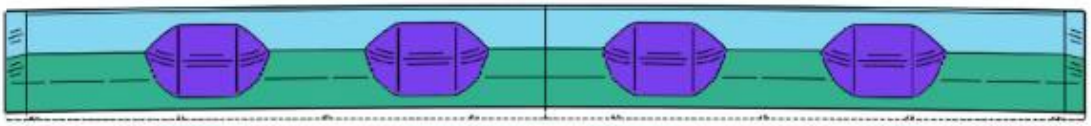
GM's provides an annotated Figure 1 with shading along the very top and side surfaces that project outwardly. Ex. 2004 ¶ 38.

The front portion adjoins a bottom portion curving rearward from a center, as best depicted in LKQ's annotated Figure 3 below.



LKQ creates an annotated Figure 3 with a top portion highlighted in blue and a bottom portion highlighted in green. Pet. 11. In the view above, the skid bar curves noticeably from side-to-side. In this view, an unclaimed bottom surface is also visible.

From a front view, the top and bottom portions have four evenly spaced recessed portions as depicted in Petitioner's annotated Figure 2 below.



LKQ creates an annotated Figure 2 with a top portion shaded in blue and a bottom portion shaded in green and the four recess portions shaded in purple. Pet. 12. In this view, the skid bar includes a set of four recesses that extend deeply into the skid bar, and that are visible in their entirety including top and bottom edges of each recess. The curvature and depth of the four recesses are best shown by GM's annotated Figure 3 below.

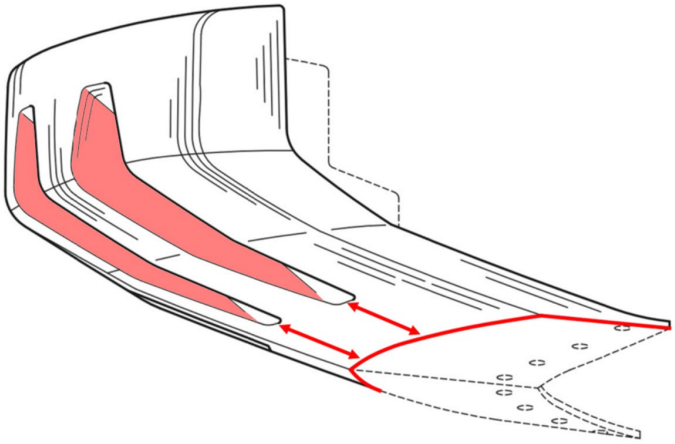


FIG. 3

GM produces an annotated Figure 3 with shading within the recesses and arrows below the recesses showing a substantial space under the recesses in the bottom portion. Ex. 2004 ¶ 39. The substantial depth of the recesses creates an impression of thickness of the claimed skid bar design. *Id.* As a result of its curvature, two recesses are prominent in this side view including the interior surfaces of two recesses that also complement the side surface of the claimed design. *Id.* ¶ 41.

Each of these specific features discussed above, and the relationships of these features, contribute to the overall appearance of the '508 Patent's

design. Neither party alleges that the claimed design includes both functional and ornamental elements, thus, we do not undertake further construction in order to identify the non-functional aspects of the design.

D. Evidence

Petitioner relies on the following references[4]:

Reference	**Exhibit**
Changfeng Leopaard CS10, http://chinaautoweb.com/carmodels/leopaard-cs10/?pid=26615, archived on July 29, 2014 by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20140729063321/http://chinaautoweb.com/car-models/leopaard-cs10/?pid=26615.	1006
Changfeng Leopaard CS10, http://chinaautoweb.com/carmodels/leopaard-cs10/?pid=26614, archived on July 29, 2014 by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20140729090625/http://chinaautoweb.com/car-models/leopaard-cs10/?pid=26614.	1007
Changfeng Leopaard CS10, http://chinaautoweb.com/carmodels/leopaard-cs10/?pid=26615, archived on July 18, 2017 by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20170718213024/http://chinaautoweb.com/car-models/leopaard-cs10/?pid=26615.	1008
Changfeng Leopaard CS10, http://chinaautoweb.com/carmodels/leopaard-cs10/?pid=26614, archived on July 18, 2017 by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20170718214205/http://chinaautoweb.com/car-models/leopaard-cs10/?pid=26614.	1009
Changfeng Leopaard CS10, http://chinaautoweb.com/carmodels/leopaard-cs10/?pid=42666, archived on July 18, 2017 by the Internet Archive organization's "Wayback Machine" at	1010

[4] We adopt Petitioner's descriptions of the references. *See* Pet. vii–viii (Table of Exhibits), 14–15 (identification of evidence relied upon).

https://web.archive.org/web/20170718021511/http://chinaautoweb.com/car-models/leopaard-cs10/?pid=42666.	
2012 Chevrolet Equinox brochure image, http://www.autobrochures.com/makes/Chevrolet/Equinox/Chevrolet_US Equinox_2012.pdf, archived on April 3, 2014, by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20140403104902/http://www.autobrochures.com/makes/Chevrolet/Equinox/Chevrolet_US%20Equinox_2012.pdf.	1011
2012 Chevrolet Equinox brochure, http://www.autobrochures.com/makes/Chevrolet/Equinox/Chevrolet_US%20Equinox_2012.pdf, archived on April 3, 2014, by the Internet Archive organization's "Wayback Machine" at https://web.archive.org/web/20140403104902/http://www.autobrochures.com/makes/Chevrolet/Equinox/Chevrolet_US%20Equinox_2012.pdf.	1012

LKQ also relies on the declarations of James M. Gandy (Ex. 1003) and Jason C. Hill (Exs. 1004, 1028) in support of its arguments.[5] GM relies on the declaration of Thomas Peters (Ex. 2004).

[5] We have considered GM's contentions that we should give no weight to LKQ's declarants because the declarations of both experts "are ***word-for-word*** the same as each other and the Petition." PO Resp. 12. Although two identical expert reports without collaboration evinces attorney driven expert reports, we decline to reach GM's specific arguments because we agree that even with full consideration of the opinions expressed in the declarations of LKQ's experts, the totality of the evidence supports our findings and conclusions in favor of GM. As a matter of weight, we do find Mr. Peters' testimony more persuasive because it is well supported by the evidence of record and because of his extensive experience in automotive design. *See* Ex. 2004, App. A.

E. Asserted Grounds of Unpatentability

Petitioner asserts that the sole design claim of the ’508 patent is unpatentable on the following grounds (Pet. 14–15):

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1	102	2015 Changfeng Leopaard CS10 (or publications depicting it)[6]
1	103	2015 Changfeng Leopaard CS10 (or publications depicting it) alone
1	103	2015 Changfeng Leopaard CS10 (or publications depicting it) and 2012 Chevrolet Equinox (or publications depicting it)

II. ANALYSIS

A. Principles of Law

1. Anticipation

The “ordinary observer” test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented design is compared with the alleged anticipatory reference rather than an accused design. *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

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[6] Petitioner identifies several exhibits as the “Primary” reference (2015 Changfeng Leopaard CS10) for each ground, including vehicle itself, and various alleged publications (Exs. 1006–1010). *See* Pet. 14–15; Tr. 5:6–24 (“I’m relying upon the skid bar itself and I’m using the publication as evidence of what that skid bar looked like. It’s an on-sale bar, if you want to call it that. It’s the actual item that was available for the critical date, that actual item was publicly known, was offered for sale. The actual item is evidenced by the publication itself.”).

> [I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Id. at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the "normal use" lifetime of the accused product, i.e., "from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article." *Int'l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior art and claimed designs,

> [t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as "minor differences between a patented design and an accused article's design cannot, and shall not, prevent a finding of infringement" . . . so too minor differences cannot prevent a finding of anticipation.

Id. at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (1984)).

2. Obviousness

"In addressing a claim of obviousness in a design patent, the ultimate inquiry [] is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved." *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (internal quotation omitted); *see also High Point Design LLC*, 730 F.3d at 1313. *See also* MPEP § 1504.03 (II) ("the proper standard is whether the design would

have been obvious to a designer of ordinary skill with the claimed type of article").

The obviousness analysis generally involves two steps: first, "one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design"; second, "once this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design." *High Point Design*, 730 F.3d at 1311 (internal quotation and citations omitted).

In performing the first step of the obviousness analysis, we must "(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates basically the same visual impression." *Id.* at 1312 (internal quotation omitted).

In the second step, the primary reference may be modified by secondary references "to create a design that has the same overall visual appearance as the claimed design." *Id.* at 1311 (internal quotation omitted). However, the "secondary references may only be used to modify the primary reference if they are 'so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.'" *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)) (alteration in original).

When evaluating prior art references for purposes of determining patentability of ornamental designs, the focus must be on actual appearances and specific design characteristics rather than design concepts. *In re*

Harvey, 12 F.3d 1061, 1064 (Fed. Cir. 1993); *see also Apple, Inc.*, 678 F.3d at 1332 ("Rather than looking to the 'general concept' of a tablet, the district court should have focused on the distinctive 'visual appearances' of the reference and the claimed design.").

3. Ordinary Observer

According to LKQ, "the ordinary observer should be the retail consumer of an automobile because that is the individual who compares the claimed design to other automobile designs, makes the decision to purchase a vehicle comprising the embodying design." Pet. 39–40 (citing Ex. 1003 ¶ 39; Ex. 1004 ¶ 37). Neither the Petition, nor the declarations filed in support thereof, provided evidentiary support for the assessment of an ordinary observer.

In its Preliminary Response, GM initially disputed this classification, arguing instead that the ordinary observer should be a commercial buyer who purchase replacement vehicle front skid bars to repair a customer's vehicle, such as repair shop professionals. *See* Inst. Dec. 12. In our Institution Decision, we determined that the ordinary observer includes both a vehicle owner and consumer and also a replacement parts buyer. Inst. Dec. 13. In its Response, GM adopts Mr. Peters' view that definitional disagreement as to the ordinary observer is irrelevant because his opinion is the same regardless, and "[t]he overall appearance of the '508 Patent is meaningfully different compared to the Leopaard from the perspective of the ordinary observer under either definition." Ex. 2004 ¶ 26; PO Resp. 8. Based upon the full record, we agree with Mr. Peters, and GM, that it is irrelevant which ordinary observer is adopted, and as such, we determine the following.

Before us is evidence that both automobile owners, as well as insurance and repair companies, desire to return vehicles to their original appearance. GM points to a letter from LKQ's counsel to U.S. Customs and Border Protection stating that "[a]utomobile owners seek to repair their automobiles in a way that returns their automobile as closely as possible to its original appearance and condition." Ex. 2002, 11. This letter also states that "[i]nsurance companies are overwhelmingly the customers in aftermarket repair parts market transactions, acting on behalf of their driver clients." *Id.*

The '508 design claims a "vehicle front skid bar," not a vehicle in total. Ex. 1001, code (57). Based on this, as well as the evidence from both parties, we determined in our Institution Decision:

> Patent Owner has presented credible arguments and evidence as to why the ordinary observer would be a repair shop professional. The evidence, however, also reveals that a retail consumer, such as the owner of a vehicle, may also be in the position of an ordinary observer. A vehicle owner may have a contract with its insurance agent that "require[s] the insurer to repair vehicles with parts of 'like kind and quality' to the OEM parts." Ex. 2002, 14 . . . . For purposes of this Decision we accept that both parties' definitions fall within the purview of an ordinary observer.

Inst. Dec. 13 (citations omitted).

LKQ clings to its argument that Federal Circuit case law supports just the prospective purchaser of a vehicle as the ordinary observer. *See* Pet. Reply 3 (citing *Pacific Coast Marine Windshields v. Malibu Boats*, 739 F.3d 694, 701–702 (Fed. Cir. 2014)). Federal Circuit cases are consistent in that the determination of the ordinary observer is factually dependent. *See Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1323 (Fed. Cir. 2007), *abrogated on other grounds by Egyptian Goddess*, 543

F.3d at 665 (The Federal Circuit explaining "that the ordinary observer is a person who is either a purchaser of, or sufficiently interested in, the item that displays the patented designs and who has the capability of making a reasonably discerning decision when observing the accused item's design whether the accused item is substantially the same as the item claimed in the design patent."). Perhaps just as important is that the ordinary observer analysis is not limited to only a product phase, such as when installed on a vehicle, but the analysis most consider the normal use lifetime of the product. *See Contessa Food Prods. v. Conagra, Inc.*, 282 F.3d 1370, 1380 (Fed. Cir. 2002) ("the 'ordinary observer' analysis is not limited to those features visible during only one phase or portion of the normal use lifetime of an accused product.").

On the facts and evidence in this proceeding, the interests and goals of both the vehicle owner and repair shop person are aligned, that is—in the context of repair, to return the vehicle to its original appearance. Ex. 2002, 11; Ex. 2004 ¶¶ 26, 43, 45, 47, 48, 51. Even if we chose between the two, our analysis would not change sufficiently to affect the outcome of this Decision. Therefore, we do not alter our determination made at institution, that the ordinary observer includes both a vehicle owner and consumer and also a replacement parts buyer.

4. The Designer of Ordinary Skill in the Art ("DOSA")

Petitioner contends that a designer of ordinary skill would be an individual who has at least an undergraduate degree in transportation or automotive design and experience in the field of transportation design, or someone who has several years' work experience in the field of transportation or automotive design. Pet. 37 (citing Ex. 1003 ¶¶ 41–42; Ex. 1004 ¶ 39).

GM originally argued for a slightly different standard for the ordinary designer in its Preliminary Response, but for purposes of its Response, GM has acquiesced in LKQ's definition. *See* PO Resp. 8. Mr. Peters contends that "I do not discern any relevant differences between these proposals, nor do I have any substantive disagreement with Mr. Gandy's proposal. My opinion is the same, regardless of which definition is applied." Ex. 2004 ¶ 27.

Based on the final record, we adopt Petitioner's proposed definition of the ordinary designer.

B. Alleged Anticipation and Obviousness of the Claim Based on 2015 Changfeng Leopaard CS10

Petitioner contends that the '508 patent claim is anticipated by the 2015 Changfeng Leopaard CS10 ("Leopaard"). Pet. 44–51. Petitioner alternatively argues that the claim would have been obvious to a designer of ordinary skill in the art over the Leopaard. Pet. 51–55.

We are mindful of the different standards for design patent anticipation versus obviousness. As noted above, anticipation requires that two designs be substantially the same to the ordinary observer. To qualify as a primary reference for purposes of obviousness, two designs must have design characteristics that are basically the same to the designer of ordinary skill in the art. Below, we determine that the Leopaard does not have design characteristics that are basically the same, or substantially the same, as the patented design. We analyze both obviousness and anticipation in the same section for convenience, but from the perspective required for each standard.

As for anticipation, LKQ argues that to the ordinary observer, "[t]he skid bar of the Leopaard is substantially the same as the claimed design of

the ’508 Patent.” Pet. 44 (citing Ex. 1003 ¶¶ 54–57; Ex. 1004 ¶¶ 54–56). For purposes of obviousness, LKQ contends “[t]o the extent any slight difference between the skid bar of the Leopaard and the single claim of the ’508 Patent can be found to prevent a finding of anticipation, then the single claim of the ’508 Patent is unpatentable as obvious over the Leopaard alone.” Pet. 51.

Below, we discuss the Leopaard’s design and then address the parties’ contentions. As we analyze in detail below, LKQ’s case is not persuasive for several reasons, including its failure to provide sufficient evidence. LKQ has not produced images of the Leopaard that would enable a persuasive comparison with corresponding views of the claimed invention. The evidence produced by LKQ related to the Leopaard simply fails to clearly show several claimed aspects of the design. Because the Petition omits sufficient views of any complete single skid bar (Ex. 2004 ¶ 51), the evidence produced by LKQ related to the Leopaard simply fails to clearly show several claimed aspects of the design. For example, Exhibits 1006–1009 include front or perspective views that show, at most, only an upper portion of a skid bar. Exhibit 1010 shows slightly more of the skid bar of its vehicle, but also omits a significant portion of the bottom of the skid bar. Ex. 2004 ¶ 51; Ex. 2006, 77:2–21. The exhibits do not show a sufficient bottom view to allow comparison and the exhibits also have obscured side views due to other trim features covering the outsides of the skid bar. For these and other reasons such as the differences between the designs discussed below, LKQ has failed to meet its burden of proof.

Based on the final record, LKQ has not shown sufficiently that the ordinary observer would view the skid bar of Leopaard as substantially the

same as the claimed design of the ’508 patent, and thus has not shown by a preponderance of the evidence that the ’508 patent is anticipated by the Leopaard.

Similarly, LKQ has not shown sufficiently that the ’508 patent and Leopaard’s skid bar have design characteristics that are basically the same to the designer of ordinary skill in the art and thus the Leopaard is not a proper *Rosen* reference. Thus, LKQ has not shown by a preponderance of the evidence that the ’508 would have been obvious over the Leopaard.

1. Leopaard

Petitioner articulates the primary reference for this ground as the Leopaard vehicle itself or “publications depicting” the Leopaard. Pet. 16–17 (citing Exs. 1006–1007, allegedly available no later than July 29, 2014, and Ex. 1008, an additional image of Leopaard publicly available no later than July 18, 2017). Petitioner contends that “Exhibits 1006–1007 constitute a separate single publication as of July 29, 2014, and Exhibits 1008–1010 constitute a separate, single publication as of July 18, 2017,” and further “each qualify as prior art under 35 U.S.C. § 102(a)(1).” Pet. 18. The skid bar of Leopaard is depicted in the images below.

LKQ produces a front left view of Leopaard as shown in Exhibit 1010, page 1. Pet. 20. Another similar view is found in Exhibit 1008.

LKQ relies on a front left view of Leopaard as shown in Exhibit 1008, page 1.

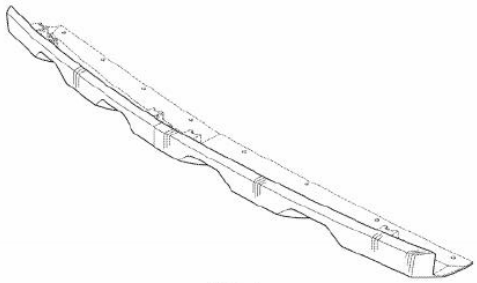
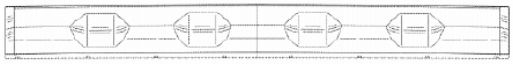
LKQ produces this front view of Leopaard showing its skid bar from Exhibit 1007, page 1. Pet. 20.

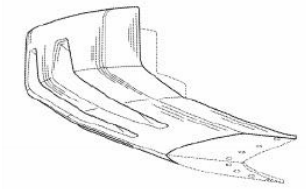
LKQ's exhibits for the Leopaard show photographs of the Leopaard vehicle taken at mid-car height. *See* Exs. 1006–1010. The images of the skid bar in each photographic exhibit are all from an upper perspective

(looking downward on the skid bar). These angles fail to provide a complete representation of the underside, or bottom, of the skid bar as well as a side view. Further, as seen above, the side portions of the skid bar are obscured in each image relied on by LKQ. *See id.* Each of Exhibits 1006–1010 appears to be a secondary webpage capture from the "Wayback Machine," also making the images less than clear.

2. Petitioner's Contentions

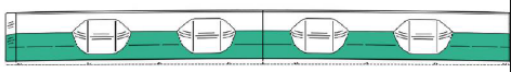
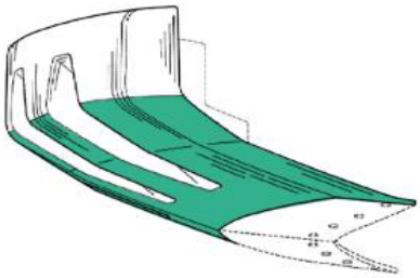
Petitioner contends "[t]he skid bar of the Leopaard is substantially the same as, if not identical to, the claimed design of the '508 Patent from the perspective of an ordinary observer," and "[a]ny differences . . . are minor and therefore insufficient to preclude a finding of anticipation." Pet. 44 (citing Ex. 1003 ¶¶ 54–57; Ex. 1004 ¶¶ 54–56). Petitioner relies on the following direct, visual comparison of the '508 patent and the skid bar of Leopaard, as shown below (Pet. 45–46).

'508 CHALLENGED PATENT	LEOPAARD
 FIG. 1 Ex. 1001, FIG. 1.	Ex. 1006, at 1; Ex. 1008, at 1 (cropped).
 FIG. 2 Ex. 1001, FIG. 2.	Ex. 1007, at 1; Ex. 1009, at 1 (cropped).

 FIG. 3 Ex. 1001, FIG. 3.	 Ex. 1010, at 1 (cropped). Ex. 1006, at 1; Ex. 1008, at 1 (cropped).

LKQ provides a set of comparisons including, Figure 1 compared to Exhibit 1006, page 1 (top), Figure 2 compared to Exhibit 1007, page 1 (middle) and Figure 3 compared to both Exhibit 1010, page 1 and Exhibit 1006, page 1 (bottom).

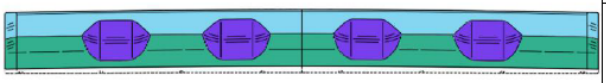
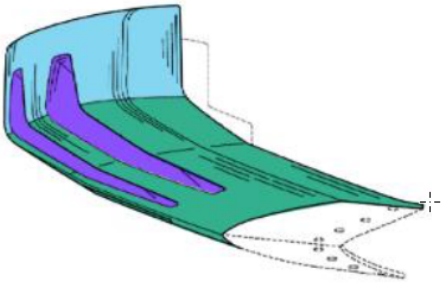
Petitioner next provides "specific comparison of particular elements" to better show similarities. Pet. 46–50. For example, a few of Petitioner's annotated comparisons are depicted below. Relying on its proposed claim interpretation, Petitioner argues "[e]ach design includes a substantially rectangular bottom portion curving slightly rearward from the center and terminating in small side portions rising slightly upward." Pet. 47.

'508 CHALLENGED PATENT	LEOPAARD
 Ex. 1001, FIG. 2 (annotated).	Ex. 1007, at 1; Ex. 1009, at 1 (cropped, annotated).
 Ex. 1001, FIG 3 (annotated).	Ex. 1010, at 1 (cropped, annotated). Ex. 1006, at 1; Ex. 1008, at 1 (cropped, annotated).

LKQ provides a set of comparisons to show similarity in the bottom portions of the skid bar including, Petitioner's comparison of Figures 2 and 3 of the '508 patent with Exhibit 1007, page 1, Exhibit 1010, page 1, and Exhibit 1006, page 1 with green highlighting along the bottom portion. Pet. 47.

Petitioner next notes that "[i]n each design, the substantially rectangular bottom portion is adjacent to a substantially rectangular vertical front portion that also curves rearward from the center that terminated in a top portion and small side portions that angle backward." Pet. 48. Petitioner further argues that "the substantially rectangular bottom portion and the

vertical front portion have four, evenly spaced, recessed portions with each recessed portion," as depicted in the following annotated figures.

'508 CHALLENGED PATENT	LEOPAARD
 Ex. 1001, FIG. 2 (annotated).	 Ex. 1007, at 1; Ex. 1009, at 1 (cropped, annotated).
 Ex. 1001, FIG. 3 (annotated).	 Ex. 1010, at 1 (cropped, annotated). Ex. 1006, at 1; Ex. 1008, at 1 (cropped, annotated).

LKQ provides a comparison of Figures 2 and 3 of the '508 patent with Exhibit 1007, page 1 (Exhibit 1009, page 1), Exhibit 1010, page 1, and Exhibit 1006, page 1 with green highlighting along the bottom portion, blue highlighting along the top portion, and purple highlighting showing on the four recesses. Pet. 49.

Petitioner alleges "[t]here is only one minor difference between the skid bar of the Leopaard and the claimed design of the '508 Patent." Pet. 51 (citing Ex. 1003 ¶ 59; Ex. 1004 ¶ 58). According to Petitioner, "[t]he vehicle skid bar of the '508 Patent has side edges that are vertical rather than

slightly angled out in a horizontal direction (i.e., the width of the Leopaard skid bar increases from the top, front edge to the bottom, back edge)." *Id.* Relying on the testimony of its declarants, Petitioner contends that "this is a *de minimis* difference that does not impact the overall visual impression of the design." *Id.* (citing Ex. 1003 ¶ 59; Ex. 1004 ¶ 58). Petitioner concludes by arguing "[t]he '508 Patent is anticipated by the skid bar of the Leopaard because an ordinary observer . . . would have believed that the skid bar design of the Leopaard had an overall visual appearance that was substantially the same as that of the design claimed in the '508 Patent." *Id.* (citing Ex. 1003 ¶ 60; Ex. 1004 ¶ 59).

As for obviousness of the design over Leopaard alone, Petitioner contends, "[t]o the extent any slight difference between the skid bar of the Leopaard and the single claim of the '508 Patent can be found to prevent a finding of anticipation, then the single claim of the '508 Patent is unpatentable as obvious over the Leopaard alone." Pet. 51. Petitioner contends that Leopaard is a proper *Rosen*[7] reference because "the Leopaard is a vehicle which includes a vehicle skid bar with basically the same overall visual appearance as the claimed design for a vehicle skid bar in the '508 Patent." Pet. 52. To address the recognized difference of "side edges that are vertical rather than slightly angled out in a horizontal direction (*i.e.*, the width of the skid of the Leopaard skid bar increases from the top, front edge to the bottom, back edge)," Petitioner contends "this is a *de minimis*

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[7] *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982) (A proper primary reference for the obviousness analysis is "a reference, a something in existence, the design characteristics of which are basically the same as the claimed design.").

difference that does not impact the overall visual impression of the design, and further would have been immediately obvious to, and well within the knowledge, experience, skill, and creativity of a designer of ordinary skill in the art." Pet. 54–55.

In its Reply briefing, LKQ relies on the additional testimony of Mr. Hill (Ex. 1028), which we have considered. *See, e.g.*, Ex. 1028 ¶¶ 21–25 (alleging that over a dozen features between the two designs "were either identical or near-identical"). LKQ contends that GM failed to perform a balanced analysis because GM, and Mr. Peters, did not address the overall visual similarity of the Leopaard and the '508 patent and then weigh those similarities against the differences. Pet. Reply 5–13. LKQ again points out the perceived similarities in the two designs, including a front facing surface, four recesses cut into the front-facing and rearward sloping surfaces, a positive space between the central two recesses, and several other similarities. *Id.* at 9–12. LKQ contends that Mr. Peters requires "perfect identity" for similarity of designs and he was unable to weigh purported differences against the designs' similarities. *Id.* at 8–9 (citing Ex. 1026, 80–85 (Peters deposition)). LKQ then addresses each of the six alleged differences examined by GM. *Id.* at 14–28. We address these arguments in our analysis below.

3. Patent Owner's Contentions

GM first contends that the Petition is based on an improper analysis that ignores the way in which an ordinary observer would have viewed the design. PO Resp. 8–9. GM points out that the ordinary observer analysis extends to the entire normal and intended use of the vehicle skid bar, including both alone as a replacement part, as depicted by the '508 Patent, and when installed on a vehicle. *Id.* at 9 (quoting *Int'l Seaway Trading*

Corp. v. Walgreens Corp., 589 F.3d 1233, 1241 (Fed. Cir. 2009) ("The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the 'normal use' lifetime of the accused product, i.e., 'from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article.'")). GM notes that "the 'ordinary observer' analysis is ***not*** limited to those features visible during only one phase or portion of the normal use lifetime of an accused product." *Id.* (quoting *Contessa Food Prods.*, 282 F.3d at 1380).

GM contends that "[t]he skid bar depicted by the '508 Patent has a unique overall appearance conveyed by the specific features of the design—both when viewed alone and when assembled with a vehicle." *Id.* at 10. GM relies on the testimony of Mr. Peters that the specific skid bar features are intended to "promote its appearance of ruggedness, strength, and capability, including its prominent, substantially vertical front surface, positioning and substantial depth of recesses that are entirely visible and spaced from a bottom edge, and the curvature of the skid bar (*e.g.*, highlighted by the shape of the bottom edge)." *Id.* (citing Ex. 2004 ¶ 46).

GM contends that "LKQ's analysis is faulty because it discounts the ordinary observer's perception of the complete skid bar, particularly when viewed as a replacement part as depicted by the '508 Patent." *Id.* at 11 (citing Ex. 2006, 96:5–8 ("It's got to be attached to the product of which it's a part of.")). GM argues that the Petitioner fails to consider certain features in its analysis and does not include an entire bottom portion of the Leopaard skid bar at all. *Id.* (citing Ex. 2004 ¶ 47). In the aggregate, GM argues that "these omissions fail to demonstrate overall appearance from the requisite

'ordinary observer' perspective." *Id.* As explained more below, we agree with GM's assessment.

GM stresses that the ordinary observer would be attuned to finding similarly appearing parts, and that observable differences matter to the ordinary observer. *Id.* (citing Ex. 2002, 14, Ex. 2004 ¶ 48). GM relies on LKQ's statement that, when choosing replacement parts, "[a]utomobile owners seek to repair their automobiles in a way that returns their automobile ***as closely as possible to its original appearance*** and condition." *Id.* (quoting Ex. 2002, 10 (LKQ letter for relief from seizure and forfeiture)). GM emphasizes that "readily visible details matter to the ordinary observer's impression of overall appearance in the context of vehicle front skid bars." *Id.* at 12.

GM contends that "[n]umerous aspects of the claimed design that make up its overall appearance are absent from the Leopaard, including the claimed design's:"

(i) substantial front face,
(ii) bottom surface and edge,
(iii) outwardly projecting top and side surfaces,
(iv) curvature from side-to-side,
(v) deep recesses entirely visible from the front, and
(vi) outer perimeter shape.

PO Resp. 14–15 (citing Ex. 2004 ¶¶ 49, 52–81). GM notes that LKQ does not even acknowledge, no less examine, any of these notable distinctions. *Id.* at 15.

(i) substantial front face

GM contends that the Leopaard lacks the claimed design's prominent front surface, which is a fundamental aspect of the '508 patent's design. PO Resp. 17–18 (citing Ex. 2004 ¶¶ 52–57). The front surface, according to

GM, "includes at least three distinct features significant to the design's overall appearance: (1) a substantial height, (2) a nearly vertical orientation, and (3) a nearly perpendicular relationship with side and top surfaces of the skid bar," as depicted below. *Id.* (citing Ex. 2004 ¶ 52).

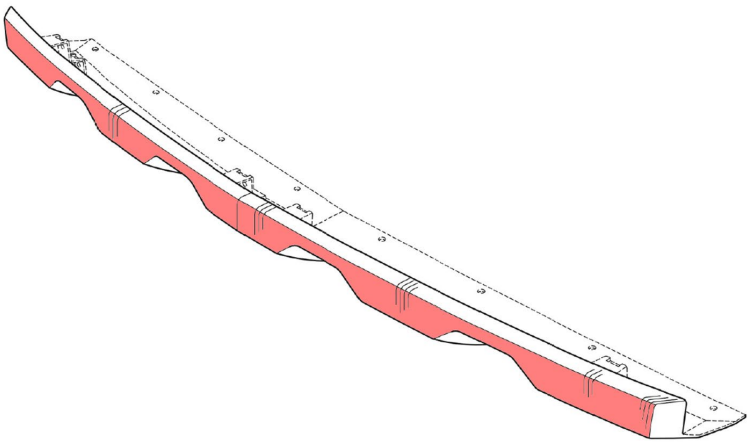


FIG. 1

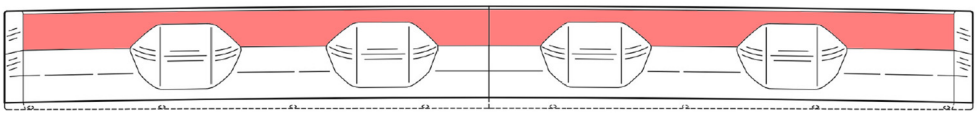


FIG. 2

GM produces annotated Figures 1 and 2 with a red shading in the front face portion of the design. PO Resp. 18. GM argues that the Leopaard lacks the specific aspects of this critical feature, and lacks the overall appearance of the claimed design. *Id.* GM notes that the front surface of the '508 patent has a substantial height relative to other portions of the skid bar, which actually accounts for more than 1/3 of the overall height of the skid bar. *Id.* (citing Ex. 2004 ¶ 53).

GM contends that the front surface has a nearly vertical orientation, which along with its relatively large size, makes the front surface particularly prominent and provides a structural, bumper-like appearance to the ordinary observer. *Id.* at 19 (citing Ex. 2004 ¶ 54). GM argues that "the

angled relationship of the front surface relative to the side surfaces and a nearly perpendicular orientation relative to the top surface accentuates an outwardly-protruding appearance of the front surface," which "provides the appearance of a commanding leading surface." *Id.* (citing Ex. 2004 ¶ 55). GM contends "the large, nearly vertical orientation, and outwardly-protruding positioning, creates an imposing presence that promotes the rugged and squarish overall appearance of the '508 Patent's design." *Id.*

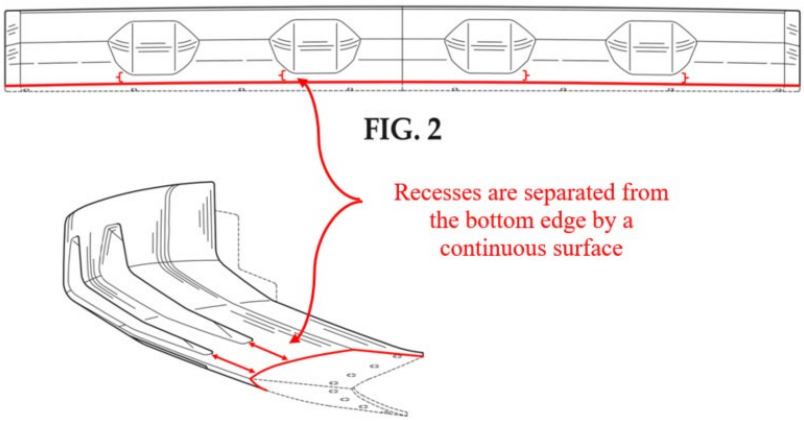
GM alleges that "[t]he different appearance of the Leopaard is glaring," because "the front surface of the Leopaard has a relatively short height that accounts for only a small portion of the overall height of the skid bar." *Id.* at 20 (citing Ex. 2004 ¶ 57). GM points out that, in the photograph shown below of a Leopaard vehicle having a skid bar, "the bottom surface that makes up a large majority of the visible surface area," and "[t]he bottom surface, and particularly its rearwardly sloping orientation, dominates the appearance of the Leopaard's skid bar." *Id.*

GM's produces a front angular view of Leopaard's skid bar from the Petition and Exhibit 1010 at 1. PO Resp. 21 (noting the image is from Pet. 20). Mr. Peters testifies that this difference is not minor and it significantly impacts the overall impression of the Leopaard's skid bar. Ex. 2004 ¶ 57.

(ii) bottom surface and edge

GM next contends that the Leopaard lacks the '508 patent's bottom surface and perimeter shape. PO Resp. 21–22. GM contends these features would contribute to an ordinary observer's perception of the design, but the Petition omits any corresponding view of the Leopaard from which comparison can be made with these features. *Id.* at 22 (citing Ex. 2006, 109–111). GM contends that "LKQ's expert also concedes, the Petition omits any corresponding views of the Leopaard from which comparison can be made with these features." *Id.*; *see also* Ex. 2006, 77:2–5; 77:13–21.

As depicted below in annotated Figures 2 and 3, GM alleges that "[t]he recesses of the claimed design are spaced from the bottom edge such that a smooth surface extends continuously across the width of the skid bar between lower ends of the recesses and the rear edge." PO Resp. 22–23.



GM produces annotated Figures 2 and 3 (Ex. 2004 ¶ 59) adding red markings along the slanted smooth surface area under the recesses. PO

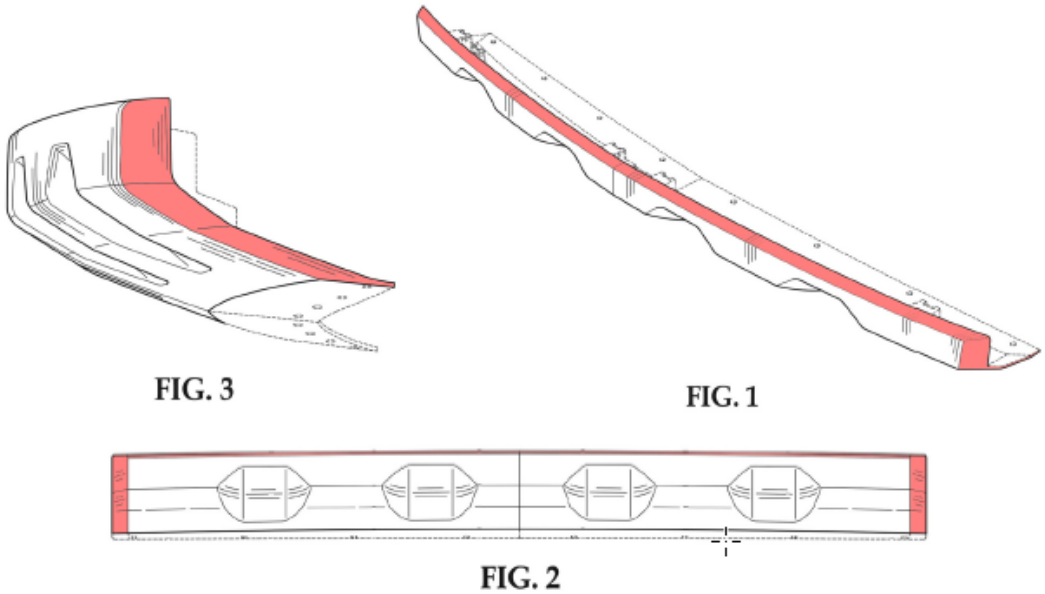
Resp. 22–23. Referring to the figures above, GM contends that the lower edge of the recesses, bottom edge of the skid bar, and continuous surface that separates these features are all visible when viewed from the front and side. *Id.* at 23. GM argues that "[n]one of these features are present in the images of the Leopaard included in the Petition," because "[t]he Petition relies exclusively on images of the Leopaard that show higher portions of the Leopaard's skid bar, not a complete bottom portion." *Id.* "Indeed, the Petition lacks any depiction of a complete bottom portion of the Leopaard from which a reasoned comparison can be made at all. Such lack of evidence plainly falls short of Petitioner's burden." *Id.* at 23–24; *see also* Ex. 2006, 77:13–21. GM further contends that "the Petition omits any views of a complete bottom portion, inexplicably alleging a ***front*** surface of the Leopaard is comparable to a ***bottom*** surface of the claimed design." PO Resp. 26 (citing Pet. 50; Ex. 2006, 104:9–105:18).

GM notes that the Petition's own claim interpretation requires "that the recessed portions of the claimed design 'each begin at approximately 70% of the height of the substantially vertical front portion and end at approximately 70% of the length of the substantially rectangular bottom portion.'" *Id.* at 24 (quoting Pet. 12) (emphasis omitted). GM contends that "[t]his feature, however, is plainly absent from the images provided in the Petition." *Id.* (citing Ex. 2004 ¶ 61; Pet. 49). Further, GM argues that the "ordinary observer" analysis must include both the visual impression of the claimed skid bar in isolation as a replacement part, and when installed on a vehicle. *Id.* at 27. Even when considered installed on a vehicle, GM contends the claimed bottom portion is readily visible and impacts the

ordinary observer's overall impression. *Id.* at 28–29 (citing Ex. 2006, 109:22–110:23, 110:2–110:23).

(iii) outwardly projecting top and side surfaces

GM alleges that "[t]he Leopaard lacks the '508 Patent's chiseled, three-dimensional appearance provided by its top and side surfaces." PO Resp. 29 (emphasis omitted). GM notes that the distinct top and side surfaces project the front surface and "[t]he top surface is oriented substantially perpendicular to the front surface and is defined by front and rear perimeter edges that curve across the width of the skid bar, and lateral edges that angle outwardly." *Id.* (citing Ex. 2004 ¶ 65). GM contends that "[t]he side surfaces angle rearwardly from the front surface to lateral edges, and are prominently visible when the skid bar is viewed from the front and sides," as depicted in the annotated figures of the '508 patent shown below.



GM provides annotated Figures 3 (upper left), 1 (upper right), and 2 (bottom), each with a red shade in the outwardly projecting top and side surfaces. PO Resp. 30 (citing Ex. 2004 ¶ 65).

GM, relying on the testimony of Mr. Peters, argues that "[t]he top and side surfaces—prominently visible in each view of the '508 Patent—are significant to the '508 Patent's overall appearance," yet, "[t]he Leopaard discloses none of these features, and fails to disclose the associated overall appearance of the claimed design." *Id.* at 30–31 (citing Ex. 2004 ¶¶ 66, 67). Mr. Peters testifies that the outwardly-extending surfaces provide a three-dimensional appearance in which the vertical front surface projects forwardly. Ex. 2004 ¶ 66 ("this would have been significant to the ordinary observer's overall impression because it creates a structural, bumperlike image and an appearance of thickness"). Mr. Peters also explains "that the side surfaces are prominently visible whether the skid bar is viewed alone, or when assembled." *Id.*

GM, and Mr. Peters, next examine the Leopaard and conclude that "[t]he Leopaard includes, at most, only a thin top edge, and does not include side surfaces at all." PO Resp. 31 (citing Ex. 2004 ¶ 67). Relying on images of the Leopaard below, GM argues "[t]hese differences are not minor," but instead, "the Leopaard's skid bar lacks the overall three-dimensionality, substantial depth, and forwardly-projected front surface of the '508 Patent."

GM produces a cut out enlarged view of the Leopaard skid bar from Exhibits 1006 (left) and 1010 (right). As seen above, GM argues that "[t]he relationship between the front and top portions are not discernable in the

Petition's images of the Leopaard," and "the Petition never addresses the size of the claimed top surface, or the substantially perpendicular relationship between the top and front surface." PO Resp. 32 (citing Ex. 2004 ¶ 68).

GM notes that Petitioner's own claim construction requires "small side portions that angle backward" and "small side portions rising slightly upward," but these features are not shown in the Leopaard and Petitioner's contrary assertions lack evidentiary support. *Id.* (citing Pet. 10–11, 47–48). "Even LKQ's own declarant again acknowledged that the Petition's images of the Leopaard skid bar do not depict a side portion like the '508 Patent." *Id.* at 33 (citing Ex. 2006, 90:1–21 (Q: "That end surface shown in figure 1 is not visible in the Leopaard vehicle, right?" [A:] "Yeah, I stated that it's not visible in the embodiment.").

(iv) curvature from side-to-side

GM and Mr. Peters argue that the claimed side view of the '508 patent requires a "significant curvature that projects the middle portion of the skid bar substantially forwardly (*e.g.*, to the left in FIG. 3) relative to the side edges of the skid bar." PO Resp. 33–34 (citing Ex. 2004 ¶¶ 70–72). Mr. Peters believes this significant curvature is significant to the overall appearance of the claimed design, and because of the curvature, a substantial portion of the skid bar is visible from the side view, including two complete recesses and space between these recesses as depicted in two annotated Figure 3s of the '508 patent reproduced below. Ex. 2004 ¶¶ 70–72.

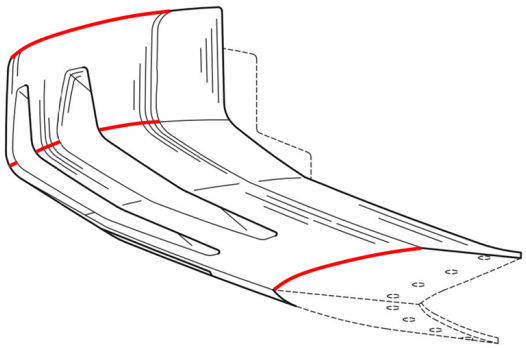


FIG. 3

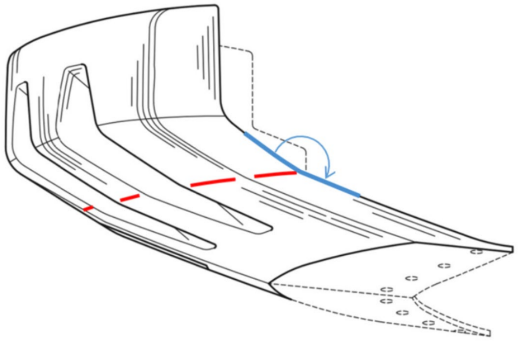


FIG. 3

GM produces two annotated Figure 3s, with the one on the left having edges in red to emphasize the significant curvature and the one on the right having a red inflection line that serves as a transition where the bottom portion changes from a slightly steeper angle to a slightly shallower angle and a blue line and arrow showing the outside change in angle. PO Resp. 34; Ex. 2004 ¶¶ 70, 71. According to GM, the bottom portion of the design includes an inflection line that is particularly prominent when viewed from the side and it extends across the bottom portion of the skid bar where the bottom surface transitions to a shallower angle as it extends rearwardly. PO Resp. 34 (citing Ex. 2004 ¶ 71).

Comparing these features to the Leopaard, GM argues that "the views of the Leopaard included in the Petition do not show significant depth from the central, leading edge to the rear-most portion, and lack an appearance in which two recesses are visible when viewed from the side." PO Resp. 35 (citing Ex. 2004 ¶ 72). GM contends that "Mr. Hill acknowledged that the Leopaard lacked the curvature of the claimed design and that he 'can't tell how much' the middle of the Leopaard's skid bar extends forward of the sides of the skid bar.'" *Id.* (quoting Ex. 2006, 88:22–89:6) (emphasis omitted); *see also* Pet. 44–51 (omitting any side views of the Leopaard). GM also contends that "Mr. Hill acknowledged that the Leopaard lacks the

inflection line or angle change of the bottom surface." PO Resp. 35 (citing Ex. 2006, 74:20–75:10). GM concludes that "[t]he significant curvature, bottom inflection line, and significant depth when viewed from the side are readily observable and prominent in the '508 Patent's design, contributing to the chiseled, rugged, and, durable overall appearance." *Id.* (citing Ex. 2004 ¶ 72). GM again argues that the Petition ignores these features even though they contribute to the overall appearance. *Id.*

(v) deep recesses entirely visible from the front

GM contends that the Leopaard fails to provide the specific shapes and proportions of the recesses of the claimed design. PO Resp. 36 ("does not disclose the claimed design's distinctive sculpting associated with its four recesses"). GM provides annotated Figure 2 below and argues that the claimed design has recesses with parallel top and bottom edges of nearly the same width, and three side edge segments that first angle outwardly from the top edge and then angle back towards the bottom edge. *Id.* (citing Ex. 2004 ¶ 74).

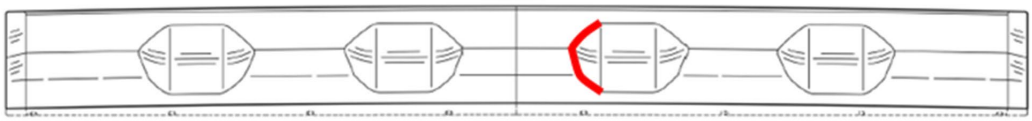


FIG. 2

GM provides annotated Figure 2 with three red lines tracing the left edge of the third recess. PO Resp. 36 (citing Ex. 2004 ¶ 74). GM contends that "[t]he Leopaard lacks this distinctive recess shape," and "[i]nstead, the Leopaard recesses include angled segments extending outwardly from a top edge, and generally vertical portions extending down from the angled segments." *Id.* (citing Ex. 2006, 78:23–79:12).

Relying on the testimony of Mr. Peters, GM next contends that "the Leopaard lacks the appearance of recesses having substantial depth depicted by the '508 Patent," and "the substantial depth of the recesses provides an impression of overall thickness that promotes the '508 Patent's chiseled, durable, and strong overall appearance." *Id.* at 37 (citing Ex. 2004 ¶ 75). GM relies on an annotated version of Figure 3, below, to show the prominence of the depth of the recesses from the side perspective as compared to the Leopaard. *Id.*

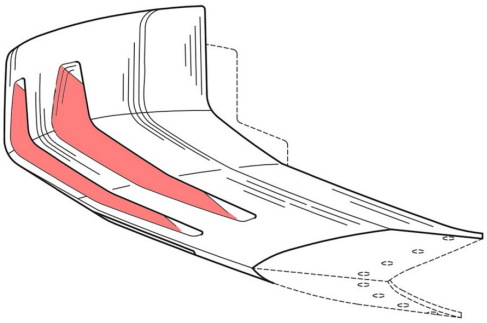


FIG. 3

GM relies on annotated Figure 3 (side view) with red shading in the recesses compared a perspective view of the Leopaard (Ex. 1010). GM contends that "the Leopaard depicts shallow depressions," which "relate to the thin top line and other small surfaces of the Leopaard skid bar, coordinating to provide a different overall appearance." PO Resp. 37.

GM further contends that "the Leopaard does not disclose the cohesive relationship between side surfaces of the recesses and the outer side surfaces of the skid bar." *Id.* at 38. As depicted below in an annotated Figure 3 with the recesses and outer side surfaces shaded in red, GM argues that in "the claimed design, the substantial depth of the side walls of the recesses coordinates with the outer side surfaces of the skid bar," such that "[t]hese surfaces complement one another to depict substantial thickness,

here again promoting the chiseled overall appearance that conveys strength and durability." *Id.* (citing Ex. 2004 ¶ 76).

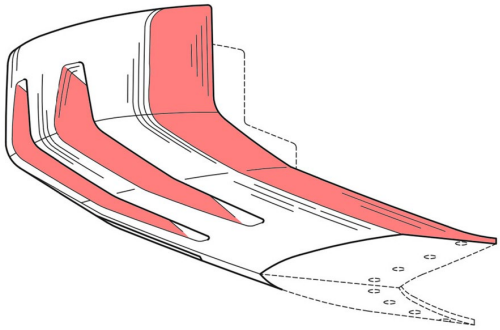


FIG. 3

GM provides annotated Figure 3 with the recesses and outer side surfaces of the claimed skid bar shaded in red. PO Resp. 38. GM concludes that the Leopaard lacks this relationship and the cohesive overall appearance because the Leopaard lacks side surfaces, and has shallow depressions, which combined result in an overall appearance entirely different from the claimed design. *Id.* Mr. Peters testifies that the shape and position of the recesses significantly impacts the character and visual impression of the '508 patent's skid bar and this visual similarity is absent in the Leopaard. Ex. 2004 ¶¶ 73–78.

(vii) outer perimeter shape

GM reiterates that "[t]he '508 Patent's design includes an outer perimeter shape having substantially vertical side edges," and further argues that "LKQ concedes that the claimed design's outer perimeter shape differs from the Leopaard, but wrongly argues (without evidence) that this feature is *de minimis*." PO Resp. 39. GM's declarant, Mr. Peters, testifies that the vertical orientation of the side edges, and relationship to other features of the skid bar, are significant to the overall appearance of the claimed design. Ex. 2004 ¶ 79. Mr. Peters opines that the vertical edges complement vertical

lines of the recesses, and the vertical sides have a nearly perpendicular relationship with the top surface, promoting the squarish, rugged overall appearance of the skid bar. *Id.* Contrastingly, Mr. Peters testifies that the Leopaard lacks a perimeter shape having vertical side edges and the Leopaard's side edges angle outwardly in each exhibit in the Petition. *Id.* ¶ 80.

GM also argues that Petitioner's experts failed to provide any explanation as to why these side features would have been considered *de minimis*. PO Resp. 41 (quoting Ex. 2006, 113:11–16 ("I did not write out any – any specific determination on why.")). GM concludes that "the Petition's assumption regarding the appearance of the Leopaard's skid bar fails to analyze the features of the design that would have been readily apparent and meaningful to the ordinary observer." *Id.*

As for anticipation, GM also argues that LKQ's anticipation theory impermissibly relies on multiple distinct references that are directed to different vehicles.[8] PO Resp. 16–17.

Turning to LKQ's grounds based on obviousness, GM contends that "[t]he Leopaard references fail to depict numerous aspects of the claimed design," yet the obviousness grounds "assume 'only one minor difference' between the '508 Patent's design and the Leopaard." *Id.* at 42 (citing

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[8] Because the outcome of the proceeding would not change, we assume that LKQ has produced a single prior art reference, or thing in existence, sufficient for an anticipation analysis for Post Grant Review. *See Verdegaal Bros. v. Union Oil Co. of Ca.*, 814 F.2d 628, 631 (Fed. Cir. 1987); *see also* Pet. Reply 13 n.3 ("the images depict the same physical item, which is sufficient for Post Grant Review, a 'thing in existence'").

Ex. 2004 ¶ 82). GM incorporates its arguments from the anticipation section and further argues that "there are in fact multiple, readily apparent differences between the claimed design and the Leopaard that are significant to the overall appearance in the eyes of the ordinary observer/designer." *Id.* (citing Ex. 2004 ¶ 82).

GM alleges that the Petition never acknowledges the numerous differences discussed above, and never attempts to modify the Leopaard with respect to these differences. *Id.* at 43. GM continues, "[g]iven these omissions, even if the Leopaard were altered to selectively 'straighten the side edges of the skid bar,' the Petition offers no reasoned analysis why the result would be substantially identical to the claimed design in view of the many other visible differences significant to the overall appearance." *Id.* (citing Ex. 2004 ¶¶ 82–83). GM contends that the obviousness grounds based on the Leopaard fail for this reason alone. *Id.*

GM, again relying on much of its earlier anticipation analysis, contends that the Leopaard is not a proper *Rosen* reference. *Id.* at 43–44. GM argues that LKQ's theory "that the Leopaard provides 'basically' the same visual impression is based on a faulty premise—that there is 'only one' difference between the claimed design and the Leopaard." *Id.* (emphasis omitted). GM reminds that "this assumption ignores readily apparent differences of the claimed design" that were noted above. *Id.* at 44. GM concludes that "[w]ithout accounting for these differences—and particularly, the significance of these differences to the ordinary observer/designer—the Petition lacks any sufficient evidence that the Leopaard is 'a single reference that creates basically the same visual impression' as the claimed design." *Id.* (quoting *High Point Design*, 730 F.3d at 1314).

4. Analysis

Automotive design is a field in which readily observable details have an impact on the overall appearance of a vehicle to both the ordinary observer and the designer of ordinary skill in the art. *See* Ex. 2004 ¶¶ 10–17. The design of the '508 patent claims four distinct views or angles of a vehicle front skid bar: a perspective view from the front (Fig. 1), a front view (Fig. 2), a side view (Fig. 3), and a bottom view (Fig. 4). Although Petitioner has produced sufficient images of the Leopaard to allow a fair comparison with the perspective view, the evidence produced is not sufficient to enable an objective comparison with the claimed bottom and side views, and the bottom of the front view is unclear in the images of the Leopaard. The images of the Leopaard focus on the entire vehicle, not the front skid bar. One image of the Leopaard shows only a partial view of the bottom of the Leopaard (Ex. 1010) – LKQ has simply not produced any bottom or side view of the Leopaard for adequate comparison.

In its Petition, LKQ and its experts improperly compared the bottom view of the claimed design (Fig. 2) to the front view of the Leopaard. *See* Pet. 50; Ex. 1003 ¶ 58; Ex. 1004 ¶ 57. LKQ also compares the side view of the claimed design (Fig. 3) to the perspective view of the Leopaard, but this comparison is inadequate for reasons set forth below. Further, Figures 1 and 3 claim a unique pronounced curvature and a tall nearly vertical front upper face portion. Ex. 2004 ¶¶ 53, 54, 66, 70. These two features are not apparent in any produced image of the Leopaard[9] and thus cannot be

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[9] We have reviewed Mr. Hill's testimony to the contrary (Ex. 1028 ¶¶ 23, 33, 39, 40), including his cross examination testimony (Ex. 2006, 85:10–86:7). We understand his position that Exhibit 1006 may be combined with Exhibit 1010 to show volume, depth, and curvature that is shown in Figure 3

accurately compared. *Id.* ¶¶ 70–72; *see also* Ex. 2006, 90:1–21. The side edges of the Leopard are also obscured by a different trim portion of the vehicle that obstructs the view of the front skid bar. Ex. 2004 ¶ 69.

These failures in evidence impact both the ordinary observer and the designer of ordinary skill analysis whereas the overall claimed design cannot be accurately compared to the Leopaard vehicle. As we discuss in more detail below, there are simply too many aspects of the claimed design that are not adequately disclosed by the images of the Leopard. Although LKQ's experts project what is likely to be in these evidentiary voids, we do not find estimations of design features on par with an actual showing. LKQ's anticipation and obviousness theories are based too much on speculation and conjecture about what features might be present in the Leopaard's skid bar (*see, e.g.*, Pet. Reply 22 ("most likely")), or that various features can be discounted as "likely barely noticeable" or "unlikely to be noticeable." *Id.* at 25, 28. With this understanding, we compare the design claim to the Leopaard, noting both the similarities and difference and also the shortcomings in evidence.

We recognize there are certain articulable and visible similarities in the overall appearance of the claimed design and the Leopaard that would be apparent to an ordinary observer as well as the designer of ordinary skill. As seen below, the ornamental design features that are most prominent are the four uniformly spaced recesses cut into the front-facing and rearward sloping surfaces. *See* Ex. 1004 ¶ 57; Pet. Reply 10.

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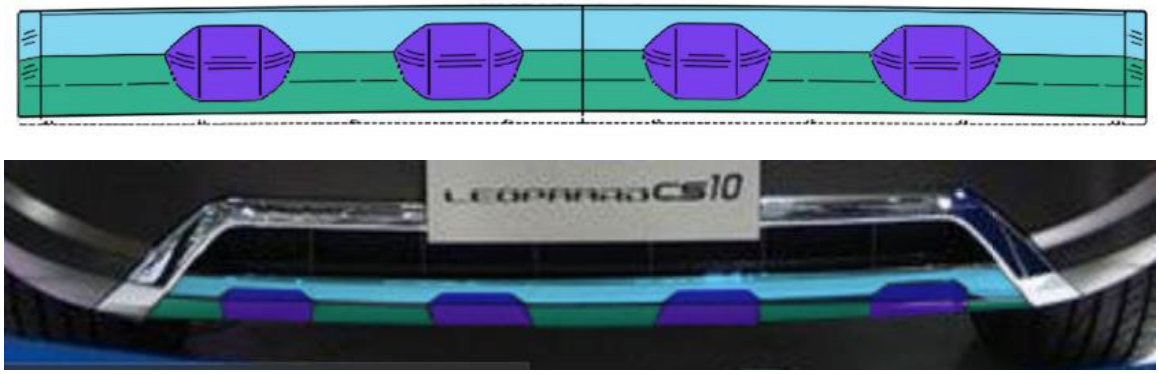
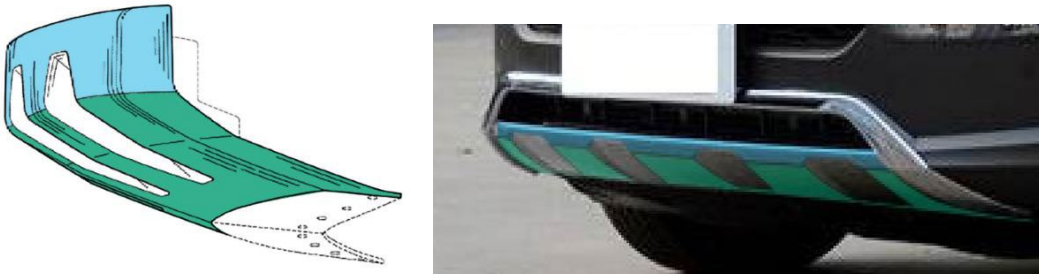
of the design claim. We do not find this testimony persuasive because it is a method to, at best, roughly estimate curvature, depth, and volume.



LKQ's annotated Figure 2 compared to Exhibit 1007, both showing the four recess portions in purple shading. Pet. 49. We agree with Mr. Hill that the cardinal feature of each design are the prominent recesses. Ex. 1028 ¶ 22. The recesses have similar positive space between each in both designs. Each recess has a horizontal top edge and a first downward slanted side edge that is visible in the produced images of the Leopaard. *See* Pet. Reply 10. Other comparisons of the two designs show that the central portion of recesses have a rearward slope between the front-facing surface and the lower surface. Each design also has a portion of the front surface visible at the top of each recess.

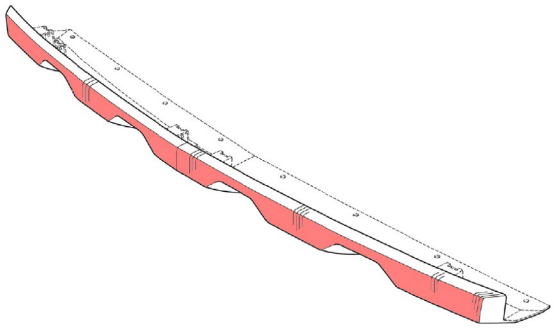
Other similarities are also present in each design. Both the '508 patent and the Leopaard have a rearwardly sloping lower surface of the skid bar that is of a slight arcuate contour as seen in green shading in each image below.

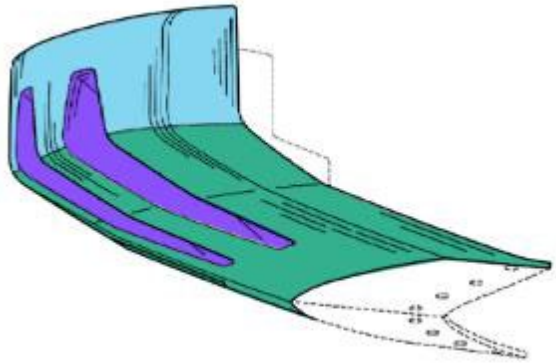


LKQ's comparison of Figure 2 with Exhibit 1010 adding a green shading to the rearwardly sloping surface of the skid bar in both designs.

These similarities are, however, overshadowed by the differences in the overall ornamental designs. Numerous features in the ’508 patent’s design are simply not persuasively disclosed by the Leopaard, including its substantial vertical front surface, top and side surfaces, significant curvature, the entire bottom portion, and the shape and positioning of four recesses as they extend deeply into the skid bar. *See, e.g.*, Ex. 2004 ¶¶ 10–17, 28–43.

The claimed design has a prominent nearly vertical front surface that visibly distinguishes the overall appearance of the ’508 patent’s design from the Leopaard. Ex. 2004 ¶ 52 (describing “substantial height,” “nearly vertical orientation,” and “nearly perpendicular relationship with side and top surfaces of the skid bar.”). The front surface includes three distinct features significant to the design’s overall appearance that are not found in the Leopaard: (1) a substantial height, (2) a nearly vertical orientation, and (3) a nearly perpendicular relationship with side and top surfaces of the skid bar, as compared below. *See id.*

 FIG. 1	

A table comparison of Figure 1 (upper left with red shading within the front surface), the Leopaard at Exhibit 1010 (upper right), Figure 3 (lower left with blue shading within the front surface), and Exhibit 1006 (lower right also with blue shading within the front surface).

We find persuasive Mr. Peters' testimony that the claimed front surface accounts for more than 1/3 of the overall height of the skid bar, as seen above in the red and blue shaded regions on the left. *See* Ex. 2004 ¶¶ 53–54. Further, as also seen, the angled relationship of the front surface relative to top and side surfaces accentuates an outwardly-protruding appearance of the front surface, while the Leopaard has no such features, and the Leopaard's front surface accounts for only a small fraction of the overall height. *See* Ex. 2004 ¶¶ 53–54. These differences are readily apparent to the ordinary observer and designer of ordinary skill, in part because of the "bumper-like" overall appearance that results from these claimed features. *Id.* ¶ 57. The visual impression is notably different than the overall appearance of the Leopaard design, which is dominated by its rearward-sloping bottom surface. *Id.*

We do not find persuasive LKQ's argument these differences in the front surface are simply a "slight difference of degree." Pet. Reply 17. Instead, we are persuaded by Mr. Peters' testimony and the images themselves that establish a cohesive relationship with other features of the '508 patent's design in orientation (e.g., nearly perpendicular to side surfaces) and in proportions (e.g., more than 1/3 of the overall height). *See* PO Sur-Reply 10. The '508 patent's design provides specific relationships, proportions, and scale directly contributing to the outwardly-protruding and bumper-like overall appearance that is absent in the design of the Leopaard. *Id.*

LKQ also has not persuasively shown that the Leopaard has the same ornamental appearance that is claimed in the side view of the '508 patent. More specifically, the '508 patent's design has an overall appearance in which its significant curvature renders a substantial portion of the skid bar visible from the side view, including two complete recesses and space between these recesses. *See* Ex. 2004 ¶¶ 70–72. The Petition's unsupported assumptions regarding these readily visible features of the claimed design would require us to speculate as to actual design, thus we do not find them persuasive. *See* Pet. 48. We agree with Mr. Hill that "both the Leopaard and the '508 patent have curvature from side to side," (Ex. 1028 ¶ 43) however, the curvature depicted in Figure 3 of the '508 patent is pronounced and significant enough to view interior side surfaces of the recesses. Ex. 2004 ¶ 41 ("significant curvature that is particularly prominent when viewed from the side"), ¶ 70 ("the middle portion of the skid bar projects substantially forwardly relative to the sides"), ¶ 72 ("the Leopaard lacks an appearance in which two recesses are visible when viewed from the side").

We also agree with Mr. Hill when he testified that he "can't tell how much" the middle of the Leopaard's skid bar extends forward of the sides of the skid bar. Ex. 2006, 88:22–89:6. The exact curvature of the Leopaard is impossible to ascertain from the views produced, but we agree more with Mr. Peters that the curvature is not as pronounced as the claimed design as seen in the comparison of Figure 3 of the '508 patent with a photograph of the Leopold vehicle showing a perspective view of the front skid bar as shown below.

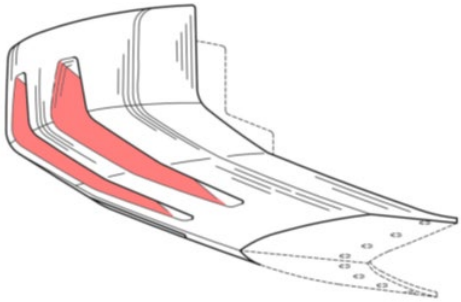


FIG. 3

GM provides annotated Figure 3 (side view) with red shading in the recesses compared a perspective view of the Leopaard (Ex. 1010). PO Resp. 37. We agree with Mr. Peters that "[t]he Leopaard has an appearance that lacks significant curvature and that does not depict a middle portion that extends significantly forwardly relative to the sides," and also "lacks the significant depth of the claimed skid bar between the central, leading edge to the rear-most portion when viewed from the side." Ex. 2004 ¶ 72.

The Petition and Reply omit any image showing a complete bottom perimeter portion of the Leopaard from which reasoned comparison can be made with the '508 patent's bottom design. Mr. Hill never disputes that the lower edge of the recesses, bottom edge of the skid bar, and continuous surface that separates these features are all visible in the '508 patent's design

when viewed from the front (Fig. 2) and side (Fig. 3) but not visible in the Leopaard exhibits. *See, e.g.*, Ex. 2006, 109:22–112:1; *see also id.* at 77:13–21, 79:13–80:8. The Petition does not include any image of the bottom portion of the Leopaard skid bar. We find persuasive Mr. Peters' testimony that by omitting certain comparisons, such as the bottom view, "the Petition's analysis is inconsistent with how an 'ordinary observer' would have viewed the claimed design, the Leopaard, and the Equinox." Ex. 2004 ¶ 47.

As seen in GM's annotated Figures 2 and 3 below, there is a prominent continuous surface below the recesses and the recesses are separated from the bottom edge by this continuous surface.

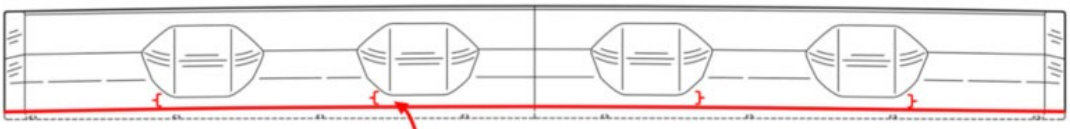
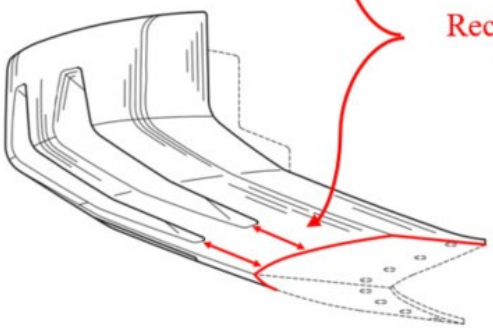


FIG. 2



Recesses are separated from the bottom edge by a continuous surface

FIG. 3

GM relies on annotated Figures 2 and 3 with red lines and arrows added to the continuous surface below the recesses, which is also labeled by red text. PO Sur-Reply 11 (citing Ex. 2004 ¶ 59). LKQ has not produced any image of the Leopaard that persuasively indicates where the recesses end and whether there is any surface under the recesses. *See* Ex. 2006, 77:2–5;

77:13–21. LKQ speculates that the Leopaard's recesses must either carry through the terminating edge creating a clear serrated or toothed look or separate the recesses from the rear edge as is seen in the Leopaard. Pet. Reply 19. Yet, there is simply no support in the record for this speculation and LKQ ignores possible configurations in which the depth of the recesses decrease from top to bottom until there is zero depth where the recesses meet the bottom edge. *See* PO Sur-Reply 14.

We are also persuaded by Mr. Hill's cross-examination testimony where he admitted that he could not accurately describe where the bottom portion of the recess of the Leopaard ends:

> Q. And you can't see anything on Exhibit 1010 below that side vertical portion for these recessed segments, right?
>
> A. I can see that it carries down the surface to -- to -- to the -- what appears to be the bottom edge, but I'm not -- I can't determine exactly where -- where the return would be and where -- where it would -- where it ends.

Ex. 2006, 79:5–12. LKQ has failed to produce persuasive evidence showing the bottom areas of the Leopaard, and this failure impacts both the ordinary observer and designer of ordinary skill analysis.

The claimed top and side surfaces that project the front surface forwardly are also not found in the Leopaard, creating an overall distinct appearance in the two designs. *See* Ex. 2004 ¶¶ 65–67. LKQ's Reply does not dispute the impact of the significant depth of the top and side surfaces on the overall appearance of the '508 patent's design. These differences, compared below, are not just a matter of degree—the substantial thickness of the top surface coordinates with similar thickness of the side surfaces, as well as a similar depth of the recesses. *See id.*

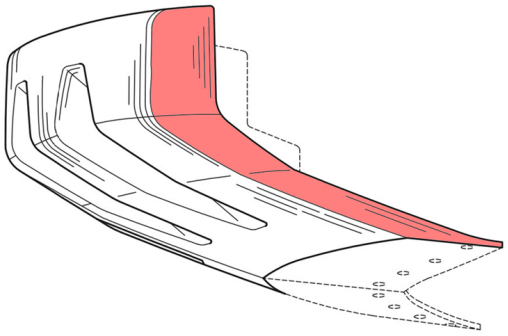


FIG. 3

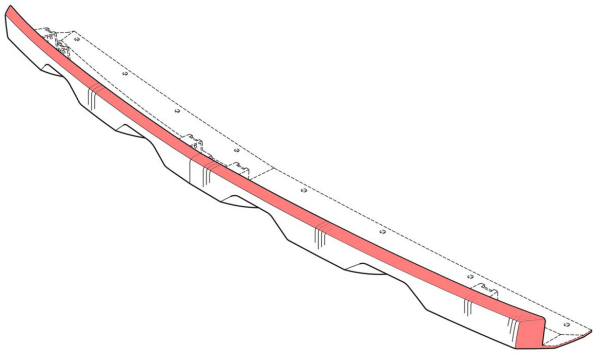


FIG. 1

GM's comparison of annotated Figures 3 and 1 (top), both with red shading along the top and side edges with Exhibit 1010 (bottom). PO Sur-Reply 15–16 (citing Ex. 2004 ¶ 65). These features, highlighted above, work in concert, creating a set of relative proportions between these respective features that contribute to the '508 patent's overall appearance, and which are lacking in the Leopaard. Ex. 2004 ¶¶ 65–67.

The Leopaard's purported top surface is substantially narrower and, based on the poor image quality, we cannot accurately discern if the top surface has a substantially perpendicular relationship with the front surface. *See* Ex. 2004 ¶ 68 ("I also note that the Petition does not address the substantially perpendicular relationship between the top and front surface."). We find unpersuasive LKQ's arguments that the ordinary observer "is capable of gauging perspective to see that the Leopaard discloses a

substantial top surface presenting a horizontal or substantially horizontal, light catching plane." Pet. Reply 21. Based on the quality of the images produced, this is speculation at best. Further, even if true (which is not evident from LKQ's images), LKQ's assertion does not demonstrate a substantially similar overall appearance to the '508 patent's design. PO Sur-Reply 17.

It is undisputed that the Leopard also does not show the claimed side surfaces highlighted in Figures 1 and 3 above. *See* Ex. 2006, 90:15–91:1 (Q: "That end surface shown in figure 1 is not visible in the Leopaard vehicle, right?" . . . A: "Yeah, I stated that it's not visible in the embodiment. . . . And then to -- and it's clearly not shown in the Leopaard as -- at -- at that -- that end surface."); Ex. 2004 ¶ 67 ("The Leopaard does not include side surfaces at all. Instead, the front surface interfaces directly with other trim components."). Mr. Hill can only "infer from the Leopaard that it has similar side portions." Ex. 1028 ¶ 41. The '508 patent's side surfaces, or portions, not only provide a substantial claimed surface, but are angled outwardly and have a cohesive relationship with the top surface and side surfaces of the recesses that contribute to the outwardly protruding and overall ornamental appearance. *See* Ex. 2004 ¶¶ 66–69; Pet. 10–11 ("small side portions that angle backward"). As Mr. Peters testifies, "[t]he Leopaard lacks these features and its overall appearance would have immediately been perceived as different by the ordinary observer." Ex. 2004 ¶ 67.

LKQ does not dispute that the Leopaard lacks the side surface feature. Instead, LKQ alleges for the first time in its Reply that, despite not being shown, the ordinary observer "would be able to understand" butted side portions of the Leopaard to be similar to those of the '508 patent. Pet.

Reply 22. Mr. Hill testifies that "the ordinary observer would infer from the Leopaard that it has similar side portions." Ex. 1028 ¶ 41 ("most likely that the Leopaard has similar butted side portions"). Again, LKQ fails to produce any supporting evidence that identifies any image showing the purported "butted side portions," or even that "butted side portions" exist in the Leopaard. We reject the "finite number of ways" approach to design analysis argued by LKQ, especially for anticipation. *See* Pet. Reply 22 ("making butted side portion most likely"). Further, LKQ's new theory that the '508 patent is "cut with butted ends" contradicts its own construction in the Petition as having side portions that "angle backwards." *Compare* Pet. 11 ("side portions that angle backward") *with* Pet. Reply 10 ("cut with butted ends"). We find LKQ's new arguments unpersuasive.

The side portions are claimed by the '508 patent and visible from every perspective view—their appearance is not a matter of "vehicle mounting position" (Pet. Reply 22) as LKQ alleges. *See* Ex. 1001, Figs. 1–4; Ex. 2004 ¶ 65. Even when assembled, the side portions are readily visible, consistent with the claimed design, and thus are significant to overall appearance regardless of whether the skid bar is viewed in isolation or installed on a vehicle. Ex. 2004 ¶ 65 ("The top and side surfaces of the '508 Patent significantly impact the character and visual impression of the claimed skid bar."), ¶ 66 ("I additionally note that the side surfaces are prominently visible whether the skid bar is viewed alone, or when assembled."); *see also* Ex. 1005, 6–7 (depicting the claimed skid bar mounted on the Silverado). In both the ordinary observer analysis and the designer of ordinary skill analysis, we view the patented skid bar design in

its entirety, as it is claimed, and the side portions are part of that claimed design.

Finally, although the recesses of the claimed design and the Leopaard have similar aspects discussed above, there are some notable differences in the specific shapes and proportions of the recesses. The claimed recesses include parallel top and bottom edges of nearly identical width, and three side-edge segments that first angle outwardly from the top edge and then angle back towards the bottom edge.

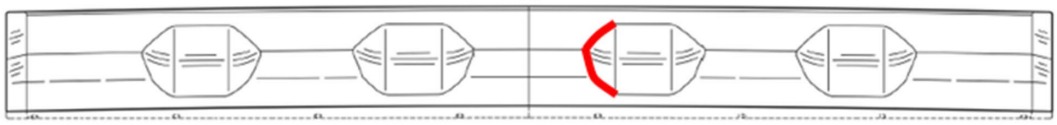


FIG. 2

GM's annotated Figure 2 with red line tracing along the three side-edge segments of the recess that first angle outwardly from the top edge and then angle back towards the bottom edge. PO Sur-Reply 20; Ex. 2004 ¶ 74. Although the Leopaard has a similar top recess edge and perhaps the first side edge that angles outwardly, it is impossible to see the bottom edge in detail. As Mr. Peters testifies, the sidewalls of the recesses have substantial depth that coordinates with the outer side surfaces of the skid bar, promoting an appearance of substantial thickness, as depicted below. Ex. 2004 ¶¶ 74–78. The Leopaard does not garner a similar visual impression, but instead the Leopaard's recesses include angled segments extending outwardly from a top edge, and generally vertical portions extending down from the angled segments, as seen below. *See* Ex. 2006, 78:23–79:12; Ex. 2004 ¶ 74.

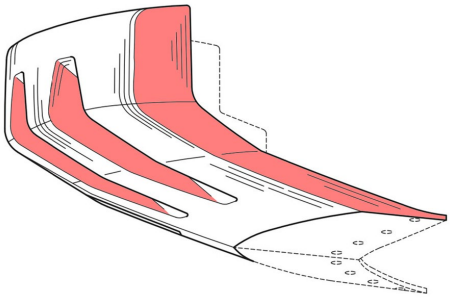


FIG. 3

GM's annotated Figure 3 with red shading along the side edges of the two visible recesses compared with Exhibit 1010 of the Leopaard showing a perspective view.

As seen above, certain features of the claimed design, including a bottom edge and side edges that angle inwardly towards the bottom edge, are not depicted by the Leopaard. Ex. 2004 ¶ 74. The Leopaard lacks the distinctive recess shape having side edges made up of three segments. Also shown in annotated Figure 3 above is the substantial depth of the recesses that conveys thickness. *Id.* ¶ 75. The deep shape of the '508 patent's recesses is further accentuated by the relatively narrow width of the recesses relative to the overall width of the skid bar. *Id.* These features are readily visible in the claimed design and, according to Mr. Peters, would have been significant to the ordinary observer. *Id.* ¶¶ 74, 75. Although the recesses have similar qualities and spacing as noted above, the smaller differences detailed above would have also been noticeable to both the ordinary observer and the designer of ordinary skill in the art. *Id.* ¶¶ 74–78.

We do not find persuasive LKQ's contention that "neither GM nor its declarant, Peters, compare the designs as a whole or consider the similarities." Pet. Reply 2. To the contrary, GM and Mr. Peters repeatedly discuss how the features of the '508 patent create a unique and cohesive overall impression, and compared the overall impression with that of the

Leopaard. *See, e.g.*, PO Resp. 18 ("significant to the design's overall appearance"), 20 ("cohesive overall appearance"), 22, 27, 30, 34–35, 37–38, 40. Likewise, Mr. Peters was also consistent in his focus on overall appearance during cross-examination. Ex. 1026, 33:17, 34:6–7 ("all of them work in concert to create that overall impression"), 35:9–11, 36:9–10 ("I'm looking at it from an overall view of the part"), 72:18 ("overall impression"), 205:2–6 ("I evaluated what was similar, what was different, just side by side, the overall impression of the two designs").

We also do not find persuasive LKQ's argument that Mr. Peters, and GM, required "perfect identity" in order to find similarity. Pet. Reply 8. LKQ's purported evidence of this is an altered quote from Mr. Peters that LKQ appends to a different question. *Id.* A review of the transcript pages cited by LKQ, however, reveals that Mr. Peters never equated the "basically the same" standard with "perfect identity"—Mr. Peters was discussing what it meant to be "the same." Ex. 1026, 80–85. LKQ's omission of an intervening question, without any notation or annotation, fails to support its incorrect assertion and contradicts Mr. Peters' actual testimony. *See* PO Sur-Reply 4.

As determined above, the two skid bar designs have some similarities. The upper shape of the recesses and their spacing is very similar and these recesses are an important feature of the design. Examining the claimed designs as a whole, there are several other aspects of the claimed design that make up its overall appearance are absent from the Leopaard, including the claimed design's substantial vertical front face, bottom surface and edge (continuous surface below the recesses), outwardly projecting top and side surfaces, curvature from side-to-side, deep recesses entirely visible from the

front, and outer perimeter shape. *See* Ex. 2004 ¶¶ 49, 52–81. The features of the claimed design that are missing from the Leopaard are significant in the aggregate, and contribute to its rugged, chiseled, three-dimensional overall appearance that contrasts with the Leopaard's appearance dominated by a rearward sloping lower surface and relatively shallow recesses. *See id.* ¶ ¶ 28-43. LKQ's anticipation theory assumes "only" one difference exists (Pet. 51) between the claimed design and the Leopaard, failing to even acknowledge multiple other differences—all of which contribute to the significantly different overall appearance of the claimed design in the eyes of the ordinary observer. Based on the final record before us, including the evidentiary shortcomings discussed above, the two designs are not substantially the same, and accordingly, the Leopaard fails to anticipate the '508 patent.

As for obviousness based on the Leopaard alone, we are also not persuaded that a designer of ordinary skill would have viewed the Leopaard to have design characteristics which are basically the same as the claimed design of the '508 patent. Thus, we determine that the Leopaard is not a proper *Rosen* reference.

As noted above, the Petition recognizes only "one" difference between the design of the '508 patent and the Leopaard. *See* Pet. 51 ("The vehicle skid bar of the '508 Patent has side edges that are vertical rather than slightly angled out in a horizontal direction."). The Petition goes on to describe how "[a] designer of ordinary skill would have been motivated to straighten the side edges of the skid bar to allow the bar to be affixed cleanly between straight-lined accent features on vehicles (rather than the angled accent feature that surrounds the skid bar on the Leopaard)." Pet. 55. The

Petition does propose any other modifications to the Leopaard. LKQ's obviousness analysis failed to address the differences that contribute to the overall appearance of the '508 patent's design. As discussed above, the evidence shows multiple readily apparent differences between the claimed design and the Leopaard. We agree with Mr. Peters that "[t]he differences I discussed above in the context of the ordinary observer are just as significant to the ordinary designer, who would likewise have recognized these readily visible features." Ex. 2004 ¶ 86. These same differences in the aggregate create an overall ornamental design that is not basically the same between the claimed design of the '508 patent and the Leopaard. Accordingly, the Leopaard is not a proper *Rosen* reference.

Even before modifications may be considered, LKQ has the burden to show that the Leopaard, as it currently is "in existence," has design characteristics of which are basically the same as the claimed design. *High Point Design*, 730 F.3d at 1311. Considering the Leopaard before any proposed modifications, it is not a proper *Rosen* reference. Ex. 2004 ¶ 84. The Leopaard does not give basically the same visual impression as the patented design because the Leopaard does not teach a substantial vertical front face, bottom surface and edge (continuous surface below the recesses), outwardly projecting top and side surfaces, curvature from side-to-side, deep recesses entirely visible from the front, and outer perimeter shape. *See id.* ¶¶ 49, 52–85. As Mr. Peters testifies, the Leopaard does not have substantially the same overall appearance because "the respective designs include numerous fundamentally different design characteristics," which "[t]he Petition does not specifically address." *Id.* ¶¶ 83, 84. Without accounting for these differences—and particularly, the significance of these

differences to the designer of ordinary skill in the art—the Petition lacks sufficient evidence that the Leopaard is "a single reference that creates basically the same visual impression" as the claimed design. Indeed, the differences described above in the context of the ordinary observer are just as significant to the ordinary designer, who is aware of readily apparent differences when assessing the visual impression of designs. Ex. 2004 ¶¶ 25, 84–86. Thus, we are not persuaded that a designer of ordinary skill would have viewed the Leopaard to give basically the same visual impression as the '508 patent.

In its Reply, LKQ has gone from recognizing only "one" difference, to proposing new modifications to the Leopaard. *See* Pet. Reply 22. LKQ's new obviousness theories propose modifications to the Leopaard to create side portions to include a "butted or backturned side portion" in order "to accommodate this surrounding chrome ring trim" (*id.*), and changing features to create a "proud configuration" in which side portions are visible when mounted (*id.* at 23). *See also* Ex. 1028 ¶¶ 38–42. These new theories to further modify the Leopaard, introduced for the first time in the Reply, were not presented in the Petition. We decline to consider these new arguments that are outside the scope of LKQ's Petition and that fail to give Patent Owner a meaningful opportunity to respond with new evidence and testimony. *See, e.g.*, *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1330–31 (Fed. Cir. 2019) ("an IPR petitioner may not raise in reply 'an entirely new rationale' for why a claim would have been obvious"); 35 U.S.C. § 312(a).

Finally, even if we were to consider LKQ's new modifications to the Leopaard, LKQ still fails to illustrate that a skilled designer would have

modified multiple features of the Leopaard in precisely the manner LKQ proposes, or that such modifications would have resulted in a design that has the same visual appearance as the ’508 patent’s design. As Mr. Peters persuasively explains, “the art of vehicle design is not one in which the designer simply picks and chooses from a menu of options to create the design,” but instead “the designer must create the design in view of the overall theme of the vehicle.” Ex. 2004 ¶ 17. The Petition’s incomplete analysis highlights LKQ’s impermissible reliance on hindsight in using the ’508 patent as a roadmap in proposing specific modifications to arrive at the claimed design. For example, LKQ’s reasoning for a “butted or backturned side portion” is “to accommodate this surrounding chrome ring trim.” Pet. Reply 22. However, LKQ’s additional modification to create a “proud” configuration purportedly results in the side portions being exposed—not “butted” with the surrounding chrome ring trim. PO Sur-Reply 24. The side areas of the claimed design are distinctly impacted by surrounding trim and LKQ has not shown how its proposed modifications make sense in the Leopard. Instead, the modifications appear driven by hindsight.

For the reasons set forth above, the Leopaard does not anticipate the design of the ’508 patent, and the Leopaard would also not have been a proper *Rosen* reference. There are simply too many aspects of the claimed design that are not adequately disclosed by the images of the Leopard. Further, both LKQ’s anticipation and obviousness theories are based on speculation and conjecture about certain features that might be present in the Leopaard’s skid bar but are not shown in the exhibits. Finally, LKQ’s proposed modifications are not grounded in the appearance of certain

ornamental features found in the Leopaard, but instead are based on hindsight driven changes to arrive at the claimed design.

C. The Alleged Obviousness of the Claim Over the Leopaard and the 2012 Chevrolet Equinox

LKQ contends that the single claim of the ’508 Patent is unpatentable as obvious over the Leopaard and the 2012 Chevrolet Equinox. Pet. 56–59. GM contends that for much of the same reasons detailed above that the Leopaard is not a proper primary reference and the Petition’s proposed modifications are directed only to modifying the Leopaard’s skid bar to have the vertical side edges of the Equinox — the Petition ignores the numerous other differences. PO Resp. 42–51.

For the reasons set forth above, the Leopaard is not a proper *Rosen* reference, and therefore the design claim would not have been obvious over the Leopaard and Equinox. Below, we provide additional analysis reiterating why the Leopaard is not a proper *Rosen* reference.

1. 2012 Chevrolet Equinox

Petitioner articulates the secondary reference for this ground in the alternative as both the “Patent Owner’s 2012 Chevrolet Equinox and its brochure.” Pet. 15. The 2012 Chevrolet Equinox (“Equinox”) is depicted in the photograph below, and specially the front skid bar.

The 2012 Chevrolet Equinox as depicted in Exhibit 1011, page 1, and Exhibit 1012, page 3.

2. Analysis

Petitioner relies on the Equinox as teaching only the vertical side edges shown in the ’508 patent. Pet. 56–59. The Petition summarily asserts that “[a]ny difference between the Leopaard and the claimed design of the ’508 Patent are taught by the Equinox.” Pet. 56. Critically, however, the Petition’s proposed modifications are here again directed only to modifying the Leopaard’s skid bar “to have the vertical side edges” of the Equinox. Pet. 58. LKQ’s analysis ignores the numerous other differences between the Leopaard and the ’508 patent’s design that are significant to the overall appearance in the eyes of the designer of ordinary skill. *See also* Ex. 2004 ¶¶ 86, 87. Even considering certain similarities in design, the multiple differences in the aggregate produce a distinct overall ornamental appearance in the designs, as detailed above. As a result, LKQ has not persuasively proven that the Leopaard would have an overall appearance “basically the same” as the claimed design and thus be a proper *Rosen* reference. *See* PO Resp. 44; PO Sur-Reply 22.

We find persuasive Mr. Peters' testimony "that the overall appearance of the claimed design is different compared to the Leopaard due to numerous features that differ," and [t]he differences I discussed above in the context of the ordinary observer are just as significant to the ordinary designer, who would likewise have recognized these readily visible features." Ex. 2004 ¶ 86. The Petition simply does not properly account for many of the differences in the Leopaard and their significance to the ordinary designer.

In Reply, LKQ argues that "a DOSA's imagination, knowledge, and skill was sufficient to bridge the gap" to make the Leopaard a proper primary reference. Pet. Reply 29–32; Ex. 1028 ¶¶ 24, 48, 66. These arguments ignore the fact that the Petition is completely silent as to most of the differences between the Leopaard and the claimed design. Apart from suggesting straightening the sides of the Leopaard to arrive at the claimed design, the Petition completely ignores numerous actual "gaps" and offers no insight as to how "a DOSA's imagination" would bridge such gaps. Pet. 54–55; Pet. Reply 30.

Accordingly, LKQ has not persuasively shown that the Leopaard is "a single reference that creates basically the same visual impression" as the claimed design. As such, LKQ has not proven by a preponderance of the evidence that '508 patent design claim would have been obvious over the Leopaard and the Equinox.

III. CONCLUSION

For the reasons expressed above, we determine that LKQ has not proven by a preponderance of the evidence that the '508 patent design claim is anticipated by the Leopaard. We determine that LKQ has not proven by a preponderance of the evidence that the '508 patent design claim would have

been obvious over the Leopaard. Likewise, LKQ has not proven by a preponderance of the evidence that the ’508 patent design claim would have been obvious over the Leopaard in combination with the Equinox.

Claims	35 U.S.C. §	Reference(s)/Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1	102	Leopaard		1
1	103	Leopaard		1
1	103	Leopaard and Equinox		1
		Overall Outcome		1

IV. ORDER

For the reasons given, it is

ORDERED that, based on a preponderance of the evidence, the claim of the ’508 patent has not been shown to be unpatentable; and

FURTHER ORDERED that, because this is a Final Written Decision, any party to the proceeding seeking judicial review of this Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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