IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of Daniel Maltese et al. Application: 15/946,723 Filed April 5, 2018 Art Unit: 1783 Examiner: Tong Guo	**THERMOFORMED WALL SKIN SHEET WITH BACKER GUIDE**

APPEAL BRIEF

Owner of the entire interest in the above referenced patent application (hereinafter the “Subject Application”) submits this appeal brief in support of its appeal against the examiner’s December 30, 2020 final rejection. Applicants timely filed a notice of appeal pursuant to 37 C.F.R. §41.31 on March 17, 2021. The applicants respectfully request that the Patent Appeals and Trials Board (hereinafter the “Board”) reverse the examiner’s final rejection and allow all pending claims.

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REAL PARTIES IN INTEREST

The real party in interest is Pulp Art Surfaces LLC who is the assignee of 100% of the interests in the Subject Application.

RELATED APPEALS, INTERFERENCES AND TRIALS

Appellant is not aware of any other appeals, interferences or trials for the Subject Application.

STATUS OF CLAIMS

There are a total of nineteen claims comprising independent claim 1, and its dependent claims 2-19. A listing of the pending claims is appended hereto.

Claims 1-19 stand finally rejected by the examiner on grounds of obviousness.

STATUS OF AMENDMENTS

All pending claims are the claims that were originally filed with the application on April 5, 2018. There have been no amendments.

SUMMARY OF CLAIMED SUBJECT MATTER

All references herein to the subject application refer to paragraph numbers and/or figures of the Subject Application as originally filed April 5, 2018.

Independent Claim 1:

Claim 1 is directed to a solid wall skin sheet having a display surface with an ornamental portion, and a backer guide located beneath the display surface which has tabs and recesses. The presence of the backer guide with tabs and recesses facilitates the easy application of multiple wall skins sheets that can be joined together onto a wall surface to form a wall covering that has accurate and tight-fitting seams and conceals from view the fasteners used to attach the wall skin sheet to the wall surface.

Claim Language	Exemplary Disclosure in The Subject Application
A solid wall skin sheet comprising:	¶ [00031]; FIG 1; wall skin sheet 310.
a substantially planar solid wall skin sheet body;	¶ [00031]; FIG 1; FIG 2; body 315.
said solid wall skin sheet body having a top display surface; a bottom hidden surface, and a periphery edge;	¶ [0033] FIG 2; body 315; top display surface 330; bottom hidden surface 340; periphery edge 390.
said display surface having an ornamental portion;	¶ [00031]; FIG 1; FIG 2; ornamental portion 320.

a backer guide located beneath said display surface;	¶ [00033]; FIG 2; FIG 3; backer guide 350.
and said backer guide having a tab and a recess.	¶ [00033]; FIG 2; FIG 3; backer guide 350; tab 360; recess 370.

ARGUMENT

A. The Rejection on Grounds of Obviousness

Pending claims 1-6, 8-11, 13-16, and 18-19 have been rejected as being unpatentable over Salm et al (US20070034346) in view of Reline on grounds of obviousness. Pending claims 7, 12 and 17 have also been rejected as being unpatentable over Salm and Reline in further view of Yamaguchi et al (US20130065065) on grounds of obviousness.

Applicant is arguing the rejection of claims 1-19 on grounds of obviousness as a group. In this case there is a single independent claim 1, and then its dependent claims 2-19. As a matter of law, if there is not substantial evidence in the record showing that independent claim 1 is obvious under 35 U.S.C. 103, then there is also not substantial evidence of claims 2-19 depending therefrom being obvious.

B. The Legal Standard

i. The Burden Is On The USPTO

An applicant for a patent is entitled to the patent unless the application fails to meet the requirements established by law. It is the Commissioner's duty (acting through the examining officials) to determine that all requirements of the Patent Act are met. The burden is on the Commissioner to establish that the applicant is

> not entitled under the law to a patent. . . . In rejecting an application, factual determinations by the PTO must be based on a preponderance of the evidence, and legal conclusions must be correct.

In re Oetiker 977 F.2d 1443, 1449 (Fed. Cir. 1992)

> [P]atentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument. . . . In reviewing the examiner's decision on appeal, the Board must necessarily weigh all of the evidence and argument. . . [T]he ultimate determination of patentability is made on the entire record.

In re Oetiker 977 F.2d 1443, 1445 (Fed. Cir. 1992)

If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988)". See also MPEP §2143.03.

ii. <u>The Obviousness Legal Standard</u>

Pursuant to the authority granted to it under Article I Section 8 Clause 8 of the U.S. Constitution, Congress has legislated that a person who timely files a proper patent application is ***entitled*** to receive a patent for a novel invention claimed in

timely filed patent application. 35 U.S.C. §102. However, in accordance with the Constitutional requirement that patents may only be granted for inventions which promote the progress of the sciences and useful arts, Congress has made an exception to the statutory entitlement where, even if a claimed invention is novel, a patent may not be obtained if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious to a person having ordinary skill in the art to which the claimed invention pertains. 35 U.S.C. §103. See also *Graham v John Deere Co. of Kansas City* 383 U.S. 1, 6 (1966).

Congress first added the statutory non-obviousness requirement found in 35 U.S.C. §103 to the Patent Act of 1952 in response to the lack of a uniform standard for a patentable “invention”. More specifically, prior to 1952 the patent statutes contained requirements for utility and novelty for the issuance of a patent. However, the courts had long imposed an additional “invention” requirement beyond novelty and utility to ensure patents comply with the Constitutional requirement “To promote the Progress of Science and the useful arts . . .” *Id.* However, the “invention” standard imposed by the courts, as described by Justice Learned Hand, had become “as fugitive, impalpable, wayward, and vague a phantom as exists in the whole paraphernalia of legal concepts.” *Harries v Air King Products Co.* 183 F.2d 158, 162 (2nd Cir. 1950). Giles Rich, a patent attorney who later served as a justice on the Federal Circuit, wrote of the patent system existing prior to the 1952 Patent Act:

> . . . the requirement for “invention” became the plaything of the judiciary and many judges delighted in devising and expounding their own ideas of what it

> meant. This kind of mystical reasoning left the judiciary free to indulge their personal whims about patentability . . . . [W]e went through periods of too much leniency and too much strictness, depending primarily, just as now, on what judges thought and the mood of country.

Laying The Ghost Of The 'Invention' Requirement, Hon. Giles S. Rich, 1 AIPLA Q.J. 26 (1972).

Preceding the 1952 Patent Act a National Patent Planning Commission was appointed by President Roosevelt. In its report it concluded that, "[n]o other feature of our law is more destructive to the purpose of the patent system than this existing uncertainty as to the validity of a patent," and that a uniform legislative standard was necessary. See The American Patent System, Report of The National Patent Planning Commission, reprinted in, 25 J. Pat. Off. Soc'y 455, 462-463 (1943). In response, Congress codified the statutory requirement for non-obviousness in §103 of the 1952 Patent Act to provide a uniform standard for judging the patentability of an invention.

Of critical importance, in codifying the non-obviousness standard set forth in 35 U.S.C. §103 Congress set forth an *objective* standard to be satisfied independent of the subjective opinion on obviousness of an individual judge or patent examiner. More specifically, obviousness was to be determined solely from the perspective of a person having ordinary skill in the art to which the claimed invention pertains. See 35 U.S.C. §103. This requires *evidence* of certain facts:

> While the ultimate question of patent validity is one of law, *A. & P. Tea Co.* v. *Supermarket Corp., supra,* at

> 155, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.

Graham v John Deere Co. of Kansas City 383 U.S. 1, 17-18 (1966).

The determination of obviousness under the framework set forth in Graham is not subject to rigid tests. *KSR Int'l Co. v. Teleflex Inc.,* 127 S.Ct. 1727, 1741 (2007). However, "strict adherence" by the USPTO to the statutory requirements as interpreted by the Court in *Graham* is still necessary to prevent a return to "the free rein often exercised by Examiners in their use of the concept of 'invention'". See *Graham* at 18-19. It should not be forgotten that the unjustified denial of a patent can have serious economic consequences for an applicant outside of the USPTO:

> We provide evidence on the value of patents to startups by leveraging the quasi-random assignment of applications to examiners with different propensities to grant patents. Using unique data on all first-time applications filed at the U.S. Patent Office since 2001, we find that startups that win the patent "lottery" by drawing lenient examiners have, on average, 55% higher employment growth and 80% higher sales growth five years later. Patent winners also pursue more, and higher quality, follow-on innovation. Winning a first patent boosts a startup's subsequent growth and innovation by facilitating access to funding from VCs, banks, and public investors.

What Is A Patent Worth? Evidence From The U.S. Patent "Lottery", Working Paper 23268, Joan Farre-Mensa, Deepak Hegde, Alexander Ljungqvist, December 2018, National Bureau of Economic Research.

Accordingly, ensuring "strict adherence" by examiners to the requirements of 35 U.S.C. §103 in evaluating the propriety of a rejection on grounds of obviousness is a critical function of the USPTO. Clearly, Congress did not intend obtaining a patent from the USPTO to be a "lottery" that depends upon the luck of the draw with patent examiners. Indeed, as explained above, Congress codified the obviousness standard of 35 U.S.C. §103 in very large part to prevent such a patent "lottery" system and establish a uniform objective standard of patentability. See also *KSR Int'l Co. v.*

Teleflex Inc., 127 S.Ct. 1727, 1729 (2007)("*Graham* . . . set out an objective analysis for applying §103). *Id.* at 1739 ("To be sure, *Graham* recognized the need for 'uniformity and definiteness'.")

As an agency of the U.S. government the USPTO is governed by the Administrative Procedure Act ("APA"), which prohibits agency actions that are arbitrary, capricious, or unsupported by substantial evidence. 5 U.S.C. §706. See also *Dickinson v. Zurko* 527 U.S. 150, 154 (1999). The term "substantial evidence" means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See *Richardson v. Perales*, 402 US 389, 401 (1971) quoting *Consolidated Edison Co.* v. *NLRB,* 305 U. S. 197, 229 (1938). See also *In re Magnum Oil Tools International, Ltd.*, 829 F. 3d 1364, 1373 (Fed. Cir. 2016).

The denial of an application for a patent by the USPTO on grounds of patentability, including obviousness, is an agency action governed by the APA that must by law be supported by relevant evidence that a reasonable mind might accept as adequate to support the action. See *Dickinson v. Zurko* 527 U.S. 150, 154 (1999). More specifically, in cases of denial on grounds of obviousness, there must be substantial evidence that a reasonable mind might accept as adequate to show that the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious to a person having ordinary skill in the art. 35 U.S.C. §103. What particular evidence will satisfy this standard in any particular case is fact specific. While the Federal Rules of Evidence may not strictly apply in the *ex parte* examination of patent applications (*In Re Epstein*, 32 F.3d 1559,

1565 (Fed. Cir. 1994)), Congress has mandated that **there must be substantial *evidence*** to support any action taken by the USPTO. 5 U.S.C. §706. See also Fed. R. Evid. 1101(e) ("A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules."). This necessarily includes requiring substantial evidence to support an action by the USPTO denying a patent on grounds of obviousness, including substantial evidence on the controlling *Graham* factors. See *KSR Int'l Co. v. Teleflex Inc.,* 127 S.Ct. 1727, 1730 (2007)("While the sequence of [the *Graham* factors] might be reordered in any particular case, the factors define the controlling inquiry").

The courts for their part have set forth what does not constitute evidence sufficient to deny a patent on grounds of obviousness:

> As is clear from cases such as Adams, ***a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.*** Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon

> building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

KSR Int'l Co. v. Teleflex Inc., 127 S.Ct. 1721, 1741 (2007) (emphasis added).

> That all elements of an invention may have been old (the normal situation), or some old and some new, or all new, is however, simply irrelevant. Virtually all inventions are combinations and virtually all are combinations of old elements.

Environmental Designs v. Union Oil Co., 713 F.2d 693, 698 (Fed. Cir. 1983)

With respect to "identify[ing] a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does" an examiner must provide substantial evidence for any reasoning. 5 U.S.C. §706. A proffered "reason" by an examiner without substantial evidence cited in support, is in reality nothing more than examiner personal opinion, speculation or argument. "[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." See *In Re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). It cannot simply be assumed that an ordinary artisan would be awakened to modify prior art in such a way as to lead to an obviousness rejection. See *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1354 (Fed. Cir. July 31, 2013). "Simply stating [a] principle (e.g., "art recognized equivalent,"

"structural similarity") without providing an explanation of its applicability to the facts of the case at hand is generally not sufficient to establish a prima facie case of obviousness." MPEP § 2144. The use of hindsight by an examiner to read into the prior art the teachings of the claimed invention is improper. *Id*.

Accordingly, to meet its burden of showing alleged obviousness of a claimed invention the USPTO must produce substantial evidence which (1) determines the scope and content of the prior art; (2) ascertains the differences between the prior art and the claims at issue; and (3) resolves the level of ordinary skill in the pertinent art. See *Graham v. John Deere Co. of Kansas City* 383 U.S. 1, 17-18 (1966). The preponderance of this evidence must persuasively show that before the effective filing date a person of ordinary skill in the art would have found the differences between the claimed invention as a whole and the prior art obvious. If the USPTO can't meet this burden, then the applicant is entitled to a patent on the claimed invention.

As explained below, on this record the examiner has not met the required burden to show that the claimed invention would have been obvious.

C. There Has Been No Showing of Obviousness

i. The Scope and Content of The Prior Art

Below is listed a summary of the references relied upon in the final office action to support the obviousness rejection.

Reline – A printout of a 2019 website page showing wall panels having slotted edges.

Wayback – A printout of a website page showing a calendar for a particular internet website address from archive.org.

U.S. Patent Application Publication 2007/0034346 (Salm) – Salm describes a shaped pulp article for covering a surface.

U.S. Patent Application Publication 2013/0065061 (Yamaguchi) – A building board with an inkjet coating film.

a. *The Reline & Wayback Machine Graph Are Not Prior Art*

The reliance in the final rejection upon the description of a wall panel system in the Reline reference is improper as a matter of law. Reline on its face is not within the scope and content of the prior art to the claimed invention as it post-dates the effective filing date of the present application.

The Reline reference relied upon by examiner in the final rejection constitutes a printout by the examiner from a commercial website operated by Nuform Building Technologies Inc.

> Prior art disclosures on the Internet or on an online database are considered to be publicly available as of the date the item was publicly posted. . . Absent evidence of the date that the disclosure was publicly posted, if the publication itself does not include a publication date (or retrieval date), it cannot be relied upon as prior art . . .

MPEP §2128 II.B

In this case the Reline publication does on its face include a copyright notice identifying the year 2019 as the date of its publication. This patent application has a filing date of April 5, 2018. A printed publication from the year 2019 is clearly not prior art to the present application. So, on its face the website page relied upon by the examiner can NOT be relied upon as prior art to the applicant's claimed invention.

In arguing that the 2019 internet website page is prior art the examiner improperly cites to a "Wayback Machine®" Report:

> The Wayback Machine® is a digital library maintained by the Internet Archive (a non-profit organization) for viewing information on archived digital Internet webpages. Simply, the Wayback Machine® uses software programs, known as crawlers, to surf the Internet and automatically store copies of Web objects (Web pages, images, videos, etc.), preserving these objects as they exist at the point and time of capture. These Web objects are stored as Web captures with the capture time/date in the form of a time stamp and the URL of the original website of capture. Accordingly, the Wayback Machine® provides the ability to view and browse Internet information that may no longer be available on the original website. . . . Prior art obtained

> via the Wayback Machine® sets forth a *prima facie* case that the art was publicly accessible at the date and time provided in the time stamp.

MPEP §2128 II.E

However, in this case the Wayback Machine® does NOT have a stored copy of the website page from prior to 2019. Instead, the examiner cites to a "calendar report" from the Wayback Machine®, that was generated after the filing date of this application, and which consists of nothing more than a bar graph. **No time stamped copy of any web object that has been stored by the Wayback Machine® is provided.**

The bar graph from the Wayback Machine® relied on by the examiner does not, as matter of law, establish that information in the 2019 Reline product internet website page was publicly accessible prior to 2019. It is common knowledge that the contents located at any particular internet address are subject to change at any time. Accordingly, a mere bar graph by the Wayback Machine® simply indicating that there was some unspecified content at an internet address in prior years does not constitute evidence of what that content was in those prior years. Especially so in this case where the website page now being relied upon by the examiner states on its face that it was only published in 2019.

Accordingly, neither the 2019 Reline website page reference itself, or the Wayback Machine® bar graph, relied upon by the examiner are within the scope and

content of the prior art. As such they can't be used to support a rejection of applicant's claimed invention on grounds of obviousness. See 35 U.S.C. §103.

ii. **The Level of Ordinary Skill in The Art**

A required factual determination in establishing any case of obviousness is that "the level of ordinary skill in the pertinent art [be] resolved". See *Graham v John Deere Co. of Kansas City* 383 U.S. 1, 6 (1966). Such determination is clearly central to the obviousness inquiry, as it is from the perspective of a person of ordinary skill in the art that obviousness must be judged.

> Factors that may be considered in determining level of ordinary skill in the art include: (1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field. . . Not all such factors may be present in every case, and one or more of these or other factors may predominate in a particular case. The important consideration lies in the need to adhere to the statute, i.e., to hold that an invention would or would not have been obvious, as a whole, when it was made, to a person of "ordinary skill in the art" — not to the

> judge, or to a layman, or to those skilled in remote arts, or to geniuses in the art at hand.

Environmental Designs v. Union Oil Co., 713 F. 2d 693, 696-97 (Fed. Cir. 1983)

Establishing a case of obviousness is the burden of the examiner. *In re Oetiker* 977 F.2d 1443, 1449 (Fed. Cir. 1992). Accordingly, it is the burden of the examiner to articulate what the level of ordinary skill is and to provide substantial evidence to support such assertion. *Id.* See also 5 U.S.C. §706. Mere generic references by an examiner to a wholly undefined "person of ordinary skill in the art" in an obviousness rejection does not meet the examiner's burden of "resolving" what the level of ordinary skill in the art is that the examiner is applying or constitute substantial evidence for what the level of ordinary skill in the art is.

In this case, there is no articulation by the examiner of what the level of ordinary skill in the art is, no consideration of any of the relevant factors, and certainly no substantial evidence provided or cited to in support of what the level of ordinary skill supposedly is. Clearly the examiner has not met the *prima facie* burden of resolving what the level of ordinary skill in the art is to support any conclusion of obviousness when the examiner has failed to even articulate what the level of ordinary skill is. It is respectfully submitted that the USPTO does not, for its own interests of convenience or examination expediency, have the authority to relieve its examiners of their evidentiary burden under the law of expressly resolving on the record the level of ordinary skill being applied when denying a patent application on grounds of obviousness. Simply paying lip service in an office action to an essential controlling

factor of the obviousness inquiry by making occasional reference to an unspecified "person of ordinary skill in the art" is insufficient.

iii. <u>The Differences Between The Prior Art & Claimed Invention</u>

a. The Differences Between the Claimed Invention and Salm

Pending claims 1-6, 8-11, 13-16, and 18-19 were rejected as being unpatentable over Salm et al (US20070034346) in view of Reline et. al. As conceded by the examiner, the applicants' claimed invention is novel over Salm.

Salm describes nothing more than a generic shaped pulp article for covering a surface, which is very different from the applicant's claimed invention. The shaped pulp article of Salm does NOT in any way describe or suggest a wall skin sheet with a backer guide located beneath a display surface which has a tab and a recess as is required by the applicant's claimed invention.

b. The Differences Between the Claimed Invention and Yamaguchi

The office action also rejected pending claims 7, 12 and 17 as being unpatentable over Salm and Reline in further view of Yamaguchi et al (US20130065065). As conceded by the examiner, the applicants' claimed invention is also novel over Yamaguchi.

Yamaguchi describes a simple building board with an inkjet coating film, which is very different from applicant's claimed invention. There is nothing in Yamaguchi describing or suggesting a wall skin sheet having a backer guide that is "located

beneath [the] display surface" and which "[has] a tab and a recess" as is required by all of the claims.

c. The Differences Between the Claimed Invention and Reline

As explained above the Reline reference is not prior art to the applicant's claimed invention. However, what is described in Reline is also very different from applicant's claimed invention.

The 2019 Reline wall system only describes wall panels having slotted edges which can interlock to join adjacent wall panels together. There is no description or suggestion of any kind for the Reline wall panels having a backer guide that is "located beneath [the] display surface" and which "[has] a tab and a recess" as is required by the claimed invention.

In rejecting the application the examiner has argued that "Reline does not need to cite exactly word by word of a backer guide, tab or recess." However, this assertion misses the point entirely, because it does not matter what "words" are used in Reline. The wall panel with a slot as described in Reline is significantly different from the wall skin sheet described, illustrated and claimed by applicant that has a backer guide that is "located beneath [the] display surface" and which "[has] a tab and a recess" of applicant's claimed invention.

iv. On This Record There Has Been No Showing of Obviousness

When one considers the record of the present application, there has been no articulation or evidence presented by the examiner of what the level of ordinary skill

in the art is, the only references presented by the examiner that might be considered to be within the scope and content of the prior art are Salm and Yamaguchi, and neither Salm or Yamaguchi has any close similarity to applicant's claimed invention.

Even if *arguendo* the 2019 Reline publication relied upon by the examiner was in the prior art, there is still no evidence that it would have made the substantial differences between the prior art and the claimed invention as a whole obvious to a person of ordinary skill. The 2019 Reline wall system only describes wall panels having slotted edges which can interlock to join adjacent wall panels together. The examiner has provided no evidence that some unspecified person of ordinary skill in the art would have found it obvious from the slotted wall panel of Reline to construct applicant's particular and distinct claimed invention of a wall skin sheet with a backer guide that is "located beneath [the] display surface" and which "[has] a tab and a recess". At most a reading of Salm in conjunction with Reline may suggest a shaped pulp article having slotted edges.

Similarly, at most a reading of Salm in conjunction with Reline and Yamaguchi would suggest the shaped pulp article of Salm having the slotted edges of Reline along with an inkjet coating: There is nothing to suggest a wall skin sheet with a backer guide located beneath a display surface that has a tab and a recess.

In rejecting the claimed invention for obviousness, the examiner argued at length, without citation to any supporting evidence, about alleged motivations for covering unsightly fasteners and capability of installation of heavy wall panels. But even assuming *arguendo* that there was substantial evidence found in the record that

one of ordinary skill in the art had such motivations, this still would not suffice to show that the differences between the prior art and applicant's claimed invention as a whole were obvious. There could be numerous possible solutions to such alleged motivations. The burden was on the examiner to produce substantial evidence and persuasive explanation showing that a person of ordinary skill in the art would have found the differences between the prior art and *applicant's particular claimed invention* as a whole obvious in light of such alleged motivations. The record has no such evidence.

There is no evidence of record, or explanation, showing that a person of ordinary skill in the art, motivated to cover unsightly fasteners or install heavy wall panels, would have considered the use a wall skin sheet with a backer guide located beneath the display surface and which has a tab and a recess to be an obvious solution to covering unsightly fasteners or hanging heavy panels. Indeed, the only evidence of record that describes any use of such a backer guide is the present application:

> A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning. See *Graham,* 383 U.S., at 36, 86 S.Ct. 684 (warning against a "temptation to read into the prior art the teachings of the invention in issue" and instructing courts to "`guard against slipping into use of hindsight'" (quoting *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.,* 332 F.2d 406, 412 (C.A.6 1964))).

KSR Intern. Co. v. Teleflex Inc., 127 S.Ct. 1727, 1743 (2007)

> Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but ***so long as it takes into account only knowledge which was <u>within the level of ordinary skill</u>*** at the time the claimed invention was made ***and does not include knowledge gleaned only from applicant's disclosure***, such a reconstruction is proper.

In re McLaughlin 443 F.2d 1392, 1395 (CCPA 1971) (emphasis added)

Accordingly, it is respectfully submitted that in rejecting the claimed invention for obviousness the examiner appears to have engaged in the improper use of hindsight.

On this record, when all is said and done, the examiner has just pointed to some alleged prior art with *some* of the elements of applicant's claimed invention, expressed his own personal opinions under the guise of making generic references to an unspecified "person of ordinary skill in the art", and then denied applicant a patent on grounds of obviousness. As explained above, Congress and the courts have made it abundantly clear that the patentability of a claimed invention is not to be determined by the individual personal opinions of a USPTO patent examiner. Under the law the USPTO is not to operate a patent "lottery" system where an applicant's ability to obtain a patent is dependent on the luck of the draw with examiners and their personal opinions on what is or is not a patentable invention. Congress has set forth an <u>*objective*</u> standard of obviousness, to which the USPTO must "strictly adhere", and in doing so produce substantial evidence in support of any action taken that denies an applicant a patent on grounds of obviousness. 35 U.S.C. §103.

Here it is not contested by the examiner that applicant has submitted a proper application claiming a novel invention. The sole ground for rejection is obviousness. To maintain such rejection the burden is on the USPTO to produce a record with substantial evidence showing that the differences between applicant's novel claimed invention as a whole and the prior art would have been obvious at the time of filing to a person of ordinary skill in the art. For all the reasons elaborated on above the USPTO has clearly not met this burden to reject the application on grounds of obviousness. Accordingly, the applicant is entitled by law to a patent for the novel claimed invention.

CONCLUSION

Reversal of the improper rejection for obviousness, and allowance of pending claims 1-19 is respectfully requested.

Date: May 27, 2021 ________/David Kleiman 42744/_______

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CLAIMS APPENDIX

1. A solid wall skin sheet comprising:

a substantially planar solid wall skin sheet body;

said solid wall skin sheet body having a top display surface; a bottom hidden surface, and a periphery edge;

said display surface having an ornamental portion;

a backer guide located beneath said display surface; and

said backer guide having a tab and a recess.

2. The solid wall skin sheet of claim 1 further comprising said tab having a fastener area that extends out beyond said periphery edge.

3. The solid wall skin sheet of claim 1 where said backer guide is a separate component attached to said hidden surface.

4. The solid wall skin sheet of claim 1 wherein said solid wall skin sheet body comprises molded pulp.

5. The solid wall skin sheet of claim 1 wherein said solid wall skin sheet body comprises molded pulp having a recycled paper fiber component.

6. The solid wall skin sheet of claim 1 further comprising a coating on said display surface.

7. The solid wall skin sheet of claim 6 where said coating comprises an ink.

8. The solid wall skin sheet of claim 1 manufactured by a process comprising the steps of:

applying a fluid wall skin sheet composition to a first molding surface of a mold;

positioning said first molding surface adjacent to a second molding surface of said mold to create a forming space containing said fluid wall skin sheet composition between said first molding surface and said second molding surface;

applying heat to said fluid wall skin sheet composition contained in said forming space until said wall skin sheet composition becomes solid; and

removing said solid wall skin sheet from said mold.

9. The solid wall skin sheet of claim 1 as manufactured by the process of claim 8 further comprising the step of applying pressure to said fluid wall skin sheet composition in said forming space.

10. The solid wall skin sheet of claim 1 as manufactured by the process of claim 8 further comprising the step of die-cutting said solid wall skin sheet using a die blade and die platen.

11. The solid wall skin sheet of claim 1 as manufactured by the process of claim 8 further comprising the step of applying a coating to said display surface.

12. The solid aesthetic three-dimensional wall skin of claim 11 where said coating is an ink.

13. The solid wall skin sheet of claim 3 manufactured by a process comprising the steps of:

applying a fluid wall skin sheet composition to a first molding surface of a mold;

positioning said first molding surface adjacent to a second molding surface of said mold to create a forming space containing said fluid wall skin sheet composition between said first molding surface and said second molding surface;

applying heat to said fluid wall skin sheet composition contained in said forming space until said wall skin sheet composition becomes said solid wall skin sheet body;

removing said solid wall skin sheet body from said mold; and

attaching said backer guide to said solid wall skin sheet body.

14. The solid wall skin sheet of claim 3 as manufactured by the process of claim 13 further comprising the step of applying pressure to said fluid wall skin composition in said forming space.

15. The solid wall skin sheet of claim 3 as manufactured by the process of claim 13 further comprising the step of die-cutting said solid wall skin sheet using a die blade and die platen.

16. The solid wall skin sheet of claim 3 as manufactured by the process of claim 13 further comprising the step of applying a coating to said display surface.

17. The solid wall skin sheet of claim 16 where said coating is an ink.

18. The solid wall skin sheet of claim 3 as manufactured by the process of claim 13 wherein said wall sheet skin composition is a pulp mixture.

19. The solid wall skin sheet of claim 3 as manufactured by the process of claim 13 where said wall sheet skin composition is a recycled-paper pulp mixture.