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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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May 1, 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

May 1, 2017

/s/ Sherry D. Coley
Sherry D. Coley

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I. ARGUMENT

A. Defendants Improperly Urge the Court to Focus on a Single Claim Element, the Connection Method, Versus the Claim as a Whole

In Appellant's brief, we pointed out how 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.

The Defendants have not refuted how this is the standard that must be applied. Instead, in their response, defendants generically state that the district court considered all the limitations of the hypothetical claim in reaching its decision. Appellees' Br. at 59-60. Not only does this statement overlook the significant treatment the court gave to the connection mechanism of the Accused Product, but it underscores the extreme emphasis defendants placed in their briefing on the Ensnarement Motion that the double-ear connection method incorporated in the Accused Product, while ignoring the other claim elements, was anticipated or rendered obvious by the prior art.

Both during trial and during the briefing after trial, defendants essentially conceded that the double-ear connection method was the only aspect of the Accused Product that differed from the '554 patent. The Accused Product had a first end and a second end, a pair of opposing side walls, a pair of opposing end walls, and a floor. The Accused Product was constructed so that the side walls, end walls and floor formed a cavity. It incorporated a pair of cylindrical rims where each rim formed a vertically-disposed cylindrical opening in the floor, and each opening was functionally adapted to receive a piling. The Accused Product had a pair of overlapping members at the second end of the structure. In fact, the district court constructed the hypothetical claim referencing the Accused Product to have overlapping members at both ends. The Accused Product's overlapping members had apertures in them for receiving fasteners. The Accused Product also has an aperture in the cylindrical rim for receiving a fastener so that it could be attached to a piling. Finally, it had reinforcement members and the cavity of the Accused Product's sections was filled with concrete.

In defendants' briefing after the jury returned a finding of willful infringement, they spent significant time arguing that the connection mechanism of the Accused Product, the double-ear connection, was anticipated or rendered obvious in the prior art. In fact, defendants devote significant time in their

appellate brief in arguing the double-ear connection was well-known in the art. Appellees' Br. at 17-21, 42-44.

The district court incorporated a hypothetical claim that set forth all of the limitations of the '554 patent. Appx9-10. However, when the district court considered defendant's arguments regarding obviousness, the court singularly focused on the connection mechanism of the Accused Product and whether the Berquist patent, or The Dock Manual, in combination with Kahr's testimony, contained elements that incorporated the double-ear connection. *See* Appx16-17 (Dkt. #117 at 15-16). The obviousness analysis should have looked at all claim limitations and not just the double-ear connection.

B. The Hypothetical Claim is Patentable, and Therefore, the District Court's Decision Granting Defendants' Ensnarement Motion Should be Reversed

While the defendants continue to fail to consider the hypothetical claim as a whole in presenting their ensnarement argument, they also continue to ignore evidence that the combination of elements was not obvious. "The claimed invention must be considered as a whole, and the question is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination." *Lindemann Maschinenfabrik GMBH v. Am. Hoist & Derrick Co.,* 730 F.2d 1452, 1462 (Fed. Cir. 1984).

1. The Jury's Determination of Willful Infringement Cannot be Overlooked

Defendants are left with the inescapable conclusion that a jury determined, based upon the factual evidence presented at trial and witness testimony, that defendants willfully infringed the '554 patent. Appx517-518 (Dkt. #100). The credibility determinations made by the jury in finding defendants willfully infringed, is the exact same evidence this Court must consider in determining whether the hypothetical claim is patentable. Defendants cannot argue that they independently created the Accused Product. In fact, the evidence presented to the jury is anything but that. The jury heard testimony about Cole's employment with Kahr and Death's Door Marine. The jury learned that Cole's prior marine construction experience was limited and that it was during his employment with Death's Door Marine that Cole learned how to construct and install docks. Appx333-334 (TT 76:24-77:4, 77:5-11). The jury also heard testimony about Cole's departure from Death's Door Marine and how he submitted competing bids as an employee which led to his termination. Appx334, Appx418-419 (TT 78:20-22, 79:6-7, 416:15-417:21).

After Cole's termination from Death's Door Marine, Kahr began his work in designing a dock which ultimately led to the '554 patent. Kahr is a licensed engineer and has significantly more marine construction experience than Cole. Appx332, Appx333-334 (TT 71:24-72:2, 76:24-77:11).

After Kahr installed the first dock which became an embodiment of the '554 patent, Kahr was approached by a potential customer, Elmore, who was interested in the same dock. Appx340 (TT 104:20-25). The jury heard how Kahr prepared proposals and drawings for Elmore. Elmore saw portions of the patented dock and there was even evidence that he took pictures of these structures. Appx366 (TT 206:25-207:19).

While the evidence of Elmore's taking pictures of the patented dock was disputed, the testimony was undisputed that Elmore asked Cole to design a height adjustable dock with the same sustainable features as the '554 patent. Appx403-404 (TT 356:18-24, 358:22-359:24). The evidence was undisputed that Cole first built the Accused Product when he installed Elmore's dock. Appx370, Appx411 (TT 222:6-16, 223:3-6, 386:15-18). Cole admitted during trial that every dock he constructed, which Plaintiff asserted infringed the '554 patent, matched in element and structure what he manufactured and installed for Elmore. 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 even admitted during trial that he knew the dock structure that had been created and installed by Kahr. Appx423 (TT 434:4-19).

After receiving several written communications from Kahr's attorneys, defendants kept manufacturing and installing the Accused Products. Appx380-382

(TT 261:18-262:3, 264:20-265:22, 267:2-7, 268:24-269:6). There was no indication defendants would stop building the Accused Product. All of this factual evidence was presented to the jury. And, all of this factual evidence led to the conclusion that defendants willfully infringed the '554 patent. Appx517 (Dkt. #100 at 1).

This evidence cannot be overlooked and should not be ignored by this Court as it was by the district court. The district court improperly held that all of this evidence was merely evidence demonstrating the validity of the '554 patent or whether defendants infringed. Appx12, Appx18-20 (Dkt. #117 at 11, 17-19). This determination was an error. While indeed the evidence establishes the validity of the '554 patent and defendants' willful infringement thereof, the evidence should also guide this Court in a determination that the hypothetical claim is patentable because it was not independently created by defendants, and there was convincing evidence defendants copied the design. This evidence is persuasive evidence the district court overlooked, and if considered it would have demonstrated the hypothetical claim was not anticipated or obvious in the prior art.

2. Secondary Considerations Must be Reviewed and Warrant Reversal

As outlined in Appellant's brief, and as ignored by the defendants, there was substantial testimony at trial by Kahr's expert, Wentland, regarding the unobvious combining of the elements of the '554 patent claims, whether or not the connection

element is limited to a collinear aperture through the side wall and rim, or not. Although this evidence supports the unobviousness of the patent claim and its equivalents, it is also evidence that the court should have considered regarding the hypothetical claim. Further, as noted in Appellant's brief, the evidence of how defendants copied the invention of the claims further supports the unobviousness of the patent claim, and its equivalents as represented by the hypothetical claim. Appellant's Br. at 13-14.

As the Court in *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.* noted, evidence of copying "support[s] the view that this combination would not have been obvious at the time of invention." *DePuy Spine,* 567 F.3d 1314, 1328 (Fed. Cir. 2009). In that case, Medtronic did not allege it independently conceived of its device, nor did it specifically deny copying. *Id*. at 1329. Similarly, defendants do not assert in support of their Ensnarement Motion that they independently conceived their Accused Product nor do they deny copying.

Defendants ask the court to disregard all secondary considerations in determining whether the hypothetical claim is patentable. If secondary considerations are properly reviewed, they would lead to the determination that defendants infringed the '554 patent under the doctrine of equivalents. Defendants' approach would amount to a total disregard of the long standing holding of the U.S. Supreme Court in *Graham* that all relevant facts should be

taken into consideration when making an obviousness determination. *Graham v. John Deere, Co. of Kansas City,* 383 U.S. 1 (1966). Ignoring relevant facts should not be permitted, especially where, as here, defendants waived their right to challenge the validity of the patent claim. The importance of these secondary considerations are emphasized by the jury having found willful infringement by defendants under the doctrine of equivalents, and inducement by Cole.

"Care must be taken to avoid hindsight reconstruction by using 'The patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit.'" *General Am. Transp. Corp. v. Cryro-Trans, Inc.,* 93 F.3d 776, 773 (Fed. Cir. 1996) citing *Grain Processing Corp. v. Am. Maze-Prods. Co.*, 840 F.2d 902, 907 (Fed. Cir. 1988). As the district court correctly noted in its decision on the Ensnarement Motion that the hypothetical claim was not anticipated because the defendants could not "point to one structure that encompasses every claim of the '554 patent," so to, the only reference which demonstrated a combination of all of the individual elements in the hypothetical claim, except for the equivalent connection method, was the '554 patent. Appx12. It is improper to use the combination of elements set forth in the '554 patent as evidence generally that combining these same elements would have been obvious.

Defendants do not oppose the law cited by plaintiff with regards to finding a patent obvious when it is composed of several elements. More specifically, "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." *KSR Int'l v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007). Despite this clear precedent, neither defendants nor the district court demonstrated a teaching, suggestion or motivation that it would have been obvious to combine the elements set forth in the hypothetical claim (which aside from the connection mechanism mirror exactly the elements in the '554 patent). Defendants' failure to set forth evidence showing the combination of elements making up the hypothetical claim would have been obvious means they failed to meet their burden of production. Repeatedly making a general statement that the combination would have been obvious or predictable, does not cure this fatal flaw.

3. Defendants Have Failed to Articulate a Reason to Combine the Elements

In regards to obviousness, the defendants' brief is replete with references to the "predictable" combining of the claim elements. Appellees' Br. at 4, 25, 54, 58, 60. In truth, the predictability of such a combining was never argued by the defendants or referred to by the district court. To now say it was considered as a way to sidestep the defendants' obligation to come forward with an articulated reasoning of the obviousness of the hypothetical claim is deceptive and wrong.

Although the Order criticized Plaintiff's failure to say it was **not** predictable to combine the elements, there is no offering by the district court or the defendants regarding the predictability of combining the elements. Appx19-20. Without such an offering, the defendants did not meet their burden of production regarding obviousness of either the patent claims or the hypothetical claim.

More particularly, 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. 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.

4. Defendants Assertions in their Appellate Brief Fail to Demonstrate the Hypothetical Claim was Anticipated

Despite the fact that defendants have not filed a cross-appeal, they take issue with the district court's Decision and Order on the Ensnarement Motion that the hypothetical claim was not anticipated. *See* Appellees' Br. at 56. For the first time, defendants raise the allegation that The Dock Manual would cause a person

of ordinary skill in the art to "envision" the combination. Appellees' Br. at 56-57. There is no mistaking the undisputed facts that The Dock Manual is exactly the kind of catalog of parts that was insufficient as a matter of law to show the hypothetical claim was anticipated. *See Lindemann*, 730 F.2d at 1459. There is no single prior art reference that embodies all the elements of the hypothetical claim as they should be arranged. Nor, is there any evidence defendants have presented that a combination would have been envisioned. For these reasons, the district court correctly held that the hypothetical claim was not anticipated. Appx12 (Dkt. #117 at 12).

C. Prosecution History Estoppel is Not Grounds for a Finding of Non-Infringement

Estoppel works against those who represent one thing, and then who turn against that representation at a later time. Since we have a claim, as allowed, that matches in scope what was originally filed, we have no representation where estoppel would be appropriate.

The defendants argue that under *Honeywell International Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131 (Fed. Cir. 2004), Plaintiff surrendered the equivalence here argued. But as explained in *Funai Electric Co., Ltd. v. Daewoo Electronics Corp.*, 616 F.3d 1357 (Fed. Cir. 2010), "[i]ssues of prosecution history estoppel are resolved as a matter of law, and receive plenary review on appeal. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359, 1367–68

(Fed. Cir. 2003) (en banc, on remand). In determining whether an estoppel arose, and the scope of the subject matter allegedly surrendered, the analysis focuses on the claims as originally filed, the amendments made, and the reasons therefor." *Funai*, 616 F.3d at 1368. The first step in this analysis is a determination of whether an amendment "narrowed the literal scope of a claim." *Festo,* 344 F.3d at 1366. If an amendment does not narrow the scope, there is no estoppel.

Funai stated that the district court correctly held no estoppel existed with respect to equivalency of the "insulating material" element of the claims, for this aspect was unrelated to or "merely tangential" to the prosecution. *Funai,* 616 F.3d at 1369. In *Festo Corp. v. Shoketsu Kinzoku Kogya Kabushiki Co.*, 535 U.S. 722 (2002), the U.S. Supreme Court stated:

> There are some cases, however, where the amendment cannot reasonably be viewed as surrendering a particular equivalent....[T]he rationale underlying the amendment may bear no more than a tangential relation to the equivalent in question;.... In those cases the patentee can overcome the presumption that prosecution history estoppel bars a finding of equivalence.

Id. at 740-41.

The Court in *Funai* held that estoppel did not apply:

> It is apparent that the nature of the insulating material was not a factor in the allowance of claim 4, for this aspect was not at issue during prosecution. This limitation is in the category that the Court called "merely tangential" to the prosecution, as discussed in Festo. Thus the district court correctly held that the cancellation

> of claims 1 and 2 did not surrender access to equivalency with respect to the insulating material. The district court appropriately tried the question of equivalency to the jury. Absent estoppel, Daewoo does not challenge that substantial evidence supports the jury's finding of infringement by equivalents. That judgment is affirmed.

Funai, 616 F.3d at 1369-70.

As in *Funai*, the added limitation here was the presence of apertures and fasteners in the overlapping member, the cylindrical rim and the side wall. Whether the aperture in the cylindrical rim and aperture in the side wall were collinear was merely tangential to the prosecution. Even if a presumption of prosecution history estoppel extends to the apertures in the cylindrical rim and the side wall, the evidence shows the equivalent subject matter was not given up during prosecution, and is not trying to be recaptured through the doctrine of equivalents.

As noted in Appellant's brief, 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 defendants' 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 Berquist patent taught that "various dock structures could be locked together and supported through the use of vertical posts." Appx257 (Dkt. #55 at 16). 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*.

D. The Accused Dock Literally Infringes the '554 Patent

The district court appropriately 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). Further, 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 apertures in the portion of the side wall, the cylindrical rim and the overlapping members to be collinear. Differences

among claims can also be a useful guide in understanding the meaning of particular claim terms. *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991). For example, the presence of the 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 Co. v. Medrad, Inc.*, 358 F.3d 898, 910 (Fed. Cir. 2004); *see also Arlington Indus., Inc. v. Bridgeport Fittings*, 632 F.3d 1246 (Fed. Cir. 2011).

After concluding the Accused Product did not have an aperture in the portion of the side wall adjacent to the cylindrical rims, the district court found the Accused Product did not literally infringe that limitation of the '554 patent. Appx244. In regards to the district court's denial of literal infringement, it reasoned that a plate welded to a side wall is not the same as the side wall. As pointed out in Appellant's brief, such reasoning is faulty. 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.

In responding to this assertion on appeal, defendants improperly represent to the court language contained in the '554 patent and ignore well-established law regarding the construction of claims. First, defendants assert that the claims

require "an aperture" (singular) that extends through the cylindrical rim and the portion of the side wall adjacent the rim. Appellees' Br. at 32. The plain and ordinary language in Claims 1 and 4 does not state that a single aperture extends through both the cylindrical rim and a portion of the side wall. In fact, the plain and ordinary language in the claims states "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 (emphasis added). Nowhere in the claims themselves does the '554 patent state that a single aperture extends through both the cylindrical rim and a portion of the side wall.

"[I]t is the *claims*, not the written description, which define the scope of the patent right." *Skedco, Inc. v. Strategic Operations, Inc.*, No. 2016-1349, 2017 WL 1497202, *3 (Fed. Cir. April 24, 2017) (emphasis in original) (citing *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1347 (Fed. Cir. 1998). Furthermore, the meaning of claim terms "is not limited to inventions looking like those in the drawings [of the patent]." *Id.*, *MBO Labs. Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007). "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." *Cornell University v. Illumina*,

No. 10-433-LPS-MPT, 2017 WL 89165, *2 (D. Del. Jan. 10, 2017) (citations omitted).

Defendants contend that the plain language of the claims requires "a single aperture extend[ing] through both the cylindrical rim and the adjacent side wall." Appellees' Br. at 32. In support of this proposition, defendants suggest the court should look at the '554 patent specification and Figures 5 and 6 that show a single aperture. Defendants are improperly importing limitations into the claim language contrary to well-established law. The plain and ordinary meaning of the claims does not state that a *single* aperture or *collinear* aperture extends *through* the cylindrical rim and the side wall. Claims 1 and 4 use language that "each cylindrical rim ***and*** that portion of the side wall adjacent the rim has an aperture," which should be construed to suggest that the '554 patent claims allow for more than one aperture. Figures 5 and 6 demonstrate an embodiment of the '554 patent with a collinear aperture, but the court should not import limitations to the claim language from the figures or specification. Neither Claim 1 nor Claim 4 require that the apertures are collinear, and this requirement is only present in dependent Claim 5. For these reasons, the Court should find that the district court erred in its determination regarding literal infringement and defendants' arguments improperly import limitations to the claims contrary to existing law.

The construction asserted by plaintiff regarding the '554 patent claims regarding apertures in "each of the cylindrical rim and that portion of the side wall adjacent the rim" is consistent with the Federal Circuit's interpretation of similar language which was construed to suggest that openings adjacent to a side wall were structurally distinct from openings adjacent to an end wall. *See General Am. Transp.*, 93 F.3d at 769-70.

II. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

In their response brief, the defendants have asserted that apart from the claimed connection mechanism, the claimed docks were well-known in the art, and allowance of the asserted claims was based on the claimed connection mechanism.

Neither of these assertions are true.

Claim 1 of the '554 patent provides:

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; Appx57.

Further, Claim 1 provides:

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.

This limitation from the application claim 2, allowed as filed, was added to application claim 1 in response to a rejection of application claim 1 under 35 U.S.C. Sections 102 and 103 in view of U.S. Berquist Patent 3,964,221.

The allowance of the asserted claims was not based on the connection method, but on the presence of apertures and fasteners in the overlapping members, the cylindrical rim and the portion of the side wall adjacent the rim.

Claim 3 of the '554 patent further provides: The dock structure of claim 1 wherein the cavity is filled with concrete. Appx57.

None of the cited references, whether alone or in combination, teach or suggest such a dock structure with the claimed pan shape forming a cavity fillable with concrete, together with the cylindrical rims forming cylindrical openings for receiving pilings, together with overlapping members, each with an aperture for receiving a fastener, and each cylindrical rim and portion of the side wall adjacent the rim having an aperture formed in it for receiving a fastener. The defendants never identified any reference which alone disclosed all of these elements, or

which was based on some articulated reasoning suggesting the combining of these individual elements as found in the prior art.

In their response brief, the defendants have asserted that the district court properly found that a person of skill in the art would have reason to combine the teachings of the cited prior art references. This is absolutely not the case. As highlighted, above, the district court's only reference to any reason to combine was as reproduced below:

"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.

This was not sufficient to meet defendants' production burden, and it did not conclude a person of skill in the art would have reason to combine the teachings of the cited prior art references. For these reasons, 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: May 1, 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 Reply Brief 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: May 1, 2017

/s/Sherry D. Coley
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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 4,729 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: May 1, 2017

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