

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

GAMON PLUS, INC.,
Patent Owner.

Case IPR2017-00093
Patent 9,144,326 B2

Before TRENTON A. WARD, BART A. GERSTENBLITH, and
ROBERT L. KINDER, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. Background

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, LLC (collectively, “Petitioner”) filed a Petition (Paper 2, “Pet.”) requesting institution of *inter partes* review of claims 1–23 of U.S. Patent No. 9,144,326 B2 (Ex. 1001, “the ’326 patent”). Gamon Plus, Inc. (“Patent Owner”) filed a Preliminary Response (Paper 9) to the Petition.

Under 35 U.S.C. § 314(a), an *inter partes* review may be instituted only if “the information presented in the petition . . . and any [preliminary] response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” *See* 37 C.F.R. § 42.108(c).

For the reasons given below, on this record, Petitioner has not established a reasonable likelihood that it would prevail in showing the unpatentability of claims 1–23 of the ’326 patent. Accordingly, we deny the Petition and do not institute an *inter partes* review of the ’326 patent.

B. Related Proceedings

The parties indicate that the ’326 patent is asserted in *Gamon Plus, Inc., et al. v. Campbell Soup Co., et al.*, No. 15-cv-8940-CRN-YBK (N.D. Ill.). Pet. 1–2; Paper 7, 1. Additionally, Petitioner filed a petition challenging the patentability of U.S. Patent No. 8,827,111 B2 (“the ’111 patent”) in IPR2017-00087. Pet. 2. The application issuing as the ’326 patent was a continuation of the application that issued as the ’111 patent. Pet. 2; *see also* Ex. 1001, [63]. Petitioner further explains that U.S. Patent Application No. 14/861,017, which is still pending before the

Office, claims priority to the application that issued as the '326 patent, and may be affected by a decision in this proceeding. *Id.*

C. Real Parties in Interest

The Petition identifies “Campbell Soup Company,” “Campbell Sales Company,” and “Trinity Manufacturing, L.L.C.” as real parties in interest.

Pet. 1. Patent Owner identifies “Gamon Plus, Inc.” and “Gamon International, Inc.” as real parties in interest. Paper 7, 1.

D. The References

Petitioner relies on the following references:

European Patent Application Publication No. 0490693 A2, published June 17, 1992 (Ex. 1020, “Nesso”)¹;

U.S. Patent No. 3,395,809, issued August 6, 1968 (Ex. 1021, “Mellion”);

U.S. Patent No. 2,382,191, issued August 14, 1945 (Ex. 1023, “Weichselbaum”);

U.S. Patent No. 3,304,141, issued February 14, 1967 (Ex. 1024, “Rogers”);

P.O.P. & Sign Design (Mar./Apr. 1997) (Ex. 1026, “POP & Sign Design”);

U.S. Patent No. 5,462,198, issued October 31, 1995 (Ex. 1027, “Schwimmer”);

¹ This reference identifies James Roderick Oattes as the named inventor and “NESSO (ENGINEERS) LIMITED” as the applicant. Ex. 1020, 1. The parties refer to this reference as “Nesso,” and we do the same for consistency.

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U.S. Patent No. Des. 405,622, issued February 16, 1999 (Ex. 1028, “Linz”);

U.S. Patent No. Des. 178,248, issued July 10, 1956 (Ex. 1029, “Knott”);

U.S. Patent No. 514,948, issued February 20, 1894 (Ex. 1030, “Luster”); and

UK Patent Application Publication No. GB 2303624 A, published February 26, 1997 (Ex. 1048, “Samways”).

E. The Asserted Grounds of Unpatentability²

Petitioner challenges the patentability of claims 1–23 of the '326 patent on the following grounds:

References	Basis	Claim(s) Challenged
Weichselbaum and Nesso	§ 103(a)	1–3, 5–8, and 12
Weichselbaum, Nesso, and Linz	§ 103(a)	4
Weichselbaum, Nesso, and Samways	§ 103(a)	4
Weichselbaum, Nesso, Linz, and POP & Sign Design	§ 103(a)	4
Weichselbaum, Nesso, Samways, and POP & Sign Design	§ 103(a)	4
Weichselbaum, Nesso, and Rogers	§ 103(a)	9, 17, 18, 22, and 23
Weichselbaum and Nesso	§ 103(a)	10 and 11
Weichselbaum, Nesso, and Luster	§ 103(a)	10 and 11
Weichselbaum, Nesso, and Mellion	§ 103(a)	13, 15, and 16
Weichselbaum, Nesso, Mellion, and Schwimmer	§ 103(a)	15 and 16
Weichselbaum, Nesso, and Knott	§ 103(a)	14
Weichselbaum, Nesso, and Luster	§ 103(a)	19
Weichselbaum, Nesso, Luster, and Rogers	§ 103(a)	19
Weichselbaum, Nesso, Luster, and Mellion	§ 103(a)	20 and 21
Weichselbaum, Nesso, Luster, and Schwimmer	§ 103(a)	20 and 21
Weichselbaum, Nesso, Luster, Rogers and Mellion	§ 103(a)	20 and 21
Weichselbaum, Nesso, Luster, Rogers and Schwimmer	§ 103(a)	20 and 21

Petitioner supports its challenge with a Declaration by Steven Visser dated October 14, 2016 (Ex. 1002).³

F. The '326 Patent

The '326 patent is directed to “dispenser racks and displays” and “to a compact, easy to assemble, easy to load and unload multiple chute dispenser with an integrated display.” Ex. 1001, 1:24–27. The dispenser includes “[a] set of panels having chutes therebetween. The chutes being defined by curvilinear rails on such panels. The curvilinear rails having stops thereon for stopping the products for viewing.” *Id.* at 2:3–6.

² Petitioner includes eight numbered grounds, many of which include several alternative combinations of references. For clarity, the chart also identifies each alternative ground.

³ Patent Owner objects to paragraphs 16–35 of the Visser Declaration as inadmissible under 37 C.F.R. § 42.65(a) because these paragraphs present testimony related to patent law. Prelim. Resp. 3. Additionally, Patent Owner objects to paragraphs 44–71 of the Visser Declaration under Federal Rule of Evidence 402 as irrelevant, and, hence, inadmissible. *Id.* at 4–5. Because we do not rely on these portions of the Visser Declaration in reaching our Decision, we need not address these objections for purposes of this Decision.

Figures 1 and 2 of the '326 patent are shown below:

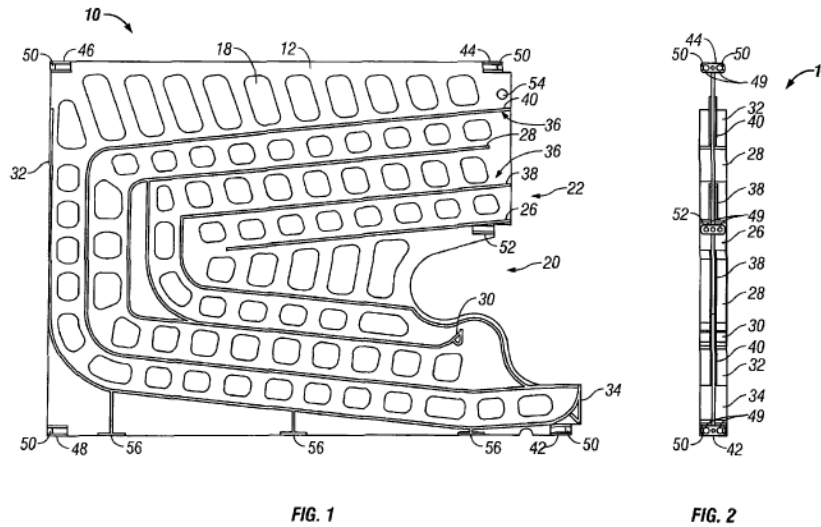


Figure 1 of the '326 patent “is a side view of a panel” (*id.* at 2:11–12), and Figure 2 is “an edge on view of a panel” (*id.* at 2:13–14). As shown, panel 10 is the “main element of the multi-chute gravity feed dispenser display” and “is generally formed as a vertical upright panel.” *Id.* at 4:16–18. Panel 10 is “preferably configured to be used in connection with conventional store shelving in place at a retailer.” *Id.* at 4:19–20.

The '326 patent explains:

The panel 10 includes at least one set of rails 20 which are formed as ribs extending normal to a side 12 of the panel 10 to cooperatively define a plurality of chutes 22, 24 for product which have a boustrophedonic or C-shaped configuration. A first rail 26 is disposed in the generally medial portion of the side 12 inclined to the horizontal, angled generally downwardly, and having a linear configuration. The second rail 28 is disposed about the first rail 26 and has a curvilinear configuration which is substantially C-shaped. The first and second rails 26 and 28 each having a minimum incline to the horizontal such that product is capable of continuous movement along such rails in response to a normal gravitational force, and where as shown in FIG. 1, can be a substantially slight angle. A first product travel stop or stop 30 is formed at a lowest extent of the second rail 28

as an enlarged portion thereof. The first stop 30 engages the product to prevent unwanted further movement down chute 22 and positions the product for viewing and selection by a customer. A third rail 32 has a curvilinear configuration which is substantially L-shaped and has a second stop 34, formed as an enlarged portion thereof at a lower end adjacent first stop 30, and prevents further downward motion down chute 24.

Id. at 4:29–50.

Figure 3A of the '326 patent is shown below:

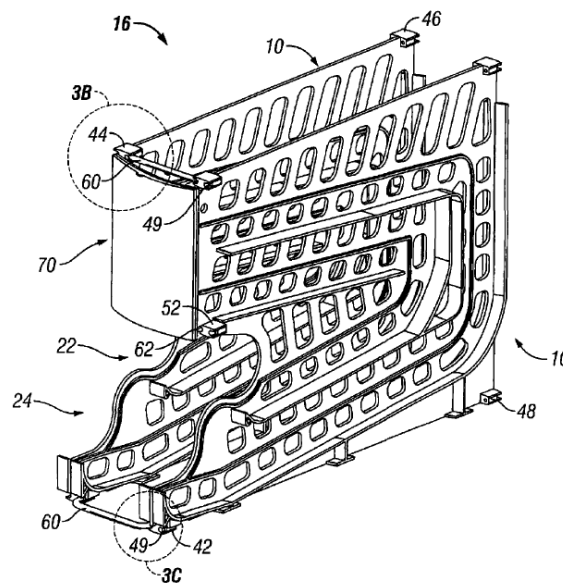


FIG. 3A

Figure 3A of the '326 patent “is a side perspective view of a display module.” *Id.* at 2:15–16. The '326 patent explains:

FIG. 3A shows a pair of panels, a display module 16, . . . connected by a pair of retention pins to define a dispenser module 16, one or more such dispenser modules 16 making up a multi-chute gravity feed dispenser display. The chutes 22, 24 are defined between adjacent pairs of panels 10 and are of a width slightly greater than the width of products 90 and which allow the products to be stored and dispensed therefrom.

Id. at 5:18–26.

Figure 6A of the '326 patent is shown below:

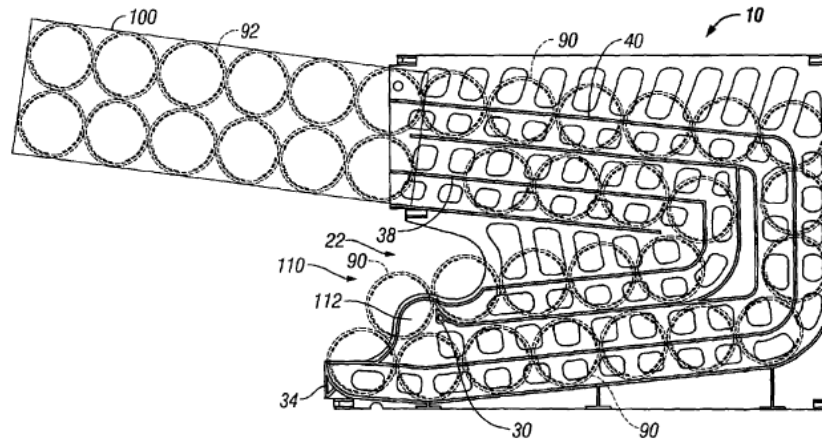


FIG. 6A

Figure 6A of the '326 patent “is a side view of both a display module with a loading magazine in a loading position.” *Id.* at 2:38–40. The '326 patent explains that “[w]hen loaded, the new product 92 simply rolls into the chute 22 or 24 whichever is empty and available.” *Id.* at 7:52–53.

The '326 patent describes, as an advantage of the invention, “the return area or replace stall 110 which is defined between the first and second stops 30 and 34 and a cradle member or ear 112 formed on the panel 10.” *Id.* at 7:58–61. In particular, “[t]he replace stall 110 is further defined as an area in which a product 90 may be replaced if the consumer decides not to purchase.” *Id.* at 7:62–63. Figure 6A shows the location of product 90, in replace stall 110, after being replaced by a consumer. *Id.* at 7:64–65.

G. Illustrative Claims

Claim 1 is the sole independent claim of the '326 patent.⁴ Claim 1 is illustrative of the claimed subject matter and is reproduced below:

⁴ Petitioner contends that Patent Owner asserted two different priority dates for different sets of claims in the related district court litigation. Pet. 18 n.13. Petitioner contends that the earliest priority date (1) for claim 5 of the

1. A display rack comprising:
 - a plurality of generally cylindrical products all having substantially equal diameters;
 - first and second chutes supporting the products passing therethrough by rolling or dropping impelled by force of gravity, a forward side of the display rack having a forward-facing product loading opening therein, and both chutes communicating with and extending generally rearwardly from the forward-facing product loading opening and receiving the products loaded into the chutes through the product loading opening, and
 - each chute having a respective dispensing end below the product loading opening such that the cylindrical products when placed in the product loading opening proceed by force of gravity through one of the chutes to the dispensing end thereof;
 - the dispensing end of the second chute being situated between the product loading opening and the dispensing end of the first chute;
 - wherein the chutes each have a respective stop structure supported adjacent the respective dispensing end that blocks forward movement of the products in the chute beyond said stop structure such that the products can be removed from the dispensing end of the chute by being elevated above the stop structure; and
 - wherein the stop structure of the second chute stops the products in the second chute rearward of the product loading opening, said second chute having a clearance space above the stop structure thereof such that a forwardmost one of the products resting thereagainst can be elevated by a user above the stop structure and removed from the second chute; and
 - the stop structure of said second chute being disposed above the dispensing end of said first chute a vertical distance and offset rearwardly from the stop structure of said first chute a horizontal distance greater than the diameter of the products such

'326 patent is December 6, 2005, and (2) for claims 1–4 and 6–23 is August 20, 2002. *Id.* at 18. Patent Owner contends that claim 1–23 are entitled to an effective filing date of August 20, 2002. Prelim. Resp. 3. For purposes of this Decision, we need not decide the earliest effective filing date of claim 5.

that, when a forwardmost product of the products in the first chute is removed from the first chute by lifting said forwardmost product up to a level above the stop structure of the first chute, the forwardmost product is at least in part horizontally forward of the dispensing end of the second chute.

Id. at 16:14–55.

II. CLAIM CONSTRUCTION

In an *inter partes* review, claim terms in an unexpired patent are construed according to their broadest reasonable interpretation in light of the specification of the patent in which they appear. *See* 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016). There is a presumption that claim terms are given their ordinary and customary meaning, as would be understood by a person of ordinary skill in the art in the context of the specification. *See In re Translogic Tech. Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Nonetheless, if the specification “reveal[s] a specific definition given to a claim term by the patentee that differs from the meaning it would otherwise possess[,] . . . the inventor’s lexicography governs.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (citing *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)). Another exception to the general rule that claims are given their ordinary and customary meaning is “when the patentee disavows the full scope of a claim term either in the specification or during prosecution.” *Uship Intellectual Props., LLC v. United States*, 714 F.3d 1311, 1313 (Fed. Cir. 2013) (quoting *Thorner v. Sony Computer Entm’t Am., LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012)). Additionally, only terms that are in controversy need to be construed, and these need be construed only to

the extent necessary to resolve the controversy. *See Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

A. *“the stop structure of said second chute being . . . offset rearwardly from the stop structure of said first chute a horizontal distance greater than the diameter of the products”*

Claim 1, as reproduced above, recites, *inter alia*,

the stop structure of said second chute being disposed above the dispensing end of said first chute a vertical distance and offset rearwardly from the stop structure of said first chute a horizontal distance greater than the diameter of the products such that, when a forwardmost product of the products in the first chute is removed from the first chute by lifting said forwardmost product up to a level above the stop structure of the first chute, the forwardmost product is at least in part horizontally forward of the dispensing end of the second chute.

Ex. 1001, 16:46–55 (emphases added).

Petitioner contends that the '326 patent specification does not define this claim phrase, and we should construe the phrase to mean “at least a portion of the stop structure of the second chute is offset by a distance greater than the diameter of the cylindrical products[] from at least a portion of the stop structure of the first chute.” Pet. 17–18 (citing Ex. 1002 ¶¶ 37–39).

Patent Owner disagrees with Petitioner's construction and contends that Petitioner provides “no justification for . . . rewording the claim, except a bare assertion that the '326 patent specification ‘does not define’ the term.” Prelim. Resp. 6. Patent Owner proposes that we construe the phrase “a horizontal distance” to mean “with a horizontal space between them,” to clarify the structural relationship between the stop structures of the respective chutes. *Id.* at 11.

Neither party explains persuasively why this claim phrase or any of the terms recited therein require construction. The meaning of each term as well as the entire phrase is clear, and, thus, does not require explicit construction. Nonetheless, we note that Petitioner fails to provide any support for its construction, which diverts from the express claim language in several respects,⁵ and we, therefore, decline to adopt it.

III. ANALYSIS

A. Level of Ordinary Skill in the Art

Petitioner contends that a person of ordinary skill in the art, as of the earliest priority date of the claims, would have had either: “(1) a Bachelor’s Degree in Industrial Design and at least 1-2 years of experience in designing gravity feed display dispensers or (2) 5-10 years of experience in designing gravity feed display dispensers.” Pet. 18 (citing Ex. 1002 ¶ 36). Patent Owner does not propose a level of ordinary skill in the art in the Preliminary Response.

For the purposes of this Decision, we adopt Petitioner’s proposed level of ordinary skill in the art.

B. Obviousness over Weichselbaum and Nesso

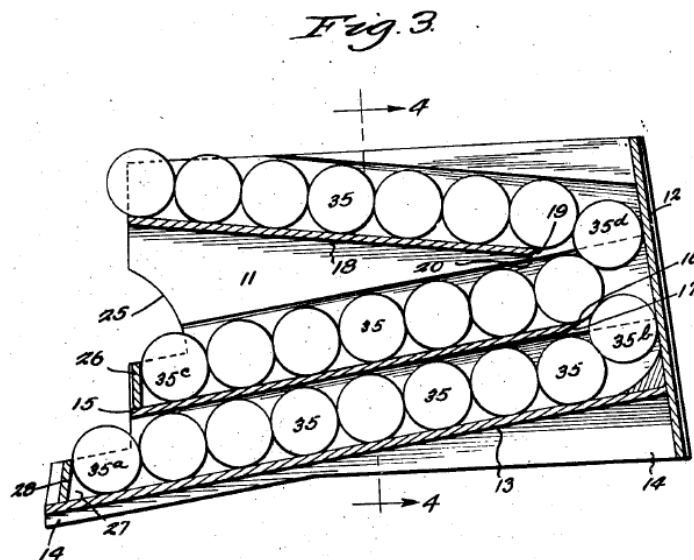
Petitioner contends that the combination of Weichselbaum and Nesso would have rendered the subject matter of claims 1–3, 5–8, and 12 obvious to one of ordinary skill in the art at the time of the invention. Pet. 18–38.

⁵ Petitioner’s construction, at a minimum, seeks to add the phrase “a portion of” before each recitation of a “stop structure” and seeks to omit the terms “rearwardly” and “horizontal” without providing any justification for the omissions. Pet. 17–18.

1. *Weichselbaum*

Weichselbaum is directed to “a dispensing device and more particularly to a device for dispensing cylindrical objects such, for example, as canned goods.” Ex. 1023, 1:1–4.⁶ Weichselbaum teaches that the dispenser is “so dimensioned as to fit normally between shelves of customary height in a grocery store or the like.” *Id.* at 1:15–18.

Weichselbaum’s Figure 3 is shown below:



Weichselbaum’s Figure 3 “is a sectional view taken along the line 3—3 of Figure 2 as viewed in the direction of the arrows.” *Id.* at 2:5–7.

Weichselbaum explains:

The dispensing device . . . is comprised of a pair of side walls 11 and rear wall 12, a shelf 13, inclined forwardly downwardly from rear wall 12, serving as a base therefor. . . . A second shelf 15 is secured between side walls 11 in parallel relation to base shelf 13 but terminates at a point 16 spaced from rear wall 12 by a distance slightly in excess of the diameter of an individual can. . . . A third shelf 18 is also positioned between

⁶ Weichselbaum contains three pages of text, each page containing two columns. Ex. 1023. Citations are to the column and line numbers of the exhibit.

side walls 11 but is inclined downwardly toward rear wall 12 thereof in a direction opposite to the angle of inclination of shelves 13 and 15, and terminates at a point 19 spaced from rear wall 12

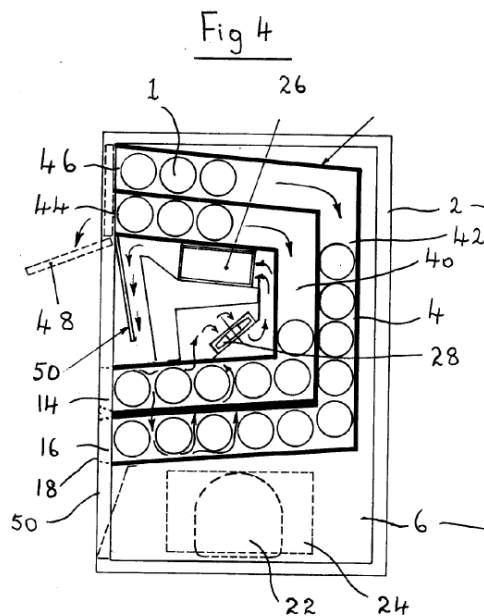
Side walls 11 are provided with aligned notches 25 adjacent but positioned above shelf 15, a stop member 26 being positioned between the side walls at the end of the shelf and extending upwardly to the bottoms of notches 25, thus providing a recessed aperture through which the can at the end of shelf 15 adjacent stop member 26 may be readily grasped for removal. . . .

A stop 28 of a height substantially equal to the height of portions 27 is positioned adjacent the end of shelf 13 to prevent the cans from rolling out of the receptacle.

Id. at 2:13–3:1.

2. *Nesso*

Nesso is directed to “a compact refrigerated dispenser for dispensing cooled articles, such as soft drink cans.” Ex. 1020, 1:1–3. Figure 4 of *Nesso* is shown below:



Nesso's Figure 4 "is a cross-sectional side view" of an embodiment. *Id.* at 2:8–9. Figure 4 shows, *inter alia*, two chutes, 40 and 42, which are filled by inserting cans through entrances 44 and 46. *Id.* at 3:25–29. Cans are dispensed by removing them from apertures 14 and 16. *Id.* at 3:37–38.

3. Discussion

In support of its challenge, Petitioner provides an analysis of each reference and a claim chart identifying how the references allegedly meet each limitation of the challenged claims. Pet. 24–45. With respect to claim 1, Petitioner relies upon Weichselbaum as disclosing most of the elements of the claim, but acknowledges that Weichselbaum "does not have a second upper chute having a second loading opening that communicates with the upper dispensing chute above surface (15)." *Id.* at 25 (citing Ex. 1002 ¶¶ 77–78). Instead, Petitioner relies upon Nesso as disclosing those elements of the claim. *Id.*

Petitioner contends that one of ordinary skill in the art would have been motivated to "add a second upper chute section to Weichselbaum to allow for two different canned products to be dispensed and/or to increase the capacity of the dispenser using roughly the same amount of shelf space." *Id.* at 25–26 (citing Ex. 1002 ¶ 80).

Patent Owner asserts that Petitioner fails to show that the combination of Weichselbaum and Nesso teaches the locations of the stop structures recited in claim 1. Prelim. Resp. 12–15. Patent Owner contends that Weichselbaum's Figure 3 fails to satisfy the claim recitation requiring a horizontal offset greater than the diameter of the products. *Id.* at 12–13.

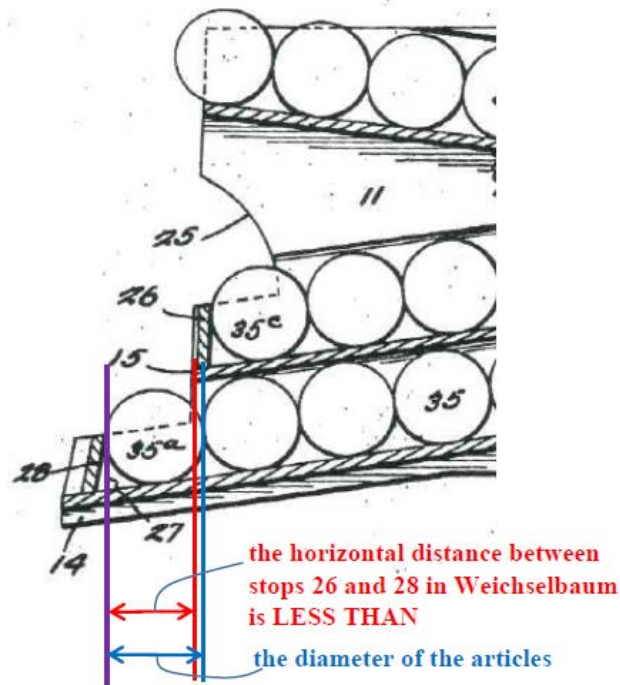
Claim 1 recites, *inter alia*, "the stop structure of said second chute being . . . offset rearwardly from the stop structure of said first chute a

horizontal distance greater than the diameter of the products.” Ex. 1001, 16:46–50. The Petition attributes this limitation to Weichselbaum in the following manner: “Fig. 3; the stop structure (26) of the second (upper) chute is offset rearwardly from the stop structure (28) of the first (lower) chute a horizontal distance greater than the diameter of the products.”

Pet. 25. Petitioner’s position appears to be based on its claim construction, which we rejected. *See supra* Section II.A. (discussing the construction of the phrase “the stop structure of said second chute being . . . offset rearwardly from the stop structure of said first chute a horizontal distance greater than the diameter of the products”). We decline to rewrite the claim to require only “at least a portion” of the stop structure of the second chute to be offset a horizontal distance greater than the diameter of the products.

Additionally, Figure 3, as discussed by Patent Owner, does not, on its face, appear to satisfy the offset requirement recited in the claim.

Weichselbaum’s Figure 3, annotated by Patent Owner, is reproduced below:



Weichselbaum, detail of FIG. 3, annotated.

Patent Owner annotated Figure 3 of Weichselbaum to identify the horizontal distance of the offset between the two stop structures. Prelim. Resp. 13.

Patent drawings not designated as being drawn to scale cannot be relied upon to define precise proportions of elements if the specification is completely silent on the issue. *Hockerson-Halberstadt, Inc. v. Avia Grp. Int'l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000). Nonetheless, Petitioner bases its argument on Figure 3, unmodified. Pet. 25. Petitioner bears the burden to show that it is likely to prevail in its challenge to the claims. In light of Petitioner's focus on Figure 3, Patent Owner is entitled to rely upon the same figure to rebut Petitioner's position. Here, Patent Owner has done so successfully. In light of the lack of any argument or explanation by Petitioner as to how Figure 3 teaches this element of the claim and the arguments presented by Patent Owner, we determine that Petitioner's assertion is not supported sufficiently for purposes of this Decision.

With respect to dependent claims 2, 3, 5–8, and 12, Petitioner relies upon Weichselbaum to the same extent discussed above and does not rely upon Nesso as teaching the offset requirements for the stop structures. *See* Pet. 26–38.

Accordingly, on the record before us, Petitioner has not shown a reasonable likelihood that it would prevail in establishing that the combination of Weichselbaum and Nesso would have rendered the subject matter of claims 1–3, 5–8, and 12 obvious to one of ordinary skill in the art at the time of the invention.

C. Remaining Grounds of Obviousness

Each of Petitioner’s remaining grounds challenge dependent claims based on at least the combination of Weichselbaum and Nesso, and each ground relies upon Petitioner’s position, discussed above, that Weichselbaum discloses the stop structures’ location recited in claim 1. *See, e.g.*, Pet. 38–43 (relying upon the arguments raised regarding claim 1).

Accordingly, on the record before us and for the reasons explained in the context of claim 1, Petitioner has not shown a reasonable likelihood that it would prevail in establishing that the combinations proposed in its remaining grounds of obviousness would have rendered the challenged claims obvious to one of ordinary skill in the art at the time of the invention.

D. Objective Indicia of Nonobviousness

On this record, Patent Owner does not rely upon evidence of objective indicia of nonobviousness.

E. Conclusion

For the foregoing reasons, on this record, Petitioner has not demonstrated a reasonable likelihood that it would prevail in showing that claims 1–23 the '326 patent are unpatentable.

IV. ORDER

Accordingly, it is:

ORDERED that the Petition is *denied* as to the challenged claims of the '326 patent; and

FURTHER ORDERED that no *inter partes* review is instituted.

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