17-1391

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MICHAEL M. KAHR,
Plaintiff-Appellant,

v.

MICHAEL E. COLE AND
IRON WORKS CONSTRUCTION COMPANY, LLC
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 1:13-CV-1005-WCG
The Honorable William C. Griesbach, Presiding Judge

BRIEF OF PLAINTIFF-APPELLANT

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February 21, 2017

CERTIFICATE OF INTEREST

Counsel for appellant Michael M. Kahr certifies the following:

The full name of every party represented by me is:

Michael M. Kahr

The name of the real party in interest represented by me is:

Michael M. Kahr

The names of all parent corporations and any publicly held companies that own 10% or more of the stock of the party represented by me are:

None

The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are (and who have not or will not enter an apperance in this case) are:

Frank W. Kowalkowski; Patrick M. Bergin; Joseph S. Heino

February 21, 2017

/s/ Sherry D. Coley
Sherry D. Coley

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Other Authorities

5B Donald S. Chisum, Chisum on Patents § 18.04[1][b](2016 27,28

TABLE OF ABBREVIATIONS

'554 patent	United States Patent No. 8,348,554 (Appx52-57)
'###(xx:yy-zz)	Column xx, lines yy to zz of the '### patent
Accused Product	A dock assembly structure made by Cole and Iron Works
Appx____	Joint Appendix Page
Berquist	United States Patent No. 3,964,221 to DeWayne Donald Berquist (Appx696-701)
Burns	Burns, Max, *The Dock Manual*, Canada, Storey Books, 1999 (Appx679-693)
Cole	defendant-appellee Michael E. Cole
Death's Door Marine	plaintiff-appellant Michael M. Kahr's company, Death's Door Marine, Inc.
defendants	defendants-appellees Michael E. Cole, Iron Works Construction Company, LLC and Iron Works Construction Company of Bailey's Harbor, Inc.
DNR	Wisconsin Department of Natural Resources
Elmore	Joseph Elmore, a witness during the trial
Ensnarement Motion	Motion for Judgment of Noninfringement as a Matter of Law Pursuant to Ensnarement Defense (Appx521-522)
Gervasi	United States Patent No. 5,713,296 to Paul R. Gervasi (Appx733-742)
Iron Works	defendants-appellees Iron Works Construction Company, LLC and Iron Works Construction

	Company of Bailey's Harbor, Inc.
Kahr	plaintiff-appellant Michael M. Kahr
USPTO	United States Patent and Trademark Office
Wentland	David E. Wentland, expert witness retained by Kahr

STATEMENT OF RELATED CASES

Kahr and his counsel are unaware of any other appeals in or from the same civil action that have previously been before this or any appellate court. Likewise, Kahr and his counsel are unaware of any other cases pending in this or any other court that will directly affect or be directly affected by a decision in this case.

STATEMENT OF JURISDICTION

Kahr filed a complaint on September 6, 2013 asserting claims against defendants for infringement of the patent-in-suit literally or under the doctrine of equivalents. The district court had jurisdiction pursuant to 35 U.S.C. §§ 1331 and 1338(a).

On December 30, 2015, the district court filed its decision denying Kahr's motion for summary judgment for literal infringement, whereby the district court held that the welded end plates of the Accused Product were not part of the side wall noted in the '554 patent. Thus, the district court held the Accused Product did not literally infringe, however, factual issues would need to be determined by the jury on infringement under the doctrine of equivalents.

After this, the case went through a three day jury trial on August 8, 2016 to August 10, 2016. After admission of all the evidence, the jury returned a verdict in favor of Kahr finding that Iron Works had infringed the '554 patent, that Cole had

induced infringement, and that all defendants had willfully infringed. As a result, the jury awarded a money judgment against defendants for a reasonable royalty in the amount of $50,000.00.

Defendants filed their Ensnarement Motion on September 9, 2016, in which they argued the doctrine of equivalents improperly ensnared the Accused Product because it was obvious and anticipated with regards to prior art references. The parties briefed this issue and submitted evidence before the district court. The district court granted Defendants' Ensnarement Motion on November 18, 2016 and entered a judgment dismissing the case on that same day. Kahr timely filed a notice of appeal of the final judgment on December 16, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

1. Whether it was proper for the district court to find on summary judgment that the welded end plates of defendants' accused product were not part of the side wall taught in the '554 patent.

2. Whether the district court erred in finding the combination of elements set forth in the Accused Product would have been obvious to a person of ordinary skill in the art, because defendants failed to meet their *prima facie* case that the doctrine of equivalents ensnared prior art thereby rendering the Accused Product non-infringing, and the district court failed to articulate its reasoning.

I. STATEMENT OF THE CASE

A. Statement of Facts

The invention leading up to the patent-in-suit was a result of Kahr's life work, experience in the marine construction industry and his education. Kahr's education and experience allowed him to combine different elements of dock construction into a unique assembly that would be permanent and yet height adjustable.

1. Kahr's Education and Work Experience

Kahr started working in Door County, Wisconsin when he was 18 years old for a marine construction company called Fitzgerald Construction. Appx331 (TT at 68:5-13). Kahr attended the University of Wisconsin in Madison and graduated with a degree in agricultural engineering in 1982. Appx332 (TT 69:9-70:4). Knowing he had an interest in marine construction, Kahr took an extra year of undergraduate studies to focus on all aspects of marine construction, including wood design, steel design, concrete design, coastal engineering and welding. Appx332 (TT 69:21-70:4).

Kahr continued working for Fitzgerald Construction for approximately three years after graduating from college, and then he went to work for an engineering firm based in Chicago. Appx332 (TT 71:15-72:2). While Kahr was employed in

Chicago, he received his professional engineering license and structural engineering license. Appx332 (TT 71:24-72:2).

In 1989, Kahr bought Fitzgerald Construction from its prior owner. Appx333 (TT 73:22-23). Then in 2001, Kahr changed the name of the company to Death's Door Marine and it was incorporated. Appx333 (TT 74:10-14). Kahr is the only owner and shareholder of Death's Door Marine. Appx333 (TT 74:16-20). One of the unique aspects of Death's Door Marine is that Kahr personally designs and engineers his docks, and he is on-site to make sure they are constructed and installed correctly. Appx333 (TT 75:18-76:15).

2. The Work History Between Kahr and Cole

Cole began working for Kahr and Death's Door Marine in 1997 as a laborer. Appx333 (TT 76:19-23). Cole had very little marine construction experience before this time. Appx333-334 (TT 76:24-77:4). Kahr taught Cole many aspects of marine construction, including welding, working with concrete, driving the truck and operating his equipment. Appx334 (TT 77:5-11). While working for Kahr, Cole did not design a dock, put together a proposal for a customer or participate in a sales meeting with a customer. Appx334 (TT 78:11-19).

In 2005, Cole was fired from Death's Door Marine for misconduct because he submitted a competing bid for a marine construction project while he was still an employee of Death's Door Marine. Appx334, Appx418-419 (TT 78:20-22,

79:6-7, 416:15-417:21). After Cole was terminated, he created Iron Works Construction Company, LLC, a marine construction company which directly competed with Death's Door Marine and Kahr. Appx334 (TT 79:8-18). After the lawsuit began, Cole created another company called Iron Works Construction Company of Bailey's Harbor, Inc. Appx408 (TT 373:8-11). This new company is what Cole was using to build the Accused Product while the lawsuit was pending. Appx302 (Dkt. #82-3 at 5).

3. Kahr's Motivation to Create the Patented Dock Structure and Assembly

Kahr's conceptualization of the technology that led to the patent-in-suit came from several different factors. First, aspects of the design came from when Kahr wrote his senior thesis on building a solid concrete dock. Appx332 (TT 70:14-18). Then, in his experience, the vertical, lateral and uplift forces of ice could cause structures to fail if they were not capable of withstanding these forces. Appx332 (TT 70:19-71:6). Additionally, the fact that these bodies of water were often rocky meant that you had to design structures so there would not be too much friction on the piles. Appx332 (TT 71:9-13). Kahr designed his patented structure to have cross bracing of the vertical pilings which would transfer some of these forces down to the bottom, while maintaining the structural integrity of the dock. Appx336 (TT 85:12-18).

Kahr also wanted to create a structure that would not have to go through the complex and often unpredictable approval and permitting process of the DNR. Appx334 (TT 80:2-11). It was becoming very difficult to get solid docks approved by the DNR. Appx334 (TT 80:12-18). The idea of constructing portable docks did not appeal to Kahr because these structures are meant to be temporary and must be removed from the water because they are not sturdy enough to last through bad storms. Appx334-335 (TT 80:19-81:3). Kahr wanted to design something with his engineering background that could withstand the wave and ice forces of the Bay of Green Bay and Lake Michigan. Appx335, Appx340 (TT 81:17-82:8, 103:24-104:12). Kahr intentionally designed his dock structure so that the steel frame sections filled with concrete go all the way to shore for strength and durability. Appx348 (TT 135:13-136:1).

Finally, Kahr wanted to design a structure that would be height adjustable. Appx335, Appx340 (TT 82:9-13, 101:10-102:11). Overall, the water level on the Bay of Green Bay and Lake Michigan can fluctuate by as much as six feet and Kahr wanted a structure that would accommodate these changes. *Id*.

4. Kahr Builds Dock Structures that Embody the ‘544 Patent

In the Fall of 2009, Kahr combined together all the aspects of his design to build the first dock that became the patented structure. Appx335 (TT 83:10-22). Kahr designed his patented structure so that the dock sections could be

prefabricated of steel channel to be efficient in the field. Appx335 (TT 82:14-23). Kahr designed the dimensions of the dock sections in his structure to be less than six feet wide and 200 square feet so he could build a structure that did not require DNR permitting. Appx336 (TT 87:5-9). Essentially, Kahr designed all the individual elements of his patented dock to work together and it is the combination of these elements that has been successful. Appx339-340, Appx348 (TT 100:25-101:6, 136:4-12). At the time Kahr created his unique design he had never seen a structure that combined together all of the same features. Appx335, Appx340 (TT 82:24-83:6, 103:16-24). He created and installed his patented dock, and no other company or competitor offered a permanent height-adjustable dock structure when he filed for patent protection. Appx340, Appx351 (TT 104:13-16, 145:15-18). Kahr believes Cole copied his design because it works. Appx351 (TT 148:14-24). The only competitor of Kahr who installs a permanent height-adjustable dock are the defendants. Appx418 (TT 413:10-21).

Below is a picture of Kahr's dock structure that embodies the '554 patent, which was part of the evidence presented to the jury at trial:



Appx463-464 (Trial Ex. 34).

After Kahr built his first structure that became the patented dock, he was approached by a potential customer, Elmore, to build the same permanent and height adjustable dock. Appx340 (TT 104:20-25). Kahr provided a proposal to Elmore in the fall of 2009, and he revised the proposal to meet Elmore's budget requirements. Appx341 (TT 106:10-14). Unbeknownst to Kahr, Elmore started talking to Cole about installing a permanent, height-adjustable dock. Appx404, Appx405, Appx406 (TT 358:10-15, 362:12-18, 365:6-10).

While Elmore was considering the revised proposal from Kahr, he went to Death's Door Marine's workshop. Witnesses testified at trial that Elmore took pictures of the steel channel dock sections that make up the segments of the patented design when he went to Death's Door Marine. Appx366 (TT 206:25-207:19). Elmore admitted that he went to Death's Door Marine's workshop and saw pre-fabricated dock sections, but he denied taking pictures. Appx403-404 (TT 356:18-24, 358:22-359:24). Sometime after seeing Kahr's dock sections, Elmore hired Cole to build his dock. Appx404 (TT 360:8-18).

Later in the Spring of 2010, Kahr saw individual dock sections sitting on a barge owned by Cole that were eventually installed into Elmore's property. Appx341-342 (TT 106:15-19, 108:17-109:1). According to an employee of Death's Door Marine, the dock sections on Cole's barge were "almost identical" to Kahr's dock. Appx367 (TT 209:15-21).

5. Defendants Start Building the Accused Product

Cole and his companies have built and continue to build a dock structure that is almost identical to Kahr's dock (the "Accused Product"). Cole's dock is made of twenty foot dock sections where the individual sections are made of steel channel frame. Appx369 (TT 220:6-16). Each section of Cole's dock is a steel frame box with side walls and end walls made of steel. Appx369 (TT 220:13-18). Cole's dock structures also had a floor, even though Cole argued unsuccessfully

that the temporary form used with the Accused Product should not be construed as a floor. Appx84 (Dkt. # 23 at 1). Cole's dock structure also has reinforcement members, or rebar, between the side walls made of steel. Appx369-370 (TT 220:23-221:4). The pan-like structure or steel box structure of Cole's docks were also filled with concrete. Appx370 (TT 221:5-10). Cole's dock sections were connected to steel pilings with fasteners and the dock sections are connected to one another with fasteners. Appx370 (TT 221:11-18, 222:6-10). As Kahr's expert, Wentland, observed for the jury, the Accused Product connects each dock section together by using a plate that extends the side wall. Appx390 (TT 303:10-24). In fact, Cole even included the cross-bracing feature of Kahr's dock into his structure. Appx371 (TT 225:20-226:17). The Accused Product could also be height adjustable. Appx390 (TT 304:20-22).

The first time that Cole built the Accused Product, a dock incorporating and combining all these elements together into one dock structure, is when he built the dock for Elmore in 2010. Appx370, Appx411 (TT 222:6-16, 223:3-6, 386:15-18). Cole built several docks after the Elmore dock that combined together all of these elements. Appx370-376, Appx378 (TT 223:7-10, 226:18-25, 227:22-229:14, 230:12-21, 232:15-233:9, 233:15-234:17, 235:19-236:14, 236:16-237:10, 244:14-245:9. 254:14-255:7). Cole did not hire outside consultants or engineers to design his docks; he did the design work for all these docks. Appx371, Appx374 (TT

227:1-6, 237:17-238:11). Below is a picture of the Accused Product that was also presented to the jury at trial:



Appx473-485 (Trial Ex. 52).

6. Kahr Receives Patent Protection for His Invention and Provides Notice to Cole to Cease Infringing Activities

On June 4, 2010, Kahr filed for patent protection a provisional patent U.S. Pat. App. No. 61/351,444. Appx52, Appx339 ('554 at p.1, TT 97:8-10). On September 27, 2010 Kahr filed U.S. Pat. App. No. 12/891,065 with the USPTO. Appx52 ('554 at p.1). On January 13, 2011, Kahr's patent application was published as Pub. No. US 2011/000810 A1. Appx52, Appx339 ('554 at p.1, TT

97:22-98:5). The USPTO allowed Kahr's patent to be issued on January 8, 2013 as U.S. Patent No. 8,348,554 ("the '554 Patent") Appx52 ('554 at p.1) Kahr continues to allow his company, Death's Door Marine, to license the '554 patent and build the patented dock structure. Appx351 (TT 146:13-25). Below are the claims of the '554 patent:

1. A dock structure for use with vertical pilings, the structure comprising:

a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a floor;

wherein the side walls, the end walls and the floor form a cavity;

a pair of cylindrical rims disposed at the first end of the structure, each rim forming a vertically-disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; and

a pair of overlapping members formed at the second end of the structure;

wherein each overlapping member has an aperture formed in it for receiving a fastener; and

wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

2. The dock structure of claim **1** further comprising at least one reinforcement member extending between the opposing side walls.

3. The dock structure of claim **1** wherein the cavity is filled with concrete.

4. A dock assembly for use with a plurality of vertical pilings, the assembly comprising:

at least one dock element, the element comprising a pan-like structure having a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the element, and a floor;

wherein the side walls, the end walls and the floor form a cavity within the element;

a pair of cylindrical rims disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it; and

a pair of overlapping members formed at the second end of the dock element;

wherein each overlapping member has an aperture formed in it for receiving a fastener; and

wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

5. The dock assembly of claim **4** wherein the apertures of the overlapping members, the cylindrical rims and side walls are collinear.

6. The dock assembly of claim **4** further comprising at least one reinforcement member extending between the opposing side walls of the dock element.

7. The dock assembly of claim **4** wherein the cavity of the pan-like structure of each element is filled with concrete.

Appx57 ('554 3:4-4:8).

While the '554 patent was being prosecuted, Kahr continued to build dock structures covered by his patent, despite the fact that he had seen Cole copying this design. Appx345 (TT 121:18-21). Kahr did not sit silently by and watch his design be copied without raising concerns. Appx345 (TT 121:22-122:7). On July 8, 2010, Kahr sent a notice to Cole advising Cole that he had filed a provisional patent application for a dock structure and that Cole was building a structure that was virtually identical. Appx345, Appx467 (TT 122:11-123:9, Trial Ex. 39). On August 11, 2010, Kahr sent another notice to Cole specifically walking through the detailed claims of the '554 patent. Appx345, Appx468-469 (TT 123:20-124:11, Trial Ex. 41). On May 6, 2013, Kahr sent a letter to Cole with a copy of the '554 patent and he advised Cole to stop making docks that infringed the '554 patent. Appx346 (TT 125:2-15). Finally, on July 24, 2013, Kahr sent a final letter to Cole advising him to stop infringing the '554 patent or Kahr would pursue legal remedies. Appx346, Appx472 (TT 127:19-128:10, Trial Ex. 43). Despite getting all of these notices, Cole kept manufacturing and installing the Accused Product, and he did not make any changes to its basic features discussed above which

infringe the ‘554 patent. Appx380-382 (TT 261:18-262:3, 264:20-265:22, 267:2-7, 268:24-269:6).

Kahr did not try to stop Cole from building all kinds of docks or engaging in marine construction; he simply wanted Cole to build a dock that did not infringe on the ‘554 patent. Appx346 (TT 126:1-14). Despite getting all these written notices, Cole never stopped building a dock structure that was nearly identical to the ‘554 patent. Appx345 (TT 124:19-22). Today, Cole is the only competitor of Kahr’s that offers a permanent height-adjustable dock. Appx351, Appx363 (TT 145:19-25, 146:8-10, 193:16-18). Although Cole told the jury that he did not promote to his customers that his docks are adjustable, his contract with Elmore claimed the dock was adjustable. Appx413-414, Appx420 (TT 396:20-397:8, 422:19-423:16). Despite assuring the jury that he had never adjusted one of his docks, Cole had, in fact, adjusted one of the Accused Products that he installed. Appx414, Appx421 (TT 397:9-10, 427:22-428:15).

7. Evidence Presented to the Jury at Trial

In an attempt to narrow the scope of the ‘554 patent for purposes of determining infringement, defendants argued to the jury at trial and later to the district court as part of motions after verdict, that individual elements of the patented design had been previously used in dock construction. Appx355, Appx397-398 (use of pilings (TT 161:25-162:4, 332:17-25, 333:8-10), pins (TT

162:3-4, 333:20-23), sleeves (TT 162:9-11), adjustability (TT 162:12-15), concrete (TT 162:20-163:2, 333:17-19), segmented docks (TT 163:3-115), steel frames (TT 333:11-16)). In response to this argument, Kahr unequivocally testified at trial that he had not seen every element of his patented design combined together into one dock structure. Appx356 (TT 166:2-167:14). While the '554 patent allows the dock structure to be built with one fastener through collinear apertures, the independent claims of the '554 patent are not limited to one fastener. Appx57, Appx340, Appx357, Appx363-364 ('554 at 3:4-4:8; TT 102:12-103:24, 169:5-22, 196:11-197:22).

Wentland confirmed the '554 patent claims uniquely combine dock construction elements. Wentland is a coastal engineer, which means he specializes in civil engineering along the waterfront, and he has a master's degree in ocean engineering. Appx384-385 (TT 280:10-14, 281:7-13). Wentland is considered an expert in the area of design and construction of marine docks and piers. Appx385 (TT 284:15-17). Wentland explained to the jury that designing dock structures in the Great Lakes could be difficult with a permanent structure because the water level fluctuates by six feet. Appx385-386 (TT 284:25-285:25). Furthermore, Wentland confirmed that the forces of ice docks must withstand in the Great Lakes are phenomenal. Appx386 (TT 286:1-23).

Ultimately, Wentland concluded that Kahr's dock was unique, that he was not aware of any other docks like Kahr's dock and that Cole's docks infringed the '554 patent. Appx387 (TT 291:18-292:11). In fact, Wentland concluded that Kahr took the best features to combine them together in his dock. Appx388 (TT 293:9-24). Finally, Wentland confirmed that the height adjustable feature of Kahr's permanent dock was unique and not something he had seen before. Appx388 (TT 296:12-23). While individual components of Kahr's dock may not have been unique, Wentland unequivocally testified that the combination of these elements by Kahr had not been done before. Appx390 (TT 301:17-25).

Wentland also opined that the connection method of the Accused Product which uses two fasteners, performed the same function as the connection method of Kahr's dock, which includes one embodiment that would use one fastener. Appx391, Appx393 (TT 305:7-306:22, 316:7-24). In Wentland's view, one would not need to be an engineer to understand that the connection method of the Accused Product would function the same as the connection method of the '554 patent. Appx394 (TT 317:23-318:15). Wentland agreed that he had seen what was termed a double-ear connection before. Appx399 (TT 337:13-19). However, he later clarified that the applications where he saw a double-ear connection were in floating docks, which are not the same structure as what is taught by the '554 patent. Appx399 (TT 339:20-340:2). Even Cole admitted that he did not consider

himself in competition with portable piers or floating docks. Appx414 (TT 400:20-22).

B. This Litigation and the District Court's Decisions

On September 6, 2013, Kahr filed his complaint in the district court against Cole and Iron Works Construction Company, LLC asserting claims for infringement of the '554 patent and willful infringement. Appx62 (Dkt. #1 at 5). Kahr sought an order declaring defendants infringed the '554 patent, money damages and a permanent injunction. *Id.*

1. Claim Construction by the District Court

The parties exchanged claim constructions and the only dispute presented to the Court for claim terms that required construction was "floor" present in claims 1, 4 and 8 of the '554 patent. Appx84, Appx57 (Dkt. #23 at 1; '554 3:6-14, 3:29-39, 4:12-23). Defendants proposed a construction of the term floor to mean "a lower inside surface of the dock structure, which is permanent and not removed." Appx84 (Dkt. #23 at 1). Kahr proposed the ordinary meaning of the claim term that it should be construed broadly to mean "a level supporting surface in any structure." The district court adopted the plain and ordinary meaning of "floor" proposed by Kahr. Appx88 (Dkt. #23 at 5). In reaching this decision, the district court asserted that defendants' argument "reflects not so much a disagreement over claim construction as an argument over infringement." Appx86 (Dkt. #23 at 3).

Defendants constructed the Accused Product by using a temporary form attached to the steel frame pan-shaped dock segment before it was filled with concrete, which was later removed when the concrete had cured. Accepting defendants' argument "would require that the limitation 'permanent and not removed' be added to the construction of any and all elements of a claimed invention." Appx87 (Dkt. #23 at 4).

2. Defendants' Waive Invalidity Defenses to the '554 Patent

While discovery was progressing, the parties attended a hearing before the district court on Kahr's motion to compel. During this hearing, counsel for defendants represented to the district court and Kahr that "[t]he question will be infringement and validity will not be challenged." Appx145 (Dkt. #37). The parties continued discovery and Kahr relied upon defendants' assertion that the validity of the '554 patent would not be challenged.

3. The District Court's Decision on Cross-Motions for Summary Judgment

After claim construction, the district court faced cross-motions for summary judgment on the issue of infringement. Appx242 (Dkt. #55 at 1). Cole raised the following differences between the Accused Product and the '554 patent in the summary judgment process: that the connections of the dock segments to pilings and each other through holes with fasteners is different, or more specifically, that the Accused Product does not have a hole in the portion of the side wall adjacent to

the cylindrical rim. Appx245 (Dkt. #55 at 4). Kahr responded to this assertion stating the welded end plate of the Accused Product is a portion of the side wall adjacent the rim required in independent claims 1, 4 and 8. Appx249 (Dkt. #55 at 8).

In reviewing the arguments made by both parties, the district court found "[t]he weld plate, however, is not the same as the sidewall. The fact that it is welded onto the side wall itself signals the fact that it is something other than the side wall." Appx249-250 (Dkt. #55 at 8-9). The district court equated the welded end plate of the Accused Product with the '554 patent's claim term overlapping member and then generally concluded that the welded end plate did not constitute part of the side wall. Appx250 (Dkt. #55 at 9). After concluding the Accused Product did not have an aperture in the portion of the sidewall adjacent to the cylindrical rims, the district court found the Accused Product did not literally infringe that limitation of the '554 patent. *Id*.

Cole further asserted that the Accused Product did not have overlapping members, and therefore, the Accused Product did not infringe. Appx250 (Dkt. #55 at 9). First, Cole asserted that the structure of his docks equivalent to overlapping members were placed on the same end of the dock segment as the cylindrical rims, and that they were not on the second end of the '554 patented dock segment. Appx250 (Dkt. #55 at 9). Kahr responded to these assertions by submitting

evidence that the Accused Product had overlapping members on both ends. Appx251 (Dkt. #55 at 10). The district court did not find in favor of Cole's interpretation regarding the placement of the overlapping members on the Accused Product. *Id*.

Then, Cole suggested that the overlapping member structure on the Accused Product was actually "'outermost tabs' that form part of a hinge-type connection to the adjoining dock segment" and they do not overlap. Appx250 (Dkt. #55 at 9). Pointing to the specification of the '554 patent, Cole argued that the overlapping members were required to "overlap the entire width of the preceding dock segment to which it is attached." Appx251 (Dkt. #55 at 10). The district court rejected this argument because the "claim language does not require that the overlapping members overlap the entire width of the adjacent dock structure." Appx252 (Dkt. #55 at 11). Therefore, the district court concluded "it is enough if the overlapping members overlap some portion of the adjacent dock segment so that they can be fastened together." Appx253 (Dkt. #55 at 12). As a result, the Accused Product literally infringed the overlapping member limitation of the '554 patent. *Id*.

Kahr argued to the district court that if the Accused Product did not literally infringe, "they nevertheless infringe under the doctrine of equivalents because the apertures in the weld plates on the accused dock perform the same function as the aperture in that portion of the side wall adjacent the cylindrical rim performs in the

patent." Appx254 (Dkt. #55 at 13). Cole opposed this argument stating Kahr waived any argument for infringement under the doctrine of equivalents by failing to assert it in the infringement contentions, that the doctrine of equivalents is barred by prosecution history estoppel, and that the Accused Product is substantially different. Appx254-255 (Dkt. #55 at 13-14).

The district court rejected Cole's assertion that infringement under the doctrine of equivalents was waived because it was identified in the infringement contentions. Appx255 (Dkt. #55 at 14). The court also concluded that "[g]iven the simple structure at issue, the argument that infringement is by equivalents requires little analysis," and Kahr had been focusing on literal infringement. *Id*. The district court also rejected Cole's argument that infringement under the doctrine of equivalents was barred by prosecution history estoppel because the amendment of the '554 patent had "little to do with the equivalents in question." Appx257 (Dkt. #55 at 16). The examiner of the '554 patent rejected the patent in light of Berquist as being obvious, and Kahr's amendment allowed for height adjustment through the use of fasteners. *Id*. The district court found that the Accused Product "uses fasteners to secure dock segments together, hold dock segments to vertical pilings, and allow for height adjustments." Appx258 (Dkt. #55 at 17). The district court held that the rationale for amending the '554 patent "bears no more than a

tangential relation to the equivalent in question," and therefore, prosecution history estoppel did not bar infringement. *Id*.

The district court concluded that a factual question existed on the merits of whether the Accused Product infringed the '554 patent under the doctrine of equivalents. Appx258 (Dkt. #55 at 17). Kahr provided expert testimony during summary judgment that the Accused Product infringed, and the district court felt "Cole should be given an opportunity to offer his own expert's opinion on the issue." Appx259517-518 (Dkt. #55 at 18).

4. Pretrial Decisions of the District Court

Leading up to trial, Kahr filed a motion *in limine* excluding Cole from testifying as an expert witness. In response, Cole affirmed that he would not be offered as an expert witness at trial. Appx316 (Dkt. # 89 at 1). Kahr also filed a motion *in limine* to introduce judicial admissions that invalidity had been waived and preclude defendants from arguing invalidity at trial. Although the district court denied Kahr's motion *in limine*, it clarified for the record "validity is not an issue at trial. These patents are valid." Appx316 (Dkt. #89 at 1). Finally, the district court considered Kahr's motion to amend the Complaint to include Iron Works Construction Company of Bailey's harbor, Inc. as an additional defendant. Appx260-262 (Dkt. # 80). The district court allowed the proposed amendment and would not eliminate any defendants. Appx317 (Dkt. # 89 at 2).

5. The Jury Returns a Verdict in Favor of Kahr Finding Defendants Willfully Infringed

The parties went through a three day jury trial before the district court where the jury heard witness testimony and received documentary evidence regarding the '554 patent and the Accused Product. After considering all the evidence and making credibility determinations for conflicting testimony, the jury returned a verdict in favor of Kahr. Appx517-518 (Dkt. #100). The jury found Iron Works made, used, sold and offered to sell dock structures and assemblies that infringe the asserted claims of the '554 patent, that the infringement was willful and that Cole induced infringement. Appx517 (Dkt. #100 at 1). The jury found $50,000 would fairly compensate Kahr as a reasonable royalty for the infringement. Appx518 (Dkt. #100 at 2). The jury was then asked to complete a Supplemental Special Verdict in which they found infringement on six dock structures and assemblies made and sold by defendants. Appx519-520 (Dkt. #101 at 1-2). The jury awarded a $5,000 reasonable royalty on the defendants' dock structure installed at 2039 Washington Harbor Drive and $9,000 a dock on defendants' dock structures installed at five other locations. *Id*.

6. Defendants File Ensnarement Motion after Trial

After trial, defendants filed the Ensnarement Motion arguing that the Accused Product should not be found infringing because the doctrine of equivalents would ensnare prior art. On September 9, 2016, defendants filed their

Ensnarement Motion and provided their claimed prior art references that would render obvious or anticipate a hypothetical claim encompassing the Accused Product. Appx521-522 (Dkt. #110). The parties briefed this issue before the district court and on November 18, 2016, the district court granted the defendants' Ensnarement Motion. Appx1 (Dkt. #118). For the reasons set forth in greater detail below, Kahr asserts that the district court's Decision and Order granting the Ensnarement Motion must be reversed.

II. SUMMARY OF THE ARGUMENT

The district court improperly interpreted the claims to require that a side wall be made of a single plate, and not two plates welded together. Having thus failed to find literal infringement, the district court sent to the jury the question of whether the defendants infringed the claims under the doctrine of equivalents. The jury so found, and in fact the jury found the claims to be willfully infringed. The district court then considered the claims as construed under the doctrine of equivalents to be not infringed, for the hypothetical claim ensnared the prior art. This was in error for there was no articulated reason as to why any prior art references were anticipatory or would be combined in such a way as to render the claimed subject matter obvious. The only reasoning offered by the defendants and the district court regarding such a combining was that it could have happened or it was obvious. This conclusory statement is not the articulated reasoning needed for

a finding of obviousness. Thus, the claims as construed under the doctrine of equivalents do not ensnare the prior art, and a determination of willful infringement of valid claims should be made by this Court.

III. ARGUMENT

A. Standard Of Review

Kahr bore the burden of proving by a preponderance of the evidence that the dock structure designed and built by defendants infringed at least one claim of the '554 patent. *Under Sea Indus., Inc. v. Dacor Corp.*, 833 F.2d 1551, 1557 (Fed. Cir. 1987). The jury found willful infringement of the '554 patent by the defendants under the doctrine of equivalents. "On appeal, this court must consider the record evidence in the light most favorable to the non-movant [the plaintiff in this case], 'drawing all reasonable inferences in its favor, without disturbing the jury's credibility determinations or substituting our resolutions of conflicting evidence for those of the jury.'" *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1375-76 (Fed. Cir. 2001) (citations omitted). To change these factual findings, defendants must show "that the jury's findings, presumed or express, are not supported by substantial evidence or, if they were, that the legal conclusion(s) implied from the jury's verdict cannot in law be supported by those findings." *Id.* at 1376 (citations omitted). Likewise, "[a]n award of damages by a jury is upheld on appellate review unless it is clearly not supported by evidence,

grossly excessive, or based only on speculation and guesswork." *Id.* (citations omitted).

A finding of infringement also hinges on a proper interpretation of the '554 patent claims. To the extent the district court's analysis of the '554 patent claims led to its decision the Accused Product did not literally infringe, this Court should review the determination *de novo*, especially when the court only reviews evidence intrinsic to the patent. *Teva Pharm. USA, Inc. et al. v. Sandoz, Inc. et al.*, 574 U. S. ____, 135 S.Ct. 831, 834 (2015). "This court reviews a district court's grant of summary judgment by reapplying the standard applicable at the district court." *MEHL/Biophile Int'l Corp v. Milgraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999) (citing *Conroy v. Reebok Int'l, Ltd*., 14 F.3d 1570, 1575 (Fed. Cir. 1994)).

This Court reviews *de novo* the question of whether the doctrine of equivalents ensnares the prior art. *Loctite Corp. v. Ultraseal Ltd*., 781 F.2d 861, 870 (Fed. Cir. 1985) (overruled on other grounds). The burden of producing evidence of prior art to challenge a hypothetical claim rests with an accused infringer. *Streamfeeder, LLC v. Sure-Feed Sys., Inc*., 175 F.3d 974, 984 (Fed. Cir. 1999); *Loctite*, 781 F.2d at 872. The burden is on the patent owner to prove that the "range of equivalents which it seeks would not ensnare the prior art." *Wilson Sporting Goods Co. v. David Geoffrey & Assoc*., 904 F.2d 677, 685 (Fed. Cir. 1990) (overruled on other grounds). More specifically, the Court reviews *de novo*

the district court's finding that the claimed doctrine of equivalents subject matter, or hypothetical claim, was obvious in view of the prior art. *KSR Int'l Co. v. Teleflex Inc*., 550 U.S. 398, 404 (2007).

B. The District Court's Failure to Follow Long-Standing Precedent Leading it to Deny Kahr's Motion for Summary Judgment of Literal Infringement by Defendants' Accused Product Requires Reversal

In the district court's Decision and Order dated December 29, 2015, filed on December 30, 2015, the court denied Kahr's Motion for Summary Judgement of Literal Infringement, but allowed to go to the jury the question of whether there was infringement under the doctrine of equivalents. Appx250, Appx253, Appx259 (Dkt. #55 at 9, 12, 18). At trial, the jury found the defendants had willfully infringed the '554 patent under the doctrine of equivalents. Appx517-518 (Dkt. # 100). The Accused Product has most of the features claimed in the '554 patent, but it uses a different connection mechanism. Appx258 (Dkt. #55 at 17).

In regards to the court's denial of literal infringement, the district court reasoned that a plate welded to a side wall is not the same as the side wall. Appx249-250 (Dkt. #55 at 8-9). Such reasoning is faulty, however, for a long line of precedent, going back to the U.S. Supreme Court in 1877, has found: "That splitting one element into two or more elements often would not avoid infringement if function and results remained the same." 5B Donald S. Chisum,

Chisum on Patents, § 18.04[1][b](2016). Where, as here, one element is formed from two welded together elements, literal infringement is not avoided, for the two welded together pieces still function as a side wall. Further, there is nothing in the language of the '554 patent claims that would require a side wall to end at an end wall. The Accused Product literally infringes the '554 patent claims, as further explained below.

Lastly, the '554 patent independent claims 1 and 4 recite "wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener." Appx57 ('554 3:19-21, 3:44-46). The district court held, in its order dated December 29, 2015, that the claims allow for an aperture in the cylindrical rim, and an aperture in the side wall adjacent the cylindrical rim. Appx244 (Dkt. #55 at 3). Claim 5, dependent from claim 4, recites: "The dock assembly of claim 4 wherein the apertures of the overlapping members, the cylindrical rims and side walls are collinear." Appx57 ('554 4:1-3).

Under the doctrine of claim differentiation, it is clear that claims 1 and 4 do not require the aperture in the portion of the side wall and the aperture in the rim to be collinear. "Differences among claims can also be a useful guide in understanding the meaning of particular claim terms." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) citing *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991). For example, the presence of a dependent claim that

adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim. *See Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004). Differences among claims can also be a useful guide in understanding the meaning of particular claim terms. *Laitram*, 939 F.2d at 1538. For example, the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim. *Liebel-Flarsheim*, 358 F.3d at 910; *see also Arlington Indus., Inc. v. Bridgeport Fittings*, 632 F.3d 1246 (Fed. Cir. 2011).

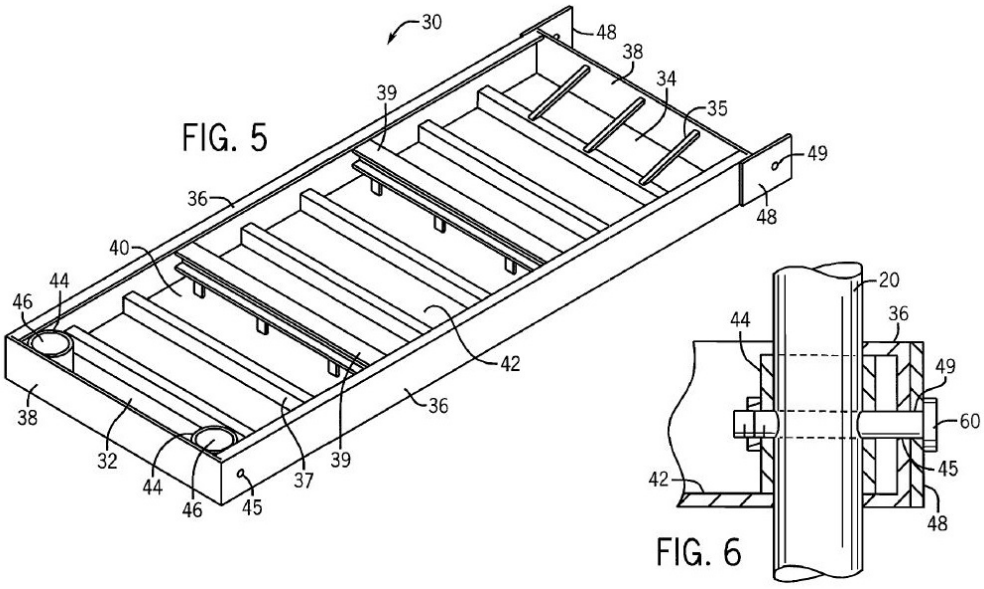
Given that the Accused Product includes a side wall formed in part by a weld plate welded to the side wall, an aperture in its cylindrical rim and an aperture in the weld plate adjacent the cylindrical rim, the Accused Product literally infringes at least the '554 patent claims 1 and 4. For these reasons, the jury's verdict of infringement should be reinstated because there is no reason to conduct an ensnarement analysis if the Accused Product literally infringes.

C. The Jury's Verdict Finding Defendants Willfully Infringed the '554 Patent Under the Doctrine of Equivalents should be Affirmed

Yet even if there were no literal infringement, the jury found, based on the facts and evidence before it, that the Accused Product was a willful infringement of at least one of the '554 patent claims 1, 2, 3, 4, 6 and 7 under the doctrine of

equivalents. Appx517-518 (Dkt. #100). The district court then, in its Decision and Order dated and filed on November 18, 2016, found that an equivalent claim 1 or 4 under the doctrine of equivalents would ensnare the prior art. Appx2 (Dkt. #117 at 1). This ruling is also faulty, for the reasons set forth below.

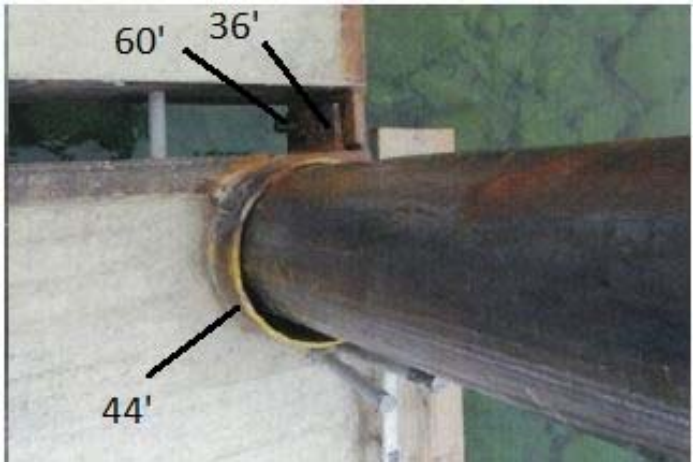
In the '554 patent, as shown in Figures 5 and 6, reproduced below, one end of the claimed dock structure has a side wall 36 by a cylindrical rim 44, and the portion of the side wall adjacent the rim 44 has an aperture 45 formed in it for receiving an fastener 60.



At trial, defendants impermissibly attempted to read the limitation of dependent claim 5 into the independent claims 1 and 4 to support their argument that the Accused Product does not infringe the '554 patent under the doctrine of equivalents. Claim 5 of the '554 patent states: "The dock assembly of claim 4

wherein the apertures of the overlapping members, the cylindrical rims and side walls are collinear." Appx57 ('554 4:1-2). Kahr presented evidence at trial that while claim 5 of the '554 patent would teach construction of the dock assembly with one aperture and fastener, the independent claims 1 and 4 were not limited to this embodiment. Ultimately, the jury found the defendants willfully infringed the '554 patent. Appx517-518 (Dkt. #100).

In the Accused Product, an aperture for receiving a fastener 60 is adjacent the cylindrical rim 44, in a side wall extension 36, as shown in the photo from the Decision and Order reproduced below (with numbering added). Appx6 (Dkt. #117 at 5). This is the doctrine of equivalents subject matter that Kahr proved by a preponderance of evidence was infringing.



At trial, the jury heard ample testimony from Kahr and Wentland that the combination of features in the '554 patent was unique and not something that had existed before. Appx356, Appx 387, Appx390 (TT 166:2-167:14, 291:18-292:11,

293:9-24, 296:12-23, 301:17-25). The jury also weighed the evidence presented by Kahr that all the elements of the Accused Product infringed the '554 patent. Appx369-371, Appx390 (TT 220:6-18, 220:23-221:18, 222:6-10, 225:20-226:17, 303:10-24, 304:20-22). Not only did the jury weigh the testimony and make the factual determination that the Accused Product infringed the '554 patent under the doctrine of equivalents, but the jury determined that defendants' actions resulted in a finding of willful infringement. Appx517-518 (Dkt. # 100). The jury finding of infringement under the doctrine of equivalents negates the need for a further finding of literal infringement, for the fact issues are essentially the same.

D. The District Court's Decision and Order Granting Defendants' Ensnarement Motion Should be Reversed Because it Failed to Consider the Hypothetical Claim as a Whole in Conducting its Ensnarement Analysis and Ignored Evidence that the Combination of Elements was Not Obvious

The district court found no infringement by virtue of an ensnarement defense, finding that a claim covering the doctrine of equivalents subject matter ensnared the prior art, specifically U.S. Patent No. 3,964,221 ("Berquist") in view of a book written by Max Burns, THE DOCK MANUAL, ("Burns") or in view of Kahr's testimony at trial. Appx678-693, Appx695-701 (Dkt. # 112-9, 112-11).

In the court below, the defendants' emphasis was on the aspect of its product that varied from the claimed subject matter, the doctrine of equivalents subject matter, or the double-ear connection. The district court also focused on this

doctrine of equivalents subject matter or the connection mechanism, to the exclusion of all other elements of the '554 patent claims. Appx19 (Dkt. #117 at 18). Having determined that the connection mechanism was a known equivalent, then the district court held Kahr's doctrine of equivalents claim to be obvious. Appx20 (Dkt. #117 at 19).

By definition, the doctrine of equivalents subject matter is known. When one of ordinary skill in the art recognizes that another structure can perform in substantially the same way to obtain the same result, the doctrine of equivalents captures this equivalent structure as infringing. The knowledge of the equivalent subject matter by one of ordinary skill in the art is understood.

What the district court failed to do, and which it should have done, was to look at patentability of the equivalent hypothetical claim as a whole, not just the equivalent subject matter. Appx16-17 (Dkt. #117 at 15-16). Section 103, by its own terms, requires that a determination of obviousness be made by considering the subject matter "as a whole." 35 U.S.C. § 103. When looking at the equivalent hypothetical claim, as a whole, the hypothetical claim is patentable, for it is neither anticipated nor obvious in view of the references offered by Cole and Iron Works.

Cole's and Iron Works' faulty obviousness analysis can be found in Exhibit 4 submitted with their Ensnarement Motion. Appx581-596 (Dkt. #112-4). Exhibit 4 attempted to demonstrate that each element of the hypothetical claim was in the

prior art, and then concluded that because each of these elements are in the prior art, individually, the hypothetical claim is obvious. This exhibit ignored uncontradicted testimony that the combination was unique.

To demonstrate that each element alone is in the prior art is not sufficient to demonstrate obviousness. It is all too common for a patent examiner or a challenger in a PTAB proceeding to identify claim elements that exist in the prior art, then state, in a wholly conclusory fashion, that it would be obvious to combine the prior art references. This approach is insufficient. Obviousness rests on whether one of skill in the art would have a reason to combine the references in a manner that would lead to the claims. Such reasoning is all too frequently missing, as in this case. *See Personal Web Tech., LLC v. Apple, Inc.*, No. 2016-1174, 2017 WL 587132 (Fed. Cir. Feb. 14, 2017).

As this Court and the Supreme Court have said many times, nearly all valid patents have individual elements which, when considered individually, exist in the prior art. "[I]nventions 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*, 550 U.S. at 418-19. The question then becomes whether it would have been obvious to one of ordinary skill in the art to combine the known prior art to obtain the Accused Product. Further, even when a *prima facie* case of obviousness is made, then various secondary considerations

must be evaluated before a conclusion that the hypothetical claim is not patentable can be reached.

To first establish a *prima facie* case of obviousness of the hypothetical claim, defendants needed to articulate a motivation to combine the specific teachings of Berquist, Burns, and Kahr's testimony at trial. But neither the defendants nor the district court articulated a motivation to combine these teachings. Not only did the district court focus exclusively on only one limitation of the hypothetical claim, it did not conduct the rigorous analysis required to find the hypothetical claim obvious.

As the U.S. Supreme Court explained when discussing machine patents in *Deepsouth Packing Co. v. Laitram Corp*., 406 U. S. 518 (1972) (overruled on other grounds):

> The patents were warranted not by the novelty of their elements, but by the novelty of the combination they represented. Invention was recognized because Laitram's assignors combined ordinary elements in an extraordinary way -- a novel union of old means was designed to achieve new ends. Thus, for both inventions, 'the whole in some way exceed[ed] the sum of its parts.' *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U. S. 147, 152 (1950).

Id. at 521-22 (footnote omitted). Defendants cannot ignore the testimony of Kahr and Wentland that the combination of elements for the '554 patent was unique and

there was no structure combining these elements with the Accused Product's connection mechanism.

1. The Hypothetical Claim Proposed by Defendants was Improper

Claim 1 from the '554 patent demonstrates the subject matter allowed by the United States Patent and Trademark Office.[1] Claim 1 is reproduced below.

> 1. A dock structure for use with vertical pilings, the structure comprising: a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a floor; wherein the side walls, the end walls and the floor form a cavity; a pair of cylindrical rims disposed at the first end of the structure, each rim forming a vertically-disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; and a pair of overlapping members formed at the second end of the structure; wherein each overlapping member has an aperture formed in it for receiving a fastener; and wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

Appx57 ('554 at 3:4-12). The district court considered the following to be a hypothetical claim for consideration under the doctrine of equivalents:

> A dock structure for use with vertical pilings, the structure comprising: a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a

[1] The district court also noted the '554 patent, claim 3, needed no revision, claim 3 providing: "3. The dock structure of claim 1 wherein the cavity is filled with concrete." Appx57 ('554 3:25-26).

> floor; wherein the side walls, the end walls and the floor form a cavity; a pair of cylindrical rims disposed at the first end of the structure, each rim forming a vertically-disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; ~~and~~ a pair of overlapping members formed at the second end of the structure; and an extended end plate at the first end, wherein each overlapping member has an aperture formed in it for receiving a fastener; and wherein each cylindrical rim and that portion of the side wall adjacent the rim and the extended end plate has an aperture formed in it for receiving a fastener.

Appx9-10 (Dkt. #117 at 8-9). The hypothetical claim considered by the district court is an improper claim revision, for it adds limitations to the '554 patent claims. *Streamfeeder*, 175 F.3d 974. An equivalent claim, or hypothetical claim, cannot be a narrowing claim.

Given the facts before this Court, a proper hypothetical claim requires no broadening or narrowing amendment. The extended end plate of the Accused Product is a portion of the side wall, so no further change to the claim is needed. Since no change to the claims is needed, and since the defendants waived their right to challenge the validity of the claims at trial, the claims are valid. Even if the validity of the claims is at issue, the claims are presumed to be valid and enforceable. "Under § 282 of the Patent Act of 1952, '[a] patent shall be presumed valid' and '[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.' 35 U. S. C. § 282. We consider

whether § 282 requires an invalidity defense to be proved by clear and convincing evidence. We hold that it does." *Microsoft Corp. v. i4i Ltd. P'ship,* 564 U.S. 91, 95 (2011) (citation omitted).

Considering a proper hypothetical claim, this Court should determine that the hypothetical claim was patentable because it was neither anticipated nor obvious based upon the prior art references cited by defendants. Therefore, the Accused Product was not improperly ensnared and the jury verdict finding infringement should be reinstated.

2. Defendants Failed to Present a *Prima Facie* Case of Obviousness or Anticipation

The issue on appeal can be summarized as to whether the proper hypothetical claim, referenced above, proffered by defendants and the '554 patent Claim 3 are obvious or anticipated in view of Berquist, Gervasi, Burns, and Kahr's testimony, and the evidence of secondary considerations presented at trial. Before any burden shifts to the patentee to prove that the range of equivalents does not ensnare the prior art, the infringer must present a *prima facie* case of obviousness. *KSR,* 550 U.S. at 404.

In this case, the jury heard testimony at trial about how Kahr designed his dock structure and obtained the '554 patent. The jury heard testimony by Kahr and Wentland that the combination of elements making up the '554 patent were novel

and unique. The jury also heard evidence about how the Accused Product was made, that there was evidence defendants copied the design through information provided by a customer, and Cole's testimony about how he constructed all of his docks. After hearing the testimony and seeing the documentary evidence, the jury concluded the defendants willfully infringed the '554 patent. Appx517-518 (Dkt. #100). Any and all factual inferences in regards to the trial testimony as it may relate to these factual underpinnings should be viewed in a light most favorable to Kahr. The Court must "presume that the jury resolved underlying evidentiary conflicts in [the patentee's] favor." *Wilson Sporting Goods*, 904 F.2d at 684.

In order to find that there is evidence of a *prima facie* case of obviousness, a reason for combining the references must be articulated. "But the flexibility afforded by *KSR* did not extinguish the factfinder's obligation to provide reasoned analysis. Instead, *KSR* specifically instructs that when determining whether there would have been a motivation to combine, the 'analysis should be made explicit.'" *In re Van Os*, 844 F.3d 1359, 1361 (Fed. Cir. 2017) citing *KSR*, 550 U.S. at 418. It is not enough for the fact finder to simply deem the combination of elements would have been common sense. "Absent some articulated rationale, a finding that a combination of prior art would have been 'common sense' or 'intuitive' is no different than merely stating the combination 'would have been obvious.' Such a

conclusory assertion with no explanation is inadequate to support a finding that there would have been motivation to combine." *Id*.

After reviewing the record below, the only attempt made by defendants to articulate a reason to combine the cited references was the following general statement by the defendants: "the Dock Manual contemplates that the features it describes and discloses will be combined to build docks." Appx813 (Dkt. # 115 at 13). This is not a sufficiently articulated reason. The only reason offered by the district court in support of combining the references was as follows:

> Defendants produced evidence that all of the hypothetical claims' limitations were well-known in the art. Although The Dock Manual does not describe one dock that contains every element, the book in its entirety does disclose every limitation of the hypothetical claim. Further, the book describes various methods of designing, building, and maintaining a dock. A builder can pick and choose any combination of features to create the structure. Defendants contend that every element discussed in the book in relation to the accused docks does what it has always done and yields predictable results. This is sufficient to meet defendants' production burden.

Appx19 (Dkt. #117 at 18). The Decision and Order thus only concludes that elements could have been combined, but fails to articulate any reason as to why the hypothetical claim elements would have been combined. Furthermore, the district court reached this conclusion while ignoring testimony by Kahr and Wentland that a combination of the elements was not something they had seen in the prior art.

Without such an articulated reason, defendants and the district court have not made out a *prima facie* case of obviousness.

Unless defendants can point to something in the prior art that would embody all of the claims of the '554 patent, or their equivalents, within the same dock structure, the Accused Product is not anticipated or rendered obvious. *See We Care, Inc. v. Ultra-Mark Int'l Corp*., 930 F.2d 1567, 1571 (Fed. Cir. 1991). Defendants try to evade this requirement of showing that every claim of the '554 patent was anticipated or obvious by pointing to several different and individual illustrations of different components of the '554 patent. They miss the point. The hypothetical claim is not obvious because there is no evidence the combination of elements would have been known to own of ordinary skill in the art.

IV. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Plaintiff-appellant, Michael M. Kahr respectfully requests:

1. That the Court reverse the district court's summary judgment order denying literal infringement of the '554 patent and reinstate the jury's verdict finding defendants willfully infringed, that Cole induced infringement and that $50,000 would fairly compensate Kahr as a reasonable royalty; or in the alternative,

2. That the Court reverse the district court's order granting defendants motion for non-infringement as a matter of law pursuant to ensnarement defense

and reinstate the jury's verdict finding Iron Works willfully infringed the '554 patent under the doctrine of equivalents, that Cole induced infringement and that $50,000 would fairly compensate Kahr as a reasonable royalty.

Dated: February 21, 2017

Respectfully submitted,

/s/Sherry D. Coley

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25 and Federal Circuit Rule 25, I certify that I caused this Brief and Addendum to be served via the Federal Circuit's CM/ECF system on counsel of record for the Defendants-Appellants:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: February 21, 2017

/s/Sherry D. Coley
Sherry D. Coley

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 9,069 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Times New Roman type.

Dated: February 21, 2017

/s/Sherry D. Coley
Sherry D. Coley
Attorney for the Plaintiff-Appellant, Michael M. Kahr

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AO 450 (Rev. 5/85) Judgment in a Civil Case ⊗

United States District Court

EASTERN DISTRICT OF WISCONSIN

MICHAEL M. KAHR,
Plaintiff,

v.

MICHAEL E. COLE,
and IRON WORKS CONSTRUCTION COMPANY, LLC
Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 13-C-1005

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff takes nothing and the case is DISMISSED.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: November 18, 2016.

JON W. SANFILIPPO
Clerk of Court

s/ Cheryl A. Veazie
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL M. KAHR,

Plaintiff,

v. Case No. 13-C-1005

MICHAEL E. COLE and
IRON WORKS CONSTRUCTION CO. LLC,

Defendants.

DECISION AND ORDER

Plaintiff Michael Kahr brought this action against Defendants Michael Cole and Iron Works Construction Co. LLC contending that several of Defendants' dock structures infringe various claims of a patent owned by Plaintiff, U.S. Patent No. 8,348,554 (the "'554 Patent"). After a three day trial, the jury returned a verdict of infringement under the doctrine of equivalents and awarded Plaintiff a total royalty of $50,000.00. Defendants' have filed two post-trial motions arguing the Court should set aside the jury's verdict and enter judgment as a matter of law pursuant to Rule 50(a), or alternatively, enter judgment of noninfringement as a matter of law pursuant to the ensnarement defense. (ECF Nos. 95 and 110.) For the reasons below, I find that the asserted scope of equivalency ensnares the prior art. Accordingly, Defendants' motion for judgment of noninfringement as a matter of law based on the ensnarement defense is granted.

BACKGROUND

A. The Proceedings

Plaintiff designs and constructs permanent dock structures primarily for residents in northeastern Wisconsin. His company, Death's Door Marine, Inc., is located in Sister Bay, Wisconsin and competes directly with Iron Works Construction Company, LLC, owned by Cole. On September 6, 2013, Plaintiff sued Defendants accusing them of infringing Claims 1–4, 6, and 7 of his '554 Patent. The central dispute in this case is whether the accused docks infringe under the doctrine of equivalents. After a three day jury trial in August 2016, the jury found that Defendants' dock structures infringed on the asserted claims of the '554 patent, that Defendants willfully infringed, that Iron Works induced Cole to infringe, and that $50,000.00 would fairly compensate Plaintiff for Defendants' infringement as a reasonable royalty.

B. The '554 Patent

The '554 Patent describes the design for interlocking and adjustable concrete dock segments and the methods of manufacturing and constructing such assemblies. Specifically, the patent "relates to a dock structure that has enhanced integrity against the elements, and against the freeze-thaw cycles experienced in northern climates." ('554 Patent, col. 1 ll. 14–17, ECF No. 112-1.)

Plaintiff claims Defendants infringed Claims 1–4, 6, and 7 of the '554 Patent. Claim 1 reads as follows:

> A dock structure for use with vertical pilings, the structure comprising: a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a floor; wherein the side walls, the end walls and the floor form a cavity; a pair of cylindrical rims forming a vertically-disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; and a pair of overlapping members formed at the second end of the structure; wherein each overlapping member has an aperture

> formed in it for receiving a fastener; and wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

('554 Patent, ECF No. 112-1.) Claims 2 and 3 are dependent upon Claim 1. Claim 2 states, "The dock structure of claim 1 further comprising at least one reinforcement member extending between the opposing side walls." (*Id.*) Claim 3 reads, "The dock structure of claim 1 wherein the cavity is filled with concrete." (*Id.*) Claim 4, an independent claim, states:

> A dock assembly for use with a plurality of vertical pilings, the assembly comprising: at least one dock element, the element comprising a pan-like structure having a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the element, and a floor; wherein the side walls, the end walls and the floor form a cavity within the element; a pair of cylindrical rims disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it; and a pair of overlapping members formed at the second end of the dock element; wherein each overlapping member has an aperture formed in it for receiving a fastener; and wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

(*Id.*) Claims 6 and 7 are dependent upon Claim 4. Claim 6 reads, "The dock assembly of claim 4 further comprising at least one reinforcement member extending between the opposing side walls of the dock element." (*Id.*) Finally, Claim 7 states, "The dock assembly of claim 4 wherein the cavity of the pan-like structure of each element is filled with concrete." (*Id.*)

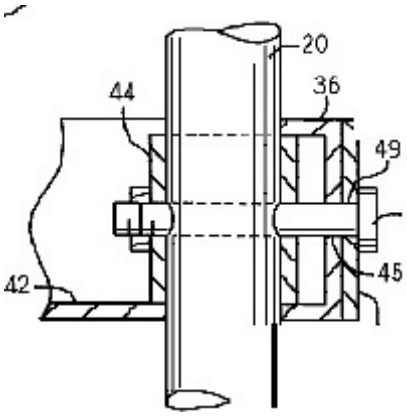
Claim 1 and Claim 4, originally Claim 5 in Plaintiff's patent application, were initially rejected by an Examiner at the U.S. Patent and Trademark Office under 35 U.S.C. § 103 as being obvious over U.S. Patent 3,964,221 (the "Berquist Patent"). Plaintiff amended these claims by including the words "wherein each overlapping member has an aperture formed in it for receiving a fastener; and wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener." (ECF No. 112-14.) This language clarified that the use and method

of a fastener allowed the height of the dock structure to be adjustable, a feature that was not present in the Berquist invention. After the Examiner received Plaintiff's claim amendments and remarks, he granted the '554 Patent on January 8, 2013.

C. The Accused Docks

The primary difference between the '554 Patent docks and the accused docks is the connection mechanism. The '554 Patent describes a dock structure, dock assembly, and dock constructing method for a permanent dock structure that is attached to vertical pilings. The patented structure permits multiple dock segments to be connected to create the desired length and straight, "T-shaped," or "L-shaped" configurations. ('554 Patent, ECF No. 112-1.) Each dock segments' side and end walls, and a floor form a cavity which is filled with concrete after the structure is assembled. Each dock segment also has two cylindrical openings through which the vertical pilings pass, and each segment overlaps with the next. Each segment's side walls and cylindrical rims contain apertures, or holes. The holes allow a single fastener to both secure a set of dock segments together and fasten the dock assembly to the pilings. (*Id.*)

Specifically, each dock segment has a pair of cylindrical rims at the first end through which a piling passes. The second end of an adjacent dock segment overlaps with this section of the first end of the next dock segment. The holes through which the fasteners are intended to pass are in the overlapping members on the side walls adjacent to the cylindrical openings of the second end and the cylindrical openings on the first end. Although the claims do not expressly state, Figure 6 below shows that a pin or bolt fastener is inserted through the hole in the overlapping member of one dock segment through the holes in the sidewall and one side of the cylindrical opening, the piling, and then the other side of the cylindrical opening before the pin is capped.



('554 Patent, fig. 6, ECF No. 112-1.) In short, a single fastener not only holds the dock segments together but also attaches the dock to the piles.

While the accused docks have many of the features claimed in the '554 patent, they use a different connection mechanism. As depicted in Image 1 below, because the accused docks do not have a hole in the dock segment's side wall, the accused docks cannot use a single fastener to connect the dock segments and attach the dock to the piles. Instead, the accused docks use two connection mechanisms—one fastening the dock segments together and another attaching the dock to the pilings.



(Tr. Ex. 1035, at 3.)

ANALYSIS

Defendants argue that judgment as a matter of law on all of Plaintiff's claims is proper because the undisputed evidence at trial, viewed in the light most favorable to Plaintiff, does not provide a reasonable jury with legally sufficient evidence to support the verdict. Defendants also assert that the '554 Patent's scope of equivalency ensnares prior art and that the Court should enter judgment of non-infringement as a matter of law. For the reasons discussed below, I find that the asserted scope of equivalency ensnares the prior art. I therefore decline to address Defendant's alternative arguments.

I. The Ensnarement Defense Standard

If a patentee invokes the doctrine of equivalents as a theory of infringement, the alleged infringer may assert the ensnarement defense, one of the various "legal limitations" on the doctrine of equivalents. *DePuy Spine, Inc. v. Medtroni Sofamor Danek, Inc.*, 567 F.3d 1314, 1322 (Fed. Cir. 2009). Under the ensnarement defense, there can be no infringement if the scope of the equivalency would cover what is considered prior art. *Intendis GMBH v. Glenmark Pharm. Inc., USA*, 822 F.3d 1355, 1363 (Fed. Cir. 2016). "[A] patentee should not be able to obtain, under the doctrine of equivalents, coverage which he could not lawfully have obtained from the PTO by literal claims." *Wilson Sporting Goods Co. v. David Geoffrey & Assocs.*, 904 F.2d 677, 684 (Fed. Cir. 1990), *overruled in part on other grounds*, *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83 (1993). As such, "ensnarement bars a patentee from asserting a scope of equivalency that would encompass, or 'ensnare,' the prior art." *DePuy Spine*, 567 F.3d at 1322. Because prior art always limits what an inventor could have claimed, it also "limits the range of permissible equivalents of a claim." *Wilson Sporting Goods*, 904 F.2d at 684. The application of the ensnarement defense is decided by

the court, "either on a partial motion for summary judgment or a motion for judgment as a matter of law at the close of evidence and after the jury verdict." *DePuy Spine*, 567 F.3d at 1324 (quoting *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 36, 39 n.8 (1997)).

To determine whether the patent would ensnare the alleged equivalent, courts generally engage in the two-step hypothetical claim analysis. *DePuy Spine*, 567 F.3d at 1324 (citing *Ultra–Tex Surfaces, Inc. v. Hill Bros. Chem. Co.*, 204 F.3d 1360, 1364 (Fed. Cir. 2000)). The accused infringer has the burden of producing evidence of prior art to challenge a hypothetical claim. *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1380 (Fed. Cir. 2001) (citing *Streamfeeder, LLC v. Sure–Feed, Inc.*, 175 F.3d 974, 984 (Fed. Cir. 1999)). Then the burden shifts to the patentee to prove the patentability of the hypothetical claim. *Id.* However, this burden does not undermine the presumed validity of the plaintiff's actual patent claims. *Wilson Sporting Goods*, 904 F.2d at 685. The plaintiff's claims will remain valid whether or not he is entitled to the range of equivalents sought in the case. *Id.*

Under the hypothetical claim analysis, the parties must first "construct a hypothetical claim that literally covers the accused device." *DePuy Spine*, 567 F.3d at 1324. Second, the court assesses the prior art introduced by the accused infringer to "determine whether the patentee has carried its burden of persuading the court that the hypothetical claim is patentable over the prior art." *Id.* at 1325. Ultimately, if the hypothetical claim would be unpatentable under 35 U.S.C. § 102, anticipation, or 35 U.S.C. § 103, obviousness, then "the accused device will be held noninfringing as a matter of law." *Interactive Pictures*, 274 F.3d at 1380.

In other words, courts determine whether a hypothetical claim containing both the literal claim scope and the accused device can be crafted without ensnaring the prior art. *Intendis GMBH*,

822 F.3d at 1363. If the hypothetical claim would not be patentable in light of the prior art, the accused product does not infringe the patent as a matter of law because the patent's scope would improperly ensnare the prior art. *Wilson Sporting Goods*, 904 F.2d at 684. However, if the patentee proves that the hypothetical claim is patentable over the prior art, the patent would not be found to ensnare the prior art. *Id.* As such, the accused product would infringe the patent under the doctrine of equivalents. *Id.*

II. The Hypothetical Claim

Again, the first step of the ensnarement analysis is to construct a hypothetical claim that literally covers the accused device. *DePuy Spine*, 567 F.3d at 1324. Plaintiff asserts infringement under the doctrine of equivalents of Claims 1–4, 6, and 7. Thus, a relevant hypothetical claim derived from Claim 1 of the '554 Patent would appear as follows (with a strike-through indicating a deletion and italics emphasizing additions):

A dock structure for use with vertical pilings, the structure comprising:

> a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a floor;
>
> wherein the side walls, the end walls, and the floor form a cavity;
>
> a pair of cylindrical rims disposed at the first end of the structure, each rim forming a vertically disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; ~~and~~
>
> a pair of overlapping members formed at the second end of the structure; ***and***
>
> ***an extended end plate at the first end***;
>
> wherein each overlapping member has an aperture formed in it for receiving a fastener; and

> wherein each cylindrical rim ~~and that portion of the side wall adjacent the rim~~ ***and the extended end plate*** has an aperture formed in it for receiving a fastener.

Claims 2 and 3 are dependent upon Claim 1 and require no changes. A hypothetical claim based on Claim 4, a claim that discloses the elements of dock assembly rather than the dock structure, would read:

> A dock assembly for use with a plurality of vertical pilings, the assembly comprising:
>
> > at least one dock element, the element comprising a pan-like structure having a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the element, and a floor;
> >
> > wherein the side walls, the end walls and the floor form a cavity within the element;
> >
> > a pair of cylindrical rims disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it; ~~and~~
> >
> > a pair of overlapping members formed at the second end of the dock element; ***and***
> >
> > ***an extended end plate at the first end;***
> >
> > wherein each overlapping member has an aperture formed in it for receiving a fastener; and
> >
> > wherein each cylindrical rim ~~and that portion of the side wall adjacent the rim~~ ***and the extended end plate*** has an aperture formed in it for receiving a fastener.

Claims 6 and 7 are dependent upon Claim 4 and do not require any changes. With this hypothetical claim in mind, the Court turns to whether the hypothetical claim is patentable.

III. Patentability of Hypothetical Claim

After the hypothetical claim is created, the court must "assess the prior art introduced by the accused infringer and determine whether the patentee has carried its burden of persuading the court that the hypothetical claim is patentable over the prior art." *DePuy Spine*, 567 F.3d at 1325 (citing *Interactive Pictures*, 274 F.3d at 1380). Defendants contend that Plaintiff could not have patented a hypothetical claim covering the accused docks because such a claim would have been anticipated or rendered obvious by two prior art references: Max Burns, THE DOCK MANUAL (1999) and the Berquist patent, U.S. Patent No. 3,964,221.

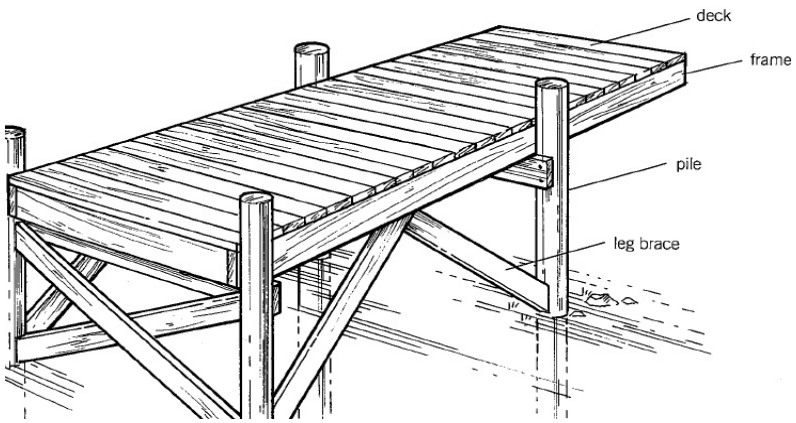
A. Anticipation Analysis

A patent is anticipated if it "was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent." 35 U.S.C. § 102(b). Anticipation is a question of fact, and the challenger of the patent's validity has the burden of proving anticipation by clear and convicing evidence. *See Glaxo Grp. Ltd. v. Apotex, Inc.*, 376 F.3d 1339, 1348 (Fed. Cir. 2004); *TriMed, Inc. v. Stryker Corp.*, 608 F.3d 1333, 1343 (Fed. Cir. 2010). For a claim to be anticipated, a single prior art reference must disclose each and every limitation either expressly or inherently. *Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1377, 1379 (Fed. Cir. 2003). "[A] prior art reference may anticipate without disclosing a feature of the claimed invention if that missing feature is necessarily present, or inherent, in the single anticipating reference." *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1343 (Fed. Cir. 2005) (quoting *Schering Corp.*, 339 F.3d at 1377); *see also Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1376 (Fed. Cir. 2005) ("Under the principles of inherency, if the prior art necessarily functions in accordance with, or includes, the claims

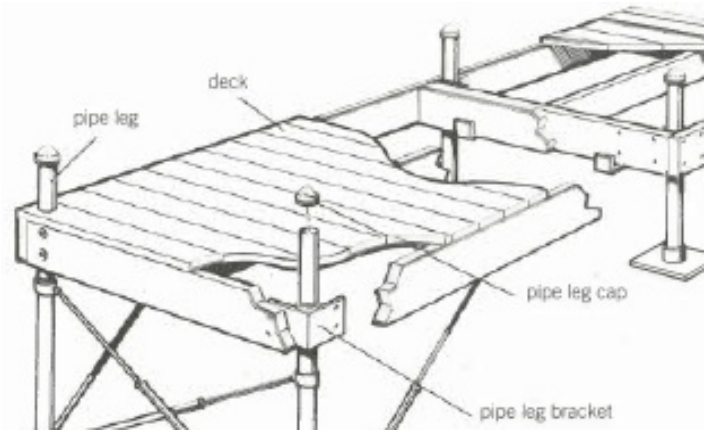
limitations, it anticipates."); *MEHL/Biophile Int'l Corp. v. Milgraum*, 192 F.3d 1362, 1366 (Fed. Cir. 1999) ("Where . . . the result is a necessary consequence of what was deliberately intended, it is of no import that the article's authors did not appreciate the results."). An anticipating reference must be "enabling; that is, the description must be such that a person of ordinary skill in the field of the invention can practice the subject matter based on the reference, without undue experimentation." *Sanofi–Synthelabo v. Apotex, Inc.*, 550 F.3d 1075, 1082 (Fed. Cir. 2008).

Plaintiff claims Defendants did not meet their production burden because they did not point to one structure that encompasses every claim of the '554 Patent to demonstrate that the '554 Patent was anticipated. Plaintiff contends that the '554 Patent was issued due to the combination of its different components along with its unique connection method. However, Defendants were not pointing to prior art to illustrate that the '554 Patent was anticipated. Instead, they produced prior art in an attempt to show that the accused docks were anticipated and obvious.

Defendants contend that the hypothetical claim is unpatentable by anticipation in light of a book written by Max Burns, THE DOCK MANUAL. This book is part of the prior art because it was published in 1999. THE DOCK MANUAL describes every aspect of dock construction: designing, building, and maintaining. Like the hypothetical claim, the book teaches of a permanent piling dock, a "heavy-weight, long-term version of the pipe dock." (Burns, *supra* at 56, ECF No. 112-10.)



(Burns, *supra* at 57, ECF No. 112-10 (illustration of a permanent piling dock) [hereinafter Image 2].) It also discusses the elements of a pipe dock.



(Burns, *supra* at 47, ECF No. 112-10 (illustration of a pipe dock) [hereinafter Image 3].)

I find that THE DOCK MANUAL does not disclose each and every limitation of the hypothetical claim, either expressly or inherently. Defendants heavily rely on the depictions of the pipe dock in Image 3 to suggest that the book describes every element in the hypothetical claim. For instance, Image 3 illustrates a first and second end of a dock segment, a pair of opposing side walls and end walls at each end of the structure, a floor, as well as a cavity. It also depicts a cylindrical rim at the end of the structure. *Id.* Each rim forms a cylindrical opening in the floor through which a pipe can be received. *Id.* While the piling dock is the "heavy-weight, long-term version of the pipe dock," (Burns, *supra* at 56, ECF No. 112-10), the Court cannot infer that the elements in the pipe dock are anticipated as elements of the piling dock. Accordingly, Defendants have not met their burden to present ample evidence illustrating that the hypothetical claim was anticipated by prior art.

B. Obviousness Analysis

Defendants claim that even if the hypothetical claim was not anticipated by THE DOCK MANUAL, it is obvious in light of the prior art. A patent is invalid as obvious "if the differences

between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." 35 U.S.C. § 103(a). Obviousness is a question of law based on the following underlying factual determinations: "(1) the scope and content of the prior art, (2) the differences between the prior art and the claims at issue, (3) the level of ordinary skill in the art, and (4) any relevant secondary considerations, such as commercial success, long felt but unsolved needs, and the failure of others." *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1237 (Fed. Cir. 2010) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966)). "The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 1727, 1739 (2007).

However, the "predictable result" refers not only to the expectation that elements of the prior art are "capable of being physically combined but also that the combination would have worked for its intended purpose." *DePuy Spine*, 567 F.3d at 1326 (citation omitted). As such, the combination of elements is obvious "when a patent 'simply arranges old elements with each *performing the same function* it had been known to perform' and yields no more than one would expect from such an arrangement." *KSR*, 550 U.S. at 1740 (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976)). On the other hand, an invention is not obvious "if the prior art indicated that the invention would not have worked for its intended purpose or otherwise taught away from the invention." *DePuy Spine*, 567 F.3d at 1326. Obviousness must be assessed at the time the invention was made, and the court must avoid engaging in hindsight analysis. *In re Cyclobenzaprine Hydrochloride Extended–Release Capsule Patent Litig.*, 676 F.3d 1063, 1073 (Fed. Cir. 2012) (citation omitted).

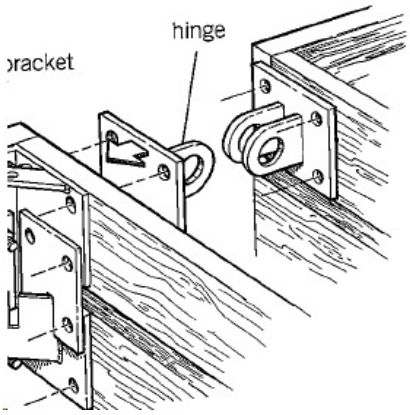
A patent challenger may assert that a patent is obvious because a person of ordinary skill in the art could have combined several prior art references to arrive at the claimed invention. *DePuy Spine*, 567 F.3d at 1324. In *DePuy Spine*, the defendant, accused of infringing various claims of a patent for a spinal implant device, argued that the hypothetical claim would have been obvious in light of two patents, referred to as the Puno and Anderson Patents. *Id.* The hypothetical claim reflected the defendant's use of a receiver member with a "conically-shaped" portion, creating a rigid screw, rather than the patented receiver member's "spherically-shaped" portion. *Id.* at 1320. The Puno Patent contained all of the hypothetical claim elements except for the "compression member," which was used to press the screw head against the receiver member. *Id.* at 1325. The defendant relied on the Anderson Patent, which did contain a compression member, to fill the gaps left by the Puno Patent. *Id.* At the ensnarement hearing, when asked whether a person of ordinary skill would combine the Anderson and Puno Patents to achieve the screw covered by the hypothetical claim, the plaintiff's expert answered, "I think so." *Id.* at 1326. The defendant argued that this combination of patents, along with the expert's testimony, was sufficient to render the hypothetical claim obvious. *Id.* Conversely, the plaintiff argued that the Puno Patent actually undermined the defendant's obviousness argument because it "taught away" from the defendant's use of a rigid screw. *Id.* at 1326.

The district court denied the defendant's ensnarement defense and held that the combination of patents was not predictable under the prior art. *Id.* at 1326. The Federal Circuit affirmed the district court's decision, agreeing that the Puno Patent did not just express a preference for one type of screw but warned against using a rigid screw in the exact way the defendant did. *Id.* at 1327. Accordingly, the court found that a person of ordinary skill in the art would have been deterred from

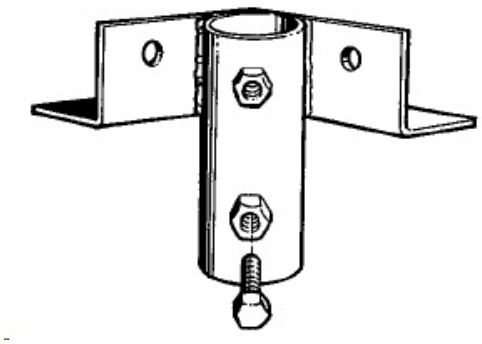
combining the patents in the way the defendant suggested, and ultimately concluded that the hypothetical claim did not ensnare the prior art. *Id.*

Here, Defendants produced two references, the Berquist Patent and THE DOCK MANUAL, in combination with testimony from Kahr and David Wentland, Plaintiff's expert witness, that they believe render the hypothetical claim obvious. As the Berquist Patent pertains to Hypothetical Claims 1 and 4, the patent discloses a dock structure comprising first and second ends, a pair of opposing sidewalls, and a floor; wherein the end walls, the sidewalls, and the floor form a cavity. (Berquist Patent, fig. 4, ECF No. 112-11.) As previously noted, Images 2 and 3 of THE DOCK MANUAL portray ends of a dock segment, opposing side walls and end walls, a floor, and a cavity. (Burns, *supra* at 47–48, ECF No. 112-10.) The Berquist Patent and THE DOCK MANUAL also depicts a pair of cylindrical rims at the first end of the structure and a cylindrical opening in the floor which are designated to receive posts. (Berquist Patent, figs. 4–5, ECF No. 112-11; Burns, *supra* at 47, ECF No. 112-10.) Plaintiff agreed at the trial that docks built before the '554 Patent incorporated sleeves to receive pilings. (Kahr Tr. Test. 162:9–11, ECF No. 103.) The Berquist Patent contains overlapping members including a top and bottom surface. (Berquist Patent, fig. 8, ECF No. 112-11.)

However, the Berquist Patent does not contain the last three elements of Hypothetical Claims 1 and 4, the elements describing the accused docks' connection mechanisms. Instead, Defendants rely on THE DOCK MANUAL and admissions of Plaintiff and his expert witness to show that these elements of Hypothetical Claims 1 and 4 are obvious. The book depicts a hinge with an extended end plate capable of receiving a fastener.



(Burns, *supra* at 81, ECF No. 112-10 [hereinafter Image 4].) When asked on cross-examination at the trial whether docks constructed before Plaintiff's and Defendants' docks used a double-ear connection, that is, a connection mechanism where plates are welded to both dock segments to receive a connector, Wentland agreed that he had seen it on floating docks. (Wentland Tr. Test. 337:12–15, 339:20–22, ECF No. 104.) Defendants' also refer to Wentland's deposition where he was asked whether he had seen docks that incorporated a connection mechanism like that in the accused docks or where two plates were either bolted or pinned together. Wentland answered, "Absolutely." (Wentland Dep. 67:6–16, ECF No. 112-8.) Finally, Defendants rely on Image 4 as well as a cylindrical rim and alternative bracket (Image 5 below) found in THE DOCK MANUAL to illustrate an aperture in a cylindrical rim and end plate capable of receiving a fastener.



(Burns, *supra* at 48, ECF No. 112-10 [hereinafter Image 5].) Both Plaintiff and Wentland agreed on cross-examination that prior to Plaintiff's invention, docks used pins to hold the dock to the pilings. (Kahr Test. Tr. 162:5–8, ECF No. 103; Wentland Test. Tr. 333:20–23, ECF No. 104.)

As to Hypothetical Claims 2 and 6, the Berquist Patent depicts grooves that function to reinforce the top and bottom of the dock. (Berquist Patent, Fig. 4–5, ECF No. 112-11.) THE DOCK MANUAL further explains that "[s]teel reinforcement should be placed before the concrete is poured." (Burns, *supra* at 96, ECF No. 112-10.) Finally, regarding Hypothetical Claims 3 and 7, THE DOCK MANUAL indicates that the framing materials for piling docks are "usually metal or wood, while the decking can be of wood, metal, concrete, or plastic." (Burns, *supra* at 58, ECF No. 112-10.) It explains that "[c]oncrete will flow into all sorts of shapes and sizes, just like molten plastic or metal. This opens up a Pandora's box of potential curves and angles — anything is possible as long as the form can be built." (Burns, *supra* at 75, ECF No. 112-10.) The book notes that "[f]orms hold the concrete in place until it sets." (Burns, *supra* at 96, ECF No. 112-10.) Defendants contend that this information is sufficient to render all of the hypothetical claims obvious.

Plaintiff asserts that Defendants did not retain an expert witness to proffer an opinion that the combination of elements embodied in the '554 Patent was obvious. (Br. in Opp. at 6, ECF No. 113.) Again, Defendants contend that the hypothetical claim, not the '554 Patent, is obvious. Moreover, in a case where the technology is easily understandable and the content of prior art, the scope of the patent claim, and the level of ordinary skill in the art are not in material dispute, the determination of obviousness may include "recourse to logic, judgment, and common sense, in lieu of expert testimony." *Wyers*, 616 F.3d at 1239 (citing *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1329 (Fed. Cir. 2009); *Ball Aerosol & Specialty Container, Inc. v. Limited Brands,*

Inc., 555 F.3d 984, 993 (Fed. Cir. 2009)). Here, because the disclosures from the prior art were "easily discernable from their drawings and written descriptions, no testimony, expert or otherwise, regarding their scope or content" is required. *See Chore-Time Equip., Inc. v. Cumberland Corp.*, 713 F.2d 774, 779 (Fed. Cir. 1983). Therefore, Defendants were not required to produce their own expert to illicit testimony regarding the obviousness of the hypothetical claim.

Defendants' presentation of prior art combined with the testimony of Plaintiff and Wentland satisfied their burden to produce evidence that challenges the hypothetical claim. Defendants produced evidence that all of the hypothetical claims' limitations were well-known in the art. Although THE DOCK MANUAL does not describe one dock that contains every element, the book in its entirety does disclose every limitation of the hypothetical claim. Further, the book describes various methods of designing, building, and maintaining a dock. A builder can pick and choose any combination of features to create the structure. Defendants contend that every element discussed in the book in relation to the accused docks does what it has always done and yields predictable results. This is sufficient to meet Defendants' production burden.

Once the defendant satisfies his production burden, the burden shifts to the patentee to prove the patentability of the hypothetical claim. *Interactive Pictures*, 274 F.3d at 1380. However, unlike the plaintiff in *DePuy Spine*, Plaintiff did not discuss the prior art in relation to the hypothetical claim or challenge Defendants' assertion that the predictable consequences of combining the features in THE DOCK MANUAL—or the aggregate of the elements of the Berquist Patent, THE DOCK MANUAL, and the trial testimony—render the hypothetical claim obvious. Instead, Plaintiff attests that the '554 Patent was a unique combination of elements never seen before. (Br. in Opp. at 7, ECF No. 113.) Because Plaintiff did little to show that the hypothetical claim was patentable, he has failed to satisfy

his ultimate burden. Having failed to meet that burden, the range of equivalents for his patent cannot be extended so as to result in infringement by Defendants' docks. Accordingly, the hypothetical claim is unpatentable because it is obvious.

CONCLUSION

Therefore, Defendants' motion for judgment of noninfringement as a matter of law (ECF No. 110) is **GRANTED**. Defendants' motion for judgment as a matter of law pursuant to Rule 50(a) (ECF No. 95) is **DENIED** as moot. This case is dismissed. The Clerk is directed to enter judgment for Defendants.

SO ORDERED this 18th day of November, 2016.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL M. KAHR,

Plaintiff,

v. Case No. 13-CV-1005

MICHAEL E. COLE

and

IRON WORKS CONSTRUCTION COMPANY, LLC,

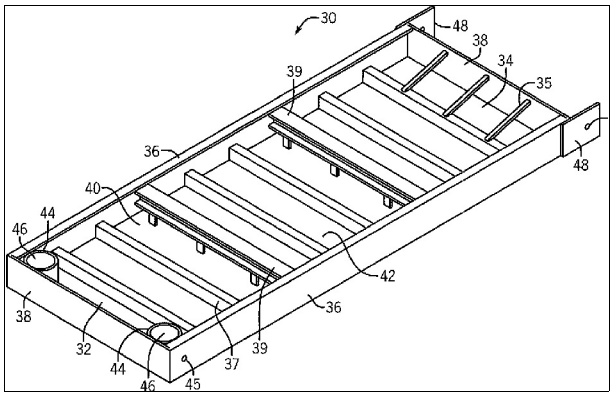
Defendants.

DECISION AND ORDER

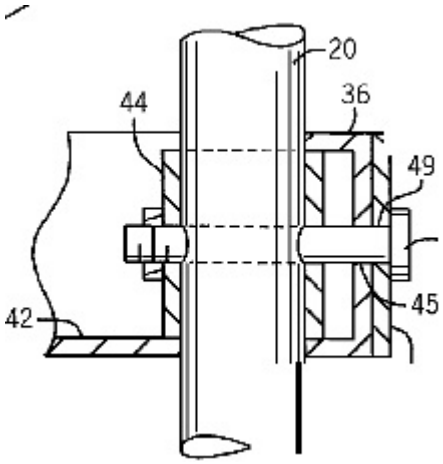
Plaintiff Michael M. Kahr filed this action for patent infringement against Defendants Michael E. Cole and Iron Works Construction Company LLC (collectively "Cole") on September 6, 2013. The patent at issue is U.S. Patent No. 8,348,554 (the '554 patent). The subject matter of the '554 patent is a permanent dock structure and assembly used in the marine industry, as well as the method for constructing the dock structure and assembly. The '554 patent describes the design for interlocking and adjustable concrete dock segments which can withstand cold northern winters. Kahr claims that docks manufactured and sold by Cole literally infringe on the '554 patent. Kahr argues in the alternative that if the accused dock does not infringe literally, it infringes under the doctrine of equivalents. The case is before the court on cross motions for summary judgment on the issue of infringement. For the reasons that follow, both motions will be denied.

BACKGROUND

The '554 patent describes a dock structure, dock assembly and dock constructing method for a permanent dock structure that is attached to vertical pilings. The patented structure allows for multiple segments to be connected to form docks of a variety of lengths and configurations. ('554 Patent, col. 1, ll. 51-55.) Each segment has two cylindrical openings through which the vertical pilings pass. ('554 Patent, col. 1, ll. 44-46.) Various dock configurations are available, with the possibility of straight lines, "T-shaped" or "L-shaped" configurations. ('554 Patent, col. 2, ll. 64.) Each segment overlaps the next, with apertures or holes through the side walls and cylindrical rims to the overlapping member. ('554 Patent, col. 4, l. 1-3.) These holes allow for a single fastener to hold together a set of dock segments and fasten the dock assembly to the pilings. ('554 Patent, col. 3, ll. 42-46.) The segments are connected both to each other and the pilings in such a way that allows the height of the dock to be adjusted in accordance with the water level. ('554 Patent, col. 1, ll. 30-33.) Side and end walls, and a floor form a cavity which is filled with concrete after assembly of the structure. ('554 Patent, col. 1, ll. 34-36.) Other elements may be added to the dock structure, including wood facing, bumpers, or lift systems. ('554 Patent, col. 2, l. 64 to col. 3, l. 2.) The drawing below depicts the main features of the patent as it appears before the assembly is filled with concrete:



Cole denies that his docks infringe the '554 patent. He contends that the docks he constructs do not include two separate limitations in the '554 patent, both dealing with the location of the apertures, or holes, in the structural members through which fasteners are intended to pass to connect the dock segments to the vertical pilings and to each other. Claim 1 of the '554 patent describes the dock segments as having a first end 32 with a pair of cylindrical openings 46 through which the vertical pilings pass and a second end 34 with overlapping members 48. The holes through which the fasteners are intended to pass are in the overlapping members on the second end 49 the sidewalls adjacent to the cylindrical openings 45 and the cylindrical openings on the first end. Although the claims do not expressly so state, it appears from Figure 6 below that a pin or bolt fastener is inserted through the hole in the overlapping member of one dock segment through the holes in the sidewall and one side of the cylindrical opening, the piling and then the other side of the cylindrical opening before the pin is capped.



'554 patent, Fig. 6. It is unclear how access to the interior end of the fastener is gained so that the height of the structure can be adjusted after the concrete is poured into the cavity as called for in dependent claim 3.

The accused dock has many of the features claimed in the '554 patent. It consists of a series of concrete dock segments held up by vertical pilings that pass through cylindrical openings. Cole notes, however, that the connections of the dock segments to the pilings and to each other, and the corresponding holes through which the fasteners pass in the '554 patent, differ from the accused docks. As depicted in Photo No. 1 below, the connection to the piling for the accused dock is made directly to the cylindrical rim that extends above the dock segment and does not pass through the adjacent sidewall. Thus, there is no corresponding aperture or hole in that portion of the side wall adjacent the cylindrical rim.

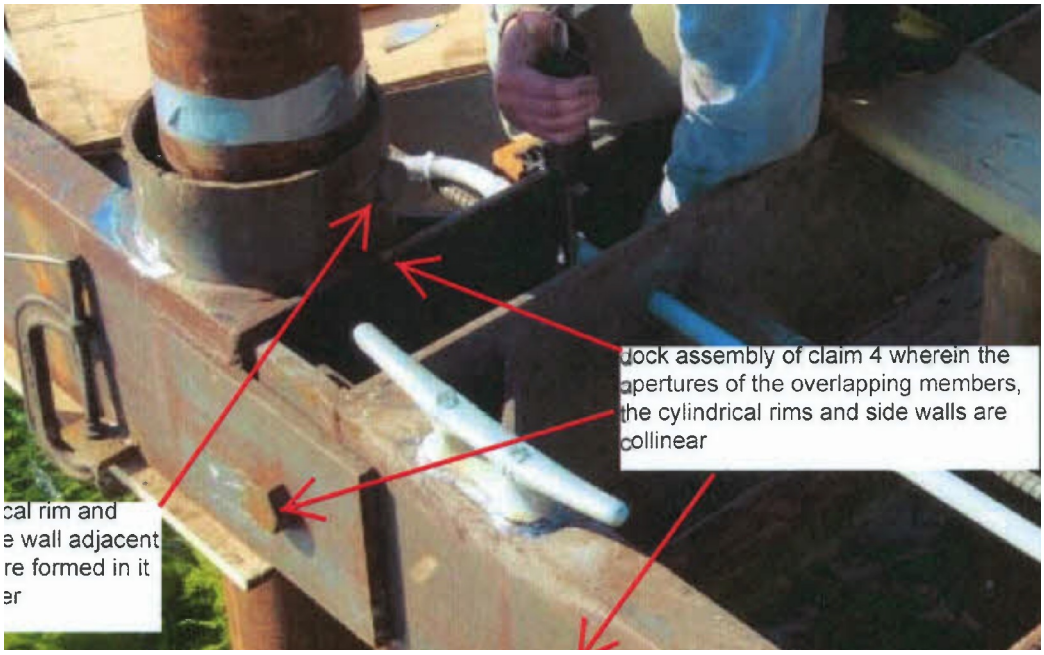


Photo No. 1. In addition, Cole contends that the accused dock does not have "overlapping members". He also notes that unlike the invention claimed in the '554 patent, what Kahr claims are overlapping members of the accused dock are on the same end as the cylindrical rims and are fastened to the adjoining dock segment with separate fasteners. It is upon these differences that Cole bases his argument that the accused product does not infringe the '554 patent.

The patent examiner initially rejected Kahr's patent application for the dock structure under a finding of obviousness. 35 U.S.C. § 103. The examiner rejected the application due to four of the claims being anticipated by U.S. Patent No. 3,964,221 to Berquist. The Berquist '221 Patent taught a dock construction and assembly method where vertically overlapping members are connected with the use of vertical posts. ('221 Patent, col. 2, ll. 42-53.) After the rejection, Kahr amended the application to include the language "wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener." Amendment dated August 10, 2012. (Kowalkowski Decl. dated 8/14/15, Ex. B.) This language clarified the use and method of a fastener which allowed for height adjustment of the dock structure, a feature not present in the Berquist invention. The examiner subsequently granted Kahr's Patent '554 on January 8, 2013.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *McNeal v. Macht*, 763 F. Supp. 1458, 1460–61 (E.D. Wis.1991). "Material facts" are those under the applicable substantive law that "might affect the outcome of the suit." *See Anderson*, 477 U.S. at 248. A dispute over "material fact" is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In deciding a motion for summary judgment, the court will view the facts in the light most favorable to the non-moving parties. *Crull v. Sunderman*, 384 F.3d 453, 460 (7th Cir. 2004). "[S]ummary judgment is as appropriate in a patent case as in any other." *C.R. Bard, Inc. v. Advanced Cardiovascular, Inc.*, 911

F.2d 670, 672 (Fed. Cir. 1990). Summary judgment should not be seen as a "disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex*, 477 U.S. at 327.**2.**

B. Literal Infringement

Patent infringement is the unauthorized making, using, selling, or offering to sell a patented invention within the United States during the term of the patent. 35 U.S.C. § 271(a). Patent infringement claims involve a two step analysis. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) *aff'd*, 517 U.S. 370 (1996). In the first step the court must determine the meaning and scope of the patent claims asserted to be infringed. *Id*. At the second step the court must compare the properly construed claims to the product or procedure accused of infringing. *Id*. Patent infringement can either occur literally or under the doctrine of equivalents. *Stiftung v. Renishaw PLC*, 945 F.2d 1173, 1178 (Fed. Cir. 1991). "To prove literal infringement, a plaintiff must show that the accused device contains each and every limitation of the asserted claims." *Presidio Components, Inc. v. Am. Technical Ceramics Corp.*, 702 F.3d 1351, 1358 (Fed. Cir. 2012). In other words, each claim must literally "read on" an accused product or procedure in order for a court to find literal infringement. *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1344 (Fed. Cir. 2002).

Kahr claims that the accused dock literally infringes on every element of claims 1–4 and 6–12 of the '554 patent. In an effort to demonstrate its claim of infringement, Kahr placed pictures of the features of the accused dock alongside every asserted claim. (Pl.'s Br. 3–18, ECF No. 47.) Cole argues that two aspects of independent claims 1, 4, and 8 are not literally present in the accused

dock.[1] (Def.'s Br. 7, 12, ECF No. 32.) First, Cole argues that the accused dock does not incorporate the feature wherein "that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener." (Def.'s Br. 7, ECF No. 32.) Second, Cole argues that the accused docks does not incorporate "a pair of overlapping members formed at the second end of the structure." (Def.'s Br. 12, ECF No. 32.) I will address each contention separately.

1. Each cylindrical rim and that portion of sidewall adjacent the rim has an aperture formed in it for receiving a fastener.

Cole first argues that the accused dock fails to meet the limitation requiring that "each cylindrical rim and that portion of the sidewall adjacent the rim has an aperture formed in it for receiving a fastener" because the accused dock does not have an aperture, or hole, in the sidewall adjacent the cylindrical rims. Cole contends that the unique feature of the '554 patent is the method it uses to fasten the dock structures or segments to the vertical pilings and to other structures or segments. In Cole's view,

> the claimed dock structures **require** a hole (an 'aperture') through both the cylindrical rims that hold the pilings and the side wall of the dock structure adjacent to the cylindrical rims; the dock structure is attached to the pilings with a 'fastener,' or pin, that is inserted through the hole. The dock structures may be attached **to one another** by a fastener that is inserted through the holes in pieces that extend from the end of the structure opposite the cylindrical rims (the 'overlapping members'). These pieces overlap with the adjacent dock structure and permit them to be attached together with the pin.

(Defs' Br., ECF No. 32 at 4.) (bold original).

Cole contends that the accused dock does uses a different method of fastening the dock segments to each other and to the pilings. Although the accused dock has cylindrical rims, or collars,

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[1] Because claims 2, 3, 5–7, 9–12 are dependent on claims 1, 4, and 8, all the asserted claims necessarily include the limitations argued by the defendant.

in the dock segments with an aperture in them for fastening the dock segment to the pilings, the aperture does not pass through the adjacent sidewall. Instead, the rims or collars on the accused dock extend above the sidewall and frame of the dock segment and are secured to the piling with a pin that is placed through the apertures in the portion of the collar that extends above the sidewall, as shown in Photo No. 2 below.

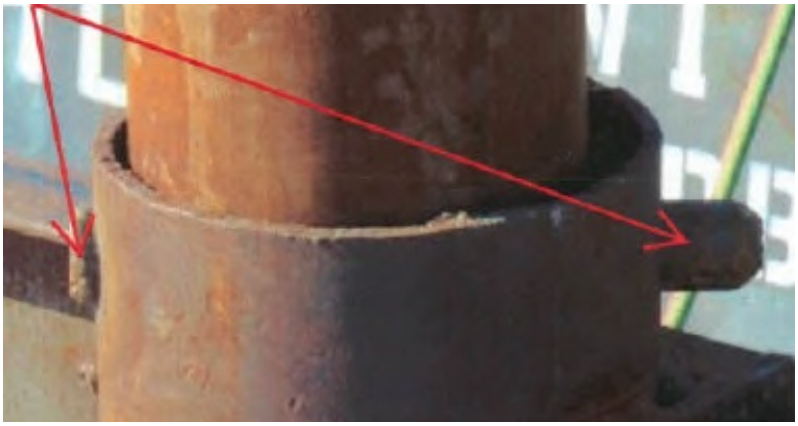


Photo No. 2.

Kahr disputes Cole's contention that the patent requires that a single aperture pass through the sidewall into the cylindrical rim. While that may be the embodiment of the invention depicted in the specification, Kahr contends that the claim language simply requires a hole in "each cylindrical rim and that portion of the sidewall adjacent the rim." Pointing to the fastener connecting the dock segments depicted in Photo No. 1 above, Kahr argues that the accused dock also has an aperture in the adjacent sidewall. In essence, Kahr argues that the hole in the weld plate extending from the sidewall, as shown in Photo No. 1, constitutes the hole in that portion of the sidewall adjacent the rim required in independent claims 1, 4 and 8.

The weld plate, however, is not the same as the sidewall. The fact that it is welded onto the

side wall itself signals the fact that it is something other than the side wall. Most importantly, the patent itself claims features nearly identical to the accused dock's weld plate. The patent has a name for this feature: "overlapping member." ('554 Patent, col. 3, ll. 4–21.) Just as the overlapping member on the '554 patent dock does not constitute part of the sidewall, so also the weld plate on the accused dock does not. It follows that the accused dock does not have an aperture in the portion of the sidewall adjacent to the cylindrical rims. I therefore conclude that the accused dock does not literally infringe this limitation of the '554 patent.

2. A pair of overlapping members formed on the second end of the structure.

Independent claims 1, 4 and 8 of the '554 patent distinguish between the first end and the second end of the dock structure. The pair of cylindrical rims through which the pilings pass are disposed at the first end and what Plaintiff refers to as the overlapping members with an aperture for a fastener are formed at the second end of the dock structure. Cole argues that the accused dock does not infringe the '554 patent because it does not have the so-called overlapping members at the second end of the dock structure. Instead, Cole contends, the purported overlapping members of the accused dock are on the same end as the cylindrical rims, which according to the claims of the '554 patent is the first end. Cole also contends that what Kahr calls the overlapping members on the accused dock do not overlap but are instead "outermost tabs" that form part of a hinge-type connection to the adjoining dock segment. (Def.'s Br. 14, ECF No. 32.) For these reasons as well, Cole contends that the accused dock does not literally infringe independent claims 1, 4 and 8 of the '554 patent.

In support of the first argument, Cole points out that many of Kahr's pictures depict so-called overlapping members on the first, not second, side of the accused dock. The second end of the

accused dock is the end opposite the cylindrical rims. Kahr also points to photographs of Cole's dock segments, however, which depict overlapping, or extending, members on the second end of the accused docks. (Dec. Of Wentland Dated June 15, 2015, 4, ECF No. 49-1.) It appears from the photographs in the record that the accused dock has members extending from *both* ends. In any event, I am unable to say on the record before me that it does not have members extending from the second end as that term is defined in the patent.

Cole's argument that the extending members do not overlap also fails. The term overlap means "to extend over or past, and cover a part of." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, p. 929 (10th ed. 1999). Although the claim language is silent as to what the overlapping member is to overlap, the specification describes them as overlapping the next dock segment:

> Positioning and fastening of adjacent dock element 30 is also established by a pair of overlapping members 48 that are formed at the second end 34 of the dock element 30, opposite the rims 44 and openings 46 formed in it for receiving a fastener 60, of the type shown in FIG. 6. A like aperture 45 is formed into the sidewall 36 and rim 44 to allow dock elements 30 to be secured, one overlapping a portion of the other. That is, the overlapping member 48 of the second end 34 of an element 30 effectively "overlaps" the first end 32 of the next adjacent element 30. With the apertures 45, 49 aligned in collinear fashion, the fastener 60 can be affixed as shown in FIG. 6.

'554 patent, col. 2:38–50.

Based on the specification, Cole argues that the overlapping members are required to overlap the entire width of the preceding dock segment to which it is attached. Cole argues that the hinge-type connection of the accused dock does not rely on overlapping members to connect the dock segments together. Instead, it joins the dock segments by inserting tabs protruding from the end of one segment between plates protruding from the end of the adjacent segment and then holding them

in place by inserting a bolt or pin through holes in the outside plates of one segment and the inner tab of the other. This feature is depicted in Photo No. 3 below. Since the accused dock does not have members that overlap the entire width of the adjoining dock segment, Cole contends that the accused dock does not literally infringe the '554 patent.



Photo No. 3 (Expert Report of Dave Wentland, ECF No. 34-4 at 11.)

The difficulty with Cole's argument is that the claim language does not require that the overlapping members overlap the entire width of the adjacent dock segment. While that is the embodiment described in the specification, the Federal Circuit has repeatedly instructed district courts against reading an embodiment of an invention in the specification into the claim language. *See, e.g.,Liebel–Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed.Cir. 2004) ("Even when the specification describes only a single embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using

"words or expressions of manifest exclusion or restriction.'") *(quoting Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed.Cir. 2002)). Absent such limitation, I conclude that it is enough if the overlapping members overlap some portion of the adjacent dock segment so that they can be fastened together. The accused dock meets that limitation. In Cole's terminology, the tab of one dock segment overlaps the hinge plates of the adjacent segment so a pin or bolt can fasten them together. This is enough to show literal infringement.

There remains the question of whether the Accused Dock infringes the limitation concerning the aperture in that portion of the side wall adjacent the cylindrical rim under the doctrine of equivalents, and it is to that issue that I now turn.

C. Doctrine of Equivalents

Even though a product or process does not literally infringe a patent, it may nevertheless be found to infringe under the doctrine of equivalents. "Under this doctrine, a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention." *Warner–Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997). A product may infringe under the doctrine of equivalents where it "performs substantially the same function in substantially the same way to obtain the same result" as the infringed upon product. *Boehringer Ingelheim Vetmedica, Inc. v. Schering Plough Corp.*, 320 F.3d 1339, 1351 (Fed. Cir. 2003). In other words, "[i]nfringement may be found under the doctrine of equivalents if every limitation of the asserted claim, or its 'equivalent,' is found in the accused subject matter, where an 'equivalent' differs from the claimed limitation only insubstantially." *Ethicon Endo Surgery, Inc. v. U.S. Surgical Corp.*, 149 F.3d 1309, 1315 (Fed. Cir. 1998). Thus,

potential infringers cannot invent around the patent simply by making an insubstantial change that barely avoids the literal language of the claim. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). Whether a difference is "insubstantial" depends on whether the differences between the claim limitation and accused product are "insubstantial to one of ordinary skill in the art." *Boehringer Ingelheim Vetmedica, Inc.*, 320 F.3d at 1351. In order to satisfy the doctrine of equivalents, every limitation of the asserted claim or its equivalent must be found in the accused subject matter. *Id.*

Kahr argues that if Cole's docks do not literally infringe the '554 patent, they nevertheless infringe under the doctrine of equivalents because the apertures in the weld plates on the accused dock perform the same function as the aperture in that portion of the side wall adjacent the cylindrical rim performs in the patent. Kahr also argues that the weld plate likewise performs the same function as the overlapping member in the patent. In support of his argument that the accused dock meets these elements under the doctrine of equivalents, Kahr cites his expert engineer who states in his report that the apertures in the accused dock "perform substantially the same function and works [sic] in substantially the same way to accomplish substantially the same result as the structure claimed in the '554 patent, i.e., to receive a fastener to attach one section of the dock to another section and to connect the dock structure to the piling." (Decl. of Dave Wentland, P.E., ¶ 13, ECF No. 49-1.)

Cole offers several arguments in response. He first argues that Kahr waived any argument under the doctrine of equivalents by failing to assert it prior to his response to Cole's motion for summary judgment. Next, Cole argues that Kahr's argument that the accused dock infringes under the doctrine of equivalents is barred by prosecution history estoppel. Finally, Cole argues that

Kahr's argument fails on the merits because the differences between the '554 patent's claims and the accused dock are substantial.

Cole first argues that Kahr waived his right to assert infringement under the doctrine of equivalents by failing to include it in his infringement contentions which he was required under the Court's scheduling order to serve on Cole by April 3, 2014, and by failing to include any evidence or analysis of such in his expert's report filed a year later. Because of Kahr's failure to assert the doctrine earlier, Cole contends that the Court should reject "this belated effort to assert infringement under the doctrine of equivalents" and strike it from the record. (Def.'s Reply, ECF No. 44, at 8.)

In fact, however, Kahr did alert Cole that he was relying, at least alternatively on the doctrine of equivalents in his infringement contentions filed in April 2014. As to each claim limitation, Kahr expressly stated that the accused dock infringed literally or under the doctrine of equivalents. (ECF No. 34-2.) It is true that Kahr did not offer detailed analysis or evidence supporting his contention that Cole's dock infringed under the doctrine of equivalents, but this was understandable under the circumstances. Kahr's primary position was that there was literal infringement. Thus, he saw no need to explain how it also infringed under the doctrine of equivalents until his argument that the defendant's product literally infringed was rejected by the court. Given the simple structure at issue, the argument that infringement is by equivalents requires little analysis. Essentially, Kahr is claiming that a bolt placed in a slightly different location on the dock structure performs substantially the same function as one placed in the location called for by the claim language. Cole can claim no prejudice from not having a more detailed analysis of such a straightforward issue. *See, e.g., Probatter Sports LLC v. Sports Tutor, Inc.*, No. 3:05-CV-01975-VLB, 2015 WL 4390055, *11, 12 (D. Conn. July 15, 2015) (rejecting claim that patentee waived argument that accused product infringed under

doctrine of equivalents where patentee saw no need to assert it until after court's rejection of claim of literal infringement and defense suffered no prejudice). Under these circumstances, I find no waiver.

Cole next argues that Kahr's claim of infringement under the doctrine of equivalents is barred by prosecution history estoppel. Prosecution history estoppel requires a court to interpret the claims of a patent in light of amendments made during the patent application process. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 733 (2002). The idea is that "[w]hen . . . the patentee originally claimed the subject matter alleged to infringe but then narrowed the claim in response to a rejection, he may not argue that the surrendered territory comprised unforeseen subject matter that should be deemed equivalent to the literal claims of the issued patent. . . . [H]is decision to . . . submit an amended claim is taken as a concession that the invention as patented does not reach as far as the original claim." *Id*. at 733–34; *see Honeywell Int'l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131, 1139–40 (Fed. Cir. 2004).

In analyzing whether prosecution history estoppel impacts the doctrine of equivalents inquiry, the court first determines whether the prosecution history shows that the amendment in question narrowed the claim. *Festo*, 535 U.S. at 733–34. If the amendment did narrow the claim, the court next determines whether the purpose of the amendment gives rise to estoppel. The burden is on the patent holder to prove a different reason for the amendment. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 33 (1997). The patent holder can show that the purpose of the amendment does not give rise to estoppel by proving that "[t]he equivalent may have been unforeseeable at the time of the application; the rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question; or there may be some other reason suggesting that the patentee

could not reasonably be expected to have described the insubstantial substitute in question." *Festo*, 535 U.S. 722, 740–41. Whether the patent holder has rebutted the presumption of surrender is a "question of law to be determined by the court, not a jury." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359, 1367 (Fed. Cir. 2003).

Cole argues that Kahr is estopped as a matter of law from arguing their claim of infringement under the doctrine of equivalents. Specifically, the disagreement between the parties focuses on the language "wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener." This language was part of an amendment to the '554 patent after an initial rejection by the examiner. Cole asserts that in amending the patent Kahr is presumptively barred from arguing that the Cole's dock has equivalent features to those described in this language.

In fact, however, the amendment had little to do with the equivalents in question. Where the rationale underlying the amendment bears no more than a tangential relation to the equivalent in question prosecution history estoppel will seldom be found. *Festo*, 535 U.S. 722, 740–41. Kahr's contention that the amendment had little to do with the equivalents in question is supported by the prosecution history of the '554 patent. The initial rejection of the Plaintiff's patent claim was based on a finding of obviousness. Specifically, four claims of the '554 patent were anticipated by U.S. Patent No. 3,964,221 to Berquist. The Berquist patent taught a dock construction technique where various dock segments could be locked together and supported through the use of vertical posts. Kahr's amendment to the '554 patent distinguished his invention from the Berquist dock by allowing for height adjustment through the use of fasteners. The rationale underlying the amendment was to distinguish dock segments which are locked together by the supporting posts and cannot be adjusted

in height from dock segments that are joined using fasteners and can be adjusted in height. In contrast, the Accused Dock uses fasteners to secure dock segments together, hold dock segments to vertical pilings, and allow for height adjustments.

The equivalency argued between the '554 and Accused docks depends on the ability of the Accused Dock to use fasteners to connect two dock segments and allow for height adjustment. The argument over the current equivalency does not depend on the Accused Dock's use of vertical posts to lock together dock segments or support the structure. Therefore, the rationale underlying the amendment bears no more than a tangential relation to the equivalent in question. I therefore conclude that Kahr has overcome the presumption of prosecution history estoppel and his claim of infringement under the doctrine of equivalents is not barred.

As to the merits, I conclude that whether the accused dock actually does infringe the '554 patent under the doctrine of equivalents is a factual question for the jury to decide. As noted above, Kahr's expert has offered the opinion that the accused dock performs substantially the same function and works in substantially the same way to accomplish substantially the same result as the structure claimed in the '554 patent, i.e., to receive a fastener to attach one section of the dock to another section and to connect the dock structure to the piling. Cole, on the other hand, contends that the weld plate in the accused dock "does not perform substantially the same overall function because it does not receive a fastener that both supports the dock and secures another section." (Def.'s Mem. in Resp., ECF No. 50, at 20.) Cole notes that the accused docks use more fasteners to attach the dock segments to each other and to the pilings than the claimed invention. This fact makes assembly more difficult and creates other disadvantages, as well. (*Id.*)

On the record before me, I am unable to determine as a matter of law that the accused docks infringes or does not infringe under the doctrine of equivalents. While Kahr cites his expert's opinion, Cole correctly notes that the opinion was only first offered in response to his motion for summary judgment. Cole should be given an opportunity to offer his own expert's opinion on the issue. Even without an expert opinion to the contrary, the issue is still one for a jury to decide. It is Cole's burden to prove infringement, whether literally or under the doctrine of equivalents, and the similarity between the claimed structure and the accused dock is not so great that a jury could not reject Kahr's expert's opinion that the differences are insubstantial. Juries, after all, are not bound by the opinions of experts. *See, e.g., Diestel v. Hines*, 506 F.3d 1249, 1268 (10th Cir. 2007) ("The general rule is that juries are not bound to believe opinions of witnesses, even if they are qualified as experts.").

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment is **DENIED** and Plaintiff's cross motion for summary judgment is likewise **DENIED.** The Clerk is directed to place this matter on the Court's calendar for a telephone conference to discuss further scheduling.

SO ORDERED this 29th day of December, 2015.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

US008348554B2

(12) **United States Patent**
Kahr

(10) **Patent No.: US 8,348,554 B2**
(45) **Date of Patent: Jan. 8, 2013**

(54) **DOCK STRUCTURE, DOCK ASSEMBLY AND METHOD OF CONSTRUCTING THE DOCK STRUCTURE AND ASSEMBLY**

(76) Inventor: **Michael M. Kahr**, Ellison Bay, WI (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 254 days.

(21) Appl. No.: **12/891,065**

(22) Filed: **Sep. 27, 2010**

(65) **Prior Publication Data**

US 2011/0008110 A1 Jan. 13, 2011

Related U.S. Application Data

(60) Provisional application No. 61/351,444, filed on Jun. 4, 2010.

(51) **Int. Cl.**
E02B 3/20 (2006.01)

(52) **U.S. Cl.** **405/218**; 405/221; 405/222

(58) **Field of Classification Search** 405/218, 405/219, 220, 221, 222
See application file for complete search history.

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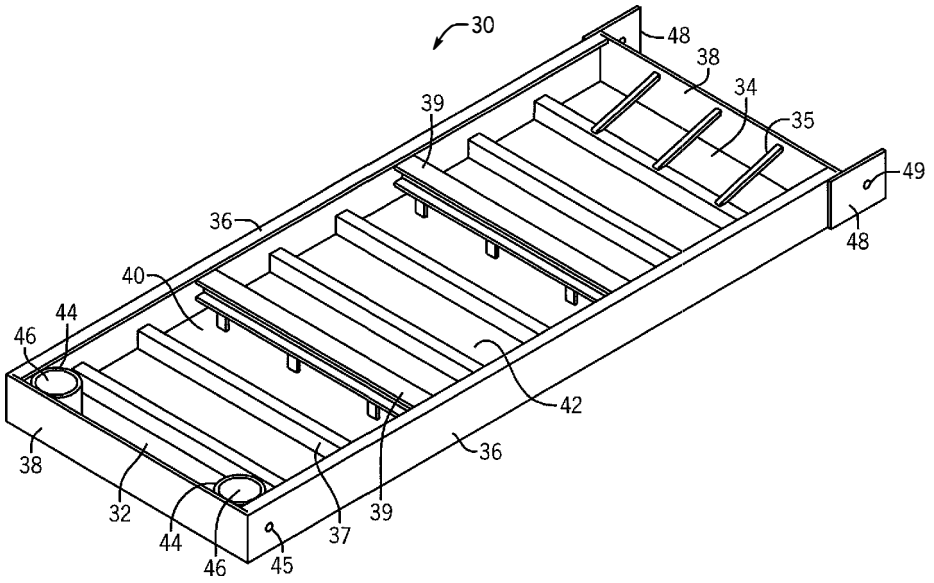
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Primary Examiner — Frederick L Lagman
(74) *Attorney, Agent, or Firm* — Joseph S. Heino; Patrick M. Bergin

(57) **ABSTRACT**

A dock structure, dock assembly and dock constructing method use one or more dock elements that are attachable to vertical pilings. Each dock element is a pan-like structure having a first end and a second end, a opposing side walls and opposing end walls, with one end wall disposed at each end of the element, and a floor. The side walls, the end walls and the floor form a pan-like cavity. Two cylindrical rims are disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it. Each dock element is attachable to pilings and a pair of overlapping members formed at the second end of each dock element allows adjacent elements to be attached one to another. Following attachment, each dock element is filled with concrete.

12 Claims, 3 Drawing Sheets



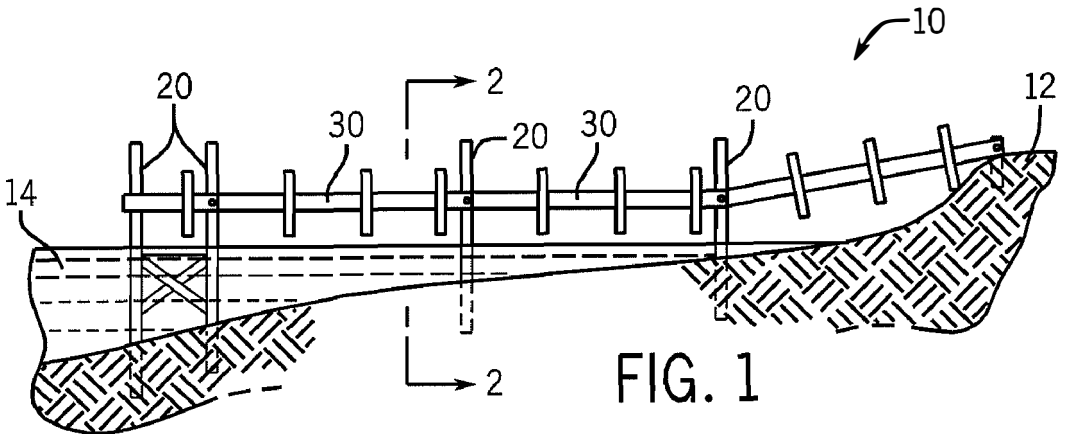


FIG. 1

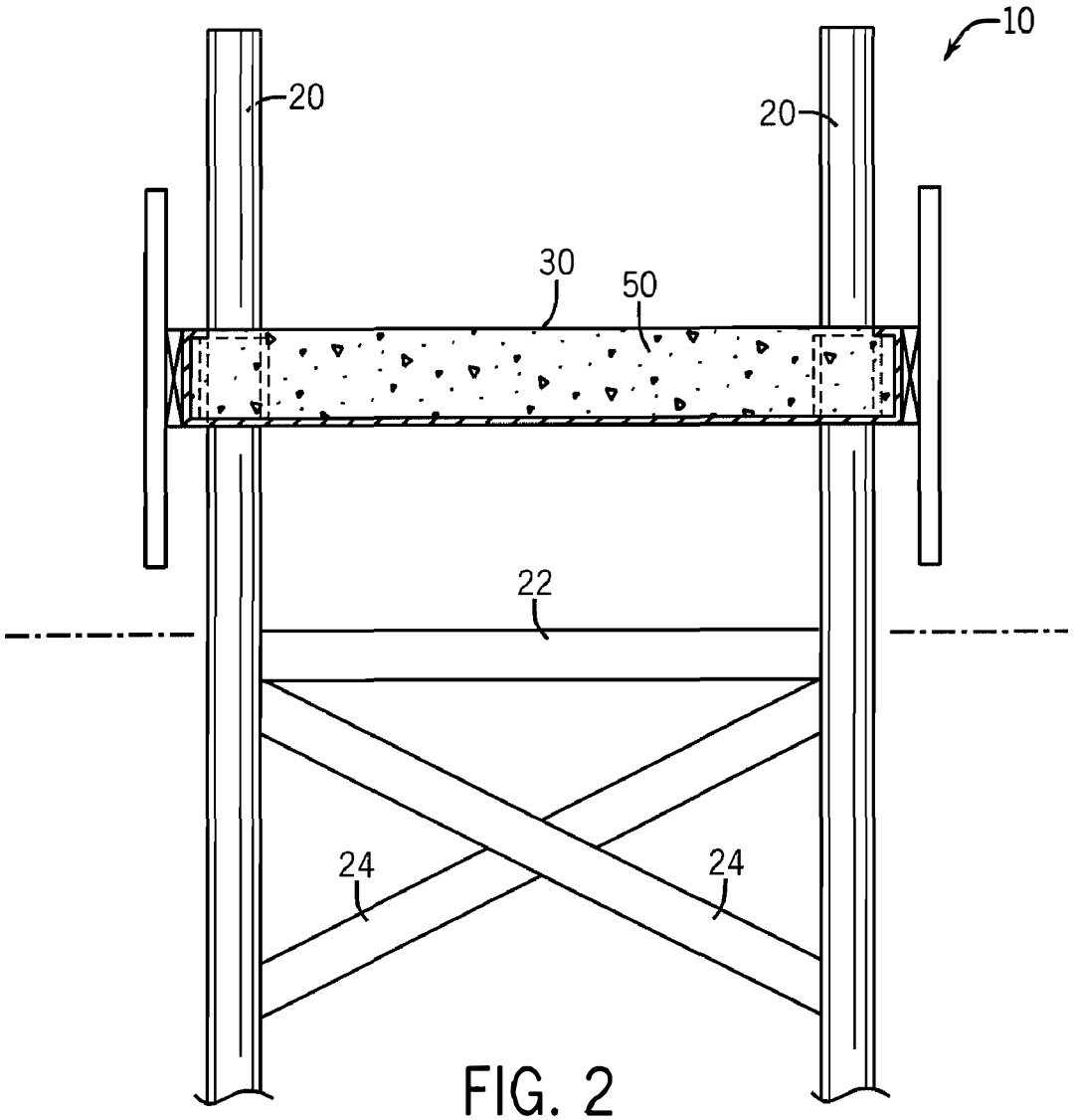


FIG. 2

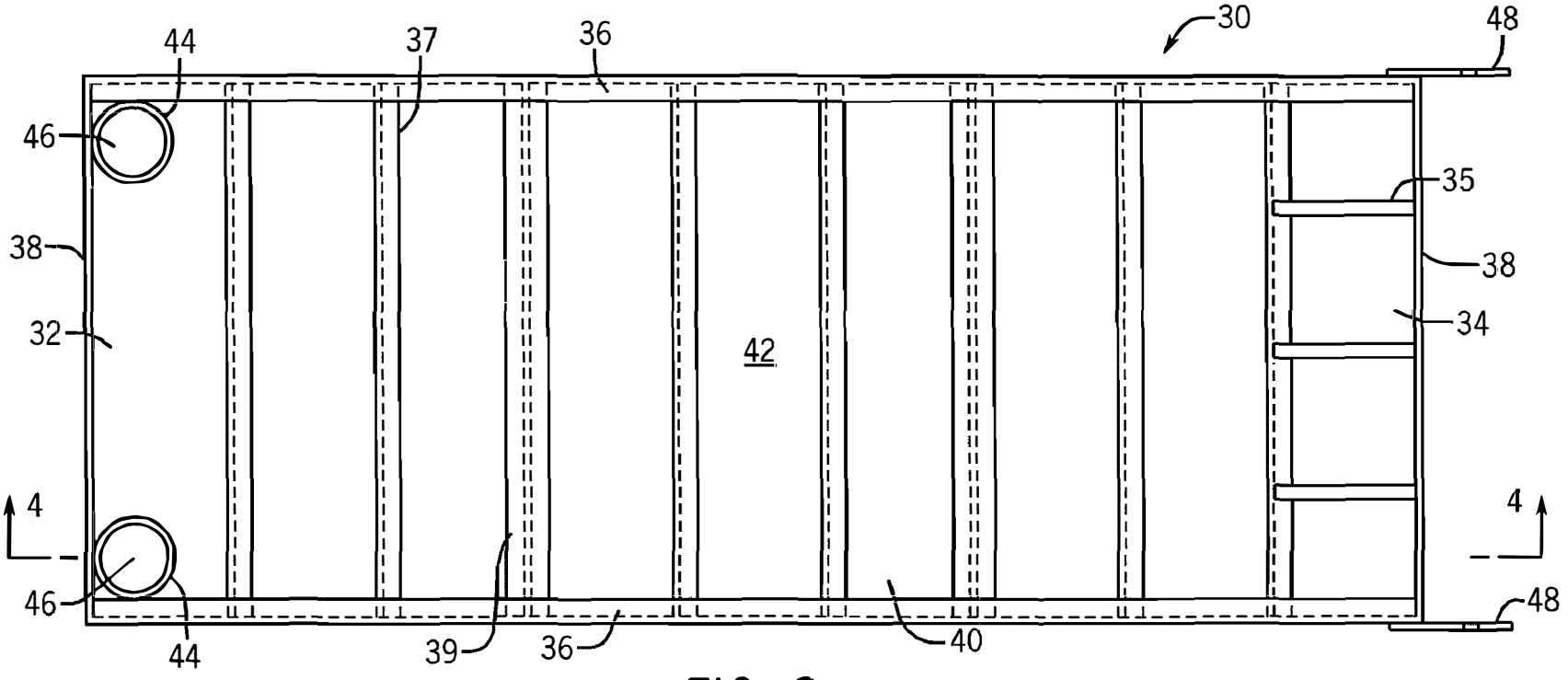

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FIG. 3

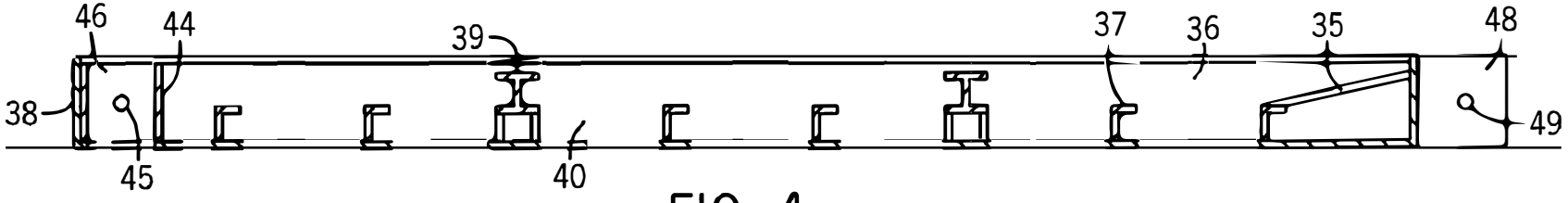

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FIG. 4

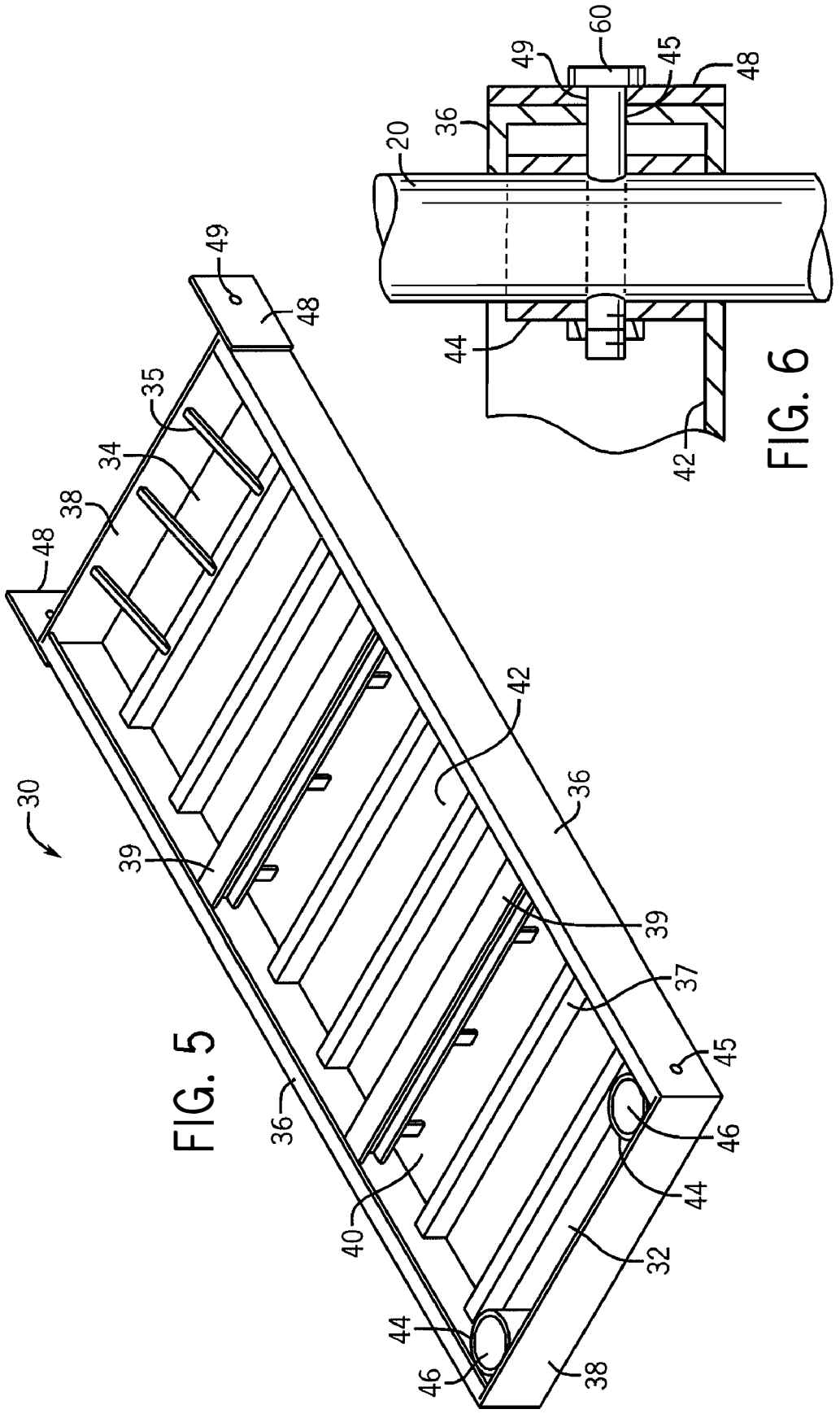

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FIG. 6

FIG. 5

DOCK STRUCTURE, DOCK ASSEMBLY AND METHOD OF CONSTRUCTING THE DOCK STRUCTURE AND ASSEMBLY

This application claims the benefit and priority of U.S. Provisional Patent Application No. 61/351,444 filed Jun. 4, 2010.

FIELD OF THE INVENTION

This invention relates generally to docks and dock structures used in the marine industry. It also relates to dock assemblies and methods of manufacturing and constructing such assemblies. More specifically, it relates to a dock structure that has enhanced integrity against the elements, and against the freeze-thaw cycles experienced in northern climates.

BACKGROUND OF THE INVENTION

Docks for mooring boats along a shoreline are well known in the art. There are many types of permanent and temporary structures known in the art that allow such mooring and other water activities to take place, such docks allowing persons to have access to deeper parts of the body of water away from shore.

In the experience of this inventor, there is a need for a permanent dock structure that is highly resistant to the freeze-thaw cycles that are experienced in bodies of water that are located in the northern climates. Such a dock structure would also be a height-adjustable structure that would allow the dock to be raised or lowered, subject to water levels that may change from time to time. Such a dock structure would also be configured of dock elements that may be placed into position and which create a form into which concrete may be poured to strengthen the element. Each such dock element is like-configured for uniformity and ease of construction.

SUMMARY OF THE INVENTION

The dock structure and dock assembly of the present invention has obtained these objects. It provides for a plurality of vertical pilings that are spaced apart to accommodate like-configured dock elements between them. Pilings are positioned near the side of a dock element and at each end of a dock element. Lateral elements are placed transversely between each pair of pilings relative to the longitudinal positioning and placement of the dock elements. Each dock element comprises a pan-like structure having internal reinforcement members and a pair of cylindrical openings disposed vertically at one end of the dock element. At the opposite end of the dock element is a hinge means for securing the dock elements in longitudinal and sequential position, and for virtually any length desired or required for a particular application. The foregoing and other features of the present invention will be apparent from the detailed description that follows.

BRIEF DESCRIPTION OF THE DRAWINGS

FIG. **1** is side elevational view of a dock assembly constructed in accordance with the present invention and showing the assembly in its installed position.

FIG. **2** is a front and cross-sectioned view of the dock assembly shown in FIG. **1** and taken along line **2-2** of FIG. **1**.

FIG. **3** is a top plan view of one dock element of the dock assembly in accordance with the present invention.

FIG. **4** is a right side elevational and cross-sectioned view of the dock element shown in FIG. **3** and taken along line **4-4** of FIG. **3**.

FIG. **5** is a top, front and right side perspective view of the dock element shown in FIGS. **3** and **4**.

FIG. **6** is an enlarged and partially cross-sectioned view of the dock element as it would be attached to a piling of the type shown in FIG. **2**.

DETAILED DESCRIPTION

Referring now to the drawings in detail wherein like numbers represent like elements throughout, FIG. **1** illustrates a side view of the dock assembly, generally identified **10**, as it would be constructed in accordance with the present invention. The assembly **10** is comprised of a plurality of pilings **20** and a plurality of dock elements **30** extending from a shoreline **12** and out into a body of water **14**. As shown in FIG. **2**, transversely adjacent pilings **20** can have horizontal cross members **22** for support and/or a plurality of angled cross members **24**. Longitudinally-adjacent dock elements **30** are secured to one another and to pilings **20** using a suitable fastener **60**. See FIG. **6**.

As previously alluded to, each dock element **30** is a pan-like structure having a first end **32**, a second end **34**, a pair of opposing side walls **36**, a pair of opposing end walls **38** and a floor **42**. The side walls **36**, **38** and floor **42** form a cavity **40** within the element **30**. Extending between the opposing side walls **36** are a plurality of variously configured reinforcement members **35**, **37**, **39** which may, in turn, be supported by other substructures of the type shown in FIGS. **4** and **5**.

At the first end **32** of each dock element **30** is a pair of cylindrical rims **44**, each of which forms a vertically-disposed cylindrical opening **46**. Each opening **46** is functionally adapted to receive a piling **20** through it. This allows the dock element **30** to be positioned at various heights along the pilings **20**. Positioning and fastening of adjacent dock element **30** is also established by a pair of overlapping members **48** that are formed at the second end **34** of the dock element **30**, opposite the rims **44** and openings **46**. See FIG. **3**. Each overlapping member **48** has an aperture **49** formed in it for receiving a fastener **60**, of the type shown in FIG. **6**. A like aperture **45** is formed into the sidewall **36** and rim **44** to allow dock elements **30** to be secured, one overlapping a portion of the other. That is, the overlapping member **48** of the second end **34** of an element **30** effectively "overlaps" the first end **32** of the next adjacent element **30**. With the apertures **45**, **49** aligned in collinear fashion, the fastener **60** can be affixed as shown in FIG. **6**.

Upon installation of a dock element **30** and securement of it to all adjacent pilings **20**, the cavity **40** of the dock element **30** is filled with concrete **50**. See FIG. **2**. Upon curing of the concrete **50**, the rigidity of the dock element **30** is established and the overall strength of the assembly **10** makes it highly resistant to freeze-thaw cycles that may be encountered at the point of installation and use of the assembly **10**.

As alluded to previously, the height of each dock element **30** can be adjusted along the length of each piling **20** to accommodate vertical adjustment of the assembly **10**, or of its individual dock elements **30**, during high-water and low-water conditions. It is to be understood that dock elements **30** can also be positioned transversely within the assembly **10** to form a "T-shaped" or "L-shaped" dock configuration. It is also to be understood that other elements may be added to the assembly **10** such as wood facing attached to the outer surfaces of the side walls **36**, wood bumpers and lift systems, all

of which are considered alternative embodiments within the scope of the present invention.

I claim:

1. A dock structure for use with vertical pilings, the structure comprising:

a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the structure, and a floor;

wherein the side walls, the end walls and the floor form a cavity;

a pair of cylindrical rims disposed at the first end of the structure, each rim forming a vertically-disposed cylindrical opening in the floor and each opening being functionally adapted to receive a piling through it; and

a pair of overlapping members formed at the second end of the structure;

wherein each overlapping member has an aperture formed in it for receiving a fastener; and

wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

2. The dock structure of claim **1** further comprising at least one reinforcement member extending between the opposing side walls.

3. The dock structure of claim **1** wherein the cavity is filled with concrete.

4. A dock assembly for use with a plurality of vertical pilings, the assembly comprising:

at least one dock element, the element comprising a pan-like structure having a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the element, and a floor;

wherein the side walls, the end walls and the floor form a cavity within the element;

a pair of cylindrical rims disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it; and

a pair of overlapping members formed at the second end of the dock element;

wherein each overlapping member has an aperture formed in it for receiving a fastener; and

wherein each cylindrical rim and that portion of the side wall adjacent the rim has an aperture formed in it for receiving a fastener.

5. The dock assembly of claim **4** wherein the apertures of the overlapping members, the cylindrical rims and side walls are collinear.

6. The dock assembly of claim **4** further comprising at least one reinforcement member extending between the opposing side walls of the dock element.

7. The dock assembly of claim **4** wherein the cavity of the pan-like structure of each element is filled with concrete.

8. A method of constructing a dock assembly for use with a plurality of vertical pilings, the method comprising the steps of:

providing at least one dock element, the element comprising a pan-like structure having a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, one end wall disposed at each end of the element, and a floor;

wherein the side walls, the end walls and the floor form a cavity within the element;

providing a pair of cylindrical rims disposed at the first end of the dock element, each rim forming a vertically-disposed cylindrical opening in the floor of the element and each opening being functionally adapted to receive a piling through it;

providing a pair of overlapping members formed at the second end of the dock element;

forming an aperture in each cylindrical rim and that portion of the side wall adjacent the rim for receiving a fastener;

mounting the at least one dock element to a plurality of pilings; and

filling the cavity within the at least one dock element with concrete.

9. The method of claim **8** wherein the aperture forming steps further comprise the step of providing apertures that are collinear.

10. The method of claim **9** comprising, after the aperture forming steps, the step of providing a fastener and the step of inserting a fastener through the apertures and into the piling.

11. The method of claim **8** further comprising, prior to the concrete filling step, the step of providing at least one reinforcement member that extends between the opposing side walls of the dock element.

12. The method of claim **8** wherein a plurality of dock elements are positioned to form a continuous dock structure.

* * * * *