

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FIRST SOLAR, INC.,
Petitioner,

v.

ROVSHAN SADE,
Patent Owner.

IPR2023-00827
Patent 9,057,546 B2

Before JOSIAH C. COCKS, KEVIN W. CHERRY, and
RICHARD H. MARSCHALL, *Administrative Patent Judges*.

COCKS, *Administrative Patent Judge*.

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

I. INTRODUCTION

First Solar, Inc. (“Petitioner”) filed a petition to institute *inter partes* review of claims 5 and 6 of U.S. Patent No. 9,057,546 B2 (Ex. 1002, “the ’57,546 patent”).¹ Paper 2 (“Pet.”). Rovshan Sade (“Patent Owner”) filed a Preliminary Response. Paper 12 (“Prelim. Resp.”).

We have authority under 35 U.S.C. § 314 to determine whether to institute an *inter partes* review. The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides that an *inter partes* review may not be instituted unless “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” The Supreme Court has held that the Board, in a decision to institute under 35 U.S.C. § 314(b), may not institute review on less than all claims challenged in the petition. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1355–56 (2018). Moreover, in accordance with our rules, “[w]hen instituting *inter partes* review, the Board will authorize the review to proceed on all of the challenged claims and on all grounds of unpatentability asserted for each claim.” 37 C.F.R. § 42.108(a) (2020); *see also PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) (interpreting the statute to require “a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition”).

Applying those standards, and upon considering the Petition, the Preliminary Response, and the evidence of record, we determine the information presented fails to show a reasonable likelihood that Petitioner

¹ The ’57,546 patent is the parent of U.S. Patent No. 9,917,546 B2 (“the ’17,546 patent”). A Petition challenging claim of the ’17,546 patent (IPR2023-00881) was filed on the same day as this IPR2023-00827 proceeding.

would prevail in establishing the unpatentability of any challenged claim of the '57,546 patent. Accordingly, we deny institution of the Petition for *inter partes* review.

II. BACKGROUND

A. Related Matters

The parties identify the following district-court proceedings as related matters involving the '57,546 patent: *Sade v. Seville Solar Two LLC*, No. 3:22-cv-00678 (W.D.N.C.); *Sade v. Seville Solar One LLC*, No. 3:22-cv-00677 (W.D.N.C.); *Sade v. Blackwell Solar LLC*, No. 1:22-cv-01111 (M.D.N.C.); *Sade v. SP Butler Solar LLC*, No. 1:22-cv-01113 (M.D.N.C.); *Sade v. North Star Solar LLC*, No. 1:22-cv-01109 (M.D.N.C.); *Sade v. SP Sandhills Solar LLC*, No. 1:22-cv-01112 (M.D.N.C.); *Sade v. SP Decatur Parkway Solar LLC*, No. 1:22-cv-01110 (M.D.N.C.). Pet. 74–75; Paper 11, 2 (Patent Owner's Updated Mandatory Notices).

B. Real Parties in Interest

Petitioner identifies its real party in interest as First Solar, Inc., Seville Solar One LLC, Seville Solar Two LLC, Blackwell Solar LLC, SP Butler Solar LLC, North Star Solar LLC, SP Sandhills Solar LLC, and SP Decatur Parkway Solar LLC. Pet. 74.

Patent Owner identifies themselves as the only real party in interest. Paper 11, 2.

C. Overview of the '57,546 patent

The '57,546 patent is titled “Solar Tracker.” Ex. 1002, code (54). The '57,546 patent issues from Application Serial No. 12/830,907 (“the '907 application”), filed July 6, 2010. *Id.* at codes (21), (22).

The '57,546 patent relates to “a free standing solar tracker with a rotating panel assembly to track the movement of the sun during the day.” *Id.* at 1:6–8. The solar tracker includes a panel assembly comprising one or more solar panels, a base, a support frame, and an actuator for rotating the solar panel. *Id.* at 1:47–57.

An illustrative embodiment of such a solar tracker is depicted in Figures 3 and 4, reproduced below.

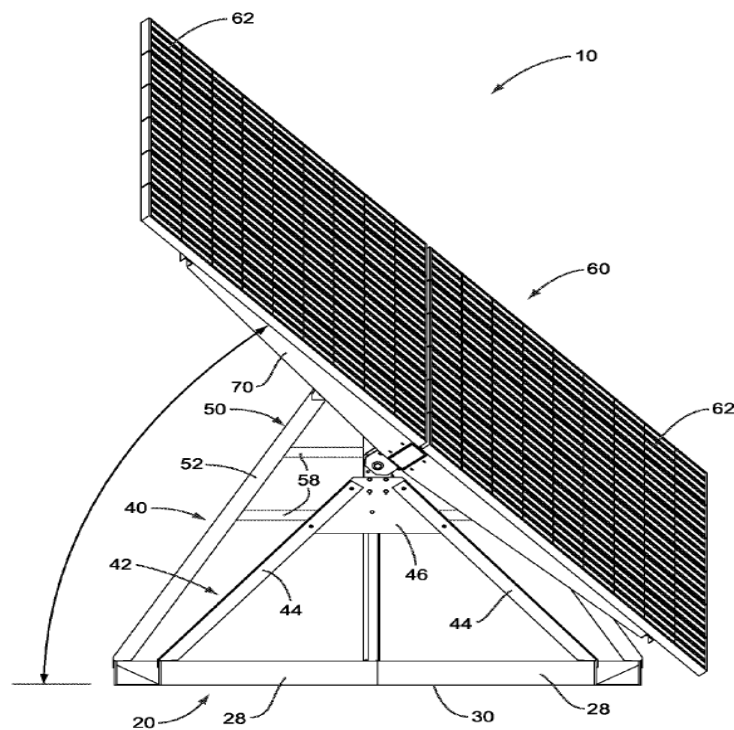


FIG. 3

Figure 3 is a solar tracker 10 which generally includes panel assembly 60, base 20, and support frame 40. *Id.* at 2:31–33. “[P]anel assembly 60 is rotatably mounted to the support frame 40 so as to rotate about a single,

inclined axis” and support frame 40 is mounted to base 20. *Id.* at 2:66–67; 3:56–57. Support frame 40 includes front frame 42 comprising legs 44, strut 50, and gusset plate 46. Support frame 40 also includes rear frame 52 comprising legs 52, strut 56, and gusset plate 52. *Id.* at 2:66–3:2; 3:18–19. Front frame 42 is connected to panel assembly 60 by a first mounting assembly 80. *Id.* at 3:58–3:59.

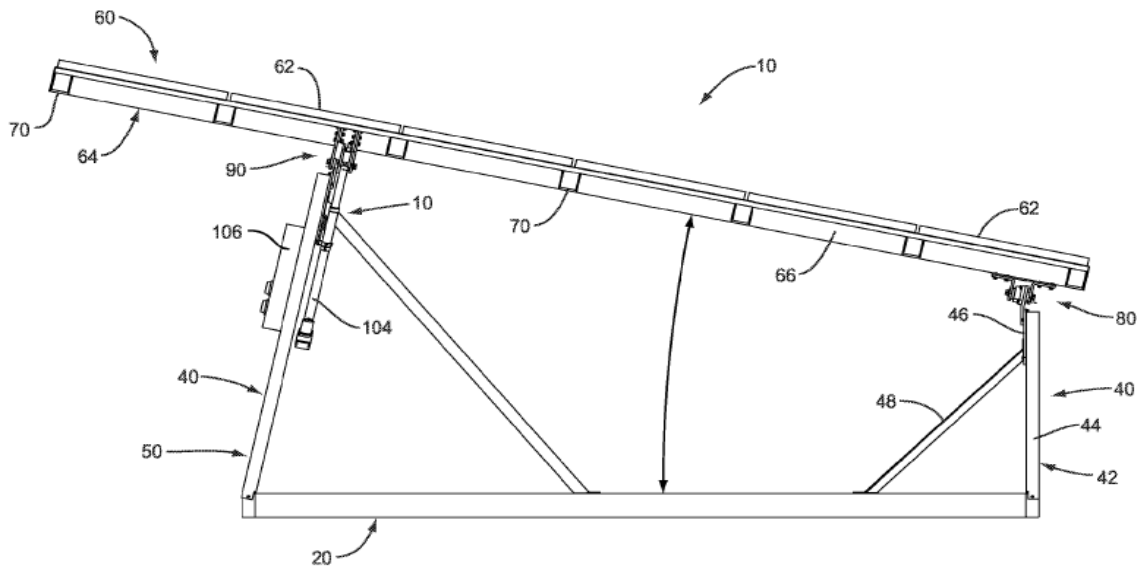


FIG. 4

Figure 4 depicts a side view of solar tracker 10 including panel assembly 60, base 20, support frame 40, and actuator assembly 90 which allows the panel assembly 60 to rotate to “follow the azimuth of the sun as it moves across the sky.” *Id.* at 2:33–35. Panel assembly 60 includes solar panels 62 and a panel support frame 64. *Id.* at 3:34–35. Panel support frame 64 includes a plurality of longitudinally-spaced panel carriers 70, a pair of laterally-spaced side members 68, and central spine 66. *Id.* at 3:36–39.

An illustrative embodiment of a second mounting assembly is depicted in Figures 6 and 7, reproduced below.

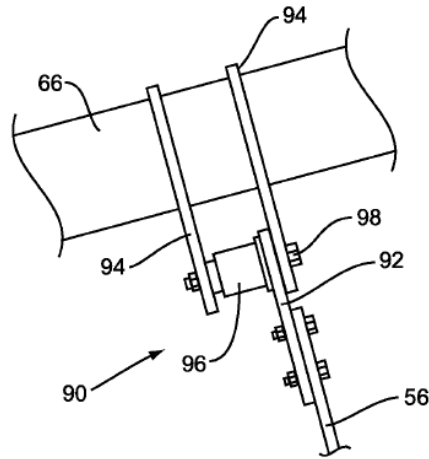


FIG. 6

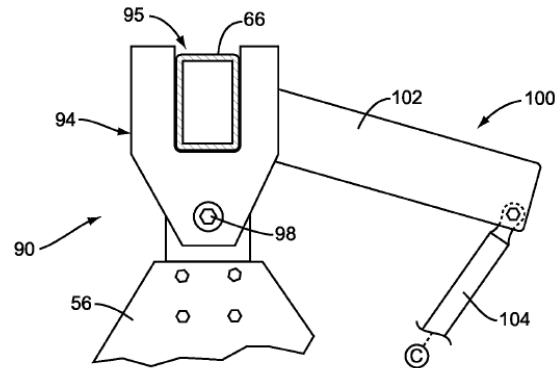


FIG. 7

Figures 6 and 7 depicts a second mounting assembly which allows panel support 64 to be mounted on rear support frame 50. *Id.* at 4:6–8. Second mounting assembly 90 includes pivot member 98, bearing 96, a pair of mounting forks 94, and connecting plate 92. *Id.* at 4:8–10. Pivot member 98 is “co-axially aligned along the axis and rotation of the panel assembly 60.” *Id.* at 4:23–25.

D. The Challenged Claims

Petitioner challenges claims 5 and 6 of the '57,546 patent. Pet. 1. Claim 5 is independent. Claim 5 and 6 are reproduced below (claim 5 is produced with Petitioner's identifiers for the claim limitations).

5[p] A solar tracker comprising:

5[a] a support frame;

5[b] a panel assembly rotatably mounted to said support frame for supporting one or more solar panels, said panel assembly comprising a central spine and a plurality of panel carriers extending outwardly from said spine;

5[c] a mounting assembly for rotatably mounting the panel assembly to the support frame, the mounting assembly comprising a mounting member rotatably connected to the support frame and a slot in said mounting member configured to receive the spine of the panel assembly; and

5[d] an actuator assembly for rotating the panel assembly to track the movement of the sun.

6. The solar tracker of claim 5 wherein the panel assembly further comprises one or more solar panels mounted to the panel carriers.

Ex. 1002, 6:38–54; *see also* Pet. 18–30 (addressing claim 5 with Petitioner’s identifiers).

E. Evidence

Petitioner submits the following evidence:

Evidence	Exhibit No.
Declaration of Edward C. Kern , Jr.	1003
Array Technologies, Inc. Wattsun Solar Trackers AZ-125 Installation Guide (retrieved from the Wayback Machine in association with the Wayback URL: https://web.archive.org/web/20051202075211/http://www.wattsun.com/PDF/Wattsun_AZ-125_Instructions.pdf)(“Wattsun”)	1004
RayTracker Webpage: (http://www.raytracker.com/products/ on or before October 16, 2008) (retrieved from the Wayback Machine in association with the Wayback URL: https://web.archive.org/web/20081016035440/http://www.raytracker.com/products/)(“RayTracker Webpage”)	1005
“It’s time to get tracking ...” Brochure (published on http://www.raytracker.com/products/ on or before October 16, 2008)(“RayTracker”)	1006
RayTracker™ GC200 & GC100 Series Product Specifications, (published on http://www.raytracker.com/products/ on or before October 16,	1007

Evidence	Exhibit No.
2008) (“RayTracker Specification”)	
Declaration of Matthew N. Schneider	1008
Affidavit of Nathaniel E. Frank-White (“Wattsun Affidavit”)	1009
Affidavit of Nathaniel E. Frank-White (“RayTracker Affidavit”)	1010

F. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability:

Claim(s) Challenged	35 U.S.C. §	Reference(s)
5, 6	102 ²	Wattsun
5, 6	102	RayTracker ³
5, 6	103	Wattsun, RayTracker

Pet. 2. Patent Owner disputes Petitioner’s asserted grounds of unpatentability. *See generally* Prelim. Resp.

² The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. § 103. The ’ 17,546 patent claims benefit of a July 6, 2010, filing date, which is before the effective date of the applicable AIA amendments. Ex. 1002, (63). Thus, we refer to the pre-AIA version of 35 U.S.C. § 102. Our decision would be the same were we to apply the AIA version of the statute.

³ Although the Petition references three documents of record, Exhibits 1005 through 1007, as the “RayTracker Collection” (*see, e.g.*, Pet. 4–5), Exhibit 2006 is alone identified as “RayTracker” and is the only document cited with any specificity as a part of Petitioner’s two identified grounds involving RayTracker (*see, e.g., id.* at 32–68). Furthermore, Petitioner states “*RayTracker Collection* includes multiple documents, but we will focus on a single document of the collection for purposes of this petition.” *Id.* at 5.

III. PATENTABILITY ANALYSIS

A. Principles of Law

Anticipation under 35 U.S.C. § 102 requires that a prior art reference set forth each and every element of a claim as set forth in the claim. *Verdegaal Bros. v. Union Oil Co. of Cal.*, 814 F.2d 628,631 (Fed. Cir. 1987); *see also Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008) (anticipation not only requires that each element of a claim be present in a prior art reference, but also the “arrangement or combination” of those elements).

A patent claim is unpatentable under 35 U.S.C. § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) when in evidence, objective evidence of nonobviousness.⁴ *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

“In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed.

⁴ Patent Owner does not present arguments or evidence of secondary considerations in its Preliminary Response. Therefore, secondary considerations do not constitute part of our analysis herein.

Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). This burden of persuasion never shifts to Patent Owner. See *Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015) (discussing the burden of proof in *inter partes* review).

B. Level of Ordinary Skill in the Art

We consider the asserted grounds of unpatentability in view of the understanding of a person of ordinary skill in the art. In assessing the level of ordinary skill in the art, various factors may be considered, including the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are made; sophistication of the technology; and educational level of active workers in the field.” *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (quoting *Custom Accessories, Inc. v. Jeffrey-Allan Indus., Inc.*, 807 F.2d 955, 962 (Fed. Cir. 1986)). “[O]ne or more factors may predominate.” *Id.*

Relying on the declaration testimony of Edward C. Kern, Jr., Petitioner contends that an ordinarily skilled artisan for the ’57,546 patent “would have had a bachelor’s degree in mechanical engineering or equivalent with 2–3 years of experience involving design, development, and manufacturing of support and mounting structures for solar trackers, with additional education substituting for experience and vice versa.” Pet. 14–15 (citing Ex. 1003 ¶¶ 34). Patent Owner does not dispute this definition of a person of ordinary skill. See generally Prelim. Resp.

Based on this record, we adopt Petitioner’s articulation of the level of ordinary skill in the art, which is consistent with the ’57,546 patent and the

asserted prior art, and we apply it in our obviousness evaluations below. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (the prior art, itself, can reflect appropriate level of ordinary skill in art).

C. Claim Construction

In interpreting the claims of the '57,546 patent, we “us[e] the same claim construction standard that would be used to construe the claim[s] in a civil action under 35 U.S.C. [§] 282(b).” *See* 37 C.F.R. § 42.100(b) (2020). The claim construction standard includes construing claims in accordance with the ordinary and customary meaning of such claims as would have been understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. *See id.*; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–14 (Fed. Cir. 2005) (*en banc*).

Petitioner submits the claims be interpreted “according to 37 C.F.R. § 42.100(b)” and that no terms require explicit construction. Pet. 15. Patent Owner does not “believe that any claim terms require express construction in order to deny institution.” Prelim. Resp. 8. Patent Owner also asserts “that providing a construction of the claims at issue is the duty of Petitioner, and the Petitioner has failed to comply.” *Id.* at 8–9.

Having considered the record, we determine that no express claim construction is necessary for any claim terms. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (holding that only claim terms in controversy need to be construed, and only to the extent necessary to resolve the controversy (citing *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

D. The Prior Art

Before turning to Petitioner's asserted grounds of unpatentability, we provide brief summaries of the asserted references.

1. Wattsun (Ex. 1004)

Wattsun is an installation guide from WattsunTM Solar Trackers. Ex. 1004, 1. Wattsun discloses specifications and instructions for assembling an AZ-125 Dual-Axis, Azimuth Drive Solar Tracker. *Id.* The solar tracker includes an AZ-125 Azimuth Gear Drive, an elevation actuator, a Wattsun solar tracker controller, and a remote sun sensor. *Id.* at 3.

The solar trackers use an optical sensing system to track and sense the sun's position. *Id.* at 19. The sun sensors send information to control electronics regarding the availability of sunlight and are mounted on a remote chassis. *Id.* Based on the sent information, the tracker sensitivity is adjusted by the controller circuitry. *Id.*

2. RayTracker (Ex. 1006)

RayTracker is a document obtained from the Internet and describing the "RayTracker GC single-axis solar tracker system." Ex. 1006, 1. Raytracker describes its system as follows: "RayTracker Gs is a single-axis tracker system that significantly increase the lifetime energy yield of a photovoltaic system, improving the return on investment for commercial-scale ground-or carport-mount installations." *Id.*

An image of the RayTracker GC single-axis solar tracker system is reproduced below:



The image above, depicts an image of the RayTracker GC single-axis solar tracker system. *Id.*

E. Alleged Anticipation by Wattsun

Petitioner contends that Wattsun anticipates claim 1. Pet. 18–40. Having considered the arguments and evidence before us, we determine that the record fails to establish a reasonable likelihood that Petitioner would prevail on this asserted ground of unpatentability.

1. Wattsun’s Prior Art Status

a) Legal Standards for Public Accessibility

“[T]he burden is on the petitioner to identify with particularity evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent, and therefore that there is a reasonable likelihood that it qualifies as a printed publication.” *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 16 (PTAB Dec. 20, 2019) (precedential).

A reference will be considered publicly accessible if it was “disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). The determination of whether a document was publicly accessible “involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public.” *Medtronic, Inc. v. Barry*, 891 F.3d 1368, 1380 (Fed. Cir. 2018). In certain situations, such as for manuscripts or dissertations stored in libraries, courts may inquire whether a reference was sufficiently indexed, catalogued, and shelved. *See, e.g., In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986); *In re Lister*, 583 F.3d 1307, 1315 (Fed. Cir. 2009) (manuscript became publicly accessible once it was placed in a searchable database). Analogously, electronic documents may be publicly accessible if they were indexed or catalogued, or if there were other tools for customary and meaningful research. *See SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1196 (Fed. Cir. 2008) (quoting *Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1378 (Fed. Cir. 2006)). “[I]ndexing is no more or less important in evaluating the public accessibility of online references than for those fixed in more traditional, tangible media.” *Voter Verified, Inc. v. Premier Election Sols., Inc.*, 698 F.3d 1374, 1380 (Fed. Cir. 2012).

What constitutes a printed publication “must be determined in light of the technology employed.” *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019) (citing *In re Wyer*, 655 F.2d 221, 226 (CCPA 1981)). Public accessibility requires more than technical

accessibility. *Id.* (citing *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 773 (Fed. Cir. 2018)). “[A] work is not publicly accessible if the only people who know how to find it are the ones who created it.” *Id.* at 1372. On the other hand, “a petitioner need not establish that specific persons actually accessed or received a work to show that the work was publicly accessible.” *Id.* at 1374. “In fact, a limited distribution can make a work publicly accessible under certain circumstances.” *Id.* (quoting *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 694 (Fed. Cir. 2018)). In sum, “[a] given reference is ‘publicly accessible’ upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.” *SRI*, 511 F.3d at 1194 (quoting *Bruckelmyer*, 445 F.3d at 1378).

b) Petitioner’s Evidence and Arguments

The Petition’s only discussion of the prior art status of *Wattsun* is

Petitioner relies on a non-patent literature document published on the Internet by third party entity, Array Technologies, Inc. of Albuquerque [*sic.*], NM, which describes a solar tracker, – the AZ-125 Dual-Axis, Azimuth Drive Solar Tracker. (“*Wattsun*”) (EX1004). *Wattsun* was publicly available on the Internet substantially before the respective critical date of the ’17546 Patent. *Wattsun* was published in 2005 and constitutes prior art under at least pre-AIA 35 U.S.C. § 102(b) or 35 U.S.C. § 102(a)(1). *Wattsun*’s prior art public accessibility is evidenced at least by its reference on a webpage verified by the Internet Archive as being [publicly] available at as early as December 2, 2005. EX1009, pp. 1, 2, 10-52.

Pet. 3. Petitioner’s expert simply states that “I understand that *Wattsun*’s prior art public accessibility is evidenced at least by its reference on a

webpage verified by the Internet Archive as being [publicly] available at as early as December 2, 2005.” Ex. 1003 ¶ 68.

Exhibit 1009 is an affidavit from Nathaniel E. Frank-White (“White Affidavit”), a Record Request Processor at the Internet Archive. Ex. 1009 ¶ 1. The White Affidavit explains that the Internet Archive is “a website that provides access to a digital library of Internet sites and other cultural artifacts in digital form.” *Id.* ¶ 2. The White Affidavit states that “the Internet Archive has created a service known as the Wayback Machine,” which “makes it possible to browse more than 450 billion pages stored in the Internet Archive’s web archive.” *Id.* ¶ 3. The White Affidavit describes that the Wayback Machine allows users to “search the archives by URL (i.e., a website address),” and that “[i]f archived records for a URL are available, the visitor will be presented with a display of available dates,” which the user may select to browse an archived version of the file for that date. *Id.* The White Affidavit also explains the format of URLs the Internet Archive assigns to the archived files about its service, and how those relate to the date that the file was archived. *Id.* ¶ 5. The White Affidavit also attaches screen shots of the Internet Archive’s records for the archived files for the URLs and dates specified. *Id.* ¶ 6. These screenshots appear to be copies of the Wattsun website (Ex. 1009, Ex. A) and the Wattsun Installation Guide (Ex. 1009, Ex. B).

c) Patent Owner’s Arguments

Patent Owner raises a number of arguments why it contends that Petitioner has failed to meet its burden to show that Wattsun is prior art. Prelim. Resp. 11–20. First, Patent Owner argues that the White Affidavit is deficient. *Id.* at 11–12. Second, Patent Owner asserts that the Wayback

Machine records are unreliable. *Id.* at 12–18. Third, Patent Owner contends that Petitioner has not shown that Wattsun was indexed in a manner that would allow a person of ordinary skill in the art searching for the information to locate it. *Id.* at 18–19. Finally, Patent Owner submits that the collective problems with Petitioner’s evidence means that Petitioner cannot meet its burden of proof. *Id.* at 19–20.

d) Analysis

We observe that Patent Owner’s arguments in connection with its challenge to Wattsun as prior art do raise meaningful questions, on this record, as to Wattsun’s status as a printed publication before the priority date of the challenged patent. In particular, we take note of Patent Owner’s contention (*see* Prelim. Resp. 18–19) that Petitioner has failed to present sufficient evidence or argument that an interested party exercising reasonable diligence would have located Wattsun. *See Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1349 (Fed. Cir. 2016).

The Federal Circuit’s *Voter Verified* case is instructive. *Voter Verified*, 698 F.3d at 1380. In *Voter Verified*, the Federal Circuit found that a particular article that was available only through an on-line publication was publicly accessible. *Id.* The court reached that conclusion based on “unrebutted testimony” in the record indicating that the particular on-line publication was well known to the community interested in the subject matter of the reference. *Id.* In addition, the court noted that numerous related articles were also located within the same on-line publication. *Id.* These factors overcame the absence of evidence demonstrating that the website at which the article was located was indexed and thereby findable by an internet search engine. *Id.* at 1381. Thus, the court concluded that

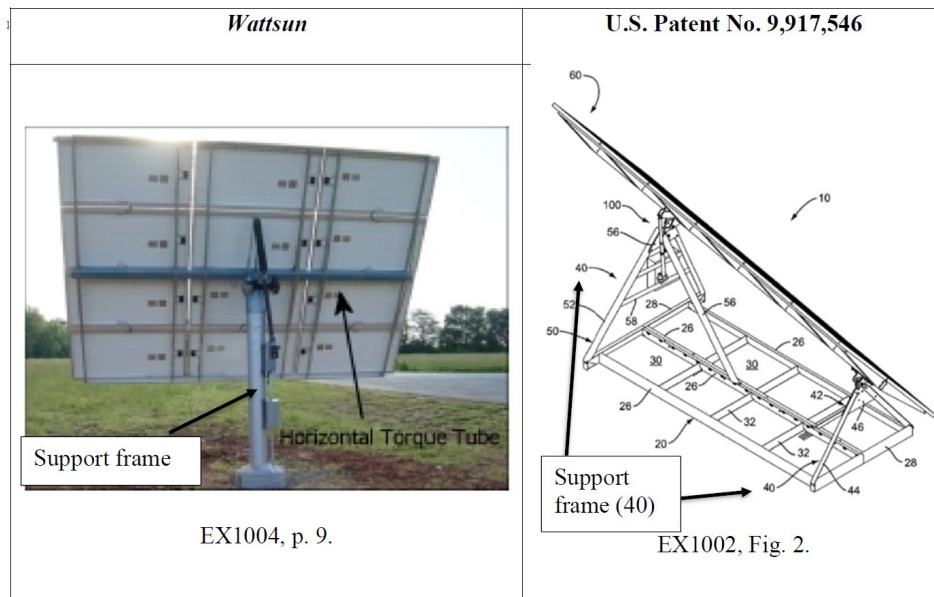
“[w]hether or not the website itself had been indexed . . . (through search engines or otherwise), the uncontested evidence indicates that a person of ordinary skill interested in electronic voting would have been independently aware of the [the on-line publication] as a prominent forum for discussing such technologies.” *Id.*

Here, however, Petitioner has provided no evidence that Wattsun was disseminated to the interested public before the critical date other than testimony from Mr. Kern that it was “*Wattsun’s* prior art public accessibility is evidenced at least by its reference on a webpage verified by the Internet Archive as being [publicly] available at as early as December 2, 2005.” Ex. 1003 ¶ 68. In contrast to *Voter Verified*, the present case lacks any testimonial evidence that a person interested in solar trackers or solar panel assemblies would be independently aware of the web address for Wattsun or even of the company or its products. In other words, there was no evidence that the ordinarily skilled artisan would know of Wattsun or its web address. Nor does Petitioner offer evidence, or even argument, that Wattsun’s webpage was “indexed . . . (through search engines or otherwise)” and thus locatable by a search engine. *See Voter Verified*, 698 F.3d at 1381. Petitioner’s White Affidavit only indicates that the Wayback Machine is searchable “by URL,” Ex. 1009 ¶ 3, not by a query of a search engine before the critical date, using any combination of search words, that would have led to Wattsun appearing in the search results. Thus, while Petitioner has attempted to make a showing that Wattsun was technically accessible, “public accessibility requires more than technical accessibility.” *Samsung*, 929 F.3d at 1369. Here, we question whether the record contains sufficient evidence that “a person of ordinary skill could have reasonably found the

website and then found the reference on that website.” *See id.* (noting that such evidence is “critical”).

2. Other Deficiencies With Regard to the Wattsun Ground

In addition to the failure in showing that Wattsun is a printed publication, we note that there are other deficiencies in Petitioner’s contention that Wattsun anticipates claim 1. For example, Petitioner maps the claimed “support frame” of claim 1 to the support post of Wattsun, as shown below in the figure from the Petition comparing Wattsun to Figure 2 of the challenged patent.

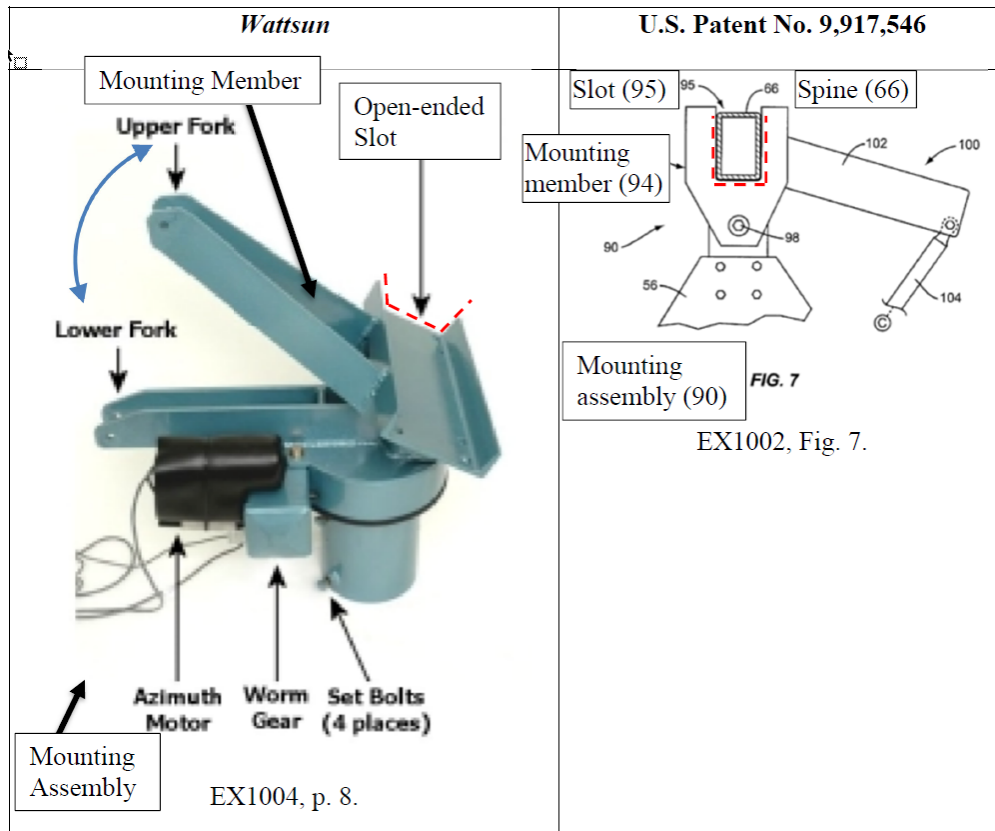


Pet. 19. Above is an annotated side-by-side comparison of a picture of the support assembly from Wattsun and Figure 2 of the challenged patent with the “support frame” in each indicated.

However, as Patent Owner explains, neither Petitioner nor its expert provides any explanation why the single support post of Wattsun constitutes a “support frame.” Prelim. Resp. 42. Without a claim construction or

reasoned explanation, it is difficult to understand why a single pipe serving as a support post would be a “support frame” as claimed.

A similar problem affects the Petition’s analysis of limitation 5[c]: “a slot in said mounting member configured to receive the spine of the panel assembly.” The Petition maps the claimed “mounting member” to the upper fork of Wattsun’s Azimuth Gear Drive and the claimed “open-ended slot” to the HZ T Tube Upper Channel, as shown in the annotated figure from the Petition reproduced below. Pet. 23–25; Ex. 1004, 8.



Pet. 25. A side-by-side annotated comparison of Wattsun’s Azimuth Gear Drive and Figure 7 of the challenged patent is reproduced above. Even if we assume Petitioner is correct that the HZ T Tube Upper Channel is a slot, Petitioner fails to explain how the HZ T Tube Upper Channel is “in” the upper form, which Petitioner identifies as the claimed “mounting member.”

As Patent Owner explains, the HZ T Tube Upper Channel is separate from the upper fork in Wattsun. Prelim. Resp. 44–46. Without more explanation from Petitioner, we find this insufficient to meet Petitioner’s burden to show Wattsun discloses this limitation.

3. *Summary of Wattsun Ground*

Here, we find that Petitioner has failed to meet its burden to show a reasonable likelihood of prevailing on its ground that Wattsun anticipates claim 1. We find that the combined deficiencies in its showings on whether Wattsun qualifies as a printed publication, on whether Wattsun discloses the claimed “support frame,” and whether Wattsun discloses the claimed “slot,” when taken together persuade us that Petitioner has failed to meet its burden. Accordingly, we find that Petitioner has failed to show a reasonable likelihood of prevailing in showing that claim 1 is anticipated by Wattsun.

F. *Alleged Anticipation by RayTracker*

Petitioner contends that RayTracker anticipates claims 5 and 6. Pet. 32–47. Patent Owner disagrees and offers several arguments underscoring that disagreement. Of those arguments, one argument focuses on Patent Owner’s view that Petitioner has not established that RayTracker (or any documents of the RayTracker Collection) are prior art to the ’57,546 patent. *See* Prelim. Resp. 9–11, 20–34. Another argument sets forth that Petitioner has failed to account for a feature required by claim 5, i.e., “a slot in said mounting member configured to receive the spine of the panel assembly.” *See id.* at 46–48. We turn first to those arguments.

1. *RayTracker's Prior Art Status?*

a) *Petitioner's Evidence and Arguments*

As with the ground involving Wattsun, Patent Owner provides a somewhat brief discussion of the prior art status of RayTracker. That discussion reads as follows:

The “It’s time to get tracking...” brochure (EX1006, “*RayTracker*”) was published in 2008 and constitutes prior art under at least under pre-AIA 35 U.S.C. § 102(b) or 35 U.S.C. § 102(a)(1). *RayTracker's* prior art public accessibility is evidenced at least by (1) its reference on a webpage verified by the Internet Archive as being publicly available at as early as October 16, 2008; (2) testimony by persons with personal experience and knowledge of *RayTracker*; and (3) identification of a later version of *RayTracker* as prior art by the Applicant during the prosecution of US9,917,546 (the ’17546 Patent), a continuation of the ’57546 Patent. *RayTracker* was linked to within the *RayTracker Website*, which was dated by the Way Back Machine as being available on October 16, 2008. EX1010, pp. 1-2, 8-9. Mr. Schneider, a former First Solar and RayTracker employee personally familiar with these documents, confirms that the linked-to version of the *RayTracker* was available as of October 16, 2008. EX1008, ¶¶ 10-13, 17, 18.

Pet. 5–6.

Exhibit 1010 (“RayTracker Affidavit”) is said to be a “Standard Wayback Affidavit in complete form authenticating various URLs.” Pet. ii.

Exhibit 1008 is a Declaration of Matthew Schneider. Mr. Schneider testifies that he “had personal knowledge of the Raytracker GC system around the time it was release and subsequently advertised on RayTracker’s website from approximately 2008 to 2011.” Ex. 1008 ¶ 4. He also testifies that it is his “belief and opinion” and the three documents identified as the RayTracker Collection, were publicly accessible “by October 16, 2008 and no later than July 5, 2009).” *Id.* ¶ 10. Although noting that “the Internet

Archive does not have archived dates as early for EX1006 [i.e., RayTracker] and EX 1007 as it does for EX 1005,” Mr. Schneider relies on his “personal knowledge” to testify that “these two documents were published on the Internet and accessible to the general public.” *Id.* ¶ 11.


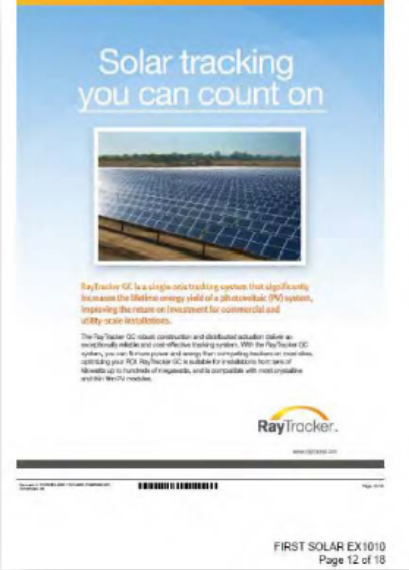
b) Patent Owner’s Arguments

As with the Wattsun reference, Patent Owner raises arguments as to why it believes Petitioner has failed to meet its burden to show that any of the RayTracker Collection documents are prior art. Prelim. Resp. 20–34. As RayTracker (i.e., Ex. 1006)⁵ is the only document that Petitioner purports to rely upon in urging the unpatentability of claims 5 and 6 of the ’57,546 patent (at least with any required specificity), we focus on Patent Owner’s challenge to the prior art status of that document. Patent Owner contends that “Petitioner has not provided *any* Wayback Machine date that corresponds directly to the document Petitioner relies on as EX1006.” *Id.* at 23. Patent Owner proceeds to lay out in side-by-side column format, how each page of Exhibit 1006, i.e., RayTracker, is different from each page of the document that is presented in Exhibit 1010 (i.e., the Wayback Machine affidavit purported to provide a publication date for Ex. 1006). *Id.* at 24–27. Patent Owner also discounts, as inadequately corroborated, the testimony of Mr. Schneider that it is he has “personal knowledge” that Exhibit 1006 was published at the necessary time to be prior art to the ’57,546 patent. *See, e.g., id.* at 27–28, 30–31.

⁵ At times, Patent Owner also refers to this document as the “RayTracker Brochure.” *See, e.g.,* Prelim. Resp. 21.

c) *Analysis*

We agree with Patent Owner and conclude that Petitioner has not adequately shown that RayTracker was a printed publication prior to the priority date of the '57,546 patent. *See* Prelim. Resp. 20–34. As Patent Owner notes, the Wayback Affidavit (Ex. 1010) is not directed to the same document that is the RayTracker reference (Ex. 1006) on which Petitioner relies in urging the unpatentability of claim 5 and 6 of the '57,546 patent. As Patent Owner demonstrates, the document that is the subject of the Wayback Affidavit is a different document than Exhibit 1006. *See* Prelim. Resp. 24–27. By way of example, we reproduce below the side-by-side comparison of the first page of Exhibit 1006 and the Appendix B of Exhibit 1010 that Patent Owner presents in its Preliminary Response.

<u>EX1006 (no evidence of “publication” date)</u>	<u>Exh. B to EX1010 (only evidence is date that is too late)</u>
	

Prelim. Resp. 24.

The images above display the first page of Exhibit 1006 (RayTracker) and the first page of the document that is presented in Appendix B of Exhibit 1010. As is immediately evident, the pages are different. The same is true for every other page of the two documents. *Compare* Ex. 1006, 2–6 with Ex. 1010, Ex. B, 13–17. It is immaterial that the two documents may be addressing similar subjects of solar tracking. Critically, contrary to Petitioner’s view, the Wayback Affidavit (Exhibit 1010) simply does not provide adequate evidence of any publication date for the document that is Exhibit 1006 (RayTracker) on which Petitioner relies for its proposed ground of unpatentability of claims 5 and 6 because the Wayback Affidavit addresses a different document. Simply put, Exhibit 1010 cannot be relied on to show a publication date of the document that is Exhibit 1006.

We also find Mr. Schneider’s testimony unavailing that it is his “belief and opinion” and references his “personal knowledge” that Exhibit 1006 was accessible to the general public as of the priority date of the ’57,546 patent. *See, e.g.*, Ex. 1008 ¶¶ 10, 11. We agree with Patent Owner (*see, e.g.*, Prelim. Resp. 27–28, 30–31) that the record at hand does not provide any suitable corroboration for Mr. Schneider’s expressed “belief and opinion” and “personal knowledge” as to the public availability of Exhibit 1006.

Accordingly, on the record before us, we are not persuaded that Petitioner has met its burden to show that RayTracker (Ex. 1006) was publicly accessible as of the priority date of the ’57,546 patent so as to constitute prior art to that patent.

We note that Patent Owner also challenges the prior art status of the other two documents of the RayTracker collection (i.e., Exs. 1005 and

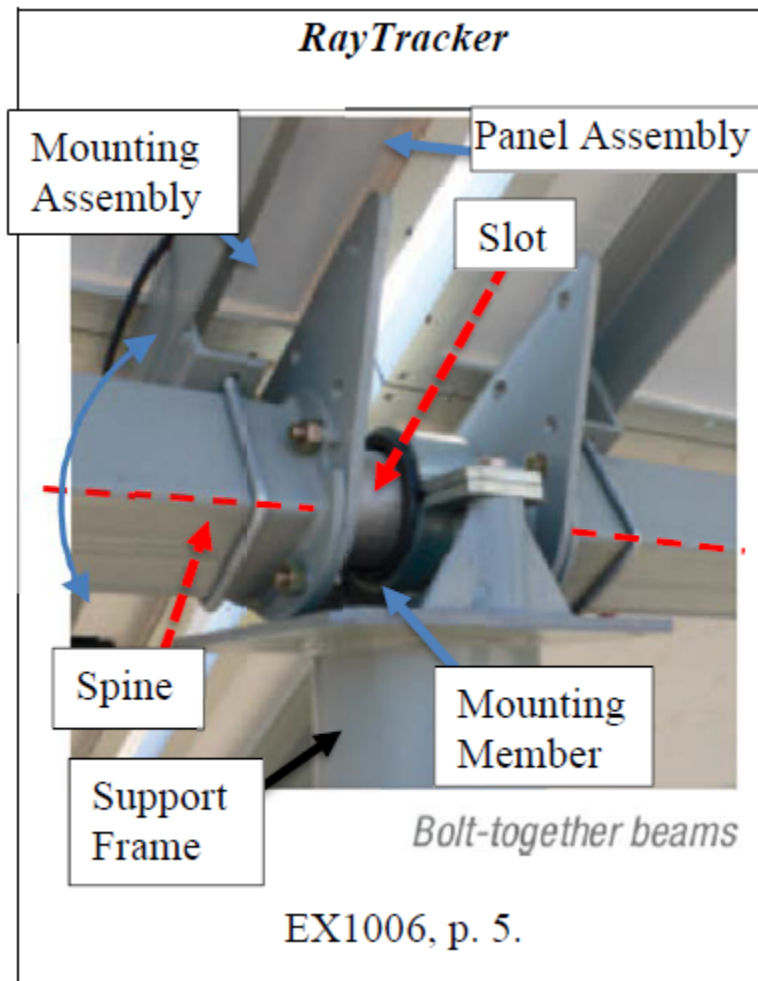
1007). *See* Prelim. Resp. 20–34. We share Patent Owner’s concern in that regard but note that Petitioner makes no citation to either of those references as a part of its proposed ground of unpatentability of claims 5 and 6 of the ’57,546 patent. *See* Pet. 32–47.⁶ Thus, whether Exhibits 1005 and 1007 constitute prior art has no bearing on Petitioner’s ground based on RayTracker.

2. *Other Deficiencies With Regard to the RayTracker Ground*

Claim 5 of the ’57,546 patent is drawn to a solar tracker with a support frame, panel, assembly, and mounting member. Ex. 1001, 6:38–51. Claim 5 also recites “a slot in said mounting member configured to receive the spine of the panel assembly.” *Id.* Separate from Petitioner’s deficiency in establishing RayTracker as prior art, Patent Owner also contends that Petitioner’s anticipation ground based on that reference is adequate as it does not account appropriately for that “slot” recitation. Prelim. Resp. 46–48. We agree with Patent Owner.

In the Petition, Petitioner provides the following annotated image from RayTracker:

⁶ We note again that Petitioner also expresses that “*RayTracker Collection* includes multiple documents, but we will focus on a single document of the collection for purposes of this petition.” Pet. 5. That “single document” is clearly Exhibit 1006.



Pet. 42. The image above shows a portion of RayTracker’s page 5 and includes Petitioner’s annotations as to what Petitioner considers, among other things, to be the “Spine” of a panel assembly and a “Slot.” *Id.* In connection with that image, Patent Owner argues the following:

The Petition does not address the fact that the purported “slot” indicated by Petitioner is separated from the purported “spine” by metal brackets. Related to that failure, the Petition does not address how the alleged “slot” of RayTracker is configured to “receive” the alleged “spine” of RayTracker, which is what the claim requires. The “spine” as identified by Petitioner clearly does not extend through the metal brackets; instead, it terminates prior to what Petitioner has identified as the “slot.” Thus, no conventional definition of “received” would result in a construction that the “spine” (as identified by Petitioner) is

“received” in the “slot” (as identified by Petitioner), as required by the Challenged Claims.

Prelim. Resp. 48.

We agree with Patent Owner that Petition does not explain why the identified “Spine” is reasonably regarded as being received in the identified “Slot.” Rather, as Patent Owner notes, Petitioner’s labeled “Spine” appears to terminate prior to the labeled “Slot.” *See id.* at 48. As a result, the Petition does not establish that RayTracker (Ex. 1006) discloses all the elements of claim 5 (or dependent claim 6) arranged as recited in the claim as is required for anticipation. *See Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d at 1371.⁷

3. Summary of RayTracker Anticipation Ground

Here too, we find that that Petitioner has failed to meet its burden to show a reasonable likelihood of prevailing on its ground that Wattsun anticipates claim 1. Because of defects in the Petition discussed above, we conclude that the Petition does not demonstrate a reasonable likelihood of success in connection with the proposed anticipation ground based on RayTracker.

G. Alleged Ground of Unpatentability Over Wattsun and RayTracker

Petitioner contends that claims 5 and 6 of the ’57,546 patent is unpatentable under 35 U.S.C. § 103 as obvious over Wattsun and RayTracker. Pet. 48–68. Patent Owner disagrees. PO Resp. 48–53.

⁷ To the extent that Petitioner relies in some fashion on Exhibits 1005 and 1007 as a part of its proposed anticipation ground based on RayTracker, we also determine that neither of those documents accounts for the “slot” and its configuration as required by claims 5 and 6.

Having considered the arguments and evidence before us, we determine that the record fails to establish a reasonable likelihood that Petitioner would prevail on this asserted ground of unpatentability.

Petitioner relies on Wattsun to account for all of the limitations of claims 5 and 6, but also alternatively applies RayTracker to account for limitation 5[d]. Pet. 48–68. Because the alleged combination does not compensate for the deficiencies recognized above with respect to Wattsun alone, we find that Petitioner has also failed to show a reasonable likelihood of prevailing with respect to this ground for the reasons stated above. *See supra* § III.E.

IV. ADDITIONAL POSITIONS

Patent Owner takes several additional positions as to why institution should be denied. Those positions include: (1) a request that we exercise our discretion 35 U.S.C. § 325(d) (*see* Prelim. Resp. 34–41); (2) a contention that Petitioner has failed to identify properly all real parties-in-interest, such that the Petition has not met the requirements of 35 U.S.C. §§ 311, 312, and 322 and should not be considered (*see id.* at 53–61); (3) a request that we exercise our discretion under 35 U.S.C. § 314 (*see id.* at 61–67); and (4) a general request that the particular circumstances here favor denial (*see id.* at 68–69).

Because we conclude that, on the merits, Petitioner has not shown a reasonable likelihood of success with respect any of the three unpatentability grounds it proposes, we determine it is unnecessary to further consider any of Patent Owner’s additional positions as to why we should deny institution, or not consider the Petition.

V. CONCLUSION

For the reasons set forth above, we conclude that Petitioner has not shown a reasonable likelihood that it would prevail with respect to the claims 5 and 6 of the '57,546 patent.

VI. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 5 and 6 of the '57,546 patent is *denied* and no trial is instituted.

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Patent 9,057,546 B2

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