

No.

IN THE
Supreme Court of the United States

GAMON PLUS, INC.

Petitioner

v.

CAMPBELL SOUP COMPANY,
CAMPBELL SALES COMPANY AND
TRINITY MANUFACTURING, LLC,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW L. TIAJOLOFF

Counsel of Record

Tiajolloff & Kelly LLP
Chrysler Building, 37th Floor
405 Lexington Avenue
New York, New York 10174
(212) 490-3285
atiajolloff@tkiplaw.com

Counsel for Petitioner

QUESTION PRESENTED

1. Whether this Court should vacate the judgment below in view of its recent decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), and remand so that the United States Court of Appeals for the Federal Circuit may in turn order the Director (or Acting Director) to decide whether to rehear the petition filed by Respondents Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, LLC.

PARTIES TO THE PROCEEDING

Petitioner Gamon Plus, Inc. was the Patent Owner in the *inter partes* reviews before the Patent Trial and Appeal Board, and the appellee in the Federal Circuit.

Respondents Campbell Sales Company, Campbell Soup Company, and Trinity Manufacturing, LLC were the Petitioners in the *inter partes* reviews before the Patent Trial and Appeal Board, and the appellants in the Federal Circuit.

RULE 29.6 STATEMENT

Petitioner, Gamon Plus, Inc., has no parent corporation, and no publicly-traded company owns more than ten percent or more of its stock.

RELATED PROCEEDINGS

The following proceedings directly relate to this case within the meaning of U.S. Supreme Court Rule 14.1(b)(iii):

- *Campbell Soup Company et al. v. Gamon Plus, Inc.*, Nos. 2020-2344, 2021-1019, U.S. Court of Appeals for the Federal Circuit, decided August 19, 2021, mandate issued October 29, 2021.
- *Campbell Soup Company et al. v. Gamon Plus, Inc.*, No. IPR2017-00091, Patent Trial and Appeal Board, Final Written Decision entered July 29, 2020.
- *Campbell Soup Company et al. v. Gamon Plus, Inc.*, No. IPR2017-00094, Patent Trial and Appeal Board, Final Written Decision entered July 29, 2020.

A case not directly related to this case but that involves the same patents is:

- *Gamon Plus, Inc. et al. v. Campbell Soup Company, et al.*, Case No. 15-CV-8940-CRN/YBK (N.D. IL).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
RELATED PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
TABLE OF APPENDICES	viii
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE PETITION	5
1. Under <i>Arthrex</i> , the U.S. Constitution requires reconsideration by the Director for a finding of patent invalidity in an inter partes review.....	5
2. Patent Owner Gamon never had any possibility of requesting reconsideration of the Final Written Decisions here by the Director.....	6
3. The Federal Circuit ruling on appeal does not remedy the unconstitutional nature of the inter partes proceedings here.	7

4. This Honorable Court has applied <i>Arthrex</i> and vacated and remanded in several similarly situated cases.....	8
5. A GVR should be granted in this case.....	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Arthrex, Inc. v. Smith & Nephew, Inc.</i> , 941 F.3d 1320 (Fed. Cir. 2019)	3, 9, 10
<i>Campbell Soup Co. v. Gamon Plus, Inc.</i> , 10 F.4th 1268 (Fed. Cir. 2021).....	1
<i>Campbell Soup Co. v. Gamon Plus, Inc.</i> , 939 F.3d 1335 (Fed. Cir. 2019)	3
<i>Chevron Oronite Co. LLC v. Infineum USA L.P.</i> , 2019 WL 5806946 (Patent Tr. & App. Bd., November 6, 2019).....	10
<i>Gamon Plus, Inc. et al. v. Campbell Soup Company, et al.</i> , Case No. 15-CV-8940-CRN/YBK (N.D. IL, filed October 8, 2015)	2
<i>Hirshfeld v. Implicit, LLC</i> , 142 S. Ct. 394, 211 L. Ed. 2d 210 (2021)	11
<i>Iancu v. Fall Line Pats., LLC</i> , 141 S. Ct. 2843, 210 L. Ed. 2d 957 (2021)	11
<i>Iancu v. Luoma</i> , 141 S. Ct. 2845, 210 L. Ed. 2d 956 (2021)	11
<i>Infineum USA v. Chevron Oronite Co.</i> , No. 21-350, 2021 WL 5869398 (U.S. Sup. Ct., Dec. 13, 2021)	9, 10
<i>Infineum USA v. Chevron Oronite Co. LLC</i> , 844 F. App'x 297 (Fed. Cir. 2021)	10
<i>Lawrence v. Chater</i> , 516 U.S. 163 (1996)	12
<i>Polaris Innovations Ltd. v. Kingston</i>	

<i>Tech. Co., Inc.</i> , 141 S. Ct. 2844, 210 L. Ed. 2d 955 (2021)	11
<i>RPM Int'l Inc. v. Stuart Tr. for Cecil G. Stuart & Donna M. Stuart Revocable Living Tr. Agreement</i> , 141 S. Ct. 2844, 210 L. Ed. 2d 957 (2021)	11
<i>United States v. Arthrex</i> , 141 S. Ct. 1970, 210 L. Ed. 2d 268 (2021)	<i>passim</i>

Statutes

28 U.S.C. §1254(1)	1
35 U.S.C. sec. 6	4, 6
35 U.S.C. sec. 6(c).....	4, 6
35 U.S.C. sec. 103	3
U.S. Const., Appointments Clause	<i>passim</i>
U.S. Const. Article II	7

TABLE OF APPENDICES

page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, DATED AUGUST 19, 2021	1a
APPENDIX B — OPINION OF THE UNITED STATES PATENT AND TRADEMARK OFFICE, DATED JULY 29, 2020	18a
APPENDIX C — OPINION OF THE UNITED STATES PATENT AND TRADEMARK OFFICE, DATED JULY 29, 2020	105a
APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED OCTOBER 22, 2021	193a
APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	195a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-to 17a) is reported at 10 F.4th 1268 (Fed. Cir. 2021). The Federal Circuit order denying rehearing *en banc* (App. 193a to 194a) is unreported. The Patent Trial and Appeal Board Final Written Decisions (App. 18a to 104a and App. 105a to 192a) are unreported.

JURISDICTION

The Opinion of the Federal Circuit Court of Appeals was issued on August 19, 2021, and a timely petition for rehearing *en banc* was denied on October 22, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved here are provided in Appendix E, App. 195a to 197a.

INTRODUCTION

Petitioner Gamon Plus, Inc. respectfully requests that this Honorable Court, pursuant to the holding in *United States v. Arthrex*, 141 S. Ct. 1970 (2021), vacate the Federal Circuit decision below and remand this matter to the U.S. Patent & Trademark Office.

STATEMENT OF THE CASE

The decision of the Federal Circuit for which a writ of certiorari is sought was in an appeal from Final Written Decisions issued July 29, 2020 by the Patent Trial and Appeal Board (“PTAB”) in *inter partes* reviews nos. IPR2017-00091 and IPR2017-00094, which were instituted against U.S. Design Patent Nos. D621,645 and D612,646 (here referred to as “the ‘645 and ‘646 patents”).

Petitioner Gamon, as owner of the ‘645 and ‘646 patents, had sued the Respondents Campbell Soup Company and Trinity Manufacturing, LLC (collectively “Campbell Soup Respondents”) for infringement of the ‘645 and ‘646 patents in the United States District Court for the Northern District of Illinois. See *Gamon Plus, Inc. et al. v. Campbell Soup Company, et al.*, Case No. 15-CV-8940-CRN/YBK (N.D. IL, filed October 8, 2015). The Campbell Soup Respondent subsequently filed petitions for *inter partes* review of the ‘645 and ‘646 patents that were instituted by the PTAB, and the District Court action was stayed pending their resolution. See, *id.*, CM/ECF paper 96.

On July 29, 2020, the PTAB issued the Final Written Decisions here at issue (the “2020 Final Written Decisions”), which held all challenges inadequate, and that the ‘645 and ‘646 patents were both valid.¹ See App. 101a to 102a; App. 190a.

The Campbell Soup Respondents appealed, and, on August 19, 2021, the Federal Circuit issued a decision in which the Court modified almost all of the fact findings of the PTAB in the 2020 Final Written Decisions, and held the ‘645 and ‘646 patents invalid as obvious under 35 U.S.C. sec. 103. See App. 17a.

A request for *en banc* review was denied on October 22, 2020. See App. 193a to 194a.

Less than two months before that Federal Circuit decision, this Court had issued its decision in *United States v. Arthrex* vacating a lower Federal Circuit decision and judgment in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). See, *Arthrex*, 141 S. Ct. at 1988. First addressing “whether the [Patent Trial and Appeal Board’s (“PTAB’s”)] structure is consistent with the Appointments Clause”, *United States v. Arthrex*, 141 S. Ct. at 1978, this Court held “that the unreviewable authority wielded by [Administrative Patent Judges

¹ The ‘645 and ‘646 patents had also previously been held valid by the PTAB in Final Written Decisions issued April 9, 2018, IPR2017-00091, Paper 84; IPR2017-00094, Paper 84. Those 2018 Final Written Decisions were partially reversed and remanded by the Federal Circuit in *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335, 1342 (Fed. Cir. 2019). On remand, the IPRs resulted in the 2020 Final Written Decisions here at issue.

(“APJs”)] during *inter partes* review is incompatible with their appointment by the Secretary to an inferior office.” *Id.* at 1985. For an appropriate remedy for that constitutional violation, this Court went on to hold that a patent owner aggrieved by the result of an *inter partes* review (“IPR”) “is not entitled to a hearing before a panel of new APJs” under the Constitution, but, rather, that “the appropriate remedy is a remand to the Acting Director for him to decide whether to rehear the petition”. *Id.* at 1987-88. This Court reasoned further that “[w]hat matters is that the Director have the discretion to review decisions rendered by APJs” and that “[i]n this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.” *Id.* at 1988.

At no point in the *inter partes* procedures here did Petitioner Gamon have an opportunity, or even cause, to request review by the Director of the Final Written Decisions.

At the time when the PTAB issued the 2020 Final Written Decisions, Patent Owner Gamon was precluded from requesting reconsideration by the Director under 35 U.S.C. sec. 6(c), then in effect, which expressly restricted rehearing to the PTAB alone. That provision of 35 U.S.C. sec. 6 was only held to be unenforceable in *Arthrex* in June 2021. See, *Arthrex*, 141 S. Ct. at 1987.

Furthermore, the Final Written Decisions had held Gamon’s patents to be valid, so there was no

reason for Gamon to request reconsideration of the Final Written Decisions by the Director.

The *inter partes* reviews here, as altered by the Federal Circuit's ruling, if allowed to stand, would result in the '645 and '646 patents being invalidated in a procedure that was completely insulated from executive review, which this Court has held is a violation of the Appointments Clause. See *Arthrex*, 141 S.Ct. at 1985.

The *Arthrex* holding of this Court therefore requires vacatur and remand of the Federal Circuit decision in this case. Given the clear violation of the U.S. Constitution involved and the fact that the *Arthrex* decision issued less than two months prior to the Federal Circuit decision here at issue, it is believed that issuance of a GVR to that effect is appropriate here.

REASONS FOR GRANTING THE PETITION

- 1. Under *Arthrex*, the U.S. Constitution requires reconsideration by the Director for a finding of patent invalidity in an *inter partes* review.**

As set out in *Arthrex*, the PTAB power to issue Final Written Decisions violates the Appointments Clause and is unconstitutional. See, *Arthrex*, 141 S. Ct. at 1982. To resolve that problem, this Court in *Arthrex*, held that for the PTAB to have constitutional power to issue Final Written Decisions, there must be, at a minimum, an

opportunity for a party to request review by the Director. *See, id.* at 1983.

This Court considered the appropriate remedy for a PTAB Final Written Decision of invalidity that had been affirmed on appeal to the Federal Circuit to be a vacatur of the Federal Circuit decision below, and remand for the Director to decide whether to rehear the petition. *Id.* at 1987.

2. Patent Owner Gamon never had any possibility of requesting reconsideration of the Final Written Decisions here by the Director.

In the entire procedure below, Patent Owner Gamon never had opportunity or cause to request reconsideration by the Director of the Final Written Decisions in the *inter partes* reviews.

When the PTAB issued the 2020 Final Written Decisions, they held Gamon's '645 and '646 patents valid, and it would have been absurd for Patent Owner Gamon to request reconsideration at that time to disturb that result in its favor.

Furthermore, even had Gamon wanted to submit a request for reconsideration of the validity finding by a principal officer, *i.e.*, the Director, that procedural avenue was precluded by 35 U.S.C. sec. 6, which restricted reconsideration of Final Written Decisions to the PTAB alone. See 35 U.S.C. sec. 6(c).

The unavailability to Patent Owner Gamon of reconsideration of the Final Written Decisions by the

Director means that the PTAB under *Arthrex* therefore did not have constitutional authority under the Appointments Clause to rule the ‘645 and ‘646 patents invalid. Nor did the Federal Circuit, in its role of judicial review of the constitutionally unauthorized PTAB power, have constitutional authorization to reach a determination of invalidity of the ‘645 and ‘646 patents.

The *Arthrex* ruling therefore requires vacatur of the Federal Circuit opinion that reversed the PTAB and held the ‘645 and ‘646 patents invalid, because that ruling failed to comply with the Appointments Clause of the U.S. Constitution.

3. The Federal Circuit ruling on appeal does not remedy the unconstitutional nature of the *inter partes* proceedings here.

The action of the Federal Circuit in reviewing the Final Written Decisions here does not confer a remedial effect on the unconstitutional Final Written Decisions, and those Federal Circuit rulings of invalidity of the ‘645 and ‘646 patents are consequently unconstitutional and should be vacated.

The *Arthrex* decision clearly states that the reconsideration of a Final Written Decision must be by a principal officer of the *Executive branch*. See, *Arthrex*, 141 S. Ct. at 1972 (“Given the insulation of PTAB decisions from any executive review”, the PTAB exercised power “that conflicts with the design of the Appointments Clause”). As the Court expressly

held, “review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision” to make the determination constitutional. *See, id.* at 1982.

In fact, the present case may be seen as even more violative of the Appointments Clause than the procedure vacated in *Arthrex* because, in *Arthrex*, the inferior officers of the PTAB had held the patent at issue invalid. In contrast, in the present case, the PTAB executive officers had issued Final Written Decisions that held the ‘645 and ‘646 patents ***valid***. *See*, App. 101a to 102a; App. 190a. The sole determination of invalidity of the ‘645 and ‘646 patents here came in the Federal Circuit appellate decision on August 19, 2021, without the action of *any* executive officer whatsoever, either inferior or principal. *See*, App. 17a.

It is clear that the review by the Judicial Branch here could not confer constitutionality to the *inter partes* review process or to the invalidity determination of the ‘645 and ‘646 patents. The determination of invalidity of the ‘645 and ‘646 patents by the Federal Circuit consequently should be vacated and the matter remanded to comply with *Arthrex*.

4. This Honorable Court has applied *Arthrex* and vacated and remanded in several similarly situated cases.

In other cases with facts similar to those in the present case, this Court has vacated and remanded the Federal Circuit holdings below.

In the *Arthrex* case itself, the procedural posture of the case was similar to that of the present case. In *Arthrex*, a PTAB Final Written Decision ruled claims of a patent invalid, and on appeal the Federal Circuit affirmed the Final Written Decision of invalidity. See *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), vacated and remanded *sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 210 L. Ed. 2d 268 (2021). This Honorable Court, nonetheless, vacated the Federal Circuit decision and ordered the matter remanded for the Director to reconsider. See, *Arthrex*, 141 S. Ct. at 1988.

The procedural posture in this case is almost identical to that in *Arthrex*, except that here the PTAB had held the ‘645 and ‘646 patents valid, and the Federal Circuit had to modify or reverse most of the fact findings of the PTAB, instead of purely affirming, to reach an invalidity determination. See, App. 11a, 13a, 17a.

That difference, however, does not alter the unconstitutional nature of the PTAB proceedings or the Federal Circuit appeal here, and, pursuant to this Court’s ruling in *Arthrex*, this case should similarly be vacated and remanded.

Furthermore, several petitions for certiorari have been granted based on *Arthrex* in cases where *inter partes* reviews had held patents invalid in violation of the Appointments Clause.

One of those cases that is very similar to the present case is *Infineum USA v. Chevron Oronite Co.*, No. 21-350, 2021 WL 5869398 (U.S. Sup. Ct., Dec. 13, 2021). In *Infineum*, the PTAB had held that all claims of Infineum's patent were invalid. See, *Chevron Oronite Co. LLC v. Infineum USA L.P.*, 2019 WL 5806946 at *26 (Patent Tr. & App. Bd., November 6, 2019). Infineum appealed and argued, *inter alia*, against the determination of obviousness, but the Federal Circuit affirmed the PTAB obviousness finding of invalidity of Infineum's patent. See *Infineum USA v. Chevron Oronite Co. LLC*, 844 F. App'x 297, 299 (Fed. Cir. 2021). Infineum also argued for vacatur and remand of the PTAB Final Written Decision of invalidity under the earlier Federal Circuit decision of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) that was reversed by this Court's June 21, 2021 decision in *Arthrex*, but the Federal Circuit rejected that argument as well on the theory then in force that the Federal Circuit had rectified the constitutional deficiencies of the PTAB. See *Infineum*, 844 F. App'x at 307–08.

In September 2021, after issuance of the *Arthrex* opinion by this Court, Infineum petitioned this Court for certiorari, seeking vacatur of the Federal Circuit ruling on appeal that had affirmed, *inter alia*, the PTAB finding of Infineum's patent claims invalid as obvious. This Court in response issued a GVR granting Infineum's petition, vacating the Federal Circuit decision below that had affirmed the PTAB finding of obviousness, and remanding the case under *Arthrex*. See *Infineum USA*, 2021 WL 5869398 at *1.

The present case is very similar to the facts of *Infineum*, differing only in that, in the present case, the Final Written Decisions had held Gamon’s ‘645 and ‘646 patents *valid*, while the PTAB in *Infineum* had held the patent claims to be invalid. That difference, however, does not impact upon the unconstitutional nature of the PTAB proceedings or the Federal Circuit appeal, and, in fact, makes summary resolution more appropriate, because the unconstitutional invalidation of the ‘645 and ‘646 patents did not occur until the Federal Circuit issued its opinion on August 19, 2021 exercising the unconstitutional PTAB to reach a determination of invalidity of the ‘645 and ‘646 patents for the first time.

Vacatur and remand of the present case, as was ordered in *Infineum*, should therefore be granted here.

In addition to *Arthrex* and *Infineum*, this Honorable Court has also granted petitions for certiorari based on *Arthrex* for Federal Circuit appeals from PTAB Final Written Decisions that had held patent claims invalid. *See, e.g., Polaris Innovations Ltd. v. Kingston Tech. Co., Inc.*, 141 S. Ct. 2844, 210 L. Ed. 2d 955 (2021)(vacating a Federal Circuit vacatur of a Final Written Decision of invalidity); *RPM Int’l Inc. v. Stuart Tr. for Cecil G. Stuart & Donna M. Stuart Revocable Living Tr. Agreement*, 141 S. Ct. 2844, 210 L. Ed. 2d 957 (2021)(same). *See also Hirshfeld v. Implicit, LLC*, 142 S. Ct. 394, 211 L. Ed. 2d 210 (2021), *Iancu v. Fall Line Pats., LLC*, 141 S. Ct. 2843, 2844, 210 L. Ed. 2d

957 (2021), and *Iancu v. Luoma*, 141 S. Ct. 2845, 210 L. Ed. 2d 956 (2021)(issuing GVRs for a number of appeals from PTAB holdings at the request of the Director).

Gamon should here be afforded the same constitutionally required remedy as those similarly-situated litigants whose patents were invalidated by unconstitutional *inter partes* proceedings.

5. A GVR should be granted in this case.

This Court has observed that a GVR may be appropriate where “recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . [depending also] on the equities of the case.” *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996).

Here, the *Arthrex* decision was issued on June 21, 2021, less than two months before the Federal Circuit decision in this case on August 19. Had the Federal Circuit appreciated the consequences of this Court’s decision in *Arthrex* when issuing its opinion in this case, it would have been compelled to abstain from its unconstitutional exercise of power of the PTAB to issue a decision holding the ‘645 and ‘646 patents invalid, and would have remanded to the U.S. Patent & Trademark Office.

Furthermore, the equities do not weigh against this Court granting GVR here, because this is not a case where “the intervening development . . . is part of an unfair or manipulative litigation strategy, or [where] the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court.” *Id.* at 168.

Due to the clear constitutional violation here, and the fact that the *Arthrex* decision issued only shortly before the Federal Circuit decision in this case, a plenary remedy of a GVR vacating and remanding the Federal Circuit decision under *Arthrex* would be particularly appropriate.

CONCLUSION

Under *Arthrex*, the determination of invalidity of the ‘645 and ‘646 patents here violated the Appointments Clause of the U.S. Constitution.

Petitioner and Patent Owner Gamon therefore respectfully asks this Honorable Court to grant this petition for certiorari, vacate the Federal Circuit judgment below, and remand to permit Director to decide whether to rehear the petitions in the *inter partes* reviews below, consistent with *United States v. Arthrex*.

Respectfully submitted,

ANDREW L. TIAJOLOFF
Counsel of Record

Tiajolloff & Kelly LLP
Chrysler Building, 37th Floor
405 Lexington Avenue
New York, New York 10174
(212) 490-3285
atiajolloff@tkiplaw.com

Counsel for Petitioner

APPENDIX

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, DATED AUGUST 19, 2021**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-2344, 2021-1019

CAMPBELL SOUP COMPANY, CAMPBELL SALES
COMPANY, TRINITY MANUFACTURING, LLC,

Appellants,

v.

GAMON PLUS, INC.,

Appellee.

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2017-
00091, IPR2017-00094.

August 19, 2021, Decided

Before MOORE, *Chief Judge*, PROST and STOLL,
Circuit Judges.

MOORE, *Chief Judge.*

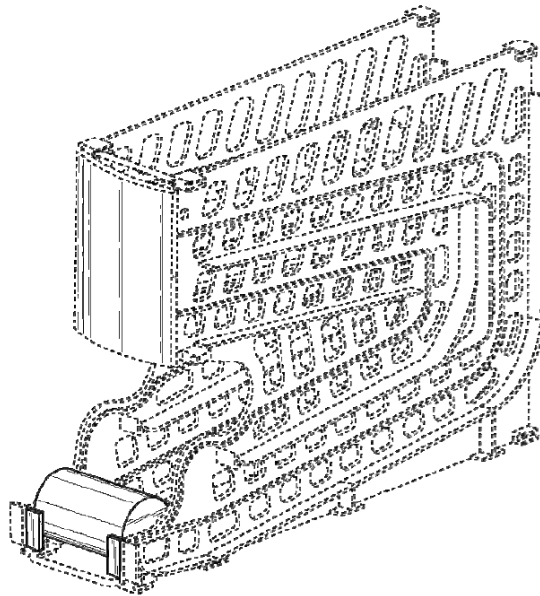
Campbell Soup Company, Campbell Sales Company,
and Trinity Manufacturing, LLC (collectively, Appellants)
appeal two final written decisions of the Patent Trial and
Appeal Board holding that Appellants did not demonstrate

Appendix A

the claimed designs of U.S. Design Patent Nos. D612,646 and D621,645 would have been obvious over U.S. Design Patent No. D405,622 (Linz) or U.S. Patent No. 4,909,578 (Abbate). Because the claimed designs would have been obvious over Linz, we reverse.

BACKGROUND**A. The Claimed Designs**

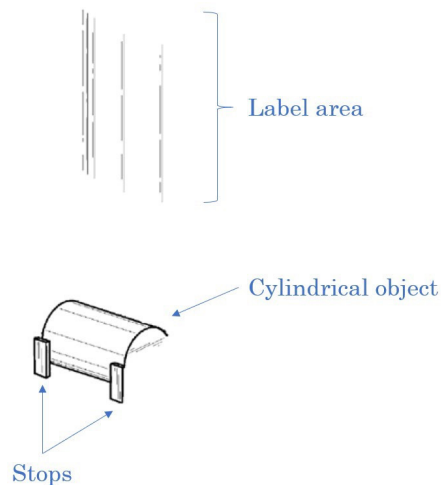
Gamon Plus, Inc., owns the '646 and '645 patents, which each claim “[t]he ornamental design for a gravity feed dispenser display, as shown and described.” J.A. 155; J.A. 158. The sole figure of the '646 patent depicts the following:



3a

Appendix A

Many features in the above figure are drawn using broken lines, which, consistent with 37 C.F.R. § 1.152, means they “represent the article in which the claimed design is embodied, but . . . form[] no part of the claimed design.” ’646 patent at Description. Omitting those features from the above figure reveals that the ’646 patent’s claimed design is limited to what the parties refer to as the label area, cylindrical object, and stops:

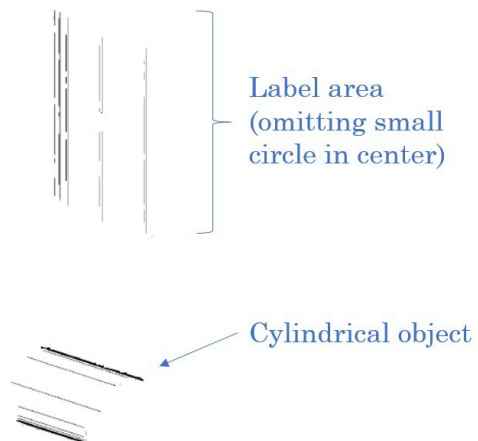


J.A. 1113 (annotations added).

The ’645 patent’s sole figure is nearly identical to the ’646 patent’s figure, differing in only two respects. First, the top and bottom edges of the cylindrical object and the stops are shown in broken lines, which, again, means they “form[] no part of the claimed design.” ’645 patent at Description. Second, there is a small circle, also shown in broken lines, near the middle of the label area. *Id.* at Figure. Omitting these features from the ’645 patent’s figure yields the following:

4a

Appendix A

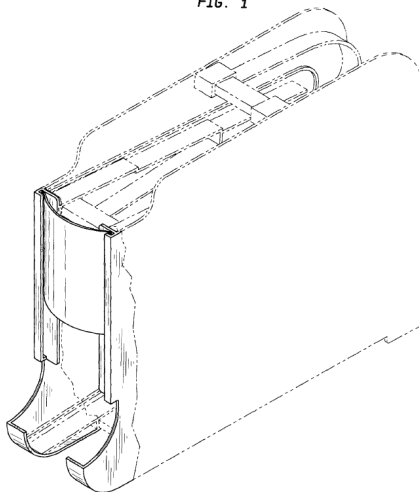


J.A. 357 (annotations added).

B. The Prior Art

Linz discloses and claims a “display rack,” as shown in Figure 1 thereof:

FIG. 1



5a

Appendix A

C. Gamon's Commercial Embodiment

Gamon's commercial embodiment of the claimed designs, called the iQ Maximizer gravity feed dispenser, is shown here:



J.A. 33.

From 2002 to 2009, Gamon sold about \$31 million worth of iQ Maximizers to Campbell. J.A. 14. Campbell installed the iQ Maximizers in about 17,000 stores nation-wide. *Id.* In its 10-K reports to the Securities and Exchange Commission, Campbell attributed increased soup sales in part to the iQ Maximizer. *See, e.g.*, J.A. 1892 (“Condensed soup also benefited from the additional installation of gravity-feed shelving systems and increased advertising.”). In an interview for an industry publication, Campbell’s marketing manager for retail development,

Appendix A

Jacques Finnel, praised the iQ Maximizer as “more efficient than existing shelving formats.” J.A. 1881. Mr. Finnel called out the dispenser’s label area for “making it easier for consumers to locate specific flavors.” *Id.* And an internal Campbell marketing study touted the iQ Maximizer, calling it a “[b]reakthrough” and highlighting the “[b]illboard effect” of its label area. J.A. 2268.

In late 2008, Campbell began purchasing gravity feed dispensers from Trinity. J.A. 16. Trinity’s dispensers were similar to Gamon’s iQ Maximizer:



J.A. 35.

D. Procedural History

In 2015, Gamon sued Appellants for patent infringement in the United States District Court for

Appendix A

the Northern District of Illinois. *Gamon Plus, Inc. v. Campbell Soup Co.*, No. 15-cv-8940 (N.D. Ill. filed Oct. 8, 2015) . Appellants petitioned for *inter partes* review of the '646 and '645 patents on multiple grounds, including that the claimed designs would have been obvious over (1) Linz in view of other references and (2) Abbate in view of Linz or another reference. The Board instituted *inter partes* review on the Linz ground but not on the Abbate ground. *Campbell Soup Co. v. Gamon Plus, Inc.*, IPR2017-00091, 2017 WL 1216049, at *12 (P.T.A.B. Mar. 30, 2017); *Campbell Soup Co. v. Gamon Plus, Inc.*, No. IPR2017-00094, 2017 WL 1216030, at *14 (P.T.A.B. Mar. 30, 2017). In its final written decisions, the Board held that Appellants had failed to prove unpatentability, finding that Linz is not similar enough to the claimed designs to constitute a proper primary reference.

Appellants appealed. We vacated and remanded, reasoning that the “ever-so-slight differences” the Board identified between Linz and the claimed designs did not support its finding that Linz is not a proper primary reference. *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335, 1340-41 (Fed. Cir. 2019) (*Campbell I*). In addition, we instructed the Board to consider the non-instituted grounds consistent with the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 200 L. Ed. 2d 695 (2018).

On remand, the Board again held that Appellants failed to prove unpatentability. It found that Abbate is not a proper primary reference, and it held that the claimed designs would not have been obvious over Linz alone or in

Appendix A

combination with other references. The Board reasoned that although Linz alone has the same overall visual appearance as the claimed designs, it is outweighed by objective indicia of nonobviousness, namely: (1) Gamon's commercial success in selling iQ Maximizers to Campbell; (2) Campbell's praise of, and commercial success in using, the iQ Maximizer; and (3) Trinity's copying of the iQ Maximizer. The Board presumed a nexus between those objective indicia and the claimed designs because it found that the iQ Maximizer is coextensive with the claims. The Board also found that Gamon established such a nexus regardless of the presumption.

Appellants again appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

DISCUSSION

We review the Board's legal determinations de novo and its factual findings for substantial evidence. *In re Van Os*, 844 F.3d 1359, 1360 (Fed. Cir. 2017). Obviousness is a question of law based on underlying facts. *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1358 (Fed. Cir. 2017). The obviousness inquiry requires consideration of the four *Graham* factors: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness, such as commercial success, long felt but unsolved needs, and failure of others. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966).

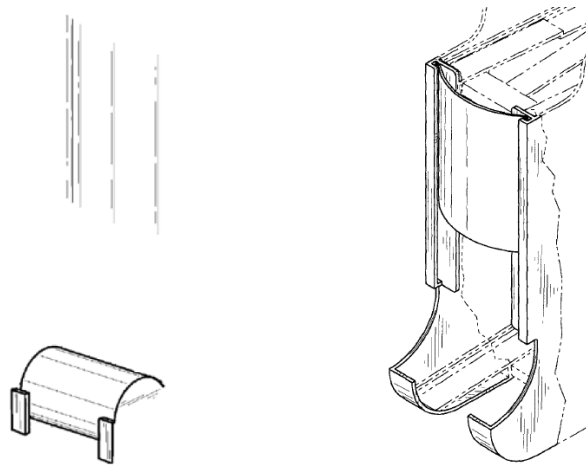
*Appendix A***A. Linz Creates the Same Overall Visual Appearance**

In the design patent context, we address the first three *Graham* factors by determining whether a designer of ordinary skill would have combined teachings of the prior art to create “the same overall visual appearance as the claimed design.” *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996). This inquiry proceeds in two steps. First, before the trier of fact can combine prior art references, it must determine whether there exists a “primary reference,” i.e., a single reference that creates “basically the same visual impression” as the claimed design. *Id.* “To be ‘basically the same,’ the designs at issue cannot have ‘substantial differences in the[ir] overall visual appearance[s]’ or require ‘major modifications’; any differences must instead be slight. *Spigen Korea Co. v. Ultraproof, Inc.*, 955 F.3d 1379, 1383 (Fed. Cir. 2020) (alterations in original) (first quoting *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1330 (Fed. Cir. 2012); and then quoting *In re Harvey*, 12 F.3d 1061, 1063 (Fed. Cir. 1993)). This is a question of fact. *Id.* Second, if a primary reference exists, the trier of fact must determine whether, using secondary references, an ordinary designer would have modified the primary reference to create a design that has the same overall visual appearance as the claimed design. *Durling*, 101 F.3d at 103. This, too, is a question of fact. *See MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1334-35 (Fed. Cir. 2014).

Here, the Board found Linz alone creates “the same overall visual appearance as the claimed design[s].” J.A.

Appendix A

63; J.A. 140. Substantial evidence supports that finding. The following side-by-side comparison of the '646 patent's claimed design (left) and the corresponding portions of Linz's Figure 1 (right) shows the two are virtually indistinguishable:



J.A. 1113; J.A. 1686.

As the Board found, the Linz design has a label area with a symmetric, convex arcuate shape and a central apex that extends forward. J.A. 19; J.A. 96. It also has a bottom receiving area for receiving and displaying a can below the label area. J.A. 20; J.A. 97. Gamon contends that Linz can only accommodate a can with a smaller diameter than the can depicted in the claimed designs. Appellee's Br. at 44-46. Gamon further appears to argue that Linz's can would come to rest farther rearward than in the claimed designs. *See id.* at 46-48. Those slight differences, however, do

Appendix A

not substantially detract from the similarity in overall visual appearances. Indeed, the Board acknowledged those differences and still found that Linz and the claimed designs share the same overall visual appearance. J.A. 61-62; J.A. 138-39. Gamon does not challenge that finding. We therefore discern no reason to disturb the Board's finding that Linz satisfies the *Durling* test.

**B. The Evidence of Commercial Success and
Praise Lacks a Nexus to the Claims**

Evidence of objective indicia of nonobviousness must have a nexus to the claims, i.e., “there must be a legally and factually sufficient connection between the evidence and the patented invention.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (internal quotation marks omitted). Here, the Board found both a presumption of nexus and a nexus-in-fact between the claimed designs and the evidence of commercial success and praise. Substantial evidence does not support either finding.

1. The Presumption of Nexus Does Not Apply

We presume a nexus if the objective indicia evidence is tied to a specific product that is “coextensive” with the claimed invention, meaning that the product “*is* the invention disclosed and claimed.” *Id.* (emphasis in original) (quoting *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988)). A product is “essentially the claimed invention” when, for example, “the unclaimed features amount to nothing more than

Appendix A

additional insignificant features.” *Id.* at 1374. Whether a product is coextensive with a claimed invention is a question of fact. *Id.* at 1373.

Despite recognizing that “the claimed portions of the display rack do not cover the entire display rack,” J.A. 41, the Board found that Gamon’s iQ Maximizer is coextensive with the claimed designs. The Board reasoned that “[t]he unclaimed rearward rails and side portions are not prominent ornamental features,” and those portions are, therefore, “insignificant to the ornamental design.” J.A. 42-43 (internal quotation marks omitted). This circular reasoning reflects a misunderstanding of the law. In determining coextensiveness, the question is not whether unclaimed features are insignificant *to a product’s ornamental design*. The question is instead whether unclaimed features are “insignificant,” period. *See Fox Factory*, 944 F.3d at 1374. That is because the purpose of the coextensiveness requirement is to ensure that nexus is presumed only when the product “*is* the invention disclosed and claimed.” *Id.* (emphasis in original). By limiting its analysis to ornamental significance, the Board simply did not answer the relevant question: whether the iQ Maximizer “*is* the invention.”

The Board attempted to distinguish *Fox Factory* because it involved a utility patent, rather than a design patent. J.A. 41. But the coextensiveness requirement does not depend on the type of patent at issue. The Board offered no rationale for taking a different approach in design patent cases, and we do not discern any. Accordingly, we reject the proposition that a product

Appendix A

satisfies the coextensiveness requirement in the design patent context merely if its unclaimed features are *ornamentally* insignificant.

Under the correct legal standard, substantial evidence does not support the Board’s finding of coextensiveness. At most, the claims cover only a small portion of the iQ Maximizer: its label area, cylindrical object, and stops. The Board thus correctly recognized that the claims do not cover, for example, the dispenser’s “rearward rails and side portions.” J.A. 42. Gamon does not contest Appellants’ assertion that those and other structures are significant because they facilitate the loading and dispensing of products. *See* Appellants’ Br. at 44-45. Because the iQ Maximizer undisputedly includes significant unclaimed functional elements, no reasonable trier of fact could find that the iQ Maximizer is coextensive with the claimed designs.¹

2. Gamon Did Not Establish Nexus-in-Fact

A patentee may establish nexus absent the presumption by showing that the objective indicia are the “direct result of the unique characteristics of the claimed invention,” *Fox Factory*, 944 F.3d at 1373-74 (quoting *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)), rather than a feature that was “known in the prior art,” *Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1312 (Fed. Cir. 2006).

1. We do not go so far as to hold that the presumption of nexus can never apply in design patent cases. It is, however, hard to envision a commercial product that lacks any significant functional features such that it could be coextensive with a design patent claim.

Appendix A

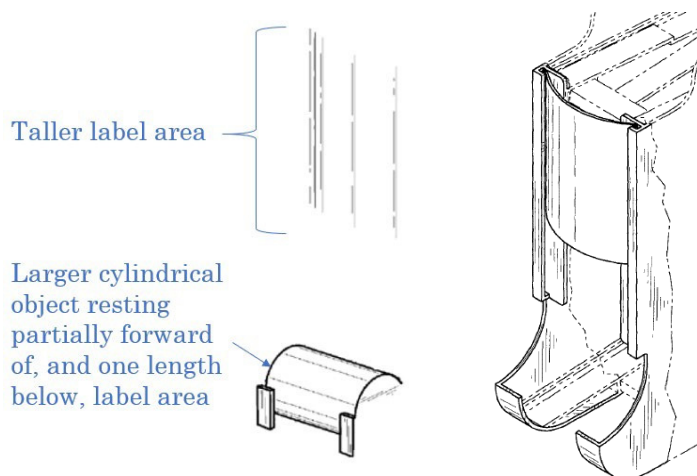
Whether a patentee has established nexus is a question of fact. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1331-32 (Fed. Cir. 2016).

Here, the Board based its nexus finding on evidence that, at best, shows the commercial success and praise of the iQ Maximizer resulted from its incorporation of the claimed label area. *See* J.A. 45-50. For example, with respect to commercial success, the Board cited the internal marketing study in which Campbell (1) credited the label area's "[b]illboard effect" for improving branding of Campbell's products and (2) recounted consumers' feedback about the label area (e.g., "The label makes a difference, it's like looking at your soup before you eat it."). J.A. 2268. As for praise, the Board cited the industry publication in which Campbell's marketing manager for retail development extolled the label area for "making it easier for consumers to locate specific flavors." J.A. 1881.

But, as the Board found, a display rack with a label area was not new. J.A. 19. The only features the Board found that distinguished the claimed designs from the prior art Linz design were: (1) a larger cylindrical object, (2) a resting point of the cylindrical object that is partially forward of the label area, (3) a taller label area that mimics the proportions of the cylindrical object; and (4) spacing equal to one label length between the label and the cylindrical object. J.A. 61-62; J.A. 65.

15a

Appendix A



J.A. 1113; J.A. 1686 (annotations added). Thus, to establish nexus, Gamon needed to present evidence that the commercial success and praise of the iQ Maximizer derived from those “unique characteristics.” *Fox Factory*, 944 F.3d at 1373-74. It failed to do so. Instead, it presented evidence that merely ties commercial success and praise to aspects of the label area that were already present in the prior art. The cited industry publication, for example, highlights only that the label area displays “soup labels printed at twice their normal size.” J.A. 1881. Likewise, the internal Campbell marketing study just notes that the label area is “210% larger” than the product label. J.A. 2268. This is also true of the prior art Linz design. Moreover, the claimed designs do not require any specific size of the label area, or spacing between the can and the label area, because the patents’ figures depict the label area boundaries using broken lines. ’646 patent at Figure; ’645 patent at Figure.

Appendix A

Gamon relies on the testimony of the named inventor, Terry Johnson, who asserted that the iQ Maximizer’s commercial success was due specifically to its label area having “the same proportions as the can.” J.A. 1815:3-17. But there is no evidence in the record supporting that self-serving assertion. And again, the size of the label area is not claimed. Accordingly, given the absence of evidence tying any commercial success or praise to the claimed unique characteristics of the iQ Maximizer, substantial evidence does not support a nexus between those objective indicia and the claims.

We reject the Board’s view that, in design patent cases, objective indicia need not be linked to the claimed design’s unique characteristics. J.A. 58 (“[W]e do not believe that to establish commercial success for a design patent, a patent owner should have to differentiate design features ‘that were already known’ from those that are purportedly novel.”). The Board reasoned that “the invalidity analysis [in design patent cases] focuses on the ornamental design as a whole.” *Id.* But the same holds true in utility patent cases, *WBIP*, 829 F.3d at 1331-32 (“[T]he obviousness analysis involves determining whether ‘*the claimed invention as a whole*’ would have been obvious.” (quoting 35 U.S.C. § 103)), and yet we still require a link to the claimed invention’s unique characteristics in that context. We therefore hold that, as in the utility patent context, objective indicia must be linked to a design patent claim’s unique characteristics.

*Appendix A***C. The Evidence of Copying Does Not Overcome Linz**

For purposes of this appeal, we assume substantial evidence supports the Board's finding that Trinity copied the unique characteristics of the claimed designs. Even accepting the evidence of copying, we conclude that this alone does not overcome the strong evidence of obviousness that Linz provides.

CONCLUSION

Weighing all of the *Graham* factors, including (1) the Board's finding that, from the perspective of a designer of ordinary skill, Linz creates the same overall visual impression as the claimed designs and (2) copying by Trinity of the claimed designs' unique characteristics, we conclude that the claimed designs would have been obvious over Linz. Accordingly, we reverse the Board's decisions holding that Appellants failed to prove unpatentability based on Linz. We have considered Gamon's arguments and find them to be without merit. Because we reverse the Board's decisions as to Linz, we need not reach Appellants' alternative arguments.

REVERSED

**APPENDIX B — OPINION OF THE
UNITED STATES PATENT AND TRADEMARK
OFFICE, DATED JULY 29, 2020**

UNITED STATES PATENT
AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

IPR2017-00091
Patent D621,645 S

CAMPBELL SOUP COMPANY, CAMPBELL
SALES COMPANY, AND TRINITY
MANUFACTURING, L.L.C.,

Petitioner,

v.

GAMON PLUS, INC.,

Patent Owner.

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

KINDER, *Administrative Patent Judge.*

JUDGMENT

Final Written Decision on Remand
Determining No Challenged Claim Unpatentable
35 U.S.C. §§ 144, 318

Appendix B

I. INTRODUCTION

We address this case on remand after a decision by the U.S. Court of Appeals for the Federal Circuit in *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335 (Fed. Cir. 2019).

A. Procedural Background

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, L.L.C. (collectively, “Campbell” or “Petitioner”) filed a Petition to institute an *inter partes* review of the claim for a “Gravity Feed Dispenser Display” in U.S. Patent No. D621,645 S (Ex. 1001, “the ’645 patent”). Paper 2 (“Pet.”). Gamon Plus, Inc. (“Gamon” or “Patent Owner”) filed a Preliminary Response to the Petition. Paper 9. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review of the challenged claim. Paper 12 (“Dec.”). Specifically we instituted review of the design claim as to three grounds pursuant to 35 U.S.C. § 103:

35 U.S.C. §	Reference(s)/Basis
§ 103(a)	Linz ¹ , Samways ²
§ 103(a)	Samways
§ 103(a)	Samways, Linz

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

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

Appendix B

Dec. 32. In our institution decision, we declined to institute review on nine of twelve grounds. *Id.* at 6, 32.

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

An oral hearing was held on January 23, 2018, and a copy of the transcript is part of the record. Paper 80 (“Tr.”). On March 29, 2018, we issued a Final Written Decision. Paper 81 (“Final Dec.”) (Paper 84, redacted version). In our Final Written Decision, we concluded that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’645 patent is unpatentable under 35 U.S.C. § 103. In the decision, we weighed the evidence of obviousness and nonobviousness as a whole, and we determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’645 patent is unpatentable as obvious based on Linz and Samways. We likewise determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’645 patent is unpatentable as obvious based on Samways alone or Samways and Linz. Petitioner filed a Notice of Appeal to the Federal Circuit on May 31, 2018. Paper 85.

Appendix B

On September 26, 2019, the Federal Circuit issued a decision affirming-in-part, vacating-in-part, and remanding for further consideration. *Campbell Soup Co.*, 939 F.3d at 1335.

The Federal Circuit determined that there was “no error in the Board’s claim construction,” with respect to the claim. *Id.* at 1340 n.1. The Federal Circuit affirmed our decision related to the Samways ground, determining “substantial evidence supports the Board’s finding that Samways is not a proper primary reference,” and “substantial evidence supports the Board’s finding that Samways does not create basically the same visual impression as the claimed designs.” *Id.* at 1341–42.

As to the ground under Section 103 based on Linz, the Federal Circuit determined “substantial evidence does not support the Board’s finding that Linz is not a proper primary reference.” *Id.* at 1342. The Federal Circuit then vacated “the Board’s conclusion that the claimed designs would not have been obvious over Linz in view of Samways” and remanded for further proceedings. *Id.* The Federal Circuit did not address any other findings related to obviousness based on Linz.

The Federal Circuit also remanded and ordered that “the Board should also consider the non-instituted grounds for unpatentability consistent with the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).” *Id.* We discuss the Federal Circuit’s decision in more detail below.

Appendix B

On December 20, 2019, we issued an Order Modifying Decision Instituting *Inter Partes* Review and Setting the Schedule for Further Proceedings on Remand. Paper 92. In light of the remand from the Federal Circuit and the Supreme Court’s decision in *SAS*, we modified our Decision on Institution to include each of the nine non-instituted grounds challenging the design claim of the ’645 patent. *Id.* at 4–5; Dec. 6. Also, pursuant to the parties’ agreement, we instituted a briefing schedule and set parameters requested by the parties for the remand proceeding. *Id.* at 3. Further, we requested the parties confer to determine if there were any grounds that Petitioner no longer intended to pursue. *Id.* at 6. If any agreement was reached, we authorized the parties to jointly request that the Board limit the proceeding through a joint motion. *Id.*

Such a motion was filed on January 10, 2020. Paper 93. In that motion filed by Campbell, the parties agreed to limit the proceeding to the following grounds on remand³:

Claim Challenged	35 U.S.C. §	Reference(s)/ Basis
1	§ 103(a)	Linz
1	§ 103(a)	Linz, Samways

3. In the chart above, we have separated the grounds remaining in the proceeding into the different combinations presented, for ease of reference.

Appendix B

Claim Challenged	35 U.S.C. §	Reference(s)/ Basis
1	§ 103(a)	Linz, Knott ⁴
1	§ 103(a)	Abbate ⁵ , Samways
1	§ 103(a)	Abbate, Samways, Linz
1	§ 103(a)	Abbate, Linz
1	§ 103(a)	Primiano ⁶ , Samways
1	§ 103(a)	Primiano, Knott

Id. at 1.

On January 27, 2020, we granted the parties' request to limit the remand proceeding to the grounds and statutory basis requested by the parties. Paper 94. Accordingly, this Final Written Decision on Remand addresses each of the grounds set forth above.

Pursuant to the briefing schedule on remand, Gamon filed a Patent Owner Response on Remand (Paper 95) and Campbell filed a Reply (Paper 97) to the Patent Owner

4. U.S. Patent No. D178,248, issued July 10, 1956 ("Knott," Ex. 1010).

5. U.S. Patent No. 4,909,578, issued Mar. 20, 1990 ("Abbate," Ex. 1011).

6. U.S. Patent No. 6,068,142, issued May 30, 2000 ("Primiano," Ex. 1012).

Appendix B

Response on Remand. We authorized Gamon to file a Sur-reply (Paper 99), to which Campbell filed a response or Sur-sur-reply (Paper 103). We refer to the post remand briefing by the corresponding paper number.

A second oral hearing was held on May 7, 2020, and a copy of the transcript is part of the record. Paper 112 (“Tr. 2”).

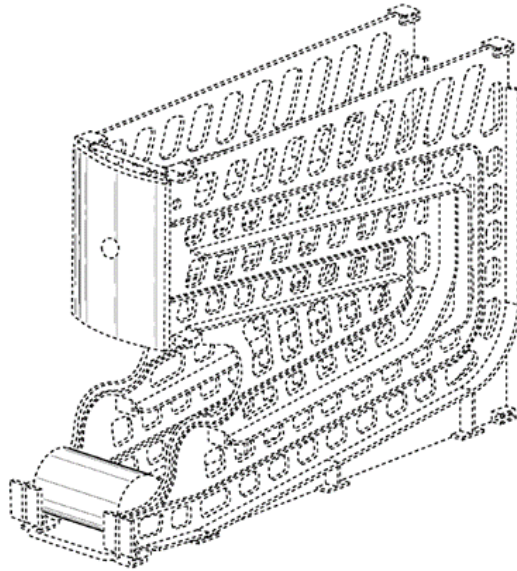
We have jurisdiction under 35 U.S.C. § 6(b). This Decision is a Final Written Decision under 35 U.S.C. § 318(a) as to the patentability of the claim on which we instituted trial. Based on the record before us, we determine that Petitioner has not shown, by a preponderance of the evidence, that the claim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

B. Related Proceedings

The parties state that the ’645 patent is at issue in *Gamon Plus, Inc., et al. v. Campbell Soup Co., et al.*, Case No. 15-cv-8940 (N.D. Ill.). Pet. 4; Paper 6, 1–2. Campbell also has filed petitions challenging the patentability of related design patents. The proceeding in IPR2017-00094 (U.S. Patent No. D621,646) is also on remand from the Federal Circuit and we issued a final decision in that proceeding. In both IPR2017-00095 (U.S. Patent No. D621,644), and IPR2017-00096 (U.S. Patent No. D595,074) we issued final decisions on March 27, 2018, finding the respective design claims unpatentable.

*Appendix B**C. The '645 Patent and Claim*

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



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

Appendix B

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

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

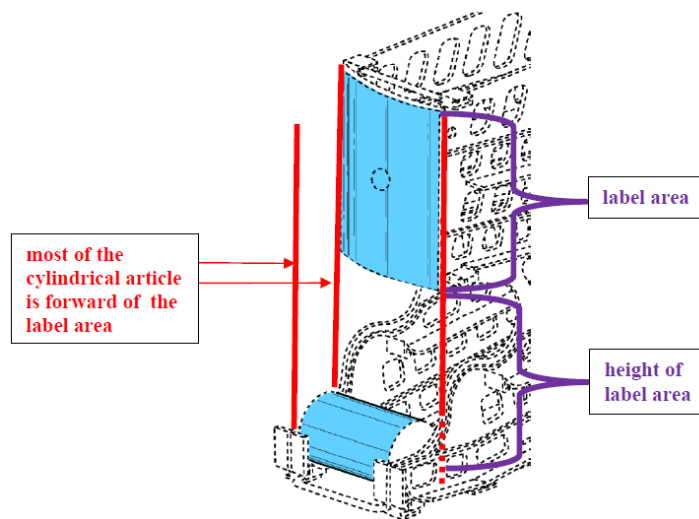
With respect to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent 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.” *Id.* 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”).

Because the Federal Circuit has reviewed, and found no error in, our claim construction, we maintain our determinations from the Final Decision. *Campbell Soup Co.*, 939 F.3d at 1340, n.1 (“We see no error in the Board’s claim construction.”). These determinations are reiterated

Appendix B

below. Campbell agrees that these prior findings below are the law of the case. Tr. 2, 13:18–14:13 (Board: “the Federal Circuit was pretty explicit as well that they adopted our claim construction Do you agree that is the law of the case, prior claim construction?” Counsel for Campbell: “I do, Your Honor. I mean, we took issue with it at the time but I accept that the Federal Circuit has ruled on that and I just would say that should be applicable here, too.”). We reiterate our claim construction below.

Considering the relationship of the prior art to the claimed design, we find it helpful to describe verbally certain features of the claim for purposes of this Final Decision. See *Egyptian Goddess*, 543 F.3d at 680. As shown in the Figure, below, the single embodiment of the patent design illustrates and claims certain front portions of a gravity feed dispenser display.



Appendix B

Patent Owner’s annotated and highlighted Figure of the ’645 patent shows a perspective view of a gravity feed dispenser display. PO Resp. 5. From top to bottom, a generally rectangular surface area, identified by the parties as an access door or label area, is curved convexly forward. Pet. 8. For ease of reference, we refer to this portion as “the label area,” as annotated above. The label area is taller vertically than it is wide horizontally, however, the boundary edges of the label area are not claimed. The label area has a noticeable small circular cutout in the center with unclaimed boundaries. Below the label area there is a gap between the label area and the top of a cylindrical object lying on its side – the gap being approximately the same height as the label area. *See* Ex. 2001 ¶¶ 5, 28; PO Resp. 5 (annotated Figure). The width of the label area is generally about the same as the height of the cylindrical object lying on its side. The height of the cylindrical object (lying on its side) is longer than its diameter. The cylindrical article is positioned partially forward of the label area. Ex. 2001 ¶¶ 5, 28. Two rectangular lugs, or stops, are positioned in front of the cylindrical object on each bottom side and stand vertically, but these are unclaimed in the ’645 patent. These lugs do, however, partially obscure the view of the cylindrical object.

We also consider the spatial relationships between the claimed features in our analysis as depicted in the Figure of the ’645 patent above. *See* Final Dec. 33 (“Although the boundary of the label area is disclaimed, Gamon has still claimed the surface area within the boundary. . . . When considering just the claimed area within the label area, a

Appendix B

spatial relationship still exists between this claimed area and the cylindrical object.”); Tr. 48:13–19.

D. Grounds on Remand

As explained above, the following grounds are before us on remand:

Claim Challenged	35 U.S.C. §	Reference(s)/ Basis
1	§ 103(a)	Linz
1	§ 103(a)	Linz, Samways
1	§ 103(a)	Linz, Knott
1	§ 103(a)	Abbate, Samways
1	§ 103(a)	Abbate, Samways, Linz
1	§ 103(a)	Abbate, Linz
1	§ 103(a)	Primiano, Samways
1	§ 103(a)	Primiano, Knott

Paper 93, 1–3; Paper 94, 4–5.

Campbell supports its challenge with two declarations by Mr. James Gandy, one in support of the Petition (Ex. 1002 (“the Gandy Decl.”)), the other in support of Petitioner’s Reply (Ex. 1018 (“the Gandy Suppl. Decl.”)). Campbell also relies on the declaration of Mr. Steven Visser. Ex. 1020 (“the Visser Decl.”).

Appendix B

Gamon relies on two declarations by Mr. Terry Johnson, one in support of Patent Owner's Response to the Petition (Ex. 2001 ("the Johnson Decl.")), and a Supplemental Declaration (Paper 60⁷ ("the Johnson Suppl. Decl.")). The parties rely on other evidence and exhibits as discussed below.

E. Development of the '645 Design Patent

Terry Johnson came up with the initial design idea underlying the ornamental design patent after visiting a store and having a difficult time finding the home-style chicken noodle soup. Ex. 1021, 27:13–28:24. Unable to find the type of soup he was looking for, he ended up buying a plain noodle soup that did not go over well at home. *Id.* Terry Johnson recognized that if he was having a problem finding a particular type of soup, others were likely having the same problem, and Terry Johnson "came up with something that was pretty simple"—a display that would visually help purchasers of canned soup. *Id.* at 28:10–16; *see also* Pet. Reply 13 (citing Ex. 1021, 29[28]:15–16). A Campbell's marketing manager agreed that shopping the soup aisle was difficult and stated that "shoppers would get so frustrated at not finding the flavor they wanted that they would walk away without it." Ex. 2007, 1 (2004 interview with Jacques Finnel, Campbell's marketing manager for retail development).

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

Appendix B

After coming up with an initial concept, Terry Johnson, on behalf of Gamon,⁸ reached out to Campbell Soup Company's CEO, David Johnson (no relation to Terry), to pitch the idea of putting Campbell's soup cans on their side and then having them roll down an inclined plane, and also having "a big convex sign on the front of it to talk to the consumer." Ex. 1021, 27:13–16, 29:11–30:10. Terry Johnson testified that David Johnson quickly hung up because "[n]o one wanted me to turn the can on its side" at that time. *Id.* Terry Johnson further explained that his design was meant to present to consumers as "a big convex sign that was the same as the label and it was the same proportions as the can." *Id.* at 45:11–17.

In later discussions with Campbell around 2002, Terry Johnson presented his concept to an executive board at Campbell, including Carl Johnson (again, no relation to Terry). *Id.* at 30:11–32:18. During these discussions, Campbell sponsored a project by a research company called Cannondale. *See, e.g.*, Ex. 2032. According to statements attributed to Campbell's Mr. Finnel, the consumer research indicated that the soup category was one of the most difficult to shop in supermarkets. Ex. 2007, 1.

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

Appendix B

An initial Cannondale survey, as conveyed to Terry Johnson, suggested that sales may be lost if Campbell put its soup cans on their sides at the point of sale. Ex. 1021, 32:19–33:10. Campbell agreed, however, to run a test of Gamon’s proposed display rack in a small number of stores. *Id.* at 32:3–33:20; *see also* Ex. 2031, 5, 6, 10–12, 14–17, 26–29 (noting that the Gamon display shelving would be tested). Soon after, Campbell allowed Gamon’s gravity feed display rack to be tested in 25 stores selling Campbell’s condensed soup. Ex. 1021, 32:3–33:20. The tested embodiment of the gravity feed display rack was the same design as embodied in Gamon’s D621,645 and ’646 design patents.⁹ *Id.* at 33:17–24; Ex. 2032, 4–10 (displaying Gamon’s gravity feed display rack at various test stores); Ex. 2001 ¶ 38 (citing Exs. 2005, 2006).

Gamon’s commercial embodiment of the patented design was tested in a select number of stores and referred to as the IQ Maximizer. Ex. 1021, 32:3–33:20, 35:13–15; Tr. 42:22–24; Ex. 2007, 1. Considering the outcome of the test market using the Gamon gravity feed display rack to sell Campbell soup products, Campbell concluded that the display rack¹⁰ increased its soup sales volume by 5.5–13.6%

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

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

Appendix B

depending on the type of soup and brand. Ex. 2032, 4.¹¹ Terry Johnson similarly testified based on his involvement in the project that Campbell's "market study showed that Campbell could secure a 5% increase in sales using the Gamon display racks," and "use of the Gamon display rack produced increased soup sales by 9 to 14% according to [a] market study conducted by Cannondale Consulting Inc." Paper 60 ¶¶ 16, 18; Ex. 1021, 35:1–12. Campbell's internal presentation discussing the results of this study is titled: "IQ SHELF MAXIMIZER The Power to Transform the Soup Section." Ex. 2032, 1. The Gamon gravity feed display rack was described as "Breakthrough Gravity Feed Shelving," that "Encourages purchase of additional varieties," and resulted in positive consumer responses in every test market. *Id.* at 4–10.

From 2002 until 2009, Campbell purchased approximately \$31 million of Gamon's gravity feed display racks¹² and installed them in over 17,000 stores. PO Resp. 42; Ex. 2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14 (Campbell's 2007 Annual Report states that "[n]early 17,400 stores in the U.S. feature our gravity-feed shelving

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

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

Appendix B

system. It is a powerful tool for merchandising *Campbell's* condensed soups.”). As admitted by Campbell, the display racks purchased fall within the scope of the '645 patent when a Campbell soup can is added to the display—the claim of the '645 patent requires a cylindrical object as part of the claim. *See* Tr. 2, 19:10–15; Ex. 1001; Ex. 2032, 4–10; PO Sur-reply 5; Ex. 2001 ¶¶ 40–45; Tr. 40:4–41:3. The purpose of the Gamon display racks tested and purchased by Campbell was to display Campbell's cylindrical soup cans as arranged in the patented design. Ex. 2001 ¶ 38 (“These display racks displayed the condensed Campbell Soup cans in the exact configuration of the design of the '645 patent.”); Tr. 43:24–45:24.

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

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

Appendix B

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

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

Appendix B

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

Appendix B

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

Campbell, relying on the testimony of Mr. Gandy, states that:

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

Appendix B

of prior art is limited to relatively simple consumer commodity dispensers and displays.

Pet. 24–25 (internal citations omitted) (citing Ex. 1002 ¶¶ 22–25). Gamon does not object to this description of the designer of ordinary skill in the art.

In our first Final Decision, we agreed that the designer of ordinary skill is as Campbell asserts, except that we disagreed that a designer of ordinary skill would need to have a basic understanding of the dimensions and functions afforded to cans and bottles *in the context of packaging*.

On appeal, the Federal Circuit did not disturb our finding as to the level of ordinary skill in the art. *See generally Campbell Soup Co.*, 939 F.3d 1335. The record on remand has not changed with respect to our consideration of this issue and, therefore, we maintain and reiterate that a designer of ordinary skill in the art would have had a background or familiarity with commercial dispensers, and particularly dispensers for consumer commodities such as cans, bottles, or small packaged items and a basic understanding of physics and/or mechanics, which may include practical experience in the field of studying or designing consumer commodity dispensers, or may include high school or introductory college level physics coursework.

*C. Obviousness Based on Linz Alone or Linz
and Samways/Knott*

Based on the final trial record before us, including the decision of the Federal Circuit, we are not persuaded

Appendix B

that Campbell has established by a preponderance of the evidence that the claim is unpatentable over Linz alone, Linz and Samways, or Linz and Knott, for the reasons explained below.

1. Linz (Ex. 1008)

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

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

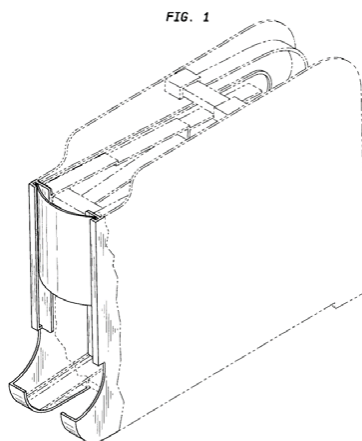


Figure 1 of Linz shows the claimed ornamental design for a display rack. Ex. 1008, Fig. 1.

40a

Appendix B

Figure 3 of Linz, depicted below, shows a side view with a flat front label area with a small curvature. The bottom receiving area is noticeably curved upwards.

FIG. 3

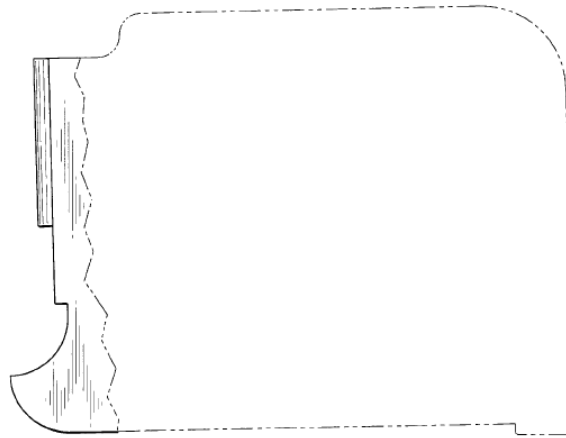


Figure 3 of Linz is a right side elevational view. Figure 3 further shows that any can received in the bottom display area would be positioned either behind or directly under the front label area.

We are also bound by the Federal Circuit's determination that "the design of Linz [is] for dispensing cans and that a can would be used in the system." *Campbell Soup Co.*, 939 F.3d at 1341. Similarly, the Federal Circuit found "that Linz's design is made to hold a cylindrical object in its display area." *Id.*

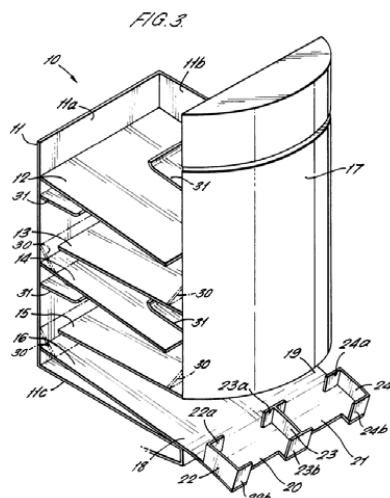
The parties briefing on remand focuses on the size, shape, position, and orientation of the hypothetical cylindrical object in the display area of Linz.

Appendix B

2. Samways (Ex. 1009)

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

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



Appendix B

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

Storage locations 20, 21 are designed such that a cylindrical object loaded therein would be visible above forward stops 22b, 23b, 24b, as well as through the two gaps between the stops. Placement of a cylindrical object in the storage area behind the forward stops is depicted in Figure 4 of Samways.

Appendix B

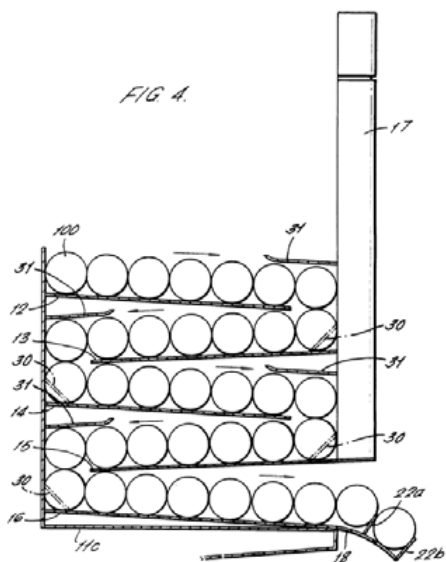


Figure 4 of Samways shown above depicts a side cross-section view of the gravity feed dispenser shown in Figure 3. *Id.* at 3:14–15. As depicted in Figure 4, there is a small gap between the bottom of label area 17 and the top of a forward cylindrical object allowing for visual display of the cylindrical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

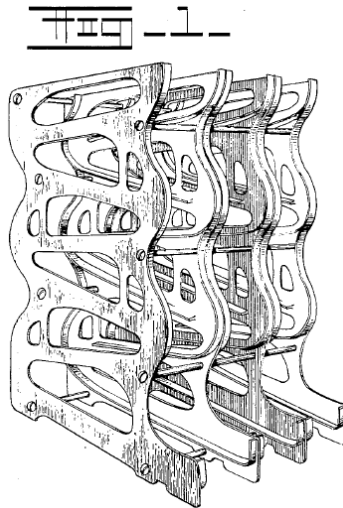
We also are bound by the Federal Circuit’s determination that “Samways is not a proper primary reference. Samways has a dual dispensing area, compared to the single dispensing area of the claimed designs, and has a front label area with different dimensions that

Appendix B

extends across both dispensing areas.” *Campbell Soup Co.*, 939 F.3d at 1341–42.

3. Knott (Ex. 1010)

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. 1010. Knott discloses that “Figure 1 is a front perspective of a bin dispenser for small cylindrical articles.” *Id.* Figure 1 of Knott is reproduced below.



Id. at Fig. 1. Figure 1 of Knott is a front perspective view of a bin dispenser for small cylindrical articles. Campbell contends that Knott discloses a serpentine dispenser having a cylindrical can dispensing area beneath the loading area. Pet. 13–14 (citing Ex. 1002 ¶ 38; Ex. 1010, Fig. 1).

Appendix B

4. Petitioner's Contentions

Campbell contends the ornamental design of the '645 patent would have been obvious to a designer of ordinary skill based on Linz alone or Linz combined with Samways or Knott. Pet. 29–34. Campbell relies on a comparison of the combined ornamental features of Linz and Samways or Knott with the design of the '645 patent, as well as the Gandy Declaration, to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 44, 48–58). Campbell contends that Linz is the same basic claimed design, “and is therefore a suitable primary reference.” *Id.* at 30.

Campbell also relies on Samways as a secondary reference. *Id.* at 32. According to Campbell, Samways provides support for the placement and shape of a cylindrical object. *Id.* at 33.

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

Appendix B

Additionally, Campbell argues that a design incorporating a cylindrical can is disclosed by Linz in view of Samways because Samways has a can is located beneath the label area. Pet. 31–32. According to Campbell, Knott similarly discloses a dispenser for small cylindrical articles. *Id.*

Campbell contends that the relative positioning, dimensions, and scaling of the can and label area are not claimed in the '645 patent. Pet. Reply 9–13. Specifically, Campbell alleges that the patent claim “disclaims any boundaries on the label area’s height and width.” *Id.* at 10; Ex. 1020 ¶ 28. Further, Campbell contends that even if these features were claimed, the design of Linz is basically the same. Pet. Reply 10–11. Campbell also contends that because Gamon’s expert, and inventor, characterizes the design as “simple,” it must therefore be obvious. *Id.* at 13 (quoting Ex. 1021, 29:15–16 [sic, 28:15–16], 45:16–17).

On remand, Campbell addresses Gamon’s arguments related to the dimensions of the hypothetical can that would fit in Linz’s display area. Campbell also addresses the spatial relationship between the hypothetical dispensed can and various parts of the dispenser. Paper 97, 6–14. Relying on the testimony of its experts, Campbell argues that

to the extent there might be any differences in dimension between a Linz dispenser with a can in the dispensing area and the design claimed in the '645 patent, “any differences are *de minimis*” at best and, from the perspective of a designer of ordinary skill, would not change

Appendix B

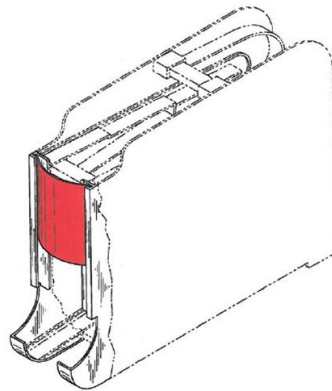
the fact that the Linz and '645 dispensers create the same overall visual appearance.

Id. at 7–8 (citing Ex. 1002 ¶¶ 48–50; Ex. 1020 ¶ 34). Campbell contends that a designer of ordinary skill in the art would not have “a higher aesthetic sensitivity to the precise dimensions of a can in a dispenser.” *Id.* at 10. Instead, Campbell contends “a designer of ordinary skill would understand the Linz reference – a proper primary reference – to teach the appearance of a dispenser with a can in the dispensing area and would understand what such a dispenser would look like.” *Id.* at 10–11.

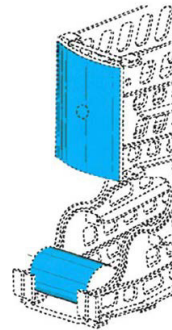
Campbell further contends that, “[t]o the extent any further teaching of a can in the dispensing area were needed to prove the obviousness of the claimed design, Samways and Knott teach that element.” *Id.* at 11. Specifically, Campbell argues, “[b]oth Samways and Knott expressly disclose gravity feed dispenser designs in which cans are dispensed below the dispenser’s label area.” *Id.* Thus, according to Campbell, “Samways and Knott provide further support by adding an express teaching of a can dispensed below the label area, as claimed. The '645 patent is accordingly unpatentable over either Linz alone, or Linz in view of either Samways or Knott.” *Id.* at 12.

5. Patent Owner’s Contentions

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

Appendix B

Linz, FIG. 1 (highlighted)



'645 patent figure (highlighted)

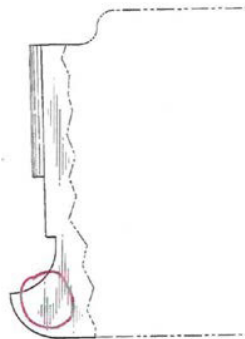
PO Resp. 23. The above illustration is a side-by-side comparison of Figure 1 of Linz (left) and the '645 patent Figure (right), and each depicts highlighted design features. According to Gamon, the highlights "show[] a distinct difference of the appearance of Linz relative to the '645 patent for a number of reasons," including Linz's failure to have "a cylindrical object, or any object, on display." *Id.* Gamon points out that Linz fails to disclose "a curved label area that extends essentially to the sides of the rack," because Linz has "flat strips extending laterally inward from the sides." *Id.* at 23–24 (citing Ex. 2001 ¶ 16). Gamon's primary argument is that "Linz, without modification, lacking the cylindrical article shown in the '645 patent design and its other elements, therefore does *not* provide 'basically the same visual impression' as the design of the '645 patent, and therefore the unaltered Linz design cannot be . . . used as primary reference against the '645 patent." *Id.* at 24.

On remand, Gamon contends that "[t]he record does not contain any basis for the dimensions and position of

Appendix B

the hypothetical can in Linz in Petitioners' drawing," and as such, Campbell's theories of can placement in Linz are based on "impermissible hindsight." Paper 95, 15. Gamon continues that "Linz does not describe or show what type of article is to be displayed in it, and the record is unclear as to what the appearance of an article in Linz would be." *Id.* at 16. Gamon contends Mr. Gandy failed to establish a "rational basis for the hypothetical can appearance or specific location in Petitioners' drawing," because he ignored "the actual function of the Linz rack" and he also ignored the specific structure that should have been examined to determine the size and location of Petitioner's hypothetical can. *Id.* at 18–19 (quoting Ex. 2019, 23 (Mr. Gandy testified: "That's not really anything that we would consider in determining patentability from a design standpoint. How it actually works is not something that we are looking at.")).

When asked during deposition to draw where a can would be located in Linz, Mr. Gandy added the following annotation to Figure 3 of Linz. *Id.* at 20–21.

FIG. 3

Appendix B

Figure 3 is a right side elevational view of the design of Linz with a red circle drawn by Mr. Gandy showing the hypothetical can located in the receiving area directly under the label area. Ex. 2026, 3. Mr. Gandy was asked whether he could determine the proportions of the can that he drew compared to the patented design and he answered:

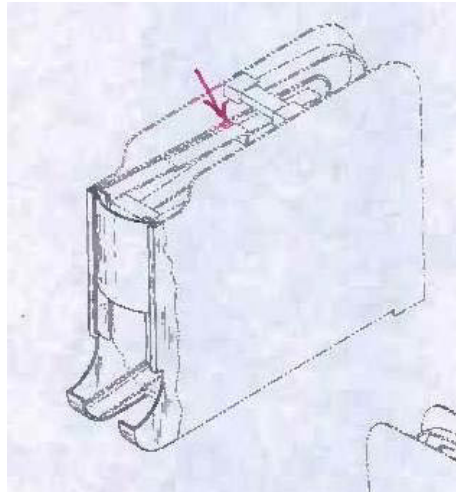
I don't think you can tell that from these drawings. These drawings are not shown to a scale of what the actual article is. It's *virtually impossible to know whether the cans would be the same or not.*

Ex. 2019, 32 (emphasis added). Gamon contends that based on these admissions, Petitioner's annotated Figure 3 of Linz showing a hypothetical can and placement is "speculative" and based on "impermissible hindsight." Paper 95, 20–21.

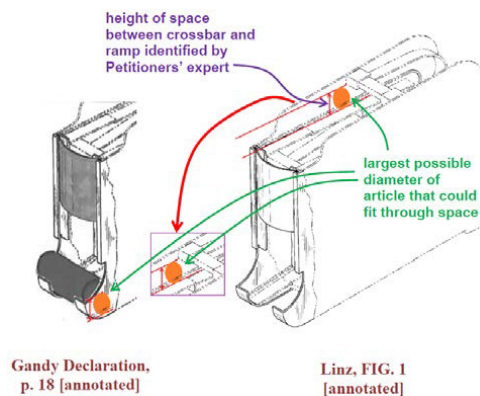
Gamon also contends that "Linz has structure that creates certain proportional limits to an article that could be used in the Linz display rack." *Id.* at 21. Relying on the cross-examination testimony of Mr. Gandy, Gamon contends that "the article loaded through the top of Linz would have to be dimensioned to fit through the space between the crossbar and the ramp at the top of Linz." *Id.* at 23 (citing Ex. 2026, 24). This space is depicted below.

51a

Appendix B



Id. at 22. The above illustration is an annotated Figure 1 of Linz showing Mr. Gandy's annotation of where a can would enter. Ex. 2026, 1 (Deposition Ex. 7). Based on these purported admissions made during cross examination, Gamon offers the following figures to contrast Petitioner's hypothetical Linz can with the largest possible diameter of a can that could be loaded into Linz. Paper 95, 24.



Appendix B

The above illustration is a side-by-side comparison of annotated Figures of Linz showing Gamon's theory as to the largest possible diameter of an article that could fit into Linz. *Id.* According to Gamon, Petitioner's hypothetical can has a diameter that is far in excess of the largest possible diameter for any article that could pass through the loading space between the crossbar and the ramp at the top of the Linz rack. *Id.*

Gamon further argues that Linz fails to teach the proportions and spatial relationships claimed in the patented design. *Id.* at 28–30. Gamon points out that the differences of the positioning and proportions of the label of the patented design relative to the can give that design an overall visual appearance that is clearly distinct from the positioning and proportions of the label of Linz. *Id.* at 29–30. Gamon notes that Campbell's hypothetical Linz drawing improperly pushes its hypothetical can farther forward and upward to try to copy the patented design, but the patented design requires a label area rearwardly positioned a greater distance from the front of the can than in the Linz rack. *Id.* at 31–33. Gamon also alleges that Linz does not teach the exposed surface shape of the can and the stop indents in Linz cover a wider portion of the length of the can than the stop indents in the design of the '645 patent. *Id.* at 30, 34.

Gamon contends that Linz cannot be combined with Samways or Knott to create the same overall visual appearance as the patented design. *Id.* at 36–40. Gamon contends that the reasons given for making the combination are impermissibly based on utilitarian reasons or otherwise improper. *Id.* Next, Gamon contends that even if the combinations were made they would still

Appendix B

fail to have the can/label spacing and proportionalities and the combination would still incorporate a can with dimensions and positioning that is generated by pure hindsight. *Id.* at 39–40.

*Gamon’s Arguments Related to Objective
Indicia of Nonobviousness*

Gamon argues that the objective indicia of nonobviousness are overwhelmingly in favor of patentability. PO Resp. 2–3. Gamon contends that the patented design has been commercially successful as “evidenced by substantially increased sales by Petitioners using the design for their products, Petitioners’ purchase of tens of millions of dollars of Gamon’s displays providing the claimed design, and the Petitioners having subsequently slavishly copied the design of the ‘645 patent.” *Id.* Gamon contends that “commercial success and industry praise are weighed against the evidence of obviousness,” and the claimed design of the ‘645 patent has seen “massive commercial success,” “both in terms of sales of display racks” and also “in sales of soup displayed with the ornamental appearance of the design.” *Id.* at 39. Gamon also contends that Campbell “ha[s] widely used display racks made in concert with Petitioner Trinity Industries for their soup products that were copied directly from racks made by Gamon so as to display cans of Campbell soup with the patented design.” *Id.*

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

54a

Appendix B



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



Appendix B

Exhibit 2006 represents a display of the commercial embodiment of the patented invention with Campbell Soup cans.

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

From 2003 until about 2005, Campbell Soup installed racks in about 14,000 stores and also began using a Gamon display rack of the same design, but scaled for use with Campbell's "Ready-To-Serve" soups. PO Resp. 40–42 (citing Exs. 2007, 2008; Ex. 2001 ¶¶ 40, 41, 47). Gamon relies on Campbell's annual reports to investors (detailed in the Background Section *supra*), which attribute increased sales of Campbell's soup to the display racks. *Id.* at 41–42; PO Sur-reply 1–2, 6; Paper 60 ¶ 18. Gamon argues that the patented design "was a significant component in the desirability of the 'gravity feed shelving systems', and the increased sales using the Gamon displays are clearly

Appendix B

linked to the use of the patented Gamon display racks and design.” PO Resp. 42 (citing Ex. 2001 ¶ 47).

Terry Johnson testifies that the patented design “was a significant contributor to the increase in sales, because Can[n]ondale found that putting the can on its side with the improved signage allowed shoppers to find their choices faster.” Paper 60 ¶ 18. Gamon further notes that “[b]y about 2009, Petitioner Campbell Soup had installed the Gamon display racks in about 30,000 stores,” and “[t]otal sales of the Gamon display racks to Campbell Soup by 2009 had totaled approximately \$31,000,000.00.” PO Resp. 42 (citing Ex. 2001 ¶ 45).

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

Appendix B

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

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

Gamon recognizes that the success of the display racks is attributable to both the ornamental design

Appendix B

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

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

Appendix B

On remand, Gamon contends that our prior determination remains undisturbed by the Federal Circuit decision because we considered Linz in combination with Samways and the secondary considerations of copying, commercial success and praise are overwhelming and would overcome even a strong case of obviousness. Paper 95, 12–13. Gamon points out that we made a parallel finding that even if Linz were a proper *Rosen* reference, Linz and Samways did not establish obviousness due to the secondary considerations. *Id.* at 11–12 (citing Final Dec. 29–35). Gamon notes that our prior “findings of copying, praise and commercial success were not disturbed by the Federal Circuit ruling, and similar findings of copying and commercial success were expressly affirmed by the Federal Circuit in the appeal of IPR2017-00087, the related utility patent IPR.” *Id.* at 41. Gamon further argues that “the same secondary considerations necessarily overcome the challenges based on Linz alone and Linz in argued combination with Knott, which were so weak that they did not even meet the threshold for *inter partes* review.” *Id.* at 42–43.

6. Overview of Analysis

We begin our analysis by first addressing evidence and argument related to the final *Graham* factor—objective indicia of nonobviousness. We then examine the differences between the prior art and the patented design, but more specifically we consider whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved. Finally, we weigh all the evidence and argument before us as to

Appendix B

make an ultimate determination as to obviousness based on Linz alone and Linz combined with Samways or Knott.

7. Objective Indicia of Nonobviousness

The objective indicia of nonobviousness should be closely considered because “[a] determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all those factors are considered.” *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016) (en banc) (citations omitted). “This requirement is in recognition of the fact that each of the *Graham* factors helps inform the ultimate obviousness determination.” *Id.* The Federal Circuit has recognized that:

Indeed, evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decision maker remains in doubt after reviewing the art.

Id. at 1052–53 (quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538–39 (Fed. Cir. 1983)). Just as with utility patents, objective indicia of nonobviousness are also considered in the analysis of design patent claims. *See L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1124 (Fed. Cir. 1993) (“As with utility patents, obviousness is

Appendix B

not determined as if the designer had hindsight knowledge of the patented design. . . . The undisputed commercial success of the patented design, and Appellants' copying thereof, are also relevant to analysis of the obviousness of a design.").

The objective evidence examined in this section is equally applicable to all of Petitioner's challenges under § 103, including our analysis below of Abbate and Primiano. We also note at the outset that Campbell's experts did not consider the objective indicia of nonobviousness in forming their opinions or offering an ultimate conclusion as to obviousness. Tr. 2, 18:1–19:15.

Gamon presents evidence of commercial success, praise, and copying attributable to the ornamental features of the patented design. As explained more fully below, Gamon also persuasively establishes a nexus, or relationship, between the ornamental features of the claimed design and the commercial success, praise, and copying of products implementing the design. Although some of the success of the commercial embodiments is attributable to utilitarian features and advertising, Campbell's internal documents and official public filings persuade us that the claimed ornamental aspects of the commercial embodiment contributed to both the success of the sales of the display rack, and also to sales of soup cans displayed as part of the claimed design. We consider commercial success, praise, and copying in turn below after first examining whether Gamon has met its burden of showing that a nexus exists.

*Appendix B**Nexus*

“In order to accord substantial weight to secondary considerations in an obviousness analysis, the evidence of secondary considerations must have a ‘nexus’ to the claims, *i.e.*, there must be ‘a legally and factually sufficient connection between the evidence and the patented invention.’ *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Circ. 2019) (internal quotations and citations omitted). “The patentee bears the burden of showing that a nexus exists.” *Id.* (quotation and citation omitted). We examine “the correspondence between the objective evidence and the claim scope” in order “[t]o determine whether the patentee has met that burden.” *Id.* (quotation and citation omitted).

Campbell admits that the evidence of record shows that the commercial products sold from Gamon to Campbell are covered by the patented design. Tr. 2, 19:10–14. Gamon also presented evidence of these display racks in their ordinary intended use to display a cylindrical Campbell Soup can as required by the claim of the ’645 patent. *See* Ex. 2006; Ex. 2015, 17; Ex. 2016, 23; Ex. 2017, 14. Gamon has thus shown that the asserted objective evidence discussed below is tied to a specific product and, as discussed in detail below, that product “is the invention disclosed and claimed in the patent.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1329 (Fed. Cir. 2016) (quoting *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997)).

Recently, the Federal Circuit reiterated that the presumption of “nexus is appropriate when the patentee

Appendix B

shows that the asserted objective evidence is tied to a specific product and that product embodies the claimed features, and is coextensive with them.” *Fox Factory, Inc.*, 944 F.3d at 1373 (quotations and citations omitted). Conversely, “if the patented invention is only a component of a commercially successful machine or process, the patentee is not entitled to a presumption of nexus.” *Id.* (quotation and citation omitted). Further, “a nexus exists if the commercial success of a product is limited to the features of the claimed invention.” *Id.* (quotation and citation omitted).

The Federal Circuit also reiterated:

To be sure, we have never held that the existence of one or more unclaimed features, standing alone, means nexus may not be presumed. Indeed, there is rarely a *perfect correspondence* between the claimed invention and the product. As we explained, the purpose of the coextensiveness requirement is to ensure that nexus is only presumed when the product tied to the evidence of secondary considerations “*is* the invention disclosed and claimed.” *Demaco*, 851 F.2d at 1392 (emphasis added). Thus, if the unclaimed features amount to nothing more than additional insignificant features, presuming nexus may nevertheless be appropriate.

Put differently, the degree of correspondence between a product and a patent claim falls along a spectrum. At one end of the spectrum lies

Appendix B

perfect or near perfect correspondence. At the other end lies no or very little correspondence, such as where “the patented invention is only a component of a commercially successful machine or process.” *Id.* Although we do not require the patentee to prove perfect correspondence to meet the coextensiveness requirement, what we do require is that the patentee demonstrate that the product is essentially the claimed invention. *See id.*

Fox Factory, Inc., 944 F.3d at 1374.

We first note that *Fox Factory* involves a utility patent and it examines the effect of components on an overall machine. We are analyzing an ornamental design. In the proceeding before us, we do not have perfect correspondence because the claimed portions of the display rack do not cover the entire display rack; instead, the ornamental design covers the front display area as discussed above. Thus, we consider whether “the unclaimed features amount to nothing more than additional insignificant features.”

We first consider what may be “significant” in regards to an ornamental design for a display rack. We find that the portions of the display rack that a consumer would observe are the most significant portions of the display rack in terms of ornamental design. Thus, we find that the front portions of the display rack are the most significant features. The unclaimed rearward rails and side portions are not prominent ornamental features to a consumer, or

65a

Appendix B

to a designer of ordinary skill. *See* Ex. 2006. For example, as depicted in Exhibit 2015 below, the unclaimed rearward rails and side portions of the display rack are not visible (and, thus, do not contribute to the ornamental features of the display rack) when the display rack is used as intended.



Appendix B

Exhibit 2015, 17 (Campbell 2005 Annual Report with highlighting added by Gamon). As depicted above, the most visible portions of the display rack, when in use, are the portions that are claimed. Therefore, we find that, in this case, the unclaimed portions of the display rack are “insignificant” to the ornamental design – to the extent such a finding is necessary in considering whether a presumption of nexus applies. In this proceeding, based on the close similarity between the specific gravity fed displays and the features of the claimed invention, and the relative insignificance of the unclaimed features to the ornamental design, we find that the display racks at issue embody the claimed features and are coextensive with them.

Even if the presumption of nexus did not apply, we find that Gamon establishes persuasively “that the evidence of secondary considerations is the ‘direct result of the unique characteristics of the claimed invention.’” *Fox Factory, Inc.*, 944 F.3d at 1374 (quoting *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)), and, therefore, establishes nexus with or without the benefit of the presumption. Our analysis below demonstrates, in detail, that, even without the presumption, Gamon has established a nexus to the patented ornamental design of the display rack.

Commercial Success and Praise

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

[C]ommercial success, while relevant as showing the nonobviousness of an invention, presents a

Appendix B

special difficulty in a design patent case. To be of value, evidence of commercial success must clearly establish that the commercial success is attributable to the design, and not to some other factor, such as a better recognized brand name or improved function.

728 F.2d 1423, 1443 (Fed. Cir. 1984). Gamon relies on its own sales of approximately \$31 million of gravity feed display racks to Campbell as evidence of commercial success. Ex. 2001 ¶¶ 37, 45. Gamon also relies on the commercial success of sales of the displayed soup cans (that is, sales made by Campbell) that comprise part of the claimed design. *Id.* We consider each measure of commercial success below and how it relates to the claimed features of the '645 patent.

Based on the final trial record before us, we determine that Gamon has established that its commercial embodiments have enjoyed commercial success attributable to the patented ornamental design and Campbell has seen increased sales volumes of soup attributable to the patented design. Terry Johnson testified that the Gamon display racks embodied the ornamental design claim of the '645 patent. Ex. 2001 ¶¶ 37–47.

Regardless of whether nexus is presumed, it has been proven by Gamon. As detailed more below, the evidence in the final record establishes that the commercial success of Gamon's display rack and an appreciable amount of Campbell's increased soup sales from 2002–2009 is attributable to the claimed ornamental features of the

Appendix B

patented design. Thus, presumption of nexus is not necessary for our determination in this proceeding. The final record establishes persuasively that the claimed ornamental design features, specifically the pronounced label area resembling the side of a can, as well as the cylindrical can lying on its side underneath the label area, attracted customers to the gravity feed display and allowed them to efficiently find and purchase soup products. *See* PO Sur-reply 4–5. The ornamental features created a display that jumped out and attracted soup customers to Campbell’s selections. Thus, the evidence before us establishes that the commercial success is directly attributable to the claimed design features.

When asked, “[W]hat facts are you aware of to show that the increase in Campbell soup sales was linked to the patented features of the display rack?” (Ex. 1021, 45:3–7), Terry Johnson explained that putting the can on its side was important and “what the consumer saw because there was a big convex sign that was the same as the label and it was the same proportions as the can.” *Id.* at 45:8–17. We agree that the patented design itself uniquely mimics the proportions of the Campbell’s soup can. *See* Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display”). The evidence shows that this proportionality in the claimed design was original and created a display that looked like a soup can, which contributed to the success of the patented display rack and also to increased soup can sales. *Id.*; Ex. 1021, 45:1–22; Ex. 2015, 10 (“while making the soup aisle dramatically easier for consumers to shop”); Ex. 2032, 4 (“Billboard effect

Appendix B

improves branding: 210% larger”); Ex. 2031, 5, 6, 10–12, 14–17, 26–31; Ex. 1021, 39:3–10 (“Cannondale said that the reason the sales went up was because the people could find their soup more rapidly and allowed them time to shop impulsively . . .”). Gamon’s ornamental design turned the soup can on its side and the record demonstrates that Campbell originally believed doing this would not work, which indicates the originality of the design. Ex. 1021, 27:13–16, 29:11–30:10 (“[n]o one wanted me to turn the can on its side”).

The evidence further shows that the claimed ornamental design allowed customers to find their desired soup more efficiently and encouraged additional purchases. Ex. 2032, 4–10 (“Breakthrough Gravity Feed Shelving,” that “Encourages purchase of additional varieties,” and resulted in positive consumer responses in every test market); *id.* at 4, 10 (“It makes me want to buy more soup!”); Ex. 2015, 17 (“Our breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop.”).

Campbell’s internal market study also determined that the label area of the claimed design improves branding and also “[e]ncourages purchase of additional varieties.” Ex. 2032, 4. Campbell concluded that the display rack would increase its soup sales volume by 5.5–13.6% depending on the type of soup and brand. *Id.* Campbell referred to the Gamon display rack as “Breakthrough Gravity Feed Shelving.” *Id.* As noted by customers participating in the market testing, the ornamental design played a significant

Appendix B

role in attracting customers to the display because “[i]t just jumps out of this section, wow,” and “it was like having a menu in front of me.” *Id.* Another customer, referring to the label area, noted “[t]he labels make a difference, it’s like looking at your soup before you eat it.” *Id.* As explained by Terry Johnson, this proportionality between the label and the soup can was purposeful and contributed to the attraction and success of the patented design. Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art”); Ex. 1021, 45:8–17. Still another customer noted that when the patented displays are placed side-by-side, it gives the visual appearance of being “the most organized store[] I have ever seen.” Ex. 2032, 5.

As discussed in the Background section above, a Campbell’s marketing manager noted in 2004 that a “key benefit[]” of the IQ Maximizer was that the program enhances the shopping experience for the consumer and also “makes it easier for consumers to find desired products while giving visibility to others,” and that “[t]he facings are better defined and easier for customers to shop, so fewer are needed.” Ex. 2007, 1.

Based on the evidence above, we find that the ornamental design and its ability to attract customers to the display and allow customers to efficiently find soup were factors in Campbell’s decision to purchase \$31 million of Gamon’s gravity feed display racks and install them in over 17,000 stores from 2002 until 2009. PO Resp. 47; Ex.

Appendix B

2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14. Campbell’s Annual Reports to shareholders confirm this assessment.

In its 2005 Annual Report, Campbell noted that “[t]he strong performance of *Campbell’s* condensed soup business demonstrates the value of the *iQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup.” Ex. 2015, 10. The report described the IQ Maximizer as “making the soup aisle dramatically easier for consumers to shop.” *Id.* Campbell’s 2006 Annual Report similarly notes that the IQ Maximizer “continues to be a powerful tool to merchandise *Campbell’s* condensed soups.” Ex. 2016, 8. Campbell described the IQ Maximizer as a “tool to deliver impactful consumer messages at the point of purchase” (*id.*), and as “Making Shopping Even Simpler” (*id.* at 22). Campbell also claims that the IQ Maximizer was a “breakthrough in soup merchandising.” *Id.*

Based on these statements, and the results of the prior market study (Ex. 2032), we find that Patent Owner has established that the claimed invention made the soup aisle “easier and faster for consumers to shop” (Ex. 2015, 17) because the ornamental display, including the label area and its spatial relationship to the cylindrical soup can, allowed customers to quickly find their desired soup—Terry Johnson’s primary goal in creating the claimed design. Ex. 1021, 27:13–28:24, 36:21–37:3, 39:3–10.

Campbell contends that factors other than the ornamental design of the ’645 patent may have contributed to the commercial success enjoyed by Campbell. Pet. Reply 14–17. We examine these factors below and agree with

Appendix B

Campbell that other factors may have also made some contribution to the overall commercial success of the sales of Campbell's Soup cans displayed in the Gamon racks. However, as discussed in detail herein, the evidence also establishes that a portion of the commercial success is attributable to the design of the '645 patent. We do not read *Litton Systems, Inc.* or *Fox Factory*, as precluding other factors from also contributing to a product's success, so long as a preponderance of the evidence establishes that the product's success was "attributable to" the claimed invention. See *Fox Factory*, 934 F.3d at 1378.

Campbell alleges that other factors such as the "organization of the overall shelf display into color-coded 'flavor clusters,'" "successful merchandising," and other advertising programs contributed to the commercial success of its soup products. Pet. Reply 15–17. Campbell also acknowledges, however, "that its new gravity-feed display system 'also' contributed to increased soup sales" but argues that its Annual Reports "did not attribute any portion of its increased sales to the display racks." *Id.* at 15; Paper 97, 24.

Even though these other factors had some impact on commercial success, we determine that Gamon has established, and Petitioner has not rebutted, that an appreciable amount of Campbell's increased commercial success of soup during the relevant time period is attributable to the ornamental features of the patented design. Ex. 2032, 4; Ex. 2017, 36. As explained more below, we do not place a specific number on the contribution of the claimed ornamental features to the overall commercial

Appendix B

success of Campbell's soup sales, but we determine the evidence establishes that an appreciable amount of increased soup sales are tied to the ornamental features of the design. This evidence is examined in more detail below.

In 2002, Cannondale projected a 5.5–13.6% increase in sales from using the gravity-feed shelving system. Ex. 2032, 4. This same market study noted that other variables were controlled so that a determination could be made on the impact of just the Gamon's IQ Maximizer—"[s]ingle variable testing will be employed." Ex. 2031, 26–27.

In fiscal 2005 Campbell's reported that "U.S. soup sales grew 5 percent" after the Gamon gravity-feed shelf system had been put into 14,000 stores. Ex. 2015, 5, 10, 30–31. Condensed soup sales grew 8% and this growth was attributable to "merchandising and kids promotional marketing," "increased advertising and higher prices," as well as "gravity-feed shelving systems installed in retail stores." *Id.* at 31. Campbell noted that its condensed soup sales increased by 5% in 2006, which Campbell attributed to "higher prices across the portfolio," and "the additional installation of gravity-feed shelving systems and increased advertising." Ex. 2017, 36.

The overwhelming weight of the direct and circumstantial evidence before us establishes that the patented ornamental design improved the sales of Campbell soup an appreciable amount in 2005 and 2006. When we state an appreciable amount sufficient to establish commercial success, this determination is based on the complete record before us, including

Appendix B

evidence that even a few percentage points difference in sales is significant in this industry. *See, e.g.*, Ex. 2015, 30–31 (stressing importance of sales increases of 3% in “U.S. Soup, Sauces and Beverages” and 5% for “U.S. soup sales”). Likewise, Campbell recognized that the Gamon shelves were valuable because they increased soup sales. *Id.* at 10 (“The strong performance of *Campbell’s* condensed soup business demonstrates the value of the *IQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup.”). Campbell’s increased sales of soup is attributable to the ornamental patented design and these increased sales demonstrate a strong showing of commercial success.

The preponderance of the evidence establishes that the ornamental patented design contributed to Campbell’s commercial success of soup cans displayed in the design. The ornamental features attracted customers. These ornamental features were praised by Campbell in its public filings to shareholders and the evidence establishes that the ornamental design contributed to increased soup sales.

We also determine that Gamon’s commercial success in selling the patented display racks is attributable to the ornamental design embodied in the patent. We have recognized that utilitarian features of the Gamon display rack also contributed to its overall success. For example, the ease of re-stocking soup cans and the return can feature (U.S. Patent No. 8,827,111 or the ’111 patent) also aided in the product’s success. The evidence also demonstrates that the ornamental aspects of the design contributed significantly to sales of the Gamon display

Appendix B

racks as detailed above. Accordingly, Gamon's sales to Campbell of about \$31 million in display racks from 2002–2009 demonstrate a strong showing of commercial success.

In its remand briefing, Campbell argues that “Gamon cannot rely on the same evidence and the same presumption of nexus to show secondary considerations for two different patent claims directed to two different combinations of features.” Paper 97, 20–21 (citing *Fox Factory, Inc.*, 944 F.3d at 1378). Similarly, Campbell argues “[w]ith a nexus now definitively established between that evidence and claim 27 of the '111 patent, Gamon can no longer rely upon the same evidence to assert non-obviousness as to the '645 patent.” Paper 103, 2. Campbell's arguments are misplaced. We do not rely on the same evidence or rely solely on a presumption of nexus. Our determinations above focus on the ornamental aspects of the claimed design patent and we specifically differentiate the impact of the utilitarian features. Campbell failed to offer any persuasive evidence or argument to refute our findings. Additionally, as we also explained above, Gamon has established persuasively that the evidence of secondary considerations is directly attributable to the claimed ornamental design. Campbell complains that Gamon did not allocate the commercial success of its patented display rack between various patents (Paper 97, 24), but we do not read *Fox Factory* as creating an obligation for patent owners to allocate percentages of success to different patents that cover a commercial product.

Further, *Fox Factory* did not address, directly, the circumstances presented here – where utility and design

Appendix B

patents cover the same product¹³ and are complimentary to one another. Nonetheless, we do not rely on precisely the same evidence in precisely the same manner as we did in IPR2017-00087. Although some of the evidence related to commercial success and copying overlaps, aspects of that evidence and how we have examined them differ. The utility patent focused on the return can feature and the ease of stocking and restocking shelves. These benefits were understood by Campbell and the stores where these shelves were placed. And, the Federal Circuit considered our analysis of the evidence related to the utilitarian features in IPR2017-00087 and agreed that they were supported by substantial evidence on appeal. *Campbell Soup Co.*, 787 F. App'x at 739 (“We also conclude that the Board’s findings regarding secondary considerations are supported by substantial evidence.”). In our discussion above, however, we have explained how the evidence before us also establishes that the ornamental features were a significant factor in both Gamon’s success and Campbell’s success. The claimed ornamental design attracted consumers to the display, made shopping easier, and encouraged consumers to purchase Campbell’s soup displayed in the patented design. Numerous other reasons are discussed herein. The commercial success based on the utilitarian and ornamental features of the Gamon display racks are complimentary. As counsel for Gamon argued, “those two things are not exclusive. They can happily coexist in one article.” Tr. 2, 38:17–18. Gamon’s and Campbell’s commercial success is attributable to both sets of features.

13. The commercial products covered by the '646 design patent and the '111 utility patent are also covered by the '645 design patent.

Appendix B

Accordingly, we find that overall Gamon has made a strong showing of commercial success attributable to the claimed ornamental design, and that the claimed ornamental design was praised by Campbell and its customers.

Copying

Gamon also alleges that Petitioner Trinity copied its patented design and began selling the same gravity feed display racks to Campbell. The final trial record establishes that the display racks made by Petitioner Trinity and sold to Campbell have the same patented design features as the display racks Gamon sold to Campbell. PO Resp. 38–39, 43–44; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013.

We found copying in our first Final Decision and the evidence has not changed. Therefore, we reaffirm our finding that Petitioner copied Gamon’s commercial display racks. Also, in related case IPR2017-00087, the Federal Circuit affirmed our determination that Gamon’s commercial embodiments were copied by Petitioner. *Campbell Soup Co. v. Gamon Plus, Inc.*, IPR2017-00087, Paper 73 at 64 (PTAB Apr. 20, 2018) (“Patent Owner has established that Petitioner copied Patent Owner’s display racks.”); *Campbell Soup Co., Inc.*, 787 F. App’x at 739 (“We also conclude that the Board’s findings regarding secondary considerations are supported by substantial evidence.”). Because the products are the same, we are bound by this determination as to copying.

Appendix B

Petitioner argues that it could not have copied the '645 patent because it was not filed until February 9, 2010. Pet. Reply 17–18; Tr. 44:11–47:25. Petitioner's argument is unpersuasive for two reasons. First, copying in the context of secondary considerations examines whether an underlying "product" is replicated. "Copying 'requires evidence of efforts to replicate a specific product.'" *Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1370 (Fed. Cir. 2011) (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)). The evidence that Petitioner Trinity copied the Gamon gravity feed display rack is unrefuted. *See* Ex. 2001 ¶¶ 48–52; Tr. 47:1–4. Second, Gamon relied on accepted continuation practice to file the '645 patent and Petitioner has not presented any persuasive argument that such practice would prevent a finding of copying. *See* Ex. 1001, [60].

The final trial record before us is replete with evidence of copying.

[C]opying requires evidence of efforts to replicate a specific product, which may be demonstrated *through internal company documents*, direct evidence such as disassembling a patented prototype, photographing its features, and using the photograph as a blueprint to build a replica, *or access to the patented product combined with substantial similarity to the patented product*.

Wyers, 616 F.3d at 1246 (emphases added).

Campbell's internal presentations in 2002 demonstrate that Campbell was aware that Gamon's gravity feed display

Appendix B

racks would increase sales volume of Campbell's soup. *See* Ex. 2032, 4. After obtaining the results of the Cannondale survey, Campbell purchased tens of thousands of Gamon's display racks between 2002 and 2009. PO Resp. 43–44. Campbell had access to the patented design and significant motivation to continue using the same design. Campbell's annual reports praise the Gamon display racks and link increased Campbell soup sales to the ornamental features of these display racks. *See supra*. Around 2009, Campbell transitioned from purchasing Gamon's display racks to those sold by Petitioner Trinity. The Trinity display racks are substantially similar to the Gamon racks, especially as related to the patented ornamental front label area and the ability to place a cylindrical object below the label area. *See* PO Resp. 43–44; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013.

Campbell's and Trinity's access to the patented product combined with substantial similarity of Trinity's product to the patented product provide unrefuted evidence that Gamon's display racks were copied. Petitioner has not presented any evidence to refute copying. To the contrary, Petitioner admitted that their only rebuttal to Gamon's copying allegations was that the patents should be held invalid or that there was no pending patent claim when the Gamon products were copied. Tr. 46:18– 47:4; Paper 97, 23 (“[t]here is nothing patentably distinct about the claimed design”).

Accordingly, we determine that Gamon has established that Petitioner copied Gamon's patented display racks.

*Appendix B**Additional Arguments Related to Secondary Considerations*

Campbell further argues that “Gamon also cannot show that any purported commercial success, praise or copying associated with Petitioners’ accused dispensers is attributable to some patentably distinct, ornamental (rather than functional) feature of the ’645 patent design.” Paper 97, 22. Campbell relies on *Ormco Corp. v. Align Technology, Inc.* for the proposition that “if the feature that creates the commercial success was known in the prior art, the success is not pertinent.” 463 F.3d 1299, 1312 (Fed. Cir. 2006); Paper 97, 22 (“Gamon cannot claim secondary considerations associated with design features that were already known.”). *Ormco Corp.* involves a utility patent. We do not find Campbell’s arguments persuasive for the reasons set forth above, and as further explained below.

First, Campbell has not argued that any portion of the claimed ornamental design is “functional.” Likewise, our original claim construction, affirmed by the Federal Circuit, did not find any portion of the claimed design to be functional. Second, our analysis above thoroughly considers all reasons for the commercial success of the Gamon display racks, including utilitarian properties.

When weighing the objective indicia of nonobviousness for design patent analysis, we consider the patented ornamental design as a whole. *See L.A. Gear, Inc.*, 988 F.2d at 1124 (“The district court concluded that there was no teaching or suggestion in the prior art of the appearance of

Appendix B

the claimed design as a visual whole. We discern no error in this conclusion.” Further, “the ornamental quality of the combination must be suggested in the prior art.”). The overall design must be “new, original and ornamental.” 35 U.S.C. § 171. The claimed ornamental design as a visual whole should guide the validity analysis for a design patent.¹⁴ See *Petersen Mfg. Co., v. Central Purchasing, Inc.*, 740 F.2d 1541, 1548 (Fed. Cir. 1984) (“The obviousness of a design must be evaluated as a whole.”). Likewise, the claimed ornamental design as a whole may also be considered in determining commercial success as we have done.

The utility patent in *Ormco Corp.* concerned an invisible orthodontic device and the evidence demonstrated “that commercial success was due to unclaimed or non-novel features of the device.” *Ormco Corp.*, 463 F.3d at 1312. In contrast, the evidence before us establishes that a significant portion of Gamon’s commercial success and an appreciable amount of Campbell’s increased sales of soup cans was the result of the claimed ornamental design as a visual whole. The final record establishes “that the

14. We do not believe that there needs to be a single “patentably distinct” feature that creates the commercial success for an ornamental design patent claim. Cf. *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1333 n.1 (Fed. Cir. 2014) (explaining that for design patent infringement the “focus [is] on the ‘overall visual appearance’ of a claimed design rather than on individual features”); *Egyptian Goddess, Inc.*, 543 F.3d at 677 (recognizing that “a claimed design” may “consist[] of a combination of old features” while abolishing the “the point of novelty test”).

Appendix B

commercial success . . . [is] related to the merits of the claimed invention.” *MRC Innovations, Inc.*, 747 F.3d at 1336.

As noted above, the invalidity analysis focuses on the ornamental design as a whole, and thus we do not believe that to establish commercial success for a design patent, a patent owner should have to differentiate design features “that were already known” from those that are purportedly novel, as argued by Campbell. To the extent that design patent law incorporates this utility patent concept, which it should not, we also determine that the commercial success *is* attributable to certain novel features. We acknowledge the Federal Circuit’s holding that “Linz’s design is made to hold a cylindrical object in the display area,” making it a proper primary reference as detailed below. 939 F.3d at 1341. Nevertheless, it is undisputed that Linz’s design does not depict a label area that mimics the proportions of the cylindrical object and spacing of the objects from one another. *See* Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art”). As explained above, that proportionality and spacing (which is not suggested by Linz) represents an original design feature and results in a display label that looks like (i.e., mimics the front of) a larger soup can positioned above the actual can lying on its side one label length below. Significantly, as explained above, the evidence demonstrates that these features of proportionality and spacing contributed to the success of the patented display rack and also to increased sales of soup cans.

Appendix B

Below, we begin our discussion with an understanding that Linz is a proper *Rosen* reference. Then, as part of second step of the obviousness analysis, we determine that Linz creates basically the same overall visual appearance as the patented design. But there is no dispute that Linz does not teach or suggest the features of proportionality and spacing. That “ever-so-slight difference[] in design” meaningfully impacts the obviousness analysis, because the proportionality of the can to the label area, and its relative positioning and spacing, impacted the commercial success of the product. Although the proportionality and spacing features do not remove Linz as a primary reference, they do represent features of the claimed design, and represent distinct ornamental features that impact our finding of commercial success.

8. Linz Alone or Linz and Samways or Knott

We begin our analysis with the understanding that Linz is a proper *Rosen* reference. Specifically, the Federal Circuit held that “the ever-so-slight differences in design, in light of the overall similarities, do not properly lead to the result that Linz is not ‘a single reference that creates “basically the same” visual impression’ as the claimed designs.” *Campbell Soup Co.*, 939 F.3d at 1341. The Federal Circuit also determined that “Linz [was] for dispensing cans and that a can would be used in the system,” but the Federal Circuit did not offer any further opinion as to the size, shape, positioning, and orientation of the hypothetical can in Linz. *Id.* The parties briefing on remand (Papers 95, 97) addresses these issues.

Appendix B

We next examine the ornamental appearance in Linz compared to the patented design to determine whether the designs would have had the same overall visual appearance to a designer of ordinary skill in the art. Similarly, we must determine “whether other references may be used to modify Linz to create a design that has the same overall visual appearance as the design claimed.” Paper 97, 5. The parties’ arguments are set forth in detail above.

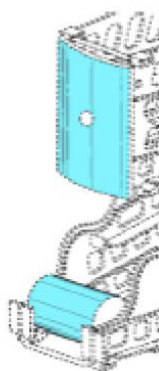
Campbell acknowledges our prior determination “that ‘Linz’s overall ornamental appearance is similar to the design claim of the ’645 patent’ once a cylindrical object is added to the display area.” *Id.* at 6 (quoting Final Dec. 34). Campbell then argues that “Linz alone renders the ’645 patent obvious, as (a) it would have been obvious to a designer of ordinary skill to put cans (or other cylindrical objects) into a Linz dispenser design, and (b) a Linz dispenser displaying a can has the same overall visual appearance as the ’645 patent design.” *Id.* Relying on the testimony of its experts, Campbell reasons “that it would have been obvious to a designer of ordinary skill that the Linz dispenser was intended to dispense cylindrical objects, and that such objects would be dispensed below the label area and behind the stops.” *Id.* at 7.

We have considered the parties’ arguments after remand and determine that Campbell’s contentions are most persuasive. After a can is added to Linz, which the Federal Circuit deemed proper, the two designs would generally have the same overall visual appearance. The Federal Circuit also made the determination that the

Appendix B

“differences in design” are “ever-so-slight.” Based on the arguments made by Campbell, and the findings of the Federal Circuit, we determine that Linz would generally have the same overall visual appearance as the patented design.

To reach this determination, we presume the hypothetical can in Linz is somewhat similar to the can added by Campbell to the Linz design, as shown the Petitioner’s annotated versions of the ’645 patent drawing (below left) and Linz’s Figure 1 (below right).



’645 Patent drawing

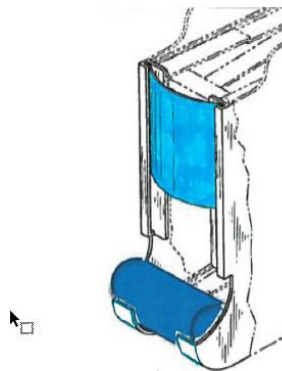


Fig. 1 of Linz a plus can

Pet. 28. The above illustration shows Campbell’s highlighted figure of the ’645 patent (left) compared to Campbell’s highlighted figure of Linz Figure 1 (right) with a can added. *Id.* The designs, as a whole, have similarities such as having label areas that are generally rectangular and curved convexly forward, with the label area taller vertically than it is wide horizontally.

Appendix B

Although the designs are similar, there are also differences. We do not agree that Campbell's depiction of the hypothetical can in Linz (above right) is completely accurate. The can in Linz would have to pass through the slots at the top of the gravity feed display, and the designer of ordinary skill would understand that these slots would require a smaller can with a much reduced diameter than that portrayed above. *See* Paper 95, 22–24. Further, we do not agree that the can placement would be as depicted above. Gamon has offered persuasive cross-examination testimony from Campbell's expert that establishes that the smaller can would be offset further rearwardly than what is depicted by Campbell. *Id.* at 20–21 (citing Ex. 2019, 32), 24. Campbell's expert also testified, "I don't think you can tell that from these drawings. These drawings are not shown to a scale of what the actual article is. It's *virtually impossible to know whether the cans would be the same or not.*" Ex. 2019, 32 (emphasis added). Campbell's portrayal of the can in Linz appears to us, therefore, as a guess guided by hindsight because no consideration was given for the overall design of the rack. For example, Campbell's proposed can could not pass through the top rail of Linz, and Campbell's expert admits that it's virtually impossible to know whether the cans would be the same or not. Petitioner also has not proven sufficiently that any can added to Linz would come to rest partially forward of the label area, as required by the claimed ornamental design. *See* Ex. 2026, annotated Fig. 3 (drawn during Mr. Gandy's cross-examination). Finally, the label area of Linz also is not as tall vertically as the claimed design. Paper 95, 31–32.

Appendix B

Campbell's experts conclude that these differences would have been minor to a designer of ordinary skill in the art. Ex. 1002 ¶¶ 48–50, 48 (“differences are *de minimis* and not sufficient to justify a finding that the design is patentable”); Ex. 1020 ¶¶ 32, 36. Further, as the Federal Circuit found, the “differences in design” are “ever-so-slight.” *See Campbell Soup Co.*, 939 F.3d at 1341. We agree that “slight differences in the precise placement of [certain design elements] does not defeat a claim of obviousness; if the designs were identical, no obviousness analysis would be required.” *MRC Innovations, Inc.*, 747 F.3d at 1332–33; Paper 97, 12. Thus, we determine Linz would have created the same overall visual appearance as the claimed design to a designer of ordinary skill in the art.

Campbell also has established that Linz combined with either Samways or Knott would have the same overall visual appearance to a designer of ordinary skill in the art. Samways and Knott provide support for moving Linz's can forward as claimed in the patented design. Petitioner has shown that Samways and Linz are so related that the appearance of certain ornamental features in Samways would suggest the application of those features to Linz. Pet. 30–34. Likewise, Petitioner also demonstrates how certain features from Knott could be integrated into Linz. *Id.*

Petitioner has established sufficiently that Linz alone or Linz combined with Samways or Knott create a design that has the same overall visual appearance as the claimed design.

Appendix B

9. Weighing the Evidence – Ultimate Determination as to Obviousness

We are faced with the situation where the prior art ornamental designs examined above have the same overall visual appearance as the claimed design, but the objective evidence is strongly in favor of nonobviousness. To reach the ultimate determination as to obviousness, we consider each of the *Graham* factors as well as the complete record before us.

As way of background, the original Petition in this proceeding asserted twelve distinct grounds. Dec. 6. Of these grounds, we determined that Petitioner established a reasonable likelihood of prevailing as to three. *Id.* at 32. At that time we did not have evidence of secondary considerations before us. We issued the first Final Decision that addressed the three instituted grounds and considered each of the *Graham* factors, including secondary considerations. In that Final Decision we weighed all four *Graham* factors and determined Campbell had not met its burden as to any ground. We were affirmed by the Federal Circuit as to two of the three grounds and reversed on one ground – the ground based on Linz and Samways. The Federal Circuit reversed our determination that Linz was not a proper primary reference, and remanded to reassess the obviousness question. Pursuant to *SAS*, the Federal Circuit also remanded as to all the grounds that we initially determined lacked merit for purposes of institution.

To reach the ultimate determination as to obviousness, we weigh the strength of Campbell's evidence of

Appendix B

obviousness against Gamon’s strong showing of objective indicia of nonobviousness. Above, we have discussed our reviewing court’s en banc direction that “[a] determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all those factors are considered.” *Apple*, 839 F.3d at 1048. “This requirement is in recognition of the fact that each of the *Graham* factors helps inform the ultimate obviousness determination.” *Id.* The Federal Circuit also has recognized that “evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Id.* at 1052–53 (quoting *Stratoflex, Inc.*, 713 F.2d at 1538–39).

As determined above, the designer of ordinary skill in the art would have had a background or familiarity with commercial dispensers, and particularly dispensers for consumer commodities such as cans, bottles, or small packaged items and a basic understanding of physics and/or mechanics. This *Graham* factor does not particularly favor either party, but it does provide the foundation for our analysis.

Petitioner established persuasively that a designer of ordinary skill in the art would have considered Linz a *Rosen* reference and thereafter combined the features of Linz with either Samways or Knott at the time of the invention. This combination, although sufficient to create a design that has the same overall visual appearance as the claimed design, does not produce a strong case

Appendix B

of obviousness. The similarities and differences are examined above. The designer of ordinary skill would understand that Linz's hypothetical can would be smaller than the can Campbell has depicted. Linz's can would sit either behind or directly under the label area and not forwardly positioned, but this forward placement is taught by either Samways or Knott when modified. The label area of Linz is not as tall, or prominent as in the claimed design. There is no evidence that the label area of Linz uniquely mimics the proportions of the can it holds and there is no suggestion in Knott or Samways of this proportionality and the spacing between the label and can. *See* Ex. 2001 ¶ 6 ("the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art"). Although the evidence presented by Petitioner is sufficient to create a design that has the same overall visual appearance as the claimed design, Petitioner's analysis appears to us to at least be guided by hindsight reconstruction that uses the disclosure of the '645 patent as a roadmap.

While the determination as to whether the prior art designs have the same overall visual appearance is a close call, the objective indicia of nonobviousness weigh strongly in favor of patentability.

Gamon presents evidence of a nexus between the ornamental features of Gamon's gravity feed display racks and the commercial success enjoyed by both Gamon through its sales of display racks, and Campbell, through its increased sales of soup using the display racks.

Appendix B

Campbell and its customers offered praise and recognition that is tied to the ornamental features of the patented design. Evidence of commercial success that is directly attributable to the claimed ornamental design features is strong. The evidence of direct copying is strong and unrebutted.

Weighing these factors, and considering the complete record before us on remand, the strength of the objective indicia of nonobviousness convinces us that the design claim would not have been obvious in light of the proposed combinations of prior art. Specifically, the strong evidence of objective indicia of nonobviousness supports an ultimate determination that the claimed design of the '645 patent would not have been obvious over Linz alone, or Linz and Samways or Knott, to a designer of ordinary skill in the art at the time of the invention. Weighing the evidence of obviousness and nonobviousness as a whole, we determine that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '645 patent is unpatentable as obvious based on the grounds and prior art examined above.

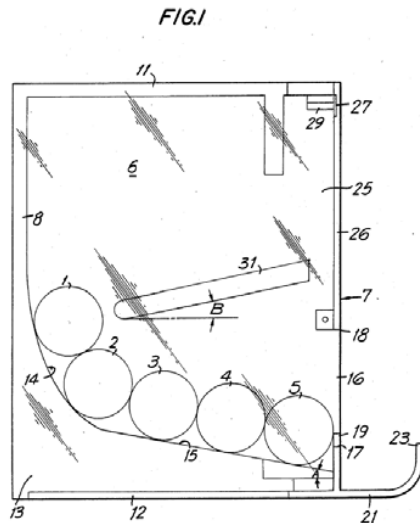
*D. Obviousness Based on Abbate and Samways
and/or Linz*

We originally denied institution on the basis that Abbate was not a proper *Rosen* reference. Dec. 28–29. Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim is unpatentable over Abbate and Samways and/or Linz for the reasons explained below.

Appendix B

1. Abbate (Ex. 1011)

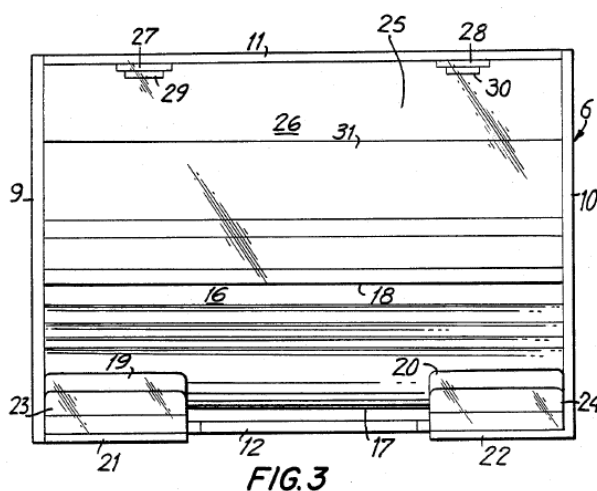
Abbate is titled “Display Case” and discloses a “display case for storing and displaying a plurality of items of overall general elongated rolled and cylindrical configuration.” Ex. 1011, [54], Abstract. Figure 1 of Abbate is reproduced below.



Id. at Fig. 1. As shown above in Figure 1, the display case “stores and displays a plurality of items 1, 2, 3, 4 and 5, shown . . . in phantom, of overall general elongated rolled and cylindrical configuration such as, for example, rolls of wallpaper.” *Id.* at 3:32–36. Bottom opening 16 is provided in the display case “for accommodating the passage therethrough of one of the items 1 to 5 at a time.” *Id.* at 3:58–60.

Appendix B

Figure 3 of Abbate is reproduced below.



Id. at Fig. 3. Figure 3, shown above, provides a front view of the display case. *Id.* at 3:26–27. Abbate discloses that a “pair of spaced substantially partially curved ledges 21 and 22 extend from the bottom 12 of the housing 6 beyond the front 7,” as shown above in Figure 3. *Id.* at 4:3–5.

As noted above, Abbate is for elongated, skinny, rolls such as wallpaper. *Id.* at 3:32–36.

2. Analysis of Alleged Obviousness Based on Abbate in View of Samways and/or Linz

Petitioner contends the ornamental design of the '645 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways or Linz. Pet. 42–46. Petitioner relies on a comparison of the combined

Appendix B

ornamental features of Abbate and Samways and/or Linz with the design of the '645 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 71–78). Petitioner relies on Abbate as the primary reference, specifically citing to Figures 1–3. *Id.* at 43. For the reasons discussed below, we disagree that Abbate has design characteristics that are basically the same as the claimed design.

On the final record before us, we determine that Abbate is not a proper *Rosen* reference. Abbate depicts a display case for long and skinny tubes, such as “wallpaper.” Ex. 1011, 1:9–11; 3:32–36. Abbate’s design is short, and has no curved label area surface, and the label area is shorter than it is tall. The height and width dimensions of Abbate’s label area are not similar to those of the '645 patent claimed design and the label area is not convex or curved forward as in the '645 patent claimed design. The display disclosed and illustrated in Abbate stores “elongated rolled and cylindrical configuration such as, for example, rolls of wallpaper.” Ex. 1011, 3:32–36. Based on these differences between Abbate and the patented design, we determine that Abbate does not provide the same visual impression as the patented design and therefore cannot serve as a *Rosen* reference.

It is not the province of design patent law to guess about designs that could be brought into existence based on descriptions in a specification suggesting other dimensions are possible or that features could be added or changed. *See* Paper 97, 18–20. Our focus in determining whether something is a proper *Rosen* reference must be

Appendix B

on *what currently exists*, and not *what hypothetically could be created* by a designer of ordinary skill in the art. *Rosen*, 673 F.2d at 391 (“and compared with something in existence—not with something that might be brought into existence”). Campbell’s analysis first suggests the necessary hypothetical changes that Abbate would require before attempting to establish that Abbate is a proper *Rosen* reference. Paper 97, 19 (“teachings of Abbate are not limited to any particular height-to-diameter proportions”). To begin the *Rosen* analysis by first changing the depicted designs in Abbate based upon general statements in its specification would be contrary to the basic foundational principles of design patent law. Adopting Petitioner’s approach would make design patents worthless because any generic description in a specification could be used to create a similar patented ornamental design based on hindsight reasoning. A word is not worth a thousand pictures.

Accordingly, we determine that Petitioner has failed to establish by a preponderance of the evidence that the claim of the ’645 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways and/or Linz.

Even if Abbate were a proper *Rosen* reference, and even if we determined that the combination of Abbate with Samways and/or Linz created the same overall visual appearance, our ultimate conclusion as to obviousness for this combination would not change. The objective indicia of nonobviousness strongly favor nonobviousness, while a finding of similarity in the overall visual appearance is

Appendix B

weak. The evidence of secondary considerations is detailed above and is equally applicable to this ground. Specifically, the evidence in favor of nonobviousness outweighs that of obviousness for this combination of references.

Abbate's front display area does not mimic the proportionality of its elongated wallpaper tubes – Abbate's front display is not curved. Even treating Abbate as a proper *Rosen* reference, and combining select features from Linz, such as a curved label area (Paper 97, 20), the cylindrical objects in Abbate still would not be proportional to the front label area. The ornamental label area of the patented design mimics the proportionality of the can below it, lying on its side. The label area of Abbate appears more like a billboard (it is wider than it is long) with an opposite proportionality to the elongated rolls (wallpaper) in its receiving area. The patented design requires a can lying on its side, with a display or label area having the appearance of that can standing upright. Such a design for Abbate does not make sense for long cylindrical rolls.

Finally, Petitioner seems to merge principles of utility obviousness with that of design patent law by arguing that a designer of ordinary skill in the art would simply “adjust the dimensions of an Abbate dispenser to suit the dimensions of whatever ‘overall general elongated’ cylindrical items” are being dispensed. Paper 97, 19. Numerous changes would be necessary in Abbate to arrive at the claimed ornamental design and these changes could only be achieved with a hindsight approach. These changes show that even if Petitioner meets the threshold of proving the designs create the same overall visual appearance,

Appendix B

the evidence for obviousness is weak. The secondary considerations are strongly in favor of nonobviousness.

Accordingly, we determine that even if Abbate and Samways and/or Linz produced the same overall visual appearance, Petitioner has still failed to establish by a preponderance of the evidence that the claim of the '645 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways and/or Linz.

*E. Obviousness Based on Primiano
and Samways or Knott*

We originally denied institution on the basis that Primiano was not a proper *Rosen* reference. Dec. 30–31. Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim is unpatentable over Primiano and Samways or Knott for the reasons explained below.

In its remand briefing, Campbell abandons its contentions with respect to Primiano. Paper 97, 1. During oral hearing, counsel for Campbell stated “we are withdrawing our challenge based on Primiano as a primary reference.” Tr. 2, 5:17–18. Because the parties did not formally settle this issue in a written paper prior to Gamon’s briefing in its Response (Paper 95, 46), we elect to address this ground.

1. Primiano (Ex. 1012)

Primiano is titled “Front Panel for a Display Rack.” Ex. 1012, [54]. Primiano describes a front panel for a

Appendix B

display rack with a front face member. *Id.* at [57]. The face member has connecting member 72 with a symmetric, convex arcuate shape, with a central apex that extends forward as depicted in Figure 3 below.

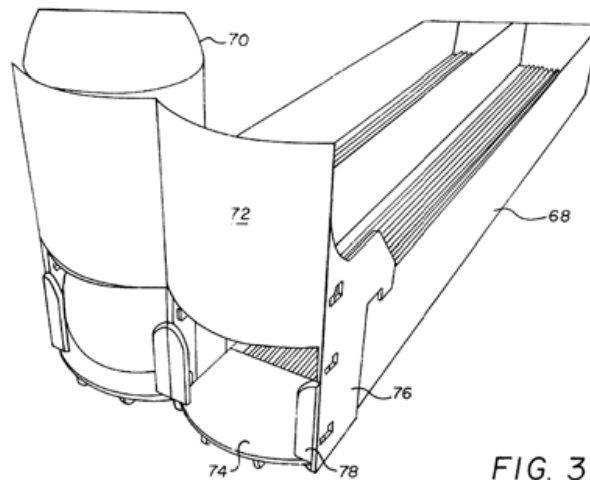


FIG. 3

Figure 3 of Primiano depicts a perspective view of a front panel with a labeling area attached to a display rack. *Id.* at 2:1–3. As depicted in Figure 3, Primiano further discloses a dispensing area surrounded by bottom end portions 78 to the sides, connecting member 72 above, and base 74 below. Bottom end portions 78 are spaced apart such that a beverage in the dispensing area would be visible through the gap along base 74. Bottom end portions 78 stand vertically and extend nearly up to connecting member 72. Bottom end portions 78 are much taller than they are wide, and wider than they are thick. The upper side of each bottom end portion 78 has a prominent downward curve from each respective outer edge.

Appendix B

Primiano is meant to display “beverage containers upright for easy viewing.” *Id.* at 1:13–15, 6:33–35 (“The container is held upright and forward in the rack so that a container is always ready for removal from the rack.”). As shown in Figure 3 above, Primiano’s design dispenses bottles with at least a portion of the upright beverage container obscured by the curved rectangular wall, connecting member 72. *Id.* at 6:25–27 (describing a “viewing window” for display of the beverage container).

2. Analysis of Alleged Obviousness Based on Primiano in View of Samways or Knott

Petitioner contends the ornamental design of the ’645 patent would have been obvious to a designer of ordinary skill based on Primiano in view of Samways or Knott. Pet. 51–55. Petitioner relies on a comparison of the combined ornamental features of Primiano and Samways or Knott with the design of the ’645 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 80–87). Petitioner relies on Primiano as the primary reference. For the reasons discussed below, we disagree that Primiano has design characteristics that are basically the same as the claimed design.

To begin, we find that Primiano is not a proper *Rosen* reference. Primiano shows a display rack for vertical bottles, not cans, standing behind a curved rectangular wall. Primiano shows a curved rectangular surface, but does not show or suggest a sideways cylindrical object as the claim requires. Beverage container 70 in Primiano is highlighted below in Gamon’s highlighted version of Figure 3.

100a

Appendix B

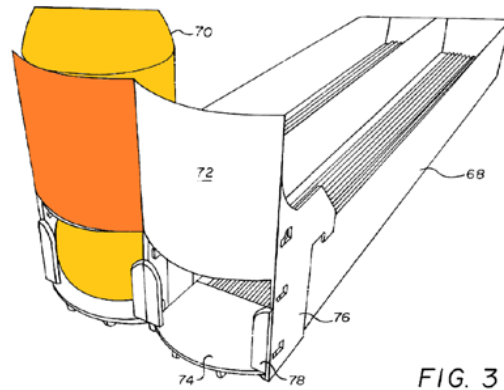


FIG. 3

Gamon’s highlighted Figure 3 of Primiano with beverage container 70 in lighter orange. Paper 95, 47. The vertical bottles stand behind the curved rectangular wall and are removed by being lifted vertically out of the device, not from underneath it. Ex. 1012, 6:35–37.

Based on the differences between Primiano and the patented design, we determine that Primiano does not provide the same visual impression as the patented design, and therefore cannot properly serve as a *Rosen* reference. Primiano’s design is meant to display “beverage containers upright for easy viewing.” Ex. 1012, 1:13–15, 6:33–37. Further, the view of upright beverage container 70 is obscured by connecting member 72 in Primiano’s design and beverage container 70 is removed by lifting up behind label 72. *Id.* These combined differences create a distinct ornamental impression when compared to the patented design.

Appendix B

Even if Primiano were a proper *Rosen* reference, and even if we determined that the combination of Primiano in View of Samways or Knott created the same overall visual appearance, our ultimate conclusion as to obviousness for this combination would not change. The objective indicia of nonobviousness strongly favor nonobviousness, while a finding of similarity in the overall visual appearance is weak. The evidence of secondary considerations is detailed above and is equally applicable to this ground. Specifically, the evidence in favor of nonobviousness outweighs that of obviousness for this combination of references.

Accordingly, we determine that Petitioner has failed to establish by a preponderance of the evidence that the claim of the '645 patent would have been obvious to a designer of ordinary skill based on Primiano in view of Samways or Knott.

III. CONCLUSION

We conclude that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '645 patent is unpatentable under 35 U.S.C. § 103.

Appendix B

Claim	35 U.S.C. §	References/ Basis	Claims Shown Unpatentable	Claims Not Shown Unpatentable
1	103(a)	Linz		1
1	103(a)	Linz, Samways		1
1	103(a)	Linz, Knott		1
1	103(a)	Abbate, Samways		1
1	103(a)	Abbate, Samways, Linz		1
1	103(a)	Abbate, Linz		1
1	103(a)	Primiano, Samways		1
1	103(a)	Primiano, Knott		1

103a

Appendix B

IV. ORDER

Accordingly, it is:

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

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

Steven E. Jedlinski
Tracy Zurzolo Quinn
Holland & Knight LLP
steven.jedlinski@hklaw.com
tracy.quinn@hklaw.com

For PETITIONER ENTITY TRINITY MANUFACTURING, LLC:

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

104a

Appendix B

For PATENT OWNER:

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

105a

**APPENDIX C — OPINION OF THE
UNITED STATES PATENT AND TRADEMARK
OFFICE, DATED JULY 29, 2020**

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.

IPR2017-00094
Patent D612,646 S

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

KINDER, *Administrative Patent Judge.*

JUDGMENT

Final Written Decision on Remand
Determining No Challenged Claim Unpatentable
35 U.S.C. §§ 144, 318

Appendix C

I. INTRODUCTION

We address this case on remand after a decision by the U.S. Court of Appeals for the Federal Circuit in *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335 (Fed. Cir. 2019).

A. Procedural Background

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, L.L.C. (collectively, “Campbell” or “Petitioner”) filed a Petition to institute an *inter partes* review of the claim for a “Gravity Feed Dispenser Display” in U.S. Patent No. D612,646 S (Ex. 1001, “the ’646 patent”). Paper 2 (“Pet.”). Gamon Plus, Inc. (“Gamon” or “Patent Owner”) filed a Preliminary Response to the Petition. Paper 10. Applying the standard set forth in 35 U.S.C. § 314(a), we instituted an *inter partes* review of the challenged claim. Paper 13 (“Dec.”). Specifically we instituted review of the design claim as to three grounds pursuant to 35 U.S.C. § 103:

35 U.S.C. §	Reference(s)/Basis
§ 103(a)	Linz ¹ , Samways ²
§ 103(a)	Samways
§ 103(a)	Samways, Linz

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

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

Appendix C

Dec. 35. In our institution decision, we declined to institute review on nine of twelve grounds. *Id.* at 6, 35.

During the original trial, Gamon filed a Patent Owner Response (Paper 24, “PO Resp.”), and Campbell filed a Reply (Paper 33, “Pet. Reply”) to the Patent Owner Response. We authorized Gamon to file a paper identifying allegedly improper new argument and citations in Petitioner’s Reply (Paper 40), to which Campbell filed a response (Paper 48). We also authorized Gamon to file a sur-reply addressing evidence that Campbell produced late in the proceeding. Paper 68 (“PO Sur-reply”).

An oral hearing was held on January 23, 2018, and a copy of the transcript is part of the record. Paper 80 (“Tr.”). On March 29, 2018, we issued a Final Written Decision. Paper 81 (“Final Dec.”) (Paper 84, redacted version). In our Final Written Decision, we concluded that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’646 patent is unpatentable under 35 U.S.C. § 103. In the decision, we weighed the evidence of obviousness and nonobviousness as a whole, and we determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’646 patent is unpatentable as obvious based on Linz and Samways. We likewise determined that Petitioner had not demonstrated by a preponderance of the evidence that the claim of the ’646 patent is unpatentable as obvious based on Samways alone or Samways and Linz. Petitioner filed a Notice of Appeal to the Federal Circuit on May 31, 2018. Paper 85.

Appendix C

On September 26, 2019, the Federal Circuit issued a decision affirming-in-part, vacating-in-part, and remanding for further consideration. *Campbell Soup Co.*, 939 F.3d at 1335.

The Federal Circuit determined that there was “no error in the Board’s claim construction,” with respect to the claim. *Id.* at 1340 n.1. The Federal Circuit affirmed our decision related to the Samways ground, determining “substantial evidence supports the Board’s finding that Samways is not a proper primary reference,” and “substantial evidence supports the Board’s finding that Samways does not create basically the same visual impression as the claimed designs.” *Id.* at 1341–42.

As to the ground under Section 103 based on Linz, the Federal Circuit determined “substantial evidence does not support the Board’s finding that Linz is not a proper primary reference.” *Id.* at 1342. The Federal Circuit then vacated “the Board’s conclusion that the claimed designs would not have been obvious over Linz in view of Samways” and remanded for further proceedings. *Id.* The Federal Circuit did not address any other findings related to obviousness based on Linz.

The Federal Circuit also remanded and ordered that “the Board should also consider the non-instituted grounds for unpatentability consistent with the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).” *Id.* We discuss the Federal Circuit’s decision in more detail below.

Appendix C

On December 20, 2019, we issued an Order Modifying Decision Instituting *Inter Partes* Review and Setting the Schedule for Further Proceedings on Remand. Paper 92. In light of the remand from the Federal Circuit and the Supreme Court’s decision in *SAS*, we modified our Decision on Institution to include each of the nine non-instituted grounds challenging the design claim of the ’646 patent. *Id.* at 4–5; Dec. 6. Also, pursuant to the parties’ agreement, we instituted a briefing schedule and set parameters requested by the parties for the remand proceeding. *Id.* at 3. Further, we requested the parties confer to determine if there were any grounds that Petitioner no longer intended to pursue. *Id.* at 6. If any agreement was reached, we authorized the parties to jointly request that the Board limit the proceeding through a joint motion. *Id.*

Such a motion was filed on January 10, 2020. Paper 93. In that motion filed by Campbell, the parties agreed to limit the proceeding to the following grounds on remand³:

Claim Challenged	35 U.S.C. §	Reference(s)/Basis
1	§ 103(a)	Linz
1	§ 103(a)	Linz, Samways

3. In the chart above, we have separated the grounds remaining in the proceeding into the different combinations presented, for ease of reference.

Appendix C

Claim Challenged	35 U.S.C. §	Reference(s)/Basis
1	§ 103(a)	Linz, Knott ⁴
1	§ 103(a)	Abbate ⁵ , Samways
1	§ 103(a)	Abbate, Samways, Linz
1	§ 103(a)	Abbate, Linz
1	§ 103(a)	Primiano ⁶ , Samways
1	§ 103(a)	Primiano, Knott

Id. at 1.

On January 27, 2020, we granted the parties’ request to limit the remand proceeding to the grounds and statutory basis requested by the parties. Paper 94. Accordingly, this Final Written Decision on Remand addresses each of the grounds set forth above.

Pursuant to the briefing schedule on remand, Gamon filed a Patent Owner Response on Remand (Paper 95) and Campbell filed a Reply (Paper 97) to the Patent Owner Response on Remand. We authorized Gamon to file a Sur-reply (Paper 99), to which Campbell filed a response or Sur-sur-reply (Paper 103). We refer to the post remand briefing by the corresponding paper number.

4. U.S. Patent No. D178,248, issued July 10, 1956 (“Knott,” Ex. 1010).

5. U.S. Patent No. 4,909,578, issued Mar. 20, 1990 (“Abbate,” Ex. 1011).

6. U.S. Patent No. 6,068,142, issued May 30, 2000 (“Primiano,” Ex. 1012).

Appendix C

A second oral hearing was held on May 7, 2020, and a copy of the transcript is part of the record. Paper 112 (“Tr. 2”).

We have jurisdiction under 35 U.S.C. § 6(b). This Decision is a Final Written Decision under 35 U.S.C. § 318(a) as to the patentability of the claim on which we instituted trial. Based on the record before us, we determine that Petitioner has not shown, by a preponderance of the evidence, that the claim of the ’646 patent is unpatentable under 35 U.S.C. § 103(a).

B. Related Proceedings

The parties state that the ’646 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. 4; Paper 6, 1–2. Campbell also has filed petitions challenging the patentability of related design patents. The proceeding in IPR2017-00091 (U.S. Patent No. D621,645) is also on remand from the Federal Circuit and we issue a final decision in that proceeding concurrently with this decision. In both IPR2017-00095 (U.S. Patent No. D621,644), and IPR2017-00096 (U.S. Patent No. D595,074) we issued final decisions on March 27, 2018, finding the respective design claims unpatentable.

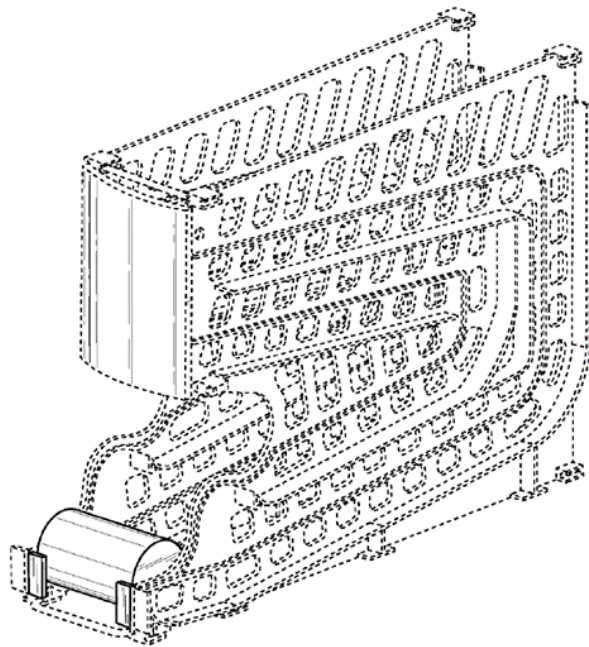
C. The ’646 Patent and Claim

The ’646 patent (Ex. 1001) issued March 30, 2010, and is assigned to Gamon. *Id.* at [45], [73]. The ’646 patent claims “[t]he ornamental design for a gravity feed

112a

Appendix C

dispenser display, as shown and described.” *Id.* at [57]. The claim for the ornamental design for a gravity feed dispenser display is depicted below:



The Figure of the '646 patent is this perspective view of a gravity feed dispenser display. *Id.* As depicted, certain elements in the front area of the design are drawn in solid lines, but much of the rearward structure is illustrated by broken lines. The Description of the invention explains:

Appendix C

The broken line disclosure in the views is understood to represent the article in which the claimed design is embodied, but which forms no part of the claimed design, and where a broken line abuts a claimed surface it is understood to form an unclaimed boundary between claimed and unclaimed surfaces.

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.”).

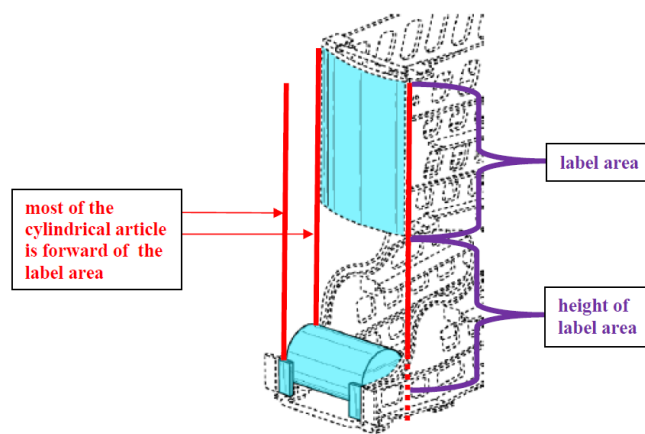
With respect to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent 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.” *Id.* 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”).

Because the Federal Circuit has reviewed, and found no error in, our claim construction, we maintain our determinations from the Final Decision. *Campbell Soup*

Appendix C

Co., 939 F.3d at 1340, n.1 (“We see no error in the Board’s claim construction.”). These determinations are reiterated below. Campbell agrees that these prior findings below are the law of the case. Tr. 2, 13:18–14:13 (Board: “the Federal Circuit was pretty explicit as well that they adopted our claim construction Do you agree that is the law of the case, prior claim construction?” Counsel for Campbell: “I do, Your Honor. I mean, we took issue with it at the time but I accept that the Federal Circuit has ruled on that and I just would say that should be applicable here, too.”). We reiterate our claim construction below.

Considering the relationship of the prior art to the claimed design, we find it helpful to describe verbally certain features of the claim for purposes of this Final Decision. See *Egyptian Goddess*, 543 F.3d at 680. As shown in the Figure, below, the single embodiment of the patent design illustrates and claims certain front portions of a gravity feed dispenser display.



Appendix C

Patent Owner’s annotated and highlighted Figure of the ’646 patent shows a perspective view of a gravity feed dispenser display. PO Resp. 5. From top to bottom, a generally rectangular surface area, identified by the parties as an access door or label area, is curved convexly forward. Pet. 8. For ease of reference, we refer to this portion as “the label area,” as annotated above. The label area is taller vertically than it is wide horizontally, however, the boundary edges of the label area are not claimed. Below the label area there is a gap between the label area and the top of a cylindrical object lying on its side – the gap being approximately the same height as the label area. *See* Ex. 2001 ¶¶ 5, 28; PO Resp. 5 (annotated Figure). The width of the label area is generally about the same as the height of the cylindrical object lying on its side. The height of the cylindrical object (lying on its side) is longer than its diameter. The cylindrical article is positioned partially forward of the label area. Ex. 2001 ¶¶ 5, 28.

Two rectangular lugs, or stops, are positioned in front of the cylindrical object on each bottom side and stand vertically. The rectangular lugs are taller vertically than they are wide horizontally and they stand vertically adjacent the cylindrical object about halfway up the diameter of the cylindrical object.

We also consider the spatial relationships between the claimed features in our analysis as depicted in the Figure of the ’646 patent above. *See* Final Dec. 32–33 (“Although the boundary of the label area is disclaimed, Gamon has still claimed the surface area within the boundary. . . .

Appendix C

When considering just the claimed area within the label area, a spatial relationship still exists between this claimed area and the cylindrical object.”); Tr. 48:13–19.

D. Grounds on Remand

As explained above, the following grounds are before us on remand:

Claim Challenged	35 U.S.C. §	Reference(s)/Basis
1	§ 103(a)	Linz
1	§ 103(a)	Linz, Samways
1	§ 103(a)	Linz, Knott
1	§ 103(a)	Abbate, Samways
1	§ 103(a)	Abbate, Samways, Linz
1	§ 103(a)	Abbate, Linz
1	§ 103(a)	Primiano, Samways
1	§ 103(a)	Primiano, Knott

Paper 93, 1–3; Paper 94, 4–5.

Campbell supports its challenge with two declarations by Mr. James Gandy, one in support of the Petition (Ex. 1002 (“the Gandy Decl.”)), the other in support of Petitioner’s Reply (Ex. 1018 (“the Gandy Suppl. Decl.”)). Campbell also relies on the declaration of Mr. Steven Visser. Ex. 1020 (“the Visser Decl.”).

Appendix C

Gamon relies on two declarations by Mr. Terry Johnson, one in support of Patent Owner's Response to the Petition (Ex. 2001 ("the Johnson Decl.")), and a Supplemental Declaration (Paper 60⁷ ("the Johnson Suppl. Decl.")). The parties rely on other evidence and exhibits as discussed below.

E. Development of the '646 Design Patent

Terry Johnson came up with the initial design idea underlying the ornamental design patent after visiting a store and having a difficult time finding the home-style chicken noodle soup. Ex. 1021, 27:13–28:24. Unable to find the type of soup he was looking for, he ended up buying a plain noodle soup that did not go over well at home. *Id.* Terry Johnson recognized that if he was having a problem finding a particular type of soup, others were likely having the same problem, and Terry Johnson "came up with something that was pretty simple"—a display that would visually help purchasers of canned soup. *Id.* at 28:10–16; *see also* Pet. Reply 15 (citing Ex. 1021, 28:15–16). A Campbell's marketing manager agreed that shopping the soup aisle was difficult and stated that "shoppers would get so frustrated at not finding the flavor they wanted that they would walk away without it." Ex. 2007, 1 (2004 interview with Jacques Finnel, Campbell's marketing manager for retail development).

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

Appendix C

After coming up with an initial concept, Terry Johnson, on behalf of Gamon,⁸ reached out to Campbell Soup Company's CEO, David Johnson (no relation to Terry), to pitch the idea of putting Campbell's soup cans on their side and then having them roll down an inclined plane, and also having "a big convex sign on the front of it to talk to the consumer." Ex. 1021, 27:13–16, 29:11–30:10. Terry Johnson testified that David Johnson quickly hung up because "[n]o one wanted me to turn the can on its side" at that time. *Id.* Terry Johnson further explained that his design was meant to present to consumers as "a big convex sign that was the same as the label and it was the same proportions as the can." *Id.* at 45:11–17.

In later discussions with Campbell around 2002, Terry Johnson presented his concept to an executive board at Campbell, including Carl Johnson (again, no relation to Terry). *Id.* at 30:11–32:18. During these discussions, Campbell sponsored a project by a research company called Cannondale. *See, e.g.*, Ex. 2032. According to statements attributed to Campbell's Mr. Finnel, the consumer research indicated that the soup category was one of the most difficult to shop in supermarkets. Ex. 2007, 1.

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

Appendix C

An initial Cannondale survey, as conveyed to Terry Johnson, suggested that sales may be lost if Campbell put its soup cans on their sides at the point of sale. Ex. 1021, 32:19–33:10. Campbell agreed, however, to run a test of Gamon’s proposed display rack in a small number of stores. *Id.* at 32:3–33:20; *see also* Ex. 2031, 5, 6, 10–12, 14–17, 26–29 (noting that the Gamon display shelving would be tested). Soon after, Campbell allowed Gamon’s gravity feed display rack to be tested in 25 stores selling Campbell’s condensed soup. Ex. 1021, 32:3–33:20. The tested embodiment of the gravity feed display rack was the same design as embodied in Gamon’s D621,645 and ’646 design patents.⁹ *Id.* at 33:17–24; Ex. 2032, 4–10 (displaying Gamon’s gravity feed display rack at various test stores); Ex. 2001 ¶ 38 (citing Exs. 2005, 2006).

Gamon’s commercial embodiment of the patented design was tested in a select number of stores and referred to as the IQ Maximizer. Ex. 1021, 32:3–33:20, 35:13–15; Tr. 42:22–24; Ex. 2007, 1. Considering the outcome of the test market using the Gamon gravity feed display rack to sell Campbell soup products, Campbell concluded that the display rack¹⁰ increased its soup sales volume by 5.5–13.6%

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

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

Appendix C

depending on the type of soup and brand. Ex. 2032, 4.¹¹ Terry Johnson similarly testified based on his involvement in the project that Campbell's "market study showed that Campbell could secure a 5% increase in sales using the Gamon display racks," and "use of the Gamon display rack produced increased soup sales by 9 to 14% according to [a] market study conducted by Cannondale Consulting Inc." Paper 60 ¶¶ 16, 18; Ex. 1021, 35:1–12. Campbell's internal presentation discussing the results of this study is titled: "IQ SHELF MAXIMIZER The Power to Transform the Soup Section." Ex. 2032, 1. The Gamon gravity feed display rack was described as "Breakthrough Gravity Feed Shelving," that "Encourages purchase of additional varieties," and resulted in positive consumer responses in every test market. *Id.* at 4–10.

From 2002 until 2009, Campbell purchased approximately \$31 million of Gamon's gravity feed display racks¹² and installed them in over 17,000 stores. PO Resp. 47; Ex. 2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14 (Campbell's 2007 Annual Report states that "[n]early 17,400 stores in the U.S. feature our gravity-feed shelving

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

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

Appendix C

system. It is a powerful tool for merchandising *Campbell's* condensed soups.”). As admitted by Campbell, the display racks purchased fall within the scope of the '646 patent when a Campbell soup can is added to the display—the claim of the '646 patent requires a cylindrical object as part of the claim. *See* Tr. 2, 19:10–15; Ex. 1001; Ex. 2032, 4–10; PO Sur-reply 5; Ex. 2001 ¶¶ 40–45; Tr. 40:4–41:3. The purpose of the Gamon display racks tested and purchased by Campbell was to display Campbell's cylindrical soup cans as arranged in the patented design. Ex. 2001 ¶ 38 (“These display racks displayed the condensed Campbell Soup cans in the exact configuration of the design of the '646 patent.”); Tr. 43:24–45:24.

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

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

Appendix C

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

In late 2008, Campbell began purchasing gravity feed display racks from Petitioner Trinity. PO Resp. 48. Trinity’s display racks maintained the same ornamental design features as the Gamon racks. *Id.* at 48–49; Ex. 2001 ¶¶ 48–51; Ex. 2012 (image of Trinity’s display rack for Campbell’s condensed soup cans); Ex. 2013 (image of Trinity’s display rack for Campbell’s Ready-To-Serve soup cans).

Appendix C

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).

Appendix C

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

Campbell, relying on the testimony of Mr. Gandy, states that:

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

Appendix C

need to be familiar with electrical or advanced mechanical concepts, as the relevant field of prior art is limited to relatively simple consumer commodity dispensers and displays.

Pet. 26 (internal citations omitted) (citing Ex. 1002 ¶¶ 22–25). Gamon does not object to this description of the designer of ordinary skill in the art.

In our first Final Decision, we agreed that the designer of ordinary skill is as Campbell asserts, except that we disagreed that a designer of ordinary skill would need to have a basic understanding of the dimensions and functions afforded to cans and bottles *in the context of packaging*.

On appeal, the Federal Circuit did not disturb our finding as to the level of ordinary skill in the art. *See generally Campbell Soup Co.*, 939 F.3d 1335. The record on remand has not changed with respect to our consideration of this issue and, therefore, we maintain and reiterate that a designer of ordinary skill in the art would have had a background or familiarity with commercial dispensers, and particularly dispensers for consumer commodities such as cans, bottles, or small packaged items and a basic understanding of physics and/or mechanics, which may include practical experience in the field of studying or designing consumer commodity dispensers, or may include high school or introductory college level physics coursework.

*Appendix C**C. Obviousness Based on Linz Alone
or Linz and Samways/Knott*

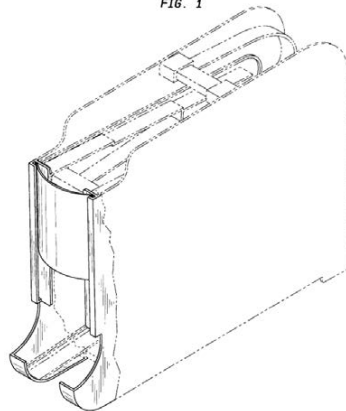
Based on the final trial record before us, including the decision of the Federal Circuit, we are not persuaded that Campbell has established by a preponderance of the evidence that the claim is unpatentable over Linz alone, Linz and Samways, or Linz and Knott, for the reasons explained below.

1. Linz (Ex. 1008)

Linz is titled “Display Rack” (Ex. 1008, [54]) and claims an “ornamental design for a display rack” (*id.* at [57]). Linz issued on February 16, 1999, making it prior art to the ’646 patent under pre-AIA 35 U.S.C. § 102(b). Linz is cited on the face of the ’646 patent. Ex. 1001, [56].

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

FIG. 1



Appendix C

Figure 1 of Linz shows the claimed ornamental design for a display rack. Ex. 1008, Fig. 1.

Figure 3 of Linz, depicted below, shows a side view with a flat front label area with a small curvature. The bottom receiving area is noticeably curved upwards.

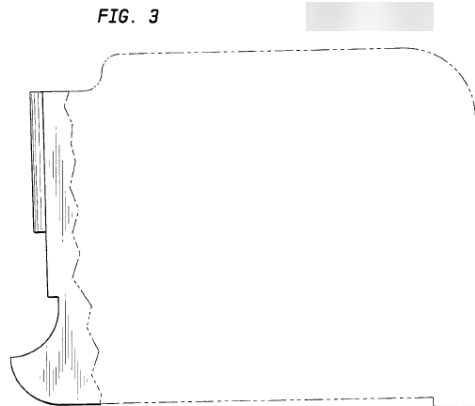


Figure 3 of Linz is a right side elevational view. Figure 3 further shows that any can received in the bottom display area would be positioned either behind or directly under the front label area.

We are also bound by the Federal Circuit’s determination that “the design of Linz [is] for dispensing cans and that a can would be used in the system.” *Campbell Soup Co.*, 939 F.3d at 1341. Similarly, the Federal Circuit found “that Linz’s design is made to hold a cylindrical object in its display area.” *Id.*

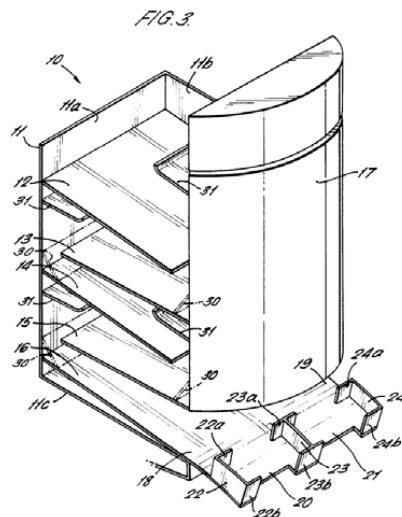
The parties briefing on remand focuses on the size, shape, position, and orientation of the hypothetical cylindrical object in the display area of Linz.

Appendix C

2. Samways (Ex. 1009)

Samways is titled “Serpentine Dispenser.” Ex. 1009, [54]. Samways published on February 26, 1997, making it prior art to the ’646 patent under pre-AIA 35 U.S.C. § 102(b). Samways describes a dispenser with a serpentine delivery path along which cylindrical objects can move by gravity to an outlet or dispensing area. *Id.* at [57], 1:7–8 (“relates to dispensers for all cylindrical objects”), 17:32–33 (claiming a dispenser “adapted to dispense cylindrical objects”).

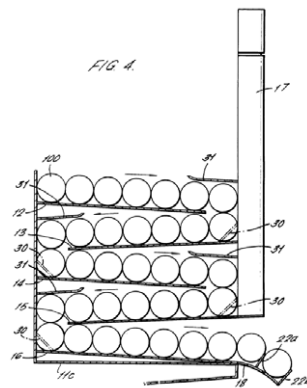
As depicted in the embodiment of Figure 3 below, Samways’s design for a serpentine dispenser incorporates a large label area, front fascia 17, with a symmetric, convex arcuate shape, and a central apex that extends forward. Samways describes Figure 3 as “preferably shaped to resemble a coffee jar, so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



Appendix C

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

Storage locations 20, 21 are designed such that a cylindrical object loaded therein would be visible above forward stops 22b, 23b, 24b, as well as through the two gaps between the stops. Placement of a cylindrical object in the storage area behind the forward stops is depicted in Figure 4 of Samways.



Appendix C

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

We also are bound by the Federal Circuit’s determination that “Samways is not a proper primary reference. Samways has a dual dispensing area, compared to the single dispensing area of the claimed designs, and has a front label area with different dimensions that extends across both dispensing areas.” *Campbell Soup Co.*, 939 F.3d at 1341–42.

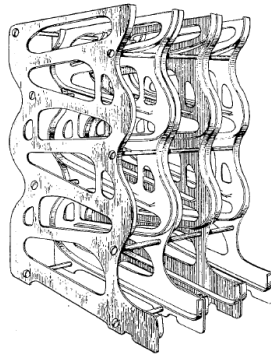
3. Knott (Ex. 1010)

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. 1010. Knott discloses that “Figure 1 is a front perspective of a bin dispenser for small cylindrical articles.” *Id.* Figure 1 of Knott is reproduced below.

131a

Appendix C

Fig. 1



Id. at Fig. 1. Figure 1 of Knott is a front perspective view of a bin dispenser for small cylindrical articles. Campbell contends that Knott discloses a serpentine dispenser having a cylindrical can dispensing area beneath the loading area. Pet. 14–15 (citing Ex. 1002 ¶ 38; Ex. 1010, Fig. 1).

4. Petitioner’s Contentions

Campbell contends the ornamental design of the ’646 patent would have been obvious to a designer of ordinary skill based on Linz alone or Linz combined with Samways or Knott. Pet. 31–37. Campbell relies on a comparison of the combined ornamental features of Linz and Samways or Knott with the design of the ’646 patent, as well as the Gandy Declaration, to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 44, 48–58). Campbell contends that Linz is the same basic claimed design, “and is therefore a suitable primary reference.” *Id.* at 31. Campbell notes that the ’646

Appendix C

patent claims stops having a straight, vertical design, and it would have been “obvious to try” vertical stops because they “were well known in the art.” *Id.* at 32.

Campbell also relies on Samways as a secondary reference. *Id.* at 33. According to Campbell, Samways provides support for the placement and shape of a cylindrical object and the claimed vertical stops forward of the cylindrical object. *Id.* at 34.

Campbell contends that “to the extent that it can be argued that Linz does not inherently disclose a cylindrical can, it would be obvious to a designer of ordinary skill in the art to use the display rack of Linz to dispense cylindrical cans.” *Id.* at 33 (citing Ex. 1002 ¶ 51). According to Campbell, the curvature of the bottom rails and the loading area would indicate to a designer of ordinary skill in the art that Linz is intended for use with cylindrical cans. *Id.* Campbell also argues that “[t]he use of a cylindrical can with Linz would yield predictable results – the can would roll from the loading area down to the stops of the display shelf, such that the can would be visible above the stops and through the gap between same.” *Id.*; Ex. 1018 ¶ 33; Ex. 1020 ¶ 32 (“it would be obvious to such a designer to place a cylindrical object in the area of Linz designed to hold such an object”).

Additionally, Campbell argues that a design incorporating a cylindrical can is disclosed by Linz in view of Samways because Samways discloses cylindrical cans dispensed from behind the vertical stops. Pet. 36. According to Campbell, “combining the vertical stops

Appendix C

and/or cans disclosed by Samways . . . with the design of Linz merely requires modifying the stops of Linz to be vertical and adding a can.” *Id.*

Campbell contends that the relative positioning, dimensions, and scaling of the can and label area are not claimed in the ’646 patent. Pet. Reply 13. Specifically, Campbell alleges that the patent claim “disclaims any height or width limitations of the label area, and any particular relationship between label area and can.” *Id.*; Ex. 1020 ¶ 28. Further, Campbell contends that even if these features were claimed, the design of Linz is basically the same. Pet. Reply 13 (citing Ex. 1018 ¶¶ 47–57; Ex. 1020 ¶¶ 60–67). Campbell also contends that because Gamon’s expert, and inventor, characterizes the design as “simple,” it must therefore be obvious. *Id.* at 15 (quoting Ex. 1021, 29:15–16 [sic, 28:15–16], 45:16–17).

On remand, Campbell addresses Gamon’s arguments related to the dimensions of the hypothetical can that would fit in Linz’s display area. Campbell also addresses the spatial relationship between the hypothetical dispensed can and various parts of the dispenser. Paper 97, 6–14. Relying on the testimony of its experts, Campbell argues that

to the extent there might be any differences in dimension between a Linz dispenser with a can in the dispensing area and the design claimed in the ’646 patent, “any differences are *de minimis*” at best and, from the perspective of a designer of ordinary skill, would not change

Appendix C

the fact that the Linz and '646 dispensers create the same overall visual appearance.

Id. at 7 (citing Ex. 1002 ¶¶ 48, 49; Ex. 1020 ¶¶ 33–37). Campbell contends that a designer of ordinary skill in the art would not have “a higher aesthetic sensitivity to the precise dimensions of a can in a dispenser.” *Id.* at 10. Instead, Campbell contends “a designer of ordinary skill would understand the Linz reference – a proper primary reference – to teach the appearance of a dispenser with a can in the dispensing area behind the stops.” *Id.* at 10–11. Further, Campbell argues that this person “would understand what such a dispenser would look like and would understand that straight stops could be used in lieu of curved stops to create the same overall visual appearance.” *Id.*

Campbell further contends that, “[t]o the extent any further teaching of vertical stops or a can in the dispensing area were needed to prove the obviousness of the claimed design, Samways and Knott teach these elements.” *Id.* at 11. Specifically, Campbell argues, “Linz uses curved stops which may be modified in light of Samways’[s] vertical stops.” *Id.* at 12. Thus, according to Campbell, “Samways provides the necessary teaching for a combination with Linz that creates the same overall visual appearance as the ‘646 patent design.” *Id.* at 12–13. Although Samways’s stops lean forward, Campbell contends that “the stops are vertical with respect to the dispensed article and the dispensing cradle.” *Id.* at 13.

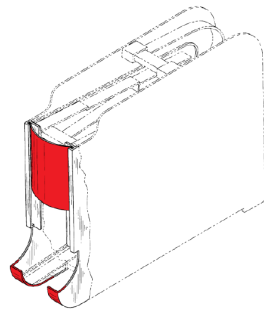
As for the combination of Linz and Knott, Campbell contends that it is “relying on Knott solely for its express

Appendix C

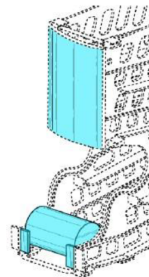
disclosure of a can in the dispenser and the use of vertical stops.” Paper 97, 13. Campbell argues that there is “unrebutted expert testimony that a designer of ordinary skill would be motivated to combine the teachings of Linz and Knott to arrive at a hypothetical dispenser having vertical stops and a cylindrical can that has the same overall visual appearance as the claimed design.” *Id.* at 14 (citing Ex. 1002 ¶¶ 56–58). Campbell concludes that “[a]lthough Linz alone teaches a gravity feed dispenser design that creates the same visual appearance as the design claimed in the ’646 patent, Samways and Knott provide further support by adding an express teaching of a can dispensed below the label area and vertical stops, as claimed.” *Id.*

5. Patent Owner’s Contentions

Gamon argues that “[n]owhere in Linz does the reference describe, show or suggest the types of articles that might be displayed in this rack.” PO Resp. 22; Ex. 2001 ¶ 16. Gamon relies on the following graphical display comparing Linz with the Figure of the ’646 patent.



Linz, FIG. 1 (highlighted)



'646 patent figure (highlighted)

Appendix C

The above illustration is a side-by-side comparison of Figure 1 of Linz (left) and the '646 patent Figure (right), and each depicts highlighted design features. According to Gamon, the highlights “show[] a distinct difference of the appearance of Linz relative to the '646 patent for a number of reasons,” including Linz’s failure to have “a cylindrical object, or any object, on display, especially one with its circular end partially visible.” PO Resp. 23. Also because Linz lacks any type of cylindrical object, there is no disclosure of “a pair of vertical, planar walls in front of a cylindrical article.” *Id.* Gamon points out that Linz fails to disclose “a curved label area that extends essentially to the sides of the rack,” because Linz has “flat strips extending laterally inward from the sides.” *Id.* at 23–24 (citing Ex. 2001 ¶ 16). Gamon’s primary argument is that “Linz, without modification, lacking the cylindrical article shown in the '646 patent design and its other elements, therefore does *not* provide ‘basically the same visual impression’ as the design of the '646 patent, and therefore the unaltered Linz design cannot be . . . used as primary reference against the '646 patent.” *Id.* at 24.

On remand, Gamon contends that “[t]he record does not contain any basis for the dimensions and position of the hypothetical can in Linz in Petitioners’ drawing,” and as such, Campbell’s theories of can placement in Linz are based on “impermissible hindsight.” Paper 95, 16. Gamon continues that “Linz does not describe or show what type of article is to be displayed in it, and the record is unclear as to what the appearance of an article in Linz would be.” *Id.* Gamon contends Mr. Gandy failed to establish a “rational basis for the hypothetical can

Appendix C

appearance or specific location in Petitioners' drawing," because he ignored "the actual function of the Linz rack" and he also ignored the specific structure that should have been examined to determine the size and location of Petitioner's hypothetical can. *Id.* at 19 (quoting Ex. 2019, 23 (Mr. Gandy testified: "That's not really anything that we would consider in determining patentability from a design standpoint. How it actually works is not something that we are looking at."))).

When asked during deposition to draw where a can would be located in Linz, Mr. Gandy added the following annotation to Figure 3 of Linz. *Id.* at 20–21.

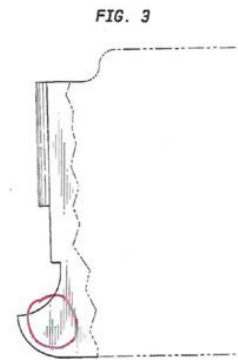


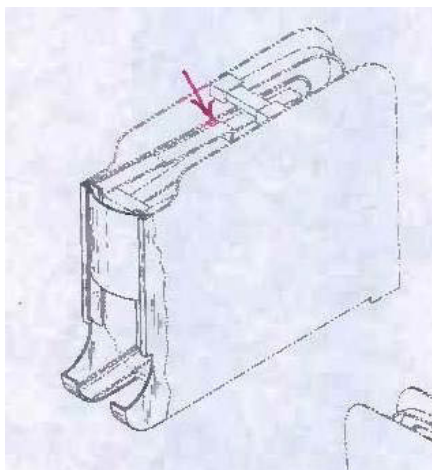
Figure 3 is a right side elevational view of the design of Linz with a red circle drawn by Mr. Gandy showing the hypothetical can located in the receiving area directly under the label area. Ex. 2026, 3. Mr. Gandy was asked whether he could determine the proportions of the can that he drew compared to the patented design and he answered:

Appendix C

I don't think you can tell that from these drawings. These drawings are not shown to a scale of what the actual article is. It's *virtually impossible to know whether the cans would be the same or not.*

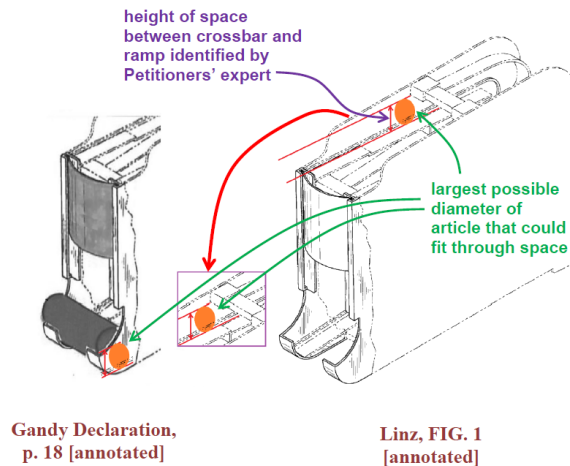
Ex. 2019, 32 (emphasis added). Gamon contends that based on these admissions, Petitioner's annotated Figure 3 of Linz showing a hypothetical can and placement is "speculative" and based on "impermissible hindsight." Paper 95, 21–22.

Gamon also contends that "Linz has structure that creates certain proportional limits to an article that could be used in the Linz display rack." *Id.* at 22. Relying on the cross-examination testimony of Mr. Gandy, Gamon contends that "the article loaded through the top of Linz would have to be dimensioned to fit through the space between the crossbar and the ramp at the top of Linz." *Id.* at 23 (citing Ex. 2026, 24). This space is depicted below.



Appendix C

The above illustration is an annotated Figure 1 of Linz showing Mr. Gandy's annotation of where a can would enter. Ex. 2026, 1 (Deposition Ex. 7). Based on these purported admissions made during cross examination, Gamon offers the following figures to contrast Petitioner's hypothetical Linz can with the largest possible diameter of a can that could be loaded into Linz. Paper 95, 24.



The above illustration is a side-by-side comparison of annotated Figures of Linz showing Gamon's theory as to the largest possible diameter of an article that could fit into Linz. *Id.* According to Gamon, Petitioner's hypothetical can has a diameter that is far in excess of the largest possible diameter for any article that could pass through the loading space between the crossbar and the ramp at the top of the Linz rack. *Id.*

Gamon further argues that Linz fails to teach the proportions and spatial relationships claimed in the patented design. *Id.* at 29. Gamon points out that the

Appendix C

differences of the positioning and proportions of the label of the patented design relative to the can give that design an overall visual appearance that is clearly distinct from the positioning and proportions of the label of Linz. *Id.* at 30. Gamon notes that Campbell’s hypothetical Linz drawing improperly pushes its hypothetical can farther forward and upward to try to copy the patented design, but the patented design requires a label area rearwardly positioned a greater distance from the front of the can than in the Linz rack. *Id.* at 31. Gamon also alleges that Linz does not teach the exposed surface shape of the can or planar vertical stops. *Id.* at 33–35.

Gamon contends that Linz cannot be combined with Samways or Knott to create the same overall visual appearance as the patented design. *Id.* at 39–40. Gamon contends that the reasons given for making the combination are impermissibly based on utilitarian reasons or otherwise improper. *Id.* Next, Gamon contends that even if the combinations were made they would still fail to have the can/label spacing and proportionalities and the combination would still incorporate a can with dimensions and positioning that is generated by pure hindsight. *Id.* at 40.

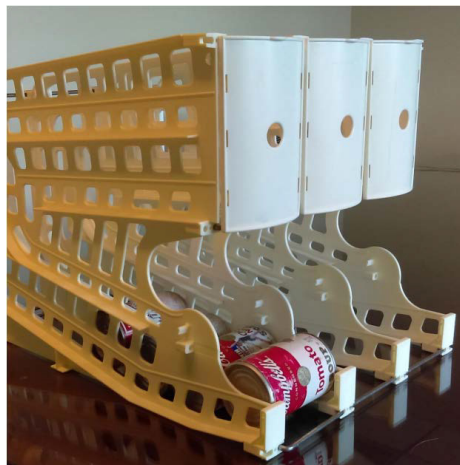
*Gamon’s Arguments Related to Objective
Indicia of Nonobviousness*

Gamon argues that the objective indicia of nonobviousness are overwhelmingly in favor of patentability. PO Resp. 2–3. Gamon contends that the patented design has been commercially successful as “evidenced by substantially increased sales by Petitioners

Appendix C

using the design for their products, Petitioners' purchase of tens of millions of dollars of Gamon's displays providing the claimed design, and the Petitioners having subsequently slavishly copied the design of the '646 patent." *Id.* Gamon contends that "commercial success and industry praise are weighed against the evidence of obviousness," and the claimed design of the '646 patent has seen "massive commercial success," "both in terms of sales of display racks" and also "in sales of soup displayed with the ornamental appearance of the design." *Id.* at 43–44. Gamon also contends that Campbell "ha[s] widely used display racks made in concert with Petitioner Trinity Industries for their soup products that were copied directly from racks made by Gamon so as to display cans of Campbell soup with the patented design." *Id.* at 44.

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



Appendix C

Exhibit 2005 represents a picture of the Gamon display rack originally sold to Campbell in 2002. *See* Ex. 2001 ¶ 38. As further depicted below, this display rack was installed in stores with “condensed Campbell Soup cans in the exact configuration of the design of the ‘646 patent.” Ex. 2001 ¶ 38.



Exhibit 2006 represents a display of the commercial embodiment of the patented invention with Campbell Soup cans.

According to Gamon, Campbell subjected these displays to market testing (Cannondale study), which established that by using Gamon's gravity feed display rack, sales volume of Campbell's condensed soup increased in a range of 9–14%. PO Resp. 45 (citing Ex. 2001 ¶ 39); Paper 60 ¶ 18; Ex. 2032, 4. Campbell called the gravity feed display rack, the “IQ-Shelf-Maximizer, and entered into an

Appendix C

exclusive Supply Agreement with Gamon in June 2003 to buy the display racks.” PO Resp. 45 (citing Ex. 2001 ¶ 40).

As explained in more detail below, Gamon contends “[t]he positive market testing prompted Campbell’s to buy \$30 million of display racks with a design of the claim of the ‘646 patent,” and such a large purchase amount “indicates that the design of the claim of the ‘646 patent was commercially successful.” PO Sur-reply 5.

From 2003 until about 2005, Campbell Soup installed racks in about 14,000 stores and also began using a Gamon display rack of the same design, but scaled for use with Campbell’s “Ready-To-Serve” soups. PO Resp. 45–46 (citing Exs. 2007, 2008; Ex. 2001 ¶¶ 41, 47). Gamon relies on Campbell’s annual reports to investors (detailed in the Background Section *supra*), which attribute increased sales of Campbell’s soup to the display racks. *Id.* at 46–47; PO Sur-reply 1–2, 6; Paper 60 ¶ 18. Gamon argues that the patented design “was a significant component in the desirability of the ‘gravity feed shelving systems’, and the increased sales using the Gamon displays are clearly linked to the use of the patented Gamon display racks and design.” PO Resp. 47 (citing Ex. 2001 ¶ 47).

Terry Johnson testifies that the patented design “was a significant contributor to the increase in sales, because Can[n]ondale found that putting the can on its side with the improved signage allowed shoppers to find their choices faster.” Paper 60 ¶ 18. Gamon further notes that “[b]y about 2009, Petitioner Campbell Soup had installed the Gamon display racks in about 30,000 stores,” and “[t]otal sales of the Gamon display racks to Campbell Soup

Appendix C

by 2009 had totaled approximately \$31,000,000.00.” PO Resp. 47 (citing Ex. 2001 ¶ 45).

Gamon contends that in 2008, Trinity began supplying gravity feed display racks to Campbell “that employed the design features of the display racks that Gamon had been selling to Campbell Soup.” *Id.* at 48. Gamon provides analysis demonstrating that the Trinity display racks are copies of the Gamon display racks and also copies of the patented design claim. *See id.* at 49 (citing Ex. 2001 ¶ 51). For example, Gamon details how “each of these racks has a can with dimensions similar to those of the cylindrical article,” and “each has a curved label area with similar dimensions and placement relative to the can.” *Id.* Gamon relies on opinion testimony and evidence depicting the use of Trinity display racks, including the following photographs.



Appendix C

Exhibit 2012 (left) shows a Campbell Soup store display for condensed soup cans and Exhibit 2013 (right) depicts a similar display for Campbell's Ready-To-Serve soup cans, each photograph including Trinity's display racks. Ex. 2001 ¶¶ 50–51. Gamon alleges that “[t]here can be no real issue that there has been wholesale copying of Gamon’s rack and product design here, and that the copying has been substantial.” PO Resp. 49. Further, “Patent Owner estimates that there are about 300,000 of these copied display racks in US stores.” *Id.*

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

Gamon recognizes that the success of the display racks is attributable to both the ornamental design and functional aspects of the design, but “the fact that both functional and ornamental aspects of the patented racks contributed to the commercial success does not vitiate that commercial success for the utility or design patents obtained.” *Id.* at 3. Gamon contends “that the ornamental or esthetic appearance of the racks on a shelf also contributed to improvement in sales of soup using the racks, and inferentially on the purchase of the racks by Campbell’s.” *Id.* at 5 (citing Ex. 2032, 4). Gamon relies on Campbell’s own sponsored survey, which states that the display rack “[e]ncourages purchase of additional varieties,” and the consumer response has been positive to the display racks because “[i]t just jumps out of

Appendix C

this section, wow.” *Id.* at 6 (quoting Ex. 2032, 4, 10 (“It makes me want to buy more soup!”); Ex. 2024, 17 (“Our breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop.”)). According to Gamon, this evidence is “indicative of both functional and ornamental desirability of Gamon’s display racks.” *Id.*

Gamon further contends that just because the invention is protected by both design and utility patents does not “vitiate the nexus of the commercial success of Patent Owner’s racks,” because the evidence of record, including “Campbell’s own market study” praises ornamental aspects of the design and Campbell’s “subsequent decision to buy \$30 million of the display racks,” demonstrates that a nexus has been established to the claimed features of the ’646 patent. *Id.* at 7.

On remand, Gamon contends that our prior determination remains undisturbed by the Federal Circuit decision because we considered Linz in combination with Samways and “the overwhelming secondary considerations of copying, commercial success, and praise overcome any argued obviousness case based on Linz and Samways.” Paper 95, 13. Gamon points out that we made a parallel finding that even if Linz were a proper *Rosen* reference, Linz and Samways did not establish obviousness due to the secondary considerations. *Id.* at 12–13 (citing Final Dec. 29–35). Gamon notes that our prior “findings of copying, praise and commercial success were not disturbed by the Federal Circuit ruling, and

Appendix C

similar findings of copying and commercial success were expressly affirmed by the Federal Circuit in the appeal of IPR2017-00087, the related utility patent IPR.” *Id.* at 47. Gamon further argues that “the same secondary considerations necessarily overcome the challenges based on Linz alone and Linz in argued combination with Knott, which were so weak that they did not even meet the threshold for *inter partes* review.” *Id.* at 48.

6. Overview of Analysis

We begin our analysis by first addressing evidence and argument related to the final *Graham* factor—objective indicia of nonobviousness. We then examine the differences between the prior art and the patented design, but more specifically we consider whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved. Finally, we weigh all the evidence and argument before us as to make an ultimate determination as to obviousness based on Linz alone and Linz combined with Samways or Knott.

7. Objective Indicia of Nonobviousness

The objective indicia of nonobviousness should be closely considered because “[a] determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all those factors are considered.” *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1048 (Fed. Cir. 2016) (en banc) (citations omitted). “This requirement is in recognition of the fact that each of

Appendix C

the *Graham* factors helps inform the ultimate obviousness determination.” *Id.* The Federal Circuit has recognized that:

Indeed, evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decision maker remains in doubt after reviewing the art.

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

The objective evidence examined in this section is equally applicable to all of Petitioner’s challenges under § 103, including our analysis below of Abbate and Primiano. We also note at the outset that Campbell’s experts did not consider the objective indicia of nonobviousness in forming their opinions or offering an ultimate conclusion as to obviousness. Tr. 2, 18:1–19:15.

Appendix C

Gamon presents evidence of commercial success, praise, and copying attributable to the ornamental features of the patented design. As explained more fully below, Gamon also persuasively establishes a nexus, or relationship, between the ornamental features of the claimed design and the commercial success, praise, and copying of products implementing the design. Although some of the success of the commercial embodiments is attributable to utilitarian features and advertising, Campbell's internal documents and official public filings persuade us that the claimed ornamental aspects of the commercial embodiment contributed to both the success of the sales of the display rack, and also to sales of soup cans displayed as part of the claimed design. We consider commercial success, praise, and copying in turn below after first examining whether Gamon has met its burden of showing that a nexus exists.

Nexus

“In order to accord substantial weight to secondary considerations in an obviousness analysis, the evidence of secondary considerations must have a ‘nexus’ to the claims, *i.e.*, there must be ‘a legally and factually sufficient connection between the evidence and the patented invention.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Circ. 2019) (internal quotations and citations omitted). “The patentee bears the burden of showing that a nexus exists.” *Id.* (quotation and citation omitted). We examine “the correspondence between the objective evidence and the claim scope” in order “[t]o determine whether the patentee has met that burden.” *Id.* (quotation and citation omitted).

Appendix C

Campbell admits that the evidence of record shows that the commercial products sold from Gamon to Campbell are covered by the patented design. Tr. 2, 19:10–14. Gamon also presented evidence of these display racks in their ordinary intended use to display a cylindrical Campbell Soup can as required by the claim of the '646 patent. *See* Ex. 2006; Ex. 2015, 17; Ex. 2016, 23; Ex. 2017, 14. Gamon has thus shown that the asserted objective evidence discussed below is tied to a specific product and, as discussed in detail below, that product “is the invention disclosed and claimed in the patent.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1329 (Fed. Cir. 2016) (quoting *J.T. Eaton & Co. v. Atl. Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997)).

Recently, the Federal Circuit reiterated that the presumption of “nexus is appropriate when the patentee shows that the asserted objective evidence is tied to a specific product and that product embodies the claimed features, and is coextensive with them.” *Fox Factory, Inc.*, 944 F.3d at 1373 (quotations and citations omitted). Conversely, “if the patented invention is only a component of a commercially successful machine or process, the patentee is not entitled to a presumption of nexus.” *Id.* (quotation and citation omitted). Further, “a nexus exists if the commercial success of a product is limited to the features of the claimed invention.” *Id.* (quotation and citation omitted).

Appendix C

The Federal Circuit also reiterated:

To be sure, we have never held that the existence of one or more unclaimed features, standing alone, means nexus may not be presumed. Indeed, there is rarely a *perfect correspondence* between the claimed invention and the product. As we explained, the purpose of the coextensiveness requirement is to ensure that nexus is only presumed when the product tied to the evidence of secondary considerations “*is* the invention disclosed and claimed.” *Demaco*, 851 F.2d at 1392 (emphasis added). Thus, if the unclaimed features amount to nothing more than additional insignificant features, presuming nexus may nevertheless be appropriate.

Put differently, the degree of correspondence between a product and a patent claim falls along a spectrum. At one end of the spectrum lies perfect or near perfect correspondence. At the other end lies no or very little correspondence, such as where “the patented invention is only a component of a commercially successful machine or process.” *Id.* Although we do not require the patentee to prove perfect correspondence to meet the coextensiveness requirement, what we do require is that the patentee demonstrate that the product is essentially the claimed invention. *See id.*

Appendix C

Fox Factory, Inc., 944 F.3d at 1374.

We first note that *Fox Factory* involves a utility patent and it examines the effect of components on an overall machine. We are analyzing an ornamental design. In the proceeding before us, we do not have perfect correspondence because the claimed portions of the display rack do not cover the entire display rack; instead, the ornamental design covers the front display area as discussed above. Thus, we consider whether “the unclaimed features amount to nothing more than additional insignificant features.”

We first consider what may be “significant” in regards to an ornamental design for a display rack. We find that the portions of the display rack that a consumer would observe are the most significant portions of the display rack in terms of ornamental design. Thus, we find that the front portions of the display rack are the most significant features. The unclaimed rearward rails and side portions are not prominent ornamental features to a consumer, or to a designer of ordinary skill. *See* Ex. 2006. For example, as depicted in Exhibit 2015 below, the unclaimed rearward rails and side portions of the display rack are not visible (and, thus, do not contribute to the ornamental features of the display rack) when the display rack is used as intended.

Appendix C

Exhibit 2015, 17 (Campbell 2005 Annual Report with highlighting added by Gamon). As depicted above, the most visible portions of the display rack, when in use, are the portions that are claimed. Therefore, we find that, in this case, the unclaimed portions of the display rack are “insignificant” to the ornamental design – to the extent such a finding is necessary in considering whether a presumption of nexus applies. In this proceeding, based on the close similarity between the specific gravity fed displays and the features of the claimed invention, and

Appendix C

the relative insignificance of the unclaimed features to the ornamental design, we find that the display racks at issue embody the claimed features and are coextensive with them.

Even if the presumption of nexus did not apply, we find that Gamon establishes persuasively “that the evidence of secondary considerations is the ‘direct result of the unique characteristics of the claimed invention.’” *Fox Factory, Inc.*, 944 F.3d at 1374 (quoting *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)), and, therefore, establishes nexus with or without the benefit of the presumption. Our analysis below demonstrates, in detail, that, even without the presumption, Gamon has established a nexus to the patented ornamental design of the display rack.

Commercial Success and Praise

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

[C]ommercial success, while relevant as showing the nonobviousness of an invention, presents a special difficulty in a design patent case. To be of value, evidence of commercial success must clearly establish that the commercial success is attributable to the design, and not to some other factor, such as a better recognized brand name or improved function.

728 F.2d 1423, 1443 (Fed. Cir. 1984). Gamon relies on its own sales of approximately \$31 million of gravity feed

Appendix C

display racks to Campbell as evidence of commercial success. Ex. 2001 ¶¶ 37, 45. Gamon also relies on the commercial success of sales of the displayed soup cans (that is, sales made by Campbell) that comprise part of the claimed design. *Id.* We consider each measure of commercial success below and how it relates to the claimed features of the '646 patent.

Based on the final trial record before us, we determine that Gamon has established that its commercial embodiments have enjoyed commercial success attributable to the patented ornamental design and Campbell has seen increased sales volumes of soup attributable to the patented design. Terry Johnson testified that the Gamon display racks embodied the ornamental design claim of the '646 patent. Ex. 2001 ¶¶ 37–47.

Regardless of whether nexus is presumed, it has been proven by Gamon. As detailed more below, the evidence in the final record establishes that the commercial success of Gamon's display rack and an appreciable amount of Campbell's increased soup sales from 2002–2009 is attributable to the claimed ornamental features of the patented design. Thus, presumption of nexus is not necessary for our determination in this proceeding. The final record establishes persuasively that the claimed ornamental design features, specifically the pronounced label area resembling the side of a can, as well as the cylindrical can lying on its side underneath the label area, attracted customers to the gravity feed display and allowed them to efficiently find and purchase soup products. *See* PO Sur- reply 4–5. The ornamental features

Appendix C

created a display that jumped out and attracted soup customers to Campbell's selections. Thus, the evidence before us establishes that the commercial success is directly attributable to the claimed design features.

When asked, “[W]hat facts are you aware of to show that the increase in Campbell soup sales was linked to the patented features of the display rack?” (Ex. 1021, 45:3–7), Terry Johnson explained that putting the can on its side was important and “what the consumer saw because there was a big convex sign that was the same as the label and it was the same proportions as the can.” *Id.* at 45:8–17. We agree that the patented design itself uniquely mimics the proportions of the Campbell's soup can. *See* Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display”). The evidence shows that this proportionality in the claimed design was original and created a display that looked like a soup can, which contributed to the success of the patented display rack and also to increased soup can sales. *Id.*; Ex. 1021, 45:1–22; Ex. 2015, 10 (“while making the soup aisle dramatically easier for consumers to shop”); Ex. 2032, 4 (“Billboard effect improves branding: 210% larger”); Ex. 2031, 5, 6, 10–12, 14–17, 26–31; Ex. 1021, 39:3–10 (“Cannondale said that the reason the sales went up was because the people could find their soup more rapidly and allowed them time to shop impulsively . . .”). Gamon's ornamental design turned the soup can on its side and the record demonstrates that Campbell originally believed doing this would not work, which indicates the originality of the design. Ex. 1021, 27:13–16, 29:11–30:10 (“[n]o one wanted me to turn the can on its side”).

Appendix C

The evidence further shows that the claimed ornamental design allowed customers to find their desired soup more efficiently and encouraged additional purchases. Ex. 2032, 4–10 (“Breakthrough Gravity Feed Shelving,” that “Encourages purchase of additional varieties,” and resulted in positive consumer responses in every test market); *id.* at 4, 10 (“It makes me want to buy more soup!”); Ex. 2015, 17 (“Our breakthroughs in soup merchandising continue to make it simpler for retailers to stock and maintain their soup shelves and easier and faster for consumers to shop.”).

Campbell’s internal market study also determined that the label area of the claimed design improves branding and also “[e]ncourages purchase of additional varieties.” Ex. 2032, 4. Campbell concluded that the display rack would increase its soup sales volume by 5.5–13.6% depending on the type of soup and brand. *Id.* Campbell referred to the Gamon display rack as “Breakthrough Gravity Feed Shelving.” *Id.* As noted by customers participating in the market testing, the ornamental design played a significant role in attracting customers to the display because “[i]t just jumps out of this section, wow,” and “it was like having a menu in front of me.” *Id.* Another customer, referring to the label area, noted “[t]he labels make a difference, it’s like looking at your soup before you eat it.” *Id.* As explained by Terry Johnson, this proportionality between the label and the soup can was purposeful and contributed to the attraction and success of the patented design. Ex. 1021, 45:8–17; Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display,

Appendix C

which creates an esthetic link between those parts absent in the prior art”). Still another customer noted that when the patented displays are placed side-by-side, it gives the visual appearance of being “the most organized store[] I have ever seen.” Ex. 2032, 5.

As discussed in the Background section above, a Campbell’s marketing manager noted in 2004 that a “key benefit[]” of the IQ Maximizer was that the program enhances the shopping experience for the consumer and also “makes it easier for consumers to find desired products while giving visibility to others,” and that “[t]he facings are better defined and easier for customers to shop, so fewer are needed.” Ex. 2007, 1.

Based on the evidence above, we find that the ornamental design and its ability to attract customers to the display and allow customers to efficiently find soup were factors in Campbell’s decision to purchase \$31 million of Gamon’s gravity feed display racks and install them in over 17,000 stores from 2002 until 2009. PO Resp. 47; Ex. 2001 ¶ 45; Tr. 50:1–5, 40:4–41:3; Ex. 2017, 14. Campbell’s Annual Reports to shareholders confirm this assessment.

In its 2005 Annual Report, Campbell noted that “[t]he strong performance of *Campbell’s* condensed soup business demonstrates the value of the *iQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup.” Ex. 2015, 10. The report described the IQ Maximizer as “making the soup aisle dramatically easier for consumers to shop.” *Id.* Campbell’s 2006 Annual Report similarly notes that the IQ Maximizer “continues to be a powerful

Appendix C

tool to merchandise *Campbell's* condensed soups.” Ex. 2016, 8. Campbell described the IQ Maximizer as a “tool to deliver impactful consumer messages at the point of purchase” (*id.*), and as “Making Shopping Even Simpler” (*id.* at 22). Campbell also claims that the IQ Maximizer was a “breakthrough in soup merchandising.” *Id.*

Based on these statements, and the results of the prior market study (Ex. 2032), we find that Patent Owner has established that the claimed invention made the soup aisle “easier and faster for consumers to shop” (Ex. 2015, 17) because the ornamental display, including the label area and its spatial relationship to the cylindrical soup can, allowed customers to quickly find their desired soup—Terry Johnson’s primary goal in creating the claimed design. Ex. 1021, 27:13–28:24, 36:21–37:3, 39:3–10.

Campbell contends that factors other than the ornamental design of the ’646 patent may have contributed to the commercial success enjoyed by Campbell. Pet. Reply 16–18. We examine these factors below and agree with Campbell that other factors may have also made some contribution to the overall commercial success of the sales of Campbell’s Soup cans displayed in the Gamon racks. However, as discussed in detail herein, the evidence also establishes that a portion of the commercial success is attributable to the design of the ’646 patent. We do not read *Litton Systems, Inc.* or *Fox Factory*, as precluding other factors from also contributing to a product’s success, so long as a preponderance of the evidence establishes that the product’s success was “attributable to” the claimed invention. *See Fox Factory*, 934 F.3d at 1378.

Appendix C

Campbell alleges that other factors such as the “organization of the overall shelf display into color-coded ‘flavor clusters,’” “successful merchandising,” and other advertising programs contributed to the commercial success of its soup products. Pet. Reply 16–17. Campbell also acknowledges, however, “that its new gravity-feed display system ‘also’ contributed to increased soup sales” but argues that its Annual Reports “did not attribute any portion of its increased sales to the display racks.” *Id.* At 17; Paper 97, 24.

Even though these other factors had some impact on commercial success, we determine that Gamon has established, and Petitioner has not rebutted, that an appreciable amount of Campbell’s increased commercial success of soup during the relevant time period is attributable to the ornamental features of the patented design. Ex. 2032, 4; Ex. 2017, 36. As explained more below, we do not place a specific number on the contribution of the claimed ornamental features to the overall commercial success of Campbell’s soup sales, but we determine the evidence establishes that an appreciable amount of increased soup sales are tied to the ornamental features of the design. This evidence is examined in more detail below.

In 2002, Cannondale projected a 5.5–13.6% increase in sales from using the gravity-feed shelving system. Ex. 2032, 4. This same market study noted that other variables were controlled so that a determination could be made on the impact of just the Gamon’s IQ Maximizer—“[s]ingle variable testing will be employed.” Ex. 2031, 26–27.

Appendix C

In fiscal 2005 Campbell's reported that "U.S. soup sales grew 5 percent" after the Gamon gravity-feed shelf system had been put into 14,000 stores. Ex. 2015, 5, 10, 30–31. Condensed soup sales grew 8% and this growth was attributable to "merchandising and kids promotional marketing," "increased advertising and higher prices," as well as "gravity-feed shelving systems installed in retail stores." *Id.* at 31. Campbell noted that its condensed soup sales increased by 5% in 2006, which Campbell attributed to "higher prices across the portfolio," and "the additional installation of gravity-feed shelving systems and increased advertising." Ex. 2017, 36.

The overwhelming weight of the direct and circumstantial evidence before us establishes that the patented ornamental design improved the sales of Campbell soup an appreciable amount in 2005 and 2006. When we state an appreciable amount sufficient to establish commercial success, this determination is based on the complete record before us, including evidence that even a few percentage points difference in sales is significant in this industry. *See, e.g.*, Ex. 2015, 30–31 (stressing importance of sales increases of 3% in "U.S. Soup, Sauces and Beverages" and 5% for "U.S. soup sales"). Likewise, Campbell recognized that the Gamon shelves were valuable because they increased soup sales. *Id.* at 10 ("The strong performance of *Campbell's* condensed soup business demonstrates the value of the *IQ Maximizer*, an innovative gravity-feed shelf system for merchandising soup."). Campbell's increased sales of soup is attributable to the ornamental patented design and these increased sales demonstrate a strong showing of commercial success.

Appendix C

The preponderance of the evidence establishes that the ornamental patented design contributed to Campbell's commercial success of soup cans displayed in the design. The ornamental features attracted customers. These ornamental features were praised by Campbell in its public filings to shareholders and the evidence establishes that the ornamental design contributed to increased soup sales.

We also determine that Gamon's commercial success in selling the patented display racks is attributable to the ornamental design embodied in the patent. We have recognized that utilitarian features of the Gamon display rack also contributed to its overall success. For example, the ease of re-stocking soup cans and the return can feature (U.S. Patent No. 8,827,111 or the '111 patent) also aided in the product's success. The evidence also demonstrates that the ornamental aspects of the design contributed significantly to sales of the Gamon display racks as detailed above. Accordingly, Gamon's sales to Campbell of about \$31 million in display racks from 2002–2009 demonstrate a strong showing of commercial success.

In its remand briefing, Campbell argues that “Gamon cannot rely on the same evidence and the same presumption of nexus to show secondary considerations for two different patent claims directed to two different combinations of features.” Paper 97, 22–23 (citing *Fox Factory, Inc.*, 944 F.3d at 1378). Similarly, Campbell argues “[w]ith a nexus now definitively established between that evidence and claim 27 of the '111 patent, Gamon can no longer rely

Appendix C

upon the same evidence to assert non-obviousness as to the '646 patent.” Paper 103, 2. Campbell’s arguments are misplaced. We do not rely on the same evidence or rely solely on a presumption of nexus. Our determinations above focus on the ornamental aspects of the claimed design patent and we specifically differentiate the impact of the utilitarian features. Campbell failed to offer any persuasive evidence or argument to refute our findings. Additionally, as we also explained above, Gamon has established persuasively that the evidence of secondary considerations is directly attributable to the claimed ornamental design. Campbell complains that Gamon did not allocate the commercial success of its patented display rack between various patents (Paper 97, 24), but we do not read *Fox Factory* as creating an obligation for patent owners to allocate percentages of success to different patents that cover a commercial product.

Further, *Fox Factory* did not address, directly, the circumstances presented here – where utility and design patents cover the same product¹³ and are complimentary to one another. Nonetheless, we do not rely on precisely the same evidence in precisely the same manner as we did in IPR2017-00087. Although some of the evidence related to commercial success and copying overlaps, aspects of that evidence and how we have examined them differ. The utility patent focused on the return can feature and the ease of stocking and restocking shelves. These benefits were understood by Campbell and the stores where these

13. The commercial products covered by the '646 design patent and the '111 utility patent are also covered by the '645 design patent.

Appendix C

shelves were placed. And, the Federal Circuit considered our analysis of the evidence related to the utilitarian features in IPR2017-00087 and agreed that they were supported by substantial evidence on appeal. *Campbell Soup Co.*, 787 F. App'x at 739 (“We also conclude that the Board’s findings regarding secondary considerations are supported by substantial evidence.”). In our discussion above, however, we have explained how the evidence before us also establishes that the ornamental features were a significant factor in both Gamon’s success and Campbell’s success. The claimed ornamental design attracted consumers to the display, made shopping easier, and encouraged consumers to purchase Campbell’s soup displayed in the patented design. Numerous other reasons are discussed herein. The commercial success based on the utilitarian and ornamental features of the Gamon display racks are complimentary. As counsel for Gamon argued, “those two things are not exclusive. They can happily coexist in one article.” Tr. 2, 38:17–18. Gamon’s and Campbell’s commercial success is attributable to both sets of features.

Accordingly, we find that overall Gamon has made a strong showing of commercial success attributable to the claimed ornamental design, and that the claimed ornamental design was praised by Campbell and its customers.

Copying

Gamon also alleges that Petitioner Trinity copied its patented design and began selling the same gravity feed

Appendix C

display racks to Campbell. The final trial record establishes that the display racks made by Petitioner Trinity and sold to Campbell have the same patented design features as the display racks Gamon sold to Campbell. PO Resp. 48–49; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013.

We found copying in our first Final Decision and the evidence has not changed. Therefore, we reaffirm our finding that Petitioner copied Gamon’s commercial display racks. Also, in related case IPR2017-00087, the Federal Circuit affirmed our determination that Gamon’s commercial embodiments were copied by Petitioner. *Campbell Soup Co. v. Gamon Plus, Inc.*, IPR2017-00087, Paper 73 at 64 (PTAB Apr. 20, 2018) (“Patent Owner has established that Petitioner copied Patent Owner’s display racks.”); *Campbell Soup Co., Inc.*, 787 F. App’x at 739 (“We also conclude that the Board’s findings regarding secondary considerations are supported by substantial evidence.”). Because the products are the same, we are bound by this determination as to copying.

Petitioner argues that it could not have copied the ’646 patent because it was not filed until September 25, 2009. Pet. Reply 19; Tr. 44:11–47:25. Petitioner’s argument is unpersuasive for two reasons. First, copying in the context of secondary considerations examines whether an underlying “product” is replicated. “Copying ‘requires evidence of efforts to replicate a specific product.’” *Tokai Corp. v. Easton Enters., Inc.*, 632 F.3d 1358, 1370 (Fed. Cir. 2011) (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)). The evidence that Petitioner Trinity copied the Gamon gravity feed display rack is

Appendix C

unrefuted. *See* Ex. 2001 ¶¶ 48–52; Tr. 47:1–4. Second, Gamon relied on accepted continuation practice to file the '646 patent and Petitioner has not presented any persuasive argument that such practice would prevent a finding of copying. *See* Ex. 1001, [60].

The final trial record before us is replete with evidence of copying.

[C]opying requires evidence of efforts to replicate a specific product, which may be demonstrated *through internal company documents*, direct evidence such as disassembling a patented prototype, photographing its features, and using the photograph as a blueprint to build a replica, *or access to the patented product combined with substantial similarity to the patented product*.

Wyers, 616 F.3d at 1246 (emphases added).

Campbell's internal presentations in 2002 demonstrate that Campbell was aware that Gamon's gravity feed display racks would increase sales volume of Campbell's soup. *See* Ex. 2032, 4. After obtaining the results of the Cannondale survey, Campbell purchased tens of thousands of Gamon's display racks between 2002 and 2009. PO Resp. 47. Campbell had access to the patented design and significant motivation to continue using the same design. Campbell's annual reports praise the Gamon display racks and link increased Campbell soup sales to the ornamental features of these display racks. *See supra*.

Appendix C

Around 2009, Campbell transitioned from purchasing Gamon's display racks to those sold by Petitioner Trinity. The Trinity display racks are substantially similar to the Gamon racks, especially as related to the patented ornamental front label area and the ability to place a cylindrical object below the label area. *See* PO Resp. 48–49; Ex. 2001 ¶¶ 48–52; Exs. 2012, 2013.

Campbell's and Trinity's access to the patented product combined with substantial similarity of Trinity's product to the patented product provide unrefuted evidence that Gamon's display racks were copied. Petitioner has not presented any evidence to refute copying. To the contrary, Petitioner admitted that their only rebuttal to Gamon's copying allegations was that the patents should be held invalid or that there was no pending patent claim when the Gamon products were copied. Tr. 46:18– 47:4; Paper 97, 25 (“[t]here is nothing patentably distinct about the claimed design”).

Accordingly, we determine that Gamon has established that Petitioner copied Gamon's patented display racks.

Additional Arguments Related to Secondary Considerations

Campbell further argues that “Gamon also cannot show that any purported commercial success, praise or copying associated with Petitioners' accused dispensers is attributable to some patentably distinct, ornamental (rather than functional) feature of the '646 patent design.” Paper 97, 24. Campbell relies on *Ormco Corp. v. Align*

Appendix C

Technology, Inc. for the proposition that “if the feature that creates the commercial success was known in the prior art, the success is not pertinent.” 463 F.3d 1299, 1312 (Fed. Cir. 2006); Paper 97, 24 (“Gamon cannot claim secondary considerations associated with design features that were already known.”). *Ormco Corp.* involves a utility patent. We do not find Campbell’s arguments persuasive for the reasons set forth above, and as further explained below.

First, Campbell has not argued that any portion of the claimed ornamental design is “functional.” Likewise, our original claim construction, affirmed by the Federal Circuit, did not find any portion of the claimed design to be functional. Second, our analysis above thoroughly considers all reasons for the commercial success of the Gamon display racks, including utilitarian properties.

When weighing the objective indicia of nonobviousness for design patent analysis, we consider the patented ornamental design as a whole. *See L.A. Gear, Inc.*, 988 F.2d at 1124 (“The district court concluded that there was no teaching or suggestion in the prior art of the appearance of the claimed design as a visual whole. We discern no error in this conclusion.” Further, “the ornamental quality of the combination must be suggested in the prior art.”). The overall design must be “new, original and ornamental.” 35 U.S.C. § 171. The claimed ornamental design as a visual whole should guide the validity analysis for a design patent.¹⁴ *See Petersen Mfg. Co., v. Central Purchasing,*

14. We do not believe that there needs to be a single “patentably distinct” feature that creates the commercial success for an ornamental design patent claim. *Cf. MRC Innovations, Inc. v.*

Appendix C

Inc., 740 F.2d 1541, 1548 (Fed. Cir. 1984) (“The obviousness of a design must be evaluated as a whole.”). Likewise, the claimed ornamental design as a whole may also be considered in determining commercial success as we have done.

The utility patent in *Ormco Corp.* concerned an invisible orthodontic device and the evidence demonstrated “that commercial success was due to unclaimed or non-novel features of the device.” *Ormco Corp.*, 463 F.3d at 1312. In contrast, the evidence before us establishes that a significant portion of Gamon’s commercial success and an appreciable amount of Campbell’s increased sales of soup cans was the result of the claimed ornamental design as a visual whole. The final record establishes “that the commercial success . . . [is] related to the merits of the claimed invention.” *MRC Innovations, Inc.*, 747 F.3d at 1336.

As noted above, the invalidity analysis focuses on the ornamental design as a whole, and thus we do not believe that to establish commercial success for a design patent, a patent owner should have to differentiate design features “that were already known” from those that are purportedly novel, as argued by Campbell. To the extent that design patent law incorporates this utility patent

Hunter Mfg., LLP, 747 F.3d 1326, 1333 n.1 (Fed. Cir. 2014) (explaining that for design patent infringement the “focus [is] on the ‘overall visual appearance’ of a claimed design rather than on individual features”); *Egyptian Goddess, Inc.*, 543 F.3d at 677 (recognizing that “a claimed design” may “consist[] of a combination of old features” while abolishing the “the point of novelty test”).

Appendix C

concept, which it should not, we also determine that the commercial success *is* attributable to certain novel features. We acknowledge the Federal Circuit’s holding that “Linz’s design is made to hold a cylindrical object in the display area,” making it a proper primary reference as detailed below. 939 F.3d at 1341. Nevertheless, it is undisputed that Linz’s design does not depict a label area that mimics the proportions of the cylindrical object and spacing of the objects from one another. *See* Ex. 2001 ¶ 6 (“the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art”). As explained above, that proportionality and spacing (which is not suggested by Linz) represents an original design feature and results in a display label that looks like (i.e., mimics the front of) a larger soup can positioned above the actual can lying on its side one label length below. *Id.* Significantly, as explained above, the evidence demonstrates that these features of proportionality and spacing contributed to the success of the patented display rack and also to increased sales of soup cans.

Below, we begin our discussion with an understanding that Linz is a proper *Rosen* reference. Then, as part of second step of the obviousness analysis, we determine that Linz creates basically the same overall visual appearance as the patented design. But there is no dispute that Linz does not teach or suggest the features of proportionality and spacing. That “ever-so- slight difference[] in design” meaningfully impacts the obviousness analysis, because the proportionality of the can to the label area, and its

Appendix C

relative positioning and spacing, impacted the commercial success of the product. Although the proportionality and spacing features do not remove Linz as a primary reference, they do represent features of the claimed design, and represent distinct ornamental features that impact our finding of commercial success.

8. Linz Alone or Linz and Samways or Knott

We begin our analysis with the understanding that Linz is a proper *Rosen* reference. Specifically, the Federal Circuit held that “the ever-so- slight differences in design, in light of the overall similarities, do not properly lead to the result that Linz is not ‘a single reference that creates “basically the same” visual impression’ as the claimed designs.” *Campbell Soup Co.*, 939 F.3d at 1341. The Federal Circuit also determined that “Linz [was] for dispensing cans and that a can would be used in the system,” but the Federal Circuit did not offer any further opinion as to the size, shape, positioning, and orientation of the hypothetical can in Linz. *Id.* The parties briefing on remand (Papers 95, 97) addresses these issues.

We next examine the ornamental appearance in Linz compared to the patented design to determine whether the designs would have had the same overall visual appearance to a designer of ordinary skill in the art. Similarly, we must determine “whether other references may be used to modify Linz to create a design that has the same overall visual appearance as the design claimed.” Paper 97, 5. The parties’ arguments are set forth in detail above.

Appendix C

Campbell acknowledges our prior determination “that ‘Linz’s overall ornamental appearance is similar to the design claim of the ’646 patent’ once a cylindrical object is added to the display area.” *Id.* at 6 (quoting Final Dec. 34). Campbell then argues that “Linz alone renders the ’646 patent obvious, as (a) it would have been obvious to a designer of ordinary skill to put cans (or other cylindrical objects) into a Linz dispenser design, and (b) a Linz dispenser displaying a can has the same overall visual appearance as the ’646 patent design.” *Id.* Relying on the testimony of its experts, Campbell reasons “that it would have been obvious to a designer of ordinary skill that the Linz dispenser was intended to dispense cylindrical objects, and that such objects would be dispensed below the label area and behind the stops.” *Id.* at 7.

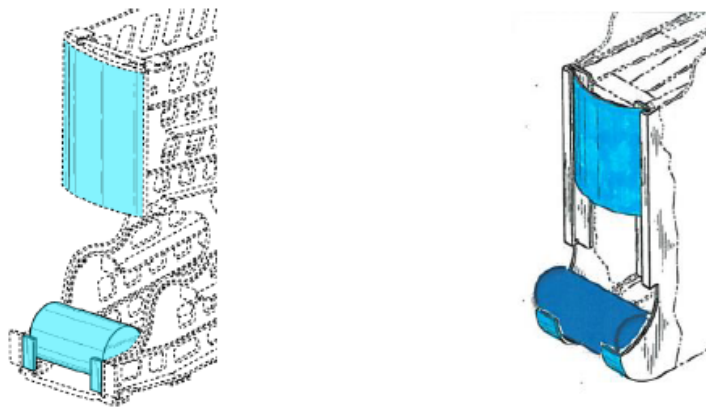
As noted above, Campbell also argues that “[t]o the extent any further teaching of vertical stops or a can in the dispensing area were needed to prove the obviousness of the claimed design, Samways and Knott teach these elements.” *Id.* at 11. Campbell notes that both secondary references disclose gravity feed dispenser designs with cans below label areas. *Id.* At 12.

We have considered the parties’ arguments after remand and determine that Campbell’s contentions are most persuasive. After a can is added to Linz, which the Federal Circuit deemed proper, the two designs would generally have the same overall visual appearance. The Federal Circuit also made the determination that the “differences in design” are “ever-so-slight.” Based on the arguments made by Campbell, and the findings of the

Appendix C

Federal Circuit, we determine that Linz would generally have the same overall visual appearance as the patented design.

To reach this determination, we presume the hypothetical can in Linz is somewhat similar to the can added by Campbell to the Linz design, as shown the Petitioner's annotated versions of the '646 patent drawing (below left) and Linz's Figure 1 (below right).



'646 Patent drawing vs. Linz, Fig. 1 plus a cylindrical can

Pet. 30. The above illustration shows Campbell's highlighted figure of the '646 patent (left) compared to Campbell's highlighted figure of Linz Figure 1 (right) with a can added. *Id.* The designs, as a whole, have similarities such as having label areas that are generally rectangular and curved convexly forward, with the label area taller vertically than it is wide horizontally.

Appendix C

Although the designs are similar, there are also differences. We do not agree that Campbell's depiction of the hypothetical can in Linz (above right) is completely accurate. The can in Linz would have to pass through the slots at the top of the gravity feed display, and the designer of ordinary skill would understand that these slots would require a smaller can with a much reduced diameter than that portrayed above. *See* Paper 95, 24. Further, we do not agree that the can placement would be as depicted above. Gamon has offered persuasive cross-examination testimony from Campbell's expert that establishes that the smaller can would be offset further rearwardly than what is depicted by Campbell. *Id.* at 20–21 (citing Ex. 2019, 32). Campbell's expert also testified, "I don't think you can tell that from these drawings. These drawings are not shown to a scale of what the actual article is. It's *virtually impossible to know whether the cans would be the same or not.*" Ex. 2019, 32 (emphasis added). Campbell's portrayal of the can in Linz appears to us, therefore, as a guess guided by hindsight because no consideration was given for the overall design of the rack. For example, Campbell's proposed can could not pass through the top rail of Linz, and Campbell's expert admits that it's virtually impossible to know whether the cans would be the same or not. Petitioner also has not proven sufficiently that any can added to Linz would come to rest partially forward of the label area, as required by the claimed ornamental design. *See* Ex. 2026, annotated Fig. 3 (drawn during Mr. Gandy's cross-examination). Finally, the label area of Linz also is not as tall vertically as the claimed design. Paper 95, 29–30.

Appendix C

Campbell's experts conclude that these differences would have been minor to a designer of ordinary skill in the art. Ex. 1002 ¶¶ 48–51, 48 (“differences are *de minimis* and not sufficient to justify a finding that the design is patentable”); Ex. 1020 ¶¶ 33, 37. Further, as the Federal Circuit found, the “differences in design” are “ever-so-slight.” *See Campbell Soup Co.*, 939 F.3d at 1341. We agree that “slight differences in the precise placement of [certain design elements] does not defeat a claim of obviousness; if the designs were identical, no obviousness analysis would be required.” *MRC Innovations, Inc.*, 747 F.3d at 1332–33; Paper 97, 14. Thus, we determine Linz would have created the same overall visual appearance as the claimed design to a designer of ordinary skill in the art.

Campbell also has established that Linz combined with either Samways or Knott would have the same overall visual appearance to a designer of ordinary skill in the art. Samways and Knott provide support for moving Linz's can forward as claimed in the patented design.

Linz's vertical planar stops are curved rearward from top to bottom but the claimed stops are vertical and straight. We find that a designer of ordinary skill in the art would have integrated the flat, vertical stops from the design of Samways into Linz to further arrive at the design of the claimed invention. *See* Paper 97, 13 (illustrating how Samway's “stops are vertical with respect to the dispensed article and the dispensing cradle”). Petitioner has shown that Samways and Linz are so related that the appearance of certain ornamental features in Samways, such as vertical stops, would suggest the application of those features to Linz. Pet. 34.

Appendix C

Petitioner also demonstrates how Knott's vertical stops are closer to the patented design and would be integrated into Linz. Pet. 35–37. Knott's design has curved stops that are similar to Linz, but slightly more vertical. *See* Ex. 1010, Fig. 1. We therefore determine that Knott's teaching when added to Linz also creates a design that has the same overall visual appearance as the claimed design.

Petitioner has established sufficiently that Linz alone or Linz combined with Samways or Knott create a design that has the same overall visual appearance as the claimed design.

9. Weighing the Evidence – Ultimate Determination as to Obviousness

We are faced with the situation where the prior art ornamental designs examined above have the same overall visual appearance as the claimed design, but the objective evidence is strongly in favor of nonobviousness. To reach the ultimate determination as to obviousness, we consider each of the *Graham* factors as well as the complete record before us.

As way of background, the original Petition in this proceeding asserted twelve distinct grounds. Dec. 6. Of these grounds, we determined that Petitioner established a reasonable likelihood of prevailing as to three. *Id.* at 35. At that time we did not have evidence of secondary considerations before us. We issued the first Final Decision that addressed the three instituted grounds and considered each of the *Graham* factors, including secondary

Appendix C

considerations. In that Final Decision we weighed all four *Graham* factors and determined Campbell had not met its burden as to any ground. We were affirmed by the Federal Circuit as to two of the three grounds and reversed on one ground – the ground based on Linz and Samways. The Federal Circuit reversed our determination that Linz was not a proper primary reference, and remanded to reassess the obviousness question. Pursuant to *SAS*, the Federal Circuit also remanded as to all the grounds that we initially determined lacked merit for purposes of institution.

To reach the ultimate determination as to obviousness, we weigh the strength of Campbell’s evidence of obviousness against Gamon’s strong showing of objective indicia of nonobviousness. Above, we have discussed our reviewing court’s en banc direction that “[a] determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all those factors are considered.” *Apple*, 839 F.3d at 1048. “This requirement is in recognition of the fact that each of the *Graham* factors helps inform the ultimate obviousness determination.” *Id.* The Federal Circuit also has recognized that “evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not.” *Id.* at 1052–53 (quoting *Stratoflex, Inc.*, 713 F.2d at 1538–39).

As determined above, the designer of ordinary skill in the art would have had a background or familiarity with commercial dispensers, and particularly dispensers for consumer commodities such as cans, bottles, or small

Appendix C

packaged items and a basic understanding of physics and/or mechanics. This *Graham* factor does not particularly favor either party, but it does provide the foundation for our analysis.

Petitioner established persuasively that a designer of ordinary skill in the art would have considered Linz a *Rosen* reference and thereafter combined the features of Linz with either Samways or Knott at the time of the invention. This combination, although sufficient to create a design that has the same overall visual appearance as the claimed design, does not produce a strong case of obviousness. The similarities and differences are examined above. The designer of ordinary skill would understand that Linz's hypothetical can would be smaller than the can Campbell has depicted. Linz's can would sit either behind or directly under the label area and not forwardly positioned, but this forward placement is taught by either Samways or Knott when modified. The label area of Linz is not as tall, or prominent as in the claimed design. There is no evidence that the label area of Linz uniquely mimics the proportions of the can it holds and there is no suggestion in Knott or Samways of this proportionality and the spacing between the label and can. *See* Ex. 2001 ¶ 6 ("the ratio of height of the curved label area to its width is similar to the height-to-diameter ratio of the cylindrical article in the display, which creates an esthetic link between those parts absent in the prior art"). Although the evidence presented by Petitioner is sufficient to create a design that has the same overall visual appearance as the claimed design, Petitioner's analysis appears to us to at least be guided by hindsight reconstruction that uses the disclosure of the '646 patent as a roadmap.

Appendix C

While the determination as to whether the prior art designs have the same overall visual appearance is a close call, the objective indicia of nonobviousness weigh strongly in favor of patentability.

Gamon presents evidence of a nexus between the ornamental features of Gamon's gravity feed display racks and the commercial success enjoyed by both Gamon through its sales of display racks, and Campbell, through its increased sales of soup using the display racks. Campbell and its customers offered praise and recognition that is tied to the ornamental features of the patented design. Evidence of commercial success that is directly attributable to the claimed ornamental design features is strong. The evidence of direct copying is strong and unrebutted.

Weighing these factors, and considering the complete record before us on remand, the strength of the objective indicia of nonobviousness convinces us that the design claim would not have been obvious in light of the proposed combinations of prior art. Specifically, the strong evidence of objective indicia of nonobviousness supports an ultimate determination that the claimed design of the '646 patent would not have been obvious over Linz alone, or Linz and Samways or Knott, to a designer of ordinary skill in the art at the time of the invention. Weighing the evidence of obviousness and nonobviousness as a whole, we determine that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '646 patent is unpatentable as obvious based on the grounds and prior art examined above.

Appendix C

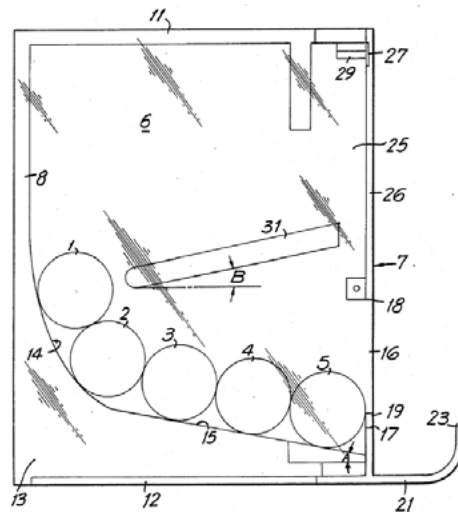
D. Obviousness Based on Abbate and Samways and/or Linz

We originally denied institution on the basis that Abbatte was not a proper *Rosen* reference. Dec. 29–31. Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim is unpatentable over Abbate and Samways and/or Linz for the reasons explained below.

1. Abbate (Ex. 1011)

Abbate is titled “Display Case” and discloses a “display case for storing and displaying a plurality of items of overall general elongated rolled and cylindrical configuration.” Ex. 1011, [54], Abstract. Figure 1 of Abbate is reproduced below.

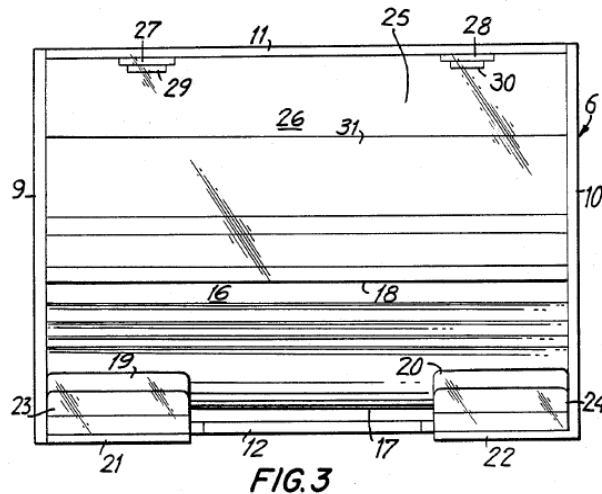
FIG.1



Appendix C

Id. at Fig. 1. As shown above in Figure 1, the display case “stores and displays a plurality of items 1, 2, 3, 4 and 5, shown . . . in phantom, of overall general elongated rolled and cylindrical configuration such as, for example, rolls of wallpaper.” *Id.* at 3:32–36. Bottom opening 16 is provided in the display case “for accommodating the passage therethrough of one of the items 1 to 5 at a time.” *Id.* at 3:58–60.

Figure 3 of Abbate is reproduced below.



Id. at Fig. 3. Figure 3, shown above, provides a front view of the display case. *Id.* at 3:26–27. Abbate discloses that a “pair of spaced substantially partially curved ledges 21 and 22 extend from the bottom 12 of the housing 6 beyond the front 7,” as shown above in Figure 3. *Id.* at 4:3–5.

As noted above, Abbate is for elongated, skinny, rolls such as wallpaper. *Id.* at 3:32–36.

Appendix C

2. Analysis of Alleged Obviousness Based on Abbate in View of Samways and/or Linz

Petitioner contends the ornamental design of the '646 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways or Linz. Pet. 46–51. Petitioner relies on a comparison of the combined ornamental features of Abbate and Samways and/or Linz with the design of the '646 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 72–79). Petitioner relies on Abbate as the primary reference, specifically citing to Figures 1–3. *Id.* at 46. For the reasons discussed below, we disagree that Abbate has design characteristics that are basically the same as the claimed design.

On the final record before us, we determine that Abbate is not a proper *Rosen* reference. Abbate depicts a display case for long and skinny tubes, such as “wallpaper.” Ex. 1011, 1:9–11; 3:32–36. Abbate’s design is short, and has no curved label area surface, and the label area is shorter than it is tall. The height and width dimensions of Abbate’s label area are not similar to those of the '646 patent claimed design and the label area is not convex or curved forward as in the '646 patent claimed design. The display disclosed and illustrated in Abbate stores “elongated rolled and cylindrical configuration such as, for example, rolls of wallpaper.” Ex. 1011, 3:32–36. Based on these differences between Abbate and the patented design, we determine that Abbate does not provide the same visual impression as the patented design and therefore cannot serve as a *Rosen* reference.

Appendix C

It is not the province of design patent law to guess about designs that could be brought into existence based on descriptions in a specification suggesting other dimensions are possible or that features could be added or changed. *See* Paper 97, 19–21. Our focus in determining whether something is a proper *Rosen* reference must be on *what currently exists*, and *not what hypothetically could be created* by a designer of ordinary skill in the art. *Rosen*, 673 F.2d at 391 (“and compared with something in existence—not with something that might be brought into existence”). Campbell’s analysis first suggests the necessary hypothetical changes that Abbate would require before attempting to establish that Abbate is a proper *Rosen* reference. Paper 97, 20–21 (“teachings of Abbate are not limited to any particular height-to-diameter proportions”). To begin the *Rosen* analysis by first changing the depicted designs in Abbate based upon general statements in its specification would be contrary to the basic foundational principles of design patent law. Adopting Petitioner’s approach would make design patents worthless because any generic description in a specification could be used to create a similar patented ornamental design based on hindsight reasoning. A word is not worth a thousand pictures.

Accordingly, we determine that Petitioner has failed to establish by a preponderance of the evidence that the claim of the ’646 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways and/or Linz.

Even if Abbate were a proper *Rosen* reference, and even if we determined that the combination of Abbate

Appendix C

with Samways and/or Linz created the same overall visual appearance, our ultimate conclusion as to obviousness for this combination would not change. The objective indicia of nonobviousness strongly favor nonobviousness, while a finding of similarity in the overall visual appearance is weak. The evidence of secondary considerations is detailed above and is equally applicable to this ground. Specifically, the evidence in favor of nonobviousness outweighs that of obviousness for this combination of references.

Abbate's front display area does not mimic the proportionality of its elongated wallpaper tubes – Abbate's front display is not curved. Even treating Abbate as a proper *Rosen* reference, and combining select features from Linz, such as a curved label area (Paper 97, 20), the cylindrical objects in Abbate still would not be proportional to the front label area. The ornamental label area of the patented design mimics the proportionality of the can below it, lying on its side. The label area of Abbate appears more like a billboard (it is wider than it is long) with an opposite proportionality to the elongated rolls (wallpaper) in its receiving area. The patented design requires a can lying on its side, with a display or label area having the appearance of that can standing upright. Such a design for Abbate does not make sense for long cylindrical rolls.

Finally, Petitioner seems to merge principles of utility obviousness with that of design patent law by arguing that a designer of ordinary skill in the art would simply “adjust the dimensions of an Abbate dispenser to suit the dimensions of whatever ‘overall general elongated’ cylindrical items” are being dispensed. Paper 97, 21.

Appendix C

Numerous changes would be necessary in Abbate to arrive at the claimed ornamental design and these changes could only be achieved with a hindsight approach. These changes show that even if Petitioner meets the threshold of proving the designs create the same overall visual appearance, the evidence for obviousness is weak. The secondary considerations are strongly in favor of nonobviousness.

Accordingly, we determine that even if Abbate and Samways and/or Linz produced the same overall visual appearance, Petitioner has still failed to establish by a preponderance of the evidence that the claim of the '646 patent would have been obvious to a designer of ordinary skill based on Abbate in view of Samways and/or Linz.

*E. Obviousness Based on Primiano
and Samways or Knott*

We originally denied institution on the basis that Primiano was not a proper *Rosen* reference. Dec. 32–33. Based on the final trial record before us, Petitioner has not established by a preponderance of the evidence that the claim is unpatentable over Primiano and Samways or Knott for the reasons explained below.

In its remand briefing, Campbell abandons its contentions with respect to Primiano. Paper 97, 1. During oral hearing, counsel for Campbell stated “we are withdrawing our challenge based on Primiano as a primary reference.” Tr. 2, 5:17–18. Because the parties did not formally settle this issue in a written paper prior to Gamon’s briefing in its Response (Paper 95, 52–54), we elect to address this ground.

Appendix C

1. Primiano (Ex. 1012)

Primiano is titled “Front Panel for a Display Rack.” Ex. 1012, [54]. Primiano describes a front panel for a display rack with a front face member. *Id.* at [57]. The face member has connecting member 72 with a symmetric, convex arcuate shape, with a central apex that extends forward as depicted in Figure 3 below.

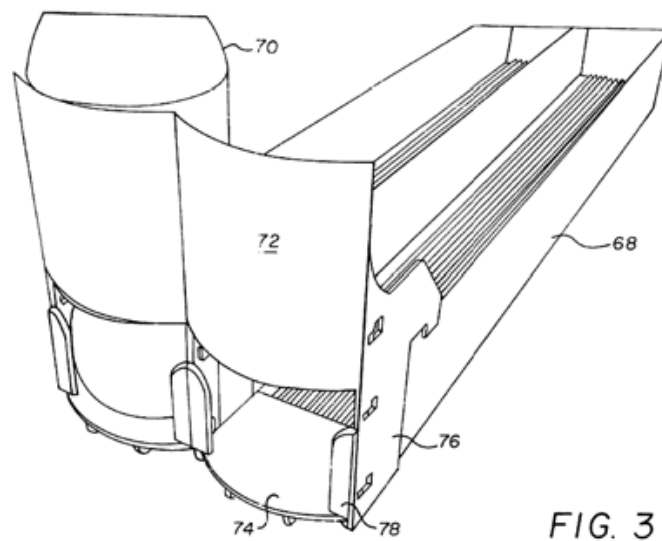


Figure 3 of Primiano depicts a perspective view of a front panel with a labeling area attached to a display rack. *Id.* at 2:1–3. As depicted in Figure 3, Primiano further discloses a dispensing area surrounded by bottom end portions 78 to the sides, connecting member 72 above, and base 74 below. Bottom end portions 78 are spaced apart

Appendix C

such that a beverage in the dispensing area would be visible through the gap along base 74. Bottom end portions 78 stand vertically and extend nearly up to connecting member 72. Bottom end portions 78 are much taller than they are wide, and wider than they are thick. The upper side of each bottom end portion 78 has a prominent downward curve from each respective outer edge.

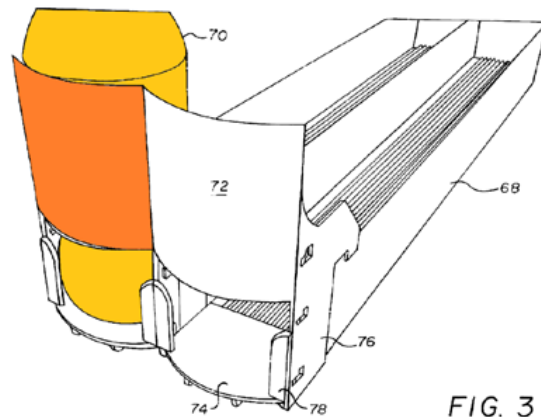
Primiano is meant to display “beverage containers upright for easy viewing.” *Id.* at 1:13–15, 6:33–35 (“The container is held upright and forward in the rack so that a container is always ready for removal from the rack.”). As shown in Figure 3 above, Primiano’s design dispenses bottles with at least a portion of the upright beverage container obscured by the curved rectangular wall, connecting member 72. *Id.* at 6:25–27 (describing a “viewing window” for display of the beverage container).

2. Analysis of Alleged Obviousness Based on Primiano in View of Samways or Knott

Petitioner contends the ornamental design of the ’646 patent would have been obvious to a designer of ordinary skill based on Primiano in view of Samways or Knott. Pet. 51–55. Petitioner relies on a comparison of the combined ornamental features of Primiano and Samways or Knott with the design of the ’646 patent, as well as the Gandy Declaration to support this analysis. *Id.* (citing Ex. 1002 ¶¶ 80–87). Petitioner relies on Primiano as the primary reference. For the reasons discussed below, we disagree that Primiano has design characteristics that are basically the same as the claimed design.

Appendix C

To begin, we find that Primiano is not a proper *Rosen* reference. Primiano shows a display rack for vertical bottles, not cans, standing behind a curved rectangular wall. Primiano shows a curved rectangular surface, but does not show or suggest a sideways cylindrical object as the claim requires. Beverage container 70 in Primiano is highlighted below in Gamon's highlighted version of Figure 3.



Gamon's highlighted Figure 3 of Primiano with beverage container 70 in lighter orange. Paper 95, 53. The vertical bottles stand behind the curved rectangular wall and are removed by being lifted vertically out of the device, not from underneath it. Ex. 1012, 6:35–37.

Based on the differences between Primiano and the patented design, we determine that Primiano does

Appendix C

not provide the same visual impression as the patented design, and therefore cannot properly serve as a *Rosen* reference. Primiano's design is meant to display "beverage containers upright for easy viewing." Ex. 1012, 1:13–15, 6:33–37. Further, the view of upright beverage container 70 is obscured by connecting member 72 in Primiano's design and beverage container 70 is removed by lifting up behind label 72. *Id.* Bottom end portions 78 are not positioned noticeably forward of the label area as in the patented design. The stops are much taller than they are wide with a prominent downward curve along the top edge. These combined differences create a distinct ornamental impression when compared to the patented design.

Even if Primiano were a proper *Rosen* reference, and even if we determined that the combination of Primiano in View of Samways or Knott created the same overall visual appearance, our ultimate conclusion as to obviousness for this combination would not change. The objective indicia of nonobviousness strongly favor nonobviousness, while a finding of similarity in the overall visual appearance is weak. The evidence of secondary considerations is detailed above and is equally applicable to this ground. Specifically, the evidence in favor of nonobviousness outweighs that of obviousness for this combination of references.

Accordingly, we determine that Petitioner has failed to establish by a preponderance of the evidence that the claim of the '646 patent would have been obvious to a designer of ordinary skill based on Primiano in view of Samways or Knott.

Appendix C

III. CONCLUSION

We conclude that Petitioner has not demonstrated by a preponderance of the evidence that the claim of the '646 patent is unpatentable under 35 U.S.C. § 103.

Claim	35 U.S.C. §	References/ Basis	Claims Shown Unpa- tentable	Claims Not Shown Unpa- tentable
1	103(a)	Linz		1
1	103(a)	Linz, Samways		1
1	103(a)	Linz, Knott		1
1	103(a)	Abbate, Samways		1
1	103(a)	Abbate, Samways, Linz		1
1	103(a)	Abbate, Linz		1
1	103(a)	Primiano, Samways		1
1	103(a)	Primiano, Knott		1

191a

Appendix C

IV. ORDER

Accordingly, it is:

ORDERED that Petitioner has not shown, by a preponderance of the evidence, that the claim of the '646 patent is unpatentable under 35 U.S.C. § 103(a); 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.

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

Steven E. Jedlinski
Tracy Zurzolo Quinn
Holland & Knight LLP
steven.jedlinski@hklaw.com
tracy.quinn@hklaw.com

For PETITIONER ENTITY TRINITY MANUFACTURING, LLC:

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

192a

Appendix C

For PATENT OWNER:

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

193a

**APPENDIX D — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT, FILED OCTOBER 22, 2021**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2020-2344, 2021-1019

CAMPBELL SOUP COMPANY, CAMPBELL SALES
COMPANY, TRINITY MANUFACTURING, LLC,

Appellants

v .

GAMON PLUS, INC.,

Appellee

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2017-
00091, IPR2017-00094.

**ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC**

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK,
PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES,
STOLL, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

194a

Appendix D

ORDER

Gamon Plus, Inc. filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on October 29, 2021.

FOR THE COURT

October 22, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Appointments Clause of the U.S. Constitution provides that the President:

shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. Const. art. II, § 2.

2. Title 35 of the United States Code provides in relevant part:

§ 318. Decision of the Board

(a) Final Written Decision.—

If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d).

196a

Appendix E

(b) Certificate.—

If the Patent Trial and Appeal Board issues a final written decision under subsection (a) and the time for appeal has expired or any appeal has terminated, the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable.

35 U.S.C. § 318.

§ 6. Patent Trial and Appeal Board

(c) 3 - Member Panels.

Each appeal, derivation proceeding, post-grant review, and inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director. Only the Patent Trial and Appeal Board may grant rehearings.

35 U.S.C. § 6.

§ 141 - Appeal to Court of Appeals for the Federal Circuit

197a

Appendix E

(c)Post-Grant and Inter Partes Reviews.—

A party to an inter partes review or a post-grant review who is dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) or 328(a) (as the case may be) may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.

35 U.S.C. § 141.

§ 103 - Conditions for patentability; non-obvious subject matter

A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains.

35 U.S.C. § 103.