

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CAMPBELL SOUP COMPANY,
CAMPBELL SALES COMPANY, and
TRINITY MANUFACTURING, L.L.C.,
Petitioner,

v.

GAMON PLUS, INC.,
Patent Owner.

Case IPR2017-00091
Patent D621,645 S

Before GRACE KARAFFA OBERMANN,¹ BART A. GERSTENBLITH,
and ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a); 37 C.F.R. § 42.73

¹ Trenton A. Ward left the Board in September 2017 and was replaced by Judge Obermann on the existing panel.

I. INTRODUCTION

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, L.L.C. (collectively, “Petitioner”) filed a Petition to institute an *inter partes* review of the claim for a “Gravity Feed Dispenser Display” in U.S. Patent No. D621,645 S (“the ’645 patent”). Paper 2 (“Pet.”). Gamon Plus, Inc. (“Gamon” or “Patent Owner”) filed a Preliminary Response to the Petition. Paper 9. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review of the challenged claim. Paper 12 (“Dec.”).

During the trial, Patent Owner filed a Patent Owner Response (Paper 14, “PO Resp.”), and Petitioner filed a Reply (Paper 33, “Pet. Reply”) to the Patent Owner Response. We authorized Patent Owner to file a paper that identifies allegedly improper new argument and citations in Petitioner’s Reply (“Paper 40”), to which Petitioner filed a response (Paper 48). We also authorized Patent Owner to file a sur-reply addressing evidence that Petitioner produced late in the proceeding. Paper 68 (“PO Sur-reply”).

Petitioner’s fully briefed Motion to Exclude Evidence is pending. Paper 49 (“Pet. Mot.”); Paper 59 (“PO Opp.”); Paper 66 (“Pet. Reply to Opp.”). Patent Owner’s fully briefed Motion to Exclude also is pending. Paper 51 (“PO Mot.”); Paper 58 (“Pet. Opp.”); Paper 67 (“PO Reply to Opp.”). We have also considered Patent Owner’s Motion for Observations on Cross-Examination of James M. Gandy (Paper 50) and Petitioner’s Opposition to the Motion for Observations (Paper 57).

An oral hearing was held on January 23, 2018, and a copy of the transcript is part of the record. Paper 80 (“Tr.”).

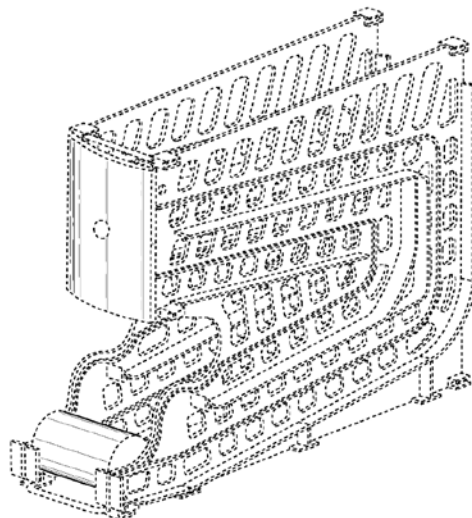
We have jurisdiction under 35 U.S.C. § 6(b). This Decision is a Final Written Decision under 35 U.S.C. § 318(a) as to the patentability of the claim on which we instituted trial. Based on the record before us, we determine that Petitioner has not shown, by a preponderance of the evidence, that the claim of the '645 patent is unpatentable under 35 U.S.C. § 103(a).

A. *Related Proceedings*

The parties state that the '645 patent is at issue in *Gamon Plus, Inc., et al. v. Campbell Soup Co., et al.*, Case No. 15-cv-8940 (N.D. Ill.). Pet. 3–4; Paper 6, 1–2. Petitioner also has filed petitions challenging the patentability of related design patents, IPR2017-00094 (U.S. Patent No. D612,646), IPR2017-00095 (U.S. Patent No. D621,644), and IPR2017-00096 (U.S. Patent No. D595,074).

B. *The '645 Patent and Claim*

The '645 patent (Ex. 1001) issued August 17, 2010, and is assigned to Gamon. *Id.* at [45], [73]. The '645 patent claims “[t]he ornamental design for a gravity feed dispenser display, as shown and described.” *Id.* at [57]. The claim for the ornamental design for a gravity feed dispenser display is depicted below:



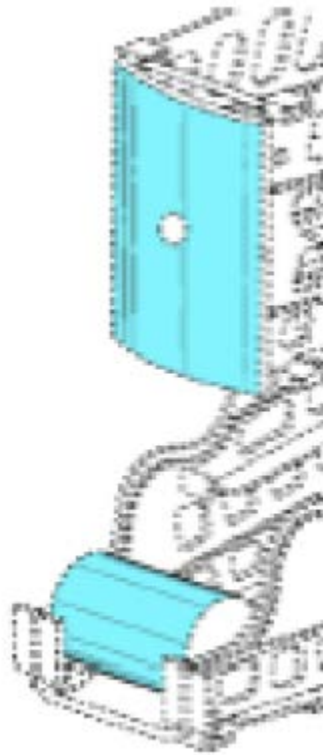
The Figure of the '645 patent is this perspective view of a gravity feed dispenser display. *Id.* As depicted, certain elements in the front area of the design are drawn in solid lines, but much of the rearward structure is illustrated by broken lines. The Description of the invention explains:

The broken line showing is for the purpose of illustrating portions of the gravity feed dispenser display and forms no part of the claimed design.

Id. at Description. *See* 37 C.F.R. § 1.152; *see also* MPEP § 1503.02, Subsection III (“Unclaimed subject matter may be shown in broken lines for the purpose of illustrating the environment in which the article embodying the design is used. Unclaimed subject matter must be described as forming no part of the claimed design or of a specified embodiment thereof.”).

In an *inter partes* review, “[a] claim in an unexpired patent that will not expire before a final written decision is issued shall be given its broadest reasonable construction in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b). With respect 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.” *Egyptian Goddess*, 543 F.3d at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

Petitioner contends the claim of the '645 patent “covers the curved access door / label area, [and] the visible portion of the cylindrical can” as depicted below:



Petitioner’s annotated Figure of the '645 patent purportedly represents the entirety of the claim. Pet. 8; *see* Ex. 1002 ¶ 15.

Gamon contends that certain aspects of the design claim are important esthetically. PO Resp. 4. Gamon points to “the relative position, dimensions and height of the label area with respect to the cylindrical can, which is a significant esthetic aspect of the design.” *Id.* “Specifically, the horizontal cylindrical article is positioned partially forward of the label area, and with the label area at a height above the bottom of the article that is about the same as the height of the label area.” *Id.* (citing Ex. 2001 ¶ 5). Gamon also contends that

while the width of the label area is about the same as the height of the cylindrical article in the display, the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art.

Id. at 6.

Based on the positions of the parties, and considering the relationship of the prior art to the claimed design, we find it helpful to describe verbally certain features of the claim for purposes of this Final Decision. *See Egyptian Goddess*, 543 F.3d at 680. As shown in the Figure, above, the single embodiment of the patent design illustrates and claims certain front portions of a gravity feed dispenser display. From top to bottom, a generally rectangular surface area, identified by the parties as an access door or label area, is curved convexly forward. Pet. 8. For ease of reference, we refer to this portion as “the label area.” The label area is taller vertically than it is wide horizontally, however, the boundary edges of the label area are not claimed. Below the label area there is a gap between the label area and the top of a cylindrical object lying on its side – the gap being approximately the same height as the label area. *See* Ex. 2001 ¶¶ 5, 28; PO Resp. 5 (annotated Figure). The width of the label area is generally about the same as the height of the cylindrical object lying on its side. The height of the cylindrical object (lying on its side) is longer than its diameter. The cylindrical article is positioned partially forward of the label area. Ex. 2001 ¶¶ 5, 28.

C. Instituted Grounds

We instituted trial based on the following grounds (Dec. 32):

Reference(s)	Basis
Linz ² and Samways ³	§ 103(a)
Samways	§ 103(a)
Samways and Linz	§ 103(a)

Petitioner supports its challenge with two declarations by Mr. James Gandy, one in support of the Petition (Ex. 1002 (“the Gandy Decl.”)), the other in support of Petitioner’s Reply (Ex. 1018 (“the Gandy Suppl. Decl.”)).

Petitioner also relies on the declaration of Mr. Steven Visser. Ex. 1020 (“the Visser Decl.”). Gamon relies on two declarations by Mr. Terry Johnson, one in support of Patent Owner’s Response to the Petition (Ex. 2001 (“the Johnson Decl.”)), and a Supplemental Declaration in support of Patent Owner’s Opposition to Petitioner’s Motion to Exclude (Paper 60⁴ (“the Johnson Suppl. Decl.”)). The parties rely on other evidence and exhibits as discussed below.

D. Background

Terry Johnson came up with the initial design idea underlying the patent after visiting a store and having a difficult time finding the home-style chicken noodle soup. Ex. 1021, 27:13–28:24. Unable to find the type of soup he was looking for, he ended up buying a plain noodle soup that did not

² U.S. Patent No. D405,622, Arthur W. Linz, issued Feb. 16, 1999 (“Linz,” Ex. 1008).

³ G.B. Patent Application No. 2,303,624, published Feb. 26, 1997 (“Samways,” Ex. 1009).

⁴ Paper 60 is Bates stamped as Exhibit 2014 in the bottom, right-hand corner of each page. Exhibit 2014, however, was expunged.

go over well at home. *Id.* Terry Johnson recognized that if he was having a problem finding a particular type of soup, others were likely having the same problem, and Terry Johnson “came up with something that was pretty simple” – a display that would visually help purchasers of canned soup. *Id.* at 28:10–16; *see also* Pet. Reply 13 (citing Ex. 1021, 29[28]:15–16). A Campbell’s marketing manager noted that “shoppers would get so frustrated at not finding the flavor they wanted that they would walk away without it.” Ex. 2007, 1 (2004 interview with Jacques Finnel, Campbell’s marketing manager for retail development).

After coming up with an initial concept, Terry Johnson, on behalf of Gamon,⁵ reached out to Campbell Soup Company’s CEO, David Johnson (no relation to Terry), to pitch the idea of putting Campbell’s soup cans on their side and then having them roll down an inclined plane, and also having “a big convex sign on the front of it to talk to the consumer.” Ex. 1021, 27:13–16, 29:11–30:10. Terry Johnson testified that David Johnson quickly hung up because “[n]o one wanted me to turn the can on its side” at that time. *Id.*

In later discussions with Campbell around 2002, Terry Johnson presented his concept to an executive board at Campbell, including Carl Johnson (no relation to Terry). *Id.* at 30:11–32:18. During these discussions, Campbell sponsored a project by a research company called

⁵ Terry Johnson is the “CEO of Patent Owner Gamon Plus, Inc.” and also a named inventor on the challenged patent. Ex. 2001 ¶¶ 1, 2. Terry Johnson states that Gamon International is a corporate affiliate of Patent Owner Gamon Plus, Inc., and Gamon International is the entity responsible for delivering display racks to Campbell Soup. *Id.* ¶ 38; *see also* Ex. 2032, 12. With this distinction in mind, we refer to the Gamon entities collectively as “Gamon” unless otherwise noted.

Cannondale. *See, e.g.*, Ex. 2032. According to statements attributed to Campbell's Mr. Finnel, the consumer research indicated that the soup category was one of the most difficult to shop in supermarkets. Ex. 2007, 1. The initial Cannondale survey, as conveyed to Terry Johnson, suggested that sales may be lost if Campbell put its soup cans on their sides at the point of sale. Ex. 1021, 32:19–33:10. Campbell agreed, however, to run a test of Gamon's proposed display rack in a small number of stores. *Id.* at 32:3–33:20; *see also* Ex. 2031, 5, 6, 10–12, 14–17, 26–29 (Cannondale report in 2002 [REDACTED] [REDACTED] noting that the Gamon display shelving would be tested). Soon after, Campbell allowed Gamon's gravity feed display rack to be tested in 25 stores selling Campbell's condensed soup. *Id.* at 32:3–33:20. The tested embodiment of the gravity feed display rack was the same design as embodied in Gamon's '645 and D612,646 design patents.⁶ *Id.* at 33:17–24; Ex. 2032, 4–10 (displaying Gamon's gravity feed display rack at various test stores); Ex. 2001 ¶ 38 (citing Exs. 2005, 2006).

Gamon's commercial embodiment of the patented design was tested in a select number of stores and referred to as the IQ Maximizer. Ex. 1021, 32:3–33:20, 35:13–15; Tr. 42:22–24; Ex. 2007, 1. Considering the outcome of the test market using the Gamon gravity feed display rack to sell

⁶ The '645 and '646 design patents both claim priority to Gamon's U.S. Patent No. 6,991,116 filed on June 20, 2003 (claiming priority to U.S. Provisional Application No. 60/404,648, filed on Aug. 20, 2002), listing the same three inventors. *See, e.g.*, Ex. 1001, [60].

Campbell soup products, Campbell concluded that the display rack⁷ increased its soup sales volume by 5.5–13.6% depending on the type of soup and brand. Ex. 2032, 4.⁸ Terry Johnson similarly testified based on his involvement in the project that Campbell’s “market study showed that Campbell could secure a 5% increase in sales using the Gamon display racks,” and “use of the Gamon display rack produced increased soup sales by 9 to 14% according to [a] market study conducted by Cannondale Consulting Inc.” Paper 60 ¶¶ 16, 18; Ex. 1021, 35:1–12. Campbell’s internal presentation discussing the results of this study was titled: “IQ SHELF MAXIMIZER The Power to Transform the Soup Section.” Ex. 2032, 1. The Gamon gravity feed display rack was described as “Breakthrough Gravity Feed Shelving,” that “Encourages purchase of additional varieties,” and resulted in positive consumer responses in every test market. *Id.* at 4–10.

From 2002 until 2009, Campbell purchased approximately \$31 million of Gamon’s gravity feed display racks⁹ and installed them in over 17,000 stores. Ex. 2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14

⁷ As suggested in the Cannondale report (Ex. 2031) other variables were controlled so that a determination could be made on the impact of Gamon’s IQ Maximizer – single variable testing. Ex. 2031, 26–27.

⁸ Exhibits 2031 and 2032 are each considered by Campbell to be “internal Campbell presentations.” Paper 72, 1. Campbell describes these documents as representing “a broad range of consumer research that Campbell had undertaken to better understand consumer shopping experiences in the soup aisle and develop strategies to improve that experience.” *Id.* at 1. These documents were produced based on our Order (Paper 41) directing Campbell to produce the 2002 study referenced by Terry Johnson.

⁹ Petitioner has not contested that the Campbell entities purchased \$31 million in display racks from Gamon. *See* Tr. 50:1–5.

(Campbell's 2007 Annual Report states that "[n]early 17,400 stores in the U.S. feature our gravity-feed shelving system. It is a powerful tool for merchandising Campbell's condensed soups."). The display racks purchased fall within the scope of the '645 patent when a Campbell soup can is added to the display – the claim of the '645 patent requires a cylindrical object as part of the claim. *See* Ex. 1001; Ex. 2032, 4–10; PO Sur-reply 4–5; Ex. 2001 ¶¶ 38–45; Tr. 40:4–41:3. The only purpose of the Gamon display racks tested and purchased by Campbell was the display of Campbell's cylindrical soup cans as arranged in the patented design. Ex. 2001 ¶ 38 (“These display racks displayed the condensed Campbell Soup cans in the exact configuration of the design of the '645 patent.”); Tr. 43:24–45:24.

In February 2004, after placing the display racks in 2800 stores, Campbell's Mr. Finnel noted in a news publication that a “key benefit” of the IQ Maximizer was that the program enhances the shopping experience for the consumer and also “makes it easier for consumers to find desired products while giving visibility to others.” Ex. 2007, 1. Referring to the front portion of the gravity feed displays, Mr. Finnel states that “[t]he facings are better defined and easier for customers to shop, so fewer are needed.” *Id.*

In 2005, Campbell issued its Annual Report to investors stating that the Gamon IQ Maximizer was available in 14,000 stores. Ex. 2015, 10. Campbell described the impact of the Gamon IQ Maximizer, noting “[t]he strong performance of Campbell's condensed soup business demonstrates the value of the *iQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup.” *Id.* The 2005 Annual Report described the IQ Maximizer as “making the soup aisle dramatically easier for consumers to

shop.” *Id.* The 2005 Annual Report also shows a graphic example of the use of the IQ Maximizer gravity feed shelf and on the same page states “[o]ur breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop.” *Id.* at 17. Campbell’s 2006 Annual Report (Ex. 2016) describes Gamon’s IQ Maximizer as now “available in 16,000 stores,” and similarly states that it “continues to be a powerful tool to merchandise Campbell’s condensed soups.” Ex. 2016, 8. Campbell described the IQ Maximizer as a “tool to deliver impactful consumer messages at the point of purchase” (*id.*), and as “Making Shopping Even Simpler” (*id.* at 22). Campbell again stated that the IQ Maximizer was a “breakthrough in soup merchandising.” *Id.* Campbell noted that its condensed soup sales increased by 5% in 2006, which Campbell attributed to “higher prices across the portfolio,” and “the additional installation of gravity-feed shelving systems and increased advertising.” Ex. 2017, 36; *see also* Ex. 2009, 2; Ex. 2010, 4. Campbell’s 2007 Annual Report similarly describes Gamon’s IQ Maximizer as “a powerful tool for merchandising *Campbell’s* condensed soups.” Ex. 2017, 14.

In late 2008, Campbell began purchasing gravity feed display racks from Petitioner Trinity. PO Resp. 39, 43–44. Trinity’s display racks maintained the same basic design features as the Gamon racks. *Id.*; Ex. 2001 ¶¶ 48–51; Ex. 2012 (image of Trinity’s display rack for Campbell’s condensed soup cans); Ex. 2013 (image of Trinity’s display rack for Campbell’s Ready-To-Serve soup cans).

II. ANALYSIS

Petitioner bears the burden of proving unpatentability of the challenged claims, and the burden of persuasion never shifts to Patent Owner. *Dynamic Drinkware, LLC v. Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378 (Fed. Cir. 2015). To prevail, Petitioner must establish the facts supporting its challenge by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d).

A. *Obviousness*

In a challenge to a design patent based on obviousness under 35 U.S.C. § 103, 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 Elecs. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (quoting *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996)). This obviousness inquiry consists of two steps. *Apple*, 678 F.3d at 1329. In the first step, a primary reference (sometimes referred to as a “*Rosen* reference”) must be found, “the design characteristics of which are basically the same as the claimed design.” *Id.* (quoting *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982)). This first step is itself a two-part inquiry under which “a court must both ‘(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.’” *High Point Design*, 730 F.3d 1301, 1311–12 (Fed. Cir. 2013) (quoting *Durling*, 101 F.3d at 103).

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. 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, 101 F.3d at 103 (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)).

B. The Designer of Ordinary Skill

Petitioner, relying on the testimony of Mr. Gandy, opines that:

The designer of ordinary skill would be someone with a background or familiarity with commercial dispensers, and particularly dispensers for consumer commodities such as cans, bottles, or small packaged items. The designer of ordinary skill would have a basic understanding of physics and or mechanics, which may include practical experience in the field of studying or designing consumer commodity dispensers, or may include high school or introductory college level physics coursework. The designer of ordinary skill in the art would also have a basic understanding of the dimensions and functions afforded to cans and bottles in the context of packaging. The designer of ordinary skill would not necessarily need to be familiar with electrical or advanced mechanical concepts, as the relevant field of prior art is limited to relatively simple consumer commodity dispensers and displays.

Pet. 24–25 (internal citations omitted) (citing Ex. 1002 ¶¶ 23–25). Gamon does not object to this description of the designer of ordinary skill in the art. Based on the final trial record, we agree that the designer of ordinary skill is as Petitioner asserts, except that we disagree that a designer of ordinary skill would need to have a basic understanding of the dimensions and functions afforded to cans and bottles *in the context of packaging*. This concept (dimensions and functions) is vague and the patented invention relates to a dispensing display, not packaging. *See* Ex. 1001, [54], [57] (The claim recites “[t]he ornamental design for a gravity feed dispenser display.”).

C. *Obviousness Based on Linz and Samways*

We instituted review on the basis that the claimed design for the '645 patent would have been obvious to a designer of ordinary skill based on Linz and Samways. Dec. 32. Based on the final trial record before us, we are not persuaded that Petitioner has established by a preponderance of the evidence that the claim is unpatentable over Linz and Samways for the reasons explained below.

1. Linz (Ex. 1008)

Linz is titled "Display Rack" (Ex. 1008, [54]) and claims an "ornamental design for a display rack" (*id.* at [57]). Linz issued on February 16, 1999, making it prior art to the '645 patent under pre-AIA 35 U.S.C. § 102(b). Linz is cited on the face of the '645 patent. Ex. 1001, [56].

Linz discloses an ornamental design for a display rack having an access door / label area with a symmetric, convex arcuate shape, with a central apex that extends forward. Ex. 1008, Fig. 1. Figure 1 of Linz is reproduced below.

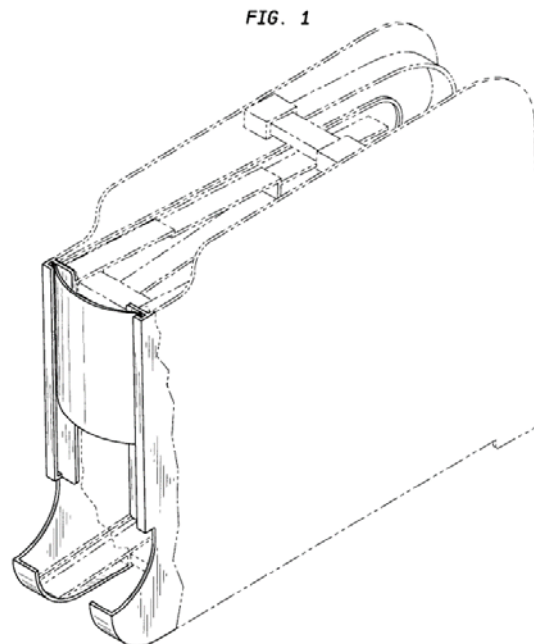


Figure 1 of Linz shows the claimed ornamental design for a display rack. Ex. 1008, Fig. 1. Although Linz has an area for receiving some type of object, Linz does not disclose the specific placement of any object in the display rack, including the size, shape, or orientation of any particular object.

2. Samways (Ex. 1009)

Samways is titled “Serpentine Dispenser.” Ex. 1009, [54]. Samways published on February 26, 1997, making it prior art to the ’645 patent under pre-AIA 35 U.S.C. § 102(b). Samways describes a dispenser with a serpentine delivery path along which cylindrical objects can move by gravity to an outlet or dispensing area. *Id.* at [57], 1:7–8 (“relates to dispensers for all cylindrical objects”), 17:32–33 (claiming a dispenser “adapted to dispense cylindrical objects”).

As depicted in the embodiment of Figure 3 below, Samways’ design for a serpentine dispenser incorporates a large label area, front fascia 17, with a symmetric, convex arcuate shape, with a central apex that extends forward. Samways describes one embodiment as “preferably shaped to resemble a coffee jar, so as to be striking to the eye of the customer.” *Id.* at 13:5–7, Fig. 3.

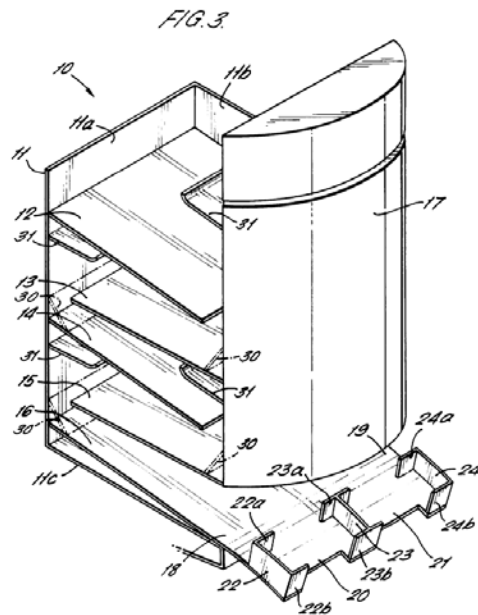


Figure 3 of Samways shown above is a perspective view of a gravity feed dispenser display. *Id.* at 3:11–13. As depicted above, Samways discloses outlet areas, or storage locations 20, 21, with U-shaped barriers 22, 24 on the sides, and I-shaped barrier 23 in between storage areas 20, 21. *Id.* at 11:6–30, Fig. 3. Barriers 22, 23, 24 include stops, or arms, located below the label area. There are three forward stops 22b, 23b, 24b and three rearward stops 22a, 23a, 24a, that help define storage areas 20 and 21 for receiving cylindrical objects on the downward incline of outlet 18 along ramp 16. *Id.* at 11:1–5. The forward stops 22b, 23b, 24b are positioned forward of the label area. As depicted, the forward stops are located to each side and in the center, with a gap between the stops. Left and right forward stops 22b, 24b are shaped like rectangles, center stop 23b is square shaped, and each stop stands perpendicular to the inclined portion of ramp 16, but not perfectly vertical.

Storage locations 20, 21 are designed such that a cylindrical object loaded therein would be visible above forward stops 22b, 23b, 24b, as well

as through the two gaps between the stops. Placement of a cylindrical object in the storage area behind the forward stops is depicted in Figure 4 of Samways.

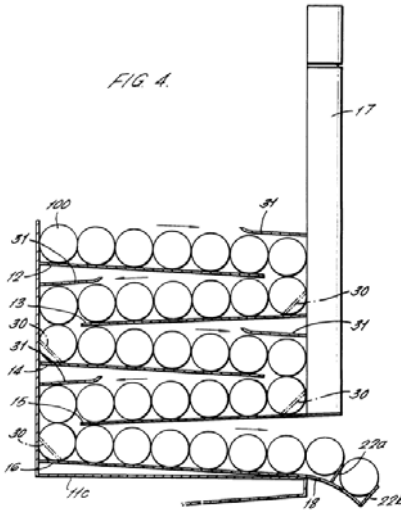


Figure 4 of Samways shown above depicts a side cross-section view of the gravity feed dispenser shown in Figure 3. *Id.* at 3:14–15. As depicted in Figure 4, there is a small gap between the bottom of label area 17 and the top of a forward cylindrical object allowing for visual display of the cylindrical object. As also visible in Figure 4, the label area extends far above the top of the rack and down to just above the top of a second cylindrical object – leaving less than one diameter of space between the cylinder and the bottom of the label area.

3. Analysis of Obviousness Based on Linz and Samways a. Petitioner’s Contentions

Petitioner contends the ornamental design of the ’645 patent would have been obvious to a designer of ordinary skill based on Linz in view of Samways. Pet. 29–34. Petitioner relies on a comparison of the combined ornamental features of Linz and Samways with the design of the ’645 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing

Ex. 1002 ¶¶ 48–57). Petitioner contends that Linz is the same basic claimed design, “and is therefore a suitable primary reference.” *Id.* at 30. Petitioner relies on Samways as the secondary reference. *Id.* at 31. According to Petitioner, Samways provides support for the placement and shape of a cylindrical object. *Id.* at 32–33.

Petitioner contends that “to the extent that it can be argued that Linz does not inherently disclose a cylindrical can, it would be obvious to a designer of ordinary skill in the art to use the display rack of Linz to dispense cylindrical cans.” *Id.* at 30 (citing Ex. 1002 ¶ 50). According to Petitioner, the curvature of the bottom rails, and the loading area would indicate to a designer of ordinary skill in the art that the Linz display rack is intended for use with cylindrical cans. *Id.* Petitioner also argues that “[t]he use of a cylindrical can with Linz would yield predictable results – the can would roll from the loading area down to the stops of the display shelf, such that the can would be visible.” *Id.*; Ex. 1018 ¶ 33; Ex. 1020 ¶ 32 (“it would be obvious to such a designer to place a cylindrical object in the area of Linz designed to hold such an object”).

Petitioner also argues that a design incorporating a cylindrical can is disclosed by Linz in view of Samways because Samways discloses cylindrical cans dispensed from a display shelf. Pet. 32. According to Petitioner, “combining the cans disclosed by Samways . . . with the design of Linz merely adds a can to the display shelf present in Linz.” *Id.* at 33.

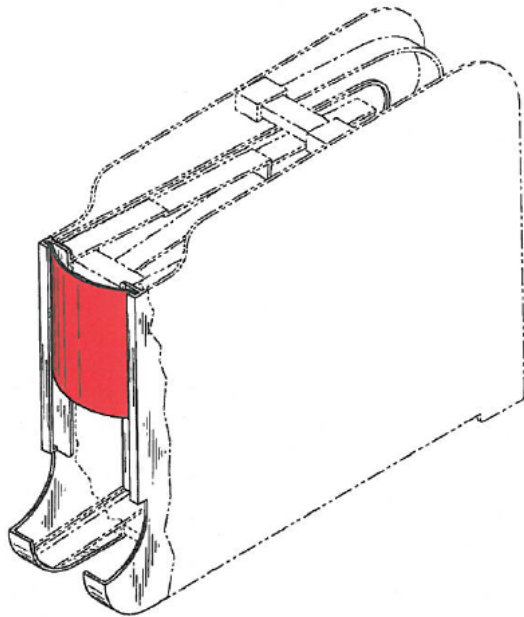
Petitioner contends that the relative positioning, dimensions, and scaling of the can and label area are not claimed. Pet. Reply 10, 13. Petitioner also alleges that the patent claim “disclaims any boundaries on the label area’s height and width.” *Id.* at 10; Ex. 1020 ¶ 28. Further, Petitioner

contends that even if these features were claimed, the design of Linz is basically the same. Pet. Reply 10–11. Petitioner also contends that because Gamon’s expert, and inventor, characterizes the design as “simple,” it must therefore be obvious. *Id.* at 13 (quoting Ex. 1021, 29:15–16 [sic, 28:15–16], 45:16–17).

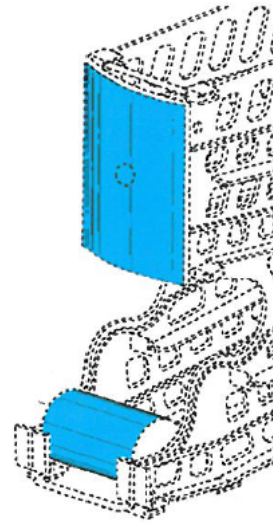
b. Patent Owner’s Contentions

Gamon contends that Linz is not a proper *Rosen* reference because it is not “substantially similar” to the patented design. PO Resp. 2. Gamon contends that Linz cannot be a *Rosen* reference because it does not “show[] something in existence that, without substantial modification, creates basically the same visual impression as the design of the ‘645 patent.” *Id.* at 7. Gamon reasons that it is improper to first modify a *Rosen* reference, and Petitioner “posit[s] substantial modifications of the appearance of the disclosed embodiments of the references to try to make them resemble the claimed design before they were employed as primary references.” *Id.* Specifically, Gamon argues that Petitioner would first have to modify Linz to contain a cylindrical article before it could be considered a *Rosen* reference. *Id.* at 7–8. Without those modifications, Linz is strikingly different from the design of the ’645 patent.

Gamon argues that “[n]owhere in Linz does the reference describe, show or suggest the types of articles that might be displayed in this rack.” *Id.* at 22; Ex. 2001 ¶ 16. Gamon relies on the following graphical display comparing Linz with the Figure of the ’645 patent.



Linz, FIG. 1 (highlighted)



'645 patent figure (highlighted)

Figure 1 of Linz (left) and the '645 patent Figure (right) each depict highlighted design features. According to Gamon, the highlights “show[] a distinct difference of the appearance of Linz relative to the '645 patent for a number of reasons,” including Linz’s failure to have “a cylindrical object, or any object, on display.” PO Resp. 23. Gamon points out that Linz fails to disclose “a curved label area that extends essentially to the sides of the rack,” because Linz has “flat strips extending laterally inward from the sides.” *Id.* (citing Ex. 2001 ¶ 16). Gamon’s primary argument is that

Linz, without modification, lacking the cylindrical article shown in the '645 patent design and its other elements, really is missing **half of the claimed design**, and therefore does *not* provide “basically the same visual impression” as the design of the '645 patent, and therefore the unaltered Linz design cannot be used as primary reference against the '645 patent.

Id. at 24.

Gamon contends that a designer of ordinary skill must first consider Linz without modification, and “Petitioners have improperly created and

added a cylindrical article of arbitrary appearance to Linz to try to make it a primary reference.” *Id.* Gamon contends Mr. Gandy’s analysis is improper because it presumes that a cylindrical can could be displayed and then goes on to create a can in the display to make it look more like the claimed design. *Id.* According to Gamon, “[t]he absence of a can in Linz is not a *de minimis* deficiency of Linz as a primary reference.” *Id.* at 25. Gamon argues that without an “arbitrarily configured can” added to Linz, it would not serve properly as a *Rosen* reference. *Id.* Gamon notes that the can missing in Linz is “a significant element of the overall appearance of the design, and, without the can added, [Linz] clearly fails to give a visual impression that is basically the same as the ‘645 patent.” *Id.*

Gamon next contends that “Petitioners’ arguments for placement of a cylindrical can in the Linz display are based on a hindsight-guided theory of inherency and on utility patent concepts of obviousness that have no place in a design patent analysis.” *Id.* at 26. Gamon notes that “Petitioners assert that Linz ‘inherently discloses’ that it is used with ‘cylindrically shaped objects, e.g., cans’ based on 1. the curved shape of the bottom of Linz, and 2. a curved loading area for the dispenser.” *Id.* (quoting Ex. 1002 ¶ 45). Gamon contends that “the can with its arbitrary appearance that Petitioners have formulated in the Linz rack cannot be ‘inherent’ to Linz,” because “[i]nherency requires that the undisclosed feature necessarily is present in the reference.” *Id.* Gamon argues that the mere probability that a cylindrical can could be designed into Linz is not enough. *Id.* Further, Gamon argues that “a variety of cylindrical and non-cylindrical articles might be used with the Linz rack.” *Id.* (citing Ex. 2001 ¶ 19 (“The particular can with its

arbitrary appearance . . . might be one of the possibilities, but it is not the only necessary article that could be used.”)).

Gamon notes that when “considering any reference in the ornamental design context, the focus must be on appearances and not uses of the prior art.” *Id.* at 27 (citing *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993)). Gamon contends that Petitioner’s position on Linz is “based on a utility-patent-type functional obviousness analysis and design concepts about the functional operation of the Linz display,” but “those functional theories are irrelevant to the ornamental appearance of Linz, and the actual appearance of an object in the Linz display rack is completely unknown.” *Id.* at 28.

Gamon argues that the objective indicia of nonobviousness are strongly in favor of patentability. PO Resp. 3, 38. Gamon contends that the patented design has been commercially successful as “evidenced by substantially increased sales by Petitioners using the design for their products, Petitioners’ purchase of tens of millions of dollars of Gamon’s displays providing the claimed design, and the Petitioners having subsequently slavishly copied the design of the ‘645 patent.” *Id.* at 3. Gamon contends that “commercial success and industry praise are weighed against the evidence of obviousness,” and the claimed design of the ‘645 patent has seen “massive commercial success,” “both in terms of sales of display racks” and also “in sales of soup displayed with the ornamental appearance of the design.” *Id.* at 39. Gamon also contends that Campbell “ha[s] widely used display racks made in concert with Petitioner Trinity Industries for their soup products that were copied directly from racks made by Gamon so as to display cans of Campbell soup with the patented design.” *Id.* at 39.

According to Gamon, in 2002, it delivered the display racks to Campbell for displaying condensed soup cans. *Id.* (citing Ex. 2001 ¶ 38). A picture of those display racks is depicted below.

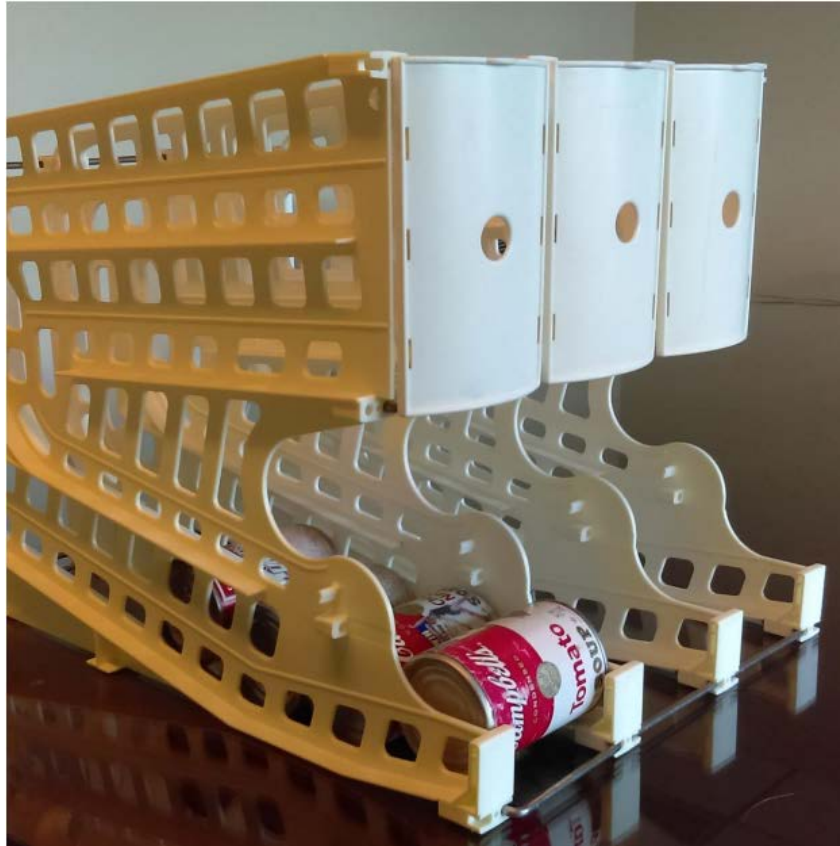


Exhibit 2005 represents a picture of the Gamon display rack originally sold to Campbell in 2002. *See* Ex. 2001 ¶ 38. As further depicted below, this display rack was installed in stores with “condensed Campbell Soup cans in the exact configuration of the design of the ‘645 patent.” Ex. 2001 ¶ 38.



Exhibit 2006 represents a display of the commercial embodiment of the patented invention with Campbell Soup cans. According to Gamon, Campbell subjected these displays to market testing (Cannondale study), which established that by using Gamon's gravity feed display rack, sales volume of Campbell's condensed soup increased in a range of 9–14%. PO Resp. 40 (citing Ex. 2001 ¶ 39); Paper 60 ¶ 18; Ex. 2032, 4. Campbell called the gravity feed display rack, the "IQ-Shelf-Maximizer, and entered into an exclusive Supply Agreement with Patent Owner in June 2003 to buy the display racks." PO Resp. 40 (citing Ex. 2001 ¶ 40). As explained more below, Gamon contends "[t]he positive market testing prompted Campbell's to buy \$30 million of display racks with a design of the claim of the '645 patent," and such a large purchase amount "indicates that the design of the claim of the '645 patent was commercially successful." PO Sur-reply 5.

From 2003 until about 2005, Campbell Soup installed racks in about 14,000 stores and also began using a Gamon display rack of the same design, but scaled for use with Campbell's "Ready-To-Serve" soups. PO

Resp. 40–41 (citing Exs. 2007, 2008; Ex. 2001 ¶¶ 41, 42). Gamon relies on Campbell’s annual reports to investors (detailed in the Background Section *supra*), which attribute increases of sales of Campbell’s soup to the display racks. *Id.* at 41; PO Sur-reply 1–2, 6; Paper 60 ¶ 18. Gamon argues that the patented design “was a significant component in the desirability of the ‘gravity feed shelving systems’, and the increased sales using the Gamon displays are clearly linked to the use of the patented Gamon display racks and design.” PO Resp. 42 (citing Ex. 2001 ¶ 47). Terry Johnson testifies that the patented design “was a significant contributor to the increase in sales, because Can[n]ondale found that putting the can on its side with the improved signage allowed shoppers to find their choices faster.” Paper 60 ¶ 18. Gamon further notes that “[b]y about 2009, Petitioner Campbell Soup had installed the Gamon display racks in about 30,000 stores,” and “[t]otal sales of the Gamon display racks to Campbell Soup by 2009 had totaled approximately \$31,000,000.00.” PO Resp. 42 (citing Ex. 2001 ¶ 45).

Gamon contends that in 2008, Trinity began supplying gravity feed display racks to Campbell “that employed the design features of the display racks that Patent Owner had been selling to Campbell Soup.” *Id.* at 43. Gamon provides analysis demonstrating that the Trinity display racks are copies of the Gamon display racks and also copies of the patented design claim. *See id.* at 43–44 (citing Ex. 2001 ¶ 51). For example, Gamon details how “each of these racks has a can with dimensions similar to those of the cylindrical article,” and “each has a curved label area with similar dimensions and placement relative to the can to those of the label area of the ‘645 patent.” *Id.*

Gamon relies on opinion testimony and evidence depicting the use of Trinity display racks, including the following photographs.



Exhibit 2012 (left) shows a Campbell Soup store display for condensed soup cans and Exhibit 2013 (right) depicts a similar display for Campbell's Ready-To-Serve soup cans. Ex. 2001 ¶¶ 50–51. Gamon alleges that “[t]here is no real issue as to whether there has been copying by Petitioners of Patent Owner’s rack and product design here, and that the copying has been substantial.” PO Resp. 44. Further, “Patent Owner estimates that there are about 300,000 of these copied display racks in US stores.” *Id.*

Gamon contends that nexus has been established and linked to both the commercial success and copying. PO Sur-reply 2–3. Gamon notes that because the display racks sold are covered by the claim of the patent, a presumption of nexus is created that Petitioner has not rebutted. *Id.*

Gamon recognizes that the success of the display racks is attributable to both the ornamental design and functional aspects of the design, but “the

fact that both functional and ornamental aspects of the patented racks contributed to the commercial success does not vitiate that commercial success for the utility or design patents obtained.” *Id.* at 3. Gamon contends “that the ornamental or esthetic appearance of the racks on a shelf also contributed to improvement in sales of soup using the racks, and inferentially on the purchase of the racks by Campbell’s.” *Id.* at 5 (citing Ex. 2032, 4). Gamon relies on Campbell’s own sponsored survey, which states that the display rack “[e]ncourages purchase of additional varieties,” and the consumer response has been positive to the display racks because “[i]t just jumps out of this section, wow.” *Id.* at 6 (quoting Ex. 2032, 4, 10 (“It makes me want to buy more soup!”)) (also quoting Ex. 2024, 17 (“Our breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop.”)). According to Gamon, this evidence is “indicative of both functional and ornamental desirability of Patent Owner’s display racks.” *Id.*

Gamon further contends that just because the invention is protected by both design and utility patents does not “vitate the nexus of the commercial success of Patent Owner’s racks,” because the evidence of record, including “Campbell’s own market study” praises ornamental aspects of the design and Campbell’s “subsequent decision to buy \$30 million of the display racks,” demonstrates that a nexus has been established to the claimed features of the ’645 patent. *Id.* at 7.

c. Discussion

Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim of the ’645 patent would

have been obvious based on Linz and Samways. As explained below, Petitioner has not established that Linz is a proper *Rosen* reference and the strong evidence of objective indicia of nonobviousness supports an ultimate determination that the claimed design of the '645 patent would not have been obvious over Linz and Samways to a designer of ordinary skill in the art at the time of the invention.

i. Linz as a *Rosen* Reference Combined with Samways

A proper *Rosen* reference must consider what is in existence—not what could be created.

In considering patentability of a proposed design the appearance of the design must be viewed as a whole, as shown by the drawing, or drawings, and compared with something in existence—not with something that might be brought into existence by selecting individual features from prior art and combining them.

In re Rosen, 673 F.2d at 391. A flaw in Petitioner's obviousness analysis based on Linz and Samways is that Petitioner begins the analysis by immediately modifying Linz to include a cylindrical object, or can, lying on its side, which Linz does not disclose. *See* Pet. 29–34. Only after adding the can to Linz, does Petitioner conclude that “the design claimed in the ‘645 patent is substantially identical to the design disclosed by Linz.” *Id.* at 27–28 (first noting in the context of anticipation that “[w]ith a can disposed in the display rack of [Linz], the rack would be set forth below” before concluding that the designs are substantially identical), 30–32 (Petitioner arguing a cylindrical object is either “inherent” or obvious in Linz and adding a cylindrical object to Linz's display before considering the combination of Linz with Samways).

Petitioner's analysis begins to combine references before effectively establishing why Linz should qualify as a *Rosen* reference. As the Federal Circuit explained, “[b]efore one can begin to combine prior art designs, however, one must find a single reference, ‘a something in existence, the design characteristics of which are basically the same as the claimed design.’” *Durling*, 101 F.3d at 103 (Fed. Cir. 1996). The analysis should not begin to combine features of other references until after a primary, or *Rosen*, reference is determined to be a substantially similar design. *See id.* (“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.”). Petitioner relies on our analysis from the Decision on Institution for the proposition that “when a can is added to the Linz design,” the Linz design “is ‘basically the same’ as the ’645 patent.” Pet. Reply 8; *see* Dec. 15. Any reasoning that first requires a modification to Linz in order to arrive at a substantially similar design is improper under *Durling* and our Decision on Institution was not based on a fully developed record (including Gamon’s arguments) that we now consider.

Petitioner improperly molds concepts of utility obviousness into the design patent obviousness analysis. For example, Petitioner alleges that if Linz “does not inherently disclose a cylindrical can, it would be obvious to a designer of ordinary skill in the art to use the display rack of Linz to dispense cylindrical cans.” Pet. 30. Petitioner’s analysis seems to ignore the basic requirement that a designer of ordinary skill in the art must first consider something “in existence” without modification and then determine whether the design “in existence” is basically the same as the claimed design. Further, Petitioner relies on utilitarian features of Linz, such as “the

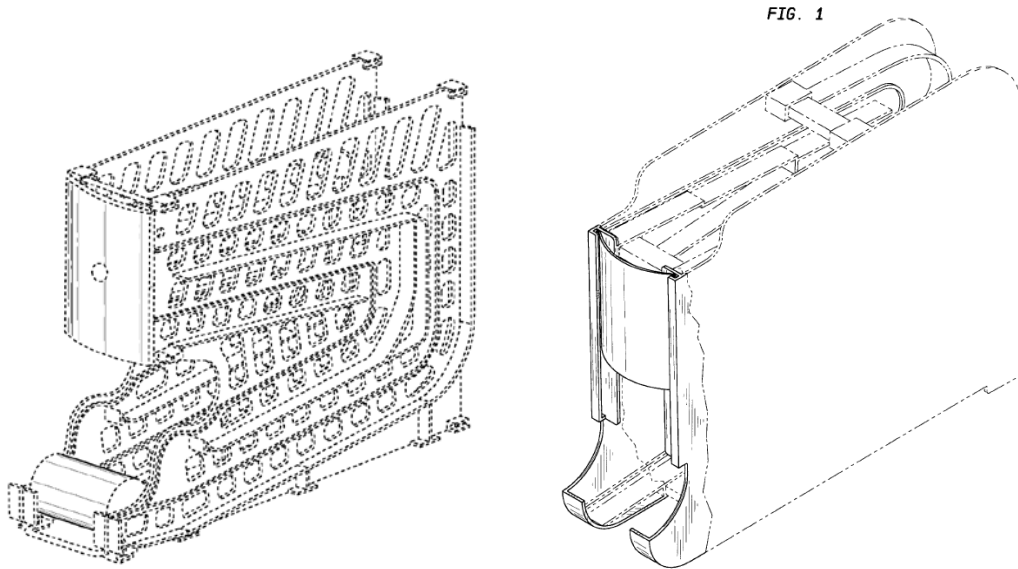
curvature of the bottom rails, and the loading area,” to justify why Linz could be modified to depict a cylindrical object, but this hypothetical design with a cylindrical can is not something in existence. *Id.* (also arguing “[t]he use of a cylindrical can with Linz would yield predictable results”).

Mr. Gandy argues that because Linz has certain utilitarian features, like a curved bottom rail, the rack must be designed for dispensing cylindrical cans. Ex. 1002 ¶¶ 49–50.

Petitioner’s analysis to determine whether Linz is a proper *Rosen* reference does not focus on just the ornamental aspects of the existing design of Linz, but instead relies on utilitarian principles in order to modify Linz’s design to more closely resemble the ’645 patent claim. *See* Pet. 29–33. Likewise, Mr. Gandy’s analysis considers not a design currently in existence, but a potential design based on his assumption of how utilitarian features like curved rails indicate that a can could be displayed. *See* Ex. 1002 ¶ 50 (“that the Linz display rack is intended for use with cylindrical cans”). Petitioner has “mixed principles of obviousness for utility patents with those for ornamental design patents.” *In re Harvey*, 12 F.3d at 1064. “Unlike an invention in a utility patent, a patented ornamental design has no use other than its visual appearance. . . . [T]he focus must be on appearances and not uses.” *Id.* (citing *In re Glavas*, 230 F.2d 447, 450 (CCPA 1956)).

Petitioner also argues that because Samways suggests certain “ornamental features, such as disposing a can in the dispensing area,” these features from Samways could be applied to Linz. Pet. 31. This analysis again fails to adequately consider whether Linz’s existing design is a proper *Rosen* reference. Focusing our analysis on actual ornamental appearances

and examining the design of Linz in existence, Petitioner has not established persuasively that the designs of Linz and the '645 patent are substantially the same.



The Figure of the '645 patent (left) compared to Figure 1 of Linz (right). Petitioner's case is not without merit whereas the designs, as a whole, have similarities such as having label areas that are generally rectangular and curved convexly forward, with the label area taller vertically than it is wide horizontally.¹⁰ Petitioner has not sufficiently explained whether any cylindrical article later added to Linz would come to rest partially forward of the label area, or just below the label area. *See* Ex. 2026, annotated Fig. 3 (drawn during Mr. Gandy's cross-examination).

¹⁰ We have considered Patent Owner's arguments that the label areas are distinct because the claimed label area extends to the sides of the rack, whereas Linz has flat strips that extend laterally inward from the sides. PO Resp. 23–24. We do not find these contentions persuasive because the boundaries of the claimed label area are disclaimed. *See* Ex. 1001, Description.

The biggest difference between the designs is that Linz does not disclose a cylindrical object in its display. The claimed cylindrical object, and its spatial relationship to the label area in the '645 patent, is half of the scope of the design claim. For example, the claimed design has a gap between the label area and the top of a cylindrical object lying on its side – the gap being approximately the same height as the label area. This spatial relationship is not present in Linz. Likewise, because Linz does not disclose a cylindrical object, it also does not disclose the width of the label area being the same as the height of the cylindrical object lying on its side.

We reject Petitioner's theory that because the label area has unclaimed boundary lines, we should not consider any spatial relationship between the cylindrical can and the claimed portion of the label area. Pet. Reply 3–4 (citing Ex. 1018 ¶¶ 19–25). Although the boundary of the label area is disclaimed, Gamon has still claimed the surface area within the boundary.¹¹ *See In re Owens*, 710 F.3d 1362, 1367 (Fed. Cir. 2013) (“when an unclaimed boundary line divides a previously claimed area, it indicates that the applicant has disclaimed the portion beyond the boundary while claiming the area within it”). When considering just the claimed area within the label area, a spatial relationship still exists between this claimed area and the cylindrical object that is not displayed by Linz.

Petitioner has failed to establish sufficiently how a designer of ordinary skill in the art would first consider Linz a primary reference. Linz does not disclose any object, including the size, shape, and placement of the

¹¹ Mr. Gandy, Petitioner's declarant, notes that the claim encompasses the “surface of the access door/label area [that] is rectangular,” and he defines “an access door/label area having a symmetrical, convex arcuate surface having a centered apex extending forward.” Ex. 1002 ¶¶ 30, 31.

object in its display area. Linz also fails to disclose a cylindrical object below the label area in a similar spatial relationship to the claimed design.

Petitioner argues that adding a cylindrical can to Linz would not be a substantial design change and thus Linz could serve as a *Rosen* reference. Pet. Reply 5–7. Adding a hypothetical can to Linz before comparing the designs is improper under *Durling* because such comparison does not consider the design “in existence” and the modification has a noticeable impact on the overall design. 101 F.3d at 103 (Fed. Cir. 1996).

ii. Objective Indicia of Nonobviousness

The considerations and analysis discussed above raise close factual questions because Linz’s overall ornamental appearance is similar to the design claim of the ’645 patent *once* Linz is modified by Samways to include a cylindrical object in the display area. For example, if Linz does qualify as a *Rosen* reference, the modifications suggested by Samways to the overall ornamental design, such as adding a cylindrical object forward of the label area could potentially create a design that has the same overall visual appearance as the claimed design. In cases such as this, the objective indicia of nonobviousness should be closely considered because “[a] determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all those factors are considered.” *Apple v. Samsung Elecs. Co.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016) (en banc) (citations omitted). “This requirement is in recognition of the fact that each of the *Graham* factors helps inform the ultimate obviousness determination.” *Id.* The Federal Circuit has recognized that:

Indeed, evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often

establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decision maker remains in doubt after reviewing the art.

Id. at 1052–53 (quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538–39 (Fed. Cir. 1983)). Just as with utility patents, objective indicia of nonobviousness are also considered in the analysis of design patent claims. *See L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1124 (Fed. Cir. 1993) (“As with utility patents, obviousness is not determined as if the designer had hindsight knowledge of the patented design. . . . The undisputed commercial success of the patented design, and Appellants’ copying thereof, are also relevant to analysis of the obviousness of a design.”).

Gamon presents evidence of commercial success, praise, and copying attributable to the ornamental features of the patented design. As explained more fully below, Gamon also persuasively establishes a nexus, or relationship, between the ornamental features of the claimed design and the commercial success, praise, and copying of products implementing the design. Although some of the success of the commercial embodiments is attributable to utilitarian features and advertising, Campbell’s internal documents and official public filings persuade us that the ornamental aspects of the commercial embodiment contributed to both the success of the sales of the display rack, and also to sales of soup cans displayed as part of the claimed design. On balance, the strength of the objective indicia of nonobviousness convinces us that the claim of the ’645 patent would not have been obvious in light of the proposed combination of prior art. We consider commercial success, praise, and copying in turn below.

As the Federal Circuit explained in *Litton Systems, Inc. v. Whirlpool Corp.*:

[C]ommercial success, while relevant as showing the nonobviousness of an invention, presents a special difficulty in a design patent case. To be of value, evidence of commercial success must clearly establish that the commercial success is attributable to the design, and not to some other factor, such as a better recognized brand name or improved function. 728 F.2d 1423, 1443 (Fed. Cir. 1984). Gamon relies on its own sales of approximately \$31 million of gravity feed display racks to Campbell as evidence of commercial success. Ex. 2001 ¶¶ 37, 45. Gamon also relies on the commercial success of sales of the displayed soup cans (that is, sales made by Campbell) that comprise part of the claimed design. *Id.* We consider each measure of commercial success below and how it relates to the claimed features of the '645 patent.

Based on the final trial record before us, we determine that Gamon has established that its commercial embodiments have enjoyed commercial success attributable to the patented ornamental design and Campbell has seen increased sales volumes of soup attributable to the patented design. Terry Johnson testified that the Gamon display racks embodied the ornamental design claim of the '645 patent. Ex. 2001 ¶¶ 37–47. Gamon also presented evidence of these display racks in their ordinary intended use to display a cylindrical Campbell Soup can as required by the claim of the '645 patent. *See* Ex. 2006; Ex. 2015, 17; Ex. 2016, 23; Ex. 2017, 14. Gamon has thus shown that the asserted objective evidence discussed below is tied to a specific product and that product “is the invention disclosed and claimed in the patent.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1329 (Fed. Cir. 2016) (quoting *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106

F.3d 1563, 1571 (Fed. Cir. 1997)). “This showing—that the specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations at issue in this case.” *Id.* at 1330. It is therefore Petitioner’s burden to rebut that presumption. *Id.* at 1329 (“a patent challenger cannot successfully rebut the presumption with argument alone—it must present evidence”).

Petitioner contends that factors other than the ornamental design of the ’645 patent may have contributed to the commercial success enjoyed by Campbell. Pet. Reply 14–16. We agree with Petitioner that other factors may have also had some contribution to the overall commercial success of the sales of Campbell’s Soup cans displayed in the Gamon racks. However, as discussed in detail below, the evidence also establishes that the commercial success is attributable to the design of the ’645 patent and we do not read *Litton Systems, Inc. v. Whirlpool Corp.*, as precluding other factors from also contributing to a product’s success, so long as a preponderance of the evidence establishes that the ornamental design features were also a reason for that success.

The final trial record establishes persuasively that the claimed ornamental design features, specifically the pronounced label area resembling the side of a can, as well as the cylindrical can lying on its side underneath the label area, attracted customers to the gravity feed display and allowed them to efficiently find and purchase soup products. *See* PO Sur-reply 4–5. The ornamental design allowed customers to find their desired soup more efficiently and encouraged additional purchases. As determined by Campbell’s internal market study, the label area of the claimed design

had an impact in improving branding and it also “[e]ncourages purchase of additional varieties.” Ex. 2032, 4. Campbell concluded that the display rack would increase its soup sales volume by 5.5–13.6% depending on the type of soup and brand. *Id.* Campbell referred to the Gamon display rack as “Breakthrough Gravity Feed Shelving.” *Id.* As noted by customers participating in the market testing, the ornamental design played a significant role in attracting customers to the display because “[i]t just jumps out of this section, wow,” and “it was like having a menu in front of me.” *Id.* Another customer referring to the label area, noted “[t]he labels make a difference, it’s like looking at your soup before you eat it.” *Id.* Still another customer noted that when the patented displays are placed side-by-side, it gives the visual appearance of being “the most organized store[] I have ever seen.” *Id.* at 5.

As discussed in the Background above, a Campbell’s marketing manager noted in 2004 that a “key benefit” of the IQ Maximizer was that the program enhances the shopping experience for the consumer and also “makes it easier for consumers to find desired products while giving visibility to others,” and that “[t]he facings are better defined and easier for customers to shop, so fewer are needed.” Ex. 2007, 1. Based on the evidence above, the ornamental design and its ability to attract customers to the display and allow customers to efficiently find soup were factors in Campbell’s decision to purchase \$31 million of Gamon’s gravity feed display racks and install them in over 17,000 stores from 2002 until 2009. PO Resp. 42; Ex. 2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14. Campbell’s own Annual Reports to shareholders confirm this assessment.

In its 2005 Annual Report, Campbell noted that “[t]he strong performance of Campbell’s condensed soup business demonstrates the value of the *iQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup.” Ex. 2015, 10. The report described the IQ Maximizer as “making the soup aisle dramatically easier for consumers to shop.” *Id.* Based on these statements, and the results of the prior market study (Ex. 2032), the soup aisle was “easier and faster for consumers to shop” (Ex. 2015, 17) because the ornamental display, including the label area and its spatial relationship to the cylindrical soup can, allowed customers to quickly find their desired soup – Terry Johnson’s primary goal in creating the claimed design. Ex. 1021, 27:13–28:24, 36:21–37:3, 39:3–10 (“Cannondale said that the reason the sales went up was because the people could find their soup more rapidly and allowed them time to shop impulsively . . .”). Campbell’s 2006 Annual Report similarly notes that the IQ Maximizer “continues to be a powerful tool to merchandise Campbell’s condensed soups.” Ex. 2016, 8. Campbell described the IQ Maximizer as a “tool to deliver impactful consumer messages at the point of purchase” (*id.*), and as “Making Shopping Even Simpler” (*id.* at 22). Campbell also claims that the IQ Maximizer was a “breakthrough in soup merchandising.” *Id.* Campbell’s praise of the patented design provides further evidence in support of nonobviousness.

Campbell alleges that other factors such as the “organization of the overall shelf display into color-coded ‘flavor clusters,’” “successful merchandising,” and other advertising programs contributed to the commercial success of its soup products. Pet. Reply 15–16. Campbell also acknowledges, however, “that its new gravity-feed display system ‘also’

contributed to increased soup sales” but argues that its Annual Reports “did not attribute any portion of its increased sales to the display racks.” *Id.* at 15. Even though these other factors had some degree of impact on commercial success, we determine that Gamon has established, and Petitioner has not rebutted,¹² that an appreciable amount of Campbell’s increased commercial success of soup during the relevant time period is attributable to the ornamental features of the patented design. Ex. 2032, 4; Ex. 2017, 36 (Campbell’s 2006 annual report attributing 5% growth of condensed soup sales in part to “the additional installation of gravity-feed shelving systems and increased advertising.”). We do not place a specific number on the contribution of the claimed ornamental features to the overall commercial success of Campbell’s soup sales, but we determine the evidence establishes that increased soup sales are tied to the ornamental features of the design. Campbell’s own market study found an increase of soup sales volume between 5–14% because of the gravity feed display rack. Ex. 2032, 4. The ornamental features attracted customers and these features were also praised by Campbell in its public filings to shareholders demonstrating that the ornamental design contributed to increased soup sales.

We also determine that Gamon’s commercial success in selling the patented display racks is attributed to the ornamental design embodied in the

¹² Once the presumption of nexus is applied, Petitioner has the burden to establish that the commercial success is not attributable to the patented design. Petitioner did not meet that burden. *See* Tr. 45:18–23. Regardless, the evidence in the final trial record establishes an appreciable amount of Campbell’s increased commercial success of soup sales from 2002–2009 is attributable to the ornamental features of the patented design.

'645 patent. Although utilitarian features of the Gamon design also contributed to overall success of the display rack, for example the ease of restocking soup cans and the return can feature (U.S. Patent No. 8,827,111), the evidence demonstrates that the ornamental aspects of the design contributed significantly to sales of the Gamon display racks as detailed above. Gamon's sales to Campbell of about \$31 million from 2002–2009 demonstrate a strong showing of commercial success.

Gamon also alleges that Petitioner Trinity copied its patented design and began selling the same gravity feed display racks to Campbell. The final trial record establishes that the display racks made by Petitioner Trinity and sold to Campbell have the same patented design features as the display racks that Gamon had been selling to Campbell. PO Resp. 39, 43–44; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013.

Petitioner argues that it could not have copied *the '645 patent* because it was not filed until September 25, 2009. Pet. Reply 17–18; Tr. 44:11–47:25. Petitioner's argument is unpersuasive for two reasons. First, copying in the context of secondary considerations examines whether an underlying “product” is replicated. “Copying ‘requires evidence of efforts to replicate a specific product.’” *Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1370 (Fed. Cir. 2011) (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)). The evidence that Petitioner Trinity copied the Gamon gravity feed display rack is unrefuted. *See* Ex. 2001 ¶¶ 48–52; Tr. 47:1–4 (“JUDGE KINDER: So your argument against copying is basically the claims are invalid? MS. QUINN: The claims are invalid because all that's claimed is a label area over a can.”). Second, Gamon relied on accepted continuation practice to file the '645 patent and Petitioner has not presented

any persuasive argument that such practice would prevent a finding of copying. *See* Ex. 1001, [60].

The final trial record before us is replete with evidence of copying. “[C]opying requires evidence of efforts to replicate a specific product, which may be demonstrated *through internal company documents*, direct evidence such as disassembling a patented prototype, photographing its features, and using the photograph as a blueprint to build a replica, *or access to the patented product combined with substantial similarity to the patented product.*” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (emphases added). Campbell’s internal presentations in 2002 demonstrate that Campbell was aware that Gamon’s gravity feed display racks would increase sales volume of Campbell’s soup. *See* Ex. 2032, 4. After obtaining the results of the Cannondale survey, Campbell purchased tens of thousands of Gamon’s display racks between 2002 and 2009. PO Resp. 47. Campbell had access to the patented design and significant motivation to continue using the same design. Campbell’s annual reports praise the Gamon display racks and link increased Campbell soup sales to the ornamental features of these display racks. *See supra*. Around 2009, Campbell’s transitioned from purchasing Gamon display racks to those sold by Petitioner Trinity. The Trinity display racks are substantially similar to the Gamon racks, especially as related to the patented ornamental front label area and the ability to place a cylindrical object below the label area. *See* PO Resp. 48–49; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013. Campbell’s and Trinity’s access to the patented product combined with substantial similarity of Trinity’s product to the patented product provide unrefuted evidence that Gamon’s display racks were copied. Petitioner has not presented any evidence to refute copying.

Accordingly, we determine that Gamon has established that Campbell and Trinity copied Gamon's patented display racks.

iii. Conclusion

Petitioner has not established persuasively that a designer of ordinary skill in the art would have considered Linz a *Rosen* reference and thereafter combined the features of Samways and Linz at the time of the invention. The Gamon gravity feed display racks sold to Campbell embody the design features of the '645 patent creating a presumption of nexus. Gamon presents evidence of a nexus between the ornamental features of Gamon's gravity feed display racks and the commercial success enjoyed by both Gamon through its sales of soup dispensers, and Campbell, through its increased sales of soup using the display racks. Campbell and its customers offered praise and recognition that is tied to the ornamental features of the patented design. The record before us also establishes that the Gamon gravity feed display racks were copied by Petitioners, including the ornamental features of the patented design. Weighing the evidence of obviousness and nonobviousness as a whole, we determine that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '645 patent is unpatentable as obvious based on Linz and Samways.

D. Obviousness Based on Samways Alone or Samways and Linz

We instituted review on the basis that the claimed design for the '645 patent would have been obvious to a designer of ordinary skill based on Samways alone or based on Samways and Linz. Dec. 23–27. Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim is unpatentable over Samways alone or Samways and Linz for the reasons explained below.

1. Analysis of Samways as a *Rosen* Reference

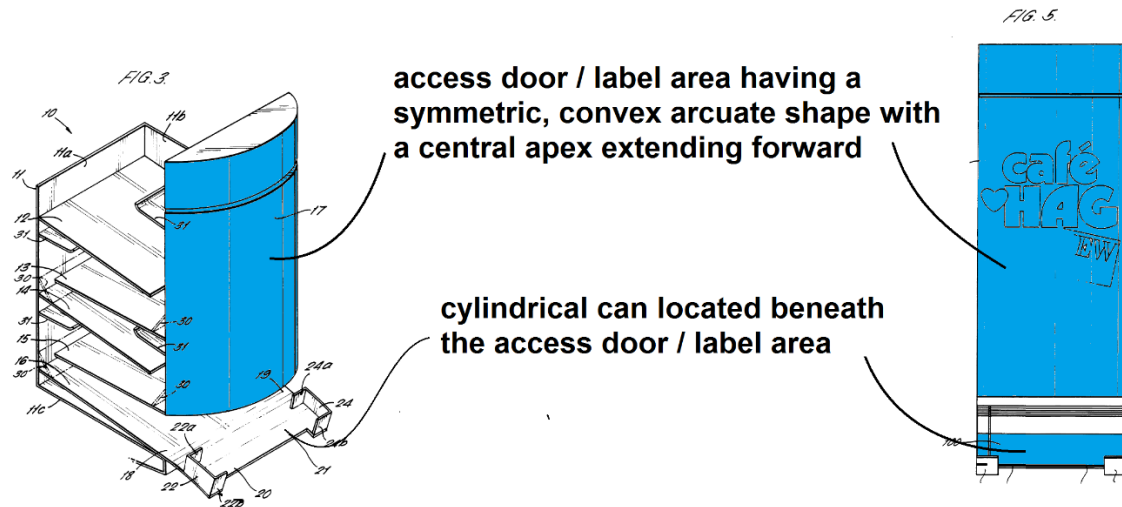
Based on the final trial record before us, Petitioner has not established that “an existing” design of Samways is a proper *Rosen* reference. In order for Samways to be “substantially similar” to the claimed design, significant modifications would first need to be made to Samways’ design, such as combining two distinct embodiments of the utility patent. Because combining two distinct embodiments into a hypothetical design is not a design in existence, Samways cannot serve as a *Rosen* reference.

a. Petitioner’s Contentions

Petitioner contends the ornamental design for the ’645 patent would have been obvious to a designer of ordinary skill based on Samways, or based on Samways and Linz. Pet. 38–41. Petitioner relies on a comparison of the combined ornamental features of Samways with the design of the ’645 patent, as well as the Gandy Declaration. *Id.* (citing Ex. 1002 ¶¶ 64–70).

Petitioner contends that “Samways alone discloses the same overall visual impression as the design claimed in the ’645 Patent, and is therefore a suitable primary reference.” *Id.* at 38. Petitioner contends that “Samways contemplates, claims, and more importantly, discloses an embodiment having an access door covering only one delivery path.” *Id.* at 36. According to Petitioner, “Samways discloses a display unit with ‘basically the same’ design characteristics as the claimed design, and any differences are *de minimis*.” *Id.* at 38 (quoting *Durling*, 101 F.3d at 103). Petitioner also argues that “it would be obvious for a designer of ordinary skill in the art to modify the teachings of Samways to have only one dispensing pathway.” *Id.* Petitioner contends “having a single dispensing path makes

the dispenser more modular, and gives stores greater flexibility regarding the arrangement of these dispensers on store shelves because stores can put any number of dispensers up rather than just an even number” of such dispensers up. *Id.* at 39. Petitioner then proposes a modified, hypothetical, figure for Samways as depicted below.

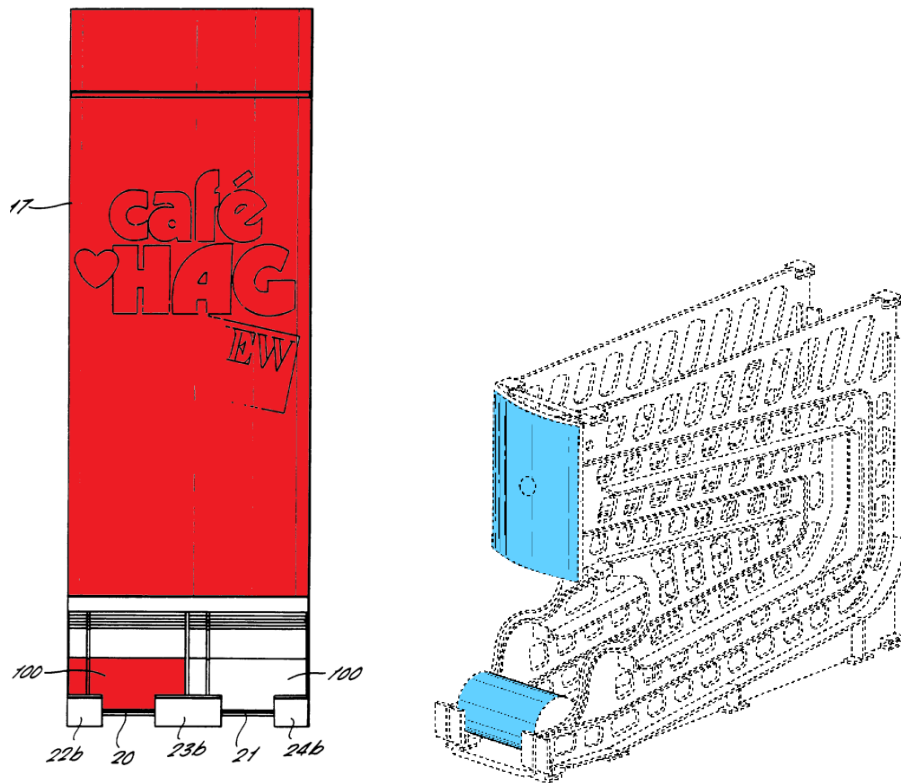


Modified and annotated Figures 3 and 5 depict Petitioner’s hypothetical design with a single delivery path. *Id.* at 41; *see* Ex. 1002 ¶¶ 69, 70.

b. Patent Owner’s Contentions

Gamon contends that Samways is not a proper *Rosen* reference because it is not “substantially similar” to the patented design. PO Resp. 2. Gamon contends that Samways cannot be a *Rosen* reference because it does not “show[] something in existence that, without substantial modification, creates basically the same visual impression as the design of the ‘645 patent.” *Id.* at 7. Gamon contends Petitioner starts off by improperly first modifying a *Rosen* reference, and that Petitioner “posit[s] substantial modifications of the appearance of the disclosed embodiments of the references to try to make them resemble the claimed design before they were employed as primary references.” *Id.*

Gamon argues that Samways' embodiment relied on by Petitioner is quite distinct from the claimed design and could not be considered a *Rosen* reference without substantial modification. *Id.* at 8–11. Gamon relies on the following comparison.



Highlighted Figure 5 of Samways (left) is compared to a highlighted version of the Figure of the '645 patent (right). *Id.* at 9. According to Gamon, this comparison “shows that the two dispensers produce visual appearances that are completely dissimilar where compared at a scale in which the cylindrical article of the '645 patent is about the same size as the coffee jar of Samways.” *Id.* Gamon relies on several distinctions between the two designs, including: “Samways does not have a cylindrical article centered symmetrically below a label area, but *asymmetrically off to the side,*” and “Samways does not have a label area about as wide as the cylindrical article

is tall, but instead *the Samways fascia [is] more than twice as wide as the height of a jar.*” *Id.* at 11. Gamon also notes that the size of Samways’ label area is significantly larger leaving almost no gap between the cylindrical object and the label area. *Id.*

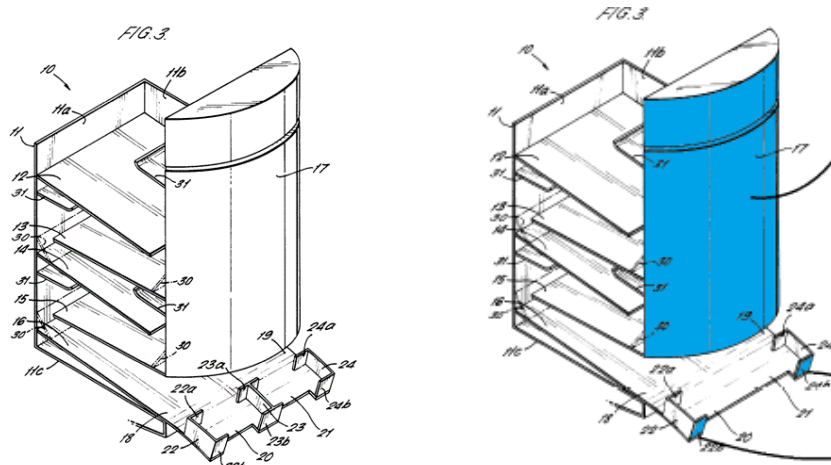
Gamon also relies on the same objective indicia of nonobviousness as set forth above in our discussion of Petitioner’s challenge based on Linz. *See* PO Resp. 38–44.

c. Discussion

Based on the entirety of the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim of the ’645 patent is unpatentable as obvious based on Samways alone or Samways and Linz. As explained in detail below, Petitioner has not persuasively established that Samways is a proper *Rosen* reference and the evidence of objective indicia of nonobviousness supports an ultimate determination that the claimed design of the ’645 patent would not have been obvious over Samways or Samways and Linz.

i. Samways as a *Rosen* Reference

The error in Petitioner’s analysis is apparent when considering the Samways design as it exists (left) compared to the modified hypothetical design (right) proposed by Petitioner. *See* Pet. 36, 41.



Petitioner begins making modifications to the existing design of Samways before establishing that Samways is a proper *Rosen* reference. *See* Pet. 38–41. Although certain claims and descriptions in the Samways’ specification suggest that one embodiment may have a single path, such an embodiment is not depicted with a label area and is therefore not an actual design in existence. *See* Pet. 38–39; Pet. Reply 11 (referencing Samways Figure 6 and proposing to modify Figure 3 based on Figure 6). “Before one can begin to combine prior art designs, however, one must find a single reference, ‘a something in existence, the design characteristics of which are basically the same as the claimed design.’” *Durling*, 101 F.3d at 103 (Fed. Cir. 1996).

Petitioner’s obviousness analysis relies on combining distinct embodiments of Samways in order for Samways to be a substantially similar design. Such an analysis is improper because modifications should not be made until after an existing design is determined to be substantially similar. *See id.* (“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.”).

Petitioner alleges that Samways is a proper primary reference because any “differences are *de minimus*,” but Petitioner never details what those

differences are and why they should be considered *de minimus*. Pet. 38. Petitioner reasons that “[t]o the extent that it can be argued that Samways does not disclose an ornamental design having only one dispensing pathway per access door / label area, it would be obvious for a designer of ordinary skill in the art to modify the teachings of Samways to have only one dispensing pathway.” *Id.* Petitioner then provides utilitarian reasons for making modifications to Samways to arrive at the claimed design. *Id.* at 38–39. Petitioner has not established, however, that an existing design of Samways is substantially similar to the claimed design without such modifications. Even considering Figure 6 of Samways (Pet. Reply 11), this schematic does not depict a label area and is further described as being “a schematic exploded perspective” having “two delivery paths . . . formed by separate ramps.” Ex. 1009, 3:18–20, 13:8–26.

Considering the design of Samways (in existence) compared to the design of the ’645 patent, we agree with Gamon that these two designs are not substantially similar.

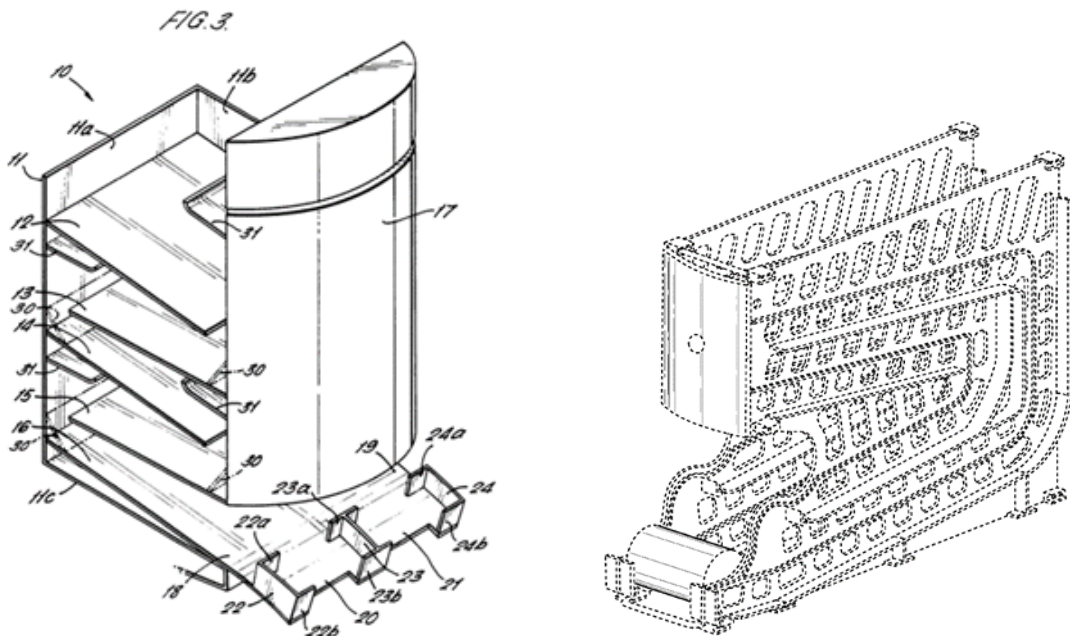


Figure 3 of Samways (left) is compared to the Figure of the '645 patent (right). Considering the designs as a whole, the design characteristics of Samways are not basically the same as the claimed design. There are several features that give Samways a distinct visual impression. For example, Samways' dual dispensing area with the addition of central tabs, or stops, is distinct from the single delivery path of the patented design. Samways front label area extends across both of the dual dispensing areas, which also creates a distinct impression that a designer of ordinary skill would not consider minor. Samways' label area is also taller than the label area of the claimed design with a small gap between the cylindrical objects and the label area. *See* Ex. 2001 ¶ 34; Ex. 1009, Fig. 4. Based on the final trial record before us, Petitioner has not established persuasively that the design characteristics of Samways are basically the same as the claimed design.

ii. Conclusion

Petitioner has not established persuasively that a designer of ordinary skill in the art would have considered Samways a *Rosen* reference and thereafter either modified Samways alone or modified Samways based on Linz. We incorporate our discussion and findings regarding the objective indicia of nonobviousness, as detailed above, which also support our ultimate determination of nonobviousness. Weighing the evidence of obviousness and nonobviousness as a whole, we determine that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '645 patent would have been obvious based on Samways alone or Samways and Linz.

III. PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Petitioner moves pursuant to Federal Rules of Evidence (“FRE”) 402 and 702, and 37 C.F.R. § 42.65 to exclude paragraphs 4–6, 9, 10, 12, 14, 26, 37, 44–48 and 52 of the Declaration of Terry Johnson (Exhibit 2001). Pet. Mot. 1. Petitioner identifies certain testimony of Terry Johnson that purportedly is “not supported by sufficient facts or data, do not reflect the application of reliable principles or methods of analysis and do not bear on any relevant issues in this case. Such testimony should accordingly be excluded.” *Id.* at 3. We first consider the legal standards for a motion to exclude and then we consider the merits of each argument in turn.

A. *Legal Standards*

A motion to exclude deals with the admissibility of evidence under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.62 (applying the Federal Rules of Evidence to *inter partes* reviews), 42.64; Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012) (“Admissibility of evidence is generally governed by the Federal Rules of Evidence.”). As stated in the Office Patent Trial Practice Guide, the parties may submit motions to exclude regarding evidence “believed to be inadmissible.” Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,758. Further, a motion to exclude “must explain why the evidence is not admissible (*e.g.*, relevance or hearsay).” *Id.* at 48,767. As the moving party, Petitioner bears the burden of proof. *See* 37 C.F.R. § 42.20(c).

B. *Challenge to Paragraphs 4–6, 9, 10, 12, 14, 26*

Petitioner contends that Terry Johnson’s testimony that the design claimed in the ’645 patent is aesthetically superior to various prior art designs should be excluded. Pet. Mot. 3. Petitioner alleges that Terry

Johnson did not disclose the underlying facts on which his opinion is based. *Id.* at 2–4. Petitioner contends that “Mr. Johnson admitted that his testimony on this issue reflects only his subjective individual opinion rather than any scientific analysis or inquiry.” *Id.* at 4.

Gamon responds, and we agree, that Petitioner did not properly preserve this objection in its objections (Paper 16) filed pursuant to 37 C.F.R. § 42.64(b)(1). Paper 59 (“PO Opp.”), 3–4. Petitioner’s objections to Terry Johnson’s testimony were limited to “F.R.E. 401–403” (relevance) and an objection that Terry Johnson is not qualified to offer expert testimony pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1973). Paper 17, 1 (“The declarant not being qualified to offer the proffered expert testimony.”). In its Motion to Exclude, Petitioner asserts that Terry Johnson’s testimony should be excluded pursuant to FRE 702 because the testimony is not based on sufficient facts or data and the testimony is not based on proper scientific analysis. Pet. Mot. 2, 3–4. Although *Daubert* is related to FRE 702, challenging an expert as generally not being “qualified” (Paper 16, 1) does not provide the “sufficient particularity” as required by 37 C.F.R. § 42.64(b)(1) “to allow correction in the form of supplemental evidence.” As noted above, reliability under FRE 702 was not the basis for Petitioner’s objection. *See* Paper 16, 1. Because Petitioner failed to preserve the objection here asserted, we do not consider these arguments in Petitioner’s Motion to Exclude because they have been waived.

In the alternative, we are not persuaded that Terry Johnson’s opinion testimony is unsupported by underlying facts or data. We have considered his testimony concerning the gravity feed display shelf design being

“aesthetically superior” in light of the entire record, including Terry Johnson’s Supplemental Declaration (Paper 60). As discussed in depth above, Terry Johnson’s testimony is supported by the entirety of the record, including Campbell’s own public filings, which recognized the aesthetic appeal of the patented design and its ability to attract customers to the display. Design patents cover ornamental features of articles of manufacture. *See* 35 U.S.C. § 171. By nature, whether an ornamental design has visual appeal is somewhat subjective. Gamon’s sales of \$31 million of its gravity feed display racks suggests strongly that others agreed with Terry Johnson’s opinion as to aesthetic appeal.¹³

C. Challenge to Paragraphs 37, 47

Petitioner contends that Terry Johnson’s testimony that the “great commercial success” of display racks covered by the ’645 patent is attributable to its claimed design features should be excluded. Pet. Mot. 3, 4. Petitioner argues

to the extent Mr. Johnson purports to opine that display racks having the same design as that claimed in the ’645 patent have experienced commercial success, he cites no facts or data to show that any such success should be attributed to any particular claimed, and patentably distinct, design characteristics of the ’645 patent rather than, e.g., the attributes of gravity feed racks generally and/or design characteristics not claimed by the ’645 patent.

¹³ Even if we were to agree with Petitioner that these portions of Terry Johnson’s testimony should be excluded, our ultimate decision would not change. The additional evidence cited in the analysis, including Campbell’s own internal documents and public disclosures discussed above, supports the ultimate determination.

Id. at 4. Petitioner contends that absent a showing of nexus between the alleged commercial success and any particular patentably distinct design characteristics his testimony is not relevant under FRE 402, and lacks sufficient supporting facts under FRE 702. *Id.*

For the same reasons as noted above, Petitioner’s FRE 702 objections have been waived. As for the remaining objections, Petitioner’s contentions, as well as Gamon’s counter-arguments, address the merits of Terry Johnson’s position concerning commercial success attributable to the claimed invention. Further, Petitioner’s arguments fail to consider that when a product is proven to be covered by a patent, as is the case here, a presumption of nexus may arise. *See WBIP, LLC*, 829 F.3d at 1330 (“This showing—that the specific products are embodiments of the claimed invention and that the proffered objective evidence relates to these products—is sufficient to establish the presumption of nexus for the objective considerations at issue in this case.”). Petitioner’s contentions thus do not offer a viable basis for excluding Terry Johnson’s testimony pursuant to FRE 402 or 702.

D. Challenge to Paragraph 48

Petitioner contends that Terry Johnson’s testimony that Petitioner Trinity’s display racks “were copied directly from racks made by Patent Owner Gamon” should be excluded. Pet. Mot. 3 (quoting Ex. 2001 ¶ 48). Petitioner argues Terry Johnson’s testimony “is speculative, conclusory and lacking in any showing of the requisite nexus between any alleged ‘copying’ by Trinity and any alleged patentably distinct design characteristic of the ‘645 patent.” *Id.* at 5. Thus, according to Petitioner, this testimony should

be excluded pursuant to “Federal Rules of Evidence 402 and 702, as well as 37 C.F.R. § 42.65.” *Id.*

For the same reasons as noted above, Petitioner’s FRE 702 objections have been waived. In the alternative, we recognize that evidence of direct copying may be difficult to obtain. Here, when one considers the entirety of the trial record, the circumstantial evidence of copying is overwhelming and persuasive. First, Campbell had access to Gamon’s claimed design (having purchased tens of thousands of Gamon’s dispensers, covered by the design). *See* Ex. 2017, 14. Second, Campbell understood that the design was responsible for increasing the sales of Campbell soup products (as evidenced by Campbell’s own consumer research and annual reports). *See* Ex. 2032, 4. Finally, having persuaded itself that the Gamon design was increasing its sales, Campbell engaged a different entity (Trinity) to supply dispensers that essentially were indistinguishable from the Gamon design. Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013. As for the remaining objections, Terry Johnson conveyed his underlying factual basis and evidence for concluding that Campbell and Trinity copied the Gamon commercial embodiment. *See id.* Petitioner has not presented a basis for excluding Terry Johnson’s testimony regarding copying of the commercial embodiment of the patented invention.¹⁴

¹⁴ Even if agree with Petitioner that these portions of Terry Johnson’s testimony should be excluded, our ultimate decision would not change. The additional evidence cited in the analysis, including the overwhelming circumstantial evidence of copying discussed above, supports our finding that Petitioner copied Gamon’s product.

E. Challenge to Paragraph 47 (profits in the hundreds of millions)

Petitioner contends that Terry Johnson’s testimony “regarding the [alleged] ‘hundreds of millions’ of dollars in ‘sales and profits’ that Petitioners purportedly accrued through sales and/or use of their accused racks is similarly speculative” and should be excluded. Pet. Mot. 5 (quoting Ex. 2001 ¶ 47). Petitioner contends that this testimony should be excluded under FRE 402 and 702, as well as 37 C.F.R. § 42.65.

Petitioner challenges Mr. Terry Johnson’s qualifications related to his “economic analysis,” and we agree with Petitioner that Terry Johnson is not a qualified economic expert. Pet. Mot. 6. This objection has not been waived because the challenge is, at least in part, to Terry Johnson’s qualifications. Terry Johnson’s testimony that “[t]he increased sales and profits, which by now should total in the hundreds of millions, that Petitioner Campbell Soup took in as a result of the use of the ’646 patent design in selling its soups constitutes massive commercial success of the patented design” (Ex. 2001 ¶ 47) is excluded because it would take expert analysis to reach a conclusion that the display racks have resulted in hundreds of millions of dollars of additional sales. Although Terry Johnson presents more detail about the factual basis for his opinion in his Supplemental Declaration (Paper 60), Terry Johnson’s opinion that the Gamon racks contributed to hundreds of millions of dollars in increased soup sales and profits would require expert economic analysis. For example, Terry Johnson simply relies on the initial sales volume increase of 5% from the 2002 study but does not account for other factors and assumptions after that point that may have impacted sales. *See id.* ¶¶ 15–17. We, therefore, give this specific testimony no weight in our analysis.

We note, however, that Terry Johnson's testimony that the Gamon display racks have been commercially successful and that Campbell's soup products displayed in those racks had increased sales volume does not require expert economic analysis because such testimony is based on his personal involvement and direct knowledge. *See* PO Opp. 9–10.

F. Conclusion

For the reasons set forth above, we grant-in-part and deny-in-part Petitioner's Motion to Exclude. Specifically, we give no weight to the quoted testimony above from paragraph 47 of Exhibit 2001 ("hundreds of millions").

IV. PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

Gamon moves pursuant to 37 C.F.R. § 42.64 to exclude Petitioner's Exhibit 1018 (Declaration of James Gandy in Support of Petitioners' Reply to Patent Owner's Response), Exhibit 1020 (Declaration of Steven Visser in Support of Petitioners' Reply to Patent Owner's Response), and certain portions of Exhibit 1021 (Deposition Transcript of James Gandy). PO Mot. 1. Gamon objects to Petitioner's evidence because it allegedly incorporates new claim construction arguments.

We have considered Gamon's contentions and Petitioner's Opposition (Paper 58) along with Patent Owner's Reply (Paper 67). We agree with Gamon that the Gandy and Visser Declarations present modified claim construction positions compared to the original Petition regarding disclaimer of claim scope, but we do not believe these modified positions present a new theory or raise new arguments not previously before us. PO Mot. 2. The '645 patent states that its borders are disclaimed, and Petitioner presented

this disclaimer argument in its Petition—albeit in a different manner. *See* Pet. 20. Thus, the general issue of disclaimer was raised by Petitioner and we do not exclude Exhibits 1018 and 1020.

Gamon raises due process concerns because Petitioner’s Reply and supporting expert testimony purportedly are inconsistent with positions taken in the Petition because they broaden claim scope. *See* PO Mot. 2–3; *see also* Paper 40 (listing alleged improper reply arguments). We believe that the inconsistencies are best considered as to the weight we should give the evidence, and in particular the expert testimony. *See* PO Mot. 4–5 (noting inconsistencies). Claim construction is an issue of law and we determine it proper to consider all evidence submitted, including any inconsistencies of Petitioner’s experts. *Compare* Ex. 1002 ¶ 30 (“claimed surface of the access door/label area is rectangular when viewed from the front, having a symmetrical convex curvature”) *with* Ex. 1018 ¶ 29, n.2 (“I do not agree that” “a convexly curved, rectangular label area” [is a] “proper claim limitation[.]”). Accordingly, we do not exclude Exhibits 1018 and 1020.

Gamon also seeks to exclude the testimony of its declarant Terry Johnson taken during cross-examination as irrelevant. PO Mot. 7. We deny Gamon’s request because we find this testimony relevant. For example, one question asked to Terry Johnson was: “how did you make it? What . . . was the process that you went through to develop this display rack that you brought to Campbell in 2002.” Ex. 1021, 27:13–16. Terry Johnson provides a detailed explanation answering the question asked by Petitioner’s counsel. *See id.* at 27:14–35:23. Neither party raised objections to this question and answer during the deposition. Petitioner relies on a portion of

Terry Johnson’s answer (*see* Pet. Reply 13), which explains that “I came up with something that was pretty simple for me to do” (Ex. 1021, 28:15–16). We find Terry Johnson’s complete testimony relevant to the ultimate determination of obviousness. Further, the fact that an ornamental design is “simple” does not make the design obvious, and as noted in the Background section above, we have considered this testimony in its proper context weighing the question and complete answer.

Accordingly, for the reasons explained above, Patent Owner’s Motion to Exclude is *denied*.

V. CONCLUSION

We conclude that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the ’645 patent is unpatentable under 35 U.S.C. § 103. We deny-in-part and grant-in-part Petitioner’s Motion to Exclude (Paper 49) and we deny Patent Owner’s Motion to Exclude (Paper 51).

VI. ORDER

Accordingly, it is:

ORDERED that Petitioner has not shown, by a preponderance of the evidence, that the claim of the ’645 patent is unpatentable under 35 U.S.C. § 103(a);

FURTHER ORDERED that Petitioner’s Motion to Exclude Evidence (Paper 49) is *denied-in-part* and *granted-in-part*;

FURTHER ORDERED that Patent Owner’s Motion to Exclude Evidence (Paper 51) is *denied*; and

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

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For PETITIONER ENTITIES CAMPBELL SOUP COMPANY and
CAMPBELL SALES COMPANY CAMPBELL:

Gerard M. Donovan
Mark T. Vogelbacker
Tracy Zurzolo Quinn
REED SMITH LLP
gdonovan@reedsmith.com
mvogelbacker@reedsmith.com
tquinn@reedsmith.com

For PETITIONER ENTITY TRINITY MANUFACTURING, LLC:

Martin B. Pavane
Darren Mogil
COZEN O'CONNOR
mpavane@cozen.com
dmogil@cozen.com

Ira Jay Levy
GOODWIN PROCTER LLP
ILevy@goodwinlaw.com

For PATENT OWNER:

Andrew L. Tiajolloff,
Edward P. Kelly
TIAJOLLOFF & KELLY LLP
atiajolloff@tkiplaw.com
ekelly@tkiplaw.com