

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 IPR2017-00095
Patent D621,644 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 dispenser and display device” illustrated in U.S. Patent No. D621,644 S (“the ’644 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 8 (“Dec.”).

After institution of trial, Patent Owner did not file a Patent Owner Response. Thus, any argument for patentability is deemed waived. Paper 9, 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 22, 23 (filed Nov. 14, 2017); Ex. 2001. “[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 24 (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 claim 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 '644 patent is unpatentable under 35 U.S.C. § 103(a).

A. Related Proceedings

The parties identify that the '644 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. 8–9; Paper 6, 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 IPR2017-00096 (U.S. Patent No. D595,074).

B. The '644 Patent and Claim

The '644 patent (Ex. 1001) issued August 17, 2010. *Id.* at [45]. The '644 patent is a design patent that claims priority to and is a continuation of utility patent application no. 12/429,861 (“the '861 App.”) (Ex. 1004). *Id.* at [63]. The '644 patent is titled “Dispenser and Display Device,” and the claim recites “[t]he ornamental design for a dispenser and display device, as shown and described.” *Id.* at [57]. Figures 1 and 2 of the ornamental design for a dispenser display device are depicted below:

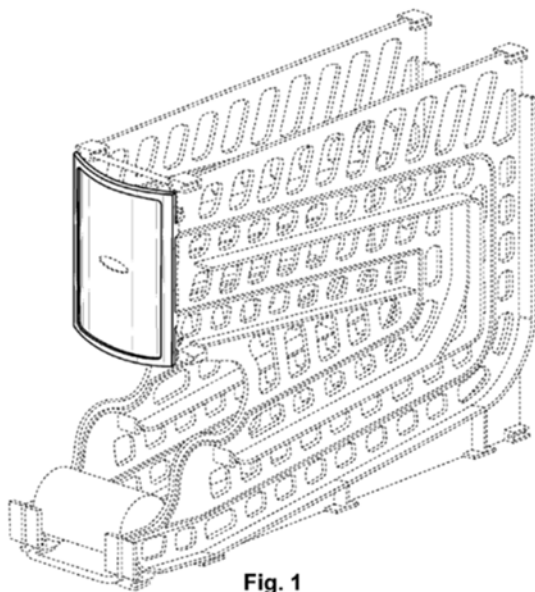


Fig. 1

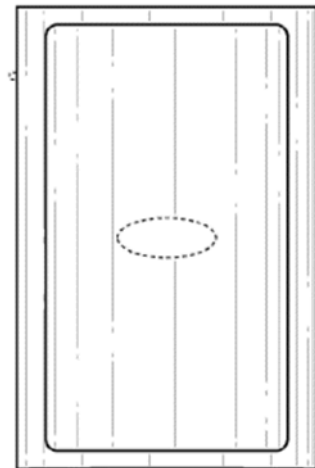


Fig. 2

Ex. 1001, Figs. 1–2. Figure 1 of the '644 patent is a perspective view of a gravity feed dispenser display and Figure 2 is a front view. *Id.* As depicted, certain elements in the front of the design are drawn in solid lines, but much of the rearward structure is illustrated by broken lines. The Description of the invention explains: “The broken line showing of the aperture, latches, arms and frame is for the purpose of illustrating portions of the dispenser and display device and forms no part of the claimed design.” *Id.* at Description. *See* 37 C.F.R. § 1.152; *see also* MPEP § 1503.02, Subsection III (“Unclaimed subject matter may be shown in broken lines for the purpose of illustrating the environment in which the article embodying the design is used. Unclaimed subject matter must be described as forming no part of the claimed design or of a specified embodiment thereof.”).

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

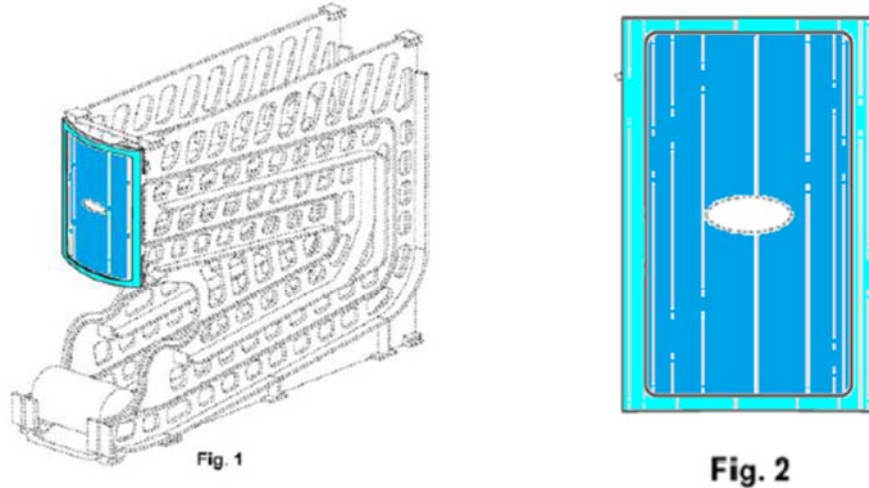
with that design”). When construing a design patent for an article that contains both functional and ornamental aspects, a patent owner “is entitled to a design patent whose scope is limited to [the ornamental] aspects alone and does not extend to any functional elements of the claimed article.”

Richardson v. Stanley Works, Inc., 597 F.3d 1288, 1293–94 (Fed. Cir. 2010).

Petitioner provides a proposed description of the claimed design. Pet. 12. Petitioner contends that the ’644 patent “claims the design of a curved door/display with a slightly raised frame,” and “the claimed design constitutes an arcuate display area with a raised frame surrounding the display area.” *Id.* Petitioner notes that “[a]ll other aspects of the dispenser and display device are shown in broken lines and expressly disclaimed as ‘form[ing] no part of the claimed design.’” *Id.* at 12–13 (quoting Ex. 1001, Description).

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. As shown in Figure 1 of the ’644 patent above, the patent design illustrates and claims certain front portions of a dispenser and display device. From top to bottom, an opaque rectangular surface area that is a curved door/display, with the area being symmetric and curved convexly forward. Ex. 1001, Figs. 1, 6; Pet. 12. For ease of reference, we refer to this portion as “the label area.” The label area is taller vertically than it is wide horizontally. *See* Ex. 1001, Fig. 2. The label area has a frame, which surrounds its viewing area, and the framed edges of the display are curved at the edges. *See* Fig. 2; Pet. 24.

Petitioner’s annotated Figures 1 and 2, below, provide a visual representation of those portions of the design that are claimed.



'644 Patent, Figures 1 and 2

Pet. 12 (providing an annotation of Figures 1 and 2 of the '644 patent).

D. Instituted Grounds

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

Reference	Basis
Linz ²	§ 103(a)
Johnson ³	§ 103(a)

Petitioner also supports its challenge with a declaration by Mr. James Gandy. Ex. 1002.

² U.S. Patent No. D405,622, Arthur W. Linz, issued February 16, 1999 (“Linz,” Ex. 1007).

³ U.S. Patent No. 6,991,116 B2, Terry J. Johnson, et al., issued January 31, 2006 (“Johnson,” Ex. 1011).

II. ANALYSIS

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

A. Obviousness

In a challenge to a design patent based on obviousness under 35 U.S.C. § 103, the ultimate inquiry is “whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (quoting *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996)). This obviousness inquiry consists of two steps. *Apple*, 678 F.3d at 1329. In the first step, a primary reference (sometimes referred to as a “*Rosen* reference”) must be found, “the design characteristics of which are basically the same as the claimed design.” *Id.* (quoting *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982)). This first step is itself a two-part inquiry under which “a court must both ‘(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates ‘basically the same’ visual impression.” *High Point Design*, 730 F.3d 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] designer of ordinary skill in the field of the ’644 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. Obviousness Based on Linz

We instituted review on the basis that the claimed design for the ’644 patent would have been obvious to a designer of ordinary skill based on Linz. Dec. 17, 32. 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 Linz for the reasons explained below. *See* Pet. 37–39.

1. Linz (Ex. 1007)

Linz is titled “Display Rack” (Ex. 1007, [54]) and claims an “ornamental design for a display rack” (*id.* at [57]). Linz issued on February 16, 1999, making it prior art to the ’644 patent under pre-AIA 35 U.S.C. § 102(b). Linz discloses an ornamental design for a display rack having an access door / label area with a symmetric, convex arcuate shape, with a central apex that extends forward. *Id.* at Fig. 1. Figure 1 of Linz is reproduced below.

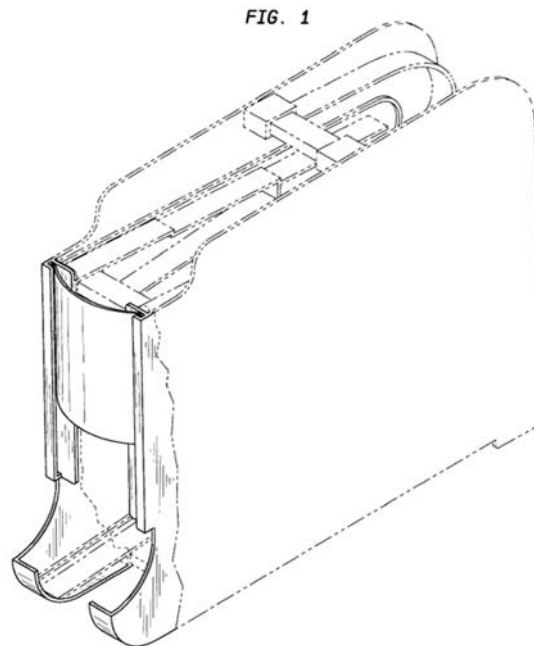


Figure 1 of Linz. *Id.*

2. Analysis of Obviousness Based on Linz

Petitioner contends the ornamental design of the ’644 patent would have been obvious to a designer of ordinary skill based on Linz. Pet. 37–39 (citing Ex. 1002 ¶ 53). Specifically, Petitioner argues that, “Linz discloses a dispenser that includes a symmetric, convex arcuate shape, with a central apex that extends forward.” *Id.* at 38 (citing Ex. 1002 ¶ 53, Ex. 1007, Fig. 1. Additionally, Petitioner argues that because Linz is so similar to the design

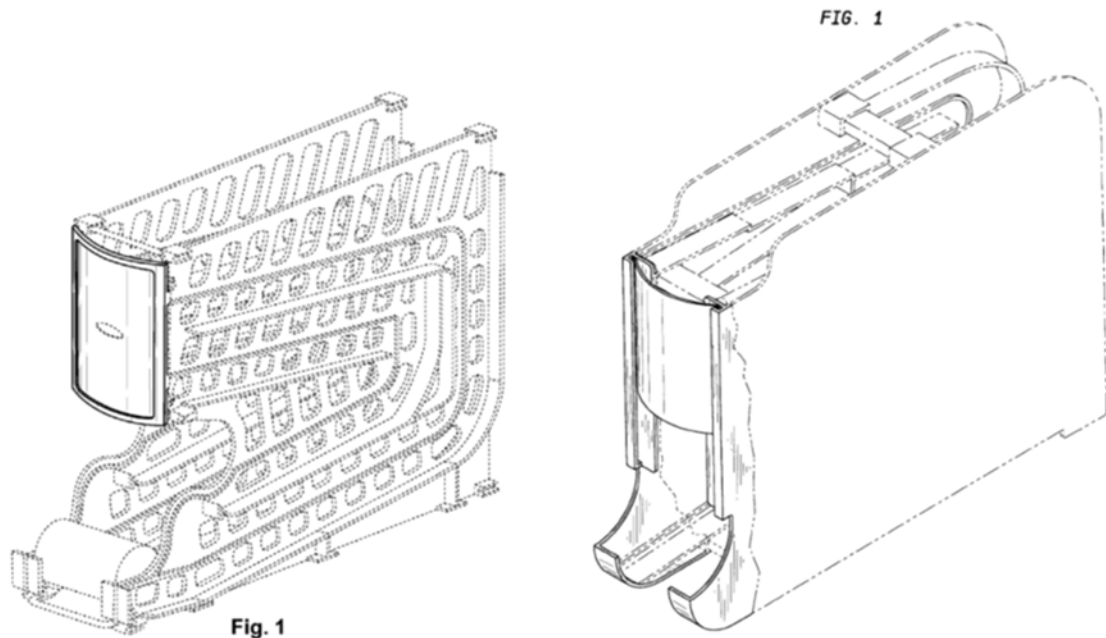
claimed in the '644 patent, no secondary reference is needed. *Id.* at 38.

Petitioner argues that there is only a minor difference between Linz and the claimed design of the '644 patent—that the frame portions in Linz do not extend across the top and bottom edges of the display area. *Id.* at 39.

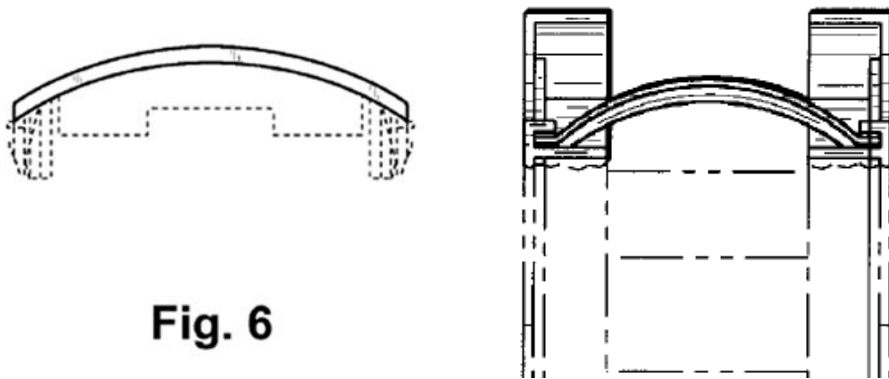
Petitioner argues that “[a] designer of ordinary skill in the art would understand and appreciate that the stops could be extended across the entirety of the bottom edge of the display area in order to better secure the display from vertical movement.” *Id.* A “designer of ordinary skill in the art would also understand and appreciate that extending the frame portion along the top edge would advantageously secure the display from moving in the vertical direction, thereby preventing tampering or manipulation of the advertisement, logo, or other message provided on the display.” *Id.*

Patent Owner has chosen not to respond to Petitioner’s allegations. Accordingly, Patent Owner has waived any response to Petitioner’s challenge based on Linz. Paper 9, 3.

We agree that Linz properly serves as a primary reference because it creates basically the same visual impression as the claimed design to the ordinary designer. *In re Rosen*, 673 F.2d at 391. A side-by-side comparison reveals that there are only minor differences in the claimed design of the '644 patent and the corresponding portions of Linz. Figure 1 of the '644 patent (left) and Figure 1 of Linz (right) are reproduced below.



Ex. 1001, Fig. 1; Ex. 1007, Fig. 1. We also reproduce the top view of the '644 patent (left) and a similar top view of Linz (right) below.



Ex. 1001, Fig. 6 (top view); Ex. 1008, Fig. 4 (modified top plan view). Both designs have an opaque rectangular surface area, a label area that is symmetric and curved convexly forward. The label area for both is similarly taller vertically than it is wide horizontally. Given the close similarity between Linz and the claimed design of the '644 patent, we determine that Petitioner establishes sufficiently based on the final record that Linz creates basically the same visual impression as the patented design.

Additionally, Petitioner establishes sufficiently how and why a designer of ordinary skill in the art would have modified the Linz design to arrive at the claimed design of the '644 patent. *See* Pet. 38–39. Specifically, Petitioner notes that Linz discloses stops extending inward from the bottom ends of the frame portions in order to restrain vertical movement, and Petitioner argues that a designer of ordinary skill in the art would extend the stops in Linz across the entirety of the bottom edge of the display area in order to create a design that secures the display from vertical movement. *Id.* at 39. Petitioner also establishes sufficiently how the “claimed design would have been obvious to a designer of ordinary skill” (*Apple*, 678 F.3d at 1329), by arguing that the design modification would be particularly obvious considering three of the four sides of the display are already restrained from movement. Pet. 39.

Accordingly, based on the final record, we are persuaded that Petitioner has established by a preponderance of the evidence that the claim of the '644 patent would have been obvious to a designer of ordinary skill in the art at the time of the invention over the teachings of Linz.

D. Obviousness Based on Johnson

We instituted review on the basis that the claimed design for the '644 patent would have been obvious to a designer of ordinary skill based on Johnson. Dec. 23–28. 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 Johnson for the reasons explained below. *See* Pet. 46–50.

1. Johnson (Ex. 1011)

Johnson is titled “Multi-Chute Gravity Feed Dispenser Display.” Ex. 1011, [54]. The listed inventor on the face of Johnson, Terry J. Johnson, also is the named inventor of the challenged ’644 patent. *Compare id.* at [73], [75], *with* Ex. 1001, [75]. Johnson issued on January 31, 2006, thus making it prior art to the ’644 patent under pre-AIA 35 U.S.C. § 102(b).

Figure 3A of Johnson is reproduced below.

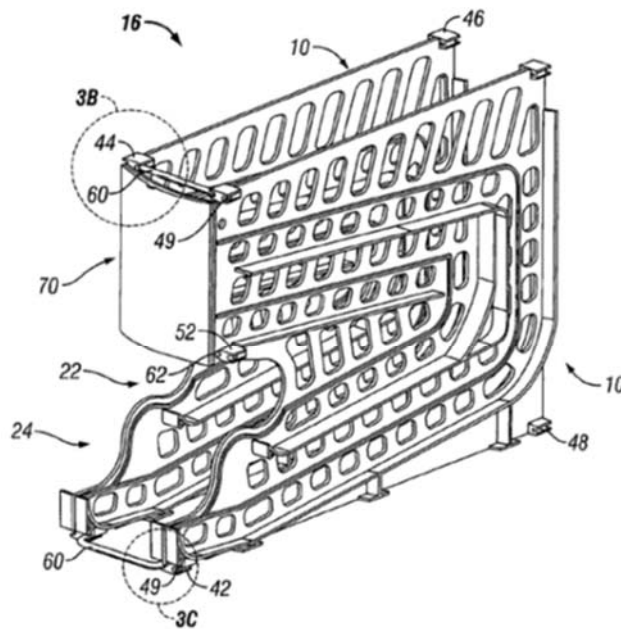


FIG. 3A

Ex. 1011, Fig. 3A. As shown above, Johnson discloses a front face that is “configured as slightly curved to present a pleasing appearance and increased surface area for advertising display purposes.” *Id.* at 14:2–4. Johnson further discloses “a plastic or paper sheet having tabs to interlink with corresponding slots on the access door 70.” *Id.* at 11:22–23. An embodiment of the access door, access door 570, is illustrated in Figure 24C reproduced below.

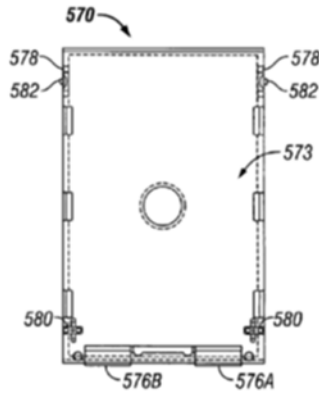


FIG. 24C

Id. at Fig. 24C. As shown above in Figure 24C, Johnson discloses that access door 570 provides tabs and other retention devices for securing a plastic sheet or paper sheet within. *Id.* at 13:65–14:22.

2. Analysis of Obviousness Based on Johnson

Petitioner contends the ornamental design of the '644 patent would have been obvious to a designer of ordinary skill based on Johnson. Pet. 46–56 (citing Ex. 1002 ¶¶ 65–67). Petitioner argues Johnson discloses the same overall visual impression as the design claimed in the '644 patent. *Id.* at 46 (citing Ex. 1002 ¶ 65).

Petitioner argues that “Johnson discloses a very similar gravity feed dispenser as that shown in the '644 patent, including a substantially similar arcuate display.” *Id.* at 46 (citing Ex. 1002 ¶ 65; Ex. 1011, 13:65–14:4). Additionally, Petitioner argues that because Johnson is so similar to the design claimed in the '644 patent, no secondary reference is needed. *Id.* at 48. Petitioner contends that Johnson discloses securing an advertisement, such as a sheet of paper, within a viewing area by slots or other means along the edges of the display area. *Id.* Petitioner argues that “[a] designer of ordinary skill in the art would understand and appreciate that the appearance

of Johnson could be modified by using a frame instead of securing slots to secure an advertisement.” *Id.* A “designer would merely have to replace the tabs disclosed in Johnson with a frame to arrive at the claimed design of the ’644 patent.” *Id.* at 48–49.

Patent Owner has chosen not to respond to Petitioner’s allegations. Accordingly, Patent Owner has waived any response to Petitioner’s challenge based on Johnson. Paper 9, 3.

Based on the final trial record before us, Petitioner has established that Johnson may properly serve as a primary reference because it creates basically the same visual impression as the claimed design to the ordinary designer. *In re Rosen*, 673 F.2d at 391. A side-by-side comparison reveals that there are only minor differences in the claimed design of the ’644 patent and the corresponding portions of Johnson.

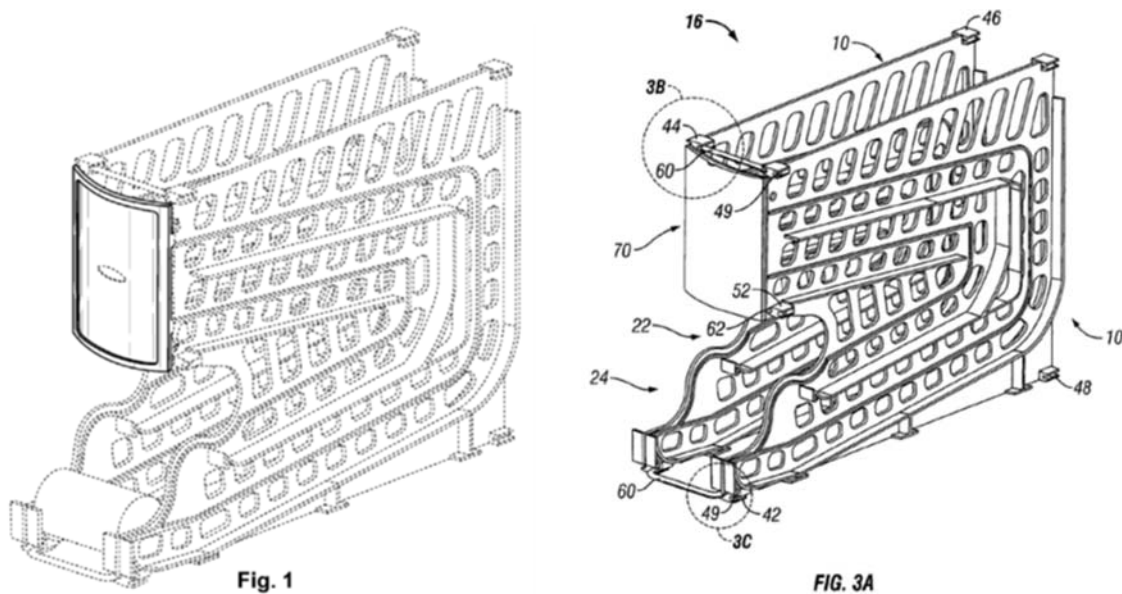


Figure 1 of the ’644 patent (left) and Figure 3A of Johnson (right) are reproduced above. Ex. 1001, Fig. 1; Ex. 1011, Fig. 1. We also reproduce

the claimed top view of the '644 patent (left) and a similar top view of Johnson (right) below.

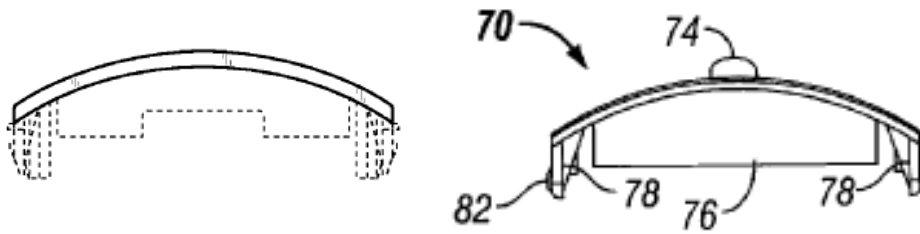


Fig. 6

FIG. 5D

Depicted left is Ex. 1001, Fig. 6 (top view) and depicted to the right is Ex. 1011, Fig. 5D (top view of access door). Both designs have an opaque rectangular surface area, a label area that is symmetric and curved convexly forward. The label area for both is similarly taller vertically than it is wide horizontally. Given the close similarity between Johnson and the claimed design of the '644 patent, we determine Petitioner establishes that only minor modifications to the label area of Johnson exist and Johnson creates basically the same visual impression as the patented design.

Additionally, Petitioner establishes persuasively how and why a designer of ordinary skill in the art would have made the minor modifications to the Johnson design to arrive at the claimed design of the '644 patent. *See* Pet. 48–49. Specifically, Petitioner notes that “Johnson could be modified by using a frame instead of securing slots to secure an advertisement.” *Id.* at 48 (citing Ex. 1002 ¶ 67); *see also* Ex. 1011, 11:14–24. Petitioner’s argument also establishes how the “claimed design would have been obvious to a designer of ordinary skill” (*Apple*, 678 F.3d at 1329).

Pet. 48 (citing Ex. 1002 ¶ 67). As explained by Mr. Gandy, “a designer of ordinary skill in the art would also understand and appreciate that adjustments to the frame would advantageously better secure the display,” and that “[a] designer would merely have to replace the tabs disclosed in Johnson with a frame to arrive at the claimed design.” Ex. 1001 ¶ 67.

Accordingly, based on the final record, we are persuaded that Petitioner has established by a preponderance of the evidence that the claim of the ’644 patent would have been obvious to a designer of ordinary skill in the art at the time of the invention over the teachings of Johnson.

III. CONCLUSION

We conclude that Petitioner has demonstrated by a preponderance of the evidence that the claim of the ’644 patent is unpatentable under 35 U.S.C. § 103 based on Linz. We also conclude that Petitioner has demonstrated by a preponderance of the evidence that the claim of the ’644 patent is unpatentable under 35 U.S.C. § 103 based on Johnson.

IV. ORDER

Accordingly, it is:

ORDERED that the claim of the ’644 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.

IPR2017-00095
Patent D621,644 S

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