IN RE BRANDT, Appeal No. 2016-2601 (Fed. Cir. March 27, 2018). Before Lourie, Reyna, and Taranto. Appealed from PTAB.

Background:

This appeal involved a patent application related to a construction board for a covered roof having a coverboard including a polyurethane or polyisocyanurate cellular structure. The claims recited "a density greater than 2.5 pounds per cubic foot and less than 6 pounds per cubic foot." During examination, the examiner found this range *prima facie* obvious over the Griffin reference, which disclosed a coverboard density range between 6 and 25 pounds per cubic foot. On appeal to the PTAB, the Board affirmed the examiner and Brandt appealed.

Issue/Holding:

Did the Board err in affirming the examiner? No, affirmed.

Discussion:

Brandt first challenged the Board's finding of *prima facie* obviousness on the grounds that it improperly applied a *per se* rule of obviousness based on an abutting but non-overlapping range. The Federal Circuit disagreed finding with no reservation that the Board, and the examiner, made a sound factual determination that the difference between the claimed range and the Griffin range was "virtually negligible." Brandt even conceded that there was nothing of record to support finding a meaningful difference between the claimed range and the Griffin range.

Instead, Brandt relied on his interpretation of the Federal Circuit's non-binding decision in *In re Patel*. In *Patel*, the Federal Circuit reversed a PTAB finding that a claimed range was *prima facie* obvious over a prior art abutting but non-overlapping range solely due to proximity of the relevant endpoints in the absence of a teaching that the prior art endpoint could be flexibly applied. Brandt argued that *Patel* instructs that a claimed range and prior art range must overlap for an examiner to find *prima facie* obviousness. The Federal Circuit declined to adopt this interpretation noting that *Patel* merely stood for what may be required to find a minor difference between abutting but non-overlapping ranges *prima facie* obvious.

Brandt also challenged the Board's finding that Griffin does not teach away from the claimed range. Brandt's theory was based on an inference that Griffin taught away from the claimed upper endpoint (less than 6 pounds per cubic foot) because Griffin's coverboard (between 6 and 25 pounds per cubic foot) and insulation board (less than 6 pounds per cubic foot) would not have the same density. The Federal Circuit stood by the Board's finding that this argument boils down to whether the upper endpoint is critical. However, Brandt submitted no evidence of unexpected results or criticality. Thus, the Federal Circuit affirmed the Board.