

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C&D ZODIAC, INC.,  
Petitioner,

v.

B/E AEROSPACE, INC.,  
Patent Owner.

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Case PGR2017-00019  
Patent D764,031 S

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Before JENNIFER S. BISK, MICHAEL J. FITZPATRICK, and  
SCOTT A. DANIELS, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

DECISION  
Institution of Post-Grant Review  
37 C.F.R. § 42.108

## 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. Patent Design Patent No. D764,031 S (“the ’031 patent”). Paper 1. B/E Aerospace, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 7 (“Prelim. Resp.”).<sup>1</sup> Applying the standard set forth in 35 U.S.C. § 324(a), which requires demonstration that it is more likely than not that at least one challenged claim is unpatentable, we grant Petitioner’s request and institute post-grant review of the challenged claim.

### B. Related Proceeding

Petitioner states that the ’031 patent and other related patents, 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. Pet. 2–3. The ’031 patent claims priority, ultimately, to a utility patent, U.S. Patent. No. 8,590,838 (“the ’838 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.*, 2017 WL 4387223 (Fed. Cir. Oct. 3, 2017).

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<sup>1</sup> Patent Owner filed a redacted version of its Preliminary Response as Paper 7, and a sealed version, Paper 8. Unless otherwise noted in this Decision we refer to the publically available redacted version, Paper 7.

*C. The '031 Patent and Challenged Claim*

The '031 patent (Ex. 1001), issued August 16, 2016, and is titled “Aircraft Interior Lavatory.” The '031 patent includes two figures, Figures 1 and 2, both reproduced below, claiming a design for an aircraft lavatory.

*FIG. 1*

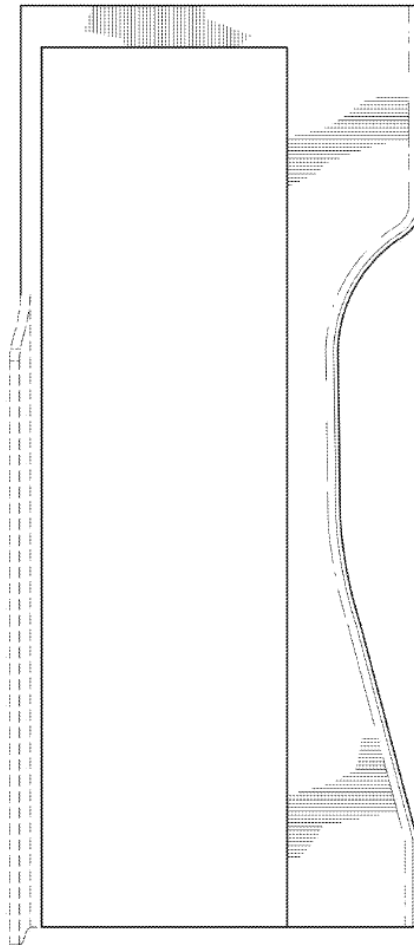


Figure 1 of the '031 patent illustrates “a front side view” of an aircraft lavatory. Ex. 1001, Written Desc.

FIG. 2

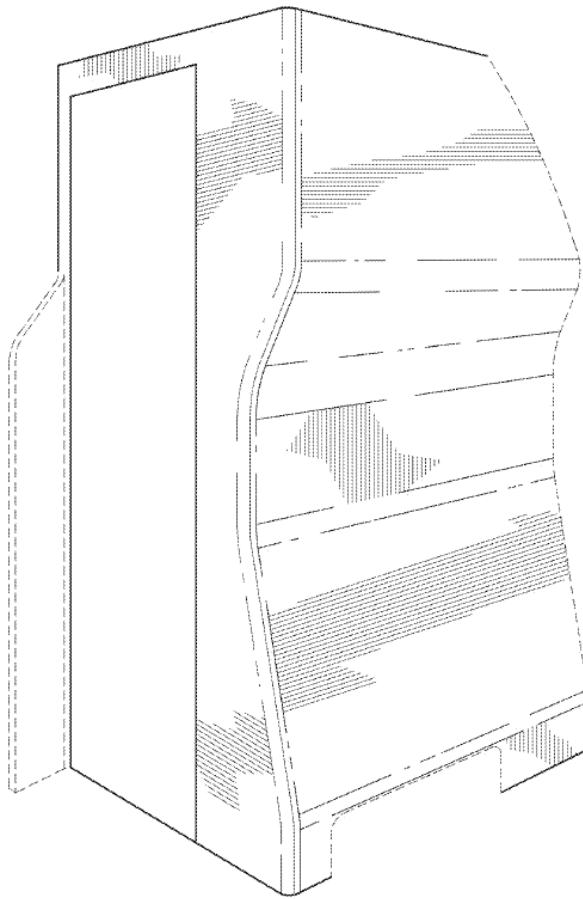


Figure 2 of the '031 patent depicts “a front perspective view” of the aircraft lavatory. *Id.*

*D. Asserted Grounds of Unpatentability*

Along with its contention that the '031 patent is available for post-grant review, Petitioner asserts essentially three grounds of unpatentability. Pet. 6. Petitioner contends that the challenged claim is unpatentable under 35 U.S.C. § 171 as lacking ornamentality and 35 U.S.C. § 112(b) as indefinite. *Id.* Petitioner contends also that the patent is invalid under 35 U.S.C. § 102(a)(1), alleging that the illustrated lavatory was on sale and in

public use prior to the effective filing date. *Id.* Importantly, Petitioner’s arguments rely fundamentally on the assertion that the ’031 patent is available for post-grant review because it is *not* entitled to the filing date of the ’838 patent and its respective patent application, application No. 13/089,063 (“the ’063 application”), which was filed April 18, 2011. *See* 35 U.S.C. § 100(i)(1)(A)-(B); *see also* Ex. 1001, 1. Petitioner supports its arguments with a declaration by Ronald Kemnitzer (“Kemnitzer Decl.”), an industrial designer. Ex. 1003.

In its Preliminary Response, Patent Owner contests mainly the issue of the filing date of the ’031 patent. Patent Owner argues that the ’031 patent clearly states on the face page of the patent that it is a “division of application 13/089,063,” arguing that the ’063 application provides sufficient written description support for the design patent. Prelim. Resp. 14–29. Therefore, Patent Owner contends, the ’031 patent *is* entitled to the filing date of the ’063 application and “is not eligible for post-grant review because it was not filed subject to the first-inventor-to-file provisions of the Leahy–Smith America Invents Act (AIA).” *Id.* at 14.

*E. Real Parties in Interest*

Section 322(a)(2) of Title 35 states that a petition to institute a post-grant review “may be considered only if— . . . (2) the petition identifies all real parties in interest.” 35 U.S.C. 322(a)(2). Invoking this statute, Patent Owner asserts: “A PGR petitioner is required to identify all real-parties-in-interest (RPII) to the petition, *as well as all privies* of the petitioner.” Pet. 3 (emphasis added). The statute, however, does not require the identification of privies, and Patent Owner has not persuaded us that the Petition fails to identify a real party in interest.

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