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Paper 11
Entered: May 5, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION and
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

PGR2020-00005
Patent D841,532 S

Before JOSIAH L. COCKS, SCOTT A. DANIELS, and ROBERT L. KINDER, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge.*

DECISION
Denying Institution of *Post-Grant* Review
*35 U.S.C. § 324*

# I. INTRODUCTION

## *A. Background and Summary*

LKQ Corporation and Keystone Automotive Industries, Inc. (collectively "LKQ" or "Petitioner") filed a Petition requesting *post-grant* review of U.S. Patent No. D841,532 S ("the '532 patent," Ex. 1001). Paper 2 ("Pet."). The Petition challenges the patentability of the sole design claim of the '532 patent. GM Global Technology Operations LLC ("GM" or "Patent Owner") filed a Preliminary Response to the Petition. Paper 7 ("Prelim. Resp.").

A *post-grant* review may be instituted only if "the information presented in the petition . . . demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable." 35 U.S.C. § 324(a) (2018). Having considered the arguments and evidence presented by LKQ and GM, we determine, for the reasons set forth below, that LKQ has failed to demonstrate that it is more likely than not that the challenged claim is unpatentable based on the grounds presented. Therefore, we do not institute a *post-grant* review of that claim.

## *B. Related Proceedings*

One or both parties identify, as matters involving or related to the '532 patent, Patent Trial and Appeal Board cases IPR2020-00062 (US D811,964 S), IPR2020-00063 (US D828,255 S), IPR2020-00064 (US D823,741 S), IPR2020-00065 (US D813,120 S), PGR2020-00002 (US D847,043 S), PGR2020-00003 (US D847,703 S), and PGR2020-00004 (US D840,306 S). Pet. 4; Paper 3, 2.

*C. The '532 Patent and Claim*

In a *post-grant* review requested in a petition filed on or after November 13, 2018, we apply the same claim construction standard used in district courts, namely that articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). *See* 37 C.F.R. § 42.200(b) (2019). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be "helpful to point out . . . various features of the claimed design as they relate to the . . . prior art." *Id.* at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to the district court, in part, for a "verbal description of the claimed design to evoke a visual image consonant with that design").

The '532 patent is titled "Vehicle Front Fascia Molding," and issued February 26, 2019, from U.S. Application No. 29/605,902, filed May 31, 2017.[1] Ex. 1001, codes (21), (22), (45), (54). The claim recites "[t]he ornamental design for a vehicle front fascia molding, as shown and described." *Id.*, code (57). The drawings of the claim depict a front surface of the claimed molding with rear portions of the design shown as unclaimed

[1] Because the earliest possible effective filing date for the '532 patent is after March 16, 2013 (the effective date for the first inventor to file provisions of the America Invents Act) and this petition was filed October 17, 2019, and within 9 months of its issue date, the '532 patent is eligible for *post-grant* review. *See* 35 U.S.C. § 321(c).

by broken lines. *See id.* ("The broken lines shown in the drawings depict portions of the vehicle front fascia molding that form no part of the claimed design."). The '532 design is depicted in four figures, which are reproduced below.[2]

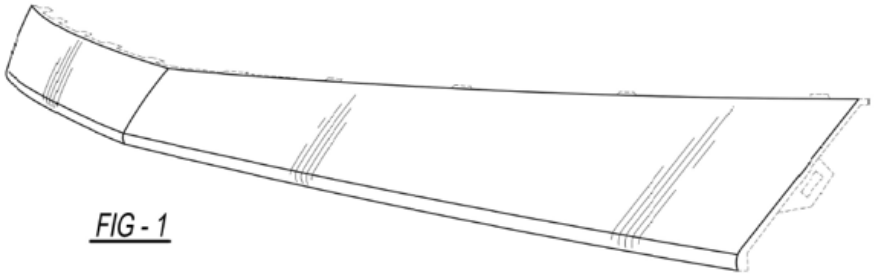


FIG - 1

FIG - 2

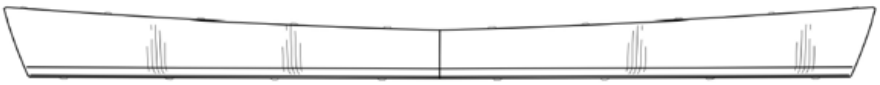


FIG - 3

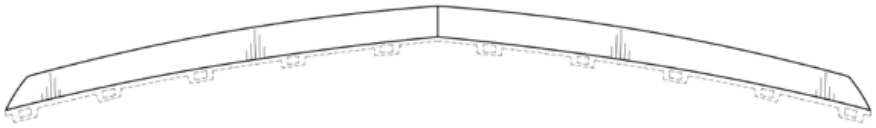


FIG - 4

Ex. 1001. Figures 1–4 above depict, respectively, the following views of the claimed vehicle front fascia molding design: a front and left side perspective

[2] We refer to the claim, i.e., the vehicle front fascia molding shown in Figures 1–4, also as "the '532 design."

view, a left side elevation view, a front elevation view, and a top plan view. *Id.*, code (57).

The parties both describe certain features that contribute to the overall appearance of the claimed design. *See* Pet. 9–13; Prelim. Resp. 8–17; *see also* Ex. 1003 ¶¶ 30–34; Ex. 1004 ¶¶ 28–32. LKQ contends that the claim can be described according to the drawings as shown by the solid lines as

> [a] A vehicle front fascia comprising:
>
> an elongated molding stretching horizontally having distal ends and sloping back from a center line;
>
> the center line bisecting the elongated molding into a first half and a second half;
>
> a top edge of each half slopes gradually upward from the center line to the respective distal ends of each the first half and the second half;
>
> a horizontal lower portion extending rearward and downward from a bottom edge of the elongated molding; and
>
> the horizontal lower portion being narrower than the elongated molding.

Pet. 11–13.

GM argues that LKQ's claim construction mischaracterizes the design because it "ignores the orientation of the 'elongated molding' in the vehicle front fascia molding design." Prelim. Resp. 10. GM argues that the 3-dimensional orientation of the '532 design is important specifically because the "front fascia molding design of the '532 Patent includes an upper portion that angles both upward (as illustrated by the dashed blue line) and rearward (as illustrated by the dashed red line)." *Id.* at 11. GM's annotated Figure 1, is reproduced below.

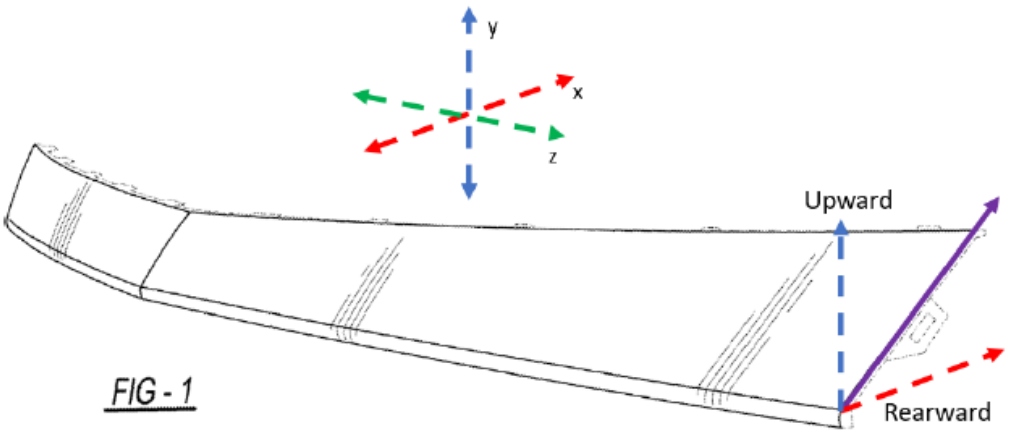



Figure 1 of the '532 design, above, as annotated by GM, illustrates an orientation based on an x-y-z axis, as shown relative to an "Upward" and a "Rearward" direction. *Id.* GM argues that LKQ's construction "ignores importance of the center line that bisects the horizontal lower portion to the design of the front fascia molding." *Id.* at 13. GM provides another annotated version of Figure 1, below.

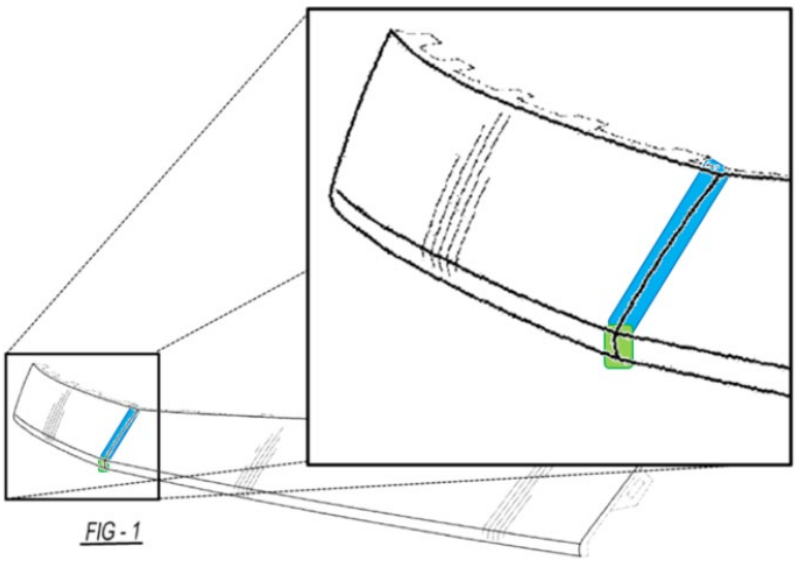



Figure 1 of the '532 design, above, as modified with an exploded view, and annotated by GM to highlight the center line. GM also argues that in the

’532 design “the upper and lower portions of the front fascia molding form an aerodynamic convex front fascia design.” *Id.* at 15

Our observation is that the descriptive analyses provided by both parties has some merit. LKQ’s description does not so much mischaracterize, as it is incomplete with respect to the relative orientation of the elongated molding and horizontal lower portion and the center line. GM’s argument about orientation of these elements and the center line is noteworthy.[3] Visually, and keeping in mind the overall appearance of the article, a distinct feature of the ’532 design is that, on either side of the centerline, the elongated molding and the horizontal lower portion are joined at a reflex angle along the length of the lower edge of the elongated molding.

Given the parties analyses, along with our own observation of the figures, we determine that an accurate description of ’532 design includes LKQ’s description as set forth above, as well as description of the centerline and relative orientation of the upper elongated molding and horizontal lower portion. Thus, LKQ’s description is modified as follows:[4]

> a horizontal lower portion extending rearward and downward from a bottom edge of the elongated molding; [and]
>
> the horizontal lower portion <u>is bisected by the centerline, and is</u> [being] narrower than the elongated molding[.]<u>; and</u>

---

[3] The claimed “vehicle front fascia molding” is not illustrated, or claimed, in relation to any other ornamental or functional element or any frame of reference, for example, a vehicle. Therefore, the ’532 design can be understood to exist essentially in any orientation in 3-dimensional space. Viewed in this light, we find it most helpful to describe the claimed design in terms of its native and illustrated elements.

[4] We indicate deleted text within [ ] brackets, and added text in the description by underlining.

the elongated molding and horizontal lower portion are oriented at a reflex angle along the length of the bottom edge of the elongated molding.

For purposes of this decision, we apply LKQ's description as modified to include these additional details and modifications.

While we recognize that the illustration, rather than a verbal description, is the better representation of the claimed design, *Egyptian Goddess, Inc.*, 543 F.3d at 679, we determine that the verbal description is helpful in this case. *See* Ex. 1001, Figs. 1–4.

### *D. Asserted Grounds of Unpatentability*

LKQ asserts that the sole design claim of the '532 patent is unpatentable on the following grounds (Pet. 14):

| Claim(s) Challenged | 35 U.S.C. § | Reference(s)/Basis |
|---|---|---|
| 1 | 102 | Munson[5] |
| 1 | 103 | Munson |
| 1 | 103 | Cadillac CTS Brochure,[6] and auto-brochures.com[7] |

## II. ANALYSIS

### *A. Principles of Law*

1. Anticipation

The "ordinary observer" test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented

[5] Ex. 1006, U.S. Patent No. D 605,082 S, issued Dec. 1, 2009.
[6] Ex. 1007, 2009 Cadillac CTS brochure, copyright 2008.
[7] Ex. 1008, 2009 Cadillac CTS photograph, April 4, 2014, http://www.auto-brochures.com/makes/Cadillac/CTS/Cadillac_US CTS_2009.pdf.

design is compared with the alleged anticipatory reference rather than an accused design. *Int'l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

> [I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

*Id.* at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the "normal use" lifetime of the accused product, i.e., "from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article." *Int'l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior art and claimed designs,

> [t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as "minor differences between a patented design and an accused article's design cannot, and shall not, prevent a finding of infringement" . . . so too minor differences cannot prevent a finding of anticipation.

*Id.* at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984)).

2. Obviousness

"In addressing a claim of obviousness in a design patent, the ultimate inquiry is whether the claimed design would have been obvious to a designer

of ordinary skill who designs articles of the type involved." *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (internal quotation and citations omitted); *see also High Point Design*, 730 F.3d at 1313 ("The use of an 'ordinary observer' standard to assess the potential obviousness of a design patent runs contrary to the precedent of this court and our predecessor court, under which the obviousness of a design patent must, instead, be assessed from the viewpoint of an ordinary designer.").

This obviousness analysis generally involves two steps: first, "one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design"; second, "once this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design." *High Point Design*, 730 F.3d at 1311 (internal quotation and citations omitted). In performing the first step, we must "(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates basically the same visual impression." *Id.* at 1312 (internal quotation and citations omitted). In the second step, the primary reference may be modified by secondary references "to create a design that has the same overall visual appearance as the claimed design." *Id.* at 1311 (internal quotation and citations omitted). However, the "secondary references may only be used to modify the primary reference if they are 'so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.'" *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)).

When evaluating prior art references for purposes of determining patentability of ornamental designs, the focus must be on actual appearances and specific design characteristics rather than design concepts. *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993); *see also Apple*, 678 F.3d at 1332 ("Rather than looking to the 'general concept' of a tablet, the district court should have focused on the distinctive 'visual appearances' of the reference and the claimed design.").

*B. The Ordinary Observer*

The parties offer different definitions for the ordinary observer. LKQ contends "the ordinary observer would be the retail consumer of vehicle front fascia moldings." Pet. 30–31 (citing Ex. 1003 ¶ 3[6]; Ex. 1004 ¶ 34). Neither LKQ, nor its declarants, further elaborate as to who may qualify as a retail consumer of front bumpers. *Id.* GM argues that "the ordinary observer includes commercial buyers who purchase replacement vehicle front fascia moldings to repair a customer's vehicle, such as repair shop professionals." Prelim. Resp. 6. GM asserts that LKQ has admitted in a related proceeding (IPR2020-00065) that "customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry." *Id.* at 7 (quoting IPR2020-00065, Paper 2, 21) (emphasis omitted). GM points out that "[b]ecause a repair shop buyer reviews and analyzes various products as part of his or her job duties, that buyer is particularly discerning." *Id.*; Ex. 2001, 4 ("LKQ's customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry.").

GM has presented credible argument and evidence as to why the ordinary observer would be a repair shop professional. The evidence, however, also reveals that a retail consumer, such as the owner of a vehicle, may also be in the position of an ordinary observer. A vehicle owner may have a contract with its insurance agent which "require the insurer to repair vehicles with parts of 'like kind and quality' to the OEM parts." Ex. 2001, 14, *see also id.* at 11 ("Automobile owners seek to repair their automobiles in a way that returns their automobile as closely as possible to its original appearance and condition."). For purposes of this Decision we accept that both parties' definitions fall within the purview of an ordinary observer. Our analysis reaches the same result using either parties' definition of the ordinary observer.

*C. The Designer of Ordinary Skill*

LKQ contends that:

> a designer of ordinary skill would be an individual who has at least an undergraduate degree in transportation or automotive design and [has work] experience in the field of transportation design or [automotive design], or someone who has several years' work experience in the field of transportation or automotive design.

Pet. 29 (citing Ex. 1003 ¶¶ 38–39; Ex. 1004 ¶ 36). GM argues, without citation to evidence, that:

> [a] designer of ordinary skill in the art relevant to the '532 Patent would have at least an undergraduate degree in automotive design, or other related industrial design field, with at least two years of relevant practical experience in designing automotive body parts. An increase in experience could

> compensate for less education, and an increase in education could likewise compensate for less experience.

Prelim. Resp. 8. The parties do not identify, and we do not discern, any material difference between the parties' proposed definitions. For purposes of this decision and on the record currently before us, which includes testimony by LKQ's witnesses, we adopt LKQ's proposed definition of the ordinary designer. Also, we point out that adopting GM's definition would not alter the outcome of this Decision.

*D. Alleged Anticipation of the Claim over Munson*

Petitioner argues that the '532 design is anticipated by Munson.

1. Munson

Munson is a U.S. Design Patent No. D605,082 S, issued December 1, 2009, and indicates that it was assigned to GM. Ex. 1006, code (73). Munson's Figures 1, 3, and 5 are reproduced below.

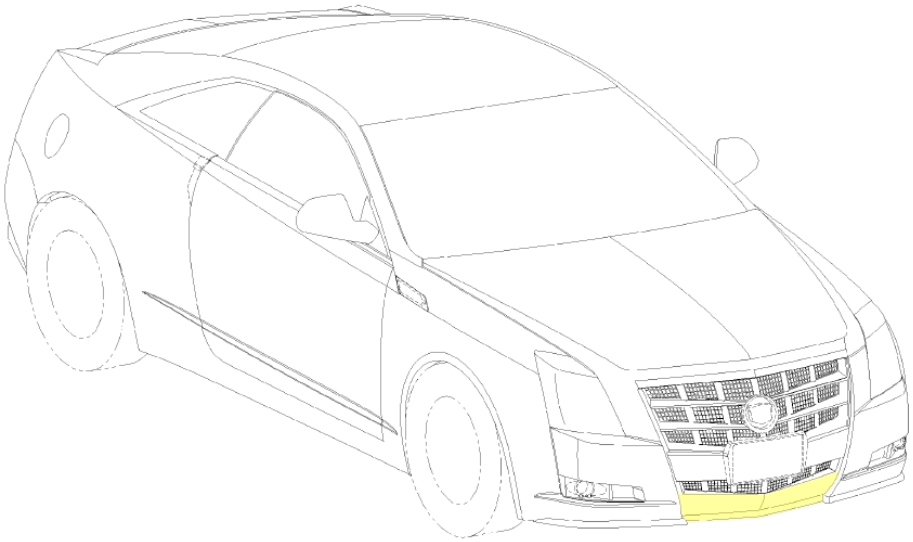


Fig-1

Munson's Figure 1, above, as annotated by the Board, depicts a front perspective view of a vehicle body including a front fascia molding as highlighted in yellow. *Id.* at code (57).

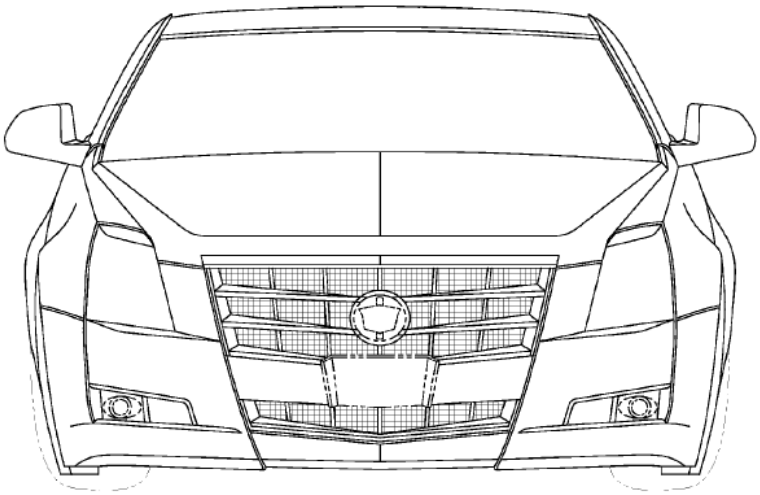


Fig-3

Munson's Figure 3, above, illustrates a front view of a vehicle body including the front fascia molding. *Id.*

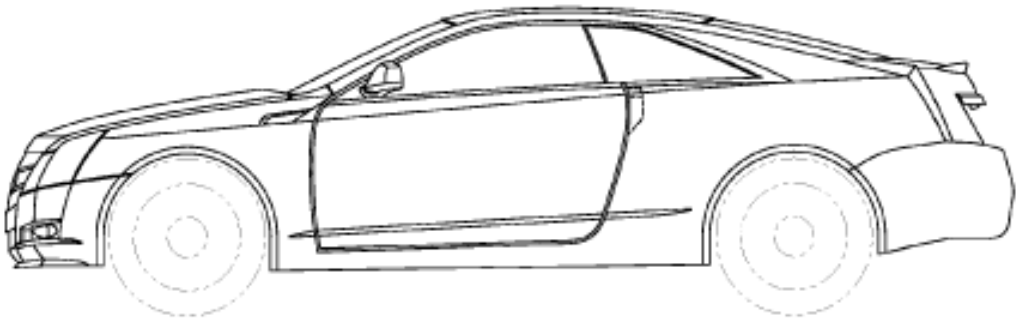


Fig-5

Munson's Figure 5, above, illustrates a side view of a vehicle body including the front fascia molding. *Id.*

2. Anticipation Analysis

To begin, we reproduce Figure 3 of the claimed design, below on the left, side-by-side and in comparison with relevant corresponding Figure 3 from Munson.

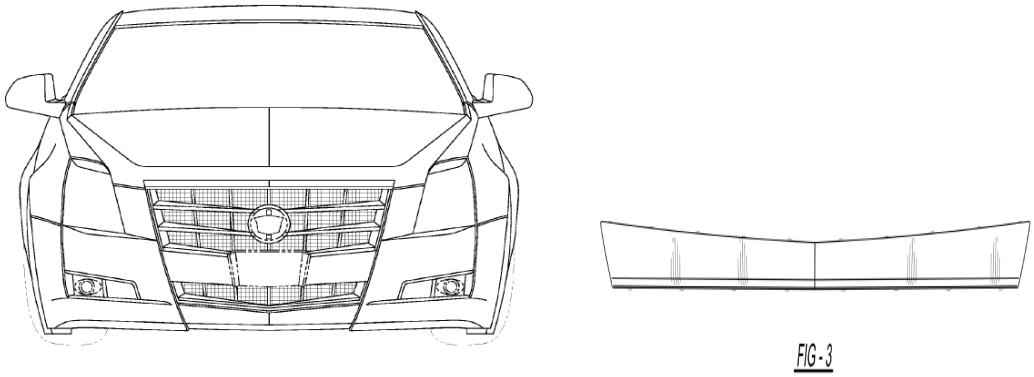



Fig-3

Munson's front elevation view in Figure 3, on the left, is shown next to a corresponding front elevation view in Figure 3 of the '532 design, on the right. Below, also in side-by-side comparison, is Munson's Figure 1 (flipped by the Board to be in mirror view) as it corresponds to Figure 1 of the '532 design.

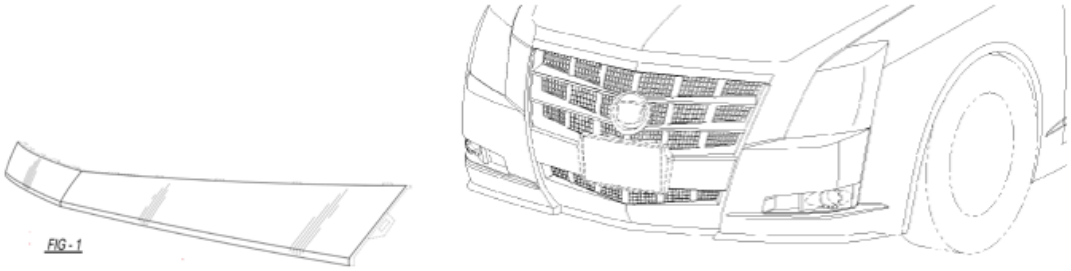


Figure 1 of the '532 design on the left illustrates a perspective view of the claimed front fascia molding, and a mirror image of Munson's perspective view in Figure 1, is shown on the right, including the front fascia molding.

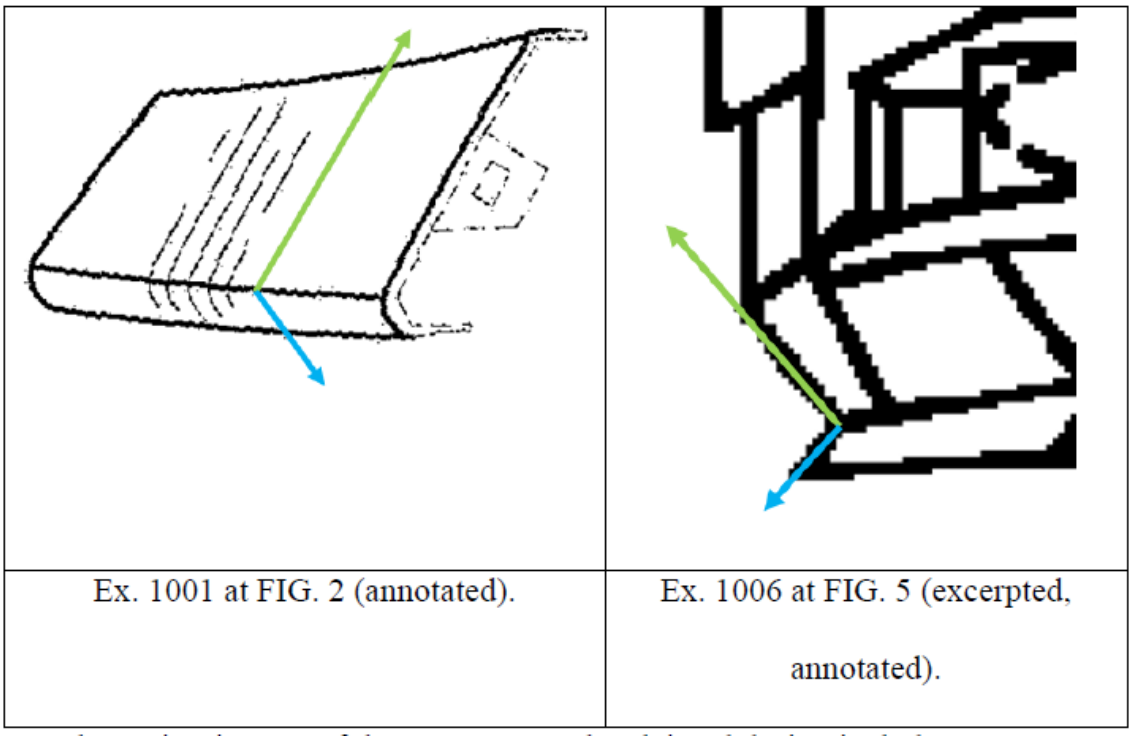
LKQ argues that "[t]he front fascia molding claimed in Munson is substantially the same as, if not identical to, the claimed design of the '532 Patent from the perspective of an ordinary observer." Pet. 31. LKQ contends specifically that the similarities include:

> 1) an elongated molding stretching horizontally having distal ends sloping back from a center line;
>
> 2) the center line bisecting the elongated molding into a first half and a second half;
>
> 3) the top half edge of each bisected half slopes gradually upward from the center line to the respective distal end of the respective half;
>
> 4) a horizontal lower portion extending rearward and downward from the bottom edge of the elongated molding, wherein the horizontal lower portion is narrower than the elongated molding.

*Id.* at 31–33.

GM argues that LKQ's analysis fails to take into account *the differences* between the '532 design and Munson. Prelim. Resp. 18–19. GM argues that LKQ "fail[s] to consider the readily apparent features of the design that contribute to its overall appearance that differ from Munson." *Id.* at 18. GM argues specifically that LKQ fails to address the differences in the orientation of the upper elongated molding of the '532 design, alleging that it slopes in a different direction, rearward, rather than forward as Munson's front fascia appears. *Id.* at 19–20. GM also argues that the '532 design's lower horizontal portion extends "***rearward*** and ***downward***" as opposed to Munson "that extends ***forward*** and ***downward*** from the bottom

edge of the elongated molding." *Id.* at 22. We reproduce below, GM's annotated comparison of Munson and the '532 design.



| Ex. 1001 at FIG. 2 (annotated). | Ex. 1006 at FIG. 5 (excerpted, annotated). |
|---|---|

Figure 2 of the '532 design is reproduced above, on the left, including annotations by GM in the form of arrows representing the relative orientation of the elongated molding along the bottom edge of the elongated molding with respect to the horizontal lower portion. *Id.* at 24. A portion of Munson's Figure 5 is shown on the right with annotations also by GM in the form of arrows also depicting the relative orientation of the elongated molding and the bottom edge of the elongated molding with respect to the horizontal lower portion. *Id.*

Observing the front elevation views in respective Figures 3 of both the '532 design and Munson, as compared above, it might appear at first glance that these designs are similar. For instance, at first glance the front profiles are similar, being reminiscent of the upper half of a bowtie. Also in both designs the proportions of the upper elongated molding and the lower

horizontal portion appear similar, although the horizontal lower portions look somewhat different in relative proportion to one another.

The perspective and end views of the ’532 design and Munson, however, reveal a distinct difference in the designs. The distinction resides in the angular orientation of the elongated molding and the bottom edge of the elongated molding with respect to the horizontal lower portion. As shown above in GM’s annotations, Figure 2 of the ’532 design depicts an orientation of the elongated molding and horizontal lower portion as a reflex angle about the bottom edge of the elongated portion. Munson’s Figures 1 and 5 illustrate the same elements being oriented at an obtuse angle (Figure 1) or perhaps closer to a right (90 degree) angle (Figure 5). GM argues that in the ’532 design, this orientation is “a convex front fascia design,” and in Munson, “a concave angle.” Prelim. Resp. 24–25 (emphasis omitted).

Although the verbal description provided by LKQ describes that the ’532 design includes “a horizontal lower portion *extending rearward and downward* from the bottom edge of the elongated molding,” LKQ has avoided substantively addressing any difference with respect to this orientation in Munson. In fact, LKQ appears to argue that Munson similarly has “a horizontal lower portion extending rearward and downward from the bottom edge of the elongated molding.” Pet. 33. A reasonable review of Munson’s drawings does not support this characterization of Munson’s design. Also, in support of this particular similarity argument, LKQ provided a comparison figure in its Petition at page 34, that appears to be either a poor reproduction or, the less clear image taken from the face page of Munson, and not from Munson’s actual claim and perspective view in

Figure 1.[8] Pet. 34. LKQ's declarants parrot the same similarity argument and less clear figure, and, as such, we do not find their testimony useful. *See* Ex. 1003 ¶¶ 53–54; Ex. 1004 ¶¶ 56–57. Importantly, this less clear, or face page image does not include the same level of detail as in the drawings specified by the claim, specifically in Figure 1, and therefore we accord little weight to any related evidence and testimony in support of LKQ's similarity argument as to this design characteristic.

We are persuaded by GM's arguments and evidence, as they are consistent with our review and visual observations of the overall ornamental characteristics of the '532 design and Munson, that there exists a distinct and significant difference in orientation and overall appearance between critical elements of the designs, namely between the elongated molding and horizontal lower portion as they are oriented about the bottom edge of the elongated molding. Whether this orientation in the '532 design is defined as a reflex angle, or as GM asserts, a concave angle, we find it creates an overall lack of visual similarity in comparison to Munson. Based on this distinction, we are not persuaded that an ordinary observer, either a repair shop professional or a vehicle owner, would recognize the designs as substantially the same. Further, we do not believe that the ordinary observer would be deceived so as to purchase one supposing it to be the other. Accordingly, we determine that LKQ has failed to establish a reasonable likelihood that the '532 design claim is anticipated based on Munson.

[8] The Petition, at page 34, erroneously cites to Munson's "Figure 3 (cropped annotated)" instead of Munson's perspective view in Figure 1.

*E. Alleged Obviousness of the Claim over Munson*

LKQ argues that the '532 design is further obvious over Munson because "[a]ny differences between Munson and the '532 Patent are *de minimis* and 'insubstantial changes' to a designer of ordinary skill in the art." Pet. 35 (citing Ex. 1003 ¶ 58; Ex. 1004 ¶¶ 60–62). LKQ argues that Munson is a proper primary, or *Rosen* [9] reference because it evokes "basically the same overall visual appearance as claimed design for a vehicle front fascia molding in the '532 Patent." *Id.* (citing Ex. 1003 ¶ 61; Ex. 1004 ¶ 63; *Durling*, 101 F.3d at 103). LKQ argues specifically, that "[t]here is but one difference between Munson and the claimed design . . . [t]he horizontal lower portion of Munson has no center line where the '532 Patent has such a center line." *Id.* at 35–36 (citing Ex. 1003 ¶ 63; Ex. 1004 ¶ 65). LKQ contends that "the addition of a center line to Munson is an 'insubstantial change that would have been obvious to a skilled designer' to arrive at a design with the same overall appearance as the '532 Patent." *Id.* at 36 (citing Ex. 1003 ¶¶ 64–66; Ex. 1004 ¶¶ 66–67; *MRC Innovations, Inc.,* at 1335).

GM argues that LKQ's obviousness challenges "are based on the flawed premise that there is only one difference between Munson and the claimed design." Prelim. Resp. 36. GM contends that "there are actually multiple readily apparent differences between the claimed design and Munson" and that LKQ has failed to provide evidence that changing Munson's design to account for such differences, for instance the

[9] In the context of design patent law, a proper primary, or *Rosen*, reference is "something in existence, the design characteristics of which are basically the same as the claimed design." *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982).

"aerodynamic convex angle formed by the orientation of the 'elongated molding' in relation to the 'horizontal lower portion,'" are unrelated to the overall aesthetic appearance of the '532 design. *Id.* at 37. For the reasons discussed below, we find GM's position to be persuasive.

For our obviousness analysis, we must evaluate the design as a whole, from the perspective of a designer of ordinary skill, and so we reproduce, again, the four figures embodying the '532 design. *See Rosen*, 673 F.2d at 390 ("In determining the patentability of a design, it is the overall appearance, the visual effect as a whole of the design, which must be taken into consideration.").

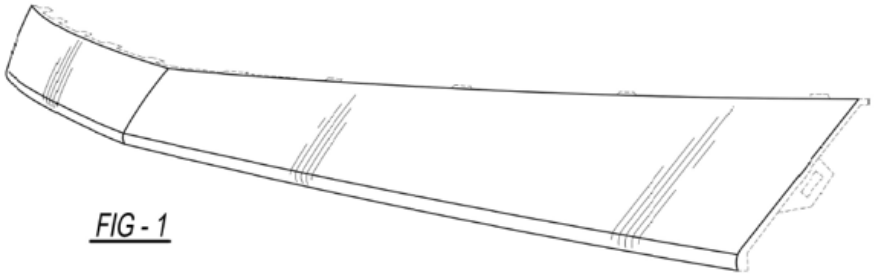


FIG - 1

FIG - 2

FIG - 3

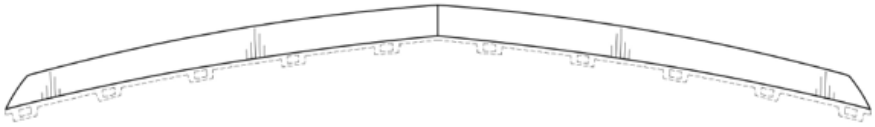


FIG - 4

Figures 1–4, reproduced above, best illustrate the visual overall appearance of the ’532 design. Also, we must keep in mind the verbal description of this design determined previously, as it helps inform us as to particular characteristics of the design that must be evaluated in terms of the overall appearance. Section II.C.

We would agree, considering for example just Figure 3 of the ’532 design, above, compared with Munson’s Figure 3, below, that there may be some degree of similarity.

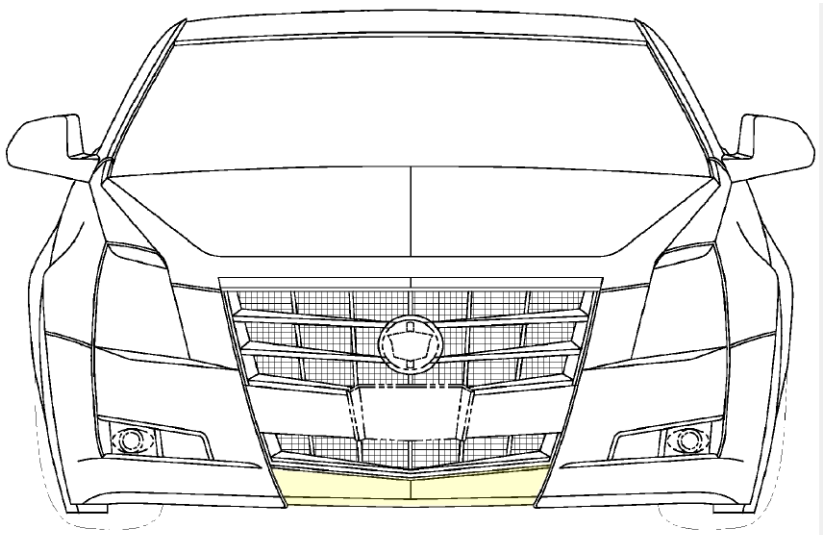


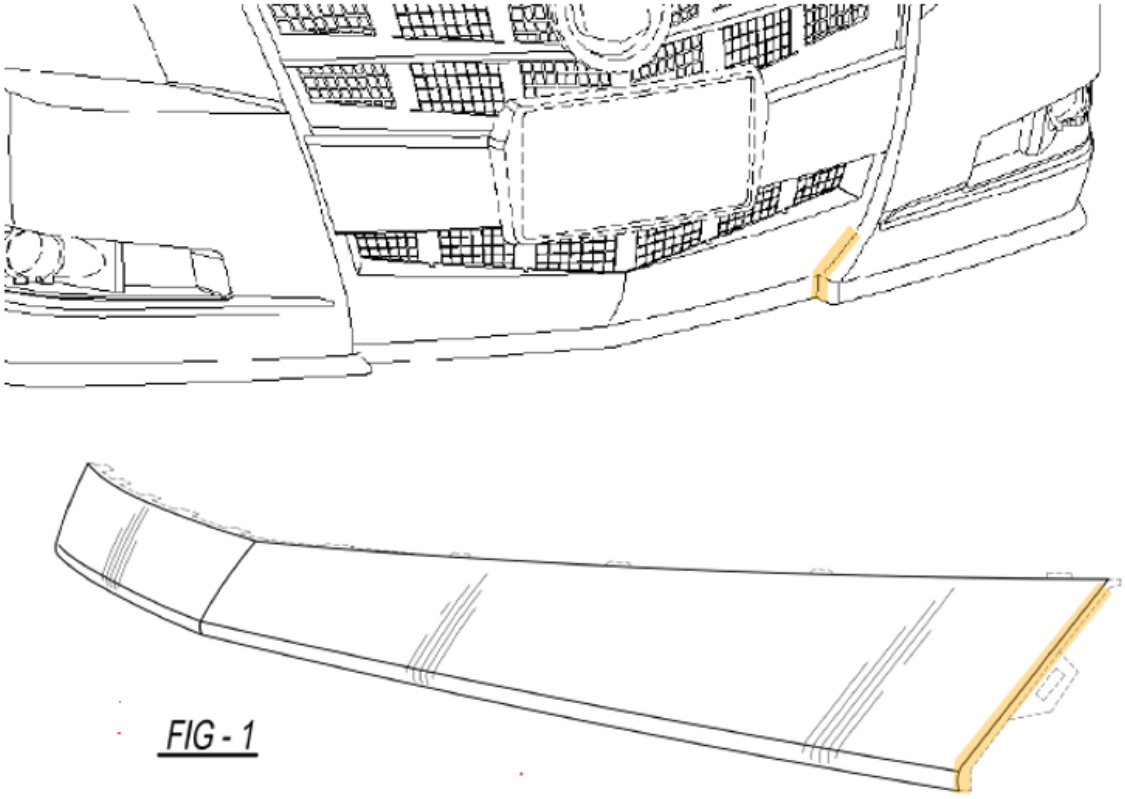
Fig-3

Munson's Figure 3, above, illustrates a front view of a vehicle body including the highlighted front fascia portion, as annotated by the Board. In this comparison, the profile and proportionality of the designs are similar, and is reflected in LKQ's proposed verbal description.

But simply relying on a comparison of front elevation views does not tell the whole story. The side and perspective views in Figures 1 and 2 of the '532 design reveal a distinct angulation, what we refer to in this Decision, as a reflex angle, between the elongated molding in relation to the horizontal lower portion, as these design elements are contiguous along the length of the bottom edge of the elongated molding. As discussed above, we have determined that it is appropriate to define this distinctive angularity actively, in terms of the elements relationship, that is—by adding to the verbal description, "the elongated molding and horizontal lower portion are oriented at a reflex angle along the length of the bottom edge of the elongated molding." *See* Section II.C. (emphasis added). LKQ's originally

proposed claim description, to some extent, attempt to account for this feature stating "a horizontal lower portion extending rearward and downward from a bottom edge of the elongated molding." *Id.* However, LKQ's obviousness analysis does not sufficiently address this readily apparent difference of the '532 design in relation to Munson. *See* Pet. 35–36 (asserting in the Petition that "[t]here is but one difference between Munson and the claimed design. The horizontal lower portion of Munson has no center line where the '532 Patent has such a center line."). LKQ concludes, wrongly, that the orientation of the elongated molding and horizontal lower portion in both designs is similar. *See* Pet. 35 (referencing Pet. 33, asserting that Munson's horizontal lower portion is "extending rearward and downward.").

We determine that a comparison of the visual characteristics as a whole, in particular of Figures 1, 2, and 4 of the '532 design, reveals a distinctly different non-obvious design compared to Munson. As discussed, Figures 1 and 2 of the '532 design depict a front fascia molding having a reflex angle, or perhaps a convex surface as GM argues, whereas Munson's vehicle body reveals an obtuse, or concave, angulation between these surfaces. This difference in angulation or, curvature, between the '532 design and Munson is not simply different, but strikingly, opposite. This is perhaps best shown in the relative perspective views, below, in a comparison of annotated version of Munson's Figure 1, with Figure 1 of the claimed design.




A highlighted obtuse angle right-edge portion of Figure 1 of Munson's vehicle body, as annotated by the Board, is shown above in comparison to a highlighted reflex angle right-edge portion Figure 1 of the '532 design.

Based on an overall comparison, we disagree with LKQ's conclusion that the only difference is that of the centerline, and find unsubstantiated the assertion that Munson can be viewed as having "a horizontal lower portion extending rearward and downward from the bottom edge of the elongated molding." Pet. 33. A reasonable observation of Munson's Figure 1 arguably shows the horizontal lower portion extending downward, but not "rearward." *See id.* Indeed, neither LKQ nor its declarants elaborate on how, or why, a designer of ordinary skill would understand that Munson in fact discloses such a "rearward" orientation of the horizontal lower portion.

Pet. 35 (citing Ex. 1003 ¶ 61; Ex. 1004 ¶ 63). Moreover, the annotations in the figures above highlight the different reflex, versus obtuse, angles that are visually distinctive along the length of each design. In other words, the comparison, above, reveals that the orientation between the elongated portion and the lower horizontal portion along the length of the front fascia molding is a reflex angle in the '532 design, as compared to an obtuse angle illustrated by the highlighted edge portion of Munson's design.

Apart from LKQ's and its Declarants' unsupported conclusions regarding the "rearward and downward" orientation of the horizontal lower portion of Munson's design, we are unable to discern a substantive discussion by LKQ addressing the visually distinct differences in angularity and relative orientation in a comparison of the claimed design to Munson. *See* Pet. 33, 35–36 (LKQ identifying what it characterizes as *the only difference* between the primary reference and the claimed design); *see also id.* at 32–34 (describing the similarities between the claimed design and Munson). To the extent that LKQ argues that this is a *de minimis* feature that, therefore, needs no analysis, we are not persuaded. *See, e.g.*, *id.* at 35 ("Any differences between Munson and '532 Patent are *de minimis* and 'insubstantial changes' to a designer of ordinary skill in the art and are, therefore, are not sufficient to justify a finding that the claimed design in the '532 Patent is patentable."). We determine that the angularity of these designs presents a significant ornamental difference, one that bears meaningfully on the overall appearance of the designs that would be apparent to a designer of ordinary skill. Keeping in mind the overall appearance of the designs, Munson is not an adequate primary reference primarily because the relevant front fascia molding shown in Munson has a

horizontally extending obtuse angle along its length presenting an in-cut air spoiler style appearance that is significantly different from the smoother swept-back appearance provided by the elongated molding and the horizontal lower portion formed at a reflex angle in the ’532 design.

On the record before us, we determine that a distinctive visual difference from Munson exists in the particular reflex angularity of the ’532 design that is clearly visible on either side of the centerline, and along the length of the elongated molding and horizontal lower portion in the claimed design. In light of this determination, LKQ has not made a threshold showing that a designer of ordinary skill, someone who designs articles in the transportation and automotive fields, would view Munson as a single reference that creates basically the same visual impression as the claimed design. *High Point Design*, 730 F.3d at 1312. LKQ has not established satisfactorily that Munson is an appropriate primary reference.

Accordingly, LKQ has not demonstrated that it is more likely than not that the challenged claim would have been obvious over Munson.

*F. Alleged Obviousness of the Claim over the Cadillac CTS Brochure and autobrochure.com*

LKQ argues that the ’532 design is obvious over the 2009 Cadillac CTS as shown in either or both of Cadillac CTS brochure, and autobrochure.com, because “[a]ny differences between GM’s 2009 Cadillac CTS and the ’532 Patent are *de minimis* and ‘insubstantial changes’ to a designer of ordinary skill in the art.” Pet. 39 (citing Ex. 1003 ¶ 69; Ex. 1004 ¶ 73). Also, we discern no difference, nor has LKQ asserted that there is, between the single front elevation image in autobrochure.com, allegedly depicting the 2009 Cadillac CTS, and the front elevation view in the Cadillac CTS Brochure shown below. *Compare* Ex. 1007, 8, *with* Ex. 1008,

1; Pet. 37–43. Also, to be clear in our analysis we differentiate between the asserted prior art reference, that is the Cadillac CTS Brochure, and the depictions of the 2009 Cadillac CTS shown therein.

As it argued with respect to Munson, LKQ contends that "[t]here is but one potential difference between GM's 2009 Cadillac CTS and the claimed design . . . [i]t is unclear whether the 2009 Cadillac CTS has a center line on the horizontal lower portion of the 2009 Cadillac CTS." *Id.* at 41 (citing Ex. 1003 ¶ 74; Ex. 1004 ¶ 80). LKQ argues that "the addition of a center line to GM's 2009 Cadillac CTS is an "insubstantial change that would have been obvious to a skilled designer' to arrive at a design with the same overall appearance as the '532 Patent." *Id.* at 42–43 (citing Ex. 1003 ¶¶ 74–75; Ex. 1004 ¶¶ 81–84; *MRC Innovations, Inc.,* at 1335). We do not agree that there is but one difference.

We reproduce, below, several images of the 2009 Cadillac CTS from the Cadillac CTS Brochure.

The Figure above is an image of a front elevation view of the 2009 Cadillac CTS from the Cadillac CTS Brochure.

The Figure above is a right-side front perspective view of the 2009 Cadillac CTS from the Cadillac CTS Brochure.

The Figure above is a left-side front perspective view of the 2009 Cadillac CTS from the Cadillac CTS Brochure.

For purposes of comparison, we reproduce below Figure 1 of the ’532 design.

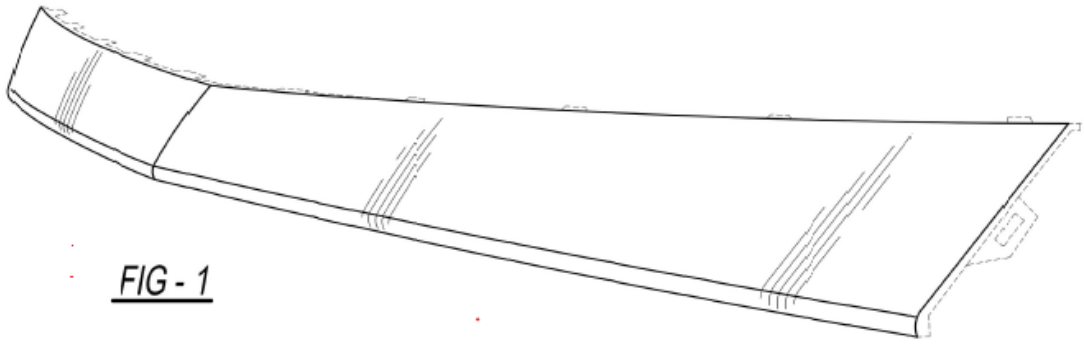



Figure 1 of the ’532 design, above, as we have determined, depicts “the elongated molding and horizontal lower portion are oriented at a reflex angle along the length of the bottom edge of the elongated molding.” *See* Section II.C. Quite differently, as observed particularly in the perspective views from the Cadillac CTS Brochure, the 2009 Cadillac CTS vehicle body reveals a front fascia molding having an obtuse, or concave, angulation between these surfaces. This difference in angularity or, curvature, between the ’532 design and 2009 Cadillac CTS front fascia molding is not simply different, but strikingly, opposite.

In this challenge LKQ fails, again, to substantively address this fundamental difference between the designs. LKQ incorrectly asserts that the centerline is the only difference in the designs, and without persuasive evidence argues that a similarity with the ’532 design is that the 2009 Cadillac CTS front fascia molding has “a horizontal lower portion extending rearward and downward from the bottom edge of the elongated molding.” Pet. 41 (citing Ex. 1001, Fig. 1; Ex. 1007, 8; Ex. 1003 ¶ 73; Ex. 1004 ¶ 76–79). And, because LKQ’s declarants make the same incorrect observations and pronouncement without further explanation or evidence to support their position we give no credit to their testimony in this regard. *See* Ex. 1003

¶ 73, *see also* Ex. 1004 ¶¶ 76–79 (describing the similarities of the '532 Patent and the 2009 Cadillac CTS front fascia molding).

For the same and similar reasons as set forth in the discussion of Munson, we determine that LKQ has not made a threshold showing that the Cadillac CTS Brochure and autobrochure.com, considered either together or separately, is a single reference that creates basically the same visual impression as the claimed design. *High Point Design*, 730 F.3d at 1312. We determine that a distinctive visual difference from the 2009 Cadillac CTS exists in the particular reflex angularity of the '532 design that is clearly visible on either side of the centerline and along the length of the elongated molding and horizontal lower portion in the claimed design. The front fascia molding shown in the 2009 Cadillac CTS defines an obtuse angle between the elongated molding and horizontal lower portion. In light of this distinction in the overall appearances of the designs, we determine that LKQ has not made a threshold showing that a designer of ordinary skill, that is—someone who designs articles in the transportation and automotive fields, would view the Cadillac CTS Brochure as a single reference that creates basically the same visual impression as the claimed design. *Id*. LKQ has, therefore, not established satisfactorily that either the Cadillac CTS Brochure or autobrochure.com is an appropriate primary reference.

Accordingly, LKQ has not demonstrated that it is more likely than not that the challenged claim would have been obvious over the Cadillac CTS Brochure and autobrochure.com.

## III. CONCLUSION

LKQ has not demonstrated that that it is more likely than not that the challenged design claim is unpatentable.

## IV. ORDER

For the foregoing reasons, it is

ORDERED that the Petition is *denied* and no trial is instituted.

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