

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 IPR2017-00096
Patent D595,074 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 “[t]he ornamental design for a gravity feed dispenser display” in U.S. Patent No. D595,074 (“the ’074 patent”). Paper 2 (“Pet.”). Gamon Plus, Inc. (“Gamon” or “Patent Owner”) did not file a Preliminary Response to the Petition. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review of the challenged claim. Paper 9 (“Dec.”).

After institution of trial, Patent Owner did not file a Patent Owner Response. Thus, any argument for patentability is deemed waived. Paper 10, 3 (“The patent owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.”). Patent Owner did, however, actively participate in the case, including participating in conference calls, filing a *pro hac vice* motion, and updating its backup counsel. *See* Papers 23–25 (filed Nov. 14, 2017). “[W]hen a Patent Owner does not abandon the contest, but chooses not to file a Patent Owner Response, the Board generally will render a final written decision, e.g., based on consideration of the Petition.” *Askeladden LLC v. McGhie*, IPR2015-00125, 3, n.6 (PTAB Mar. 11, 2016) (Paper 56). Neither party requested oral hearing and no oral hearing was held. *See* Paper 26 (vacating oral argument).

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 claims on which we instituted trial. Based on the record before us, we

determine that Petitioner has shown, by a preponderance of the evidence, that the claim of the '074 patent is unpatentable under 35 U.S.C. § 103(a).

A. Related Proceedings

The parties identify that the '074 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. 9–10; Paper 7, 1–2. Petitioner also has filed petitions challenging the patentability of related design patents, IPR2017-00091 (U.S. Patent No. D621,645), IPR2017-00094 (U.S. Patent No. D612,646), and IPR2017-00095 (U.S. Patent No. D612,644).

B. The '074 Patent and Claim

The '074 patent (Ex. 1001) issued on June 30, 2009. *Id.* at [45]. The '074 patent is titled “Gravity Feed Dispenser Display,” and the claim recites “[t]he ornamental design for a gravity feed dispenser display, as shown and described.” *Id.* at [54], [57]. The claim for the ornamental design for a gravity feed dispenser display is depicted below:

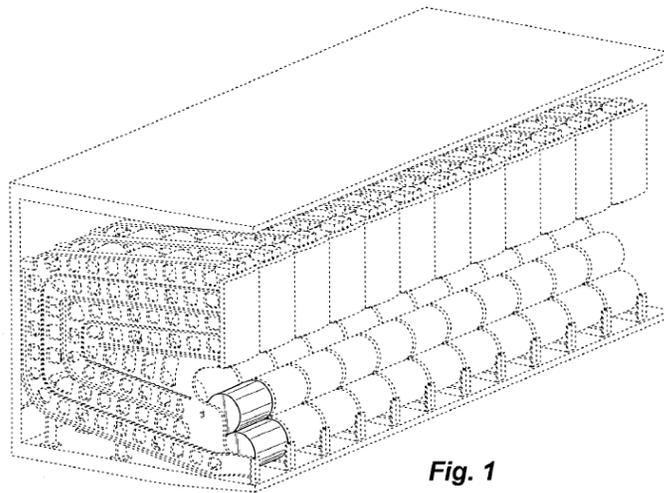


Fig. 1

Figure 1 of the '074 patent is a perspective view of a gravity feed dispenser display. *Id.* As depicted, only two cylindrical objects in the bottom front area of the design are drawn in solid lines. The majority of the structure is

illustrated by broken lines. The Description of the invention explains “[t]he broken-line disclosure in the views is understood to be for illustrative purposes only and forms no part of the claimed design, and the broken lines which abut claimed surface area are understood to represent an unclaimed boundary.” *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.”).

The claimed design of the '074 patent encompasses two embodiments. The first embodiment, represented by Figures 1 and 2 below, covers the ornamental appearance of two cylindrical objects:

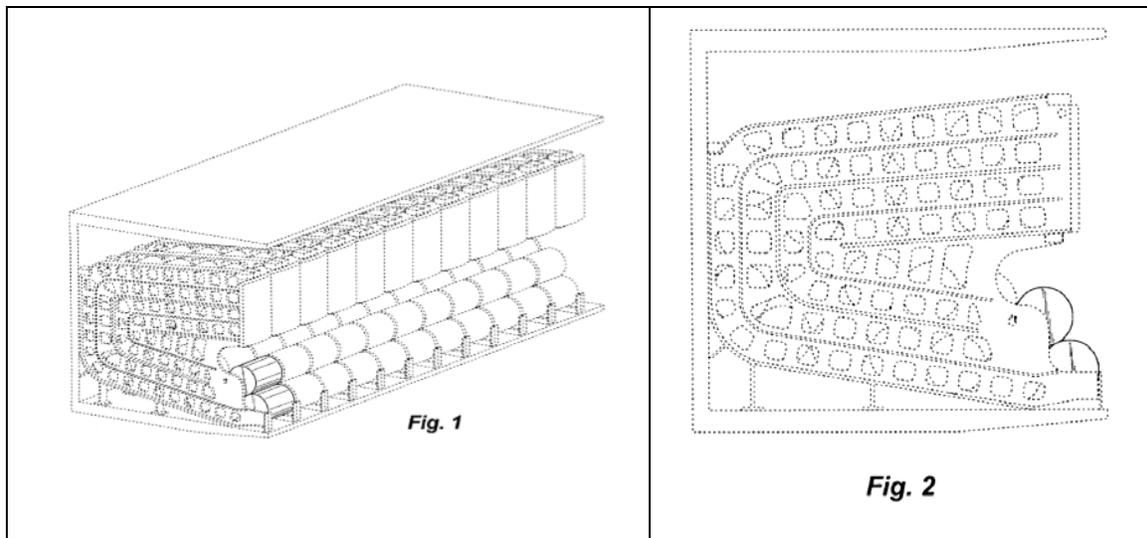


Figure 1 (left) is a perspective view of a first embodiment of a gravity feed dispenser display, and Figure 2 (right) is a left-side, elevational view of the same embodiment. Ex. 1001, Figs. 1–2.

The second embodiment, represented by Figures 3 and 4 below, covers the ornamental appearance of three cylindrical objects:

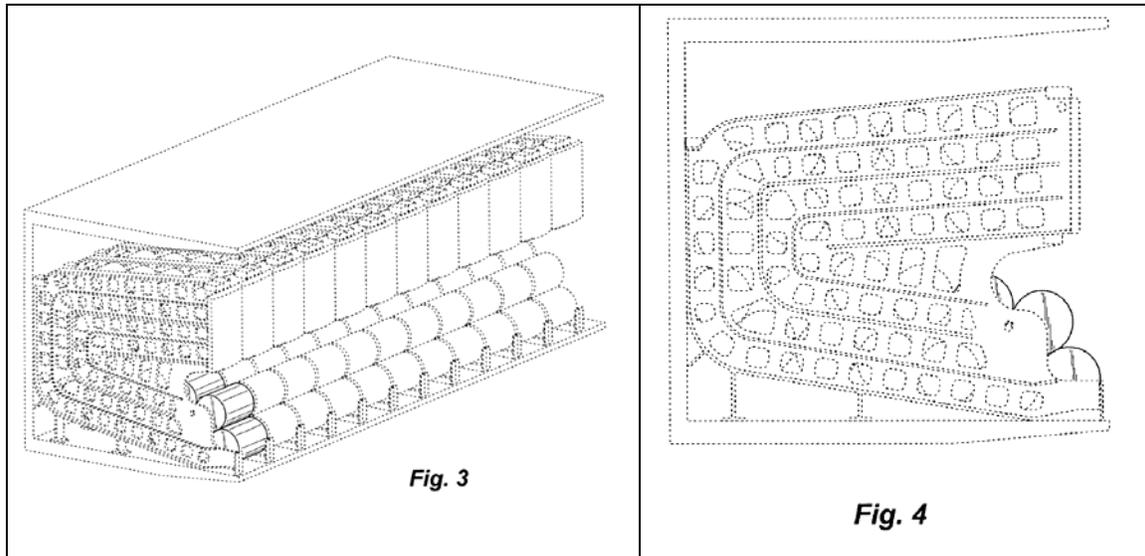


Figure 3 (left) is a perspective view of a second embodiment of a gravity feed dispenser display, and Figure 4 (right) is a left-side, elevational view of the same embodiment. *Id.* at Figs. 3–4.

C. Claim Construction

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”). When construing a design patent for an article that contains both functional and ornamental aspects, a patent owner “is entitled to a design patent whose scope is limited to [the ornamental] aspects alone and does not extend to any functional elements of the claimed article.” *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293–94 (Fed. Cir. 2010).

Petitioner proposes a description, or construction, for the claimed design. Pet. 22–27. Petitioner contends “the claim should be construed to require either two *or* three cylindrical objects as shown in the figures.” *Id.* at 25. According to Petitioner, the surfaces of each of either two or three cylindrical objects is claimed, which includes “a smooth curved surface with planar ends.” *Id.* (citing Ex. 1002 ¶ 31).

Petitioner also contends “multiple factors weigh in support of limiting the scope of the ’074 [p]atent claim to only extend to the ornamental features of either two or three cylindrical objects, but *not* the functionally driven arrangement of the cylindrical objects.” *Id.* at 24. Petitioner argues that the stacking arrangement of the cylindrical objects, or cans, “is a functional aspect of the design and should be disregarded in determining the claim scope.” *Id.* According to Petitioner, “the positioning of the cylindrical objects, including the claimed cylindrical objects, is clearly dictated by function,” because “[a]ttempting to adjust this natural arrangement of the cylindrical objects would adversely affect the dispenser’s utility as being gravity fed.” *Id.* at 23; *see also* Ex. 1002 ¶¶ 24–33.

Based on these contentions, Petitioner proposes the broadest reasonable construction of the '074 patent claim is “the ornamental design of either two or three adjacent cylindrical objects in a gravity feed dispenser display, each cylindrical object comprising a smooth curved surface with planar ends, as shown in the drawings of the '074 Patent.” Pet. 26 (emphasis omitted).

Based on the undisputed arguments above, 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 Decision. *See Egyptian Goddess*, 543 F.3d at 680. We interpret the scope of the claimed design based on the unique or distinctive shape or appearance of the cylindrical objects that is not dictated by function. Based on the final record before us, we find persuasive Petitioner’s contention that the specific arrangement of the cylindrical objects is dictated primarily by function. The precise placement of cylindrical objects is controlled by the use of the gravity feed dispenser and the natural resting position of one cylindrical object on two others. *See, e.g.*, Ex. 1001, Fig. 4.

Our invalidity analysis below focuses on what the claimed cylindrical objects contribute to the design’s overall ornamentation. *See Richardson*, 597 F.3d at 1293–94 (factoring out purely functional aspects of a design patent from an obviousness analysis). Neither party has indicated that our claim interpretation from the Decision to Institute (Dec. 3–8) is improper and we do not perceive any reason or evidence that recommends any deviation from our initial construction. We therefore convey the scope of the claim of the '074 patent as: “*the ornamental design of a gravity feed dispenser display depicting either two or three adjacent cylindrical objects,*

each cylindrical object comprising a smooth curved surface with planar ends, as shown in the drawings of the '074 patent.” See Dec. 8.

D. Instituted Grounds

We instituted trial based on the following grounds (Dec. 23):

| Reference(s) | Basis |
|------------------------------------|--------------|
| Pendergrast ² | § 102 |
| Pendergrast | § 103(a) |
| Pendergrast and Knott ³ | § 103(a) |

Petitioner also supports its challenge with a declaration by James Gandy. Ex. 1002 (“the Gandy Declaration”).

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. Principles of Law

1. Anticipation

The “ordinary observer” test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented design is compared with the alleged anticipatory reference rather than an

² Ex. 1007, U.S. Patent No. 3,203,554, issued Aug. 31, 1965 (“Pendergrast”).

³ Ex. 1009, U.S. Patent No. D178,248, issued July 10, 1956 (“Knott”).

accused design. *Int'l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Id. at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the “normal use” lifetime of the accused product, i.e., “from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article.” *Int'l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior-art and claimed designs,

[t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding of infringement” . . . so too minor differences cannot prevent a finding of anticipation.

Id. at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (1984)).

2. 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 at 1311–12 (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’s declarant, Mr. Gandy, opines:

[A] design[er] of ordinary skill in the field of the ’074 Patent would have been a person 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 also have a basic understanding of physics and or mechanics, which may include practical experience in the field of studying consumer commodity dispensers, or may include high school or introductory college level physics coursework. The designer of ordinary skill would also have a basic understanding of the dimensions and functions afforded to cans and bottles in the context of packaging.

Ex. 1002 ¶¶ 21, 22. We agree with Mr. Gandy’s undisputed testimony as to the designer of ordinary skill based on the final trial record.

C. Anticipation Based on Pendergrast

We instituted review to determine whether the claim is anticipated by Pendergrast under 35 U.S.C. § 102. Dec. 11–14, 23. Based on the final trial record before us, we are persuaded that Petitioner has established by a preponderance of the evidence that the claim is unpatentable based on Pendergrast for the reasons explained below.

1. Pendergrast (Ex. 1007)

Pendergrast is titled “Can Carton Rack,” and it discloses a combined container and dispenser rack. Ex. 1007, 1:9–13. Pendergrast’s rack is designed to “provide a combined merchandise rack and dispensing, shipping carton used on the rack to dispense cans therefrom.” *Id.* at 2:16–19. As depicted in Figure 1, below, a series of cylindrical objects are stacked to allow retrieval after they roll by gravity onto a rack.

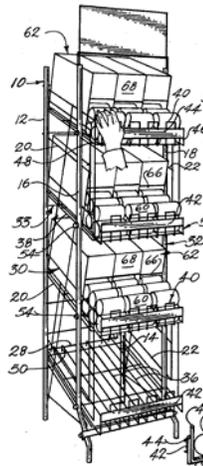


Figure 1 is a perspective view of the combined rack and dispensing carton. *Id.* at 2:49–52. As depicted in Petitioner’s annotated Figure 3, reproduced below, “cans 60 roll by gravity to the front of the shelf contacting front members 40 and remaining in position.” *Id.* at 3:60–67.

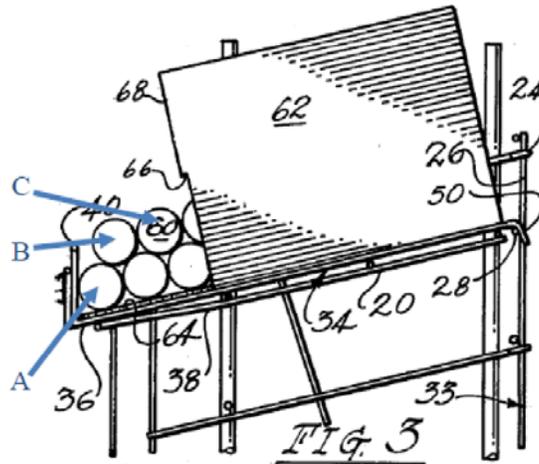


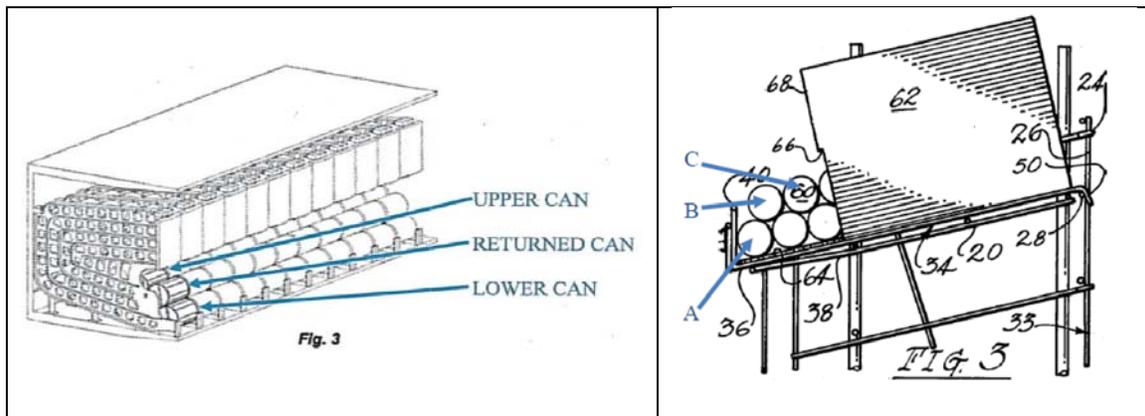
Figure 3 is an annotated, side-elevation view of the rack with a dispensing carton in place and with cans being dispensed. *Id.* at 2:55–58.

2. Analysis of Alleged Anticipation by Pendergrast

Petitioner contends that the '074 patent claim is anticipated by Pendergrast. Pet. 32. Petitioner relies on the declaration of James Gandy. Petitioner contends that to the ordinary observer, “the design disclosed by Pendergrast is substantially the same as that claimed in the '074 Patent, such

that the resemblance would deceive such an observer, inducing him to purchase one supposing it to be the other.” *Id.*

Petitioner alleges “[t]he substantial similarities between Pendergrast and the ’074 Patent are evident from a simple comparison of Figure 3 of Pendergrast to the drawings of the ’074 Patent.” *Id.* (citing Ex. 1002 ¶ 43). Petitioner contends “Pendergrast discloses an ornamental design showing both two cans and three cans as drawn and claimed in the ’074 Patent.” *Id.* Relying on annotated Figure 3 of the ’074 patent compared to annotated Figure 3 of Pendergrast, both reproduced below, Petitioner reasons that the cans identified as A, B, and C in the disclosed display unit of Pendergrast are respectively in substantially the same positions as the lower can, the returned can, and the upper can in the ’074 patent. Pet. 33–34.⁴ Further, as Mr. Gandy testifies, “the cans of Pendergrast are substantially similar, if not identical, to the ’074 Patent cylindrical objects,” whereas “[b]oth have smooth curved surfaces with planar ends.” Ex. 1002 ¶ 44.



⁴ We have considered Petitioner’s improper recitation of “[a] designer of ordinary skill in the art” (Pet. 33), but find the statement harmless error because Petitioner later applies the correct ordinary observer analysis for anticipation. *Id.* at 34 (“[A]pplying the ordinary observer test, the design claimed in the ’074 Patent is substantially identical to the design disclosed by Pendergrast.”).

Pet. 33 (providing an annotation of Figure 3 (left) of the '074 patent and Figure 3 (right) of Pendergrast).

Patent Owner has chosen not to respond to Petitioner's allegations. Accordingly, Patent Owner has waived any response to Petitioner's challenge based on Pendergrast. Paper 10, 3.

Based on the record before us, Petitioner has established persuasively that both embodiments of the '074 patent design and the design of Pendergrast are substantially the same under the ordinary observer analysis. Both designs are for a gravity feed dispenser display. Petitioner establishes that the ornamental design of the cans of Pendergrast are substantially identical to the '074 patent cylindrical objects, with each having a smooth curved surface with planar ends. *See* Ex. 1003, Fig. 1, 3; Ex. 1002 ¶¶ 42–47. Further, although not required under our claim construction, the placement and positioning of Pendergrast's cylindrical objects are also substantially the same as that of the '074 patent. *See* Ex. 1002 ¶ 46.

Accordingly, based on the final record before us, Petitioner has established by a preponderance of the evidence that Pendergrast anticipates the claim of the '074 patent.

D. Obviousness Based on Pendergrast Alone or in View of Knott

We instituted review on the basis that the claimed design for the '074 patent would have been obvious to a designer of ordinary skill based on Pendergrast alone, or in view of Knott. Dec. 14–18, 23. Based on the final trial record before us, we are persuaded that Petitioner has established by a preponderance of the evidence that the claim is unpatentable over Pendergrast alone or over Pendergrast and Knott for the reasons explained below. *See* Pet. 35–40.

1. Knott (Ex. 1009)

Knott is titled “Bin Dispenser For Small Cylindrical Articles” and claims an “ornamental design for a bin dispenser for small cylindrical articles, as shown.” Ex. 1009. Figure 1 of Knott is reproduced below.

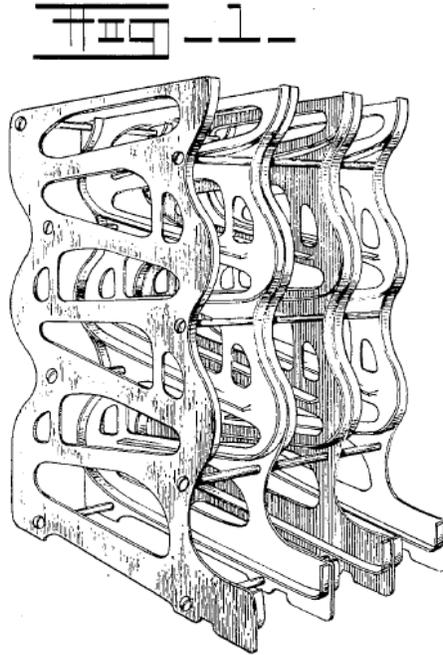


Figure 1 of Knott is depicted above showing a dispenser. *Id.* at Fig. 1. Knott discloses that “Figure 1 is a front perspective of a bin dispenser for small cylindrical articles.” *Id.* Knott depicts a serpentine dispenser having a cylindrical can dispensing area beneath the loading area. *Id.*; *see also* Pet. 18–19 (citing Ex. 1002 ¶ 40).

2. Analysis of Alleged Obviousness Based on Pendergrast Alone or in View of Knott

Petitioner contends the ornamental design of the '074 patent would have been obvious to a designer of ordinary skill based on Pendergrast alone, or based on Pendergrast in view of Knott. Pet. 35–40. Petitioner relies on a comparison of the combined ornamental features of Pendergrast

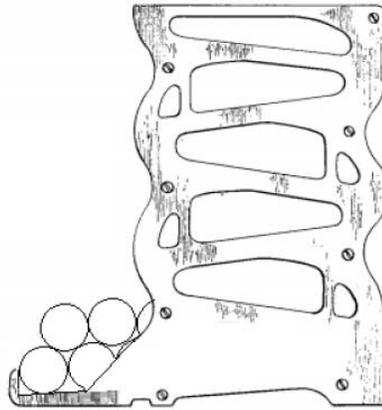
and Knott with the design of the '074 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 48–54).

Petitioner contends that Pendergrast discloses the same overall visual impression “and is therefore a suitable primary reference.” *Id.* at 36. Petitioner relies in part on its anticipation analysis of Pendergrast and further argues that “any differences are *de minimis*.” *Id.* Petitioner argues that “[t]o the extent any differences exist, they are minor” and “[d]esign incentives and market considerations would have prompted adaption of Pendergrast.” *Id.*

For similar reasons as discussed above with respect to anticipation based on Pendergrast, we likewise find Petitioner’s contention that Pendergrast has basically the same design characteristics as the claimed design persuasive based on the final record before us. Further, we also find persuasive Petitioner’s contention that Pendergrast alone creates a design that has the same overall visual appearance as the claimed design.

Petitioner also relies on the combination of Pendergrast and Knott, with Knott serving as a secondary reference. *Id.* at 37–38. According to Petitioner, Knott provides support for modifying Pendergrast to have channels and specifically a front display area that would occlude portions of the cans in the same fashion as the unclaimed broken lines of the '074 patent. *Id.* at 38. Petitioner contends “[t]he design disclosed in Knott is so related to Pendergrast that a designer of ordinary skill in the art would be motivated to combine features from one with features from the other.” *Id.* at 37–38. Petitioner contends that both designs disclose a “dispenser for small cylindrical articles” (Ex. 1009, Description), and “[t]hus, the appearance of ornamental features, such as cans disposed in a dispensing

channel, would suggest the application of the features of Knott to Pendergrast.” Pet. 38. Petitioner proposes a hypothetical combination of Pendergrast and Knott “combining the dispenser disclosed by Knott with the design of Pendergrast” as depicted below. *Id.* at 39.



Hypothetical Reference: Pendergrast in view of Knott

Petitioner’s hypothetical combination of Pendergrast and Knott is reproduced above. *Id.* Petitioner contends that “[a] designer of ordinary skill would find the hypothetical reference of the ornamental components of the stacked cans in Pendergrast combined with the serpentine channels of Knott to be the same as the claimed design of the ’074 Patent.” *Id.* at 39–40. As explained by Mr. Gandy, modifying Pendergrast to have channels similar to those depicted in Knott would be obvious given the similarity in field, purpose, and design of the two references.” Ex. 1002 ¶ 53. Further, Mr. Gandy testifies that “combining the dispenser disclosed by Knott with the design of Pendergrast merely requires substituting the dispenser of Knott for the box shown in Pendergrast.” *Id.*

Petitioner has established persuasively, based on the final record before us, that the design disclosed in Knott is so related to Pendergrast that

a designer of ordinary skill in the art would have been motivated to combine features from one with features from the other. We also are persuaded that Petitioner has explained sufficiently why a designer of ordinary skill would have combined the ornamental components of the stacked cans of Pendergrast with the serpentine channels of Knott to also arrive at the claimed design of the '074 patent. We are persuaded that Petitioner has established that the claimed design would have been obvious to a designer of ordinary skill at the time of the invention based on the combination of Pendergrast and Knott.

Accordingly, based on the final record, we are persuaded that Petitioner has established by a preponderance of the evidence that the claim of the '074 patent would have been obvious to a designer of ordinary skill in the art at the time of the invention over the teachings of Pendergrast alone, and over the teachings of Pendergrast and Knott.

III. CONCLUSION

We conclude that Petitioner has demonstrated by a preponderance of the evidence that the claim of the '074 patent is unpatentable under 35 U.S.C. § 102 based on Pendergrast. We also conclude that Petitioner has demonstrated by a preponderance of the evidence that the claim of the '074 patent is unpatentable under 35 U.S.C. § 103 based on Pendergrast alone, and Pendergrast and Knott.

IV. ORDER

Accordingly, it is:

ORDERED that the claim of the '074 patent is unpatentable; and
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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