

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C&D ZODIAC, INC.,  
Petitioner,

v.

B/E AEROSPACE, INC.,  
Patent Owner.

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PGR2017-00019  
Patent D764,031 S

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Before JENNIFER S. BISK, SCOTT A. DANIELS, and  
RICHARD H. MARSCHALL, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

FINAL WRITTEN DECISION  
Post-grant Review  
*35 U.S.C. § 328(a) and 37 C.F.R. § 42.73*

## I. INTRODUCTION

### A. Background

C&D Zodiac, Inc. (“Petitioner”) filed a Petition to institute a post-grant review of the sole claim of U.S. Design Patent No. D764,031 S (“the ’031 patent”). Paper 1 (“Pet.”). An issue in this case is the priority claim of the ’031 patent. *Id.* The ’031 patent asserts priority to the filing date, April 18, 2011, of U.S. Patent Application No. 13/089,063, (“the ’063 application”), which became U.S. Patent. No. 8,590,838 (“the ’838 patent”).<sup>1</sup> *Id.*

Petitioner relies on the testimony of Mr. Ronald Kemnitzer (Ex. 1003) in support of its Petition. We instituted post-grant review (Paper 12, “Inst. Dec.”) of the ’031 patent on the grounds that the claim is indefinite under 35 U.S.C. § 112(b) and unpatentable under 35 U.S.C. § 102(a)(1) because Petitioner had shown that it was more likely than not that the ’031 patent was not entitled to the filing date of the ’063 application, and the claimed lavatory was therefore on sale and in public use prior to the effective filing date. Paper 12, 26.

Following the Institution Decision, B/E Aerospace, Inc. (“Patent Owner”) filed a Patent Owner’s Response. Paper 19 (“PO Resp.”). Patent Owner relies on the testimony of Dr. Adam Dershowitz (Ex. 2104) in its Response. Subsequently, Petitioner filed a Reply to Patent Owner’s Response. Paper 26 (“Reply”).

Patent Owner also filed a Motion to Exclude Evidence. Paper 31 (“Mot.”). Petitioner filed an Opposition to the Motion to Exclude Evidence

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<sup>1</sup> Unless otherwise noted, we refer to the ’063 application, as opposed to the ’838 patent, as the initial priority document and parent application of the ’031 patent throughout our Decision.

(Paper 33, “Opp. Mot.”), and Patent Owner filed a Reply (Paper 34, “Reply Opp. Mot.”). Patent Owner filed several unopposed Motions to Seal. Papers 8, 20, 28.

An oral hearing was held on August 3, 2018 and the transcript of that hearing (Paper 36, “Tr.”) has been entered into the record of this proceeding.

For the reasons discussed below, Petitioner has shown by a preponderance of the evidence that the sole claim of the ’031 patent is unpatentable under 35 U.S.C. § 102(a)(1) because possession of the aircraft lavatory claimed in the ’031 patent is not shown as of the filing date of the ’063 application and the claimed lavatory was on sale and in public use prior to the effective filing date. Because the § 102(a)(1) ground is dispositive as to the sole challenged claim, we need not reach the indefiniteness ground. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1359 (2018) (holding a petitioner “is entitled to a final written decision addressing all of the claims it has challenged”).

*B. Additional Proceedings*

The parties state that the ’031 patent and other related patents, U.S. Patent Nos. 9,073,641, 9,365,292, 9,434,476, and 9,440,742, are asserted against Petitioner in *B/E Aerospace, Inc. v. Zodiac Aerospace, Inc.*, No. 2:14-cv-01417 in the United States District Court, Eastern District of Texas and that this underlying district court litigation is currently stayed. Pet. 2–3; PO Resp. 2.

Each of the four related patents identified above is the subject of a petition for an *inter partes* review filed by Petitioner. *See* Cases IPR2017-01273 (involving Patent 9,434,476); IPR2017-01274 (involving Patent

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9,365,292); IPR2017-01275 (involving Patent 9,073,641); and IPR2017-01276 (involving Patent 9,440,742).

As explained above, the '031 patent claims priority, ultimately, to the '838 patent, a utility patent which was the subject of Case IPR2014-00727 between Petitioner and Patent Owner. In the final written decision in that case, the Board held certain claims had been proven unpatentable, and other claims had not been proven unpatentable. IPR2014-00727, Paper 65. Both sides appealed, and the Court of Appeals for the Federal Circuit affirmed. *See B/E Aerospace, Inc. v. C&D Zodiac, Inc.*, 709 F. App'x 687 (Fed. Cir. Oct. 3, 2017).

*C. The '031 Patent and Claim*

The '031 patent (Ex. 1001), titled "Aircraft Interior Lavatory," includes two figures, reproduced below, claiming a design for an aircraft lavatory.

*FIG. 1*

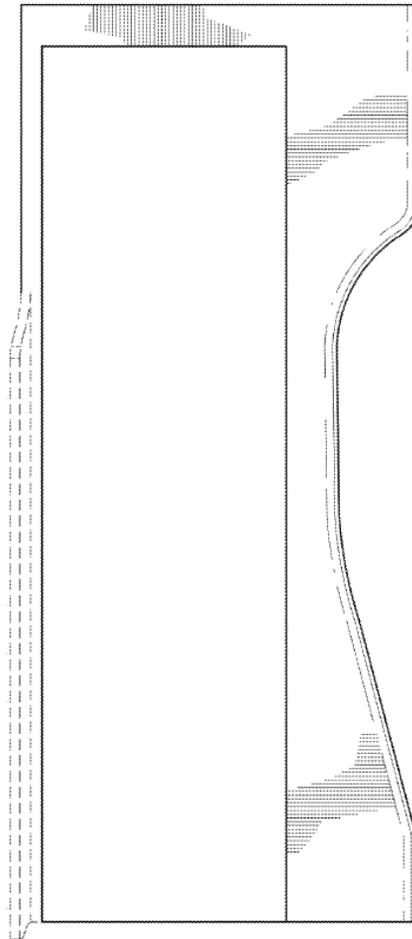


Figure 1 of the '031 patent illustrates “a front side view” of an aircraft lavatory. Ex. 1001, Written Desc.

*FIG. 2*

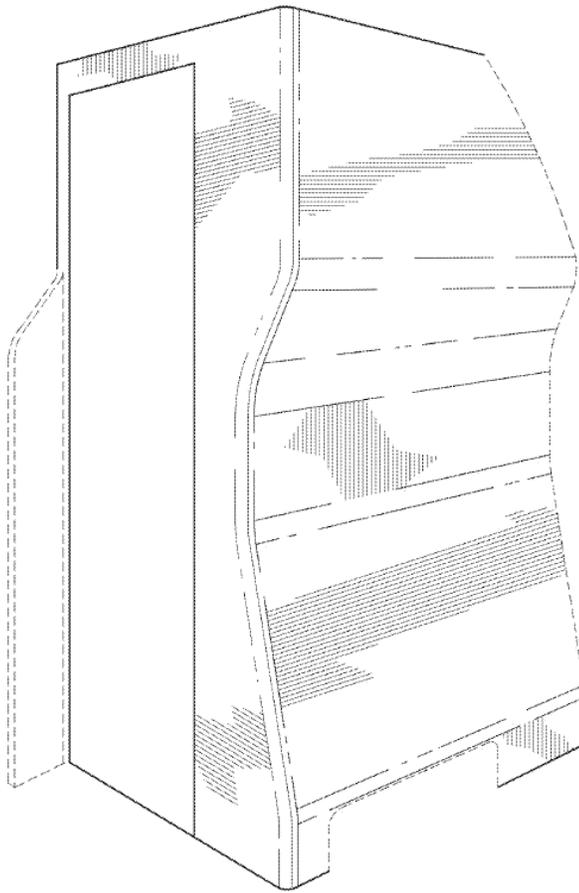


Figure 2 of the '031 patent depicts “a front perspective view” of the aircraft lavatory. *Id.*

The “DESCRIPTION” of the '031 patent identifies these two views, which include broken lines indicating that certain portions of the aircraft lavatory form no part of the claimed design. *See In re Owens*, 710 F.3d 1362, 1367 n.1 (Fed. Cir. 2013) (“[I]t is appropriate to disclaim certain design elements using broken lines, provided the application makes clear what has been claimed.”).

## II. CLAIM CONSTRUCTION

With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80; cf. *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

In the Petition, Petitioner proposed a written claim construction for the claimed lavatory design that relates element names to certain portions of the design, including, for example, “a forward wall,” “a rectangular door opening,” and “a recessed depression.” Pet. 45. Patent Owner asserts that the figures “are plain and do not require an express construction.” PO Resp. 2. In its Reply, Petitioner states “that a written construction is not *necessary* to address the issues raised in this proceeding.” Reply, n. 1. Petitioner’s counsel confirmed during the oral hearing that no claim construction is necessary. Tr. 97:22–98:4.

We agree with the parties that no written claim construction is necessary. Observing Figures 1 and 2 in their entirety, we are not persuaded that a construction applying specific nomenclature to elements of the design provides any clarity to either a designer of skill in the art, or to an ordinary observer, that is not self-evident by simply observing the overall appearance

of the design itself. We determine that the scope of the claimed design protects the ornamental aspects of an aircraft lavatory including a forward wall and an inboard wall as shown in Figures 1 and 2 of the '031 patent.

### III. ANALYSIS

#### *A. Prosecution History*

The '031 patent issued from a division of U.S. design application No. 29/469,502, filed October 10, 2013, now U.S. Patent No. Des. 749,709 (“the '709 patent”). Ex. 1001, Related Appl'n Data. The '709 patent in turn issued from a division of the '063 application, filed April 18, 2011, now the '838 patent. *Id.* The divisional application that issued as the '031 patent contains a specific reference to the earlier filed '063 application. Ex. 1002, 1 (“This is a divisional of USSN 29/469,502, filed on October 10, 2013, which is a divisional of USSN 13/089,063, filed April 18, 2011, USPN 8,590,838, issued November 26, 2013, which are hereby incorporated by reference as if set forth in full herein.”).

Thus, the '031 patent expressly claims priority back to the '063 application and the challenged claim is potentially entitled to an effective filing date of April 18, 2011, under 35 U.S.C. § 120.

#### *B. The Designer of Ordinary Skill in the Art*

Petitioner's declarant, Mr. Kemnitzer, asserts that “one of ordinary skill in the art would be a designer having a year or more experience designing interior components and structures for mass transportation vehicles.” Ex. 1003 ¶ 6. Patent Owner's declarant, Dr. Dershowitz, argues that in addition to an engineering or similar degree and several years of work experience in a related field, “a designer of ordinary skill would have knowledge and familiarity of aircraft interior design environments and

concepts and with general aviation principles applicable to interior components such as lavatories.” Ex. 2104 ¶¶ 60, 55.

Although their specific definitions of a designer of ordinary skill in the art differ, both declarants offer compelling professional background information and technical skills that lend credence to their assertions that their testimony should be considered as that of a person, and designer, of ordinary skill in the art. *Compare* Ex. 1003 ¶ 6 (Mr. Kemnitzer testifies that “[b]ased on my background and experience in industrial design, I believe that I am qualified to testify as an expert with respect to the ornamental and functional designs of aircraft interior walls.”), *with* Ex. 2104 ¶ 57 (discussing the person of ordinary skill in the art, Dr. Dershowitz states that “regarding my background and qualifications, I have at least this level of skill, but certainly in my assessment regarding obviousness and claim construction I have viewed the Challenged Patents and the prior art through the lens of one of ordinary skill in the art.”).

There is no substantive dispute between the parties that both Mr. Kemnitzer and Dr. Dershowitz are capable of opining from the position of a designer of ordinary skill. *See* PO Response 15 (“As the experts agree, there is no specific shape or structural design required to fill the cut-out depicted in Figure 2 of the ‘031 patent.”) (citing Ex. 2080, 32:1–10, 37:21–38:8; Ex. 2104 ¶ 183). Having reviewed Mr. Kemnitzer’s and Dr. Dershowitz’s substantial educational, technical, and engineering design backgrounds, we are persuaded that both declarants have at least a level of expertise, education and experience that qualifies them to testify in this proceeding from the standpoint of a designer of ordinary skill in the art.

To the extent that a level of skill in the art needs to be specified, and having also reviewed the patents and related prosecution history, as well as other litigation related documents and asserted prior art in this and related proceedings, we determine that the education and experience of a designer of ordinary skill in the art would include criteria and backgrounds proffered by both declarants, namely a person having at least an undergraduate degree in a mechanical or aeronautical engineering, industrial design, or another relevant technical degree, and several years of work experience applying their education and experience in engineering and industrial design projects including experience in the design and manufacture of transportation vehicle interiors such as aircraft, rail cars and passenger cars.

*C. Priority to Earlier Filed '063 Application and Eligibility for Post-Grant Review*

In our Institution Decision, we determined that Petitioner had shown a reasonable likelihood that the '031 patent claim was *not* entitled to priority to the '063 application due to a lack of written description support for the claimed design in the '031 patent. Inst. Dec. 19–25 (citing, *inter alia*, 35 U.S.C. § 100(i)(1)(A)-(B)). We determined, therefore, that the '031 patent *was* eligible for post-grant review because the '031 patent, filed September 18, 2015, has an effective filing date on or after March 16, 2013. *See id.* The Petition in this proceeding was filed April 10, 2017, within the 9 months of the August 16, 2016 grant date of the '031 patent, as required by 35 U.S.C. § 321.

Petitioner argues that the '063 application fails to provide written description support for the claim of the '031 patent and is therefore not entitled to claim priority to the '063 application. Pet. 28–43. If Petitioner cannot show that the '063 application lacks written description, then the

'031 patent is not eligible for post-grant review, and Petitioner's challenges must fail.

Patent Owner contends that “the '031 patent properly claims priority to B/E's prior '838 patent” and that the claim of the '031 patent *is* entitled to an effective filing date of April 18, 2011—the filing date of the '063 application. PO Resp. 1. As Patent Owner points out, the appropriate analysis hinges on whether “the written description requirement of 35 U.S.C. § 112, first paragraph, is satisfied as required under 35 U.S.C. § 120.” *Id.* at 4 (citing MPEP § 1504.20 (“Where the conditions of . . . [§] 120 are met, a design application may be considered a continuing application of an earlier utility application.”))).

To be entitled to a parent's effective filing date under 35 U.S.C. § 120, a continuation must comply with the written description requirement. *Owens*, 710 F.3d at 1366.

The test for sufficiency of the written description, which is the same for either a design or a utility patent, has been expressed as “whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.”

*Id.* (quoting *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc)).

In the context of design patents, the drawings provide the written description of the invention. Thus, when an issue of priority arises under § 120 in the context of design patent prosecution, one looks to the drawings of the earlier application for disclosure of the subject matter claimed in the later application.

*Owens*, 710 F.3d at 1366 (citations omitted).

Petitioner's challenge is based on the differences in the wall shape, structure, and ornamentation between Figure 2 of the '063 application (the '838 patent) and Figures 1 and 2 of the '031 patent, reproduced below.

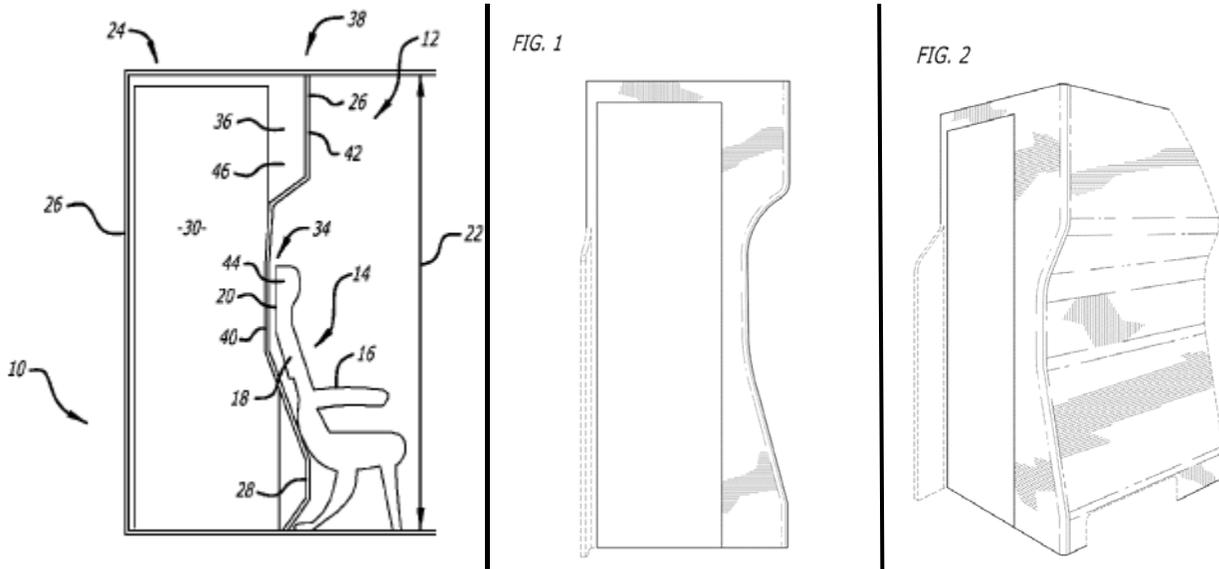


Figure 2 of the '063 application, above, on the left, depicts a cross-section of an aircraft lavatory forward wall defining an upper recess, for accommodating the seat back of a passenger seat and a lower recess for receiving a foot of the passenger seat. Figures 1 and 2 of the '031 patent are shown, above, on the right.

Here, based on our review of the relevant figures, we determine that the claimed design in the '031 patent includes a wall that is different in several respects from that disclosed in the '063 application. Comparing the immediately adjacent side-views, (1) the claimed wall of the '031 patent has a smooth profile defining the upper recess, whereas the '063 application illustrates sharply angled intersections between various planar wall portions forming the upper recess; (2) below the upper recess, the profile of the '031 patent includes a lower-most vertical wall portion perpendicularly intersecting the floor as opposed to an angled lower-most wall portion as

seen in the '063 application; (3) the angled lower-most wall portion, apparently accommodating a foot of passenger chair 14 in Figure 2 of the '063 application, is entirely missing in both Figures 1 and 2 of the '031 patent claim, but the claim does show the front wall having a vertical panel, albeit with an unclaimed recess, intersecting the floor, which is not shown in the '063 application; and (4) both parties agree that Figure 2 of the '063 application is a cross-section and thus, the entire inboard wall and rounded corner detail between the inboard and the forward wall shown in the '031 patent is absent in Figure 2 of the '063 application.<sup>2</sup> *Compare* Tr. 10:19–11:18, *with id.* at 87:2–4.

Patent Owner makes several arguments to support its position that, essentially, the differences are inconsequential and the '063 application provides adequate written description for the '031 patent claim because it “‘reasonably conveys’ that [Applicant] had possession of the design of the '031 patent” by April 18, 2011. PO Resp. 8. Patent Owner first asserts that the '031 patent “applies to a full height lavatory . . . depicted in [the '063 application] Figure 2.” *Id.* Second, Patent Owner argues specifically that the written description of the '063 application “reasonably conveys” the design claimed in the '031 patent because it describes “having a forward wall portion . . . shaped to include a recess 34.” *Id.* at 8–9 (citing Ex. 1006,

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<sup>2</sup> We do not agree with Patent Owner’s counsel’s characterization, made during the oral hearing, that Figure 1 of the '063 application, labeled “Prior Art,” or the written description in the '838 utility patent generally describing a lavatory as having “one or more walls” and a “rectangular door,” therefore shows sufficient description of the specific inboard wall claimed in the '031 patent. *See* Tr. 87:8–20; *see also* PO Resp. 12–13 (Patent Owner explains that “[t]hose of skill in the art understand that lavatories must have doors.” (citing Ex. 2104)).

2:35–37, 4:25–26; Ex. 2080, 38:25–39:23, 41:11–18). Third, referring to the lower-most angled wall portion shown in the cross-section of Figure 2 in the '063 application, Patent Owner argues that

the forward wall allows the foot of a passenger seat to closely nestle into it, because the foot extends further aft than the rest of the seat support. This creates a more compact and appealing design because the structures appear more closely integrated, exactly as required by the claimed design.

*Id.* at 10. Patent Owner's declarant, Dr. Dershowitz, reiterates that the features in the '031 patent, specifically, "a full height lavatory," "a substantially not flat, or contoured . . . forward wall," that is "an efficient use of space" and "aesthetically appealing," are design features that are "reasonably conveyed in the ['063] application." Ex. 2104 ¶ 180 (citing Ex. 1017 2:35–37, 4:25–26; Ex 2102; Ex 2103). Based on these arguments and testimony, Patent Owner concludes that "the exact size, shape, and location of the various recesses are simply not a part of the claim. As such, any differences in these aspects of the drawing are not relevant." PO Resp. 10.

Petitioner disagrees, contending that Patent Owner's arguments misstate design patent law and attempt to read clearly visual elements out of the '031 design patent claim, thus abrogating the legal standard for written description. Reply 4–9. Petitioner asserts that the proper focus in determining the scope of a design patent claim "must be 'on actual appearances, rather than 'design concepts.'"" *Id.* at 7 (citing *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993)). Addressing Patent Owner's position that visual elements of the claimed design itself, "are simply not part of the claims," Petitioner argues that the correct precedent is that "[d]esign patents have almost no scope' and are 'limited to what is shown in the application

drawings.” *Id.* at 17 (citing *In re Mann*, 861 F.2d 1581, 1582 (Fed. Cir. 1988)). Contrary to Dr. Dershowitz’s comparison, Petitioner’s declarant, Mr. Kemnitzer, states that the visual differences “are significant enough, in my opinion, that the ’838 Patent and its application(s) fail to disclose the claimed subject matter of the ’031 Patent.” Ex. 1003 ¶ 61.

For priority under 35 U.S.C. § 120, and to meet the requirements of 35 U.S.C. § 112, first paragraph, in the case of a design it is “simply a question of whether the earlier application contains illustrations, whatever form they may take, depicting the ornamental design illustrated in the later application and claimed therein.” *Racing Strollers, Inc. v. TRI Indus., Inc.*, 878 F.2d 1418, 1420 (Fed. Cir. 1989).

We are presented with conflicting testimony from the parties’ declarant’s regarding whether a person of skill in the art, i.e. a designer of ordinary skill in the art, would find the claimed design of the ’031 patent depicted in the ’063 application. Explaining what he perceives in the claimed design, Patent Owner’s declarant, Dr. Dershowitz, states that “[f]irst, the claimed design applies to a full height lavatory[;] . . . [s]econd, the design includes a substantially not flat, or contoured, portion in the middle of the forward wall[;] . . . [t]hird, the design includes a lower portion of the wall that accommodates a closely nestled seat foot.” Ex. 2104 ¶ 180. According to Dr. Dershowitz, these features are also shown in Figures 1 and 2 of the ’063 application, which disclose a full height lavatory, a “recess,” where “the forward wall portion is shaped to substantially conform to the shape of the exterior aft surface of the aircraft cabin structure,” e.g., where the cabin structure is, for example, a passenger seat. *Id.* (citing Ex 1017, 2:35–37). Dr. Dershowitz testifies also that shown in Figure 2 of the

'063 application is a “wall/seat interface” where the “the forward wall allows the foot of a passenger seat to closely nestle into it, because the foot extends further aft than the rest of the seat support.” *Id.* Dr. Dershowitz concludes, based on his comparisons, that “the '838 patent reasonably conveys to one of skill in the art that B/E had possession of the claimed design as of April 18, 2011.” *Id.* ¶ 181.

Petitioner’s declarant, Mr. Kemnitzer, testifies that “neither figure of the '031 patent physically appears in the ['063 application] or are disclosed in the ['063 application’s] detailed description.” Ex. 1003 ¶ 49. Comparing Figure 2 of the '063 application side-by-side with Figure 1 of the '031 patent, Mr. Kemnitzer explains that “Fig. 2 of the '838 Patent does not show rounded corners between any panels of the forward wall.” *Id.* ¶ 52. In addition, Mr. Kemnitzer states that “Figure 1 of the '031 Patent also claims a flat, vertical bottom panel to the forward wall, while Figure 2 of the '838 Patent depicts an aft-extending panel similar to a flange or recess.” *Id.* ¶ 53. Comparing the lower-most wall panel of the '031 design claim, including the recess or opening defined by the dashed lines, to the cross-section in Figure 2 of the '063 application, Mr. Kemnitzer observes that “[t]he '838 Patent does not disclose or suggest any discontinuity to the base panel of the forward wall.” *Id.* ¶ 57. Pointing to the intersection of the inboard wall and the forward wall of the claimed design shown in Figure 2 in the '031 patent, Mr. Kemnitzer testifies that

Figure 2 of the ['063 application] also provides no indication of how the forward wall and the inboard wall intersect (assuming the ['063 application] even discloses an inboard wall), while Figure 2 of the '031 Patent shows the intersection as a continuously radiused edge along the entire length of the corner.

*Id.* ¶ 56. Based on his comparisons, Mr. Kemnitzer testifies that “the differences . . . are significant enough, in my opinion, that the [’063 application] fail[s] to disclose the claimed subject matter of the ’031 Patent.”

*Id.* ¶ 61.

There is no dispute between the declarants that the drawings of the claimed design are not the same as Figures 1 and 2 in the asserted parent ’063 application. *See* Ex. 1031, 106:20–107:5. We agree, to an extent, with Dr. Dershowitz that the concept of “a substantially not flat, or contoured, portion in the middle of the forward wall,” i.e., a recess formed in a forward wall for receiving a portion of a passenger seat is shown in Figure 2 of the ’063 application. *See* Ex. 2104 ¶ 180. Where we part ways with Dr. Dershowitz and Patent Owner’s analysis is their position that the disclosure of a “substantially not flat, or contoured” wall conveys to an ordinary designer that *the ornamental design* of the aircraft lavatory shown and claimed in the ’031 patent was depicted in the ’063 application. *See In re Daniels*, 144 F.3d 1452, 1456 (Fed. Cir. 1998) (“Thus when an issue of priority arises under § 120, one looks to the drawings of the earlier application for disclosure of the subject matter claimed in the later application.”).

Although the ’063 application illustrates in cross-section an aircraft lavatory having a forward wall with an upper recess, the cross-section of Figure 2 does not disclose a wall profile defining an upper recess with the same smooth contours as illustrated in the ’031 patent, or that the claimed profile includes a lower-most vertical wall panel perpendicularly intersecting the floor. *Compare* Ex. 1001, Fig. 1, *with* Ex. 1006, Fig. 2. In addition, the cross-section of the forward wall in Figure 2 of the ’063 application does not

disclose any aspect of the claimed inboard wall and the rounded corner detail that is visually apparent as connecting the inboard wall and the forward wall in the '031 patent. *Id.* The lower recess formed by the angled panel in Figure 2 of the '063 application may be consistent in function with the unclaimed recess of Figure 2 in the '031 patent, but it is not consistent in form. *See* Ex. 2104 ¶ 180 (“[T]he design includes a lower portion of the wall that accommodates a closely nestled seat foot.”).

From a comparison of the '063 application's Figure 2, including the relevant written description, with the claimed design as a whole in Figures 1 and 2 of the '031 patent, it is readily observable that certain features such as the horizontal panel transitions, i.e., smooth as opposed to sharply cornered transitions, are different in visual appearance, thus dictating overall visually distinct profiles of the upper recesses. It is also readily apparent that elements and features in the claimed design, such as the convex transitioning corner between the forward wall and inboard wall, as well as the lower panel of the forward wall, are simply not found in any written or illustrative disclosure of the '063 application.

Patent Owner argues that the design elements which are not shown in the '063 application, but are now claimed in the '031 patent, fall within the holding of *In re Daniels* “because the '838 figures allow persons of ordinary skill in the art to recognize the claimed design.” Reply 7. We disagree. *Daniels* does not stand for the proposition that a designer of ordinary skill in the art may broadly “recognize” the claimed design to procure the appropriate level of written description support. In *Daniels* there were no newly added claimed, unclaimed, or even slightly altered claim elements, but the complete *removal* of a surface ornamental design element. *See*

*Daniels*, 144 F.3d at 1457 (Despite the removal of a leaf design “[t]he leecher as an article of manufacture is clearly visible in the earlier design application, demonstrating to the artisan viewing that application that Mr. Daniels had possession at that time of the later claimed design of that article.”).

In view of the overall visually apparent differences from the ’063 application, including new and altered elements in the claimed design that are part and parcel of the ornamental appearance of the design as a whole, we are not persuaded that the ornamental design illustrated in the ’031 patent is depicted in the ’063 application. We determine that Petitioner has shown by a preponderance of the evidence that a person of ordinary skill in the art would not understand the inventors to have possession of the ornamental design claimed in the ’031 patent at the time of filing of the ’063 application, and therefore, the ’031 patent claim is not entitled to the benefit of the filing date of the ’063 application. Accordingly, Petitioner has demonstrated that the ’031 patent is eligible for post-grant review.

*D. Whether Spacewall, the Alleged Commercial Embodiment of the Claimed Design in the ’031 Patent, Was Sold or in Public Use Prior to the Effective Filing Date of the ’031 patent*

Petitioner asserts that the sole claim of the ’031 patent is subject to post-AIA 35 U.S.C. § 102(a)(1) and thus, unpatentable, because Patent Owner’s “Spacewall,” the alleged commercial embodiment of the claimed design, was sold and in public use prior to the ’031 patent’s effective filing date of October 10, 2013. Pet. 46.

Patent Owner does not substantively address this issue in its Response. *See* PO Resp. 26 (relying mainly on the asserted priority date of April 18, 2011). Patent Owner does contest, in its Motion to Exclude, the

admissibility of certain evidence relied upon by Petitioner to show that Spacewall was sold or in public use.

Based on our determination, above, that the '031 patent is *not* entitled to priority from the April 18, 2011 filing date of the '063 application, and where the effective filing date of the '031 patent is no earlier than October 10, 2013, and for the reasons below, Petitioner has established by a preponderance of the evidence that the sole claim of the '031 patent is unpatentable.

*1. Spacewall and the Investor Day Presentation*

Petitioner asserts that Patent Owner has admitted that “Spacewall,” the alleged commercial embodiment of the design depicted in the '031 patent, “was offered for sale, and in fact sold to Boeing, Delta Airlines, and United Airlines, prior to the earliest effective filing date of October 10, 2013.” Pet. 46. Petitioner points to evidence from a slide-show presentation titled “B/E Aerospace Investor Day” (“Investor Day Presentation”), which apparently occurred on March 12, 2012, and included the following slide. Ex. 1009, 1, 16.

## Boeing 737 Modular Lavatory Systems



- ▶ Utilizes B/E Aerospace, patent pending, Spacewall® technology, creating the opportunity to add up to six incremental passenger seats
- ▶ Integrates B/E Aerospace technologically advanced Aircraft Ecosystems® vacuum toilet, B/E long-life LED lighting and B/E tamper proof, state-of-the-art lavatory oxygen system
- ▶ Achieves significant weight savings as compared with the current system through new material development
- ▶ First delivery for Delta's new Boeing 737's second half of 2013
- ▶ Significant retrofit opportunity
  - 737 fleet largest in the world

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The slide 16, above, titled “Boeing 737 Modular Lavatory Systems,” and describing “B/E Aerospace, patent pending, Spacewall® technology,” includes an image of a portion of an aircraft lavatory including an inboard wall and a profile view of a nonplanar front wall defining a recess into which a portion of a passenger chair seat back extends. *Id.*

Another slide, slide 9, from Investor Day Presentation, reproduced below, is titled “Market Successes in 2011” and touts an \$800 million contract with Boeing for the “Spacewall™ technology lavatory structure.”



## Market Successes in 2011

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- ▶ Awarded \$800 million sole-source contract from Boeing for modular lavatory systems, which integrate four proprietary B/E Aerospace products
    - Spacewall™ technology lavatory structure, vacuum toilet, LED lighting, and lavatory oxygen system
  - ▶ Received a number of new awards from Star Alliance across all product platforms. Led by Pinnacle™ platform seat, which continued its industry leading roll-out
    - Star Alliance network has 28 member airlines with more than 4,000 aircraft flying over 21,000 flights a day in 185 countries
    - Star Alliance selected B/E Aerospace as its development partner for long-haul economy seats
    - To date, Pinnacle™ platform seat has received orders for ~1,300 aircraft valued at ~\$650 million (3 Star Alliance members so far)
- 

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Slide 9, above, describes a “sole-source contract” with Boeing, apparently from 2011, relating to the Spacewall lavatory structure as well as awards from Star Alliance, a network of 28 member airlines. *Id.* at 9.

Investor Day Presentation is corroborated by a B/E Aerospace news release, dated February 22, 2012, advertising the date and time, March 12, 2012, 9:00 am, and including a URL link to the live audio broadcast of the presentation. *See* Ex. 1023. Further corroborating the evidence of an existing contract and sale, a little more than a year later, a further B/E Aerospace news release, dated September 30, 2013,

announced the first delivery by Boeing to Delta Air Lines of a Boeing Next-Generation 737-900ER (Extended Range) airplane. The airplane is configured with the B/E Aerospace modular advanced lavatory system . . . [t]he lavatory incorporates B/E’s patent pending Spacewall technology, which frees up floor space

in the cabin, creating the opportunity to add up to six incremental passenger seats per airplane.

Ex. 1018, 1.

2. *AIA 35 U.S.C. § 102(a)(1)*

AIA 35 U.S.C. § 102(a)(1) states

A person shall be entitled to a patent unless —

the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.

According to the B/E Aerospace Investor Day Presentation, by at least March 12, 2012, when the webcast of the presentation apparently occurred, a contract existed between B/E Aerospace and Boeing for Spacewall lavatory structures. Ex. 1009, 9. The existence of a contract between B/E Aerospace and Boeing infers strongly that there was an offer for sale. *See Atlanta Attachment Co. v. Leggett & Platt, Inc.*, 516 F.3d 1361, 1365 (Fed. Cir. 2008) (“[A]n attempt to sell is sufficient if it rises to an offer upon which a contract can be made merely by accepting it.”).

The above evidence is further corroborated by a declaration from Mitchell Freeman, a Corporate Account Executive at B/E Aerospace. Ex. 1016 ¶ 1. Mr. Freeman’s declaration was submitted during prosecution of apparently related patent applications and states that “[a]fter our demonstrations of functional mock-ups of the Spacewall™ system to Boeing . . . B/E Aerospace became the exclusive supplier for all lavatory structures for Boeing’s next-generation 737 aircraft.” *Id.* ¶¶ 5–6. Whether or not the Spacewall “mock-ups” described by Mr. Freeman are the same as the above Spacewall system image and drawings in the ’031 patent is not entirely

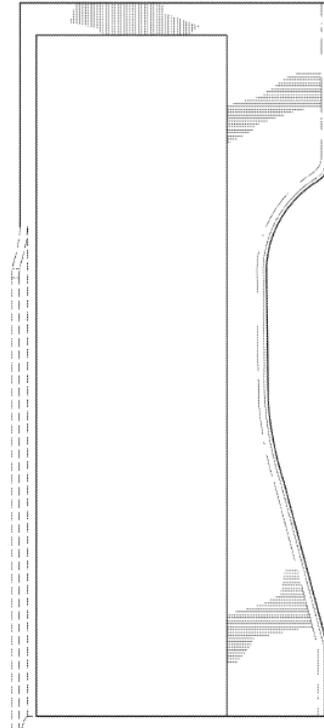
clear, but testimony from an inventor of the design in the '031 patent, Mr. Klaus Brauer, indicates that he could not recollect any differences between the mock-ups shown to Boeing, and the drawings in the '031 patent. *See* Pet. Reply 15–16; *see also* Ex. 1029, 52:10 – 53:1. Thus, the timing described by Mr. Freeman and the filing dates of the related patent applications are generally consistent with the timeline of the Investor Day Presentation and the corroborating new release evidence discussed above. Indeed, Patent Owner does not contest that a contract existed, or that a sale occurred, or that Spacewall, and Spacewall “mock-ups,” are encompassed by the '031 patent. Nor does Patent Owner offer any evidence undermining Petitioner’s assertions of Spacewall being sold to Boeing in the time frame alleged by Petitioner. We are persuaded that Petitioner has presented sufficient evidence of a commercial offer for sale, and a sale, at least to Boeing, of the Spacewall lavatory design shown in the Boeing 737 Modular Lavatory Systems slide above at least by March 12, 2012, prior to the effective filing date of the '031 patent.

Having determined on the evidence before us that Spacewall was subject at least to a commercial offer for sale prior to the effective date, we must determine whether the invention was also ready for patenting. *See Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67 (1998). We are persuaded that this condition of the on-sale bar is satisfied because B/E Aerospace presented at least an image of Spacewall to investors in the March 12, 2012 “Investor Day” presentation. And, observing a side-by-side comparison of the overall appearances of Spacewall, as shown in the image from Investor Day Presentation, slide 16, next to Figure 1 of the claimed design, below, we are persuaded that Spacewall as depicted in the image of Investor Day

Presentation falls within the scope of the design claimed in the '031 patent. Indeed, both parties' declarants agree that B/E Aerospace's Spacewall falls within the scope of the '031 patent. *Compare* Ex. 1003 ¶¶ 80–92, with Ex. 2104 ¶ 203.



FIG. 1



The image on the left, above, from Inventor's Day Presentation, slide 16, is a portion of an aircraft lavatory and a profile view of a non-planar front wall having a recess. Ex. 1009, 16. Figure 1 of the '031 patent, on the right, illustrates "a front side view" of an aircraft lavatory with a non-planar front wall having a recess. Ex. 1001, Written Desc.

We are persuaded that Petitioner has shown by a preponderance of the evidence that the claimed design for a lavatory as embodied in B/E

Aerospace's Spacewall was the subject of an offer for sale, and a sale, prior to October 10, 2013, the effective filing date of the '031 patent.

*E. Indefiniteness*

In view of our determination that the sole claim of the '031 patent is unpatentable because the illustrated lavatory was on sale and in public use prior to the effective filing date of this claim, we need not reach the issue of whether or not the claim is indefinite.

*F. Patent Owner's Motion to Exclude*

Patent Owner moves to exclude Exhibits 1003, 1008, 1009, 1017, 1018, and 1019, and any reliance thereon alleging that these exhibits are hearsay, have not been authenticated, and are not relevant. Mot. 2.

Petitioner opposes the Motion, and argues that Patent Owner's objections to Exhibit 1003 are factually inaccurate, and to the other exhibits, the assertions of hearsay, authentication, and relevance, are conclusory. Opp. Mot. 2.

*1. Exhibit 1003*

Regarding Exhibit 1003, the Kemnitzer Declaration, Patent Owner argues that paragraphs 63–69 should be excluded because Mr. Kemnitzer's testimony relating to indefiniteness based on a lack of a sufficient number of views "is inconsistent with the *Nautilus* standard" and is therefore unreliable. Mot. 2–3.

Because we need not decide indefiniteness in this proceeding, Patent Owner's Motion to Exclude Ex. 1003 is DISMISSED as moot.

*2. Exhibit 1008*

Patent Owner argues that Exhibit 1008, a series of attorney letters including various documents and disclosures to Patent Owner's counsel

urging dismissal of a lawsuit with respect to the '838 patent, is not properly authenticated, inadmissible hearsay and not relevant. Mot. 4.

As to authenticity, we observe, for example, an April 7, 2014 letter from counsel for Petitioner, Mr. Dean Russell, who is backup counsel in this proceeding, to Mr. Morgan Chu, who is currently a partner at the law firm representing Patent Owner (Exhibit 1008, 1–3). *See* <https://www.irell.com/professionals-22.html> (last visited Oct. 1, 2018). The circumstances of these letters are formal attorney correspondence relating to a lawsuit filed in 2014 by Patent Owner against Petitioner pertaining to the '838 patent. Ex. 1008, 1. Patent Owner does not contest Mr. Russell's personal knowledge of the letter nor contend that Mr. Chu denies personal knowledge of the letter. Overall, the arms-length negotiating characteristics of the letter along with the circumstances of the related litigation surrounding its existence including the availability of the authoring and recipient attorneys and Patent Owner's failure to provide any evidence that the document is not authentic, furnishes the necessary foundation such that Exhibit 1008 is sufficiently authenticated under Fed. R. Evid. 901(b)(4).

With respect to hearsay, Patent Owner argues that Petitioner is relying on Ex. 1008 for the truth of the matter asserted. Mot. 4. We disagree. The contents of the letter are not relevant to the questions of whether the claimed design is entitled to the asserted priority date and therefore, qualifies as prior art, or whether the claimed design in the '031 patent is indefinite. The contents of the letter, as they relate to potential infringement, are not being offered for the truth of the matter asserted in the letter itself, but rather for the fact that a prior dispute between the parties was apparently resolved, and

that the field of contoured aircraft walls was a crowded one. *See* Pet. 3, 56–58.

Patent Owner argues further that Exhibit 1008 “is not relevant to any ground on which the PGR was instituted.” Mot. 5. Patent Owner’s argument as to relevance under Fed. R. Evid. 403 is a boilerplate, undeveloped argument without explanation as to why Exhibit 1008 is not relevant. *See id.* Finally, we need not rely on Exhibit 1008 to find that the claimed design in the ’031 patent was the subject of a commercial offer for sale prior to its effective filing date, and granting this Motion with respect to Exhibit 1008 would have no impact on the outcome of this case. Patent Owner’s Motion to Exclude Exhibit 1008 is DENIED.

### 3. *Exhibit 1009*

Patent Owner contends that Exhibit 1009, Investor Day Presentation, should be excluded because it is not properly authenticated under Fed. R. Evid. 901. Mot. 4. Patent Owner argues that “Petitioner has not produced evidence sufficient to support a finding that this exhibit is what Petitioner claims it is,” and has, therefore, failed to lay a foundation for its admission as evidence. *Id.* On the other hand, Petitioner asserts that the distinctive characteristics of Investor Day Presentation are sufficiently corroborated by BE Aerospace’s public news release, Exhibit 1023, so as to authenticate Investor Day Presentation under Fed. R. Evid. 901(b)(4). Opp. Mot. 8. Petitioner contends that Investor Day Presentation is not hearsay and that it is relevant to the ultimate question of a commercial sale. *Id.*

The date and time on the title slide, slide 1, of Investor Day Presentation, and also noted in the “Agenda,” slide 3, is 9:00am, March 12, 2012. This date and time is consistent with the B/E Aerospace news release

of February 22, 2012, titled “B/E Aerospace to Webcast March 12, 2012 Investor Meeting,” further stating that the webcast was scheduled for 9:00 a.m. Ex. 1023, 1. Also, the B/E Aerospace news release, attributed to Greg Powell, Vice President of Investor Relations, stated that “Amin J. Khoury, B/E Aerospace founder, Chairman and CEO, Werner Lieberherr, President and COO, and Tom McCaffrey, Senior Vice President and CFO, will host the meeting.” *Id.* This too, is consistent with the “Introductions,” slide 2, of Investor Day Presentation which listed the same B/E Aerospace executives. Ex. 1009, 2. Moreover, Patent Owner does not deny that Investor Day Presentation was shown and disclosed to investors and other attendees of the March 12, 2012 Investor Meeting. Nor does Patent Owner offer any affirmative evidence that Investor Day Presentation is a fabrication, alteration or in any way a presentation that is not what it appears, on its face, to be. Thus, Patent Owner does not refute Petitioner’s position that Investor Day Presentation was authored by Patent Owner and disclosed to any interested persons at the March 12, 2012 Investor Meeting.

Patent Owner argues also that Investor Day Presentation is inadmissible hearsay under Fed. R. Evid. 802 because it is being offered for the truth of the matter asserted. Mot. 4–5. The statement in Investor Day Presentation, as presented by one of the acknowledged executive presenters, that B/E Aerospace was “Awarded \$800 million sole-source contract from Boeing for modular lavatory systems,” including the “Spacewall™ technology lavatory structure,” is not hearsay. Ex. 1009, 9. It is, with respect to the question of a commercial offer for sale prior to the ’031 patent’s effective filing date, an opposing party statement offered

against an opposing party, and thus not inadmissible as hearsay. *See* Fed. R. Evid. 801(d)(2).

Finally, Patent Owner argues that Investor Day Presentation “is not relevant to any ground on which the PGR was instituted,” and therefore irrelevant and prejudicial under Fed. R. Evid. 401, 402, 403. Mot. 5. The bar to show relevance is not high, and Patent Owner does not explain why a party opponent statement, going directly to the question of a commercial sale by Patent Owner, is irrelevant. *See id.*; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (“[E]vidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’”) (citing Fed. R. Evid. 401). Patent Owner offers no explanation, at all, why the probative value of this evidence relating directly to the question of a commercial sale, is outweighed by certain prejudice, confusion, or delay, or is cumulative to the extent it is unfair or harmful to Patent Owner.

Petitioner has established sufficiently the authenticity of the Exhibit under Fed. R. Evid. 901(b)(4), that the Exhibit is not hearsay, and that the Exhibit is relevant and not unfairly prejudicial. Patent Owner’s Motion to Exclude Exhibit 1009 is DENIED.

#### *4. Exhibits 1017, 1018, and 1019*

According to Patent Owner, Exhibits 1017, 1018, and 1019 should be excluded because the exhibits are not properly authenticated under Fed. R. Evidence 901. Mot. 5. Patent Owner argues that these exhibits are offered for the truth of the matter asserted and therefore hearsay, and further that

they are not relevant to any ground on which the PGR was instituted. *Id.* These arguments are not developed further, and Patent Owner does not refer to the specific contents of these exhibits. *See id.* Petitioner opposes excluding these exhibits, and argues that Patent Owner's conclusory statements as to authenticity, hearsay and relevance fail to show that these exhibits should be excluded. Opp. Mot. 10.

*Exhibits 1017 and 1019*

Exhibit 1017 is a screenshot from the website of Tony Bravetti, apparently a designer of the Spacewall design. Pet. 70–71. Petitioner relied on this exhibit to assert that the Spacewall design is dictated solely by function, that is, to provide additional cabin space in the aircraft. *Id.*

Exhibit 1019 includes screen shots ostensibly from B/E Aerospace's website, <http://beaerospace.com/products/structures-andintegration/737-advanced-lavatory/>, showing the Spacewall design. Ex. 1019. Petitioner relies on this exhibit, in part, to corroborate its contention that the “public uses, offers for sale, and sales of the Spacewall embodiment of the '031 patent occurred prior to the effective filing date of October 10, 2013.” Pet. 53.

Our Decision does not reach Petitioner's assertions of functionality with respect to the design claimed in the '031 patent or rely upon Exhibit 1017 for any reason. We also do not rely upon Exhibit 1019 to decide whether Spacewall, as it is embodied in the claimed design of the '031 patent, was the subject of a commercial offer for sale prior to the '031 patent effective filing date. Therefore, we dismiss the Motion as to Exhibits 1017 and 1019 as moot.

*Exhibit 1018*

Exhibit 1018 is a September 30, 2013, B/E Aerospace news release, stating that Boeing's 737 and 737 MAX will be equipped "[with] B/E's patent pending Spacewall technology, which frees up floor space in the cabin, creating the opportunity to add up to six incremental passenger seats per airplane." Ex. 1018. Petitioner alleges, based on this news release, that the Boeing 737s delivered to Delta on September 30, 2013 included the Spacewall design. Pet. 53. The implication, of course, is that this news release establishes, in addition to a sale, delivery and public display of the aircraft containing Spacewall prior to the October 10, 2013 effective filing date of the '031 patent.

Although Patent Owner argues that Petitioner has failed to properly authenticate this news release, Patent Owner does not contest the authenticity of their own news release or offer any evidence to refute its authenticity. Mot. 5. Petitioner asserts that the indicia of B/E Aerospace logo on the news release itself and that, like the news release of Exhibit 1023, which is not challenged, this news release is expressly attributed to B/E Aerospace executive Greg Powell, are sufficient under Fed. R. Evid. 901(b)(4) to support its authenticity. Opp. Mot. 11. Petitioner argues also that Exhibit 1018 is a party admission and therefore not hearsay, and is relevant and not prejudicial because it refers to the Spacewall product. *Id.*

We agree with Petitioner's position that Exhibit 1018 is sufficiently authenticated under Fed. R. Evid. 901(b)(4), at least for the limited purpose of corroborating evidence of a publicized timeline implicating an offer and sale of Spacewall to Boeing. Opp. Mot. 11. We also agree that the news release is a party opponent admission and thus not hearsay, and that its limited use as corroborating evidence is relevant to the ultimate question of a

commercial sale and that Patent Owner has not explained why the exhibit is prejudicial. *Id.* Patent Owner's Motion to Exclude Exhibit 1018 is DENIED.

5. *Patent Owner's Motions to Seal*

Patent Owner filed three unopposed Motions to Seal. Papers 8, 20, and 28. In the first, Patent Owner seeks to seal Exhibits 2020, 2038, 2039, 2040, 2048, 2049, 2050, 2051, 2053, 2060, 2061, 2062, 2063, 2064, 2065, and 2066 as well as Patent Owner's unredacted Preliminary Response. Paper 8, 1. The Motion also seeks entry of a protective order that deviates from our standard protective order in several respects. *Id.* at 7–8. In the second Motion to Seal, Patent Owner seeks to seal Exhibits 2077, 2078, 2079, 2089, 2090, 2091, 2092, 2096, 2097, 2098, and 2104, as well as Patent Owner's unredacted Response. Paper 20, 1. In the third Motion to Seal, Patent Owner seeks to seal Exhibit 1029 and Petitioner's unredacted Reply. Paper 28, 1.

There is a strong public policy that favors making information filed in *inter partes* review proceedings open to the public. *See Garmin Int'l v. Cuozzo Speed Techs., LLC*, Case IPR2012-00001 (PTAB March 14, 2013) (Paper 34) (discussing the standards of the Board applied to motions to seal). The moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c).

[A] movant to seal must demonstrate adequately that (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

*Argentum Pharms. LLC v. Alcon Research, Ltd.*, Case IPR2017-01053, slip op. at 4 (PTAB Jan. 19, 2018) (Paper 27) (informative).

In the Motions, Patent Owner asserts that confidential information has been exchanged in the underlying district court litigation and the parties have agreed that the information can be used in this proceeding, provided that it is filed under seal. Paper 8, 1; Paper 20, 1; Paper 28, 1. Patent Owner asserts that the “material includes confidential and business sensitive information of Patent Owner, Petitioner, and Related Entities.” Paper 8, 2; Paper 20, 1; Paper 28, 1. Patent Owner also contends that disclosure of the information would cause competitive harm to one or more of those entities. *Id.* Patent Owner then explains why each exhibit contains confidential information that justifies sealing the exhibit. Paper 8, 2–6; Paper 20, 2–4. For example, Patent Owner contends that Exhibits 2048–2050, 2053, 2061, and 2062 “include competitively-sensitive information regarding the technical composition and operation of systems created and provide[d] by Patent Owner’s successor-in-interest.” Paper 8, 2; *see also* Papers 20, 28 (addressing Exhibit 1029 using a similar rationale); Paper 28, 2. Patent Owner and Petitioner also contend that Exhibits 2020, 2038, 2039, 2040, 2051, 2060, and 2063–66 contain competitively sensitive information of Petitioner, including technical schematics for aircrafts manufactured by Petitioner that were exchanged under an “Attorney’s Eyes Only” designation in the district court litigation. Paper 8, at 3–6; *see also* Paper 20, 2 (addressing Exhibits 2078, 2089, 2092, and 2097, which include information produced under “Attorney’s Eyes Only” designation in district court litigation), 3 (addressing Exhibits 2079, 2090, and 2091, which contain Petitioner’s competitively sensitive information).

Based on our review of the record and Patent Owner's Motions, we agree that a sufficient basis exists to seal the exhibits in question. Although sealing the entirety of all of the exhibits in question is undoubtedly overbroad in that portions of each exhibit contain non-confidential material, we understand the burden imposed in determining, on a line-by-line basis, after consultation with all parties involved, which material is truly confidential and which is not. The public interest in reviewing non-confidential information in exhibits that may not be germane to the issues in the case is also lower than with respect to exhibits at the core of the parties' dispute. Accordingly, we grant Patent Owner's Motion to Seal (Paper 8) as to Exhibits 2020, 2038, 2039, 2040, 2048, 2049, 2050, 2051, 2053, 2060, 2061, 2062, 2063, 2064, 2065, and 2066, we grant Patent Owner's Motion to Seal (Paper 20) as to Exhibits 2077, 2078, 2079, 2089, 2090, 2091, 2092, 2096, 2097, and 2098, and we grant Patent Owner's Motion to Seal (Paper 28) as to Exhibit 1029.

We do not grant Patent Owner's Motion to Seal (Paper 20) as to Exhibit 2104 because Patent Owner has not provided any reason or rationale as to why Dr. Dershowitz's declaration testimony, on any subject, is confidential. Indeed, the publically available version of Dr. Dershowitz's testimony filed by Patent Owner contains no redactions or omissions as compared to the Board and Parties Only version also filed by Patent Owner.

We also reach a different conclusion regarding the redacted versions of Patent Owner's Preliminary Response, Patent Owner's Response and Petitioner's Reply. *See* Papers 7, 19, 26. The Motions do not separately address the specific material redacted from those documents, or justify their exclusion from the public record. The redacted material appears to quote

from or summarize information from exhibits subject to the motion to seal. However, as noted above, although we grant the motion to seal the exhibits, that does not mean that every line of every exhibit contains confidential information. In addition, the public interest is perhaps highest when addressing the ability of the public to view the information in the briefs of record. That information, by dint of its inclusion in the briefs, is arguably the most germane to the issues in the case and the basis for our Decision. On balance, we conclude that the interest in maintaining the confidentiality of the redacted portions of the Patent Owner's Preliminary Response, Patent Owner's Response and Petitioner's Reply are outweighed by the public interest in viewing the material. Accordingly, we deny the Motion to Seal Patent Owner's Preliminary Response and Patent Owner's Response.

Patent Owner also seeks entry of an agreed Protective Order. Paper 8, 7, Addendum A. According to Patent Owner, the parties' agreed Protective Order deviates from the Board's default protective order by modifying the list of individuals that can receive confidential information, and by clarifying that the Protective Order only governs documents marked "PROTECTIVE ORDER MATERIAL" in connection with this proceeding. *Id.* at 7–8. Patent Owner states that similar orders have been entered in related *inter partes* reviews. *Id.* at 7. We are amenable to the changes to our default protective order proposed by the parties. Accordingly, we grant Patent Owner's Motion for entry of the Protective Order attached to the Motion to Seal (Paper 8) as Addendum A.

#### IV. CONCLUSION

For the foregoing reasons, Petitioner has shown that the claim of the '031 patent is not entitled to the benefit of the filing date of the '063

application. Following from this, and based on our finding that Petitioner has shown by a preponderance of the evidence that the commercial embodiment, Spacewall, of the '031 patent was the subject of an offer for sale, and a sale, prior to the filing date of the '031 patent, the claim is anticipated under 35 U.S.C. § 102(a)(1).

V. ORDER

It is

ORDERED that the sole claim of the '031 patent has been shown to be unpatentable;

FURTHER ORDERED that Patent Owner's Motion to Exclude is DISMISSED as moot as to Exhibits 1003, 1017, and 1019, and DENIED as to Exhibits 1008, 1009, and 1018;

FURTHER ORDERED that Patent Owner's Motion to Seal (Paper 8) as to Exhibits 2020, 2038, 2039, 2040, 2048, 2049, 2050, 2051, 2053, 2060, 2061, 2062, 2063, 2064, 2065, and 2066 is GRANTED;

FURTHER ORDERED that Patent Owner's Motion to Seal (Paper 20) as to Exhibits 2077, 2078, 2079, 2089, 2090, 2091, 2092, 2096, 2097, and 2098 is GRANTED;

FURTHER ORDERED that Patent Owner's Motion to Seal (Paper 20) as to Exhibit 2104 is DENIED;

FURTHER ORDERED that Patent Owner's Motion to Seal (Paper 28) as to Exhibit 1029 is GRANTED;

FURTHER ORDERED that Patent Owner's Motion for entry of an agreed Protective Order (Paper 8, Addendum A) is GRANTED;

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FURTHER ORDERED that Patent Owner's Motion to Seal its Patent Owner Preliminary Response (Paper 8), Patent Owner Response (Paper 20), and Petitioner's Reply (Paper 26), is DENIED; and

FURTHER ORDERED that, because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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