

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VECTAIR SYSTEMS INC.,
Petitioner,

v.

FRESH PRODUCTS, INC.,
Patent Owner.

IPR2024-00824
Patent 10,145,098 B2

Before JEFFREY N. FREDMAN, SHERIDAN K. SNEDDEN, and
RICHARD H. MARSCHALL, *Administrative Patent Judges*.

SNEDDEN, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314, 37 C.F.R. § 42.4

I. INTRODUCTION

Vectair Inc. (“Petitioner”) filed a Petition for *inter partes* review of claims 1, 19 and 38 of U.S. Patent No. 10,145,098 (“the ’098 patent,” Ex. 1001). Paper 2 (“Pet.”). Fresh Products, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 8 (“Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review. 35 U.S.C. § 314; 37 C.F.R. § 42.4(a). An *inter partes* review may be instituted only upon a showing that “there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition.” 35 U.S.C. § 314(a). After considering the Petition, Preliminary Response, and information presented by the parties, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing with respect to at least one claim challenged in the Petition. Accordingly, we decline to institute *inter partes* review.

A. Real Parties in Interest

Petitioner identifies its real party-in-interest as Vectair Systems Inc. Paper 5. Patent Owner identifies its real party-in-interest as Fresh Products, Inc. Paper 3.

B. Related Matters

The ’098 patent is at issue in *Vectair Systems Inc. v. Fresh Products, Inc.* No. 0:24-cv-01454-MBECW (D. Minn). Paper 3; Paper 5.

C. The ’098 patent

1. Specification

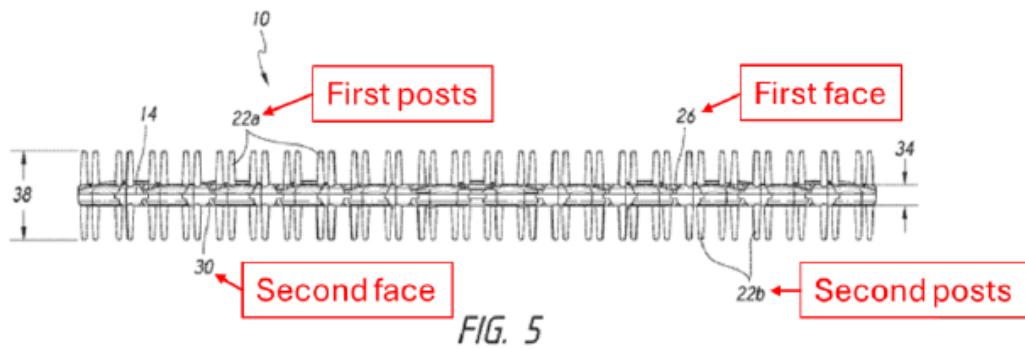
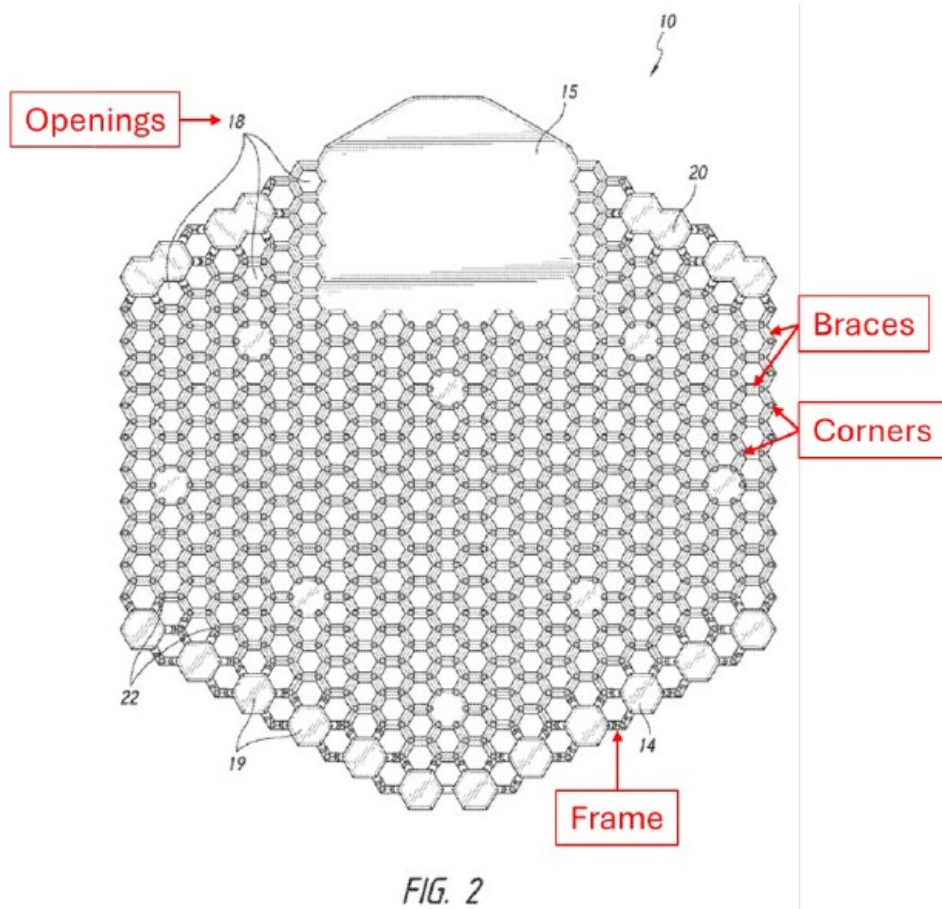
The ’098 patent discloses

A urinal assembly having a frame and a plurality of posts or posts extending from the frame. The frame can include a plurality of

openings. The openings can be defined by a plurality of sides and corners. The posts can extend from the corners and/or from the sides of the openings. In some embodiments, posts extend from a first face and a second face of the frame.

Ex. 1001, Abstract. The '098 patent discloses that the improved urinal screens “reduce splashing in the urinal by deflecting urine or other fluids which pass between the frame 14 and the installation surface (e.g., fluid that passes through the openings 18 or around the perimeter of the frame 14).” *Id.* at 7:12–19. The improved urinal screens also “reduce the likelihood that the openings 18 are clogged by debris.” *Id.* Moreover, the relative surface areas and relative thicknesses help to “reduce the overall weight of the urinal screen 10.” *Id.* at 4:48–49, 6:55–57.

Figures 2 and 5 of the '098 patent are reproduced and annotated below.



Ex. 1001, FIGS. 2 and 5.¹ Figure 2 provides a top view and Figure 5 provides a side view of a urinal screen according to the '098 patent. The urinal screen is described as having a frame with a first face and a second

¹ All annotations added by Patent Owner. Prelim. Resp. 6.

face opposite the first face. *Id.* at 1:25–33. Openings extend “through a thickness of the frame.” *Id.* at 4:4–5. “[T]he openings 18 can have various shapes, including, but not limited to, polygons (e.g., triangles, rectangles, pentagons, hexagons, etc.), ellipses, and/or some combination thereof.” *Id.* at 4:35–37. The openings can occupy more than half of the total surface area of the frame. *Id.* at 3:11–13.

The openings may be defined as “cells” where one or more of the openings (e.g., cells) can have a perimeter having a plurality of sides and corners. *Id.* at 4:35–41. The ’098 patent also states: “each of the interconnected cells shares at least one side and at least one corner with another interconnected cell.” *Id.* at 3:37–40. The ’098 patent also uses the term “braces” to describe the perimeter sides of the openings. *Id.* at 4:63–65.

The urinal screen also includes first posts extending from the first face of the frame and second posts extending from the second face of the frame. *Id.* at 4:50–54. The ’098 patent also discloses that, in some embodiments, “the posts 22 extend from the corners 46 of the frame forming openings 18.” Ex. 1001, 5:32–46. In other embodiments, the posts can extend from the sides of the openings. *Id.* The posts may alternatively extend from both corners and sides of the openings. *Id.* Additionally, the sides and/or corners of the openings can have “contoured (e.g., convex) upper and/or lower surfaces.” *Id.* at 5:4–9.

The ’098 patent further discloses that, in some embodiments, “the frame thickness 34 at a given position on the frame 14 is less than or equal to approximately $\frac{1}{2}$ of the overall screen thickness 38 as measured perpendicularly to the first surface 26 of the frame 14.” *Id.* at 1001, 6:46–

57. The '098 patent discloses other frame-to-screen thickness ratios and teaches that the relative thicknesses cause “the posts 22 [to] space the frame 14 from the installation surface” by at least a certain amount, such as $\frac{1}{3}$ of the overall thickness or $\frac{1}{4}$ of the overall thickness. *Id.* at 1001, 6:58–7:11.

2. *Challenged Claims*

Challenged claims 1, 19 and 38 are reproduced below.

1. A urinal screen comprising:

a frame having:

a first face;

a second face opposite the first face; and

a plurality of openings extending through the frame between the first face and the second face;

a plurality of first posts extending from the first face of the frame; and

a plurality of second posts extending from the second face of the frame;

wherein the plurality of openings occupy at least half of a surface area of the frame as observed perpendicular to the first face of the frame when the frame is set on a flat surface;

wherein a plurality of ends of the plurality of first posts form a base upon which the urinal screen rests when the plurality of second posts point away from a surface upon which the urinal screen is set;

wherein a plurality of ends of the plurality of second posts form a base upon which the urinal screen rests when the plurality of first posts point away from a surface upon which the urinal screen is set;

wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is

oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame;

wherein at least one of the plurality of first posts extends from a perimeter around each of said plurality of openings; and

wherein at least one of the plurality of second posts extends from a perimeter around each of said plurality of openings

19. A urinal screen comprising:

a frame having:

a first face;

a second face opposite the first face; and

a plurality of interconnected cells at least partially defined by a plurality of braces that intersect at corners, the plurality of interconnected cells comprising at least a plurality of perimeter cells and a plurality of interior cells;

wherein the plurality of interior cells comprises a first cell, a second cell, and a third cell, said first cell and said second cell each partially defined by a first brace positioned between said first cell and said second cell, said second cell and said third cell each partially defined by a second brace positioned between said second cell and said third cell, and said first cell and said third cell each partially defined by a third brace positioned between said first cell and said third cell;

wherein each of the first brace, the second brace, and the third brace comprises a first end and a second end, and wherein:

the first end of the first brace intersects at a corner with the two other braces;

the first end of the second brace intersects at a corner with the two other braces; and

the first end of the third brace intersects at a corner with the two other braces;

a plurality of first posts each connected to a brace or corner of the frame and extending from away from the first face of the frame, and

a plurality of second posts each connected to a brace or corner of the frame and extending away from the second face of the frame.

38. A urinal screen comprising:

a frame having:

a first face:

a second face opposite the first face; and

a plurality of openings extending through the frame between the first face and the second face;

a plurality of first posts extending from the first face of the frame; and

a plurality of second posts extending from the second face of the frame;

wherein a plurality of ends of the plurality of first posts form a base upon which the urinal screen rests when the plurality of second posts point away from a surface upon which the urinal screen is set;

wherein a plurality of ends of the plurality of second posts form a base upon which the urinal screen rests when the plurality of first posts point away from a surface upon which the urinal screen is set;

wherein a number of said plurality of first posts and a number of said plurality of second posts are positioned along a perimeter of at least some of the plurality of openings, so as to surround the at least some of the plurality of openings; and

wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface by at least $\frac{1}{4}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame, such that posts positioned between the frame and the surface upon which the urinal screen is set can reduce splashing on a user of the urinal by deflecting a flow of urine which passes through said plurality of openings.

Ex. 1001, 7:64–8:32, 9:31–63, 10:64–29.

D. Evidence

Petitioner relies upon the following prior art references.

Ex. 1005, Fresh Products 3WDS60SAP Wave 3D Urinal Deodorizer Screen, First Available May 10, 2013 (“FP 3WDS60SAP Wave 3D”).

Ex. 1006, Fresh Products Wave 3D, First Available September 3, 2013, (Publication – Amazon Sale Listing). (“FP Wave 3D”).

Ex. 1008, Big D Industries, Inc. Product Catalog, “The Pearl 3D Urinal Screen, page 15,” copyright 01/2013 (“Big D Catalog”).

Ex. 1009, Big D Industries, Inc. ordering information and cut Sheet for “The Pearl 3D” dated 09/2013 (“Pearl 3D”).

Ex. 1011, U.S. Patent No. 8,007,707 to Brown et al., issued Aug. 30, 2011 (“the ’707 Patent”).

Ex. 1012, Korean Patent Publication No. 20-0395055, published Sept. 7, 2005 (“KR’055”).

Ex. 1014, Fresh Products, January 2013 Catalog, printed publication including Wave 2.0 urinal deodorizer (“FP Catalog Wave 2.0”).

Ex. 1015, Fresh Product October 17, 2013 website (freshproducts.com) advertisement for Wave 2.0, archived website from archives.org,

<https://web.archive.org/web/20131017043205/http://freshproducts.com/index.php/wave-2-0>, accessed April 16, 2024 (“Wave 2.0”).

Ex. 1017, European Cleaning Journal entry for V-Screen, “*Vectair V-Screen urinal screen range expanded*,” March 13, 2013, screenshot of <https://www.europecleaningjournal.com/magazine/february-march-2013/product-review/vectair-vscren-urinal-screen-range-expanded> (“V-Screen 1”).

Ex. 1018, Vectair V-SCREEN product information brochure, copyright 2012 (“V-Screen 2”).

E. Asserted Grounds of Unpatentability

Petitioner asserts that claims 1, 19 and 38 would have been unpatentable on the following grounds.

Ground	Claim(s)	Basis ²	References
1	1, 19, 38	§ 102	FP 3WDS60SAP Wave 3D
2	1, 19, 38	§ 103	Big D Catalog, Pearl 3D, the '707 Patent, KR'055
3	1, 19, 38	§ 103	FP Catalog Wave 2.0, FP Wave 2.0, the '707 Patent, V-Screen 1, V-Screen 2

² The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), amended 35 U.S.C. §§ 102 and 103. Because the challenged claims of the '013 patent have an effective filing date before the effective date of the applicable AIA amendments, we refer to the pre-AIA versions of 35 U.S.C. § 103 throughout this Decision.

II. ANALYSIS

A. Claim Construction

We interpret a claim “using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b).” 37 C.F.R. § 42.100(b) (2019). Under this standard, we construe the claim “in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” *Id.*

Petitioner proposes construction for several claimed terms: “openings,” “interconnected cells” and “braces.” Pet. 9–10. Patent Owner “does not object to the constructions proposed by Petitioner at this time.” Prelim. Resp. 13.

We determine that no express construction of any claim term is necessary to determine whether to institute *inter partes* review. *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (“[W]e need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy.’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))). To the extent further discussion of the meaning any claim term is necessary to our decision, we provide that discussion below in our analysis of the asserted grounds of unpatentability.

B. Petitioner’s Patentability Challenges

1. Ground 1: Anticipation of Claims 1, 19, and 38 by FP 3WDS60SAP Wave 3D, as evidenced by FP Wave 3D

In view of the following, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing on this ground.

a. The Parties' Contentions

Petitioner asserts that claims 1, 19, and 38 are anticipated by FP 3WDS60SAP Wave 3D, as evidenced by FP Wave 3D (collectively, “the Amazon Listings”). Pet. 14–28. To support its contentions, Petitioner provides a detailed claim analysis addressing how each element of claims 1, 19 and 38 are disclosed by FP 3WDS60SAP Wave 3D, as evidenced by FP Wave 3D. *Id.* According to Petitioner, FP 3WDS60SAP Wave 3D “is a publication in the form of a publicly available advertisement, available online through Amazon.com, for Fresh Products [3WDS60SAP] Wave 3D [U]rinal [Deodorizer] [S]creen.” Pet. 10. Petitioner contends that “[t]he Wave 3D product, as evidenced by Ex. 1005[,] was publicly on-sale as of May 10, 2013, more than one year before the effective filing date of the ‘098 Patent.” *Id.*

Patent Owner challenges whether FP 3WDS60SAP Wave 3D is a prior art printed publication. Prelim. Resp. 22–23. To support its contentions, Patent Owner directs our attention to a declaration from Jeffery A. Smith, Chief Operating Officer of Fresh Products, Inc. Patent Owner contends that,

As explained in Mr. Smith’s declaration, the hearsay “Date First Available” recited in Exhibits 1005 and 1006 is inaccurate. Ex. 2001. The Wave 3D Urinal Screen was first publicly disclosed by Fresh Products at the ISSA Interclean North America trade show in November of 2014, which Mr. Smith attended. *Id.*

Prelim. Resp. 23. Mr. Smith also testifies that “Fresh Products did not create the Amazon Listing, and Fresh Products does not control the content of the Amazon Listings” (Ex. 2001 ¶ 5), and testifies further that Patent Owner did not manufacture production units of the Wave 3D Urinal Screen until March

of 2015 (*id.* at ¶ 9). Thus, according to Mr. Smith, the Amazon Listings offering the Wave 3D Urinal Screen for sale could not have existed prior to November 2014, the priority date of the '098 patent. *Id.* at ¶ 10.

b. Legal Standard

A Petitioner in an *inter partes* review may challenge the patentability of claims under 35 U.S.C. § 102 or § 103 “only on the basis of prior art consisting of patents or printed publications.” 35 U.S.C. § 311(b). At the institution stage, the “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, 21 (PTAB Dec. 20, 2019) (precedential). This differs from the standard in a final written decision, at which point “the petitioner bears the burden of establishing by a preponderance of the evidence that a particular document is a printed publication.” *Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1375 (Fed. Cir. 2018) (citing *Medtronic, Inc. v. Barry*, 891 F.3d 1368, 1380 (Fed. Cir. 2018)).

Whether a reference qualifies as a “printed publication” is a legal conclusion based on underlying factual findings. *Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1375 (Fed. Cir. 2018) (citing *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018)). The underlying factual findings include whether the reference was publicly accessible. *Id.* (citing *In re NTP, Inc.*, 654 F.3d 1279, 1296 (Fed. Cir. 2011)). In determining whether a reference qualifies as a printed publication, “[t]he key inquiry is whether or not a reference has been made

‘publicly accessible.’” *M&K Holdings, Inc. v. Samsung Elecs. Co.*, 985 F.3d 1376, 1379 (Fed. Cir. 2021) (quoting *In re Klopfenstein*, 380 F.3d 1345, 1350 (Fed. Cir. 2004)). “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.” *Medtronic*, 891 F.3d at 1380 (internal quotation marks and citations omitted). The Federal Circuit has interpreted the printed publication provision “broadly, finding that even relatively obscure documents qualify as prior art so long as the relevant public has a means of accessing them.” *GoPro, Inc. v. Contour IP Holding LLC*, 908 F.3d 690, 694 (Fed. Cir. 2018) (citing *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1354–60 (Fed. Cir. 2018)).

c. Discussion

Having considered the parties’ positions and evidence of record, summarized above, we determine that Petitioner fails to establish a reasonable likelihood that the Amazon Listings were publicly accessible before the priority date of the ’098 patent, and therefore fails to establish a reasonable likelihood that the Amazon Listings qualify as printed publications. As explained in a previous Board decision, “[t]he date that a product was listed as first available on a website . . . is not sufficient evidence that the content of the listing, including the photographs depicted therein, were published at that time.” *Next Step Grp., Inc. v. Deckers Outdoor Corp.*, No. IPR2024-00525, 2024 WL 3678413, at *5 (P.T.A.B. Aug. 6, 2024) (citing *Ex parte Basulto*, Appeal 2020-00129, 2021 WL 1264902, at *2 (PTAB Apr. 2, 2021) (stating “the date [a] product was listed on Amazon.com is not compelling evidence that the content of [the] listing

itself as shown in the document, and the photographs relied on within it were published at that time”). That is because product listings may be updated and photographs of the products may change over time and, therefore, a statement on a commercial website as to when a product was “first available” is insufficient evidence without additional corroborating evidence that the listing itself, or any photograph depicted therein, has not changed over time. *See id.* (citing *Ex parte Zhang*, Appeal 2021-000087, 2021 WL 633718 at *3 (PTAB Feb. 16, 2021) (stating “while the [webpage] date indicates that the product information was last updated on [date], there is no additional evidence to corroborate that the picture was publicly accessible on that date”). In this case, Petitioner does not provide sufficient corroborating evidence that any of the information or images depicted in the Amazon Listings were available and remained unchanged on the website prior to the critical date. In contrast, Patent Owner provides evidence in the form of testimony of Mr. Smith, which we find credible, that the Amazon Listings offering the Wave 3D Urinal Screen for sale could not have existed prior to November 2014, the priority date of the ’098 patent.

d. Conclusion

In view of the above, we determine that, on this record, Petitioner has not established a reasonable likelihood of prevailing in demonstrating the unpatentability of claims 1, 19, and 38 with respect to Ground 1.

2. Ground 2: Obviousness in view of Big D Catalog, Pearl 3D, the ’707 Patent, and KR ’055

In view of the following, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing on this ground.

a. The Parties' Contentions

Petitioner asserts that claims 1, 19, and 38 are unpatentable as obvious over the combination of Big D Catalog, Pearl 3D, the '707 Patent, and KR'055. Pet. 28–47. To support its contentions, Petitioner provides a detailed claim analysis addressing how each element of claims 1, 19, and 38 are disclosed by the combination of Big D Catalog, Pearl 3D, the '707 Patent, and KR'055. *Id.*

Patent Owner contends that Petitioner's proposed combinations do not render obvious the challenged claims. Prelim Resp. 27–31. Patent Owner contends also that “Petitioner's obviousness argument amounts to a search for each claim limitation somewhere in the prior art” without any articulation of a reason or motivation to combine the references as Petitioner proposes. *Id.* at 3. For example, with regard to claim 1, Patent Owner contends that the combination of references fails to disclose the element of claim 1 requiring that, “wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame.” Ex. 1001, 8:20–26.³ In particular, Patent Owner contends that

Petitioner makes the conclusory—and incorrect—assertion that “[a] POSITA understands that this is a function of the length of the posts in relation to the thickness of the screen, and that *length of these posts is merely design choice.*” Petition, 36 (emphasis added). Petitioner presents no evidence in support of this

³ Claim 38 similarly recites that “the frame is positioned away from the surface by at least $\frac{1}{4}$ of a thickness of the urinal screen.” Ex. 1001, 11:20–29.

assertion. Moreover, this assertion is incorrect. As the '098 Patent explains, “[s]pacing the frame 14 from the installation surface can reduce the likelihood that the openings 18 are clogged by debris” and “can reduce splashing in the urinal by deflecting urine or other fluids which pass between the frame 14 and the installation surface.” Ex. 1001, 7:12–19. Thus, the claimed spacing from the urinal surface serves functional purposes and is not merely a design choice as Petitioner alleges.

Prelim. Resp. 29.

Regarding claim 19, Patent Owner contends that

The references raised in ground 2 do not disclose this claimed arrangement of interconnected cells and braces. Instead, Petitioner attempts to cure the references’ deficiencies by alleging that each of the limitations listed above “is within the ordinary knowledge of a POSITA” and that “[a] POSITA would understand that the exact shape and intersection of braces defining the plurality of interconnected cells can be varied.” Petition, 38–41. But no evidence of record supports Petitioner’s blanket assertions. *See Elbit Systems of America, LLC v. Thales Visionix*, 881 F.3d 1354, 1359 (Fed. Cir. 2018) (rejecting Petitioner’s assertions regarding a POSITA’s knowledge because “attorney argument is not evidence”). Further, even assuming arguendo that a POSITA would have understood that “exact shape and intersection of braces defining the plurality of interconnected cells can be varied” as Petitioner alleges, Petitioner does not identify any motivation to modify the Pearl 3D to include the specific claimed arrangement of interconnected cells and braces.

Prelim. Resp. 30–31.

b. Legal Standard

“To satisfy its burden of proving obviousness, a petitioner cannot employ mere conclusory statements. The petitioner must instead articulate specific reasoning, based on evidence of record, to support the legal conclusion of obviousness.” *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d

1364, 1380 (Fed. Cir. 2016). Moreover, “[a] party seeking to invalidate a patent on the basis of obviousness must demonstrate by clear and convincing evidence that a skilled artisan would have been motivated to combine the teachings of the prior art references to achieve the claimed invention, and that the skilled artisan would have had a reasonable expectation of success in doing so.” *See Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1360 (Fed. Cir. 2012) (quotation marks omitted); *see also In re Nuvasive, Inc.*, 842 F.3d 1376, 1383 (Fed. Cir. 2016) (explaining that “conclusory statements” are “insufficient articulations of motivation to combine” prior art references). When an assertion of obviousness “fails to identify any actual reason why a skilled artisan would have combined the elements in the manner claimed,” the assertion of obviousness “is inadequate.” *See In re Van Os*, 844 F.3d 1359, 1361 (Fed. Cir. 2017).

Furthermore, unsupported statements that a combination of elements would have been merely a design choice is insufficient to establish obviousness. *See Stryker Corp. v. Karl Storz Endoscopy–America, Inc.*, IPR2015–00677, Paper 15 at 37 (P.T.A.B. Sept. 2, 2015) (“[t]he mere recitation of the words ‘common sense’ or ‘design choice,’ however, without any evidentiary support, adds nothing to the obviousness equation.” (citing *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1377 (Fed. Cir. 2012))).

c. Discussion

Having considered the parties’ positions and evidence of record, summarized above, we find Patent Owner to have the better position. In particular, we agree with Patent Owner that the Petition fails to articulate a reason to modify the prior art to arrive at the claimed subject matter with sufficient evidentiary support.

For example, with regard to claim 1, we have considered Petitioner’s argument that a skilled artisan would understand that, in view of the Pearl 3D product and KR’055, “the placement, number and lengths of the posts are merely design choices.” Pet. 36. However, whether a skilled artisan would have understood how to make a modification does not address the question of why a skilled artisan would have had reason to make the modification. *See Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1073 (Fed. Cir. 2015) (“[O]bviousness concerns whether a skilled artisan not only could have made but would have been motivated to make the combinations or modifications of prior art to arrive at the claimed inventions.”); *Personal Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 993 (Fed. Cir. 2017) (stating that “it is not enough” to show that “a skilled artisan, once presented with the two references, would have understood that they could be combined”).

Additionally, we note that Petitioner’s challenges to claim 1 consist largely of attorney argument with no cited evidentiary support. *See, e.g.*, Pet. 32, 36 (Petitioner arguing that the differences between the claimed subject matter and the cited prior art are mere design choices without evidentiary support).⁴ As Petitioner’s primary argument regarding key elements of claim 1 lack adequate evidentiary support, we do not find it persuasive. *See In re Pearson*, 494 F.2d 1399, 1405 (C.C.P.A. 1974) (“Attorney’s argument in a brief cannot take the place of evidence.”). As

⁴ Similarly, Petitioner contentions regarding claims 19 and 38 also consist largely of attorney argument with no cited evidentiary support. *See e.g.* Pet. 39, 40 (“A POSITA understands the exact shape and intersection of braces defining the plurality of interconnected cells can be varied”), 46 (“The arguments [from claim 1] are incorporated herein and the change from 1/3 to 1/8 [sic] is merely a design choice and/or obvious optimization.”).

such, we conclude that Petitioner's rationale to combine the cited references is insufficient to demonstrate a reasonable likelihood of prevailing with respect to Petitioner's obviousness challenges.

d. Conclusion

Having considered the parties positions and evidence of record, summarized above, we determine that Petitioner has not established a reasonable likelihood of prevailing in demonstrating the unpatentability of claims 1, 19, and 38 with respect to Ground 2.

3. Obviousness in view of FP Catalog Wave 2.0, FP Wave 2.0, the '707 Patent, V-Screen 1, and V-Screen 2

In view of the following, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing on this ground.

a. The Parties' Contentions

Petitioner asserts that claims 1, 19, and 38 are unpatentable under as obvious over the combination of FP Catalog Wave 2.0, FP Wave 2.0, the '707 Patent, V-Screen 1, and V-Screen 2. Pet. 47–62. To support its contentions, Petitioner provides a detailed claim analysis addressing how each element of claims 1, 19, and 38 are disclosed by the combination of FP Catalog Wave 2.0, FP Wave 2.0, the '707 Patent, V-Screen 1, and V-Screen 2. *Id.* For example, claim 1 requires that, “wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame.” Ex. 1001, 8:20–26. With reference to that claim element, Petitioner contends that

A POSITA seeing the Wave 2.0 product (Ex. 1014, 1015) would understand that when the urinal screen is set on a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame. A POSITA would understand that this is a function of the length of the posts in relation to the thickness of the screen, and that these are merely design choices.

Pet. 53.

Similar to its response to Ground 2, Patent Owner contends that Petitioner's proposed combinations do not render obvious the challenged claims. Prelim Resp. 34–38. Regarding claims 1 and 38, Patent Owner argues that

claims 1 and 38 of the '098 Patent recite relative thicknesses not disclosed by Petitioner's references. Claim 1 recites "wherein, when the urinal screen is set upon a surface in a urinal such that the first or second face of the frame is oriented toward the surface upon which the urinal screen is set, the frame is positioned away from the surface upon which the urinal screen is set by at least $\frac{1}{3}$ of a thickness of the urinal screen as measured perpendicular to the first face of the frame." Ex. 1001, 8:20–26. Claim 38 similarly recites that "the frame is positioned away from the surface by at least $\frac{1}{4}$ of a thickness of the urinal screen." Ex. 1001, 11:20–29. Petitioner once again makes the conclusory—and incorrect—assertion that "[a] POSITA would understand that this is a function of the length of the posts in relation to the thickness of the screen, and that these are merely design choices." Petition, 53 (emphasis added). Petitioner presents no evidence in support of this assertion.

Prelim. Resp. 36–37.

Regarding claim 19, Patent Owner contends that

The references raised in ground 3 do not disclose this claimed arrangement of interconnected cells and braces. Instead,

Petitioner alleges that each of the limitations listed above “is within the ordinary knowledge of a POSITA” and that “[a] POSITA would understand that the exact shape and intersection of braces defining the plurality of interconnected cells can be varied.” Petition, 56–59. But no evidence of record supports such conclusory assertions. Additionally, Petitioner does not identify any motivation to modify the Wave 2.0 to include the specific claimed arrangement of interconnected cells and braces.

Prelim. Resp. 38.

b. Discussion

Having considered the parties’ positions and evidence of record, we find Patent Owner to have the better position, summarized above, which we adopt as our own. In particular, we agree with Patent Owner that Petitioner’s assertions that, for example, modifications to the Wave 2.0 product (Pet. 53) necessary to achieve the requirements of claim 1 would have been mere design choices is insufficient to support an obviousness determination without evidentiary support. Because Petitioner’s obviousness rationale lacks sufficient evidentiary support, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing with respect to this obviousness challenge.

c. Conclusion

Having considered the parties positions and evidence of record, summarized above, we determine that Petitioner has established a reasonable likelihood of prevailing in demonstrating the unpatentability of claims 1, 19, and 38 with respect to Ground 3.

III. CONCLUSION

On the present record, we find Petitioner has failed to demonstrate that the cited references would have taught or suggested each element of

claims 1, 19, and 38, and set forth a sufficient rationale for why a person of ordinary skill would have been motivated to combine these teachings and suggestions to arrive at the invention recited in those claims. Accordingly, Petitioner has not established a reasonable likelihood of prevailing in demonstrating that claims 1, 19, and 38 would have been obvious over the combinations of prior art set forth in the asserted grounds.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is denied as to all challenged claims, and no trial is instituted.

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