

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRONT ROW TECHNOLOGIES, LLC,
Petitioner,

v.

MLB ADVANCED MEDIA, L.P.,
Patent Owner.

Case IPR2015-01932
Patent 8,121,872 B2

Before RICHARD E. RICE, SCOTT A. DANIELS, and
CARL M. DeFRANCO, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

A. Background

Front Row Technologies, LLC (“Petitioner”) filed a Petition to institute an *inter partes* review of claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22 of U.S. Patent No. 8,121,872 B2 (“the ’872 patent”). Paper 1 (“Pet.”). MLB Advanced Media, LP (“Patent Owner”) filed a Preliminary Response. Paper 5 (“Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). Upon consideration of the Petition and the Preliminary Response, we determine that Petitioner has not established a reasonable likelihood of prevailing on the claims challenged in the Petition. For the reasons expressed below, we do not institute an *inter partes* review of claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22 of the ’872 patent.

B. Additional Proceedings

Petitioner states that it is unaware of any other related matter involving the ’872 patent. Pet. 3.

C. The ’872 Patent

The ’872 patent (Ex. 1001), titled “System And Method For Allocating Seats for a Ticketed Event,” relates generally to a method for selecting and allocating a seat or group of seats to a ticketed event, such as a sporting or concert event for example. Based on a desired number of seats for the event, the method includes selecting “a best unassigned seat,” for the event, and “determining a best grouping of seats . . . wherein the best grouping of seats comprises the best unassigned seat at the ticketed event.” Ex. 1001, 2:40–44, Fig. 2. Figure 2 of the ’872 patent, illustrating a basic step-wise algorithm for the claimed method, is reproduced below.

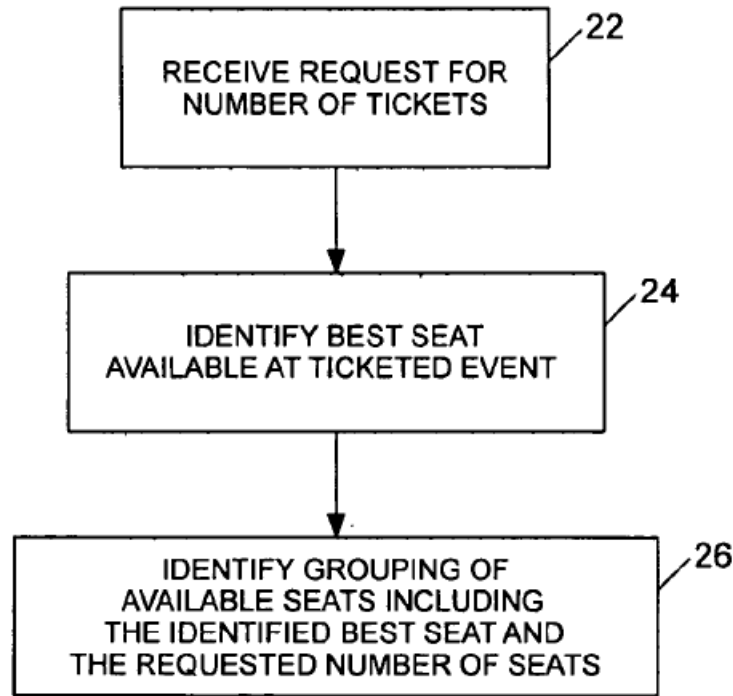


FIG. 2

Figure 2, above, illustrates three steps of the claimed method: receive request for number of tickets 22, identify best seat availability at ticketed event 24, and, identify grouping of available seats including the identified best seat and the requested number of seats 26. *Id.* at 3:61–4:15. The '872 patent also describes that in order to identify the best seat “[t]he best seat definition can be set by the ticket purchaser or the ticket seller.” *Id.* at 4:46–47.

The purpose of the claimed method is to provide to a potential purchaser the option to first identify and purchase the best seat for the event

in the facility and, secondly, to also obtain a grouping of additional seats nearby to the best seat, although the additional seats might not be immediately adjacent to the best seat or in the same row. *Id.* at 2:17–24. An annotated version of Figure 4 of the '872 patent illustrating this concept is reproduced below.

	1	2	3	4	5	6	7	8	9	10	11	12
A	X	X	X	X	X	O	X	X	X	X	X	X
B	X	X	X	O	O	X	X	X	X	X	X	X
C	X	X	O	O	O	X	X	X	X	X	X	X
D	X	X	X	O	X	O	X	X	X	X	X	X
E	X	X	X	X	X	X	X	X	X	X	X	X
F	X	X	X	X	X	X	X	X	X	X	X	X

46 

FIG. 4

Figure 4, above, illustrates in yellow highlighting an example of a grouping of seats in section 46 that share a common boundary with another seat in the group. *Id.* at 5:16–19. It could be that seat A6, for example, is the best available seat at a concert because it is closest to the stage, and that seats B4, B5, C3, C4, C5, D4, and D6, are available nearby seats. The Specification also makes clear that seats do not have to have an adjoining or common boundary. *See id.* at 5:43–46.

D. Illustrative Claim

Claims 1, 3–4, 6–10, 17–18, and 20 were amended by Reexamination Certificate issued November 8, 2013, and claims 2, 5, 11, 16, and 19 were canceled. *See* Ex. 3010.¹ The remaining claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22 in the '872 patent are all challenged in this IPR proceeding.

Of the challenged claims, claims 1, 9, and 17 are independent. Each of dependent claims 3–4 and 6–8 are dependent upon claim 1; claims 10 and 12–15 depend from claim 9, and claims 18 and 20–22 depend, directly or indirectly, from claim 17. Claim 1 is reproduced below and illustrates the claimed subject matter with the amendments made during reexamination shown in italics:

1. A method for allocating ticketed event seats *with a device having a processor coupled to an interface and a database*, the method comprising:

the device presenting a purchaser with an option of grouping of seats based on a number of tickets indicated by the purchaser and a best grouping selection made by the processor;

receiving, at [a] *the device*, a request for a number of seats at a ticketed event;

the device selecting a first seat wherein the first seat is determined to be a best unassigned seat at the ticketed event;
[and]

the device determining a best grouping of seats wherein the best grouping of seats includes the number of seats requested and further wherein the best grouping of seats comprises the best unassigned seat at the ticketed event; *and*

the device presenting said best grouping of seats to the purchaser for selection by the purchaser,

¹ Ex Parte Reexamination No. 90/012,432, filed August 14, 2012. Ex. 3004 (“’872 Reexamination” or “reexamination proceeding”).

wherein the first seat is determined to be a best unassigned seat at the ticketed event according to a definition based on the ticketed event, wherein the definition is set by a ticket seller.

E. The Alleged Grounds of Unpatentability

Petitioner contends that the challenged claims are unpatentable on the following specific grounds.

References	Basis	Claims Challenged
Brett ² and Silbershatz ³	§ 103	1, 3–4, 6–10, 12–15, 17–18, and 20–22
Brett, Silbershatz, and Austin ⁴	§ 103	1, 3–4, 6–10, 12–15, 17–18, and 20–22
Brett, Silbershatz, and Nakfoor ⁵	§ 103	1, 3–4, 6–10, 12–15, 17–18, and 20–22
Brett, Silbershatz, and Gathman ⁶	§ 103	1, 3–4, 6–10, 12–15, 17–18, and 20–22
Brett, Silbershatz, and Nestor ⁷	§ 103	1, 3–4, 6–10, 12–15, 17–18, and 20–22

II. ANALYSIS

Patent Owner asks that we deny institution of trial on the first ground in the Petition, because *inter alia*, all of the prior art was before the Office during prosecution or in the '872 Reexamination and does not present any new issues that were not addressed fully during prosecution or in the reexamination proceeding. Prelim. Resp. 1.

² Ex. 1005, U.S. 2002/0023041 A1 (February 21, 2002).

³ Ex. 1006, EP 1 091 308 A2 (November 4, 2001).

⁴ Ex. 1007, WO 2002/069078 A2 (September 6, 2002).

⁵ Ex. 1008, U.S. 2003/0093387 A1 (May 15, 2003).

⁶ Ex. 1009, U.S. 2003/0069764 A1 (April 10, 2003).

⁷ Ex. 1010, WO 01/71669 A2 (September 27, 2001).

Our discretion on whether to institute is guided by 35 U.S.C. § 325(d), which provides, in relevant part:

MULTIPLE PROCEEDINGS -- . . . In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.⁸

We, therefore, initially examine whether the first ground asserted in the instant Petition presents “the same or substantially the same prior art or arguments” as those previously presented to the Office. Then, we determine whether it is appropriate to exercise our discretion to deny institution.

A. Prosecution History of the '872 patent

The '872 patent issued from U.S. Patent Application No. 10/998,834, (the '834 application) filed November 29, 2004. Ex. 3001, 1.⁹ Prior to allowance, the Examiner finally rejected all claims of the '834 application over Brett and Kanai¹⁰ and Applicants appealed the rejection to the Patent Trial and Appeal Board. Ex. 3002. The Board reversed the Examiner, finding that:

Brett at [0107] discloses that the *user* may define the personal bidding section (FF2) and this does not show that the computer or device selects the seat which has been determined to be a best seat.

⁸ Although this provision appears in Chapter 32 of the Patent Act, which is directed to post-grant reviews, by its terms it is applicable also to proceedings under Chapter 31, which covers *inter partes* review proceedings

⁹ For purposes of clarity and completeness the Board enters various exhibits from the prosecution of the '834 application and the '872 Reexamination as Exhibits 3001 *et seq.*

¹⁰ U.S. 2004/0205006 (October 14, 2004).

Ex. 2001, 4. Based at least in part on the Board's decision, the Examiner allowed the claims and the '872 patent issued with 22 claims including independent method claim 1 and independent system claims 9 and 17. Ex. 3003.

B. Reexamination of the '872 patent

Petitioner filed an *ex parte* reexamination request of the '872 patent on August 14, 2012, alleging, *inter alia*, that claims 2–4, 7, 12, 18, 20–22 would have been obvious in view of Brett and Silberschatz, and that claims 1–3, 5, and 7–22 were anticipated by Silberschatz. Ex. 3004. During the reexamination proceeding, the Examiner issued a non-final Office Action determining claims 1–22 as obvious over Brett and Silberschatz. Ex. 3005, 3. In response, Patent Owner initially amended the claims to include limitations for example, “that presents a purchaser with an option of grouping of seats based on a number of tickets indicated by the purchaser and a best grouping selection made by the processor.” *See* Pet. 7; Ex. 3006, 2.

Not persuaded, the Examiner issued a Final Office action on August 2, 2013 maintaining the claim rejections in view of Brett and Silberschatz. Ex. 3007, 3–25. The Examiner made findings that both Brett and Silberschatz disclosed the *user* (not the ticket seller or “device”) setting the best seat definition by setting “preferences” or “constraints” and explained that “[w]hile the claims require that the best seat determination is performed by the device, the claims do not require that *the best seat definition* is set by the device.” *Id.* at 13, 24–25 (emphasis added).

Patent Owner then further amended the claims to include the limitation that the best unassigned seat is determined according to a

“definition set by *a ticket seller*.” Ex. 3008, 2 (emphasis added). This amendment resulted in a Notice of Intent to Issue Ex Parte Reexamination Certificate, indicating the allowance of claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22. Ex. 3009. In the Statement of Reasons for Patentability, the Examiner stated that:

Claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22 are allowed. The prior art of record fails to disclose a best unassigned seat determined by the processor/device wherein the best unassigned seat definition is set by a ticket seller, as required by independent claims 1, 9, and 17. Silberschatz, for instance, allows a ticket purchaser to set seat constraints (define the best seat(s)). These seat constraints/preferences are received by the ticket processing system (computer 100) which determines a best grouping of seats based on the given purchaser constraints/preferences. However, *Silberschatz does not disclose, teach, or suggest that the best seat definition is set by a ticket seller*.

Id. at 2 (emphasis added). A Reexamination Certificate was then issued, including the above noted claims indicated as patentable over Brett and Silberschatz. *See* Ex. 3010, 1:43–44, 2:24–25, 50. Claims 2, 5, 11, 16, and 19 were canceled. *Id.* at 1:18–19.

C. Relevant Portions of the Petition

Because Petitioner’s arguments are focused on the last paragraph of each independent claim that was added during reexamination, by way of example, we find it helpful to reproduce the last paragraph of claim 1 from the Reexamination Certificate:

wherein the first seat is determined to be a best unassigned seat at the ticketed event according to a definition based on the ticketed event, wherein the definition is set by a ticket seller.

Ex. 3010, 1:41–44.

Petitioner breaks this paragraph down into 3 elements: “(1) a first seat that is determined to be the best unassigned seat; (2) said first seat is defined based on a ticketed event; and (3) the definition of that seat is set by the ticket seller.” Pet. 23–24. Petitioner argues that element (1) is satisfied for the same reasons as set forth in the ’872 Reexamination, because Brett teaches *user defined* seat constraints, such as requiring an aisle seat. *Id.* at 24. Petitioner argues that element (2) is disclosed because “*Silberschatz* teaches that . . . ‘[a]n event matrix represents the seating chart for a particular event, at a particular venue.’” *Id.* (citing Ex. 1006 ¶ 0010). Petitioner also asserts that the Examiner addressed element (2) in the reexamination proceeding in the analysis of independent claim 17. *Id.*; *see also* f.n. 9.

With respect to element (3), Petitioner alleges that the Examiner essentially overlooked relevant portions of Brett. *Id.* at 25. For element (3), Petitioner argues that “*Brett* teaches a ticket seller defining the best available seats. For example, *Brett* first discloses prior existing systems where event employees pre-rank the seat locations to customers.” *Id.* (citing Ex. 1005 ¶¶ 0009, 0022). Also in regards to element (3), Petitioner relies on Brett for the argument that a ticket purchaser and a ticket seller are, or can be, essentially the same:

Brett equates a ticket seller and ticket purchaser because “[s]ome Internet sites do offer tickets in an auction format, but only a few tickets to select events sold by individuals who have purchased the tickets and are attempting to resell them.”

Id. (citing Ex. 1005 ¶ 0032). Therefore, Petitioner contends it would have been obvious “to combine the seat selection algorithm and user constraints

described in Silberschatz with Brett's auction system such that either 'ticket seller' or 'ticket reseller' defines the best available seat." *Id.* at 26.

D. The Same or Substantially the Same Prior Art or Arguments

The analysis under 325(d) requires two determinations: (a) whether or not Brett and Silberschatz were presented to and considered previously by the Office in conjunction with claims 1, 3–4, 6–10, 12–15, 17–18 and 20–22; and (b) whether or not Brett's disclosure of "pre-rank[ed]" seats was relevant and overlooked by the Examiner with respect to the requirement in the independent claims that "the definition is set by a ticket seller." Also with respect to Brett, we address Petitioner's contentions equating a ticket seller and a ticket purchaser.

It is uncontroverted that the same prior art references, Brett and Silberschatz, were presented to and considered by the Office. *See* Ex. 3007; *see also* Pet. 18 ("The August 2, 2013 Final Rejection maintained the Examiner's rejection of claims 1, 3–4, 6–10, 12–15, 17–18, and 20–22 as being unpatentable over *Silberschatz* in view of *Brett*"). The question resolves, therefore, on whether the Examiner overlooked certain disclosures in Brett that, in combination with Silberschatz, are relevant to and render obvious the definition for a best unassigned seat being "set by the ticket seller," as recited in the independent claims.

We note that Brett was substantively presented to and considered by the Office during the original prosecution of the '872 patent and, in the subsequent '872 Reexamination. *See generally* Exs. 3001–3010. Also, Brett was considered in the reexamination proceeding in conjunction with the same claims at issue here, namely claims 1, 3–4, 6–10, 12–15, 17–18 and

20–22, which issued in the Reexamination Certificate. *See* Ex. 3010, 1:22–2:61.

Petitioner presented Brett in its Request for Reexamination (Ex. 3004, “Request”), asserting that together with Silberschatz these references raised a substantial new question of patentability under 35 U.S.C. § 103. Ex. 3004, 6–9. The Examiner specifically relied on Brett’s teaching that “[i]t was additionally known that *user seat preferences* could include a particular single seat constraint, such as requiring an aisle seat.” Ex. 3007, 13 (citing ¶¶ 103–104). The Examiner found that Brett teaches “a user constraint of a particular **best unassigned seat.**” *Id.* at 20. Moreover, the Examiner determined during reexamination that Brett did not disclose or teach “that the best seat definition is set by the device,” and made a finding that “[t]he prior art of record fails to disclose a best unassigned seat determined by the processor/device wherein the best unassigned seat definition is set by a ticket seller.” *Id.* at 25–26. Accordingly, based on the totality of evidence, we find that Brett itself, and certainly the substance of Brett, was considered by the Office with regards to the claims issued in the Reexamination Certificate.

Petitioner, in this IPR proceeding, now argues that “*Brett* teaches a ticket seller defining the best available seats. For example, *Brett* first discloses prior existing systems where event employees pre-rank the seat locations to customers.” Pet. 25 (citing Ex. 1005 ¶¶ 0009, 0022). Petitioner, however, fails to explain or link Brett’s disclosure of “rank[ing]” seats for setting the relative prices of seats in a venue, to determining and selecting a best unassigned seat according to “a definition [] set by a ticket seller” as called for in the independent claims of the ’872 patent. Reading Brett in

context, seats are apparently known to be “ranked prior to sale” so that a price can be set and “assigned to tickets in large blocks.” Ex. 1005 ¶ 0009. This arguably discloses that a ticket seller, or device programmed by the seller, sets ticket prices for blocks of seats. That blocks may have different prices or market values associated with them does not, without more, persuade us that Brett discloses “a device selecting . . . a best unassigned seat at the ticketed event according to a definition based on the ticketed event, wherein the definition is set by a ticket seller,” as recited in claim 1.

Without a clear link or explanation as to why this disclosure is applicable to the claim limitations noted by Petitioner, we are not persuaded that the Examiner overlooked or misapprehended any relevant disclosure in Brett. We are persuaded that in the ’872 Reexamination, the Office considered substantively—and in significant detail—the same prior art and arguments substantially similar to those set forth by Petitioner in this IPR proceeding. *See* Exs. 3005, 3007. Specifically, (1) in the reexamination proceeding the Office articulated expressly the differences between the Brett/Silberschatz combination and the claimed invention as being “a best unassigned seat determined by the processor/device wherein the best unassigned seat definition is set by a ticket seller” (Ex. 3007, 26); (2) the Office stated expressly that Brett only disclosed seat selection criteria by a “user” as opposed to a device or ticket seller (Ex. 3007, 19); and as discussed above, (3) the conclusory references in the Petition to paragraphs 0009, 0022, and 0087, and “ranked” seats in a venue are not persuasive that the Office overlooked any pertinent disclosure, teachings, or evidence in Brett during the reexamination with respect to a best unassigned seat being

selected and presented to a ticket purchaser according to a definition set by the ticket seller.

Petitioner also contends that a “ticket seller” and a “purchaser” are essentially interchangeable entities, because in a commercial sense, a ticket purchaser may be a reseller. Pet. 25–26 (citing Brett ¶ 0032). This rationale is not persuasive as a new argument because the claims expressly describe a specific transaction between an entity that owns the tickets (or rights to seats) i.e. a ticket seller, and a purchaser—someone who desires the tickets or rights. Claim 1 recites, for example, “the device presenting a *purchaser* with an option of grouping of seats based on a number of tickets indicated by the *purchaser*.” (Emphasis added). Whether an entity is a ticket seller or a purchaser is relevant in the context of the claimed transaction only to the tickets or rights being offered for sale, not to potential future rights. The fact that the recited “purchaser” may later become, after obtaining tickets to the “best unassigned seat,” a seller in a different transaction, is not encompassed by any reasonable reading of the claim on its face. To that end, although colorably a different argument than presented to the Office in the reexamination proceeding, we find this argument misplaced and unpersuasive towards raising or resolving a new question of patentability not previously considered by the Office.

E. Discretion to Deny Institution of Trial

Having found that the instant Petition raises the same or substantially the same prior art and arguments as those previously presented to the Office, § 325(d) states that we may take these facts into consideration when determining whether to institute trial. The question, therefore, is whether we should exercise our discretion to deny the Petition as to Brett and

Silberschatz after weighing the particular circumstances of this proceeding, the interests of the parties, and the needs of the Board. Petitioner effectively has asked us to reconsider the Office's decision to issue a Reexamination Certificate including revisiting the Examiner's analysis and findings that are supported, upon our review, by sound reasoning and related evidentiary underpinnings. To the extent that the specific paragraphs of Brett that Petitioner brings to our attention in this Petition might suggest a new argument not previously presented to the office, the analysis provided by Petitioner as to the relative similarity between the claimed subject matter and the asserted paragraphs is conclusory and unsupported by sufficient facts or evidence. *See* Pet. 25. Mere citation to Brett's paragraphs 0009, 0022, and 0087, and a brief three sentence restatement of these paragraphs does not persuade us that the subject matter allegedly disclosed by Brett was overlooked by the Examiner or is even pertinent evidence of an issue of patentability. *See id.* Indeed, given the relative clarity of the already-considered difference in scope between the Brett and Silberschatz references and claims 1, 3–4, 6–10, 12–15, 17–18 and 20–22, we need not re-analyze those references and reconsider unpatentability issues presented previously to and considered by the Office. Under these facts, we are unpersuaded that adjudicating such a dispute on an already-considered issue is an efficient use of Board resources.

F. Grounds 2–5

Petitioner argues that claims 1, 3–4, 6–10, 12–15, 17–18 and 20–22 are unpatentable over Brett, Silberschatz and any of Austin, Nakfoor, Gathman or Nestor. Pet. 6, 26–42.

Section 103(a) forbids issuance of a patent when “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.” In *Graham v. John Deere Co.*, 383 U.S. 1 (1966), the Court set out a framework for applying the statutory language of § 103:

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined.

Id. at 17–18. “While the sequence of these questions might be reordered in any particular case, the factors continue to define the inquiry that controls.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007).

The Supreme Court has made clear that we apply “an expansive and flexible approach” to the question of obviousness. *Id.* at 415. Whether a patent claiming the combination of prior art elements would have been obvious is determined by whether the improvement is more than the predictable use of prior art elements according to their established functions. *Id.* at 417. To reach this conclusion, however, requires more than a mere showing that the prior art includes separate references covering each separate limitation in a claim under examination. *Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011). Rather, obviousness requires the additional showing that a person of ordinary skill at the time of the invention would have selected and combined those prior art elements in the normal course of research and development to yield the claimed invention. *Id.*

Against this general background, we consider the references, other evidence, and arguments on which Petitioner relies.

1. Ground 2 — Brett, Silberschatz, and Austin

Petitioner asserts that Austin is analogous and properly combined with Brett and Silberschatz. Pet. 26–27, 43–45. Petitioner does not identify in the Petition, however, any differences between the prior art including Austin, and the claims at issue, or provide a substantive analysis of why or how a person of ordinary skill in the art would have modified the prior art to render the claims obvious. *See Unigene Labs.*, 655 F.3d at 1360. As a basis for the combination with Austin, Petitioner asserts that “it would have been obvious . . . to utilize a ticket selling device in place of a ticket seller.” Pet. 26. This is not persuasive reasoning or even a motivation to combine Austin because Brett already utilizes various ticket selling devices such as internet servers and internet sites that communicate with a user via personal computers, telephones, televisions, and satellite communications. Ex. 1005 ¶ 0078, Fig. 1. With respect to Petitioner’s assertion that “ticket brokers” are “ticket sellers” who can determine a “best available seating arrangement” (Ex. 1007, 1:13), Brett already teaches that a seller is capable of ranking priority rights to seats and then selling the seats based on such ranking. *See id.* ¶ 0009. Petitioner’s nomenclature comparison is not persuasive of a substantive difference between the prior art references nor a sufficient articulated reason based on evidentiary underpinnings to combine the references.

Moreover, Petitioner’s contentions are directed to what Austin purportedly discloses and do not compensate for the lack of meaningful analysis of the differences between the prior art and the claims at issue. *See*

Pet. 26–27. We are not apprised by a brief summary of Austin of any persuasive evidence that a person of ordinary skill at the time of the invention would have modified, selected and/or combined prior art elements in the normal course of research and development to yield the claimed invention. The Petition provides simply that “it would have been obvious to a person of ordinary skill in the art at the time of the invention to combine the seat selection algorithm and user constraints described in *Silberschatz* as modified by *Brett* with *Austin*’s ticket selling device used to define the best available seats.” Pet. 27.

Even if Petitioner has pointed to persuasive evidence in Austin with respect to determining a “best unassigned seat” according to a definition “set by a ticket seller”—and we are not persuaded that it has—this is not sufficient for a proper obviousness analysis. “[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. . . . This is so because inventions 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. This is not a sufficient fact-based analysis to persuade us that it would have been obvious to a person of ordinary skill to combine *Silberschatz*, *Brett*, and *Austin*.

2. *Ground 3 — Brett, Silberschatz, and Nakfoor*

Petitioner argues that *Nakfoor* discloses that ticket purchasers are also ticket sellers, and that *Nakfoor* “teaches a venue owner setting pricing rules (Ex. 1008 ¶ 0021), a venue owner determining that some seats are better than others (Ex. 1008 ¶ 0022).” Pet. 27. First, as discussed above with

respect to the proposition of equating ticket “purchasers” and “ticket sellers,” this argument is not persuasive. Second, simply providing a summary of the reference’s purported teachings does not adequately satisfy a proper *Graham* factors analysis, describe differences between the prior art and the claims at issue, or provide a substantive analysis of why or how a person of ordinary skill in the art would have modified the prior art to render the claims obvious. *See Unigene Labs.*, 655 F.3d at 1360. Following a brief summary of Nakfoor, the entirety of Petitioner’s reasoning for the combination of Silberschatz, Brett, and Nakfoor is set forth in the following paragraph:

In light of Silberschatz and Brett, it would have been obvious to one of ordinary skill in the art at the time of the invention to combine the seat selection algorithm and user constraints described in Silberschatz as modified by Brett with Nakfoor’s secondary market system used to define the best available seats.

Pet. 28. Such unsupported argumentative conclusions are unpersuasive for similar reasons discussed above with respect to Silberschatz, Brett, and Austin. This is not a sufficient fact-based analysis to persuade us that it would have been obvious to a person of ordinary skill to combine Silberschatz, Brett, and Nakfoor.

3. *Ground 4 — Brett, Silberschatz, and Gathman*

Petitioner asserts that Gathman’s system “presents the best available seat when the customer enters the public facility and when the best available seat is better than the general admission seat already purchased. Pet. 28 (citing Ex. 1009 ¶ 0043). Petitioner’s analysis merely discusses specific teachings of Gathman and concludes that it would have been obvious “[i]n light of Silberschatz and Brett . . . for Gathman’s electronic ticket control system [] to define the best available seats for the customer.” *Id.* Such

analysis simply provides a conclusory summary of the additional prior art reference and implies such analysis as support for the combination of Gathman, Silberschatz and Brett. Again, this is not an adequate fact-based analysis sufficient to persuade us that it would have been obvious to a person of ordinary skill to combine Gathman, Silberschatz and Brett.

4. *Ground 5 — Brett, Silberschatz, and Nestor*

Petitioner contends that “*Nestor* teaches an electronic ticket exchange system that replaces the function of ticket agents and brokers for reselling tickets.” Pet. 29 (citing Ex. 1010, 7:21–28). Petitioner argues that *Nestor*’s ticket exchange system utilizes an “optimal seating configuration” and a “seating map” being presented to a user. *Id.* (citing Ex. 1010, 9:9–12, 14:20–15: 29). Petitioner’s summary of *Nestor*’s purported teachings does not, however, provide any of the necessary Graham factors analysis, discuss differences between the prior art and the claims at issue, or provide a substantive analysis of why or how a person of ordinary skill in the art would have modified the prior art to render the claims obvious. *See Unigene Labs.*, 655 F.3d at 1360. As with grounds 2–4 and the other tertiary prior art references, this is not a sufficient fact-based analysis to persuade us that it would have been obvious to a person of ordinary skill to combine *Nestor*, Silberschatz and Brett.

G. *Analogous Art*

Petitioner, again providing a brief summary of each of the references purported teachings, alleges that Brett, Silberschatz, Austin, Nakfoor, Gathman, and *Nestor* are analogous art and in the same field of endeavor. Pet. 43–45. The fact that the cited references are “analogous art” (Pet. 43) and “are all in the same field of endeavor as the claimed invention” (*id.*)

does not, by itself, however, establish that it would have been obvious to combine their features. Petitioner must show some reason why a person of ordinary skill in the art would have thought to combine particular available elements of knowledge, as evidenced by the prior art, to reach the claimed invention. *KSR*, 550 U.S. at 418. These conclusory labels and brief summaries of the prior art reference teachings do not substitute for a fact-based analysis in the Petition establishing what is being modified and why, based on the differences between the prior art and the claimed invention, it would have been obvious to a person of ordinary skill to make the modification.

Under the statute, any petition for *inter partes* review must “identif[y] . . . with particularity . . . the grounds on which the challenge to each claim is based.” 35 U.S.C. § 312(a)(3). Petitioner has the burden of proof to establish that it is entitled to the requested relief. 37 C.F.R. § 42.20(c). The Petition must include a full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence. 37 C.F.R. § 42.22(a). The Petition must include a statement of the relevance of the evidence to the challenge raised. 37 C.F.R. § 104(b)(5). “The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.” *Id.* “Thus, we will address only the basis, rationale, and reasoning put forth by the Petitioner in the petition, and resolve all vagueness and ambiguity in Petitioner’s arguments against the Petitioner.” *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, Case CBM2012-00003, slip op. at 10 (PTAB Oct. 25, 2012) (Paper 8). It is Petitioner’s responsibility “to explain specific evidence that support its

arguments, not the Board's responsibility to search the record and piece together what may support Petitioner's arguments." *Dominion Dealer Solutions, LLC v. Autoalert, Inc.*, Case IPR2013-00225, slip op. at 4 (PTAB Oct. 10, 2013) (Paper 15).

III. CONCLUSION

We conclude that the facts and evidence do not establish a sufficient or persuasive reason for the Board to again consider the same prior art, the same claims, and substantially the same arguments as substantively considered in the prior reexamination proceeding of the '872 patent. We also determine that the Petition does not set forth a meaningful obviousness analysis over any of the newly cited art because it does not adequately explain the significance of the evidence, it does not articulate any substantive difference between the claimed invention and the cited art, and it does not direct us to any persuasive evidence to support a rationale for the particular combination of references identified in the separate patentability challenges.

It is Petitioner's burden to demonstrate how the prior art would have made obvious the claimed subject matter as a whole, and Petitioner has not done this. Petitioner's presentation is incomplete in this respect and, therefore, insufficient to demonstrate a reasonable likelihood of prevailing on its obviousness challenges.

For these reasons, we determine that Petitioner has not demonstrated a reasonable likelihood that claims 1, 3-4, 6-10, 12-15, 17-18, and 20-22 are unpatentable over the prior art relied on by Petitioner. Accordingly, we do not institute a trial with respect to claims 1, 3-4, 6-10, 12-15, 17-18, and 20-22.

IV. ORDER

For the reasons given, it is

ORDERED that the Petition is *denied* and *inter partes* review is not instituted.

IPR2015-01932
Patent 8,121,872 B2

For PETITIONER:

Alfonso Garcia Chan
Ari Benjamin Rafilson
Shore Chan DePumpo LLP
achan@shorechan.com

Richard Krukar
Ortiz & Lopez, PLLC
krukar@olpatentlaw.com

For PATENT OWNER:

George C. Beck
Christopher L. Kalafut
Foley & Lardner LLP
gbeck@foley.com
ckalafut@foley.com