

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIRAC, INC.,
Petitioner,

v.

ECOFASTEN SOLAR, LLC,
Patent Owner

IPR2021-00532
U.S. Patent No. 10,763,777

**PETITIONER'S MOTION FOR REHEARING
PURSUANT TO 37 C.F.R. §§42.71(c)-(d)**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. LEGAL STANDARD	2
III. ARGUMENT	3
A. The Board Overlooked and Misapprehended Substantial Evidence in the Petition and the Patent Owner’s Analysis that Wentworth’s Stanchion Is a “Bracket”	3
B. The Board Did Not Apply the Ordinary and Customary Meaning of “Bracket” in Its Analysis, and Thus the Decision Was Based on an Erroneous Interpretation of Law	8
C. The Board’s Criticism of the Petition’s Proposed Modification to Wentworth Is Premised on Same Legal Error	11
D. The Board Overlooked and Misapprehended Substantial Evidence That Wentworth’s Stanchion Includes a “Flange”	13
E. The Board’s Criticism of Petition’s Proposed Combination of Wentworth With Ullman Is Also Premised on Same Legal Error	14
IV. CONCLUSION.....	15
CERTIFICATE OF SERVICE	1

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Graham v. John Deere Co. of Kansas City</i> , 383 U.S. 1 (1966).....	9
<i>KSR Int’l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007)	10
<i>Palo Alto Networks, Inc. v. Juniper Networks, Inc.</i> , IPR2013-00369, Paper 39, 2–3 (PTAB Feb. 14, 2014)	2
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (<i>en banc</i>).....	1, 3
<i>In re Preda</i> , 401 F. 2d 825 (CCPA 1968).....	10
<i>Star Fruits S.N.C. v. United States</i> , 393 F.3d 1277 (Fed. Cir. 2005)	3
Other Authorities	
37 C.F.R. §42.71(c).....	1-2
37 C.F.R. §42.71(d)	1-2

I. INTRODUCTION

Pursuant to 37 C.F.R. §§42.71(c) and (d), Unirac, Inc. (“Petitioner”) respectfully requests rehearing of the Board’s July 22, 2021 Decision (Paper 7, hereinafter “Decision” or “Dec.”) denying institution of trial for *inter partes* review of U.S. Patent No. 10,763,777 (the “’777 Patent”). In rendering its Decision, the Board overlooked and misapprehended substantial evidence, and misapplied the proper analysis and legal standard for claim construction. In particular, although the Decision states that the Board is applying the claim construction standard of *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), where the words of a claim are given their ordinary and customary meaning as would have been understood by one of ordinary skill in the art, the Board does not give or properly apply the ordinary and customary meaning of the claim terms “bracket” and “flange” in its analysis, and as a result, the Decision is based on an erroneous interpretation of law.

As explained below, and in accordance with *Phillips*, each of the asserted grounds of the Petition applied the ordinary and customary meaning of the terms “bracket” and “flange” as the terms would have been understood by a person of ordinary skill in the art (POSA), to establish those claim elements are met by Wentworth’s stanchion. In the Decision, however, the Board misapprehended this analysis.

The Board's misapprehension appears to be based on Patent Owner's assertion that Wentworth's stanchion is not a bracket. Patent Owner Preliminary Response (Paper 6, hereinafter "POPR") at 6, 17. And it is the Board's misapprehension in this regard—adopting the Patent Owner's improper *ipsissimus verbis* test and related failure to apply the proper claim construction analysis for the "bracket" and "flange" claim terms—upon which the Decision rests, which constitutes legal error sufficient to warrant reconsideration.

Thus, Unirac respectfully requests that the Board grant this request for rehearing.

II. LEGAL STANDARD

Pursuant to 37 C.F.R. § 42.71(d), a party may request rehearing of a decision by the Board whether to institute a trial. "The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." 37 C.F.R. § 42.71(d). The Board will review the previous decision for an abuse of discretion. 37 C.F.R. § 42.71(c). "An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors." *Palo Alto Networks, Inc. v.*

Juniper Networks, Inc., IPR2013-00369, Paper 39, 2–3 (PTAB Feb. 14, 2014) (citing *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)).

III. ARGUMENT

A. The Board Overlooked and Misapprehended Substantial Evidence in the Petition and the Patent Owner’s Analysis that Wentworth’s Stanchion Is a “Bracket”

The Petitioner construed the term “bracket” according to its ordinary and customary meaning, expressly stating that the claims are construed “in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.”

Petition (Paper 2) at 12. The Patent Owner did not challenge Petitioner’s proposed claim construction (POPR at 3), and the Board agreed that it would apply the claim construction standard of *Phillips*, under which the “words of a claim ‘are generally given their ordinary and customary meaning’” (Dec. at 9).

The ordinary and customary meaning of “bracket” is “a projecting support.” *See e.g., McGraw-Hill Dictionary of Scientific and Technical Terms* (5th ed. 1994) (EX-1022) at 262; *Merriam-Webster’s Collegiate Dictionary* (10th ed. 1998) (EX-1023) at 137 (“an overhanging member that projects from a structure (as a wall) and is usu. designed to support a vertical load or to strengthen an angle”).

The Petition, supported by the Declaration of Philip D. Dregger (EX-1003, hereinafter “Expert Declaration”), confirmed such meaning of “bracket” in its

discussion of both the “State of the Art” as well as the ‘777 Patent itself. *See e.g.*, Petition at 4, 17-19; Expert Declaration at ¶¶ 38, 58. With respect to the State of the Art section, the Petition cited to specific prior art references and explained that:

[D]epending on the type of roof (e.g., flat, shingled, tiled), design and mounting considerations (e.g., low-profile, angle of sun), etc., it was well-known that a bracket for attaching a structure could be formed in a variety of shapes and configurations, including bases in solid or “U” shapes with threaded portions extending upwardly or holes to receive fasteners vertically; mounts with extensions formed in “L” or “Z” shapes for attachment with clamps or fasteners horizontally; stanchions integral to, or separate from, a base or other mount to provide, e.g., stand-off from the roof surface. ... The figures below (annotated with colors and labels) demonstrate that it was known to use a variety of configurations and shapes of brackets or stanchions (blue) affixed to a roof with fasteners (purple) to provide support for structures attached to roofs....

Petition, at 17-19; Expert Declaration at ¶ 58 (both citing to EX-1008, FIGS. 3-4, 7-8; EX-1010, 1:5-2:60, FIG. 1; EX-1011, 1:9-2:24, 3:1-6:30, FIGS. 1-15; EX-1012 , 1:30-2:40, 3:9-5:60, FIGS. 1-13; EX-1020, FIGS. 2A-7). The Petition further explained:

[T]he ‘777 Patent admits that the shape of the bracket is not critical to the invention, as “[t]he illustrated brackets...are shown by way of example only. Any suitable brackets can be utilized, such as any of

the brackets shown and described herein” and the claimed L-shaped bracket is provided “by way of example only.”

Petition at 4; Expert Declaration at ¶ 38 (both citing to EX-1001, 24:6-9; 33:14-15).

The disclosure of the ’777 Patent confirms that it is using the term “bracket” consistent with its customary and ordinary meaning, as it describes numerous configurations and shapes of brackets all of which are projecting supports, confirming the Petitioner’s explanation and construction of the term. *See e.g.*, EX-1001, FIGS. 1, 13-19, 28-34, 40-42, 47-53, 60-62, 64-65, 68-94.

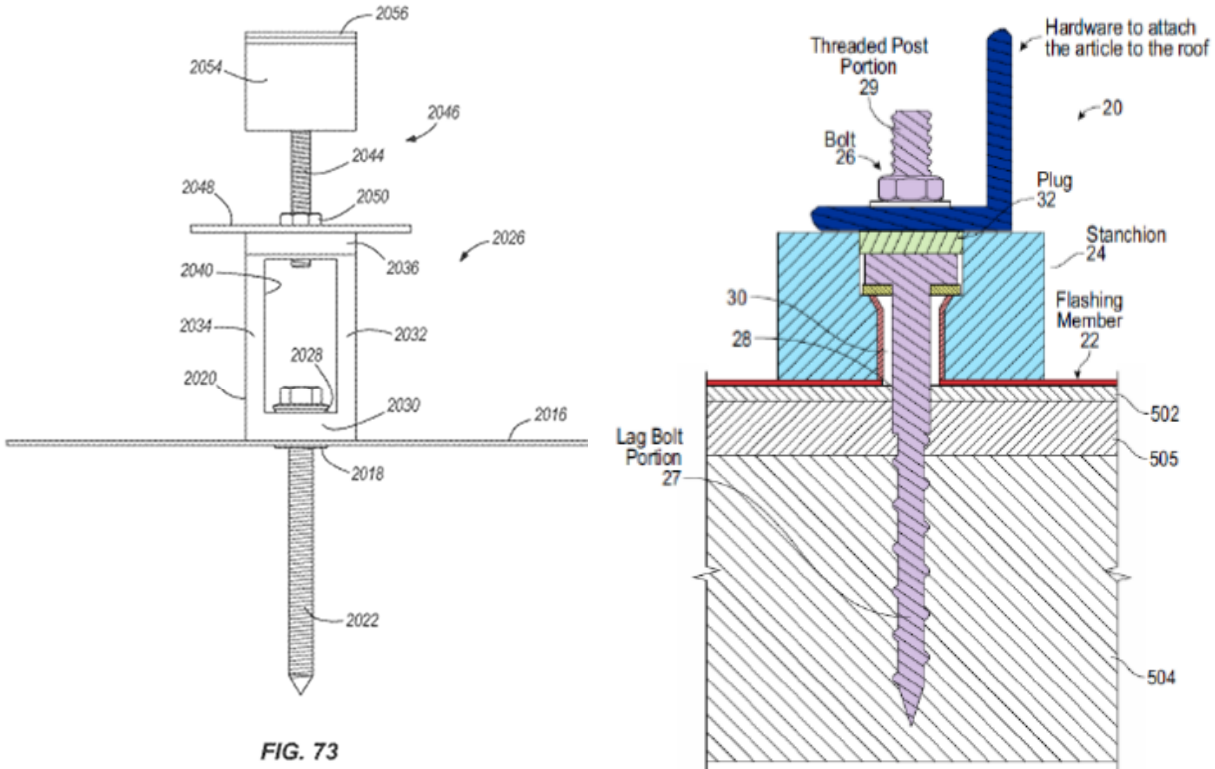
In its analysis, as supported by the Expert Declaration, the Petitioner applied the ordinary and customary meaning of “bracket” as “a projecting support” to establish that Wentworth’s stanchion is a “bracket.” As made clear in the Petition, Wentworth’s stanchion 24 projects above the flashing 22 and roof to support and attach an article (such as a solar panel) to the roof. *See e.g.*, Petition at 21-22, 39 (“stanchion 24’ with a portion projecting around the flashing protrusion”) (emphasis omitted), 41 (“the height of stanchion 24, that is the distance it extends above the plane of the roofs shingles 502 (refer to FIG. 2), may be varied to accommodate various article installation needs”), 56 (“support bracket or stanchion”); Expert Declaration at ¶¶ 61-63, 94, 97, 121. “[I]t was known to use brackets of various configurations and shapes with a body portion that extends away from the flange portion attached to the roof, such body portion elongated to

have one or more apertures to receive fasteners to attach the article.” Petition at 41; Expert Declaration at ¶ 96 (both citing to EX-1010, FIG. 1; EX-1011, FIGS. 9A, 9B, 12A, 12B, 13A, 13B, 15; EX-1012 FIG. 8; EX-1020 FIG. 5). As such, the Petition specifically identified substantial evidence that Wentworth’s stanchion is a “bracket” under that term’s customary and ordinary meaning.

The Patent Owner did not dispute that the claim terms should be construed according to their ordinary and customary meaning, but failed to apply such construction in its analysis to argue that Wentworth’s stanchion is not a “bracket.” POPR at 3, 5-7, 11-14, 24-27. Indeed, the Patent Owner could not make any reasonable argument that Wentworth’s stanchion is not “a projecting support.”

Instead, the gist of Patent Owner’s argument for why Wentworth’s stanchion is not a bracket is: (1) “[t]here is no mention of a bracket in Wentworth”; and (2) “the Wentworth invention was designed to retain a bracket atop the stanchion.” POPR at 7. The first argument, which the Board appears to have been misled to adopt, is an improper *ipsissismus verbis* test and should be rejected for the reasons discussed *infra*. The second argument—which is based on the faulty assumption that just because some component is used with a bracket, that component cannot itself be a bracket—is expressly contradicted by the ’777 Patent. In particular, the ’777 Patent teaches multiple embodiments of a system where one bracket is attached or mounted to another bracket. EX-1001, FIGS. 71-89. Indeed, FIGS. 71-

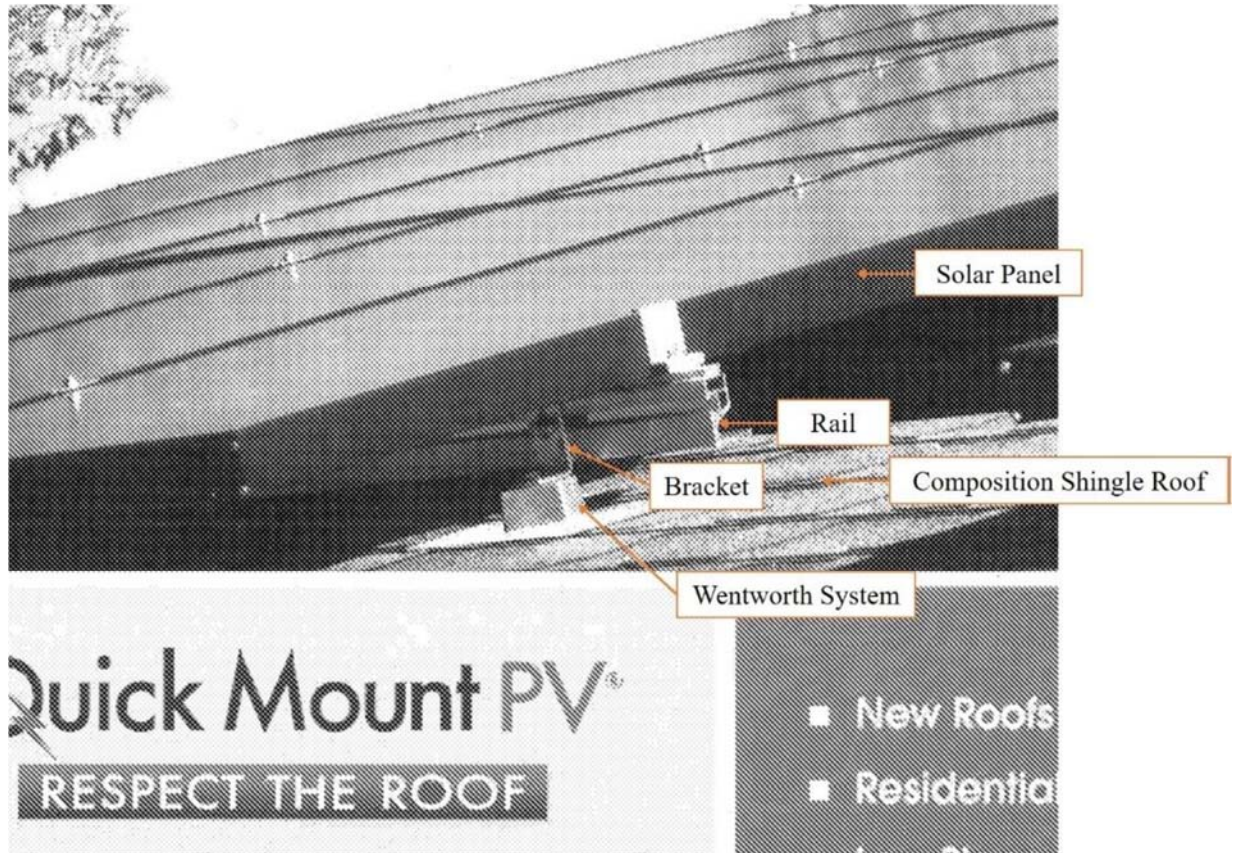
74, for example, show an assembly where a “second bracket 2054” is attached to a “first bracket 2020” with a threaded fastener, just like the modified and annotated version of Wentworth Figure 3 provided in the POPR and reproduced in the Decision. EX-1001, 25:42-27:57, FIGS. 71-74; POPR at 13-14.



EX-1001, FIG. 73; POPR at 13-14. As such, contrary to the Patent Owner’s argument, Wentworth’s stanchion can itself still be a “bracket” even if it is used with another bracket.

Moreover, Patent Owner’s analysis regarding Wentworth’s stanchion simply confirmed that such stanchion is a “bracket” under the ordinary and customary meaning of “a projecting support.” This is clearly shown in the excerpt of the

brochure reproduced in the POPR, showing that Wentworth's stanchion, as installed, projects above a roof and provides support for a rail and solar panel:



POPR at 13. And the POPR admitted that “the stanchion of Wentworth ... [is] an elevated attachment point[] for ... module support rails.” POPR at 17.

Thus, the Board overlooked and misapprehended the Petition’s analysis, and the substantial evidence of record in the proceeding, including the Patent Owner’s own statements, to conclude (mistakenly) that “we are not sufficiently persuaded that Wentworth’s stanchion 24 is a ‘bracket’ as recited in the claims of the ’777 patent.” Dec. at 21.

B. The Board Did Not Apply the Ordinary and Customary Meaning

**of “Bracket” in Its Analysis, and Thus the Decision Was Based on
an Erroneous Interpretation of Law**

The Board declined to provide an express construction for the term “bracket,” but agreed with the Petitioner that the claim terms should be “given their ordinary and customary meaning.” Dec. at 9-10.

However, led to error by Patent Owner’s misdirection that “[t]here is no mention of a bracket in Wentworth” (POPR at 7), the Board failed to apply the ordinary and customary meaning of “bracket” in its analysis of whether Wentworth’s stanchion is a “bracket.” In particular, the Decision did not provide any analysis of Wentworth’s stanchion under the ordinary and customary meaning of the term “bracket,” nor did the Decision recognize that the State of the Art section of the Petition set forth the general understanding of a POSA of the scope and content of the prior art regarding brackets, a critical part of *Graham* analysis. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966). Dec. at 19-20. Instead, the Decision simply noted: “Petitioner has not cited to any portion of Wentworth calling item 24 a bracket. In fact, Petitioner could not do so because Wentworth never uses the word ‘bracket.’” *Id.* (citations omitted).

Such an *ipsissimus verbis* test to conclude that Wentworth’s stanchion is not a “bracket” is improper. The question is not, as the Decision suggests, whether the word “bracket” itself appears in Wentworth, but rather whether Wentworth’s stanchion would be understood by a POSA to be a “bracket” under that term’s

ordinary and customary meaning. *In re Preda*, 401 F. 2d 825, 826 (CCPA 1968) (“[I]t is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom.”); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (explaining that prior art references must be evaluated, taking into account “the background knowledge possessed by a person having ordinary skill in the art” and “the inference and creative steps that a person of ordinary skill in the art would employ.”). Critically, the Petition included factual support identifying the scope and content of the prior art regarding brackets. Petition at 17-19 (citing EX-1010, FIG. 1; EX-1011, FIGS. 9A, 9B, 12A, 12B, 13A, 13B, 15; EX-1012 FIG. 8; EX-1020, FIG. 5). This support in the Petition was overlooked in the Decision.

Moreover, the Decision mistakenly asserts that Petitioner’s expert’s opinion is conclusory and does not identify any factual support:

Petitioner has not provided sufficiently persuasive testimony from a witness demonstrating that one of skill in the art would consider either (1) that a stanchion is a type of bracket or (2) that the specific stanchion taught in Wentworth is a bracket. Instead, Petitioner’s witness merely parrots the conclusory statements of Petitioner. *See, e.g.*, Ex. 1003 ¶¶ 61, 63, 95, 97 (stating “stanchion or bracket 24” without any explanation). Based on the facts of this case, such conclusory testimony without sufficient explanation is not persuasive.

Dec. at 20. However, the Board’s factual finding in this regard is clearly erroneous as paragraphs 58, 61, 63, 95 and 97 of the Expert Declaration clearly disclose the underlying facts or data on which the opinion is based. For example, paragraph 58 includes the expert’s explanation for what a POSA understood to be a “bracket” and pincites to EX-1008, EX-1010, EX-1011, EX-1012, EX-1020 confirming the same. Paragraphs 61, 63 and 95 include direct quotations and pincites to EX-1005 (Wentworth) as the underlying factual support. Paragraph 97 explains the motivation to modify the stanchion of Wentworth with express reference to the State of the Art section and pincites to Wentworth. Further, it appears that the Board overlooked the immediately preceding paragraph 96 which specifically identified EX-1010, FIG. 1; EX-1011, FIGS. 9A, 9B, 12A, 12B, 13A, 13B, 15; EX-1012 FIG. 8; EX-1020 FIG. 5. as the factual support from the State of the Art section upon which the expert’s opinion regarding motivation to modify Wentworth was based. Thus, the Decision’s assertion that the expert’s testimony is conclusory is clearly erroneous and without substantial evidence.

As such, the Petitioner respectfully submits that the Board committed legal error by not applying the ordinary and customary meaning of the term “bracket” in its analysis, and thus the Decision is based on an erroneous interpretation of the law, and further, its analysis is not supported by substantial evidence.

C. The Board’s Criticism of the Petition’s Proposed Modification to Wentworth Is Premised on Same Legal Error

The Decision further stated, with respect to the Petition’s Ground 1, that “we are also not persuaded by Petitioner’s argument as to why a person having ordinary skill in the art would have modified stanchion 24 to include a body portion.” Dec. at 20. Such criticism, however, was based on the premise that Wentworth’s stanchion is not a “bracket”: “[Petition’s] argument presumes that stanchion 24 is a bracket and should be modified into a better shape for a bracket. But, as discussed above, Petitioner has not sufficiently explained the predicate of Petitioner’s argument—that stanchion 24 is a bracket.” Dec. at 20-21. In other words, this second point ultimately turns on the first point—i.e., whether the Wentworth stanchion is a bracket. Because the Petition established that Wentworth’s stanchion is indeed a “bracket” under the ordinary and customary meaning of that term, as discussed *supra*, this criticism of the Petition’s modification to Wentworth’s stanchion cannot stand.

The Decision also stated that “Petitioner’s argument is inconsistent with the express teachings of Wentworth,” suggesting that the two embodiments of Wentworth’s stanchion are used for receiving hardware to attach an article, as opposed to attaching directly to the article. Dec. at 21. First, this is a distinction without a difference as the stanchion is still a “bracket,” consistent with its ordinary and customary meaning of “a projecting support,” that functions as a point of attachment. To the extent that the Board is suggesting some other

meaning for “bracket” that requires indirect rather than direct attachment of an article, the Decision fails to provide such meaning and, in any event, such meaning would be inconsistent with the ordinary and customary meaning which the Board acknowledged is the appropriate meaning here. Second, the Decision misapprehended or overlooked the Petition’s discussion of the teachings of Wentworth that “[t]he preferred embodiments of the invention described herein are exemplary and numerous modifications, variations, and rearrangements can be readily envisioned,” as well as the understanding of a POSA that “Wentworth’s teachings ... did not only apply to the disclosed stanchion, but would be useful with well-known brackets such as the L-brackets ... [as] it was known to use brackets of various configurations and shapes.” Petition at 41-42 (citing EX-1005, 5:21-26; EX-1010, FIG. 1; EX-1011, FIGS. 9A, 9B, 12A, 12B, 13A, 13B, 15; EX-1012 FIG. 8; EX-1020 FIG. 5).

D. The Board Overlooked and Misapprehended Substantial Evidence That Wentworth’s Stanchion Includes a “Flange”

The Decision stated that “although Petitioner identifies stanchion 24 as a ‘flange’ or ‘flange portion,’ Petitioner does not sufficiently explain why that is so.” Dec. at 21.

The Petition construed the term “flange” according to its ordinary and customary meaning and identified the specific components of the stanchion that make up the flange. Petition at 12. The ordinary and customary meaning of

“flange” is “a rim of a mechanical part for strength, for guiding, or attachment to another object.” *See e.g.*, EX-1022 at 767 (“a projecting rim of an organism or mechanical part”); EX-1023 at 442 (“rib or rim for strength, for guiding, or for attachment to another object”).

The Petition, supported by the Expert Declaration, applied this ordinary and customary meaning of “flange” in its analysis, explaining that Wentworth’s stanchion includes a flange, e.g., a rim defined by hole that provides guidance for receiving a sleeve of a flashing member and attaching the stanchion to a roof using a fastener or bolt. Petition at 39 (“*Stanchion 24 has a hole 30 for receiving sleeve 40 of flashing member 22*”), 47 (“*single lag bolt attaches the system to the structural member of the roof*”); Expert Declaration at ¶¶ 94, 105.

The Board thus overlooked and misapprehended this analysis of the Petition when the Board concluded that the Petitioner had not sufficiently explained why the Wentworth stanchion includes a “flange” or “flange portion.”

E. The Board’s Criticism of Petition’s Proposed Combination of Wentworth With Ullman Is Also Premised on Same Legal Error

The Decision stated that “we are not sufficiently persuaded that a person having ordinary skill in the art would have replaced Wentworth’s stanchion 24 with the structure Petitioner identifies as a mounting bracket from Ullman Figure 16.” Dec. at 27. Here, similar to the Board’s analysis regarding the modification of Wentworth for Ground 1, this analysis appears to be based on the premise that

Wentworth’s stanchion is not a “bracket.” *Id.* (“Petitioner has not sufficiently explained why a person having ordinary skill in the art would not have used that same structure when combining Ullman with Wentworth—that is, placing the “bracket” assembly on top of the stanchion.”). Because that premise is a mistake (as already discussed), the Decision’s analysis cannot stand.

IV. CONCLUSION

For the reasons above, Petitioner respectfully asks that the Board rehear its prior decision and grant institution on all grounds.

Respectfully submitted,

Dated: August 23, 2021

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.105, I hereby certify that a true and correct copy of Petitioner's Motion for Rehearing Pursuant to 37 C.F.R. §§ 42.71(c)-(d) was served by filing through the Patent Trial and Appeal Board End to End system as well as delivering a copy via email upon the Patent Owner at the following address:

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