Trials@uspto.gov
571-272-7822

Paper 46
Entered: December 28, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FIRST QUALITY BABY PRODUCTS, LLC,
Petitioner,

v.

KIMBERLY-CLARK WORLDWIDE, INC.,
Patent Owner.

Case IPR2016-01205
Patent 7,534,237 B2

Before JOHN C. KERINS, KEN B. BARRETT, and
SUSAN L. C. MITCHELL, *Administrative Patent Judges.*

KERINS, *Administrative Patent Judge.*

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 *C.F.R. § 42.73*

I. INTRODUCTION

Petitioner, First Quality Baby Products, LLC, filed a petition (Paper 1, "Pet.") requesting an *inter partes* review of claims 1–4 and 6–23 of U.S. Patent No. 7,534,237 B2 (Ex. 1001, "the '237 patent"). Pet. 1. Petitioner also filed a Declaration of John Blevins (Ex. 1006) to support its positions. Patent Owner, Kimberly-Clark Worldwide, Inc., filed a preliminary response (Paper 10, "Prelim. Resp.") to the Petition. Pursuant to 35 U.S.C. § 314(a), on December 29, 2016, we instituted an *inter partes* review of challenged claims 1–4 and 6–23 to determine if the claims are unpatentable under 35 U.S.C. § 103 as obvious over the combination of Van Gompel,[1] LaFleur,[2] Redfern,[3] and Long.[4] Paper 12, 19.

Patent Owner filed a Patent Owner Response (Paper 20, "PO Resp."), along with a Declarations of G.A.M. (Tony) Butterworth (Ex. 2004), John Amundson (Ex. 2007), and Melanie Huet (Ex. 2009) to support its positions. Petitioner filed a Reply (Paper 26, "Pet. Reply") to the Patent Owner Response, along with a supplemental Declaration of Mr. Blevins (Ex. 1021).

Petitioner filed a Motion to Exclude portions of Mr. Butterworth's testimony on commercial success generally and the reason for such success, his testimony regarding Long's "fasten anywhere" teachings, and his testimony regarding elastomeric nonwoven material. Paper 34, 1–11. In addition, Petitioner moved to exclude Exhibits 2006–2012, and 2014 that

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[1] Paul T. Van Gompel et al., U.S. Patent No. 4,940,464, issued July 10, 1990 (Ex. 1002).
[2] Ruby S. LaFleur, U.S. Patent No. 4,610,680, issued Sep. 9, 1986 (Ex. 1003).
[3] Robin Redfern, U.S. Patent No. 4,402,690, issued Sep. 6, 1983 (Ex. 1004).
[4] Andrew M. Long et al., U.S. Patent No. 5,624,429, issued Apr. 29, 1997 (Ex. 1005).

relate to Patent Owner's contentions concerning commercial success. *Id*. at 11–13.

Patent Owner filed a Motion to Exclude Petitioner's Exhibits 1022–1025 as irrelevant, and paragraphs 25, 40, 41, 46–49, and 55 of Exhibit 1021, Mr. Blevins' Rebuttal Declaration, also as irrelevant. Ex. 35, 1–10.

An oral hearing was held on October 5, 2017. A transcript of the hearing is included in the record. Paper 44 ("Tr.").

This Final Written Decision is entered pursuant to 35 U.S.C. §318(a). We have jurisdiction under 35 U.S.C. § 6. For the reasons set forth herein, we determine that Petitioner has not shown by a preponderance of the evidence that any of claims 1–4 and 6–23 of the '237 patent are unpatentable under 35 U.S.C. § 103(a). *See* 35 U.S.C. §316(e).

A. Related Proceedings

No federal court litigation proceedings involving the '237 patent have been identified in the course of this proceeding. *Inter partes* review of Patent No. US 6,645,190 B1, which is the parent to the '237 patent, was instituted contemporaneously with this proceeding.

Petitioner additionally identified various litigation matters and PTO proceedings involving patents owned by Patent Owner which, according to Petitioner, are "very similar" to the '237 patent. Pet. 12–15.

B. The '237 Patent

The '237 patent relates to an absorbent article having attachment panels that cover the side of the hips of the wearer, with the attachment panels extending from a first waist region and being adapted to refastenably engage mechanical fastening components at an opposite waist region to maintain the absorbent article in a pant configuration. Ex. 1001, Abstract.

The attachment panels consist essentially of an elastomeric nonwoven material defining an inner attachment surface, with there being no separate fastening elements bonded to the attachment panels.

The refastenable seams allow the absorbent article to be either pulled on like a pant or applied like a diaper. *Id.* at 2:13–14. Such seams additionally permit the interior of the article to be checked without having to pull down the article, as well as allowing for removal of the article in a diaper-like manner in the event that the article is soiled during wear. *Id.* at 1:52–54; 2:14–19. The exclusion of separate fastening elements bonded to the attachment panels "allows the product to have fewer components, which makes the product more underwear-like, and provides manufacturing efficiencies." *Id.*, 16:38–40.

C. Challenged Claims

Petitioner challenges the patentability of claims 1–4 and 6–23. Of those claims, claims 1, 6, and 13 are independent claims. Claims 2–4 depend from claim 1, claims 7–12 depend from claim 6, and claims 14–23 depend from claim 13. Claim 1 is illustrative of the claimed subject matter at issue, and is set forth below.

> 1. An absorbent article defining a longitudinal axis, an overall length dimension measured parallel to the longitudinal axis, a transverse axis, first and second longitudinally spaced waist regions, a crotch region which extends between and interconnects the first and second waist regions, an inner surface and an opposite outer surface, the absorbent article adapted to provide a pant configuration having a waist opening and a pair of leg openings, the absorbent article comprising:
>
> an absorbent chassis comprising an absorbent assembly;

> attachment panels extending transversely outward from the absorbent assembly in the first waist region, the attachment panels having a length dimension that is about 20 percent or greater of the overall length dimension, each attachment panel consisting essentially of an elastomeric nonwoven material that extends from the waist opening to one of the leg openings and defines an inner attachment surface, wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels; and
>
> at least one fastening component disposed in the second waist region on the outer surface, the at least one fastening component comprising a mechanical fastening element adapted to refastenably engage the inner attachment surfaces;
>
> wherein the refastenable engagement of the mechanical fastening element and the inner attachment surfaces maintains the absorbent article in the pant configuration.

Ex. 1001, 19:6–33. Each of independent claims 6 and 13 require the presence of attachment panels that consist essentially of an elastomeric nonwoven material and have inner attachment surfaces, and wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels. *Id.* at 20:1–6; 20:57–61.

II. ANALYSIS

A. Claim Interpretation

In an inter partes review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *Cuozzo Speed Techs., LLC v. Lee*, 136 S.Ct. 2131, 2144–46 (2016). Under the broadest reasonable interpretation approach, claim terms are given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in the

context of the entire disclosure. *In re Translogic Tech., Inc*., 504 F.3d 1249, 1257 (Fed. Cir. 2007).

A claim term will not be accorded its ordinary meaning, however, "if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history." *CCS Fitness, Inc. v. Brunswick Corp*. 288 F.3d 1359, 1366 (Fed. Cir. 2002). "Although an inventor is indeed free to define the specific terms used to describe his or her invention, this must be done with reasonable clarity, deliberateness, and precision." *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

In the Decision to Institute, we addressed the following claim terms:

(a) "wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels;"

(b) "a pant configuration;" and

(c) "elastomeric."

Dec. 6–8.

Following institution, neither party challenged the below constructions of those terms, nor proposed other terms requiring explicit construction. The terms are construed as follows, consistent with the prior constructions:

> *"wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels"*

Petitioner, in several instances, discusses this claim term in a manner evidencing its view as to how the term should be construed. *See, e.g.,* Pet. 8, describing the '237 article ("no separate patches, strips or tabs of loop material are used"); Pet. 27, describing the proposed combination of prior art ("the only refastenable fastening components in the training pant would be

the elastomeric nonwoven material on the inner surface of Van Gompel's back side panels and the hook strips added to the outer surface of the front side panels").

Patent Owner asserts that the term "wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels" should be construed to mean that "no additional layers for fastening are joined, adhered, connected, attached, or the like–whether integrally or otherwise–to the elastomeric nonwoven attachment panels." Prelim. Resp. 10. As the parties apply the term to the asserted art, we are unable to discern any substantive difference between Petitioner's implicit, *see* Pet. 30,[5] and Patent Owner's express proposed construction, and determine that there is no real dispute as to how the term is to be construed.

Accordingly, we adopt Patent Owner's expressly stated construction, i.e., "no additional layers for fastening are joined, adhered, connected, attached, or the like–whether integrally or otherwise–to the elastomeric nonwoven attachment panels."

"a pant configuration"

There appears to be no dispute as to how "a pant configuration" is to be construed, and we adopt Patent Owner's proposed construction that it is

[5] "As explained by Petitioner's expert, when modifying Van Gompel to be refastenable according to LaFleur, Redfern, and Long, the only refastenable fastening components in the training pant would be the elastomeric nonwoven material on the inner surface of Van Gompel's back side panels and the hook strips added to the outer surface of the front side panels. As such, according to Petitioner, the nonwoven material and hook strips are the only option for refastenably connecting the front waist region to the back waist region. (Ex. 1006 ¶¶ 117–18.)"

to mean "a configuration where the garment can be pulled on." Prelim. Resp. 12.

"elastomeric"

Patent Owner identifies a definition for "elastomeric" provided in the '237 patent, to wit, "a material or composite which can be elongated by at least 25 percent of its relaxed length and which will recover, upon release of the applied force, at least 10 percent of its elongation." Prelim. Resp. 13, quoting Ex. 1001, 5:28–31. We determine that no further elaboration as to the meaning of this term is necessary.

B. Obviousness of Independent Claims 1, 6, and 13 based on Van Gompel, LaFleur, Redfern, and Long

1. Legal Standards

To prevail in its challenges to the patentability of the claims, a petitioner must establish facts supporting its challenges by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). A claim is unpatentable under § 103(a) if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. *KSR Int'l Co. v. Teleflex Inc*., 550 U.S. 398, 406 (2007). The question of obviousness is resolved based on underlying factual determinations, including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of skill in the art; and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere*, 383 U.S. 1, 17–18 (1966).

In that regard, an obviousness analysis "need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *KSR*, 550 U.S. at 418; *see Translogic*, 504 F.3d at 1259.

We analyze the instituted grounds of unpatentability in accordance with the above-stated principles.

2. Level of Ordinary Skill in the Art

Petitioner and Patent Owner agree that a person of ordinary skill in the pertinent art is a person having two to four years of work experience in product design and testing of absorbent articles such as diapers, training pants, and incontinence briefs. Pet. 24, PO Resp. 16. We apply the parties' agreed-upon description of the person of ordinary skill in the art. Also, this level of ordinary skill in the art is supported by the prior art of record. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995); *In re Oelrich*, 579 F.2d 86, 91 (CCPA 1978).

3. Summary of the Cited Prior Art

Van Gompel

Van Gompel discloses an absorbent article in the form of a training pant having bonded, non-refastenable, side seams. The article includes a front waist region, a back waist region, a crotch area therebetween, and pairs of front and back side panels extending from respective front and back waist regions. Ex. 1002, 3:19–33; 10:19–34; Figs. 1, 6. The front and back side

panels 18, 20, 24, 26 of the article may be made of a nonwoven elastic or stretchable material. *Id.* at 4:31–33. Figures 1 and 6 of Van Gompel, as annotated by Petitioner and appearing at page 24 of the Petition, are reproduced below:

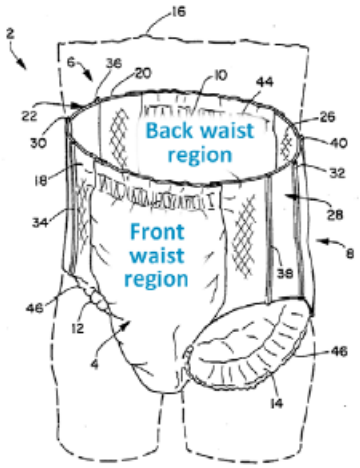

FIG. 1

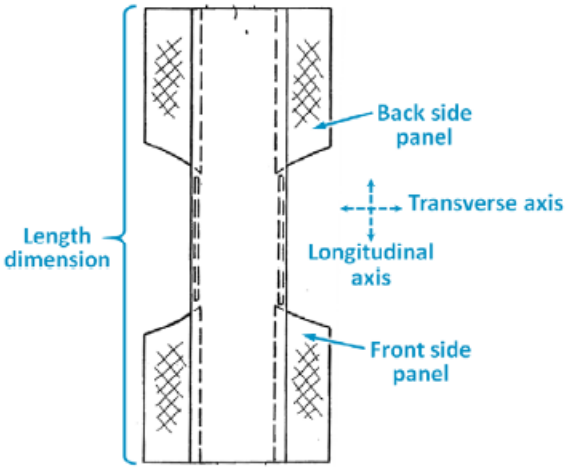

FIG. 6

Figure 1 above illustrates, in perspective view, a training pant according to one embodiment of Van Gompel; Figure 6 above illustrates, in plan view, a training pant according to a different embodiment of Van Gompel.

In the Figure 6 embodiment,[6] nonstretchable intermediate members 22, 28 employed in the Figure 1 embodiment are dispensed with. *Id.*, Figs. 1, 6. Whereas, in the Figure 1 embodiment, stretchable side members 18, 20, 24, and 26 are joined to nonstretchable intermediate members 22, 28 by seams; with members 22, 28 being omitted from the Figure 6 embodiment (*see id.* at 10:29–34), stretchable side members 18 and 24, and 20 and 26, would be joined directly by a seam, even though not explicitly shown or disclosed.

[6] As can be seen above, Figure 6 does not include reference numerals. The reference numerals identified in discussing Figure 6 are from the identical components in Figure 1 and other figures.

LaFleur

In pertinent part, LaFleur evidences that a problem was recognized in the art that unitary undergarments which must be removed by pulling down over a child's leg can increase the spread of soilage, and presents the solution of employing refastenable side portions in order to allow the garment to be removed without the need to pull it down over the leg. Ex. 1003, 1:34–36; 3:44–53. LaFleur discloses that mating hook and loop fastening strips may be employed as the fastening elements. *Id.* at 3:58–67.

Redfern

In pertinent part, Redfern discloses the placement of the relatively hard, stiff, hook elements of a hook and loop (pile) fastening system on the exterior of a diaper, so as to face away from the wearer, to reduce or eliminate potential skin irritation as a result of exposed hooks contacting the skin, were they facing toward the wearer. Ex. 1004, 3:54–68. Redfern additionally discloses that the hook sections are longer than the loop or pile sections, and are positioned to allow for maximum adjustability in fitting the diaper to a wearer. *Id.* at 4:1–8; Figs. 1, 2.

Long

In pertinent part, Long discloses that, in a hook-and-loop fastening arrangement for a diaper, the loop material may be a woven, nonwoven, or knit fabric, and that it need not be limited to a discrete landing zone patch. Ex. 1005, 20:13–15 and 24–25. Long discloses, in particular, that a backsheet 22 constructed of a substantially continuous outer fibrous layer extending over a total exposed surface of a cloth-like cover of the diaper would provide a "fasten anywhere" mechanical fastening system. *Id*. at 20:25–32. Elsewhere, Long describes that backsheet 22 may alternatively

be made of a thin plastic film, a woven or nonwoven fibrous web layer treated to impart liquid impermeability, or a gas-permeable, non-woven fabric layer laminated to a polymer film. *Id*. at 5:43–67.

4. Summary of Positions Advanced by Petitioner and Patent Owner

Petitioner essentially maintains that a combination of the teachings of Van Gompel, LaFleur, and Redfern results in an absorbent article meeting all limitations set forth in independent claims 1, 6, and 13, with the exception of "each attachment panel consisting essentially of an elastomeric nonwoven material . . . defin[ing] an inner attachment surface, wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels." Pet. 24–28. According to Petitioner, Long teaches that the loop component of its mechanical fastening system "can either be (1) a separate strip or (2) the nonwoven surface of the product," and that "when the nonwoven surface is used, it forms a 'fasten anywhere' system that allows the diaper to be adjusted to fit children of various sizes." *Id.* at 23 (citing Ex. 1006 ¶¶ 86–88).

Petitioner asserts that it would have been obvious to modify the combination of Van Gompel, LaFleur, and Redfern in view of Long to arrive at the claimed subject matter. More specifically, Petitioner characterizes the use of the nonwoven side panels of Van Gompel to engage the hooks as being one of a finite number of identified, predictable solutions for fastening a training pant, such that a person of ordinary skill in the art would have good reason to pursue this known option. Pet. 28. Petitioner additionally maintains that a person of ordinary skill would have recognized from Long that size adjustability in a refastenable training pant would be desirable, and

would have applied that teaching by opting to use the nonwoven material of Van Gompel's back side panels as the loop material in the fastening system. *Id.* at 29. Relatedly, Petitioner further takes the position that the use of the surface of the Long diaper in lieu of a separate loop strip to provide a fasten anywhere system would be recognized as improving the Van Gompel/LaFleur/Redfern training pant in the same manner. *Id.*

Petitioner further asserts that a person of ordinary skill in the art would recognize that adding separate loop strips to the back side panels of the modified Van Gompel training pant would be redundant to the nonwoven panel material, would be costly compared to omitting the loop strip, and would unnecessarily complicate the manufacturing process. Pet. 27.

According to Petitioner's expert, once the teachings of Long are considered and applied to the Van Gompel training pant as modified by LaFleur and Redfern, "the only refastenable fastening components in the training pant would be the elastomeric nonwoven material on the inner surface of Van Gompel's back side panels, and the hook strips added to the outer surface of the front side panels." Ex. 1006 ¶¶ 117-18. As such, according to Petitioner, the ultimate modified Van Gompel training pant would meet all limitations set forth in independent claims 1, 6, and 13.

Patent Owner counters that the references that disclose a refastenable seam all include both a separate hook component and a separate loop component, in contrast to the claimed invention, which requires that a surface of a side panel itself serve as the loop-type attachment surface. PO Resp. 15. With respect to the Long disclosure, Patent Owner maintains that, although Long sets forth that the loop material need not be limited to a

discrete patch, in the situation in which it is not, Long adds an additional layer to the diaper, extending over the total exposed surface of the cloth-like outer layer of the diaper. *Id.* at 19–20. Patent Owner avers that this additional layer, even though disclosed as being integrated with the cloth-like backsheet, would be viewed by a person of ordinary skill in the art as a separate component or fastening element. *Id.* Patent Owner further notes that Long does not specify that this additional layer is a nonwoven layer. *Id.* at 21. As such, according to Patent Owner, the mere disclosure in Long that nonwoven material can be suitable for use as a loop material would not, in consideration of the Long disclosure in its entirety, suggest to a person of ordinary skill in the art that solely the nonwoven material at the surface of Van Gompel's side panels could be used as a loop-type attachment surface. *Id.* at 22.

Patent Owner maintains that its position regarding the nonobviousness of its claims is not based on a bodily incorporation of the Long attachment structure to the Van Gompel training pant, but rather is grounded in a consideration of the teachings of Long as a whole, and that such teachings do not suggest using the existing Van Gompel elastomeric nonwoven side panels as an attachment surface. PO Resp. 21–22.

Patent Owner further takes the position that none of the references discloses the use of an elastomeric nonwoven material as an attachment surface. *Id.* at 16, 24–25. According to Patent Owner, Van Gompel discloses side panels formed of an elastomeric nonwoven material, but does not disclose the same as an attachment surface. *Id.* at 25. Patent Owner maintains that Long discloses generally that the loop material may constitute a nonwoven fabric, but that Long does not specifically disclose that an

elastomeric nonwoven fabric would be suitable for use as a loop material, and that Long's disclosure directed to using nonwoven material is "very broad and non-specific." *Id.* at 26.

Petitioner replies that, contrary to Patent Owner's assertion, Long does disclose using simply a nonwoven surface instead of a separate loop patch, noting that Long discloses using the entire cloth-like backsheet to provide the loop material for a fasten anywhere system, and that the cloth-like backsheet can be made from a stretch thermal laminate, which is disclosed in the '237 patent as an elastomeric nonwoven material. Pet. Reply 5. Petitioner additionally argues, and cites to evidence of record, that the back side panel material disclosed in Van Gompel "would function as an attachment surface when engaged with hook fasteners." *Id.* at 4–5, citing, *e.g.*, Ex. 1021 (Blevins Rebuttal Decl.) ¶¶ 6–11.

Petitioner also takes the position that the additional outer fibrous layer relied on by Patent Owner is optional, and that "the nonwoven surface itself of Long's preferred backsheet 22 can function as the attachment surface." *Id.* at 6, citing Blevins Rebuttal Decl. ¶ 19. According to Petitioner, Long "simply never discusses adding a second layer of nonwoven material to a first layer of nonwoven material that is already on the backsheet. *Id.*

5. Analysis

Weighing all of the evidence and arguments before us, including those summarized above, we agree with Patent Owner that the evidence does not adequately support the position advanced in the Petition that Long provides a person of ordinary skill in the art with a teaching that would have rendered obvious using the side panel material of Van Gompel alone as a loop-type attachment surface. Although Long indeed includes a general teaching that

nonwoven material is suitable for use as a loop-type fastener, the evidence does not support the notion that a person of ordinary skill in the art would regard any nonwoven material, regardless of form or construction, as being suitable for use as a loop-type fastening surface, which is essentially what Petitioner attempts to prove.

Petitioner relies exclusively on the following statements in Long for its analysis that one of skill in the art would use Van Gompel's nonwoven side panels as a loop material attachment surface for a loop-type fastener.

> In the various configurations of the invention, the loop material can be provided by a nonwoven, woven, or knit fabric. For example, a suitable loop material fabric can be composed of a 2 bar, warp knit fabric of the type available from Guilford Mills, Inc., Greensborough, N.C. under the trade designation #34285, as well other of knit fabrics. Suitable loop materials are also available from the 3M Company, which has distributed a nylon woven loop under their SCOTCHMATE brand. The 3M Company has also distributed a linerless loop web with adhesive on the backside of the web, and 3M knitted loop tape.
>
> In particular aspects of the invention, the loop material need not be limited to a discrete landing zone patch. Instead the loop material can, for example, be provided by a substantially continuous, outer fibrous layer which is integrated to extend over substantially the total exposed surface area of a cloth-like outer cover employed with the diaper 20. The resultant, cloth-like backsheet 22 can thereby provide the loop material for an operative "fasten anywhere" mechanical fastening system.

Ex. 1005, 20:13–32 (cited in Pet. 40, 49, 52, 56).

Mr. Blevins, Petitioner's expert, relies on the second paragraph of the above-quoted text of Long to opine that

> Just like Long, Van Gompel teaches that the surfaces of the front and back side panels include a "nonwoven" material. (Ex. 1002, Van Gompel, 4:31–33.) Although Van Gompel does not state that this nonwoven material could function as a loop

> fastener, in view of Long's teaching to use an integral nonwoven fastener instead of a separate loop strip, a POSITA would have known that such nonwoven material could be used to engage the hook fasteners in place of loop strips to provide a "fasten anywhere" system. (*See supra* ¶ 81.) Doing so would have been well within the POSITA's technical grasp as it was well known in the art how to do this. Indeed, the attachment panels of Van Gompel and the '190 Patent are made from the same nonwoven material (a spunbonded material or a bonded carded web), and the '190 Patent does not provide any specific details regarding how to make a nonwoven material for use as the loops. (Ex. 1002, Van Gompel, 4:67–5:6; Ex. 1001, '190 Patent, 14:60–65.) Further, it was well-known that a nonwoven material itself could be used to engage hook fasteners, rather than using a separate loop material.

Ex. 1006 ¶ 123; *see also id*. ¶¶ 96–99, 122 (discussing Long).

In referencing the Long teaching of an "integral nonwoven fastener material," it is apparent that Petitioner and Mr. Blevins, at the Petition stage, rely on the configuration disclosed in Long of a diaper having a substantially continuous outer fibrous layer that is *integrated* with the cloth-like outer cover of the diaper, as guiding a person of ordinary skill in the art to use only the elastomeric nonwoven material of the Van Gompel side panel as the loop-type attachment surface. Pet. 23. To this, Patent Owner counters that that the outer fibrous layer discussed in Long would be viewed by persons of ordinary skill in the art as additional layer providing an attachment surface, and thus the use of the elastomeric side panel itself in Van Gompel as a loop-type attachment surface is not disclosed or suggested. PO Resp. 19–20. In response, Petitioner and Mr. Blevins change course, and maintain that it would have been obvious to employ the elastomeric side panels of Van Gompel as attachment surfaces in view of the alleged disclosure in Long of using the "nonwoven surface itself of Long's preferred backsheet" as a loop-

type attachment surface, and that the outer fibrous layer discussed in Long is merely optional. Pet. Reply 6 (citing Ex. 1021 ¶ 19).

Not only is this shift in position beyond the scope of proper rebuttal, the position is also not supported by a fair reading of Long as a whole. Long indeed describes generally that an optional separate outer cover may be provided that is additional to the cloth-like backsheet. Ex. 1005, 6:9–11. As seen, however, in the passage in Long quoted above, Long discloses that, in the case in which a discrete loop patch is dispensed with in favor of a "fasten anywhere" fastening system, a "substantially continuous, outer fibrous layer" is provided to "extend over substantially the total exposed area of a cloth-like cover employed with the diaper." *Id.* at 20:24–29. It is the outer surface of that "resultant, cloth-like diaper," and not the newly-argued "nonwoven surface itself of Long's preferred backsheet," (Pet. Reply 11–12) that Long discloses as functioning as the attachment surface.

Notwithstanding Petitioner's expert testimony to the contrary, we find that a plain reading of Long does not support Petitioner's argument that the reference "specifically suggest[s] using an elastomeric nonwoven material as the attachment surface (identical to the '237 Patent's attachment panels)." Pet. Reply 7 (citing Ex. 1021 ¶ 26). Thus, in viewing the teachings of Long as a whole, a person of ordinary skill in the art would understand that a separate outer cover may, in general, be optional, but in the case of the "fasten anywhere" system, an additional outer fibrous layer is required.[7] As

[7] Further, considering this in conjunction with Petitioner's position that Long does not anywhere disclose adding a second layer of nonwoven material to a first layer of nonwoven material that is already on the backsheet, it can be further concluded that that additional fibrous layer disposed over the Long cloth-like outer cover material to be used as a loop material in a "fasten

such, that person of ordinary skill would not have understood Long to teach, alone or in combination with Van Gompel, an absorbent article in which "each attachment panel consist[s] essentially of an elastomeric nonwoven material that extends from the waist opening to one of the leg openings and defines an inner attachment surface, wherein no separate fastening elements are bonded to the elastomeric nonwoven attachment panels," as claimed.

Indeed, the foregoing interpretation is entirely consistent with the declaration testimony of Patent Owner's expert, G.A.M. (Tony) Butterworth. *See*, Ex. 2004 ¶¶ 62–68. We find that the explanation and analysis of Long in the Butterworth Declaration to be more faithful to the actual disclosure in Long. In particular, we agree that "Long suggests providing an additional layer or a separate fastening element, even where a woven or nonwoven material is already present, for example, providing a cloth-like outer cover." *Id.* at ¶ 63. This leads to a conclusion, with which we also agree, that "[t]here is no suggestion in Long (or in Van Gompel) that the nonwoven material already employed in Van Gompel would be sufficient to work as a loop material. *Id.* at ¶ 67.

Petitioner's argument, based in part on new evidence presented in the Blevins Rebuttal Declaration (Ex. 1021),[8] that the inner surface of the Van

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anywhere" system, is not a nonwoven layer at all, or is at least not specified to be a nonwoven layer.

[8] Paragraphs 6–9 of Exhibit 1021 belatedly attempt to establish that the appearance in Figure 10 of Van Gompel of "lofty loops" formed by the inner nonwoven layer of the elastomeric nonwoven side panel material would have imparted to persons of ordinary skill in the art the knowledge or understanding that that material would function as an attachment surface to which hooks could engage to form a refastenable seam. Although Mr. Blevins opines that this knowledge and understanding would have existed as of the 1999 effective filing date of the '237 patent (Ex. 1021, ¶ 11), nothing

Gompel side panels would function as an attachment surface (Pet. Reply 4–5) is not only untimely, in that it goes beyond the scope of an appropriate reply, it also misses the mark. The '237 patent acknowledges that the Van Gompel side panels would be appropriate for such use. Ex. 1001, col. 14, ll. 1–4. The pertinent question is, however, whether, as of the effective filing date of the parent application of the '237 patent, a person of ordinary skill in the art would have recognized the suitability of the inner surface of the Van Gompel side panel to function as an attachment surface, in view of the teachings in Long. As discussed above, Long's general statement that its "loop material can be provided by a nonwoven, woven or knit fabric," when considered in the overall context of the teachings of Long, and in particular the disclosure of the additional outer fibrous layer in the Long "fasten anywhere" embodiment, is insufficient to suggest that the elastomeric nonwoven side panel itself of Van Gompel would obviously be used as the attachment panel, with the nonwoven inner surface constituting the inner attachment surface.

Petitioner's additional insistence that Long never discusses adding a second layer of nonwoven material to a first layer of nonwoven material that is already on the backsheet is only true to the extent that Long does not disclose an additional layer that is specifically "nonwoven." As acknowledged by Petitioner, Long, at a minimum, optionally provides an additional outer fibrous layer to a cloth-like backsheet, which backsheet is a stretch thermal laminate having a nonwoven material laminated to a polypropylene film, with the nonwoven material providing the cloth-like

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in the preceding paragraphs 6–9 of Exhibit 1021 relied on supports that this was knowledge and understanding existing in the art as of that date.

characteristic to the backsheet. Long, col. 5, l. 67–col. 6, l. 11. Even though described as being optional, the addition of a second fibrous layer to a first layer of nonwoven material is indeed disclosed in Long.

We also acknowledge Petitioner's statements directed to prior litigation and proceedings involving the '379 patent, and prior proceedings involving the '067 patent. *See* Pet. 29–30; Pet. Reply 7. Petitioner does not discuss those other cases or explain persuasively how those cases, which involve patents and claims not before us here, impact the issues that are before us.

The various reasons propounded by Petitioner as purportedly evidencing the obviousness of combining the teachings of Long with those of Van Gompel, as modified by LaFleur and Redfern, are unavailing as well. *See, e.g.*, Pet. 28–31. Underlying each of those reasons is an overreaching position in terms of what Long would have taught or suggested to a person of ordinary skill in the art relative to use of nonwoven material as a loop fastener in an absorbent article such as a training pant. The Federal Circuit has consistently held that a determination of obviousness, and possible modifications to the prior art leading to such a determination, must evidence that such modification(s) would have a reasonable likelihood or expectation of success, viewed in light of the prior art. *In re Dow Chemical Co.*, 837 F.2d 469, 473 (Fed. Cir. 1988). Here, given the teaching in Long to provide the additional fibrous layer over the cloth-like backsheet when opting to employ a "fasten anywhere" system, and the lack of any suggestion in Long that the surface of the cloth-like backsheet itself could be used as a loop-type fastener, as discussed in detail above, Petitioner has not shown that a person of ordinary skill in the art would have believed that there would have been a

reasonable likelihood of success in using the nonwoven surface of the elastomeric nonwoven side panel alone as a loop-type fastener.

6. Secondary Considerations

Because our evaluation of the first three *Graham* factors leads us to determine that Petitioner has not demonstrated that the challenged claims would have been obvious in view of the cited art, we need not determine whether Patent Owner's evidence of secondary considerations weighs further against a conclusion of obviousness.

Conclusion Regarding Petitioner's Obviousness Challenge

For the reasons discussed above, based on the record now before us, we determine that Petitioner has not carried its burden to demonstrate that claims 1, 6, and 13 would have been obvious in view of Van Gompel, LaFleur, Redfern, and Long.

8. Claims 2–4, 7–12 and 14–23

Each of claims 2–4, 7–12, and 14–23 depends directly or indirectly from one of independent claims 1, 6, and 13. In that we have determined, as set forth above, that Petitioner has not carried its burden to demonstrate the unpatentability of claim 1, 6, and 13, and given that Petitioner's proposed grounds of unpatentability of these dependent claims is based on the same references and combination of the teachings thereof, Petitioner has not carried its burden of demonstrating the unpatentability of the dependent claims over Van Gompel, LaFleur, Redfern, and Long.

MOTION TO SEAL

Patent Owner filed a Motion to Seal and to enter the Default

Protective Order. Paper 21, 1. Patent Owner seeks to have us seal Exhibit 2008, which Patent Owner states contains highly confidential information that it submitted in support of objective indicia of nonobviousness. *Id*. at 2–3.

Specifically, Patent Owner states that Exhibit 2008 is a proprietary CAD drawing of Patent Owner's Huggies® Pull-Ups® brand training pants with Easy Open Sides. *Id*. at 3. Patent Owner provided a public version of the portion of the CAD drawing on which it relies in its Patent Owner Response. *Id*. at 4; *see* Ex. 2008.

Patent Owner states that Petitioner agreed to the entry of the Default Protective Order. *Id*. at 1. Petitioner did not file an opposition to Patent Owner's Motion to Seal.

We have considered Patent Owner's argument to seal Exhibit 2008, and the information sought to be sealed by Patent Owner. We determine that Patent Owner has demonstrated good cause for sealing confidential portions of Exhibit 2008, portions on which it does not rely in its Patent Owner Response. Therefore, we will grant Patent Owner's Motion to Seal, enter the Default Protective Order, and seal the unredacted version of Exhibit 2008. *See* Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,769–71, App. B.

PETITIONER'S MOTION TO EXCLUDE

Petitioner moves to exclude portions of Mr. Butterworth's testimony regarding secondary indicia of nonobviousness, *see* Ex. 2004 ¶¶ 53, 112–128, including the reason for commercial success, *see id*. ¶¶ 53, 112, 120–128. Paper 34, 1–6.

Petitioner asserts that such evidence should be excluded because the district court in a previous litigation involving U.S. Patent No. 6,849,067 ("the '067 Action)

> found that the *sole* reason for the commercial success of [Patent Owner's] refastenable HUGGIES® PULL-UPS® training pant—the same product that is at issue here—was the refastenable seam feature. . . .
> . . . .
> Since the reason for the success of [Patent Owner's] PULL-UPS® was "fully and fairly tried" in the previous '067 Action and was "adversely resolved against" [Patent Owner, Patent Owner] is collaterally estopped from offering a new reason for its success of the exact same PULL-UPS® product in this IPR.

Paper 34, 3. Petitioner also asserts that Exhibits 2006 through 2012, and 2014 should be excluded because they relate to secondary considerations of non-obviousness also because Patent Owner is collaterally estopped from re-litigating the issue of commercial success. *Id*. at 11–13.

Petitioner also asserts that Mr. Butterworth's testimony regarding the reason for the commercial success of the HUGGIES® PULL-UP® training pant should be excluded because Mr. Butterworth does not possess the specialized knowledge to evaluate the commercial success of a product and his evaluation is merely conclusory and not supported by appropriate evidence. *See id*. at 4–6.

Because we did not need to evaluate or rely on Patent Owner's evidence of commercial success because we found that Petitioner had failed by a preponderance of the evidence to show the combination of asserted references taught all of the claimed features for each challenged claim, we need not reach the issue presented here as to whether Mr. Butterworth's analysis of the commercial success of Patent Owner's product should be

excluded. Thus, we do not exclude this evidence and dismiss this portion of the motion as moot.

Next, Petitioner asserts that we should exclude Mr. Butterworth's testimony regarding Long's fasten anywhere teachings based on collateral estoppel.[9] *See id*. at 6–10. Petitioner asserts that the prior proceedings on which it bases its collateral estoppel argument "involved the same issues that [Patent Owner] is seeking to reargue here—namely (i) whether Long disclosed using a nonwoven material as an integral loop component rather than a separate loop component; (ii) whether Long's teaching could be used for an *elastomeric* nonwoven material; (iii) whether a POSITA would have been *motivated* to combine Long's teaching for use on elastomeric side panels of a refastenable training pant; and (iv) whether a POSITA would have been motivated to combine Long's teaching to improve the refastenable seam in a training pant that used separate loop strips." *Id*. at 9.

Petitioner points us to a final decision for an *inter partes* review involving U.S. Patent No. 8,747,379 B2 ("the '379 patent") involving a claim to a training pant requiring "first and second loop type fastening components disposed on an outer surface of and comprising *integral* portions of the first and second back side panels." *See* Ex. 1018, 6; Paper 39, 9 (PO Opp. to Motion). In finding that the trial record supported sufficiently that this claim limitation was met for claim 25, the Board stated that "[w]ith respect to the limitation of claim 25 that the loop fastening

[9] Patent Owner asserts in opposition that because collateral estoppel is a substantive issue, not strictly an admissibility issue, a motion to exclude is an improper vehicle to address the issue. Paper 38, 8. Regardless as to the categorization of the issue, we will address the issue here because we did not reach the collateral estoppel issue in determining whether the challenged claims are unpatentable.

components comprise 'integral portions' of the back side panels, Petitioner relies on Long as teaching side panels with loop material that is 'integrally formed.'" *See id*. at 15–16; Paper 39, 11–12.

Here, Patent Owner does not disagree that Long teaches that the loop material may be integrated with the absorbent article to supply the attachment means; Patent Owner is arguing, however, that such integration does not negate the fact that this loop material is a separate component. *See* PO Resp. 2–3, 15, 20. Patent Owner asserts that "[b]ecause Long discloses an additional layer, Long does not disclose using an attachment surface instead of a separate loop component." PO Resp. 20–21 (citing Ex. 2004 ¶¶ 58–60); *see* Paper 39, 9–10 (stating issues decided by district court do not "relate to whether Long's continuous outer fibrous layer is a separate, additional layer to the cloth-like outer cover of Long"). Petitioner has not shown that this issue was addressed, much less decided in the prior *inter partes* review.

Petitioner's reference to the definition of "integral" set forth in the '379 patent constitutes ex post facto reasoning not mentioned in the final written decision, and is therefore of no probative value. *See* Paper 41, 5. Also, Petitioner does not point us to any further evidence that Long's alleged teaching of an elastomeric nonwoven material or any motivation to combine Long's teachings with other asserted references were issues that were decided in the prior litigation other than the reference to one of our final decisions discussed above that does not address these issues. *See* Paper 39, 10–11. Therefore, we do not exclude Mr. Butterworth's testimony concerning Long's fasten anywhere teachings, and deny this portion of Petitioner's motion to exclude.

Finally, Petitioner next asserts that Mr. Butterworth's testimony regarding the use of elastomeric nonwoven material as a suitable engagement surface should be excluded. Paper 34, 10–11. Petitioner asserts that Mr. Butterworth lacks specialized knowledge to assist us in determining how one of skill in the art would have viewed such use of elastomeric nonwoven material and fails to provide any supporting documents or information. *Id*.; Paper 40, 5. We disagree.

Mr. Butterworth has requisite knowledge to opine on this issue as he details his extensive experience in nonwoven and absorbent technology in his declaration. *See* Ex. 2004 ¶¶ 5–15; Ex. 2005. We find that whether Mr. Butterworth provided supporting documentation for his opinions goes to the weight to be given to his opinion, not to its admissibility. Therefore, we do not exclude Mr. Butterworth's testimony regarding the use of elastomeric nonwoven material as a suitable engagement surface and deny this portion of Petitioner's motion to exclude.

PATENT OWNER'S MOTION TO EXCLUDE

Patent Owner moves to exclude Exhibits 1022 through 1025, and paragraphs 25, 40, 41, 46–49, and 55 of Exhibit 1021 based on relevancy. Paper 36, 1. Specifically as to the first two exhibits, Patent Owner seeks to exclude Exhibit 1022 and prior testimony of Mr. Butterworth in Exhibit 1023, both of which were submitted in a previous litigation involving Patent Owner's '379 patent. *Id*. at 1–6.

Relevancy under the Federal Rules of Evidence, defined as "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," sets a liberal standard for the admissibility of

evidence. *See* Fed. R. Evid. 401, 402; *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 587 (U.S. 1993). In applying this standard, we find that Patent Owner's arguments concerning the admissibility of Exhibits 1022 and 1023 do not merit excluding these exhibits, but go toward the weight to be accorded the evidence. We also do not find that any probative value of these exhibits is substantially outweighed by the danger of unfair prejudice and confusing the issues under Federal Rule of Evidence 403, as we can assess the probative value of the evidence presented as it applies to this proceeding. Therefore, we will not exclude either Exhibit 1022 or 1023 and deny this portion of Patent Owner's motion to exclude.

Next, Patent Owner moves to exclude Exhibit 1024 as irrelevant and inadmissible hearsay and Exhibit 1025 as irrelevant. Paper 36, 7–8. Exhibits 1024 and 1025 are two United States patents offered by Petitioner "along with testimony from Mr. Blevins in its Reply (Paper 26 at 13–18) to rebut the assertion made by [Patent Owner] and its expert that 'the conventional wisdom at the time of invention was that a loop material with a distortable base . . . would not be suitable for engagement with hooks.'" Paper 37, 6–7 (citing Ex. 2004 ¶¶ 86–92, Paper 20, 33–38).

Patent Owner asserts that "[t]eachings in an isolated patent (or in two isolated patents) do not make it any more or less probable that those teachings are convention." Paper 36, 1, 8, 9. Petitioner responds that both exhibits are relevant because they "provide examples of elastomeric nonwoven material that inventors in the field asserted would work as a loop fastener" rebutting Mr. Butterworth's testimony regarding conventional wisdom. Paper 38, 8. We agree with Petitioner that this evidence is

relevant, and that Patent Owner's arguments go to the weight to be accorded such evidence. We also agree with Petitioner that it is offering statements from Exhibit 1024 to establish what was thought to be conventional wisdom at the time, and that it is not offering the statements for the truth of the matter asserted. Therefore, the evidence is not hearsay. *See* Fed. R. Evid. 801(c). Therefore, for these reasons, we do not exclude Exhibits 1024 or 1025 and deny this portion of Patent Owner's motion to exclude.

Finally, Patent Owner seeks to exclude Mr. Blevins' testimony regarding Exhibits 1022 through 1025. Because we have found that none of these exhibits should be excluded, we do not exclude Mr. Blevin's testimonial evidence at paragraphs 25, 40, 41, 46–49, or 55 of Exhibit 1021. Therefore, we also deny this portion of Patent Owner's motion to exclude.

ORDER

In consideration of the foregoing, it is hereby:

ORDERED that claims 1–4 and 6–23 of U.S. Patent 7,534,237 B2 have not been shown by a preponderance of the evidence to be unpatentable;

FURTHER ORDERED that the Default Protective Order set forth in Appendix B of the Office Patent Trial Practice Guide is hereby entered and shall govern the conduct of this proceeding unless otherwise modified;

FURTHER ORDERED that Patent Owner's Motion to Seal (Paper 21) is *granted*;

FURTHER ORDERED that Exhibit 2008 shall be sealed as "Board and Parties Only," and will be kept under seal unless and until we refer to material in the exhibit in a final written decision;

FURTHER ORDERED that Petitioner's Motion to Exclude is *dismissed in part as moot* and *denied in part*;

FURTHER ORDERED that Patent Owner's Motion to Exclude is *denied*; and

FURTHER ORDERED that, because this is a Final Written Decision, 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.

For PETITIONER:

Kenneth P. George
Bryan A. Comack
Amster, Rothstein & Ebenstein LLC
kgeorge@arelaw.com
FQ-237IPR@arelaw.com

For PATENT OWNER:

Mark W. Rygiel
David K.S. Cornwell
Stephen A. Merrill
Byron Pickard
Sterne, Kessler, Goldstein & Fox P.L.L.C.
mrygiel-PTAB@skgf.com
davidc-PTAB@skgf.com
smerrill-PTAB@skgf.com
bpickard@skgf.com