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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOSEPH S. MISKOVICH

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Appeal 2015-000822  
Application 13/135,581  
Technology Center 3600

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Before MICHAEL L. HOELTER, JILL D. HILL, and  
ERIC C. JESCHKE, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from a final rejection of claims 1–4, 7–9, 21–24, and 30.<sup>1</sup> App. Br. 43. Claims 5, 6, 10–12, 16–20, and 25 have been canceled. App. Br. 23–25 (Claims Appendix). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> The Examiner withdrew the rejections of claims 13–15 and 26–29 under 35 U.S.C. § 103(a). Ans. 2. Claims 13 and 29 are independent. Claims 14, 15, and 26–28 depend from claim 13. No rejection of these claims is presently before us for review.

## THE CLAIMED SUBJECT MATTER

The disclosed subject matter “relates to underground water collection and storage chamber systems.” Spec. ¶ 1. Claims 1 and 13 are independent claims. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. An underground water collection and storage system, wherein the system comprises:
  - a primary underground water collector having an enclosure wall, a water inlet, a floor and ends defining a primary storage chamber enclosure having a longitudinal axis;
  - a secondary underground water overflow collector<sup>2</sup> having an enclosure wall and ends defining a secondary storage chamber enclosure; and
  - a water transfer device for transferring excess overflow water from the primary chamber to the secondary chamber, the transfer device including:
    - a first elongate pipe having a first end extending through the primary collector enclosure wall and elevated above and distant from the primary chamber floor defining an elongate axis, the first elongate pipe having a first end defining a first plane substantially perpendicular to the elongate axis positioned in the primary storage chamber and an outlet end positioned and longitudinally extending into the secondary storage chamber having a lowest portion; and
    - an angled inlet elbow positioned in the primary storage chamber extending from the elongate pipe first end, the inlet elbow having an inlet end defining an inlet opening in an inlet plane angularly displaced relative to the elongate pipe first plane and elevated above and distant from the primary chamber floor to restrict the passage of debris in the water from the primary chamber

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<sup>2</sup> The Examiner does not raise this issue, but we presume this is a typographical error and that Appellant meant to say “collector.” Our analysis will be based on this assumption.

to the secondary chamber as overflow water in the primary chamber rises above the elbow inlet opening.

REFERENCES RELIED ON BY THE EXAMINER

Wold	US 2,527,046	Oct. 24, 1950
Hurley	US 4,919,568	April 24, 1990
Hashimoto	US 6,132,139	Oct. 17, 2000
Miskovich	US 2007/0258770 A1	Nov. 8, 2007
Lucas	US 2009/0261036 A1	Oct. 22, 2009

THE REJECTIONS ON APPEAL

Claims 1–4, 9, 21–24, and 30 are rejected under 35 U.S.C. § 103(a) as obvious over Miskovich and Hurley.

Claim 7 is rejected under 35 U.S.C. § 103(a) as obvious over Miskovich, Hurley, and Hashimoto.

Claim 8 is rejected under 35 U.S.C. § 103(a) as obvious over Miskovich, Hurley, and Lucas.

Claim 8 is rejected under 35 U.S.C. § 103(a) as obvious over Miskovich, Hurley, and Wold.

ANALYSIS

*The rejection of claims 1–4, 9, 21–24, and 30  
as obvious over Miskovich and Hurley*

Appellant presents separate arguments for each of these claims except for claim 21, which depends from claim 3. App. Br. 4–13. Regarding claim 21, Appellant states that this claim “stands and falls based on the patentability of claim 3.” App. Br. 10. Accordingly, except for claim 21,

we address each claim separately, with claim 21 standing or falling with claim 3. *See* 37 C.F.R. § 41.37(c)(1)(iv).

### Claim 1

The Examiner primarily relies on Miskovich for teaching the recited limitations, but the Examiner acknowledges Miskovich's lack of a disclosure of the recited "inlet elbow" forming a part of the claimed "transfer device." Final Act. 3. The Examiner relies on Hurley for disclosing "an inlet elbow (see Fig. 4)" and concludes that it would have been obvious to modify "Miskovich to use the elbowed pipe of Hurley as described in the claim as a substitution of [] one known element for another to obtain predictable results." Final Act. 3–4. Appellant "disagrees that Hurley discloses the claimed transfer device and elbow and further asserts that the combination of Hurley's associated elbow with [Miskovich] is improper." App. Br. 4–5.

Regarding the recited "transfer device," claim 1 states that this device includes "a first elongate pipe" and also "an angled inlet elbow." The term "elbow" is not employed in Appellant's Specification; instead, Appellant's Specification repeatedly refers to a "90° angled water transfer device." *See e.g.*, Spec. ¶¶ 5, 13, 15–27, 47–51 and the various figures discussed therein. The dictionary definition of "elbow" is "something (such as a pipe or a piece of food) that is bent like an elbow."<sup>3</sup> The dictionary definition of "elbow" is consistent with how "90° angled" is employed in Appellant's Specification.

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<sup>3</sup> *See* <http://www.merriam-webster.com/dictionary/elbow>, last visited on November 17, 2016.

Accordingly, we understand the claim term “elbow” as referring to something that is bent.<sup>4</sup>

The Examiner references Hurley’s Figure 4 and provides an annotation thereof where the claimed “elbow” can be found. Final Act. 3. Appellant contends that Hurley’s device is “a siphon device” or one that requires a “vacuum force to draw water from a catch basin.” App. Br. 5; *see also* Reply Br. 2–5. However, this argument is not an argument that the claimed structure is not shown or taught by Hurley; instead, this argument is directed to how Hurley functions and to the environment in which Hurley operates.<sup>5</sup> Hurley was relied on for disclosing “an inlet elbow” (Final Act. 3) and Appellant’s contention is not an argument that Hurley fails to disclose an “elbow” (as that term is understood, *see infra*) or that Hurley’s “elbow” could not be substituted as stated by the Examiner. Final Act. 4.

As indicated *supra*, Appellant also contends, “the Examiner is incorrect that the asserted Hurley device elbow discloses the claim 1 elbow structure.” App. Br. 5. However, Appellant does not explain how the “elbow” identified by the Examiner (Final Act. 3) is not “something that is

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<sup>4</sup> For completeness, we note that the claims do not recite any particular angle (i.e., 90°), but instead recite “an angled inlet elbow.” Appellant’s Specification further states that “any angle could be utilized.” Spec. ¶ 47. Additionally, it is noted that Appellant’s Figures depict this “90° angled” device as having horizontal and vertical linear extensions of different lengths, and that the claim language is silent regarding the length of these linear extensions. *See e.g.*, Figures 3, 4b, 4d, 5, and 8–14. Accordingly, the recited elbow is not precluded from having linear extensions, or that they be of different lengths. *See also* Spec. ¶ 60.

<sup>5</sup> We are instructed that “apparatus claims cover what a device *is*, not what a device *does*.” *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468 (Fed. Cir. 1990).

bent,” as the claim term “elbow” is understood. *See supra*. This is especially the case when Hurley’s device is shown as having a 90° angle. *See Hurley Fig. 4*. Appellant’s contention that Hurley fails to disclose an elbow structure is not persuasive.

Appellant further contends, “[t]he asserted Hurley elbow does not serve as the inlet end or define an inlet opening.” App. Br. 5. To be clear, claim 1 recites “an angled inlet elbow” “having an inlet end” that is “elevated above and distant from the primary chamber floor.” Appellant does not explain how Hurley’s identified “elbow” fails to meet this criteria.<sup>6</sup>

Appellant also contends, “the Hurley catch basin/retention pond system is expressly distinguished by [Miskovich]” and that the Examiner’s modification “would render the [Miskovich] system inoperable for its intended functions.” App. Br. 6; *see also* Reply Br. 2–5. First, the Examiner is not relying on Hurley for its disclosure of a catch basin or a retention pond. Instead, the Examiner is relying on Hurley for disclosing “an inlet elbow (see Fig. 4).” Final Act. 3. Second, Appellant does not explain how the substitution of Hurley’s elbow structure for the intake structure of Miskovich would render Miskovich inoperable because both pertain to water transfer devices.<sup>7</sup> *See Miskovich* item 26; *Hurley* item 30.

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<sup>6</sup> The Examiner provides alternate explanations on this point involving either the elbow alone or the elbow with a linear pipe extension. Ans. 4. Should the elbow be a separate structure from the piping connected thereto, then “the bottom portion of the elbow would clearly define an inlet.” *Id.* On the other hand, should Hurley’s vertical pipe be a part of the elbow, then “the elbow pipe combination would still read on the claim language.” *Id.*

<sup>7</sup> Appellant identifies some of the “disadvantages” that may arise upon the “placement of the Hurley pipe inlet as applied to” Miskovich (Reply Br. 3), but the Examiner is not relying on Hurley for disclosing the “placement” of

Nevertheless, the Examiner acknowledges that Miskovich does not disclose “an inlet elbow connected to the elongate pipe” and the Examiner relies on Hurley for teaching the use of an inlet elbow. Final Act. 3. Accordingly, Appellant does not explain how the substitution of one known device (i.e., Hurley’s elbow) into Miskovich would render Miskovich “inoperable for its intended function.”<sup>8</sup> App. Br. 6; *see also* Reply Br. 4.

Appellant also addresses “an elbow and long extension pipe downward as shown in Hurley” and contends that this structure cannot be combined with Miskovich. App. Br. 6; *see also* Reply Br. 4–5. However, even should Hurley’s elbow include an extension pipe (*see* Ans. 4), this would not disqualify Hurley’s structure from being equated to the claimed “elbow” because Appellant’s own device has horizontal and vertical linear components of unequal length. *See supra*.

Appellant also addresses the problem of “[d]ebris and sediment clogging” (App. Br. 6) but it is noted that both Miskovich and Hurley additionally discuss water filtration. *See* Miskovich ¶ 31; Hurley 4:38–42. Appellant does not explain how these references, by also addressing

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the pipe inlet. Further, Appellant’s contention is not dispositive, even should Hurley’s placement have been under consideration, because we are instructed that a given course of action often has simultaneous advantages and disadvantages, and this does not necessarily obviate any or all reasons to combine teachings. *See Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349, n.8 (Fed. Cir. 2000).

<sup>8</sup> Appellant addresses locating the inlet “close to the bottom of the chamber” (App. Br. 6; *see also* Reply Br. 5) but this argument relies on incorporating more from Hurley into Miskovich than relied on by the Examiner. As indicated *supra*, claim 1 recites that the inlet be “elevated above and distant from the primary chamber floor” and Appellant does not explain how that is not shown or taught by Hurley’s elbow (*e.g.*, Figure 4 of Hurley illustrates this elbow and its inlet as being located above the chamber floor).

filtration, are not also concerned with reduced operability due to clogging and the like. Appellant also references the “huge improvement” the disclosed filter puck provides and also the “demand and commercial success” of the system. App. Br. 7 (referencing the Inventor’s Declaration and three attachments). The Examiner states that “Appellant’s reliance on the declarations is misplaced.” Ans. 6. We agree that Appellant’s reference to filtering and these documents on this point is better suited to the rejection of claim 4, which recites “a filter cartridge.” Claim 1 does not include such language. However, regarding the commercial success of Appellant’s device, the submitted inventor’s Declaration does not address that topic, or provide any sales or market share data having a nexus to the recited claim language that might support this general assertion of commercial success.<sup>9</sup> Furthermore, the three attachments are letters of praise and are directed to Appellant’s filtration methods, and hence will be further addressed when discussing the rejection of claim 4.

Appellant’s Reply Brief additionally addresses the issue of “teaching away,” contending that “[o]ne looking for Applicant’s solution for debris and sediment management would be discouraged by Hurley from proceeding in Applicant’s direction.” Reply Br. 4. However, as discussed above, Hurley is not relied on for its method of operation, but instead for the structure disclosed therein that is used to drain or transfer water from one location to another. This is emphasized by the Examiner when stating the

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<sup>9</sup> Additionally, our reviewing court has instructed us that “secondary considerations of nonobviousness . . . simply cannot overcome a strong prima facie case of obviousness” and that for obviousness under § 103, “all that is required is a reasonable expectation of success.” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1242, 1246 (Fed. Cir. 2010).

reason to combine Miskovich and Hurley, i.e., “to modify the water transfer device of Miskovich *to use the elbowed pipe of Hurley.*” Final Act. 4 (emphasis added). Appellant’s contention is not persuasive of Examiner error.

Appellant also seems to argue that Hurley is not analogous art. *See* Reply Br. 2; *see also* Ans. 2–3. However, both Hurley and Miskovich pertain to the drainage of water (*see* respective Titles and Abstracts) and hence Appellant’s contention is not persuasive that Hurley and Miskovich are not in the same field of endeavor. *See In re Kahn*, 441 F.3d 977, 987 (Fed. Cir. 2006).

Appellant further contends that, in addition to the “secondary considerations” previously discussed, Appellant’s device “has further achieved unexpected results in the management of debris and sediment in the primary collector.” Reply Br. 5. Appellant relies on the submitted declaration and documents for support (Reply Br. 5 (referencing App. Br. 6–7)), but it is not made clear how the inclusion of a known elbow (Hurley) into a known system (Miskovich) achieves an unexpected result. In other words, Appellant does not explain how the inclusion of an elbow, which knowingly changes the system’s input location, accomplishes something unexpected. There is no evidence that the elbow operates differently or receives water differently. Accordingly, Appellant’s contention regarding

“unexpected results” is not persuasive that one skilled in the art would have considered the result of adding an elbow to be unexpected.<sup>10,11</sup>

In summary, and based on the record presented, we are not persuaded the Examiner erred in rejecting claim 1 as being obvious over Miskovich and Hurley.

### Claim 2

Claim 2 depends from claim 1 and includes the limitation “wherein the angled elbow inlet plane is oriented toward the primary chamber floor and positioned below the outlet end lowest portion.” The Examiner finds this limitation met by Hurley’s elbow, whose inlet is “at a lower elevation than the outlet end of the pipe (30).” Final Act. 4; *see also* Ans. 5. Appellant disagrees and directs attention to “end/exit point (40)” shown in Hurley Figure 4. App. Br. 7; *see also* Reply Br. 6. It appears that the Examiner is distinguishing between the elbow inlet and the horizontal run of pipe 30 whereas Appellant is addressing an exit point that occurs after horizontal pipe 30 is secured to both another elbow and a length of vertical piping. In effect, the parties are addressing different locations, as well as different components, shown in Hurley Figure 4. While both might be

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<sup>10</sup> Regarding the inventor’s declaration, it does address how the “elbow and transfer devices were designed to improve on and minimize clogging” (*see* Declaration ¶ 8) but Appellant does not explain how such improvement is “unexpected” rather than good engineering judgement. Further, the inventor’s disagreement with the Examiner’s position (*see* Declaration ¶ 9) does not render the Examiner’s rejection based on obviousness wrong.

<sup>11</sup> The submitted letters each address how the use of an elbow is “unique” or “novel” or “brings a new dimension to treatment” of runoff, but none of these letters address the elbow disclosed in Hurley, nor are any persuasive that the use of Hurley’s elbow in Miskovich is wrongfully deemed by the Examiner to be obvious.

correct based on the structure relied upon, Appellant has not shown how the arrangement of the components identified by the Examiner is not as claimed. Appellant also contends that Hurley “does not meet the claim 2 elbow and transfer device elements” but this contention is not persuasive based on the previous discussion of the scope of the claim term “elbow.” *See supra*. In summary, Appellant has not shown error by the Examiner and accordingly, we sustain the Examiner’s rejection of claim 2.

### Claim 3

Claim 3 depends from claim 1 and includes the limitation “wherein the inlet plane is positioned at an angle about 90° relative to the elongate pipe first plane.” The Examiner finds this 90° orientation disclosed in Hurley. Final Act. 4; Ans. 5. Appellant contends that “Hurley’s asserted elbow does not define an inlet end or inlet plane due to the long vertical pipe extending therefrom down to point (32).” App. Br. 8; *see also* Reply Br. 6. Even assuming, for the sake of argument, that Hurley’s elbow incorporates this “long vertical pipe” (which is not precluded, *see supra*), the 90° bend depicted in Hurley discloses the two planes at ninety degrees to each other in the same manner as Appellant describes its device having planes ninety degrees offset to each other. *See* App. Br. 8 (referencing Spec. Figs. 4a, 19, and 21). Appellant’s contention is not persuasive of Examiner error. We sustain the Examiner’s rejection of both claim 3 and claim 21.

### Claim 4

As discussed above, claim 4 (which depends from claim 1) recites a “filter cartridge,” and more specifically, “a filter cartridge positioned in the inlet opening.” The Examiner relies on Miskovich, stating that it would have been obvious “to modify the location of the filter” to the elbow inlet

opening because Miskovich teaches a “filter to assist with water quality within the system (paragraph 0031).”<sup>12</sup> Final Act. 4; *see also* Ans. 6. Granted, Miskovich does not disclose (nor does Hurley) the location of this filter as being in the elbow inlet opening (*see, e.g.*, Reply Br. 6), but Appellant does not explain how or why it would not have been obvious “to modify the location of the filter” to this recited location as stated by the Examiner. Final Act. 4. The Examiner explains that Miskovich’s teaching of filtration “guides one of ordinary skill in the art to utilize filtration media in areas of maximum flow to increase the water quality of the system.” Ans. 6. Thus, according to the Examiner, “[a]n obvious location would be the inlet of the water transfer device as it balances filtering the water at the earliest time with not limiting the flow into the primary chamber.” Ans. 6.

Appellant’s further reliance on the inventor’s Declaration and the three attachments do not explain how modifying the location of the filter as stated by the Examiner would not have been obvious. *See* App. Br. 9; Reply Br. 7. In short, these documents each acknowledge the known need to filter water so as to prevent clogging, and each signatory also indicates that they are not aware of another system where the filter is so located.<sup>13</sup> However, such documents are not persuasive that one skilled in the art, aware of a

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<sup>12</sup> As noted above but not relied on by the Examiner, Hurley also discusses water filtration and that if a screen were used, “[t]his screen will filter all but the smallest particles thus allowing for the use of much smaller pipe.” Hurley 4:38–42.

<sup>13</sup> One document (Declaration of Joseph S. Miskovich, Attachment B), signed by both Messrs. Lance Hoff and Daniel Murphy, states that “several systems are currently available on the market that provide filtration of stormwater,” which use filter fabric but that the use of Appellant’s “Filter Puck product is a novel idea.” Hence, this document seems to indicate that the presence of the filter puck is novel, not its location.

desire to filter water, would consider placing a filter at an inlet as being non-obvious. Accordingly, we are not persuaded the Examiner erred in rejecting claim 4 as being obvious over Miskovich and Hurley.

### Claim 9

Claim 9 depends from claim 1 and includes a recitation to first and second transfer devices “separated along the primary storage chamber longitudinal axis” and also at separate heights “relative to the primary storage chamber floor.” The Examiner relies on Miskovich for disclosing this limitation and references paragraph 24 thereof. Final Act. 4; Ans. 6. Paragraph 24 of Miskovich states that “half pipes **10** [are] connected together at one or more ports” and that “[a] series of half pipes **10** can be connected to a manifold pipe by connector pipes **26** to form a leaching field.” Here, it is understood that the Examiner correlates Miskovich’s “manifold pipe” to the claimed “primary storage chamber.”<sup>14</sup> Final Act. 3. Paragraph 24 further states, “[t]he half pipes may also be connected to each other, either through side ports **15** or top ports **18**.” Hence, Miskovich teaches that pipes 10 can be “connected together at one or more ports” and that these connections can be “either through side ports **15** or top ports **18**.” Miskovich ¶ 24. Appellant addresses side ports 15 and top ports 18 separately, but not in combination. *See* App. Br. 10; Reply Br. 8. In effect, by arguing only the use of side ports 15 or only the use of top ports 18 (and

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<sup>14</sup> The Examiner identifies Miskovich’s item 10 as “a primary underground water collection and storage chamber” and that it has “multiple water transfer devices (26) connecting the primary chamber and the secondary chambers for transferring overflow water.” Final Act. 3; *see also* Miskovich Fig. 2.

explaining their deficiencies),<sup>15</sup> Appellant does not indicate how the Examiner erred by utilizing Miskovich's teaching of multiple connections involving multiple ports. Accordingly, we are not persuaded the Examiner erred in rejecting claim 9.

### Claim 22

Claim 22 depends from claim 21 (and hence ultimately from claim 1). Claim 22 includes the additional limitation of "wherein the elbow inlet plane is positioned elevationally above a highest portion of the elongate pipe outlet end." The Examiner references Figures 4 and 5 of Hurley as disclosing this limitation and relies on the "discussion of claim 1." Final Act. 4; Ans. 6–7. However, Appellant does not address the Examiner's rejection or the structure discussed above with respect to claim 1. Instead, Appellant presumes the Examiner is addressing a totally different pipe altogether, i.e., collection pipe 19.<sup>16</sup> App. Br. 11. Appellant argues that the inlet of this collection pipe 19 ("apparently at 23 in Fig. 5") "is not in combination with the claim (22) elbow and therefore does not satisfy or render obvious the claim (22) structure." App. Br. 11. Appellant's argument premised on a totally different pipe, which is not illustrated as even having an elbow

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<sup>15</sup> For example when addressing side ports 15, Appellant states, "ports (15) are not disclosed or suggested to be at different heights." App. Br. 10. In other words, Appellant is not addressing the elevational difference between side ports 15 and top ports 18, nor does Appellant contend that Miskovich's top and side ports cannot be employed concurrently.

<sup>16</sup> Interestingly, Appellant's Reply Brief does not further address collection pipe 19 but instead begins to address a new and different portion of the structure illustrated in Hurley, i.e., "the bend at the far right side of Hurley Fig. 4 toward the pond-exit point 40." Reply Br. 8. Appellant's new focus on this part of Hurley, which is not addressed in Appellant's Appeal Brief, is likewise not persuasive of Examiner error.

associated therewith, is not persuasive the Examiner's rationale for rejecting claim 22 is in error. We sustain the Examiner's rejection of claim 22.

Appellant also relies on "[t]he secondary considerations argued for claim 1" regarding filtration (App. Br. 11), but as previously indicated, Appellant's documents are not deemed persuasive by the Examiner. Ans. 6. We agree with the Examiner (*see supra*).

### Claim 23

Claim 23 depends from claim 9 and includes the additional limitation of "wherein the higher second water transfer device elbow inlet plane is positioned substantially perpendicular to the primary storage chamber longitudinal axis." The Examiner relies on Miskovich, and particularly side and top ports 15 and 18, for disclosing this limitation. Final Act. 4, Ans. 7. Appellant "views the asserted [Miskovich] ports (18) (or 15) as being parallel to the longitudinal length of the [Miskovich] chamber (10)." App. Br. 11–12 (citing Miskovich Fig. 1). To be clear, claim 23 is addressing the "plane" of the inlet and how this "plane" is "substantially perpendicular" to the primary storage "axis." The "planes" of Miskovich's ports 15 and 18 are illustrated as running parallel to Miskovich's axis, not perpendicular as recited.

Accordingly, we agree with Appellant's view that "the asserted [Miskovich] ports (18) (or 15) [are] parallel to the longitudinal length of the [Miskovich] chamber (10)." The Examiner provides no other reason for the rejection of this claim, and, accordingly, we do not sustain the rejection of claim 23 as being obvious over Miskovich and Hurley.

Claim 24

Claim 24 depends from claim 1 and recites “a second transfer device” having “a second inlet opening extending into the primary storage chamber and an outlet end positioned in the secondary storage chamber.” In other words, claim 24 recites a second transfer device between storage chambers, but in this case, this “second inlet opening is positioned elevationally higher than a highest portion of the first transfer device inlet opening.” The Examiner again references Miskovich’s disclosure of “a plurality of inlets (15, 18) at different elevations” as teaching this limitation. Final Act. 4; *see also* Ans. 7 (referencing Miskovich ¶ 24). Appellant contends that Miskovich’s “disclosure of using a single, aligned row of ports (15 on each side) and (18 on the top) further supports that there is only *one row of transfer devices* shown in [Miskovich].”<sup>17</sup> App. Br. 12 (emphasis added).

We are not in agreement with Appellant’s interpretation of Miskovich in light of the teachings of Miskovich Paragraph 24. *See also* Reply Br. 9. As indicated *supra*, Miskovich Paragraph 24 teaches that half pipes 10 can be “connected together at one or more ports” and that these pipes “may also be connected to each other, either through side ports **15** or top ports **18**.” Hence, as above, Miskovich’s teaching of multiple connections involving multiple ports at different elevations is not persuasive that Miskovich is limited to “only one row of transfer devices,” although that arrangement may be the only embodiment shown. Accordingly, we are not persuaded by Appellant’s argument that the Examiner erred in rejecting claim 24.

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<sup>17</sup> Appellant further states (regarding Miskovich) that “[t]here is no disclosure or suggestion of a secondary or auxiliary row of ports or inlets at an elevation above” Miskovich’s side ports 15. App. Br. 12.

Claim 30

Claim 30 depends from claim 9 and includes the limitation wherein the first and second inlet planes are “positioned at a different angle relative to the respective elongate pipe first plane.” In other words, the first and second inlet planes are positioned at a different angle than their respective pipe planes. The Examiner relies on both Miskovich and Hurley for disclosing this limitation. Final Act. 4; Ans. 7. Appellant addresses the teachings of Miskovich stating that ports 15 and 18 “are parallel to the longitudinal axis of the single manifold” (similar to that “argued for claim 9”). App. Br. 13. Presuming, as indicated by Appellant, that the longitudinal axis of the manifold corresponds to the claimed “elongate pipe first plane,” then indeed, the plane of Miskovich’s inlet ports are arranged “parallel to the longitudinal axis” of the manifold as discussed above. However, one such inlet plane in Miskovich is arranged horizontally parallel and the other inlet plane is arranged vertically parallel (i.e., inlet planes 15 and 18 are orthogonal to each other). As this is the arrangement Miskovich illustrates, Appellant does not explain how these two inlet planes fail to be “positioned at a different angle” (one being horizontal, the other vertical) with respect to the longitudinal axis of the manifold, as claimed.

Regarding Hurley, Appellant does not attempt to indicate how Hurley fails to disclose this limitation. Instead, Appellant reverts to arguments previously made to the effect that “the asserted Hurley transfer device inlet (long vertical pipe and asserted elbow) also does not disclose the claimed elbow inlet transfer device and is not properly combined with [Miskovich].” App. Br. 13.

Appellant's arguments are not persuasive the Examiner erred. We sustain the Examiner's rejection of claim 30.

*The rejection of claim 7  
as obvious over Miskovich, Hurley, and Hashimoto*

Claim 7 depends from claim 4. The Examiner relies on the additional reference to Hashimoto for disclosing the additional limitation of the transfer device comprising "a radially enlarged portion defining an increased inlet end." The Examiner finds that "Hashimoto discloses that the water transfer pipes can be expanded in a bell mouth (radially enlarging the opening portion)." Final Act. 5; *see also* Hashimoto Fig. 22, 6:62–64 and 12:2–4. The Examiner concludes that it would have been obvious "to modify the inlet openings of the Miskovich-Hurley combination to be enlarged" as described in Hashimoto "as the simple substitution of a known pipe opening for another to obtain predictable results." Final Act. 5. The Examiner further concludes that it would have been obvious "to place the filter of the Miskovich-Hurley combination in the enlarged inlet opening as an obvious location to try."<sup>18</sup> Final Act. 5.

Appellant does not dispute the Examiner's additional reliance on Hashimoto for disclosing this additional limitation, or combining same with the Miskovich-Hurley combination. App. Br. 14; *see also* Ans. 7. Instead, Appellant repeats arguments set forth regarding claims 1 and 4. App. Br. 14; Reply Br. 11. The Examiner again replies stating "[a]n obvious location would be the inlet of the water transfer device" and provides a reason for

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<sup>18</sup> The Examiner finds, "[a]n obvious location would be the inlet of the water transfer device as it balances filtering the water at the earliest time [while] not limiting the flow into the primary chamber." Ans. 8.

this statement. Ans. 8. Appellant also contends that no filter cartridge could be found in Hashimoto (App. Br. 14), but the Examiner did not rely on Hashimoto for disclosing a filter. Appellant further contends, “[p]lacing a filter in the Hurley elbow which is in the middle of Hurley’s transfer device would leave no way to service the filter and disable Hurley when the filter gets plugged or contaminated.” App. Br. 14. First, there is no recitation in any of claims 1, 4, or 7 regarding servicing the filter. Second, there is no limitation in any of claims 1, 4, or 7 precluding any disablement “when the filter gets plugged or contaminated.”<sup>19</sup> Third, Appellant has not provided any evidence in support of this allegation (“no way to service the filter”) and such attorney argument is “not the kind of factual evidence that is required to rebut a prima facie case of obviousness.” *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997).<sup>20</sup> (Citations omitted). Additionally, Appellant’s reference to “secondary considerations” and “Declarations” (App. Br. 14) are, as indicated *supra*, not persuasive because they lack a showing of nexus to the recited limitation and do not address Hashimoto.

Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claim 7 as obvious over Miskovich, Hurley, and Hashimoto.

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<sup>19</sup> We note that Appellant is silent as to how one can service Appellant’s own filter without any disablement of Appellant’s system when Appellant’s filter likewise “gets plugged or contaminated.”

<sup>20</sup> See *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974) (“Attorney’s arguments in a brief cannot take the place of evidence.”) (citation omitted); see also *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (lawyer arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value).

*The rejection of claim 8  
as obvious over Miskovich, Hurley, and Lucas*

Claim 8 depends from claim 1. The Examiner relies on the additional reference to Lucas for disclosing the additional limitation of the transfer device having “a second inlet bypass opening positioned elevationally above” the first inlet. Final Act. 5; *see also* Ans. 9. More specifically, the Examiner identifies “two outlets (201,202) that are in fluid communication” with pipe 9 “to control flow.” Final Act. 5; *see also* Lucas Figure 1 and ¶ 63; *see also* Ans. 8–9. The Examiner also provides a reason to combine Lucas with Miskovich and Hurley based on “applying a known flow control technique to a known device ready for improvement.” Final Act. 6.

Appellant emphasizes that “[c]laim 8 recites a second inlet bypass opening” whereas Lucas discloses “outflow devices” designed “to ‘detain as much runoff as possible while treating large events.’” App. Br. 15 (referencing Lucas ¶¶ 59–63); *see also* Reply Br. 11–12. Accordingly, as per Appellant, “[t]he Examiner’s stated bases for modifying [Miskovich] and Hurley is improper as the cited Lucas openings are flow outlets.” App. Br. 16; *see also* Reply Br. 12.

The Examiner states, “Appellant’s assertion that [] they are outlets is a distinction without merit. In a water flow system, inlet or outlet are determined by the direction of water flow. If the flow is reversed, the inlets become outlets and vice versa.” Ans. 9. Appellant does not indicate or explain how a change in the flow of water would fail to render Lucas’s identified components as inlets. Appellant does not provide a structural distinction regarding the teachings of Lucas, only functional. We are instructed that functional recitations serve to define over the prior art only where those recitations result in a structural distinction as compared to that

prior art. *See K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999). *See also Hewlett-Packard Co.*, 909 F.2d at 1468.

Appellant also states that the claim requires the additional opening to be “in the elbow.” App. Br. 15. However, Appellant does not further elaborate as to how this limitation is not disclosed in view of the teachings of Miskovich, Hurley, and Lucas and also in view of how this claim term is understood. *See supra*, *see also* Ans. 9. Appellant further references “secondary considerations of failure of prior designs and long felt need.” App. Br. 16. However, as the recited documents lack a nexus to this recited limitation, Appellant’s contention is not persuasive the Examiner erred in rejecting claim 8 as being obvious over Miskovich, Hurley, and Lucas.

*The rejection of claim 8  
as obvious over Miskovich, Hurley, and Wold*

Similar to the discussion above, the Examiner relies on Wold for disclosing “an inlet (40) with multiple openings (80) at different elevation levels.” Ans. 9. Thus, even presuming we reverse the Examiner’s rejection of claim 8 in view of Wold, our affirmance of the rejection of claim 8 in view of Lucas above would still “constitute[] a general affirmance of the decision of the examiner on” claim 8. 37 C.F.R. § 41.50(a)(1). Accordingly, we do not address the Examiner’s duplicative rejection of claim 8 based on Miskovich, Hurley, and Wold.

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DECISION

The Examiner's rejections of claims 1–4, 7–9, 21, 22, 24, and 30 are affirmed.

The Examiner's rejection of claim 23 is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART