

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LEAPFROG PRODUCT DEVELOPMENT, LLC,
Petitioner,

v.

LIFEFACTORY, INC.,
Patent Owner.

Case IPR2015-00614
Patent 8,579,133 B2

Before MICHAEL W. KIM, MITCHELL G. WEATHERLY, and
JAMES A. WORTH, *Administrative Patent Judges*.

WEATHERLY, *Administrative Patent Judge*.

DECISION
Final Written Decision
35 U.S.C. § 318; 37 C.F.R. § 42.73

I. INTRODUCTION

A. Background

Leapfrog Product Development, LLC (“Leapfrog”) filed a Petition (Paper 1, “Pet.”) to institute an *inter partes* review of claims 1–21 of U.S. Patent No. 8,579,133 B2 (Ex. 1001, “the ’133 patent”). 35 U.S.C. § 311. Leapfrog supported the Petition with the Declaration of Don Nole

(Ex. 1011). Lifefactory, Inc. (“Lifefactory”) timely filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). On August 17, 2015, based on the record before us at the time, we instituted an *inter partes* review of claims 1–21. Paper 7 (“Institution Decision” or “Dec.”). We instituted the review on the following challenges to the claims:

References	Basis	Claims challenged
U.S. Patent No. 1,690,509 (Ex. 1003, “Thoreson”)	§ 102(b)	12
Thoreson	§ 103	1–5, 7, 9, 10, 12–17, and 19–21
Thoreson and U.S. Patent Pub. No. 2008/0078824 A1 (Ex. 1004, “Spriegel”)	§ 103	1–5 and 7–21
Thoreson, Spriegel, and U.S. Patent No. 3,760,968 (Ex. 1005, “Amberg”)	§ 103	6
U.S. Patent Pub. No. 2006/0081640 A1 (Ex. 1002, “Tobias”)	§ 102(b)	1–7, 9, 11, 13–16, 18, and 19
U.S. Patent Pub. No. 2008/0047967 A1 (Ex. 1007, “Brunner”) and U.S. Patent Pub. No. 2004/0084460 A1 (Ex. 1006, “Scheetz”)	§ 103	1–20

Dec. 9–14.

After we instituted this review, Lifefactory filed a Patent Owner Response in opposition to the Petition (Paper 11, “PO Resp.”) that was supported by Declarations from Jim Goldman (Ex. 2009) and Roy Mabrey (Ex. 2011). Leapfrog filed a corrected Reply in support of the Petition (Paper 23, “Reply”) that was supported by a Declaration from Kurt Sward

(Ex. 1021). With our prior authorization (Paper 22), Lifefactory filed a Surreply to Leapfrog's Reply (Paper 27, "Surreply").

Lifefactory filed a Motion for Observation on Cross Examination of Mr. Sward (Paper 26), to which Leapfrog filed a Response (Paper 28). Lifefactory did not move to amend any claim of the '133 patent.

We heard oral argument on April 13, 2016. A transcript of the argument has been entered in the record (Paper 30, "Tr.").

We have jurisdiction under 35 U.S.C. § 6(c). The evidentiary standard is a preponderance of the evidence. *See* 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73.

For the reasons expressed below, we conclude that Leapfrog has demonstrated by a preponderance of evidence that claims 13–17, 19, and 21 are unpatentable, but it has failed to do so for claims 1–12, 18, and 20.

B. Related Proceedings

The parties have identified as a related proceeding the co-pending district court litigation of *Lifefactory, Inc. v. Leapfrog Product Development, LLC*, No. 14-cv-03257 (N.D. Cal.), which was dismissed. Pet. 1; Paper 5, 2.

C. The '133 Patent

The '133 patent is generally directed to a sleeve or wrap for protecting a container. Ex. 1001, Abstract. Figures 1A, 1B, and 3A, reproduced below, illustrate an example of sleeve 100 as it may be positioned on bottle 20.

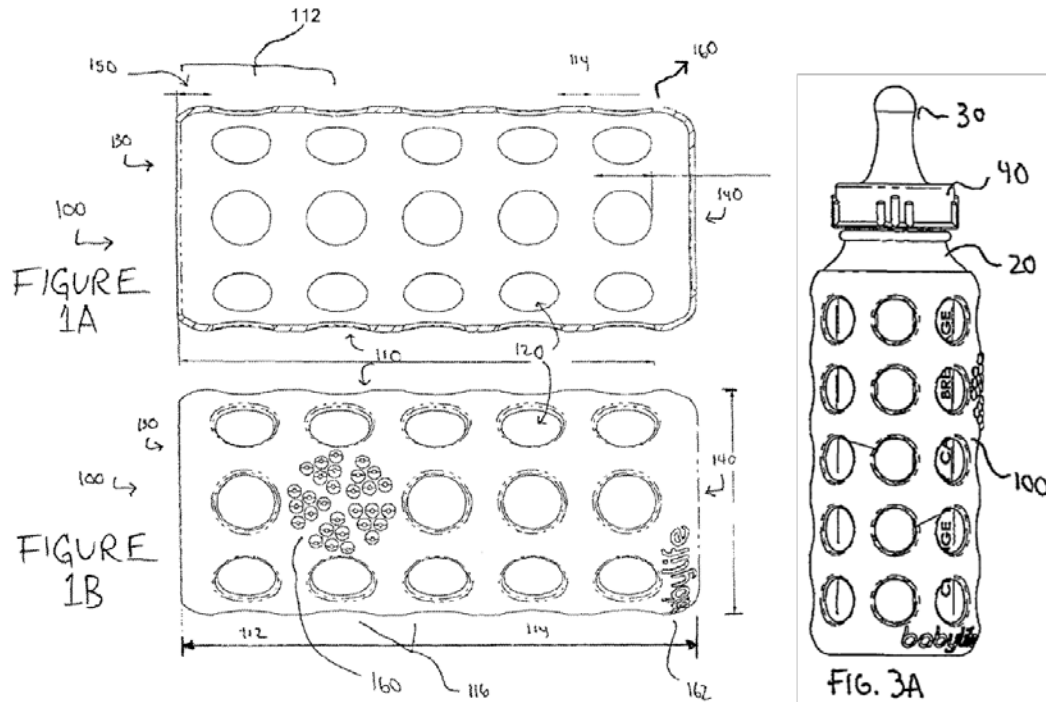


Figure 1A is a cross section view and Figure 1B is a perspective view illustrating protective sleeve 100, and Figure 3A is a perspective view illustrating protective sleeve 100 on bottle 20.

Sleeve 100 is designed to conform tightly to the exterior of the container. *Id.* at 10:36–40. Sleeve 100 is generally described as comprising tubular body 110 with openings 130, 140 at either end for receiving and/or retaining bottle 20. *Ex.* 1001, 11:60–12:12. The ends may include “lips” 150, 160 that wrap around the bottom or top of the container. *Id.* Sleeve 100 may also include a plurality of holes 120 “for allowing one to see a level of the contents of a container,” but the holes may also suit other purposes. *Id.* at 12:1–3, 7:35–41.

Independent claims 1, 12, and 13 recite:

1. A protective sleeve for holding a container, comprising:
 a protective sleeve comprising a molded tubular body configured for holding a container, said tubular body defining

- (a) a first opening at a first end of said tubular body adapted for receiving the container,
- (b) a second opening opposite said first opening at a second end opposite said first end,
- (c) a lip adjacent to the second opening, and
- (d) a main body between said first opening and said lip, wherein said second end and said lip are configured to surround and extend over a bottom edge of the container and to cover at least a portion of the bottom surface of the container to thereby facilitate retaining of the container,

wherein said tubular body comprises silicone and

wherein said first opening of said tubular body, when said tubular body is not holding the container, has a cross section that is smaller than all parallel cross sections along a length of said main body of said tubular body.

Id. at 16:26–42 (with line breaks added for clarity).

12. A sleeve for holding a container, comprising:

a molded tubular body comprising an elastic material and defining a space to hold a container;

said tubular body defining a first circular opening at a first end of said tubular body configured for receiving the container;

said tubular body defining a second circular opening at a second end of said tubular body that is opposite said first end of said tubular body, wherein said first circular opening is in a first plane and a second circular opening is in a second plane that is parallel to said first plane, said second end configured to prevent any portion of the container from passing through said second circular opening; and

said tubular body defining a plurality of three or more holes in a pattern that extends from said first end of said tubular body to said second end of said tubular body, wherein the three or more holes are configured to allow visual access through said sleeve.

Id. at 17:9–27.

13. A bottle and a sleeve for holding the bottle, comprising:
- a bottle comprising
 - a top portion,
 - a bottom portion,
 - a middle portion extending between said top portion and said bottom portion,
 - wherein said top portion comprises a bottle opening and said bottom portion comprises a bottom edge and a bottom surface opposite said bottle opening; and
 - a molded elastic tubular sleeve comprising silicone and having a middle section extending along an outside of said middle portion of said bottle,
 - wherein said tubular sleeve further comprises a bottom portion that extends over an outside of said bottom portion of said bottle and at least partially over said bottom edge of said bottle and defines an opening in a plane parallel to said bottom surface of said bottle, and
 - wherein said tubular sleeve comprises a top portion that tapers inward relative to said middle section when said bottle is absent from said tubular sleeve;
 - wherein said tubular sleeve comprises a plurality of holes along said middle section, wherein said holes are sized and positioned to enable visual observation of contents within the bottle.

Id. at 17:28–18:9 (with line breaks added for clarity).

II. ANALYSIS

A. Claim Interpretation

“A claim in an unexpired patent that will not expire before a final written decision is issued shall be given its broadest reasonable construction

in light of the specification of the patent in which it appears.” 37 C.F.R. § 42.100(b); *see Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016) (affirming that USPTO has statutory authority to construe claims according to Rule 42.100(b)). When applying that standard, we interpret the claim language as it would be understood by one of ordinary skill in the art in light of the specification. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). Thus, we give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning ‘is the meaning that the term would have to a person of ordinary skill in the art in question.’”). For the purposes of this decision, and on this record, we determine that no claim term other than “sleeve” needs express interpretation. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (only those terms which are in controversy need to be construed, and only to the extent necessary to resolve the controversy).

In our Institution Decision, we preliminarily interpreted “sleeve” to mean “a flexible wrap that fits around another object.” Lifefactory purports to be continuing to assert that “sleeve” means “a flexible wrap that fits around another object while maintaining substantial contact with that object.” PO Resp. 6 (identifying its proposed interpretation of “sleeve” in its Preliminary Response); *see also* Prelim. Resp. 9 (proffering interpretation of “sleeve”). Nevertheless, Lifefactory also “applied the Board’s guidance [on ‘sleeve’] as basis for the arguments” in its Patent Owner Response, without identifying any new argument for altering our preliminary interpretation of “sleeve.” PO Resp. 6. For the reasons expressed in our Institution Decision,

we maintain our interpretation of “sleeve” as meaning “a flexible wrap that fits around another object.”

B. The Parties’ Post-Institution Arguments

In our Institution Decision, we concluded that the argument and evidence adduced by Leapfrog demonstrated a reasonable likelihood that various selections of claims 1–21 were unpatentable as either anticipated or rendered obvious based on the challenges identified in the table in Part I.A above. Dec. 9–14. We must now determine whether Leapfrog has established by a preponderance of the evidence that the specified claims are unpatentable over the cited prior art. 35 U.S.C. § 316(e). In this connection, we previously instructed Lifefactory that “any arguments for patentability not raised in the [Patent Owner Response] will be deemed waived.” Paper 8, 6; *see also* 37 C.F.R. § 42.23(a) (“Any material fact not specifically denied may be considered admitted.”). Additionally, the Board’s Trial Practice Guide states that the Patent Owner Response “should identify all the involved claims that are believed to be patentable and state the basis for that belief.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012).

In connection with the arguments and evidence adduced by Leapfrog to support its positions that Lifefactory chose not to address in its Patent Owner Response, the record now contains unrebutted arguments and evidence presented by Leapfrog regarding the manner in which the asserted prior art teaches all other elements of the claims against which that prior art is asserted. Except as otherwise stated below, for the reasons stated by Leapfrog in its Petition, we conclude that the prior art identified by Leapfrog describes all limitations of the reviewed claims except for those that

Lifefactory contested in the Patent Owner Response, which we address below.

C. The Challenges to the Claims

Leapfrog challenges the patentability of the challenged claims 1–21 on the grounds that the claims are either anticipated or obvious in light of various references including: Thoreson, Spriegel, Amberg, Tobias, Brunner, and Scheetz.

To anticipate a patent claim under 35 U.S.C. § 102, “a single prior art reference must expressly or inherently disclose each claim limitation.” *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008). Under the principles of inherency, if the prior art necessarily functions in accordance with, or includes, the claim limitations, it anticipates, even though artisans of ordinary skill may not have recognized the inherent characteristics or functioning of the prior art. *MEHL/Biophile Int’l Corp. v. Milgraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999) (citation omitted); *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349–50 (Fed. Cir. 2002).

The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), reaffirmed the framework for determining obviousness as set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966). The *KSR* Court summarized the four factual inquiries set forth in *Graham* that we apply in determining whether a claim is reasonably likely to be unpatentable as obvious under 35 U.S.C. § 103(a) as follows:

1. determining the scope and content of the prior art,
2. ascertaining the differences between the prior art and the claims at issue,
3. resolving the level of ordinary skill in the pertinent art, and

4. considering objective evidence present in the application indicating obviousness or nonobviousness.

KSR, 550 U.S. at 406. With these standards in mind, we address each challenge below.

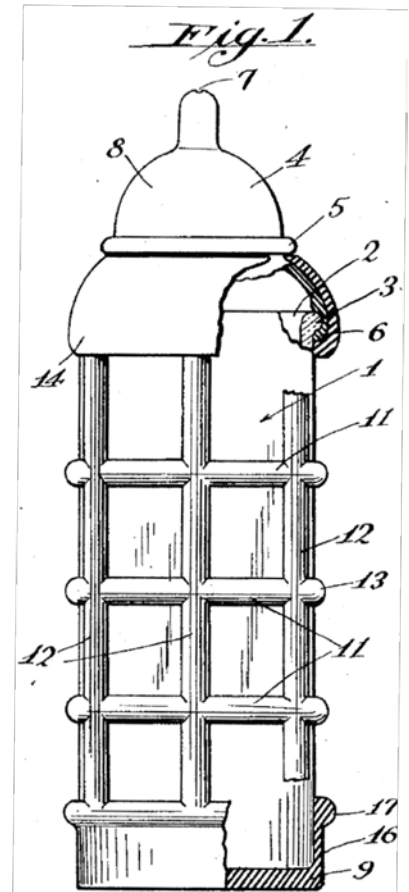
1. *Claims 1–21: Challenges Based on Thoreson*

Leapfrog challenges the patentability of all challenged claims based upon Thoreson alone and in combination with Spriegel and Amberg. We address each challenge in turn below.

a) Overview of Thoreson

Thoreson, which issued November 22, 1926, describes a protective covering for a glass bottle, Ex. 1003, 1:41–42, that is made of “rubber or the like,” *id.* at 1:5–9. Thoreson later describes the covering as a “casing.” *Id.* at 1:50. A first embodiment is illustrated in Figure 1 (reproduced at right), which is a side elevation of bottle 1 with the casing having some portions partially broken away to reveal internal structures of the casing and nipple on the bottle. *Id.* at 1:27–30. Thoreson describes the casing as follows:

A casing is shown surrounding the bottle having a thickened bottom 9 with an aperture . . . 10 therethrough and is *formed in one continuous integral piece* in the form of a frame consisting of horizontal annular strips 11 and vertical strips 12, which strips are preferably rounded as at 13, as shown. The upper portion of *this casing* is provided with an enlarged flattened annular portion 14 which firmly clamps the nipple 4 over the bead 3 and holds the same in place and extends an appreciable distance above the upper end of the bottle 1 to prevent fracture thereof.



Id. at 1:50–63 (emphases added). Thoreson’s claim 5 further describes the casing as “a resilient protective covering for the bottle provided at its upper end with an annular reinforcing strip extending above the upper end of the bottle to prevent fracture thereof and pressing the nipple directly against the annular bead.” *Id.* at 2:19–24.

b) Claim 12: Anticipation by Thoreson

Claim 12 is the only challenged claim that does not require that the sleeve be made of silicone.¹ Ex. 1001, 16:26–18:38. Leapfrog contends that Thoreson anticipates claim 12. Pet. 16–17. Leapfrog supports its contention by comparing, in detail, the disclosure of Thoreson with each limitation of claim 12. *Id.* Leapfrog also proffers testimony from Mr. Nole supporting its comparison of Thoreson to claim 12. *Id.* (citing Ex. 1011 ¶ 11 at Pet. 13–14 incorporated by reference).

Lifefactory argues that Thoreson does not anticipate claim 12 because Thoreson fails to describe a sleeve “comprising a molded tubular body.” PO Resp. 24–27. To meet this requirement of claim 12, Leapfrog relies solely upon expert testimony of Mr. Nole. Pet. 13 (citing only Ex. 1011 ¶ 11). Mr. Nole testifies that “Thoreson would likely have been molded, and certainly *could* have been molded.” Ex. 1011 ¶ 11. On cross examination, Mr. Nole concedes that Thoreson does not expressly describe that its protective structure was molded. Ex. 2021, 56:2–8.

¹ In the Petition, Leapfrog also contends that Thoreson anticipates claims 1–5, 7, 9, 10, 13–17, and 19–21, which require that the sleeve be made of silicone. We did not institute an *inter partes* review based upon this challenge because we found that Leapfrog had failed to establish a reasonable likelihood of establishing that Thoreson described a sleeve made of silicone. Dec. 9–10.

We determine that Leapfrog’s evidence fails to establish that Thoreson describes a sleeve having a “molded tubular body” with sufficient certainty to establish anticipation. Mr. Nole testifies merely about the likelihood or possibility that Thoreson’s protective structure was molded. Such unsupported testimony fails to establish adequately that Thoreson expressly or inherently describes a molded tubular body.

We also determine for reasons expressed in Part II.C.1.c)(3) below that Leapfrog fails to establish that Thoreson describes a “first circular opening . . . for receiving the container” as required in claim 12. Accordingly, for both reasons, we conclude that Leapfrog has failed to establish by a preponderance of evidence that Thoreson anticipates claim 12.

c) Claims 1–5, 7, 9, 10, 12–17, and 19–21: Obviousness over Thoreson Alone

Leapfrog contends that Thoreson alone renders obvious claims 1–5, 7, 9, 10, 12–17, and 19–21. Pet. 12–19. Leapfrog supports its contention by comparing, in detail, the disclosure of Thoreson with each limitation of these claims. *Id.* at 13–19. Leapfrog also proffers testimony from Mr. Nole supporting its comparison of Thoreson to the claims. *Id.* (citing Ex. 1011 ¶¶ 7–9, 11–13). Lifefactory argues that Thoreson fails to describe a number of elements recited in each of independent claims 1, 12, and 13, which we address individually below.

(1) Claim 1: “first opening” having a “cross section that is smaller than all parallel cross sections”

Claim 1 recites a sleeve having a tubular body with a first opening that “has a cross section that is smaller than all parallel cross sections along a length of said main body of said tubular body.” Ex. 1001, 16:39–42. Lifefactory argues that Thoreson fails to describe a sleeve with such a first

opening. PO Resp. 18–20. Lifefactory contends that both experts agree that Thoreson’s annular portion 14 is not part of the sleeve. *Id.* at 18–19 (citing Ex. 2021, 60:7–20; Ex. 2009 ¶¶ 33–35). Lifefactory reasons that if annular portion 14 is not part of Thoreson’s casing, then Thoreson’s casing fails to include a first opening with the smaller cross section. *Id.* at 19.

Leapfrog responds that Thoreson “specifically describes” annular portion 14 as part of its casing. Reply 2 (citing Ex. 1003, 1:56–61). Leapfrog also argues that, even if annular portion 14 were a separate component, Lifefactory’s argument would fail because the claimed “sleeve” need not “be of unitary construction.” *Id.* at 2–3.

Leapfrog’s argument and evidence is persuasive. Thoreson expressly describes annular portion 14 as part of the casing and also describes its casing as being “formed in one continuous integral piece.” Ex. 1003, 1:50–53. Additionally, claim 5 supports a determination that Thoreson’s casing is a single piece that includes annular portion 14 because it describes an annular reinforcing strip extending above the upper end of the bottle as part of the resilient protective covering for the bottle. *Id.* at 2:19–22. Based on Thoreson’s express description, we determine that its casing is a one-piece resilient item, which includes annular portion 14, made of “rubber or the like.” To the extent that the experts testify that Thoreson’s annular portion 14 is separate from the casing, we consider it to be entitled to no weight because it is inconsistent with Thoreson’s express description of its casing. Lifefactory’s argument that Thoreson fails to describe the first opening with a smaller cross section depends upon the premise, which we reject, that annular portion 14 is not part of Thoreson’s casing. Accordingly, we determine that, by a preponderance of the evidence, Thoreson describes a

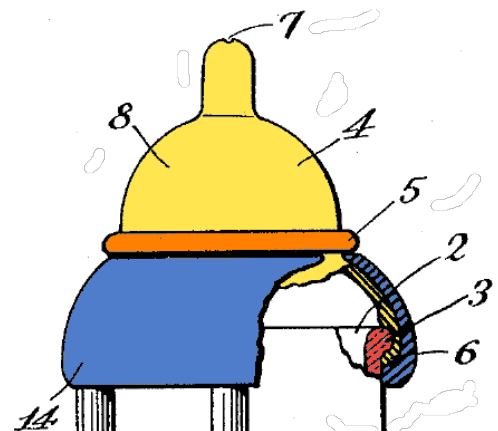
sleeve having a first opening with a smaller cross section, as required in claim 1.

(2) Claim 13: “a top portion that tapers inward relative to said middle section”

Claim 13 recites that the “sleeve comprises a top portion that tapers inward relative to said middle section.” Ex. 1001, 18:2–4. Lifefactory argues that Thoreson fails to describe a sleeve with this characteristic for “essentially the same reasons” that Thoreson fails to describe the first opening of smaller cross section in claim 1. PO Resp. 21. Lifefactory’s argument relies upon its contention that Thoreson’s annular portion 14 is not part of Thoreson’s casing. For the reasons expressed in Part II.C.1.c)(1) above, we determine that Thoreson’s casing is a one-piece construction including annular portion 14. Annular portion 14 indisputably tapers inward relative to the middle portion of Thoreson’s casing as required in claim 13. Accordingly, we determine that, by a preponderance of the evidence, Thoreson describes a sleeve having “a top portion that tapers inward relative to said middle section” as required in claim 13.

(3) Claims 1 and 12: first opening “for receiving the container”

Claims 1 and 12 both require a first opening “for receiving the container.” Ex. 1001, 16:29–30 (claim 1), 17:12–14 (claim 12). Leapfrog contends that Thoreson’s annular portion 14 includes such an opening in the top of the portion that expands to receive the container. Pet. 13. The pertinent portion of Thoreson’s Figure 1 is reproduced at right with colors added to aid our discussion.



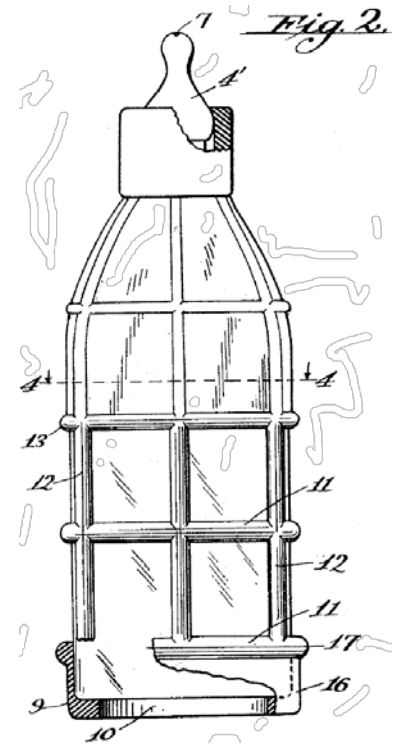
The colorized Figure illustrates annular portion 14 (blue), which Leapfrog contends to include the first opening that abuts the bottom of annular bead 5 (orange) of nipple 4 (yellow). *Id.* at 14. Lifefactory responds that Thoreson does not illustrate any opening in the top of annular portion 14, citing testimony of both experts in support of its contention. PO Resp. 23 (citing Ex. 2021, 60:12–20; Ex. 2009 ¶ 36). Lifefactory also argues that even if annular portion 14 were to include an opening at its upper end, the opening at the top end is too small and annular portion 14 would be too stiff to expand enough to permit the bottle to pass through it. *Id.* at 12–15 (citing Ex. 2009 ¶¶ 36–38).

For the reasons expressed above, we have already determined that Thoreson’s annular portion 14 is part of a one-piece casing. Nevertheless, we must determine whether the top of annular portion 14 includes an opening that can expand to receive bottle 1. Thoreson’s description of the manner in which annular portion 14 (blue) secures nipple 4 (yellow) to bottle 1 indicates that nipple 4 includes an “inturned annular flange 6” that fits over bead 3 (red) of bottle 1. Ex. 1003, 1:43–46. Nipple 4 also includes bead 5 (orange), and annular portion 14 (blue) slides over bead 5 to the position shown in the colorized figure to hold nipple 4 “in place.” *Id.* at 1:44–60, Fig. 1. The lower opening in annular portion 14, which, as part of the casing, is made of “rubber or the like,” is depicted as being expanded to receive the top of bottle 1 including bead 3. Thoreson also describes its casing as having “a thickened bottom 9 with an aperture 10 therethrough.” *Id.* at 1:51–52. Thoreson never describes, however, that manner in which bottle 1 is inserted into its casing.

The experts present different theories of how a bottle is inserted into Thoreson's casing. Mr. Nole testifies that annular portion 14 is "not part of the sleeve" but part of nipple 4 and would be assembled onto Thoreson's casing after the bottle was placed inside. Ex. 2021, 60:7–61:21. Mr. Goldman testifies that annular portion 14 is not part of Thoreson's casing, despite Thoreson's express statement otherwise. Ex. 2009 ¶ 34.

Because we have already found that Thoreson's annular portion 14 is part of its one-piece casing, we give little or no weight to the experts' testimony otherwise. Nevertheless, Leapfrog fails to adduce any persuasive evidence that the opening at the top of annular portion 14, which it identifies as the claimed "first opening," would be capable of expanding enough to receive bottle 1. On this point, Leapfrog provides Mr. Nole's Declaration in which he testifies that Thoreson's casing would be "mechanically assembled to the bottle. This assembly would require the sleeve opening (top or bottom) to be stretched enough so that the bottle could be inserted into the sleeve." Ex. 1011 ¶ 12. Based on his testimony during cross examination that annular portion 14 is not part of Thoreson's casing, Ex. 2021, 60:7–61:21, we find that Mr. Nole's Declaration testimony relating to stretching the "top" opening of the sleeve to permit the bottle to be inserted therethrough cannot refer to the top opening of annular portion 14. Mr. Goldman agrees, when he testifies that the "opening in the annular portion (14) could not stretch wide enough to receive the bottle." Ex. 2009 ¶ 38. He reasons that the because annular portion 14 must be stiff enough to lock the soft nipple 4 in place, annular portion 14 could not be flexible enough to allow the bottle to pass through it. *Id.*

In its Reply, Leapfrog argues that even if we were to accept Lifefactory's contention that Thoreson's annular portion 14 were not part of the casing, Figure 2 of Thoreson (reproduced at right) still illustrates a casing that describes the first opening for "receiving the container" of claims 1 and 12. Reply 5–6. Thoreson's Figure 2 illustrates "a slightly modified form" of bottle 1 having a "narrow neck." Ex. 1003, 1:31–33. Leapfrog asserts that the top of the casing shown in Figure 2 "has the smallest cross-section," as required in claim 1, and otherwise meets "all of the physical limitations of claims 1, 12 and 13 without the annular ring (14)." Reply 5–6.



We have already determined, based on Thoreson's express description of its casing, that Thoreson's casing, including the annular portion at the top of the casing, is a one-piece structure made of "rubber or the like." Leapfrog's evidence that Thoreson's bottle 1 could pass through the annular portion at the top of the casing shown in Figure 2 is unpersuasive in view of Mr. Goldman's testimony otherwise. Moreover, aperture 10 at the bottom of the casing, which Thoreson illustrates in Figure 2 and describes to be present for the embodiment of Figure 1 also, Ex. 1003, 1:50–52, is the largest opening in the casing for receiving bottle 1, *id.* at 1:50–67, Figs. 1, 2. The opening at the bottom of Thoreson's casing is not, however, identified by Leapfrog as the claimed "first opening." Accordingly, we are unpersuaded that Thoreson's Figure 2 illustrates a sleeve with a first opening "for receiving the container" as required in claims 1 and 12.

For the reasons expressed above, Leapfrog fails to persuade us that Thoreson describes a “first” opening that is capable of “receiving the container” as required in independent claims 1 and 12.

(4) *Claims 1–5, 7, 9, 10, 12–17, and 19–21: “molded” sleeve or tubular body*

Claims 1 and 12 require a sleeve “comprising a molded tubular body,” Ex. 1001, 16:27 (claim 1), 17:10 (claim 12), and claim 13 similarly requires “a molded elastic tubular sleeve,” *id.* at 17:35. Claims 2–5, 7, 9, and 10 depend from claim 1, and claims 14–17 and 19–21 depend directly or indirectly from claim 13. Thus, claims 1–5, 7, 9, 10, 12–17, and 19–21 all require a “molded” sleeve.

Leapfrog contends that an ordinarily skilled artisan would understand that Thoreson’s casing “could be (and likely was) molded.” Pet. 13 (citing Ex. 1011 ¶ 11). At the cited location, Mr. Nole testifies that “[b]ased on its dimensions, material description and function, the protective structure described and shown in Thoreson would likely have been molded, and certainly *could* have been molded.” Ex. 1011 ¶ 11. However, Mr. Nole also testifies that “Thoreson does not specify how the elastomeric sleeve or cover should be manufactured. . . . [T]he *assumption* would be that the sleeve is molded as a separate component, and mechanically assembled to the bottle.” *Id.* ¶ 12 (emphasis added).

Lifefactory argues, based on Mr. Goldman’s testimony, that “[i]n the 1920s or even now (beyond the time of the invention), there is no molding technique that the ordinarily skilled person would consider an obvious choice for fabricating all of the various sleeve designs shown in Thoreson.” PO Resp. 25 (citing Ex. 2009 ¶ 42). Mr. Goldman explains in great detail why it would not have been obvious to an ordinarily skilled artisan in 2007

to mold the structure of any of Thoreson's three casings. In particular, Mr. Goldman testifies that the complex shape of the lattice shown in Thoreson's casing would make it impossible to mold without creating faults called "knit lines" that would compromise the structural integrity of the lattice.

Ex. 1019, 180:14–181:21.

Leapfrog responds that Mr. Goldman explained that an ordinarily skilled artisan would have "[modified] Thoreson to better enable injection molding." Reply 8 (citing Ex. 1019, 187:19–188:8). The cited testimony reads as follows:

Q So is injection molding the preferred industry method of making sleeves, as described in the '133 Patent?

A Did you say injection molding?

Q Yes.

A That's -- that's the more common means of making, you know, most -- most rubber -- or most -- most parts.

Q Most rubber and polymer parts?

A Right.

Q So a person of ordinary skill in 2007 would be motivated to find a sleeve design that could be manufactured via an injection molding process, correct?

A Yes.

Ex. 1019, 187:19–188:8. At most, this testimony establishes that injection molding was the preferred manufacturing technique for rubber and polymer parts in 2007. We find that it does not support the proposition that an ordinarily skilled artisan would have modified Thoreson to use an injection molding technique. Leapfrog also cites the following testimony of Mr. Goldman:

Q: How would a person of ordinary skill modify Thoreson so it could be injection mold[ed]?

A: Probably they would make it entirely -- do it -- you know, make it look exactly like Lifefactory.

Reply 8 (citing Ex. 1019, 181:22–182:4). Leapfrog argues that this testimony establishes that this rationale in 2007 to use injection molding would cause an ordinarily skilled artisan to modify Thoreson so that it looked like the claimed design. *Id.* We are not persuaded by this testimony because the question posed to Mr. Goldman presumes that an ordinarily skilled artisan would have thought it necessary to make Thoreson’s casing by injection molding. Essentially, the testimony is based on a hypothetical situation, rather than establishing that an ordinarily skilled artisan would have modified the manufacturing process used to make Thoreson or modify Thoreson to accommodate a different manufacturing process.

Leapfrog also contends, however, that Mr. Goldman testifies that Thoreson’s casing is molded via an extrusion process. Reply 11 (citing Ex. 1019, 178:2–19). At the cited location, Mr. Goldman describes Thoreson’s strips 11, 12 as being “extruded strips.” Ex. 1019, 178:4–9. Mr. Goldman also testifies that extrusion “is a type of molding technique.” *Id.* at 67:21. This testimony from Mr. Goldman undermines Lifefactory’s argument that Thoreson’s casing is definitively not “molded.” Although the evidence fails to establish precisely which molding technique may have been used to make Thoreson’s casing, the entirety of the evidence of record establishes that an ordinarily skilled artisan would have understood that Thoreson’s casing at least suggests being made using some type of “molding” process, either compression molding as indicated by Mr. Nole or extrusion as indicated by Mr. Goldman. For these reasons, we determine

that Leapfrog has established by a preponderance of evidence that an ordinarily skilled artisan would have found it obvious to have made Thoreson's casing using a molding process as required in claims 1–5, 7, 9, 10, 12–17, and 19–21.²

(5) Claim 20: Objective Indicia of Non-obviousness

For reasons discussed in Part II.C.4 below, we determine that Lifefactory has adduced strong evidence of objective indicia of non-obviousness for claim 20. When we consider that evidence in view of Leapfrog's evidence of obviousness, we conclude that Leapfrog's argument and evidence for claim 20 fails to carry its burden of establishing obviousness of claim 20 by a preponderance of evidence.

(6) Conclusions for Challenges Based on Thoreson Alone

For the reasons identified above, we conclude that Leapfrog has established by a preponderance of evidence that Thoreson alone renders claims 13–17, 19, and 21 unpatentable as obvious, but it has failed to do so with respect to claims 1–5, 7, 9, 10, 12, and 20.

d) Claims 1–5 and 7–21: Obviousness in View of Thoreson and Spriegel

Leapfrog contends that the combination of Thoreson and Spriegel renders claims 1–5 and 7–21 unpatentable as obvious. Pet. 19–22. To support its contention, Leapfrog incorporates all its argument and evidence comparing Thoreson to claims 1–5, 7, 9, 10, 12–17, and 19–21. Pet. 19. Leapfrog also relies upon Spriegel as expressly describing sleeve 110 made

² We note that the standard for anticipation of a claim limitation is different from determining that same claim limitation would have been obvious. Compare Part II.C.1.b above.

of silicone. *Id.* at 21 (citing Ex. 1004 ¶ 30). Leapfrog also details the ways in which Spriegel describes the “sleeve further comprising a carrying mechanism” as recited in dependent claim 8. Pet. 22 (citing Ex. 1004 ¶ 38, Fig. 10). Regarding claims 11 and 18, Leapfrog contends that Thoreson renders the recited circular holes obvious. Pet. 19–20. Leapfrog also proffers testimony from Mr. Nole to support its challenge based upon Thoreson and Spriegel. *Id.* at 19–21 (citing Ex. 1011 ¶¶ 11, 13). Leapfrog does not, however, rely upon Spriegel as describing a first opening for “receiving the container.” *Id.* at 19–22.

(1) Claims 1–5 and 7–12

For the reasons expressed in Part II.C.1.c)(3) above, we have determined that Thoreson fails to describe a first opening for “receiving the container” as required of independent claim 1 (and, therefore, its dependent claims 2–5 and 7–11) and independent claim 12. Leapfrog does not rely on Spriegel to cure this deficiency. Therefore, we conclude that Leapfrog has failed to establish by a preponderance of evidence that the combination of Thoreson and Spriegel renders independent claims 1 and 12 and dependent claims 2–5 and 7–11 unpatentable as obvious.

(2) Claims 13–21

For the reasons expressed in Part II.C.1.c) above, we have concluded that Thoreson alone renders claims 13–17, 19, and 21 unpatentable as obvious. Leapfrog also argues that the combination of Thoreson and Spriegel renders claims 13–21 unpatentable as obvious. Pet. 19–22. Leapfrog asserts that Thoreson describes all elements of claims 13–21 and relies upon Spriegel as confirming the obviousness of using silicone in the claimed sleeve. *Id.* at 20–21. Lifefactory’s argument against Leapfrog’s

challenges based on Thoreson and Spriegel is directed solely to deficiencies in Thoreson's teachings, which we found to be unpersuasive in relation to claims 13–19 and 21 for reasons described in Part II.C.1.c) above.

Lifefactory's arguments based on objective indicia of non-obviousness were persuasive, however, with respect to claim 20. Accordingly, we determine that Leapfrog has established by a preponderance of evidence that the combination of Thoreson and Spriegel renders claims 13–19 and 21 unpatentable as obvious, but it has failed to do so with respect to claim 20.

(3) Conclusions for Challenges Based on the Combination of Thoreson and Spriegel

For the reasons identified above, we conclude that Leapfrog has established by a preponderance of evidence that the combination of Thoreson and Spriegel renders claims 13–19 and 21 unpatentable as obvious, but it has failed to do so with respect to claims 1–5, 7–12, and 20.

e) Claim 6: Obviousness in View of Thoreson, Spriegel, and Amberg

Claim 6 depends from claim 1 and further recites that the “tubular body comprises an exterior and an interior surface, wherein said interior surface comprises a coating layer.” Ex. 1001, 16:54–56. Leapfrog concedes that neither Thoreson nor Spriegel describes the “coating layer.” Pet. 22. Leapfrog contends that Amberg describes the “coating layer” as an “adhesive inner coating on the interior surface of sleeve 19.” *Id.* at 23 (citing Ex. 1005, 9:49–67). Leapfrog points out that the Office applied Amberg as describing the “coating layer” during prosecution of the '133 patent and that Lifefactory did not dispute the propriety of doing so. Pet. 22.

For the reasons expressed in Part II.C.1.c)(3) above, we have determined that Thoreson fails to describe a first opening for “receiving the container” as required of independent claim 1 and, therefore, its dependent claim 6. Neither Spriegel nor Amberg are cited by Leapfrog for curing this deficiency. Therefore, we conclude that Leapfrog has failed to establish by a preponderance of evidence that the combination of Thoreson, Spriegel, and Amberg renders claim 6 unpatentable as obvious.

2. Claims 1–7, 9, 11, 13–16, 18, and 19: Anticipation by Tobias

Leapfrog contends that Tobias anticipates claims 1–7, 9, 11, 13–16, 18, and 19. Pet. 23–32. Leapfrog compares specific portions of Tobias to all the limitations in these claims. *Id.* Leapfrog supports its contentions with testimony by Mr. Nole. *Id.* (citing Ex. 1011 ¶¶ 15, 16). Independent claims 1 and 13 and, therefore, all their respective dependent claims 2–7, 9, 11, 14–16, 18, and 19, recite that the sleeve is made of silicone. To meet this claim limitation, Leapfrog relies upon Tobias’s description of its second layer 48 of protective container 10 as being “produced from a foam, rubber, polymer, synthetic rubber, synthetic or natural fabric, gel, or the like.” Pet. 26 (citing Ex. 1002 ¶ 24). Mr. Nole testifies that “[s]ilicone is a polymer, and could be among the list of materials used to form the ‘second layer’ of the sleeve in Tobias.” Ex. 1011 ¶ 15 (emphasis added).

Lifefactory argues that Tobias’s description of materials as a “polymer” and Mr. Nole’s testimony that the polymer “could be” silicone is insufficient to meet the requirement that the claimed sleeve be made of silicone. PO Resp. 27–30. Mr. Goldman testifies that an ordinarily skilled artisan would not interpret Tobias’s use of “polymer” as necessarily referring to silicone because silicone is merely one of many polymers that could be

suitable for Tobias's protective container 10. Ex. 2009 ¶ 53. In its Reply, Leapfrog contends that even though "polymer" generically refers to many materials that are not silicone, the context provided by Tobias would lead an ordinarily skilled artisan to conclude that only one polymer, silicone, would have been suitable for protective container 10. Reply 8–9. Leapfrog asserts that Mr. Goldman's inability to name a suitable polymer other than silicone demonstrates that Tobias inherently describes silicone. *Id.* at 9 (citing Ex. 1019, 77:10–21).

Leapfrog's argument is unpersuasive. Mr. Goldman did not testify that Tobias's reference to "polymer" necessarily equates to "silicone." Rather, Mr. Goldman, "without going through reference manuals" was able to identify only silicone as a polymer that was "resilient; . . . able to be molded; . . . elastic; . . . durable; and . . . dishwasher safe." Ex. 1019, 77:10–19. Mr. Goldman also testified that "there probably is" a polymer other than silicone that meets the same functional requirements. *Id.* at 77:20. We conclude that Mr. Goldman's testimony, by itself, falls far short of establishing that Tobias's use of "polymer" necessarily equates to "silicone." Indeed, Tobias itself identifies "neoprene," which is a polymer that is not silicone, as the most preferred material for its protective container. Ex. 1002 ¶ 24. Finally, Mr. Nole's speculative "could be" testimony is insufficient to outweigh the other evidence referenced above. Based on our review of the record before us, we determine that Leapfrog has failed to establish by a preponderance of evidence that Tobias describes a sleeve made of silicone as required in claims 1–7, 9, 11, 13–16, 18, and 19. Accordingly, Leapfrog has not established that Tobias anticipates these claims.

3. *Claims 1–20: Obviousness in View of Brunner and Scheetz*

Each of independent claims 1, 12, and 13 require a “lip” that extends around the bottom edge of a bottle. Claim 1 recites a “lip [that is] configured to surround and extend over a bottom edge of the container.” Ex. 1001, 16:34–37. Claim 12 recites a “second end configured to prevent any portion of the container from passing through said second circular opening.” *Id.* at 17:20–22. Claim 13 recites a sleeve comprising “a bottom portion that extends . . . at least partially over said bottom edge of said bottle.” *Id.* at 17:38–40. Leapfrog contends that the combination of Brunner and Scheetz renders claims 1–20 obvious. Pet. 32–42. Leapfrog supports its contention by comparing specific portions of Brunner and Scheetz with each limitation of these claims. *Id.* Regarding the limitations directed to the bottom of the protective sleeve, Leapfrog relies upon Scheetz and its description that “sleeve lower edge 58 reaches the bottom of the container” and “engages the . . . container at a bottom surface.” Pet. 36 (citing Ex. 1006 ¶¶ 28–29). Based on these passages in Scheetz, Leapfrog contends that Scheetz’s sleeve “folds under the bottom of the container as shown in Fig. 1.” *Id.*

Lifefactory responds that Scheetz fails to describe a sleeve that extends over the bottom of the container around which it is wrapped. PO

Resp. 32. Figure 1 of Scheetz is reproduced at right and illustrates insulating sleeve 10 wrapped around bottle 12. Lifefactory points out that Scheetz expressly states that “sleeve 10 does not provide an insulating surface on the bottom of the bottle 12” and that “the bottle’s bottom surface is insulated by the surface on which the bottle 12 is resting.”

Ex. 1006 ¶ 17.

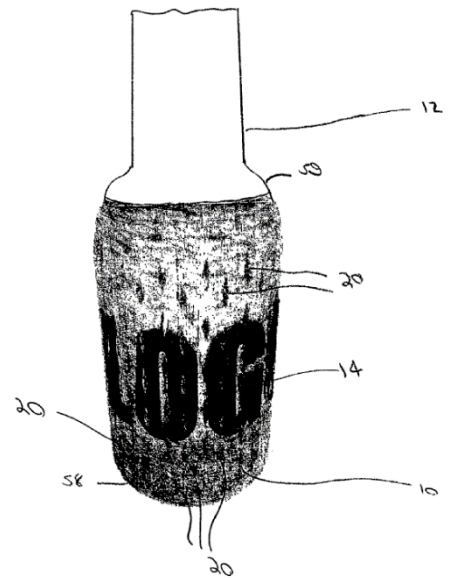


Figure 1

In its Reply, Leapfrog argues that, the Patent Office relied upon a curved bottom portion of Scheetz’s sleeve 10 as meeting the limitations of claims 1, 12, and 13. Reply 10 (citing Ex. 1017, 14–15). Leapfrog contends that Lifefactory “admitted” that “the bottom end of Scheetz’s sleeve [is] curved after it is placed on the bottle.” *Id.* (citing Ex. 1017, 28). Leapfrog also contends that Mr. Goldman conceded that the bottom portion of Scheetz’s sleeve 10 is curved.

Leapfrog’s argument does not persuade us that Scheetz describes the claimed lip and bottom edge features. Scheetz expressly states that its sleeve 10 does not cover the bottom of the bottle. Ex. 1006 ¶ 6. The portion of Scheetz that Leapfrog cites demonstrates that Scheetz’s sleeve 10 does not cover the bottom by explaining that “the sleeve is slidably engaged over the container top and *slid down* over the container sidewalls *until* a sleeve lower edge 58 *reaches* the bottom of the container. See FIG. 1.” *Id.* ¶ 28 (emphases added). “Reaches” indicates that sleeve lower edge 58 stops when it encounters, and hence does not cover, any of the bottom of the container. Leapfrog’s reliance on Exhibit 1017, which is a portion of the

prosecution history of a patent application related to the '133 patent and claims that are not before us, is also unpersuasive. We find that the alleged “admission” by Lifefactory is quoted out of context in a manner that mischaracterizes its meaning.

In its Reply, Leapfrog asserts that even if Scheetz were to fail to describe the claimed lip or bottom edge, it “would have been plainly obvious in 2007.” Reply 10. Leapfrog cites testimony from Mr. Goldman as establishing that an ordinarily skilled artisan would have been motivated to add the claimed lip or bottom edge to protect the heel of the container. *Id.* (citing Ex. 1019, 99:11–15, 198:16–18, 112:20–25). We find Leapfrog’s reliance on Mr. Goldman’s testimony to be unpersuasive because, in every instance, Mr. Goldman is testifying about the function or benefits of the claimed lip and bottom edge. Ex. 1019, 99:11–15, 198:16–18, 112:20–25. The cited testimony is wholly unrelated to any teaching of Scheetz, including any rationale to alter the sleeve described in Scheetz.

Based upon our review of the record, we determine that Leapfrog has failed to carry its burden of establishing by a preponderance of evidence that the combination of Brunner and Scheetz describes the lip of claims 1–11, the second end of claim 12, or the bottom portion of claims 13–20. Accordingly, we conclude that Leapfrog has failed to carry its burden of establishing that the combination of Brunner and Scheetz renders claims 1–20 unpatentable as obvious.

4. Objective Indicia of Nonobviousness

“For objective evidence . . . to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the claimed invention.” *Rambus, Inc. v. Rea*, 731 F.3d 1248, 1256 (Fed. Cir.

2013) (quoting *In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)) (emphasis omitted) (internal quotation marks omitted)). “While objective evidence of nonobviousness lacks a nexus if it exclusively relates to a feature that was ‘known in the prior art,’ the obviousness inquiry centers on whether ‘the claimed invention as a whole’ would have been obvious.” *Rambus*, 731 F.3d at 1257–58 (citation omitted). Thus, “[w]here the allegedly obvious patent claim is a combination of prior art elements, . . . the patent owner can show that it is the claimed combination as a whole that serves as a nexus for the objective evidence.” *WBIP, LLC v. Kohler Co.*, Nos. 2015-1038, 2015-1044, 2016 WL 3902668, at *7 (Fed. Cir. July 19, 2016) (citing *Rambus*, 731 F.3d at 1258). “[T]here is a presumption of nexus for objective considerations when the patentee shows that the asserted objective evidence is tied to a specific product and that product ‘is the invention disclosed and claimed in the patent.’” *WBIP*, 2016 WL 3902668, at *6.

Further, objective evidence of nonobviousness “must be reasonably commensurate with the scope of the claims.” *Kao*, 639 F.3d at 1068 (citations omitted); accord *S. Ala. Med. Sci. Found. v. Gnosis S.p.A.*, 808 F.3d 823, 827 (Fed. Cir. 2015). This does not mean that the proponent of the evidence must test every embodiment within the scope of the claims. *Id.* Rather, for the objective evidence of nonobviousness to be reasonably commensurate with the scope of the claims, the requirement is that “an adequate basis [exists] to support the conclusion that other embodiments falling within the claim will behave in the same manner.” *Id.*

a) Nexus

Lifefactory contends that it sells a commercial product that is commensurate in scope with claim 13³ and presents the relationship between a representative version of its commercial products⁴ and claim 13 in a claim chart format. PO Resp. 40, 45–49 (citing Ex. 2009 ¶ 73; Ex. 2010). The claim chart reflects Mr. Goldman’s comparison of the exemplary bottle shown in the photograph reproduced at right to the elements of claim 13. Ex. 2009 ¶ 73. Mr. Goldman also testifies that the bottle shown in the photograph is a “glass bottle.” *Id.*; Ex. 2010, 9. Accordingly, Mr. Goldman’s comparison establishes that the product shown in the photographs meets every limitation of claim 20, which requires that the bottle be made of glass. Ex. 1001, 18:34–36.



Claim 13 recites a “bottle and a sleeve” but does not require that the bottle be glass. Ex. 1001, 17:28–18:9. We find that all the evidence upon which Lifefactory relies to argue that the claimed invention enjoyed commercial success and garnered industry praise refers to a product that combines a silicone sleeve with a *glass* bottle. Ex. 2020; Ex. 2011 ¶¶ 3–6, 8, 9; Ex. 2013. The only claim in the ’133 patent that recites a combination of

³ We need not evaluate Mr. Goldman’s comparison of Lifefactory’s commercial product to claim 1 because we have determined that Leapfrog’s challenges to the patentability of independent claim 1 and all its dependent claims fail for other reasons.

⁴ The product shown in Lifefactory’s claim chart is a 16-ounce, screw cap, version of its product line which includes nine different product types. Ex. 2010, 1 (citing Ex. 2011 ¶ 3).

a silicone sleeve on a glass bottle is claim 20. Ex. 1001, 16:26–18:38. Based on our review of the claim charts and our analysis in Parts II.C.4.b) and c) below of the evidence adduced by Lifefactory, we determine that Lifefactory has established a prima facie case that it sold a wide range of products that embody every feature of claim 20. However, we determine that Lifefactory has failed to establish a prima facie case that it sold products that embody only those features recited in independent claim 13 and its dependent claims 14–17 and 19.⁵

We determine, under *WBIP*, that Lifefactory has shown a rebuttable presumption of nexus between the evidence of objective indicia and claim 20. *WBIP*, 2016 WL 3902668, at *6. Leapfrog may rebut this presumption by presenting evidence that shows that the success and praise of Lifefactory’s bottles were due to factors other than the patented invention. *Id.* Based on our review of Leapfrog’s argument in its Reply, we conclude that it fails to rebut the presumption of nexus between Lifefactory’s evidence of objective indicia of non-obviousness and the invention of claim 20.

Leapfrog admits that Lifefactory’s commercial success is due to its incorporation of glass bottles in its products, Reply 16–17, and all those products were also covered by a silicone sleeve meeting the requirements of claim 20, Ex. 2011 ¶ 3. Leapfrog argues that the “BPA scare” is the real source of consumer demand for glass bottles and that claim 13 does not recite a glass bottle. Reply 17. As pointed out by Leapfrog, Mr. Goldman testifies that, during the early 2000’s, the BPA scare motivated providers of

⁵ We need not analyze objective indicia of non-obviousness for dependent claim 18 because we have determined that Leapfrog’s challenge to claim 18 as being obvious fails for other reasons.

packaging to introduce containers without BPA, particularly glass baby bottles. Ex. 1019, 32:15–33:15, 35:15–25. We find that Leapfrog’s evidence diminishes the nexus between the objective indicia of non-obviousness and the silicone sleeve alone. To the extent that Lifefactory may be entitled to a presumption of nexus between the invention recited in claim 13, which does not require a glass bottle, and the objective indicia of non-obviousness, we determine that Leapfrog’s evidence would rebut such a presumption.

Nevertheless, claim 20 is directed to the combination of a glass bottle and a silicone sleeve. Ex. 1001, 18:34–36. We are persuaded that the combination of claim 20 was critical to consumers who wished to use a glass bottle to avoid BPA because the sleeve protects the glass bottle from breakage and makes the bottle easier to grip. Leapfrog, thus, fails to rebut adequately the presumption that a nexus exists between Lifefactory’s objective indicia of non-obviousness and the invention of claim 20.

b) Commercial Success

Lifefactory contends that it has achieved significant commercial success by selling \$20M worth of its sleeved glass bottles from August 2013 until August 2015. PO Resp. 53 (citing Ex. 2009 ¶ 70; Ex. 2011 ¶ 8; Ex. 2012). Lifefactory’s products also achieved 25% share of the market for water bottles and a 95% share of the market for glass bottles in the niche distribution channel through which it focuses its sales efforts, namely “Natural Product Supermarkets.” *Id.* at 53–54 (citing Ex. 2009 ¶ 71; Ex. 2011 ¶ 9; Ex. 2013; Ex. 2014).⁶ According to Lifefactory, its evidence

⁶ Some or all of the cited portions of Exhibits 2011, 2012, and 2013 are marked confidential and not available to the public. Nevertheless, the

establishes that, “in five years,” its sleeved glass bottles have “come to dominate the glass bottle market in Natural Product Supermarkets.” *Id.* at 54. None of Lifefactory’s evidence of commercial success relates to sales of sleeves alone without a glass bottle within the sleeve. Therefore, we conclude that its evidence of commercial success relates only to the combination of a silicone sleeve on a glass bottle as recited in claim 20.

Leapfrog responds that Lifefactory’s claims of commercial success are exaggerated because it “defined the market in a manner so narrow as to exclude” the primary competition to the patented products. Reply 14–15. Based upon testimony from Mr. Kurt Sward, Leapfrog’s CEO, Leapfrog also contends that “Lifefactory has reached a mere 1% market share over its many years of operation.” *Id.* at 15 (citing Ex. 1021 ¶ 8). Mr. Sward’s testimony reads: “Based on information provided to me by commercially available and reliable industry sources, Lifefactory has only about 1% of the reusable water bottle market.” Ex. 1021 ¶ 8. Leapfrog provides no evidence of the source of the information provided to Mr. Sward. Additionally, Mr. Sward testifies that his belief that Lifefactory bottles have a one percent market share was not a reason upon which he relied when concluding that those bottles were not a commercial success. Ex. 2025, 7:16–21. For both reasons, we consider Leapfrog’s evidence relating to Lifefactory’s alleged one percent market share to be unpersuasive and non-responsive to Lifefactory’s evidence of commercial success. Furthermore, based on the evaluation of the underlying evidence, we are persuaded that Lifefactory’s assertions concerning the relevant markets are credible.

information directly presented in this Decision is available either in the public portions of the Exhibits or Lifefactory’s Patent Owner Response.

c) Industry Praise

Lifefactory contends that its sleeved glass bottles have “received an exceptional amount of industry praise.” PO Resp. 49 (citing Ex. 2009 ¶ 81). Lifefactory bolsters its contention by providing copies of “industry reviews” upon which Mr. Goldman opines. Ex. 2020. Among the comments reflected in those reviews are that Lifefactory’s silicone sleeve on its glass bottle is “a game-changer in making glass containers capable of being used on-the-go as they protect the bottle and provide a non-slip grip.” PO Resp. 50 (citing Ex. 2020, 8). The same reviewer gave a “Best Product” award to Lifefactory’s bottles. Ex. 2020, 7. Another reviewer described the silicone sleeve as making the glass bottle “practically shatterproof and easy to grip.” *Id.* at 1. Yet another reviewer commented that the silicone sleeve was “the bottle’s greatest feature” because it prevents “the bottle from slipping from your hand . . . [and] protects the bottle from breaking.” *Id.* at 17.

Lifefactory argues that its evidence of praise focused on Lifefactory’s silicone sleeve. PO Resp. 52. None of Lifefactory’s evidence of industry praise establishes praise for the silicone sleeve independent of its use with a glass bottle. Therefore, we conclude that Lifefactory’s evidence of industry praise relates only to the combination of a silicone sleeve on a glass bottle as recited in claim 20.

Leapfrog criticizes Lifefactory’s evidence of praise as being a “collection of random comments . . . from unknown authors posted on obscure websites” that is “hearsay” and “should be given little or no weight.” Reply 15. Leapfrog waived its hearsay objection to Lifefactory’s evidence of praise by not filing a motion to exclude that evidence. 37 C.F.R. § 42.64(c). Leapfrog also presents a table purportedly summarizing traffic

rankings for the websites on which Lifefactory's reviewers posted their praise in support of its argument that those websites are "obscure." *Id.* (citing Ex. 1022). The evidence cited by Leapfrog, Exhibit 1022, fails to support the proposition for which that evidence is offered. Exhibit 1022 is a selection of pages from Webster's dictionary reflecting definitions for "casing" and "sleeve." Ex. 1022. Leapfrog also contends that those who praised Lifefactory's products directed much of their praise to features not covered by the '133 patent. See Reply 16 (contending that praise was directed to "wide-open mouth," "soda lime glass," "caps and lids," and sleeve being made in USA). Leapfrog's contentions are accurate but fail to address those instances in which the same reviewers praised the combination of the silicone sleeve on a glass bottle, which are the primary features of claim 20. Based on our review of the record, we are not persuaded by Leapfrog's argument that Lifefactory's evidence of praise "should be given little or no weight."

d) Conclusion

Based on our review of the record, we determine that Lifefactory has provided strong evidence that the features of claim 20 drove significant commercial success and garnered notable industry praise. We also find Leapfrog's attempts to discount the probative value of Lifefactory's evidence of non-obviousness to be unpersuasive.

III. CONCLUSION

For the reasons expressed above, we determine that Leapfrog has persuaded us by a preponderance of evidence that:

1. claims 13–17, 19, and 21 of the '133 patent are unpatentable as obvious under 35 U.S.C. § 103 in view of Thoreson alone and

2. claims 13–19 and 21 of the '133 patent are unpatentable as obvious under 35 U.S.C. § 103 in view of the combination of Thoreson and Spriegel.

We also determine that Leapfrog has failed to carry its burden of persuading us by a preponderance of evidence us that:

1. claim 12 of the '133 patent is unpatentable under 35 U.S.C. § 102(b) as anticipated by Thoreson;
2. claims 1–5, 7, 9, 10, 12, and 20 of the '133 patent are unpatentable under 35 U.S.C. § 103 in view of Thoreson alone;
3. claims 1–5, 7–12, and 20 of the '133 patent are unpatentable under 35 U.S.C. § 103 as obvious in view of the combination of Thoreson and Spriegel;
4. claim 6 of the '133 patent is unpatentable under 35 U.S.C. § 103 as obvious in view of the combination of Thoreson, Spriegel, and Amberg;
5. claims 1–7, 9, 11, 13–16, 18, and 19 of the '133 patent are unpatentable under 35 U.S.C. § 102(b) as anticipated by Tobias; and
6. claims 1–20 of the '133 patent are unpatentable under 35 U.S.C. § 103 as obvious in view of the combination of Brunner and Scheetz.

IV. ORDER

For the reasons given, it is:

ORDERED that claims 13–19 and 21 of the '133 patent are *unpatentable*;

FURTHER ORDERED that claims 1–12 and 20 of the '133 patent are *patentable*; and

FURTHER ORDERED that, because this is a Final Written Decision pursuant to 35 U.S.C. § 318(a), parties to the proceeding seeking judicial review of the Decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

IPR2015-00614
Patent 8,579,133 B2

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