

No. 2020-1144

**United States Court of Appeals
for the Federal Circuit**

INTEX RECREATION CORP.,
Appellant,

v.

TEAM WORLDWIDE CORPORATION,
Appellee,

ANDREW HIRSHFELD, Performing the Functions and Duties of the Under
Secretary of Commerce for Intellectual Property and Director of the
United States Patent and Trademark Office,
Intervenor.

*Appeal from the United States Patent and Trademark Office -
Patent Trial and Appeal Board in IPR2018-00859*

**APPELLANT'S RESPONSE TO APPELLEE'S PETITION
FOR REHEARING *EN BANC***

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Sept. 9, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 20-1144

Short Case Caption Intex Recreation Corp. v. Team Worldwide Corporation

Filing Party/Entity Appellant, Intex Recreation Corp.

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/09/2021

Signature: /s/ Reid E. Dodge

Name: Reid E. Dodge

| <p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p> | <p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p> | <p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p> |
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| <p>Provide the full names of all entities represented by undersigned counsel in this case.</p> | <p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> | <p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> |
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| <p>Intex Recreation Corp.</p> | | <p>Intex Corp. (parent)</p> |
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Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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| Team Worldwide Corporation v. Academy, Ltd., 2:19-cv-00092 (E.D. Tex.) | Team Worldwide Corporation v. Ace Hardware Corporation, 2:19-cv-00093 (E.D. Tex.) | Team Worldwide Corporation v. Amazon.com, Inc., et al., 2:19-cv-00094 (E.D. Tex.) |
| Team Worldwide Corporation v. Bed Bath & Beyond Inc., 2:19-cv-00095 (E.D. Tex.) | Team Worldwide Corporation v. Costco Wholesale Corporation, 2:19-cv-00096 (E.D. Tex.) | Team Worldwide Corporation v. Dick's Sporting Goods, Inc., 2:19-cv-00097 (E.D. Tex.) |
| Team Worldwide Corporation v. The Home Depot, Inc., 2:19-cv-00098 (E.D. Tex.) | Team Worldwide Corporation v. Macy's, Inc., et al., 2:19-cv-00099 (E.D. Tex.) | Team Worldwide Corporation v. Target Corporation, 2:19-cv-00100 (E.D. Tex.) |

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ADDITIONAL PAGES TO CERTIFICATE OF INTEREST

Case No. 20-1144

Intex Recreation Corp.

v.

Team Worldwide Corporation

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

- *Team Worldwide Corporation v. Sears, Roebuck and Co., Sears Holdings Corporation, and Transform Holdco LLC*, No. 2:20-cv-00006 (E.D. Tex.);
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00859, pending before the Patent Trial and Appeal Board;
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00870, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal No. 20-1149 consolidated under No. 20-1141;
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00871, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal Nos. 20-1143 and 20-1150 consolidated under No. 20-1141;
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00872, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal No. 20-1141;
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00873, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal No. 20-1142 consolidated under No. 20-1141;
- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00874, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal No. 20-1151 consolidated under No. 20-1141;

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

- *Intex Recreation Corp. v. Team Worldwide Corporation*, Case IPR2018-00875, pending before the Patent Trial and Appeal Board and subject to Federal Circuit appeal No. 20-1147.

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | INTRODUCTION | 1 |
| II. | ARGUMENT..... | 3 |
| | A. The Panel Decision Does Not Violate SAS Institute..... | 3 |
| | B. The Panel Decision Did Not Consider Combinations of References not Identified in the Grounds..... | 6 |
| | C. The Panel Applied the Appropriate Standard of Review..... | 9 |
| III. | CONCLUSION..... | 14 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| FEDERAL CASES | |
| <i>Adaptics Ltd. v. Perfect Company</i> , IPR2018-01596, 2019 WL 1084284 (PTAB March 6, 2019) | 8 |
| <i>Airbus SAS v. Firepass Corp.</i> , 941 F.3d 1374 (Fed. Cir. 2019) | 7 |
| <i>Artrip v. Ball Corp.</i> , 735 F. App'x 708 (Fed. Cir. 2018) | 10 |
| <i>Jennings v. Mansfield</i> , 509 F.3d 1362 (Fed. Cir. 2007) | 11 |
| <i>Koninklijke Philips N.V. v. Google LLC</i> , 948 F.3d 1330 (Fed. Cir. 2020) | 2, 6, 7 |
| <i>KSR Int'l Co. v. Teleflex, Inc.</i> , 550 U.S. 398 (2007)..... | 5, 12, 13 |
| <i>Lone Star Silicon Innovations LLC v. Iancu</i> , 809 F. App'x 773 (Fed. Cir. 2020) | 7 |
| <i>McDonnell Douglas Corp. v. United States</i> , 323 F.3d 1006 (Fed. Cir. 2003) | 10 |
| <i>Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC</i> , 138 S. Ct. 1365 (2018)..... | 10 |
| <i>Polygroup Ltd. MCO v. Willis Elec. Co., Ltd.</i> , 780 F. App'x 880 (Fed. Cir. 2019) | 11 |
| <i>Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.</i> , 786 F.3d 960 (Fed. Cir. 2015) | 10 |
| <i>Randall Mfg. v. Rea</i> , 733 F.3d 1355 (Fed. Cir. 2013) | 7, 10, 12 |

Uber Techs., Inc. v. X One, Inc.,
957 F.3d 1334 (Fed. Cir. 2020)2, 9, 11

RULES

Fed. Cir. R. 352
Fed. Cir. R. 35(b)2
Fed. R. App. P. 35(a)2

I. INTRODUCTION

TWW’s petition for rehearing *en banc*¹ rests on a fundamentally flawed representation of the panel’s nonprecedential opinion. Specifically, the panel did not endorse obviousness combinations beyond the grounds advanced in the *inter partes* review petition or apply an improper standard of review. Rather, the panel—reviewing the “Board’s ultimate legal determination on obviousness de novo and its underlying factual findings for substantial evidence”—found that the Board “misapplied the obviousness standard” in its evaluation of the Parienti and Goldsmith references asserted in Grounds 5 and 6 of the petition. Slip Op. at 9, 12. Under the correct legal standard, the panel opinion concludes that the Board’s determination that Intex failed to meet its burden on obviousness was unsupported by substantial evidence—exactly what is required under precedent of both the Supreme Court and this Court. Slip Op. at 12.

¹ It is unclear whether TWW intended to also seek panel rehearing, as the petition references the requirements of Fed. Cir. R. 40(a)(5), Pet. at 6-8, which only apply to petitions for panel rehearing or combined petitions. Because the petition is captioned and filed as seeking only “Rehearing En Banc,” however, TWW waived any attempt to seek panel rehearing. Nonetheless, panel rehearing is equally inappropriate for substantially the same reasons as expressed herein.

This case does not meet the standard for *en banc* rehearing.² See Fed. R. App. P. 35(a); Fed. Cir. R. 35(b). The panel’s nonprecedential opinion applies settled law to specific facts. As TWW’s petition acknowledges, the law regarding unasserted combinations and the standard of review for *inter partes* reviews is well established and uncontroversial. See, e.g., *Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330, 1336 (Fed. Cir. 2020) (finding that “the Board erred when it instituted *inter partes* review based on a combination of prior art references Google did not advance in its petition”); *Uber Techs., Inc. v. X One, Inc.*, 957 F.3d 1334, 1337 (Fed. Cir. 2020) (“The Board’s ultimate determination on obviousness is a legal determination that we review *de novo*, although we review any underlying factual findings for substantial evidence.”). Likewise, TWW does not contend that the panel articulated any new rules of law or question the correctness of any precedential opinion. Rather, TWW disagrees with how the panel applied the law to the evidence with respect to the (now-expired) ’018 patent.³ Pointing to nothing in the panel’s opinion beyond the fact-bound specifics of this case, and demonstrating no clear error of fact or law in the opinion nor presenting any question of exceptional importance, TWW has not articulated an adequate basis for rehearing *en banc* on any of the issues in its petition.

² Notably, “[a] petition for rehearing *en banc* is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it.” Fed. Cir. R. 35, Practice Notes.

³ The ’018 patent expired April 4, 2020.

II. ARGUMENT

The panel’s decision did not stray from the grounds, references, or arguments advanced in Intex’s *inter partes* review petition. To the contrary, the panel’s decision clearly identifies the Parienti and Goldsmith combination asserted in Grounds 5 and 6, Slip. Op. at 5-9, 11-12, but concludes that the Board erred by “misappl[ying] the obviousness standard” in its consideration of the proposed modification and motivation to combine. Slip Op. at 12. Moreover, the panel’s decision explicitly applies the correct standard of review—reviewing the “ultimate legal determination on obviousness de novo and its underlying factual findings for substantial evidence.” Slip Op. at 9. TWW’s contrary arguments in its rehearing petition amount to nothing more than a mischaracterization of the panel’s decision.

A. The Panel Decision Does Not Violate *SAS Institute*

In a detailed recounting, the panel opinion explicitly identifies the grounds, references, and arguments made by Intex in the petition for *inter partes* review and considered by the Board. Slip Op. at 5-9. The decision details the asserted Grounds 5 and 6—that “claims 1, 7, and 11-14 would have been obvious to a POSA based on U.S. Patent No. 6,018,960 (‘Parienti’) in view of U.S. Patent No. 2,493,067 (‘Goldsmith’)” and that “claim 5 should have been obvious based on Parienti in view of Goldsmith and Walker”—citing to the Final Written Decision. Slip. Op. at 5

(citing Appx7).⁴ The decision then details Intex’s proposed modification of the Parienti reference in view of Goldsmith, Intex’s arguments regarding the motivation for the modification, and the evidence—including an expert opinion and background references—supporting the proposed modification and motivation to combine Parienti and Goldsmith. Slip Op. at 6-8 (citing Appx247-51).

The panel discussion, like the Board’s Final Written Decision, “focused on whether a POSA would have made Intex’s proposed modification to Parienti in light of Goldsmith, namely moving the pump body slightly so that it is not merely attached to the air mattress’s surface, but at least partially recessed within it.” Slip Op. at 8 (citing Appx41). The panel concluded that the Board “misapplied the obviousness standard” in making this determination because it “fixated on whether the prior art literally disclosed” the proposed modification of Parienti in view of Goldsmith—that is, whether a partially-recessed pump was **expressly disclosed** by Parienti or Goldsmith. Slip. Op. at 12. This approach, the panel explained, violated the Supreme Court’s instruction in *KSR* that the obviousness approach is “expansive and flexible,” and rather than requiring a literal “teaching, suggestion, or motivation” in the prior art references, “any need or problem known in the field of endeavor at the

⁴ Ground 6 depends from Ground 5; the Board’s determination with respect to Ground 6 was based solely on its conclusion with respect to Ground 5, and the Board did not reach the obviousness of the additional limitation of claim 5 in view of Parienti, Goldsmith and Walker.

time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” Slip Op. at 11 (citing *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 415, 418-19, 420 (2007)).

Accordingly, the panel determined that under the correct obviousness standard—the “expansive and flexible” approach mandated in *KSR*—and considering the broadly crafted “wholly or partially recessed” limitation, the Board improperly concluded that Intex failed to satisfy its burden on obviousness. Slip Op. at 11; *see also id.* at 9 (quoting Appx50, where the Board found that “Goldsmith discloses a configuration with the pump body disposed well inside of the bed’s mattress”). The panel’s decision is, accordingly, the uncontroversial result of the application of blackletter obviousness case law to the asserted combination of Parienti and Goldsmith.

The panel decision does not, however, rest upon “new” combinations or unasserted references. Rather, the panel decision cites to the references Intex relied upon before the Board to demonstrate the “need[s] and problem[s] known in the field of endeavor”—including, for example, the “intuitive desire . . . to save space” and the documented history of solving that problem by recessing pumps, Slip Op. at 12. This is exactly what is required by Supreme Court and this Court’s precedent. *See, e.g., KSR*, 550 U.S. at 420.

TWW's reliance on *Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330 (Fed. Cir. 2020) is misplaced. The holding of *Philips* is straightforward: the Board may not institute upon combinations of references that were not asserted in a petition. *Id.* at 1335. The holding is inapplicable here: as detailed above, the Board instituted on the proposed modification of Parienti in view of Goldsmith, and the panel reviewed the proposed modification of Parienti and Goldsmith.

B. The Panel Decision Did Not Consider Combinations of References not Identified in the Grounds

Nothing in the panel's decision suggests that it considered combinations of references not identified in the grounds—it is settled law that consideration of unasserted grounds is neither required nor appropriate. To the contrary, the panel's decision is focused on Ground 5—the combination of Parienti in view of Goldsmith—upon which the Board instituted.

TWW's primary complaint appears to be that the panel was not entitled to consider—or even mention—the background knowledge of a skilled artisan or references evidencing that knowledge unless explicitly recited as part of a ground. *See, e.g.*, Pet. at 10 (arguing that because Ground 5 was limited to Parienti and Goldsmith, the “general knowledge or common sense of a POSA” could not be considered). TWW is wrong. This Court has repeatedly rejected similar arguments, holding that “the knowledge of such an artisan is part of the store of public knowledge that **must be consulted** when considering whether a claimed invention

would have been obvious.” *Randall Mfg. v. Rea*, 733 F.3d 1355, 1362–63 (Fed. Cir. 2013) (in the context of ex parte reexaminations). Indeed, in *Philips*, this Court rejected a substantially similar argument, holding that “[a]lthough the prior art that can be considered in inter partes reviews is limited to patents and printed publications, **it does not follow that we ignore the skilled artisan’s knowledge** when determining whether it would have been obvious to modify the prior art.” *Philips*, 948 F.3d at 1337 (emphasis added). *Lone Star Silicon Innovations LLC v. Iancu*, 809 F. App’x 773 (Fed. Cir. 2020), is even more directly on point. There, the Court found that the Board’s reliance on “additional references . . . for their teachings about what was well-known in the art” did not constitute a “new ground.” *Id.* at 777. Indeed, the Court noted that the “statutory definition of obviousness **expressly depends** on what would have been known to a person having ordinary skill in the art.” *Id.* (emphasis added).

Moreover, because this Court has recognized that prior art is “perhaps the most reliable” evidence of the background knowledge of the skilled artisan, it has long held that the Board may not ignore “record evidence [] cited to demonstrate the knowledge and perspective of one of ordinary skill in the art” in determining “why an ordinarily skilled artisan would have been motivated to combine or modify the cited references to arrive at the claimed invention[.]” *Randall*, 733 F.3d at 1362–63; *see also Airbus SAS v. Firepass Corp.*, 941 F.3d 1374, 1383 (Fed. Cir. 2019)

(“‘[D]ocumentary evidence consisting of prior art in the area’ is ‘perhaps the most reliable’ form of evidence of what an ordinarily skilled artisan would have known.”). Accordingly, TWW’s suggestion that the panel cannot consider background references cited in support of the asserted in the combination is contrary to well-established precedent.⁵

To the extent that TWW is arguing that Intex did not make arguments about the background knowledge or skilled artisan’s motivation before the Board, TWW is incorrect. For example, as recognized in the panel decision,

Intex argued that a POSA would have been motivated by, among other things, a desire for spatial efficiency to combine Parienti with Goldsmith and thereby arrive at the claimed inventions. According to Intex, it was well known in the art as of December 18, 2000, that a more compact design would reduce the opportunity for a pump’s components ‘to impact or interfere with the use of’ an airbed. In support, Intex cited U.S. Patent No. 7,039,972 (“Chaffee”), filed on May 17, 2001—about five months after Team Worldwide’s claimed priority date—which disclosed an air mattress with a “recessed” pump. Intex also pointed to U.S. Patent No. 5,529,377 (“Miller”), issued in 1996, which disclosed an air cell module for an automotive seat and taught that disposing an air pump inside the air cell ‘provide[d] a compact design to facilitate handling and shipment and to reduce space requirements in the seat.’

⁵ TWW’s reliance on *Adaptics Ltd. v. Perfect Company*, is inapposite. In this non-precedential Board decision, the Board denied institution because the petition “suffer[ed] from a lack of particularity that results in voluminous and excessive grounds,” including grounds “yielding hundreds of possible combinations.” Case No. IPR2018-01596, 2019 WL 1084284, at *8 (PTAB March 6, 2019). Here, as the panel (and the Board) found, the asserted ground relied on Parienti and Goldsmith as disclosing each and every limitation. Additional references as evidence of the background knowledge of a skilled artisan were provided in support of the asserted motivation to combine Parienti and Goldsmith.

Slip Op. at 6-7 (citing Appx251) (internal citations omitted). Likewise, TWW is incorrect that the Fink, Hong, Hargin, and Pinkwater references were not cited as background references before the Board. *See* Appx1819-1820, ¶¶ 51-55; Appx1823-1829, ¶¶ 59-75.

Here, as in *Philips*, *Randall*, and *Lone Star*, the panel decision appropriately considered the background knowledge of the skilled artisan, as evidenced by background references and Intex’s expert’s declaration, in evaluating the combination of Parienti and Goldsmith. Such consideration—required by *KSR* and this Court’s precedent—is not a “new ground” or otherwise contrary to any established precedent of this Court. Because the panel properly assessed the Board’s analysis of Ground 5 under the governing *KSR* framework, TWW has not established an adequate basis for rehearing *en banc*.

C. The Panel Applied the Appropriate Standard of Review

The panel opinion is explicit as to the standard of review it is applying: “We review a Board’s ultimate legal determination on obviousness *de novo* and its underlying factual findings for substantial evidence. *Uber Techs., Inc. v. X One, Inc.*, 957 F.3d 1334, 1337 (Fed. Cir. 2020).” Slip Op. at 9. The panel opinion does not depart from this standard of review in its discussion and holding; the opinion finds that the Board “misapplied the obviousness standard,” that is, the Board **legally erred**.

It is well-settled law that this Court reviews compliance with governing legal standards de novo. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018) (“When reviewing the Board’s decision, the Federal Circuit assesses ‘the Board’s compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence.’”); *Randall*, 733 F.3d at 1362–63 (“On appeal, we review the Board’s compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence.”); *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 964 (Fed. Cir. 2015) (“Whether the Board applied the correct legal standard . . . is a question of law we review de novo.”); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1014 (Fed. Cir. 2003) (holding that “determination of legal standards is a pure issue of law” that the Federal Circuit reviews *de novo*). TWW’s argument—that the panel failed to analyze the Board’s decision under the “substantial evidence” standard of review—is based on a flawed understanding of the panel decision. The panel owed the Board’s misapplication of the obviousness standard “no deference.” *See, e.g., Artrip v. Ball Corp.*, 735 F. App’x 708, 711 (Fed. Cir. 2018) (“*De novo* review requires an appellate court to look at the issues as though for the first time, with no deference to the trial court.”). Consistent with its determination that the Board misapplied the obviousness standard, the panel

determined that the Board “erred in determining that Intex failed to prove claims 1, 7, and 11-14 obvious.” Slip Op. at 12.

Setting aside TWW’s flawed understanding of the basis of the panel decision, TWW’s primary argument appears to be that the words “substantial evidence” are not repeated under the heading “Obviousness Based on Grounds 5 and 6.” Repetition of the standard of review or the use of magic words in stating a holding is not required. *Cf. Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007) (in Veteran’s Board context, “where Board has explained its decision in detail and has made clear the reasons and bases for the decision, and in substance has articulated the correct burden of proof” the Board need not use magic words and the reviewing court can assume the Board used the correct standard). Moreover, the panel’s analysis—that under the proper obviousness standard, the Board’s decision lacked substantial evidence—is consistent with both governing law and this Court’s determinations in similar factual circumstances. *See, e.g., Polygroup Ltd. MCO v. Willis Elec. Co., Ltd.*, 780 F. App’x 880, 883-84 (Fed. Cir. 2019) (finding that “[s]ubstantial evidence does not support the Board’s findings” regarding obviousness where “the Board applied the law of obviousness too narrowly”); *Uber Techs.*, 957 F.3d at 1338-42 (reversing where the Board erred in misapplying the law of obviousness).

TWW's defense of the alleged substantial evidence supporting the Board's decision fails because it is premised on the same incorrect obviousness standard the panel found to be error.

First, TWW asserts that because the Board found that “no reference disclosed a partially-recessed pump body,” Pet. at 16, substantial evidence supported the Board's determination that the proposed partially-recessed modification of Parienti in view of Goldsmith was not obvious. But, as the panel explained, under *KSR*, the approach is “expansive and flexible.” Slip Op. at 11. There is no requirement for “precise teachings directed to the specific subject matter of the challenged claim” and, instead, must “account [for] the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 418; *see also Randall*, 733 F.3d at 1362 (noting that *KSR* “reject[ed] a blinkered focus on individual documents, [and] required an analysis that reads the prior art in context, taking account of ‘demands known to the design community,’ ‘the background knowledge possessed by a person having ordinary skill in the art,’ and ‘the inferences and creative steps that a person of ordinary skill in the art would employ.’”). Like the Board's legally flawed decision, TWW's continued focus on whether the references precisely teach a “partially-recessed pump” ignores the proper obviousness framework set forth in *KSR* and the panel opinion.

Second, the Board did not make a factual finding that the difference between Parienti and the challenged claims was “more than a ‘slight change.’” Pet. at 17-18 (not citing Final Written Decision). Again, TWW repeats the Board’s legal error by insisting that the Board’s finding that Goldsmith did not teach a partially-recessed pump body is determinative of the obviousness analysis. *Id.* There is no “factual finding” by the Board as to how slight—or not—the proposed modification of Parienti in view of Goldsmith would have been, which further contributed to the Board’s error. *See KSR*, 550 U.S. at 417 (“[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” (citation omitted)).

Third, the Board’s findings with respect to the skilled artisan’s motivation to modify Parienti in view of Goldsmith are, likewise, infected by the same legal error in the application of the obviousness standard. Specifically, the panel opinion criticizes the Board’s “laser-focus[.]” on the lack of express teaching of a partially recessed pump, an error that infected the Board’s evaluation of the motivations to combine. The panel pointed to the “volumes of prior art” in the record, including Goldsmith and others, to conclude that there “‘should have been no question that a POSA, using her creativity and common sense’ would have arrived at the claimed inventions.” Slip Op. at 13. That is, the panel determined that, applying the correct

obviousness standard and in view of the evidence of record, the Board's conclusion was unsupported by substantial evidence. *Id.* Accordingly, there is no basis for *en banc* review, as the panel correctly applied the standard of review to the Board's legally erroneous decision.

III. CONCLUSION

Because the panel correctly applied precedent and the standard of review in its non-precedential opinion, and because TWW has not established that this case presents any question of exceptional importance, the Court should deny TWW's petition for *en banc* review.

Respectfully submitted,

/s/ Reid E. Dodge
Reid E. Dodge

Counsel for Appellant Intex Recreation Corp.

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2021, I electronically filed the foregoing document through the Court's CM/ECF system, thereby it was served on all counsel of record by Electronic Means (by CM/ECF).

/s/ Reid E. Dodge

Reid E. Dodge

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g), I certify that this brief complies with the type-volume limitation of FED. CIR. R. 32(a). The brief contains 3,279 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and FED. CIR. R. 32(b), as calculated by Microsoft Word 2010, the word processing system used in its preparation.

I further certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 Point Times New Roman font.

Date: September 9, 2021

/s/ Reid E. Dodge

Reid E. Dodge