

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

C&D ZODIAC, INC.,
Petitioner,

v.

B/E AEROSPACE, INC.,
Patent Owner.

PGR2017-00019
Patent D764,031 S

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

DANIELS, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. Background

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

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

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

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

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

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

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

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

B. Additional Proceedings

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

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

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

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

C. The '031 Patent and Claim

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

FIG. 1

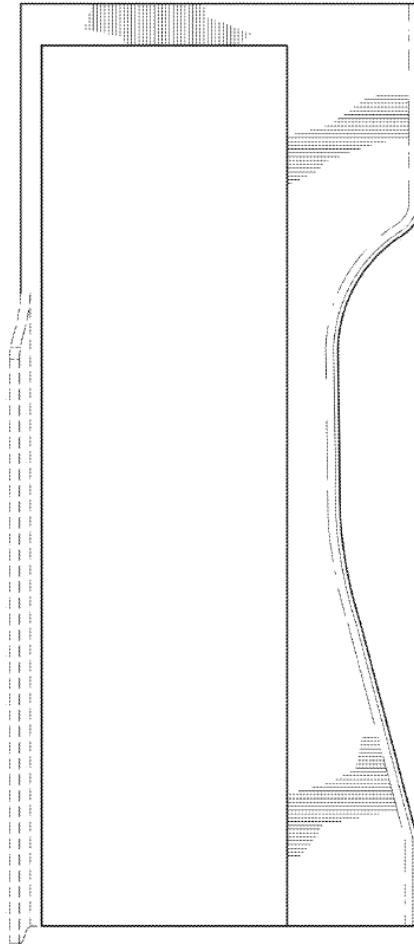


Figure 1 of the '031 patent illustrates “a front side view” of an aircraft lavatory. Ex. 1001, Written Desc.

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