

2020-1144

IN THE
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.

TEAM WORLDWIDE CORPORATION'S PETITION FOR REHEARING
EN BANC

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August 5, 2021

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CERTIFICATE OF INTEREST

Counsel for Appellee Team Worldwide Corporation certifies the following:

1. The full name of every party represented by the undersigned is:

Team Worldwide Corporation

2. The real party in interest represented by the undersigned is:

Team Worldwide Corporation

3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the party represented the undersigned are:

None

4. The names of 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. Those who have already entered an appearance in this court are not included:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal, not including the originating number(s) for this case:

- *Team Worldwide Corporation v. Macy's, Inc. & Macys.com, LLC*, No. 2:19-cv-00099-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Target Corporation and Target Brands, Inc.*, No. 2:19-cv-00100-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. The Home Depot, Inc.*, No. 2:19-cv00098-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Dick's Sporting Goods, Inc.*, No. 2:19-cv-00097-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Costco Wholesale Corporation*, No. 2:19-cv-00096-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Bed Bath & Beyond, Inc.*, No. 2:19-cv-00095-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Amazon.com, Inc. and Amazon.com LLC*, No. 2:19-cv-00094-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Ace Hardware Corporation*, No. 2:19-cv-00093-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Academy, Ltd. d/b/a Academy Sports + Outdoors*, No. 2:19-cv-00092-JRG (E.D. Tex.)
- *Team Worldwide Corporation v. Sears, Roebuck and Co., Sears Holdings Corporation, and Transform Holdco LLC*, No. 2:20-cv00006 (E.D. Tex.)

- ***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, 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**
- ***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**

6. 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

/s/ Robert M. Harkins, Jr.

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STATEMENT OF COUNSEL – FEDERAL CIRCUIT RULE 35(B)(2)

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States:

1. The panel decision warrants *en banc* rehearing because the panel went outside the grounds as set forth in the IPR petition to reverse the Board’s determination of patentability, which is a clear violation of the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018). Also, based on my professional judgment, I believe this appeal requires an answer to one or more related precedent-setting questions of exceptional importance: In the review of a PTAB final written decision for an *inter partes* review petition, can the Federal Circuit consider all combinations of references in the record despite them not being asserted in the grounds of the petition, and can it require the Board to do the same?

2. The panel decision warrants *en banc* rehearing because the panel afforded the PTAB no deference and should have, but did not, review the PTAB decision to determine if the Board’s decision was “arbitrary and capricious” or “unsupported by substantial evidence” in accordance with Section 706 of the Administrative Procedure Act pursuant to the Supreme Court’s decision in *Dickinson v. Zurko*, 527 U.S. 150 (1999).

Dated: August 5, 2021

By: /s/ Robert M. Harkins, Jr.

Attorney for Appellee

Team Worldwide Corporation

I. INTRODUCTION AND STATEMENT OF THE CASE

Intex filed an *inter partes* review petition challenging the '018 Patent on seven grounds. Appx00169-00170. The Board considered each of these grounds and found that Intex did not show, by a preponderance of the evidence, that the claims were unpatentable. Appx00062-00063.

Intex appealed on two grounds. First, Intex argued that the Board made a claim construction error with respect to Ground 3 (and Ground 4, which depends from Ground 3). Accordingly, Intex requested this Court to review the Board's claim construction *de novo* and to remand for further consideration of Grounds 3 and 4. Opening Brief at 26, 29. After due consideration, this Court affirmed the Board's claim construction. Panel Opinion at 11.

Second, Intex challenged the Board's determination that the combination of Parienti with Goldsmith asserted in Ground 5 (and Ground 6, which depends from Ground 5) did not render the claims obvious. Specifically, Intex alleged that the Board's findings "ignored the governing obviousness framework, are unsupported by substantial evidence, and rest on prejudicial procedural errors." Opening Brief at 41. Intex makes this argument despite admitting that "a POSA would not wholly recess Parienti's design" (Opening Brief at 48, emphasis in original), that Parient's pump is "on top of mattress 5," (Opening Brief at 12) rather than being recessed, and that Goldsmith is not a reference that teaches a partially-recessed

pump (*see* Opening Brief at 52-53, not including Goldsmith in a list of references allegedly disclosing partially-recessed pumps).

The panel held that the “Board misapplied the obviousness standard” by being “fixated on whether the prior art literally disclosed Intex’s theory of modifying Parienti only slightly by taking the pump attached to the outside of the mattress and recessing it partially within the mattress.” Panel Opinion at 12. Instead of analyzing the arguments presented by Intex in Ground 5, the panel articulated a new theory that “Parienti was already close to the challenged claims,” “only a slight change was needed,” and “numerous references since the late 1800s illustrated prior artisans’ intuitive desire to recess pumps to save space.” *Id.* The panel’s decision based on a combination of references other than that advanced by Intex in Ground 5 is in violation of the Supreme Court’s admonition in *SAS Institute* that it is “the petitioner’s petition, not the Director’s discretion, [that] should guide the life of the litigation.” *SAS Institute*, 138 S.Ct. at 1351.

The Board explicitly considered whether a POSA would have been motivated to modify Parienti in the manner proposed by Intex for the reasons proposed by Intex and concluded that the evidence did not support a finding of obviousness. Appx00041-00046. The panel did not find that the Board’s determinations were arbitrary and capricious, unsupported by substantial evidence, or the result of procedural errors. The Panel Opinion does not identify errors of

law and correct the framework under which the Board should consider the evidence, but instead concludes that “Intex satisfied its burden of proving obviousness.” Panel Opinion at 13. Without more, this conclusion is in violation of the Supreme Court’s holding that a “reviewing court reviews an agency’s reasoning to determine whether it is ‘arbitrary’ or ‘capricious,’ or, if bound up with a record-based factual conclusion, to determine whether it is supported by ‘substantial evidence.’” *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999). Even if one or more of the reviewing judges had “a ‘definite and firm conviction’ that an error has been committed,” the Administrative Procedure Act requires greater deference to agency decision-making. *Id.* at 162, 165.

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

Pursuant to Federal Circuit Rule 40(a)(5), TWW provides this statement of points of law or fact that were overlooked or misapprehended by the Court in its panel decision.

1. The panel determined that Intex satisfied its burden of proving obviousness based on Parienti in view of “numerous references” and an artisan’s “intuitive desire to save space,” but Intex alleged in Ground 5 that the claims of the ’018 Patent were rendered obvious by Parienti in view of Goldsmith. There is no error by the Board making determinations on combinations of references on which a Ground is based and failing to consider combinations of references not asserted by the Ground. Additionally, a requirement that the Board consider all combinations of references in the record would be an unworkable burden on the Patent Office and exceeds the scope of the grounds asserted in the petition, which violates the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

2. The panel’s determination that the PTAB erred fails to afford the PTAB due deference required by Section 706 of the Administrative Procedure Act pursuant to the Supreme Court’s decision in *Dickinson v. Zurko*, 527 U.S. 150 (1999) including by concluding that Intex’s reliance on references teaching

wholly-recessed pumps were insufficient to support Intex's proposed modification in the form of a partially-recessed pump. However, the panel does not allege that there is a lack of *substantial evidence* supporting the Board's determination that partially-recessed pumps face challenges that are not presented by fully-recessed pumps, and that Intex failed to meet its burden to show that a POSA would have been motivated to make the proposed modifications to Parienti despite these challenges. Appx00046-00051. Nor does the panel allege that the Board's findings were "arbitrary and capricious." Thus, the panel did not apply the correct standard of review with respect to the Board's factual findings.

Similarly, the panel did not apply the correct standard of review with respect to the Board's factual findings, which also were required to be reviewed only for "substantial evidence" under *Dickinson v. Zurko*, 527 U.S. 150 (1999). The panel determined that "Intex satisfied its burden of proving obviousness," because "Parienti was already close to the challenged claims" and "numerous references since the late 1800s illustrated prior artisans' intuitive desire to recess pumps to save space." Panel Opinion at 12-13. Nonetheless, the panel does not allege that there is a lack of substantial evidence supporting the Board's determination that a POSA would not have been motivated to make the proposed modification to save space. Nor does the panel address the portion of the Final Written Decision addressing Intex's spatial efficiency argument. Appx00041-00046. This further

shows that the panel did not apply the correct standard of review with respect to the Board's factual findings.

III. ARGUMENT

A. The Court Should Grant Rehearing *En Banc* to Explicitly Address the Supreme Court’s Ruling in *SAS Institute* that Limits *Inter Partes* Reviews to the Grounds Asserted in the Petition

1. The Board did not err by focusing on Petitioner’s arguments—
instead, the appellate panel violated the Supreme Court’s mandate in *SAS*
Institute by straying from Petitioner’s arguments

As explained by the Supreme Court, the Director cannot “initiate whatever kind of *inter partes* review he might choose,” and “it’s the petitioner, not the Director, who gets to define the contours of the proceeding.” *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018). Thus, the grounds of the petition itself set the metes and bounds of any *inter partes* review proceeding, and it is error for the Board or an appellate court reviewing the Board to review more or less than the grounds as asserted in the petition. Here, the Board adhered to the Supreme Court’s decision, but the appellate panel did not, and that error resulted in an improper reversal.

In *In re Koninklijke Philips N.V. v. Google LLC*, 948 F.3d 1330 (Fed. Cir. 2020), the petitioner alleged two grounds of unpatentability. The first ground was that the challenged claims were anticipated by a “SMIL 1.0” reference. *Id.* at 1333-1334 The second ground was that the challenged claims were rendered

obvious by SMIL 1.0 in view of “the general knowledge of” a POSA. *Id.* at 1334. To support the claim that the necessary elements would be part of the POSA’s general knowledge, the petitioner relied on an expert declaration and a second reference, Hua. *Id.* The Board instituted on both alleged grounds and a third ground, SMIL 1.0 in view of Hua. *Id.*

On appeal, the panel held that “the Board erred by instituting inter partes review based on a combination of prior art references not advanced” in the petition. *Id.* at 1335.

In the present case, Petitioner did not allege before the Board that the challenged claims were rendered obvious by Parienti in view of the general knowledge or common sense of a POSA. Nor did Petitioner allege that the challenged claims were rendered obvious by Parienti in view of “numerous references since the late 1800s.” Panel Opinion at 12. Furthermore, Petitioner did not allege that only a “slight change” was needed to Parienti to satisfy the broadest reasonable interpretation of the challenged claims. Instead, with regard to these two grounds of the seven grounds proffered, Petitioner chose to challenge the claims of the ’018 Patent on the ground that they were rendered obvious by Parienti in view of Goldsmith. Appx00242 (Ground 5). Accordingly, as this Court recognized in *Philips, SAS Institute* mandated that the Board’s consideration be directed to the combination of Parienti and Goldsmith.

The Court’s conclusion that the Board erred by not finding that Parienti, “together with Intex’s showing that numerous references since the late 1800s illustrated prior artisan’s intuitive desire to recess pumps to save space, satisfied Intex’s burden,” is in conflict with *SAS Institute* and the bounds set by that decision as correctly recognized in *Philips*,. Panel Opinion at 12. The Board determined that Parienti’s non-recessed design was not combinable with Goldsmith’s wholly-recessed design in the manner proposed by Intex to create a partially recessed design, and was not persuaded by Petitioner’s arguments to the contrary. Appx00041-00051. The Board was not permitted to consider whether Parienti, in combination with other references of record, would render the claims obvious. Accordingly, the Board did not err by being “laser-focused” or “fixated” on the arguments raised by Petitioner, and rehearing *en banc* on this issue is respectfully requested.

2. The Board is not required to consider combinations of references not identified in the Grounds

Since the panel’s decision is based on a combination of Parienti with “numerous references since the late 1800s,” the panel has considered Parienti in combination with references *other than* Goldsmith, that is combinations outside

the scope of the grounds set forth in the petition. Panel Opinion at 12. In Petitioner's Appeal Brief, Petitioner argues that "other references that are indisputably prior art also disclosed inflatable products with *partially recessed* pumps." Opening Brief at 52 (emphasis in original). In support of this argument, Petitioner cites U.S. Patent No. 5,467,543 ("Fink") and U.S. Patent No. 4,702,235 ("Hong"), neither of which was cited for this purpose in the IPR petition. *See* Appx00187. Thus, Petitioner's argument that it was known to recess pumps based on these references was not before the Board and the Board did not err by failing to consider arguments that were not presented by Intex.¹

As a matter of policy, the panel's implication that such combinations must be considered forces the PTAB to consider not only the combinations of references argued by Petitioners in their Grounds, but every combination of references cited in the Petition. This would have the effect of substantially curtailing the PTAB's ability to institute review fairly and efficiently. For example, in *Adaptics Ltd. v. Perfect Company*, Decision Denying Institution of *Inter Partes* Review, Case

¹ Despite not being included in the Ground, the Board did consider several additional references proffered by Intex, including Hargin and Pinkwater, Appx00040 and Appx00047-00048.

IPR2018-01596, pp. 8-9 (PTAB March 6, 2019), *Adaptics* challenged the claims of U.S. Patent No. 9,772,217 on five grounds. The final ground asserted that the claims were rendered obvious by “Bendel and Sartorius ... in combination with each other, Williams, Turnage, Abrams, Bordin, Mettler, Digi-Star, Yuyama, and/or Wright.” *Id.* at 18. As a result, the final ground included “hundreds of possible combinations” where even “seventeen possible combinations” would have been “unduly burdensome.” *Id.* at 18-19.

In the IPR below, Petitioner asserted seven grounds, each of which included no more than three references. Appx00188-00189. The Petition was accompanied with an Exhibit list comprising not only the five references asserted in various combinations in the seven grounds, but also over forty additional references. Appx00278-00279. If the Board were tasked with considering just the possible combinations of a single additional reference with the references of each ground, this would add hundreds of possible combinations of references. Such a rule would require every “Patent Owner to address whether each and every claim limitation is taught not only” by the references in the grounds, “but by each of these references in combination with one or more of the other references asserted in the proceeding.” *Adaptics*, IPR2018-01596 at 20-21. This “is not reasonably bounded in scope and [is] unduly burdensome for both Patent Owner and the Board to address.” *Id.* at 21. Furthermore, this would effectively reverse this

Court’s holding “that petitioners in the IPR proceedings adhere to the requirement that the initial petition identify ‘with particularity’ the ‘evidence that supports the grounds for the challenge to each claim.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016) (quoting 35 U.S.C. § 312(a)(3)).

Accordingly, *en banc* review is requested to determine whether the Board is required to consider combinations of references other than those asserted by the Petitioner in the grounds on which IPR is instituted (and whether on appeal, *SAS Institute* bars the Board and appellate courts from doing so). If the Court determines that the burden is not unreasonable because only some combinations need to be considered, the *en banc* Court is requested to identify which references and combinations must be considered by the Board.

B. The Court Should Grant Rehearing *En Banc* to Confirm that Appellate Review Must Give Appropriate Deference to PTAB Determinations and Review to Confirm the Ruling Was Based on Substantial Evidence and is not Arbitrary and Capricious, Pursuant to *Dickinson v. Zurko*, Which the Panel Failed to Provide Here

1. Substantial evidence supports the Board’s factual determination that the combinations of references of Grounds 5 and 6 do not teach a POSA to use a partially-recessed pump

In *Dickinson v. Zurko*, 527 U.S. 150 (1999), the Supreme Court held that review of PTAB decisions must follow the Administrative Procedure Act. *Dickinson*, 527 U.S. at 162. As such, pursuant to 5 U.S.C. § 706, PTAB decisions may only be reversed for a specific set of reasons including that they are wholly “unsupported by substantial evidence” or are “capricious and arbitrary.” *Id.* Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). The substantial evidence standard asks “whether a reasonable fact finder could have arrived at the agency's decision,” and “involves examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision.” *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000). Thus, reversal of the Board’s factual findings requires analysis of the evidence used by the Board to support its conclusions. **The Panel Opinion does not include such an analysis**, nor does it allege that any factual findings were unsupported by substantial evidence. Further, the opinion affords no deference to the PTAB as an administrative agency. As a result, it

clearly violates Supreme Court mandate on the standard of review of final written decisions by the PTAB in *inter partes* reviews.

The Panel Opinion holds that the Board erred by finding “that the prior art’s repeated disclosure of *wholly*-recessed pumps detracted from Intex’s proposed modification in the form of a *partially*-recessed pump.” Panel Opinion at 12, emphasis in original. To be clear, the Board found that *no* reference disclosed a partially-recessed pump body (Appx00049) and that there was insufficient evidence to use the teachings of Parienti and Goldsmith based on alleged spatial efficiency and durability advantages to achieve Intex’s proposed partially-recessed pump body (Appx00041-00051).

The Board, as the finder of fact, found that a partially recessed design “would introduce negative impacts on durability by greatly increasing the size of the opening in mattress 5 to accommodate the perimeter of the alleged pump housing,” “which would create a greater chance that the air mattress would leak.” Appx00047. Therefore, the Board was not “fixated on whether the prior art literally disclosed Intex’s theory of modifying Parienti only slightly by taking the pump attached to the outside of the mattress and recessing it partially within the mattress,” but considered whether a POSA would be motivated by the prior art to make the modifications proposed by Intex. Panel Opinion at 12.

In concluding that references teaching wholly-recessed pumps support “Intex’s proposed modification in the form of a *partially*-recessed pump,” (Panel Opinion at 12, emphasis in original) this Court overlooked or misapprehended the Board’s factual determinations as to the teaching of the cited references and Intex’s alleged motivations to make the modification. Since the Panel Opinion does not allege a lack of substantial evidence to support the Board’s factual determinations, *en banc* rehearing is requested for application of the proper standard of review on the Board’s determination that the Ground does not support a modification of Parienti to include Intex’s proposed partially-recessed pump body.

2. Substantial evidence supports the Board’s factual determination that Intex’s proposed modification of Parienti is more than a “slight change”

The Panel Opinion holds that “Parienti was already close to the challenged claims, and only a slight change was needed to satisfy the broadest reasonable interpretation of ‘wholly or partially’ recessing a pump” body. Panel Opinion at 12. However, the Board, in its fact-finding role, determined that the difference between Parienti and the challenged claims was more than a “slight change.”

The Board considered Goldsmith and other references and concluded that there was no teaching in the prior art of a partially recessed pump body.

Appx00049. Furthermore, the Board found that partially recessing a pump body, relative to wholly recessing a pump body, involved an increased risk of leakage, an increased amount of sealed seams, and would not improve durability of pump components already contained in the pump body. Appx00049-00050. The Panel Opinion does not include a finding that the Board's factual determinations regarding the problems of partially recessing a pump lacked substantial evidence. Accordingly, *en banc* review is requested for application of the proper standard of review on the Board's determination that the proposed modification to Parienti was more than a "slight change."

3. Substantial evidence supports the Board's factual determination that a POSA would not recess Parienti's pump to save space

The Panel Opinion further finds that the "Board erred" in finding that Intex failed to meet its burden with respect to Ground 5 because Intex's evidence "illustrated prior artisans' intuitive desire to recess pumps to save space." Panel Opinion at 12. However, the Board found, as a matter of fact, that the references and expert testimony did not support a conclusion that a POSA would modify Parienti to include a partially-recessed pump for spatial efficiency. Appx00041-00046.

The Board spent five pages discussing the expert testimony, the cited references, and explaining its reasoning. *Id.* Intex argued that a POSA would have modified Parienti to include a partially recessed housing in order to reduce the physical impact of the pump on a user lying on the mattress and address a problem with a “jagged corner.” Appx00035, Appx00041. However, considering the evidence, the Board determined that it was not clear that the alleged “jagged corner” would motivate a design change by a POSA, especially in light of durability problems introduced by the proposed change. Appx00041, Appx00047.

The factual determination that a POSA would not modify Parienti to include a partially-recessed pump for spatial efficiency was entitled to review for substantial evidence. Despite this, the Court does not allege that the Board’s decision on this point is not supported by substantial evidence, even though the Panel Opinion comes to the contrary conclusion. Panel Opinion at 12. Accordingly, rehearing is requested for application of the proper standard of review on the issue of whether a POSA would be motivated to modify Parienti to include a partially recessed pump to save space.

Indeed, if any of the above points results in the notion that “any reasonable person” could agree with the PTAB, the Supreme Court has held that the Federal Circuit must affirm that decision. *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999). It is clear from a review of the panel’s decision that the PTAB provided a full

analysis and was reasonable in its determinations, even if others could reach a different conclusion. By substituting its own decision-making for the Board's – effectively conducting a *de novo* review – the panel failed to provide the Supreme Court-mandated level of deference for agency decisions. It is an issue of exceptional importance that this Court clarify that PTAB determinations are not to be reviewed to determine if a panel agrees with the PTAB, but only to determine if the PTAB's decision is so without merit such that no reasonable person could have found as the PTAB here. Had the panel applied that correct standard, there is no way it would have reversed the PTAB's final determination in this case.

IV. CONCLUSION

For the foregoing reasons, Appellee respectfully requests *en banc* rehearing of this matter. In the event that a panel rehearing is granted instead, Appellee respectfully requests that a full three-judge panel rehear the case.

Dated: August 5, 2021

By: /s/ Robert M. Harkins, Jr.

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ADDENDUM

NOTE: This disposition is nonprecedential.

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

INTEX RECREATION CORP.,
Appellant

v.

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**ANDREW HIRSHFELD, PERFORMING THE
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THE UNITED STATES PATENT AND TRADEMARK
OFFICE,**
Intervenor

2020-1144

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2018-
00859.

Decided: June 21, 2021

R. TREVOR CARTER, Faegre Drinker Biddle & Reath
LLP, Indianapolis, IN, argued for appellant. Also

represented by REID E. DODGE, ANDREW M. MCCOY.

ROBERT M. HARKINS, JR., RuyakCherian LLP, Berkeley, CA, argued for appellee. Also represented by KORULA T. CHERIAN; TIMOTHY E. BIANCHI, Schwegman Lundberg & Woessner, PA, Minneapolis, MN.

MOLLY R. SILFEN, Office of the Solicitor, United States Patent and Trademark Office, Alexandria, VA, argued for intervenor. Also represented by DANIEL KAZHDAN, THOMAS W. KRAUSE, FARHEENA YASMEEN RASHEED.

Before NEWMAN, REYNA, and STOLL*, *Circuit Judges*.

REYNA, *Circuit Judge*.

Intex Recreation Corp. appeals the Patent Trial and Appeal Board’s decision that none of the challenged claims of U.S. Patent No. 9,211,018 are unpatentable for obviousness. Intex challenges the Board’s construction of “inflatable body” as requiring substantial airtightness, as well as the Board’s conclusion of non-obviousness. For the reasons explained below, we affirm the Board’s construction of the term “inflatable body” and vacate the Board’s conclusion of non-obviousness.

BACKGROUND

The ’018 patent

Team Worldwide Corp. owns U.S. Patent No. 9,211,018 (“’018 patent”), titled “Inflatable Airbed Provided with Electric Pump Having Pump Body Recessed into the Inflatable Airbed.” *See* ’018 patent col. 1 ll. 1–3. The ’018 patent

* Judge Stoll did not participate in deciding this case, and instead it was decided by the remaining judges in accordance with Fed. Cir. Rule 47.11.

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was filed on January 10, 2005, and it stems from a series of applications beginning with U.S. Patent Application No. 09/542,477, filed on April 4, 2000. For purposes of the claims at issue in this case, Team Worldwide claims priority to U.S. Patent Application No. 09/738,331, filed on December 18, 2000.

The '018 patent is directed to an inflatable airbed with an electric pump that is “wholly or partially recessed into the inflatable body.” *Id.* at abstract. The patent recites two independent claims 1 and 14, which are identical in all respects material to this appeal.¹ Claim 1 is representative recites:

1. An inflatable product comprising:
an inflatable body comprising an exterior wall; and
an electric pump for pumping the inflatable body, the electric pump comprising a pump body and an air outlet, wherein the pump body is built into the exterior wall and wholly or partially recessed into the inflatable body, leaving at least a portion of the pump body exposed by the exterior wall, and wherein the pump body is permanently held by the inflatable body.

'018 patent col. 7 ll. 27–36.

On March 30, 2018, Intex Recreation Corp. (“Intex”) filed a petition for inter partes review (“IPR”) of the '018 patent. J.A. 100, 168–252.

Grounds 3 and 4

In its petition, Intex asserted ground 3, contending that claims 1, 7, and 12–14 were anticipated by U.S. Patent No. 5,564,963 (“Chan”), and ground 4, contending that

¹ Claim 14 is identical to claim 1 except that it omits claim 1’s final “wherein” clause. J.A. 95.

claims 5 and 11 would have been obvious to a person of ordinary skill in the art (“POSA”) based on Chan in view of U.S. Patent No. 4,890,344 (“Walker”).

Chan was filed on September 2, 1993, issued on October 15, 1996, and is titled “Air-Cushioned Toy.” J.A. 2799. The toy includes a platform that sits on top of a pillow. *Id.* According to Chan, the toy uses a motorized fan to draw air into the pillow, which in turn expels the air through perforations on the bottom surface of the pillow, enabling a child lying on it to “hover.” *Id.*

Walker issued on January 2, 1990, and is titled “Air Control System for Air Bed.” J.A. 2807. Walker discloses, among other things, an air supply and control apparatus having an air pump for purposes of supplying pressurized air to an air mattress. *Id.*

In the context of grounds 3 and 4, the parties disputed the meaning of the claim term, “inflatable body.” *See* J.A. 29–30. In its decision instituting an IPR, the Board preliminarily construed the phrase to mean “a substantially airtight structure that expands when filled with air or other gases,” as proposed by Team Worldwide. J.A. 21. During the IPR, Intex argued that the Board’s construction was unduly narrow because it included the “substantial airtightness” requirement. J.A. 21–22. Team Worldwide responded that the prosecution history supports the limitation. J.A. 22. Specifically, Team Worldwide contended that, during prosecution, the applicant took the position that the claims did not cover bodies that did not expand because they were not substantially airtight. *Id.* Intex responded that the applicant’s statements were ambiguous and failed to rise to the level of a clear and unmistakable disavowal of claim scope.

In its Final Written Decision issued on October 21, 2019, the Board agreed with Team Worldwide and readopted the construction that “inflatable body” means “a substantially airtight structure that expands when filled

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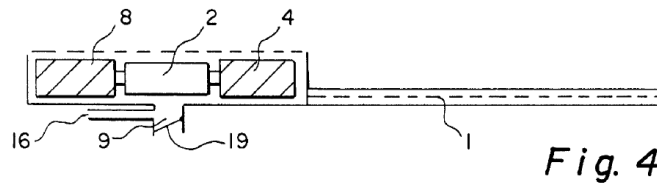
with air or other gases.” J.A. 23–24. Subsequently, when addressing grounds 3 and 4, the Board found that those grounds failed to render the challenged claims unpatentable because Chan did not disclose a substantially airtight inflatable body as required by the construed claims. J.A. 29–30.

Grounds 5 and 6

Intex also asserted ground 5, contending 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 ground 6, contending that claim 5 should have been obvious based on Parienti in view of Goldsmith and Walker. J.A. 7.

Parienti was filed in France pursuant to the Patent Cooperation Treaty (“PCT”) on July 22, 1996. J.A. 2776. The PCT application published on February 13, 1997, and entered the U.S. national stage under 35 U.S.C. § 371 on March 20, 1998. The application issued as U.S. Patent No. 6,018,960 on February 1, 2000, about ten months before Team Worldwide’s claimed priority date.

Parienti discloses an “automatically inflatable, deflatable and foldable” mattress whose top surface is attached to a solar-powered pump device. Figure 4 depicts a cross-section of the pump device. *Id.*



J.A. 2778. As shown in Figure 4, the solar-powered pump device that is attached to the top of the air mattress includes a protective grid for intaking air (8), a motor (2), a turbine (4), a voltaic cell array (1), and a pipe (9) with a

valve (19) to guide the air into and out of the air mattress. J.A. 2780–81.

Goldsmith was filed in 1945 and issued in 1950. It discloses an inner spring mattress that includes an electrically operated blower unit that blows temperature-controlled air into the mattress and thereby regulates the mattress’s temperature. *See, e.g.*, J.A. 2797 at col. 1 ll. 4–12. In one embodiment, the blower unit is mounted on a stand located outside the mattress and blows air into the mattress via a tube. J.A. 2796; J.A. 2798 at col. 3 ll. 1–10. In another embodiment, pertinent to this appeal, the blower unit is mounted to the mattress wall, and all but one surface of the blower resides within the mattress. Goldsmith explains that, in this embodiment, “no outside unit is necessary.” J.A. 2796; J.A. 2797 at col. 1 ll. 41–44; J.A. 2798 at col. 4 ll. 1–15.

Intex argued in its petition that the combination of Parienti and Goldsmith satisfied the following claim language for purposes of § 103: “wherein the pump body is built into the exterior wall and wholly or partially recessed into the inflatable body, leaving at least a portion of the pump body exposed by the exterior wall.” J.A. 247. Intex contended that, although Parienti does not clearly disclose recessing the body portion of the pump device into the inflatable body, it would have been obvious for a POSA to do so in view of Goldsmith. J.A. 248. Intex pointed to Goldsmith’s embodiment having an air blower mounted to the mattress wall, arranged to blow air into the mattress and leaving only a surface of the blower exposed to the outside. J.A. 249–51.

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. J.A. 251, 1819–20. 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

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pump's components "to impact or interfere with the use of" an airbed. J.A. 251. 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. *Id.* (citing Chaffee col. 4 ll. 50–56 (J.A. 2792)). 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." J.A. 251; Miller col. 2 ll. 40–52 (J.A. 3013).

Intex also relied on the opinions of its expert, Dr. Beaman, regarding the spatial efficiency motivation. *See* J.A. 251 (citing Beaman Decl. ¶¶ 61–70 (J.A. 1824–28), ¶ 232 (J.A. 1916)). For example, Dr. Beaman reiterated Goldsmith's teaching that, when the blower is recessed into the mattress, "no outside unit is necessary." J.A. 1826 (citing Goldsmith fig. 6, col. 4 ll. 1–15). Dr. Beaman also pointed to U.S. Patent No. 388,037 ("Hargin"), filed in 1887 and issued in 1888, which disclosed a wooden, manual pump that was "wholly inclosed within the covering of the air mattress." J.A. 1825; Hargin p. 1 ll. 53–58 (J.A. 2884). Hargin later explained, as Dr. Beaman pointed out, that the "pump must be wholly inclosed within the air-tight covering of the mattress to protect it from accident, injury, or separation when plunged into water." J.A. 1820; Hargin p. 2 ll. 129–31 (J.A. 2885).

Dr. Beaman identified a host of various inflatable products designed throughout the twentieth century that included built-in pumps. J.A. 1825 at ¶ 64 n.8. Dr. Beaman cited, among others, U.S. Patent No. 4,702,235 ("Hong"), a 1987 patent on an inflatable lumbar brace; U.S. Patent No. 4,862,533 ("Adams"), a 1989 patent on an air mattress combined with a sleeping bag; U.S. Patent No. 5,467,543 ("Fink"), a 1995 patent on an inflatable decoy automotive passenger; and U.S. Patent No. 6,287,095 ("Saputo"), a

2001 patent filed in 1999 on an “internal pump for inflatables.” *Id.* Based on the cited references, Dr. Beaman opined that inventors going back to at least 1888 and throughout the twentieth century “recognize[d] the advantages of designing pumps, both motorized and manual, built into the body of the inflatable product.” J.A. 1825.

On January 29, 2019, Team Worldwide filed its Patent Owner’s Response. Team Worldwide argued that a POSA would not modify Parenti by recessing the pump portion because doing so “would not yield an appreciable improvement.” J.A. 712. According to Team Worldwide, Parenti’s mattress is better unmodified because, among other things, leaving the pump unrecessed would “encourage a user to not lay over [it].” J.A. 716. Team Worldwide further contended that the additional references cited by Intex do not support the spatial efficiency motivation to combine because, for example, they involve pumps that are “already inconspicuous without modification” or they involved manual pumps rather than electric pumps such as those disclosed in Parenti. J.A. 718–19.

In its Final Written Decision, the Board concluded that claims 1, 7, and 11–14 were not proven unpatentable under § 103 based on Parenti and Goldsmith. J.A. 53. The Board focused on whether a POSA would have made Intex’s proposed modification to Parenti 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. J.A. 41. According to the Board, Intex did not “provide persuasive factual underpinnings for its reasoning.” *Id.* The Board rejected Chaffee on the grounds that it was not prior art. J.A. 43. The Board also gave Miller and Goldsmith minimal weight on the grounds that they dispose the pump entirely within the inflatable objection rather than only partially within it. J.A. 44–45. Elsewhere, however, the Board acknowledged that the claim language was so broad that it did “not require[]” the prior art to specifically disclose only partially

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recessing the pump. J.A. 50 (“[A]lthough *not required*, neither Parienti nor Goldsmith discloses the proposed modification, as Goldsmith discloses a configuration with the pump body disposed well inside of the bed’s mattress, rather than only partially recessed.” (emphasis added)). The Board also dismissed the “numerous other prior art’ references” cited by Intex and Dr. Beaman as failing to support Intex’s specific proposed modification on the grounds that they are factually distinguishable in certain respects. *See* J.A. 46. Based solely on its determination as to claims 1, 4, and 7–11, the Board further determined that Intex failed to prove claim 5 obvious in light of Parienti, Goldsmith and Walker. J.A. 54–55.

Intex appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(4).

STANDARD OF REVIEW

We review claim construction based on intrinsic evidence de novo. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015). 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).

DISCUSSION

Construction of “Inflatable Body” for Purposes of Grounds 3 and 4²

The claims and specification of the ’018 patent lack any limiting definition of the term, “inflatable body.” Team

² Because Intex filed its petition on March 30, 2018, the Board applied the broadest reasonable interpretation claim construction standard in effect at that time. J.A. 18–19. We therefore apply the same standard. *See, e.g., Ethicon LLC v. Intuitive Surgical, Inc.*, No. 2020-1600, 2021 WL 960766, at *3 n.4 (Fed. Cir. Mar. 15, 2021).

Worldwide points, however, to the prosecution history to argue that “inflatable body” is limited by the applicant’s assertions to the examiner during prosecution.

We have held that a statement during prosecution limits a claim where it constitutes a clear and unmistakable disavowal of claim scope. *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1370 (Fed. Cir. 2012); *see also Braintree Lab’ys, Inc. v. Novel Lab’ys, Inc.*, 749 F.3d 1349, 1355 (Fed. Cir. 2014).

In an office action dated August 22, 2006, the examiner rejected certain claims, stating that U.S. Patent No. 5,068,933 (“Sexton”) met the claim limitation, “inflatable body.” J.A. 2588. The applicant responded arguing that Sexton failed to meet that limitation because the pillow case cited “is expressly disclosed not to be substantially airtight. Consequently, the cloth pillow case of Sexton would not in and of itself expand when filled with air.” J.A. 2577. The applicant further contended, “[F]or the combined structure to be an inflatable body, it must itself meet the criterion of an inflatable body, i.e., the combined structure taken as a whole must be substantially airtight and expand when filled with air or other gas.” *Id.*

Intex argues that the Board erred in finding the applicant’s assertions to the examiner limited the claim scope. *See* Appellant’s Br. 27–28. Specifically, Intex argues that the applicant, in distinguishing Sexton, focused primarily on whether or not Sexton’s pillow case expands and fills with gas. According to Intex, the applicant never distinguished Sexton *solely* on the ground that Sexton’s pillow case lets air escape.

We conclude the applicant’s statement was a clear and unmistakable disavowal of claim scope that limits the pertinent claims by defining the claim term, “inflatable body.” We have held that an applicant’s use of the term, “i.e.,” in a definitional way with respect to a claim term may limit the claim scope. *Rembrandt Wireless Techs., LP v.*

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Samsung Elecs. Co., 853 F.3d 1370, 1376–77 (Fed. Cir. 2017) (holding that the applicant’s use of “i.e.” to define the “different types” claim language during prosecution limited the claim scope); *see also Edwards Lifesciences LLC v. Cook Inc.*, 582 F.3d 1322, 1334 (Fed. Cir. 2009) (“[U]se of ‘i.e.’ signals an intent to define the word to which it refers.”). “Whether a statement to the PTO that includes ‘i.e.’ constitutes a clear and unmistakable disavowal of claim scope depends on the context.” *Braintree*, 749 F.3d at 1355. Here, the applicant expressly set forth the “criterion,” followed by the term, “i.e.,” for an “inflatable body”: it must be “substantially airtight and expand when filled with air or other gas.” J.A. 2577. The examiner accepted that definition and allowed the patent. Under these circumstances, we affirm the Board’s construction. On this basis, we affirm the Board’s determination that Chan failed to disclose an “inflatable body.”

Obviousness Based on Grounds 5 and 6

Section 103 provides that a patent claim is unpatentable where the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious to a POSA. 35 U.S.C. § 103. In *Graham v. John Deere Co.*, the Supreme Court enumerated four factors for determining obviousness: the scope and content of the prior art, the differences between the prior art and the claims at issue, the level of ordinary skill in the pertinent art, and objective indicia of non-obviousness. 383 U.S. 1, 17–18 (1966). In *KSR International Co. v. Teleflex, Inc.*, the Court clarified that the proper approach is an “expansive and flexible” one and that the teaching, suggestion, or motivation test is not a “rigid and mandatory formula,” but a “[h]elpful insight[.]” 550 U.S. 398, 415, 418–19 (2007). The Court further explained that, “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed. *Id.* at 420.

Intex argues that the Board erred in determining that it failed to prove claims 1, 7, and 11–14 obvious. Intex points out that the claim language at issue requires that the “pump body” must be “*wholly or partially* recessed.” See, e.g., Appellant’s Br. 38 (emphasis added). According to Intex, the obviousness question at hand is therefore whether a POSA would have found it obvious to modify Parienti’s pump so that it is at least partially embedded into the mattress body rather than merely attached to the outside surface. See Appellant’s Br. 36–37. Intex further points to the “volumes of prior art,” including Goldsmith and others throughout the 1900s, that discuss recessed pump designs. *Id.* at 37. According to Intex, “[T]here should have been no question that a POSA, using her creativity and common sense,” would have arrived at the claimed inventions. *Id.* at 42. Intex contends that the Board’s analysis was “laser-focused” on the reasoning that the prior art’s repeated disclosure of *wholly*-recessed pumps detracted from Intex’s proposed modification in the form of a *partially*-recessed pump. *Id.* at 45. We agree.

We conclude that the Board erred in determining that Intex failed to prove claims 1, 7, and 11–14 obvious. The Board misapplied the obviousness standard, and misapprehended Intex’s argument, when it fixated on whether the prior art literally disclosed Intex’s theory of modifying Parienti only slightly by taking the pump attached to the outside of the mattress and recessing it partially within the mattress. Intex’s argument regarding its proposed modification showed that Parienti was already close to the challenged claims, and only a slight change was needed to satisfy the broadest reasonable interpretation of “wholly or partially” recessing a pump. This showing, together with Intex’s showing that numerous references since the late 1800s illustrated prior artisans’ intuitive desire to recess pumps to save space, satisfied Intex’s burden. The Board erred in concluding to the contrary.

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Finally, we note that the Board declined to conduct certain analyses on the grounds that they were not necessary in light of its determination. Specifically, the Board did not address Team Worldwide's evidence regarding objective indicia of non-obviousness, nor did it address whether claim 5 was obvious based on asserted ground 6. Because we hold that Intex satisfied its burden of proving obviousness, we remand for the Board to conduct further proceedings consistent with his opinion, including resolving these two issues that the Board declined to reach.

CONCLUSION

We have considered the parties' remaining arguments and find them unpersuasive. For the reasons set forth above, we affirm the Board's determination that grounds 3 and 4 fail to render the challenged claims unpatentable. We further vacate the Board's determination that claims 1, 5, 7, and 11–14 are not unpatentable based on grounds 5 and 6, and we remand for further proceedings consistent with this opinion.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

COSTS

No costs.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This brief complies with the type-volume limitation of Federal Circuit Rule 21(f) and F. R. App. P. 35(b). This brief contains 3,617 words, excluding the parts of the brief exempted by Federal Circuit Rule 32(b)(2) and Fed. R. App. P. 32(f).

2. The motion has been prepared in proportionally spaced typeface using Microsoft Word 2016 MSO in 14-point Times New Roman font as provided by Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: August 5, 2021

By: /s/ Robert M. Harkins, Jr.

Counsel for Appellee

Team Worldwide Corporation