

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NANOBEBE US INC.,
Petitioner,

v.

MAYBORN (UK) LIMITED,
Patent Owner.

IPR2023-00465
Patent 11,207,244 B2

Before ULRIKE W. JENKS, MICHAEL L. WOODS, and
CYNTHIA M. HARDMAN, *Administrative Patent Judges*.

JENKS, *Administrative Patent Judge*.

DECISION
Granting Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Nanobebe US Inc. (“Petitioner” or “Nanobebe”) filed a Petition (Paper 2, “Pet.”) for *inter partes* review of claims 21–24, 26, and 27 (the “Challenged Claims”) of U.S. Patent No. 11,207,244 B2 (Ex. 1003, “the ’244 patent”). Pet. 1. Mayborn (UK) Limited (“Patent Owner”) filed a Preliminary Response (Paper 6, “Prelim. Resp.”).

We also *sua sponte* authorized the parties to submit additional briefing to address an argument raised by Patent Owner. Paper 7. Petitioner filed a Reply (Paper 8, “Reply”) and Patent Owner filed a Sur-reply (Paper 10, “Sur-reply”).

Under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a), we have authority to institute an *inter partes* review if “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). After considering the Petition, the Preliminary Response, the Reply, the Sur-reply, and the evidence of record, we determine the information presented shows a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of at least one of the Challenged Claims of the ’244 patent. Accordingly, we institute an *inter partes* review of claims 21–24, 26, and 27 of the ’244 patent on the grounds asserted in the Petition.

II. BACKGROUND

A. Real Parties-in-Interest

Petitioner identifies Nanobebe US Inc. as the real parties-in-interest. Pet. 1. Patent Owner identifies Mayborn (UK) Limited, Mayborn USA, Inc., and Mayborn Group Limited as real parties-in-interest. Paper 5, 2.

B. Related Matters

The parties identify the following court proceedings relating to the '244 patent: *Nanobebe US Inc. v. Mayborn (UK) Limited et al.*, Case No. 1:21-cv-08444 (S.D.N.Y.) (the “Related Litigation”); and *Mayborn (UK) Limited, et al. v. Comotomo Inc., et al.*, Case No. 1:22-cv-00694 (S.D.N.Y.). *See* Pet. 1; *see also* Paper 5, 2.

The parties also identify the following *inter partes* reviews: IPR2022-01325 (challenging U.S. Patent No. 10,952,930 B2 (“the '930 patent” (Ex. 1001)) and IPR2022-01326 (challenging the '244 patent). Pet. 2; Paper 5, 2. We also identify *inter partes* review IPR2023-00467, which challenges the '930 patent.

C. Overview of the '244 Patent

The '244 patent is titled “Baby Bottle with Flexible Nipple Regions.” Ex. 1003, code (54). The '244 patent purports to describe “a drinking vessel with a nipple, in particular a baby bottle having a nipple of increased flexibility and functionality.” *Id.* at 1:22–25. The '244 patent discusses improving air ingress into the bottle during baby feeding to reduce vacuum formation within the bottle, thereby reducing the likelihood of baby colic. *See id.* at 1:49–52.

To illustrate an embodiment of the described baby bottle, we reproduce Figure 4 of the '244 patent, below:

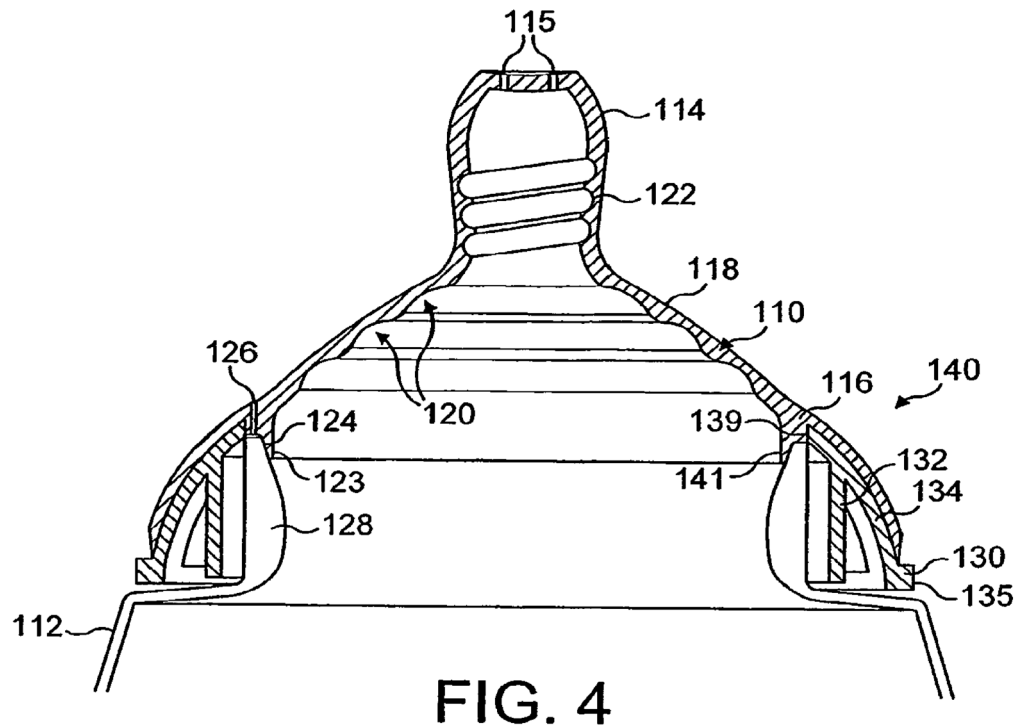


Figure 4 “is a cross-sectional side view of a teat and vessel according to” an aspect of the ’244 patent. *Id.* at 2:39–40. In particular, Figure 4 depicts teat assembly 140 mounted on infant drinking vessel 112. *Id.* at 3:60–61. Teat assembly 140 includes teat 110 with areola region 118 and teat portion 114 forming a nipple having drink apertures 115 at its upper end. *Id.* at 3:61–63. Base portion 116 is mountable on drinking vessel 112. *Id.* at 3:63–64. Teat 110 is formed from an elastomer with walls of decreasing thickness from base portion 116 to teat 114, thereby “providing a more realistic flexing characteristic.” *Id.* at 4:13–15. “[A]reola portion 118 further includes undulating grooves 120 forming, in cross-section, a wavy profile on the inner surface of [] areola portion 118 and extending circumferentially.” *Id.* at 4:16–19. A tight-pitch helical groove 112 is formed around the inner cylindrical vertical surface of teat portion 114 “to form a flow passage even when the teat portion is collapsed.” *Id.* at 4:37–38.

The figure further depicts vent passage 126. *Id.* at 6:13. When an infant drinks from the vessel, the resulting pressure differential pulls lip valve 123 away from the inner face of neck 128, and vent passage 126 permits venting to reduce the risk that the infant encounters colic, or distress. *See id.* at 6:10–14. The '244 patent explains, “[b]ecause of the provision of the lip valve[,] there is no requirement for providing slits and a natural, robust and resilient valve assembly is provided.” *Id.* at 6:14–16.

D. Challenged Claims

Petitioner challenges 21–24, 26, and 27 of the '244 patent. Pet. 1. Claim 21 is independent with claims 22–24, 26, and 27 depending directly from the independent claim. Ex. 1003, 8:1–33. We reproduce the Challenged Claims, below:

- 21[(Pre)] A drinking vessel comprising:
- [21(A)] a container comprising a varying internal circumference and an opening into the container; and
 - [21(B)] a cover assembly configured to couple to the container over the opening, the cover assembly comprising:
 - i. [21(C)] a nipple comprising a mouthpiece configured to allow liquid flow through the nipple to an aperture, [21(D)] a flex region configured to allow flex of the mouthpiece towards and away from a lower portion of the nipple, the [21(E)] mouthpiece defining a bite region, [21(F)] and a flange depending from the lower portion of the nipple defining the nipple circumference furthest from the aperture; and
 - ii. [21(G)] a collar configured to removably couple to the nipple to seal over the opening of the container; and
 - [21(H)] wherein the collar and the lower portion of the nipple together define a downward domed shape that extends outwardly and downwardly from the flex region of the nipple towards a widest circumferential edge of the collar.

22. The drinking vessel of claim 21, wherein the container is a trainer cup.

23. The drinking vessel of claim 21, wherein the container comprises a material more rigid than the nipple material.

24. The drinking vessel of claim 21, wherein the cover assembly further comprises an air vent apart from the mouthpiece.

...

26. The drinking vessel of claim 21, wherein the mouthpiece is located in the center of the nipple.

27. The drinking vessel of claim 21, wherein the teat portion comprises a resilient material

Ex. 1003, 8:1–33 (formatting and numbering added for reference convenience).

E. Asserted Grounds of Unpatentability

Petitioner asserts that the Challenged Claims are unpatentable based on the following grounds (Pet. 5):

Claims Challenged	35 U.S.C. § ¹	References
21, 24, 26, 27	103	Ishimaru ² , Kurkjian ³
21-24, 26, 27	103	Ishimaru, Atkin ⁴

Petitioner also relies on the Declaration of Mr. Brian H. Silver (Ex. 1005). *See, e.g.*, Pet. iii (referencing the declaration of Mr. Silver).

¹ The pre-AIA version of 35 U.S.C. applies to this proceeding. *See* Pet. 3 (confirming the same); *see also* Ex. 1003, code (63).

² JP 2001-299877, published Sept. 17, 2001 (Ex. 1008, “Ishimaru”). This exhibit includes an English-language translation.

³ U.S. Patent No. 2,093,730, issued Sept. 21, 1937 (Ex. 1009, “Kurkjian”).

⁴ EP 0151862, published Oct. 18, 1989 (Ex. 1010, “Atkin”).

III. ANALYSIS

A. Discretionary Denial Based on General Plastic

As a preliminary matter, Patent Owner argues that the Board should deny institution because the Petition is an unfair serial attack on the '244 patent based on an earlier, now terminated, petition filed by Comotomo Inc. and Comotomo Corp. (collectively, “Comotomo”). *See* Prelim. Resp. 7 (citing *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 18 (PTAB Sept. 6, 2017) (precedential) (“*General Plastic*”). As mentioned above, we *sua sponte* authorized the parties to file additional briefing to address this issue. *See* Reply; *see also* Sur-reply.

1. Governing Law

Institution of *inter partes* review is discretionary. *See* 35 U.S.C. § 314(a).

Under *General Plastic*, we consider the following seven factors (“Factors 1–7”) in deciding whether to exercise our discretion to deny institution based on a second follow-on petition:

1. Whether the same petitioner previously filed a petition directed to the same claims of the same patent.
2. Whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it.
3. Whether at the time of filing of the second petition the petitioner already received the patent owner’s preliminary response to the first petition or received the Board’s decision on whether to institute review in the first petition.

4. The length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition.

5. Whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent.

6. The finite resources of the Board.

7. The requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.

General Plastic at 15–16.

In *Valve Corporation*, the Board applied *General Plastic* in a situation in which a subsequent petition was filed by a different petitioner. *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, Paper 11 (PTAB Apr. 2, 2019) (precedential) (hereinafter “*Valve Corporation*” or “*Valve Corp.*”).

2. Analysis

Patent Owner cites to an earlier petition filed by a *different party*, Comotomo, which challenged claims 1–31 of the ’244 patent. *See* Prelim. Resp. 6, 10. Patent Owner characterizes Nanobebe, the Petitioner here, as “similarly-situated” as Comotomo (*id.* at 12) because, apparently, “Comotomo and Petitioner lodged overlapping challenges and share common circumstances on infringement” in related district court litigation (*id.* at 13).

Petitioner submits that Petitioner and Comotomo are not “similarly situated.” Reply 1. Petitioner argues that there is no “significant relationship” between Comotomo and Petitioner. *See id.* at 1–3; *see also id.* at 4 (“Here, there is no such relationship . . .”). Petitioner explains that “Petitioner and Comotomo are not co-defendants in the same case” (*id.* at 1)

and “Petitioner and Comotomo were each accused of infringement based on their own unique products, which necessitates the pursuit of different invalidity theories” (*id.* at 2).

In *Valve Corporation*, the Board considered the “significant relationship” between the two different parties filing the petitions. *Valve Corp.* 2, 10. The Board explained, “when different petitioners challenge the same patent, [the Board] consider[s] any relationship between those petitioners when weighing the *General Plastic* factors.” *Id.* at 2.

Absent a “significant relationship” between Petitioner and Comotomo, on this record, the *General Plastic* factors are of “little probative value.” *Cf. Samsung Elecs. Co. v. Scramoge Tech. Ltd.*, IPR2022-00284, Paper 12 at 12 (PTAB Jun. 22, 2022) (finding Factor 2 “of little probative value” where “there is no significant relationship” between petitioners).

Furthermore, “[a]ny ‘implicit’ relationship created merely by challenging the same claims of the same patent with similar allegations of unpatentability is not the sort of ‘significant relationship’ contemplated by *Valve [Corporation]*.” *See Ebates Performance Mktg., Inc. v. IBM*, IPR2022-00646, Paper 10 at 9 (PTAB Oct. 25, 2022).

In *Valve Corporation*, the two petitioners had a *licensing relationship* and were accused of infringing based on the *same product*. *Valve Corp.* 9–10.

Here, the record does not support a finding that Comotomo and Nanobebe have any relationship, let alone a “significant” one. We credit the testimony of Petitioner’s co-founder and executive chairman, Mr. Lanternari, that Petitioner “was not involved in the preparation and/or filing of the Comotomo IPR petitions, nor was Comotomo involved in the preparation and/or filing of [Petitioner’s] petitions.” Ex. 1023 ¶¶ 1, 14.

Additionally, Patent Owner accused Petitioner and Comotomo of patent infringement based on *different products*. *See id.* ¶ 14. This difference further distinguishes the facts from *Valve Corporation*. *See Valve Corp.* 9–10.

On this record, and because Petitioner and Comotomo are different parties without a significant relationship, Factor 1 weighs against exercising our discretion to deny institution. *See id.* at 2, 9–10 (addressing Factor 1). Further, Factors 2–4 are not pertinent, given that Petitioner and Comotomo are different petitioners, filed petitions directed to different claims of the same patent, and raised different prior art and arguments in their respective petitions. Patent Owner does not point us to any persuasive evidence of record that Petitioner “used the earlier Comotomo petition as a test case,” or that Petitioner used the prior petition to gain “tactical advantages.” Prelim. Resp. 12, 15; Sur-reply 1.

As to Factor 5, we find persuasive Mr. Lanternari’s testimony that Petitioner “has been (and remains) resource constrained” and “it was financially challenging to file petitions for *inter partes* review prior to January 2023 while simultaneously continuing the district court litigation.” Ex. 1023 ¶ 13.

As to Factors 6 and 7, we do not find this proceeding to strain the Board’s resources and we currently do not anticipate any difficulty in issuing a final written decision before the statutory due date.

3. *General Plastic Summary*

For the above reasons, we decline to exercise our discretion to deny institution under *General Plastic*.

B. Level of Ordinary Skill in the Art

Petitioner contends that a person of ordinary skill in the art at the time of the invention (“POSITA” or “POSA”) “would have a B.S. in Mechanical or Industrial Engineering; Materials Science, Product Design, or equivalent field, with 3-5 years of academic or industry experience with fluid dynamics, or a comparable industry.” Pet. 15 (citing Ex. 1005 ¶ 47). Petitioner further submits that “[a]dditional education could compensate for less practical experience and vice versa.” *Id.* (citing Ex. 1005 ¶ 47).

Patent Owner does not dispute Petitioner’s definition of a POSITA. *See generally* Prelim. Resp.

For purposes of this Decision, we adopt Petitioner’s assessment of the level of ordinary skill in the art as it appears consistent with the ’244 patent and the asserted prior art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001).

C. Claim Construction

In this *inter partes* review, we apply the same claim construction standard that would be used in a civil action under 35 U.S.C. § 282(b). 37 C.F.R. § 42.100(b). In applying this standard, we generally give claim terms their ordinary and customary meaning as would be understood by a person of ordinary skill in the art at the time of the invention and in the context of the entire patent disclosure. *See id.*; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–14 (Fed. Cir. 2005) (en banc).

Petitioner proposes construction for several terms, including a “flex region,” “mouthpiece,” and “flex of the mouthpiece towards and away from a lower portion of the nipple.” *See* Pet. 16.

Patent Owner proposes construction of “domed shape.” Prelim. Resp. 22.

We further note that the District Court in the Related Litigation issued a *Markman* Order (Ex. 2008, hereinafter, “*Markman* Order”) in which it construed these terms.

In rendering our Decision, we construe the terms raised by Petitioner and Patent Owner.

1. “*flex region*”

Petitioner construes this term to mean “a region having characteristics, e.g., grooves or channels, specifically designed to enable flexing.” Pet. 16 (citing Ex. 1018, 21). Patent Owner proposes that the term should be construed to mean “a region having surface characteristics that control flexing.” Ex. 1018, 21; Ex. 1019, 9–10.

In the *Markman* Order, the District Court concluded that term “flex region” means “a region having surface characteristics that control flexing.” See Ex. 2008, 26–30.

Our Rules provide that

In an *inter partes* review proceeding, a claim of a patent . . . shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b), including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent. Any prior claim construction determination concerning a term of the claim in a civil action . . . that is timely made of record in the *inter partes* review proceeding *will be considered*.

37 C.F.R. § 42.100(b) (third emphasis added).

In the *Markman* Order, the District Court determines that parties' proposed definitions of "flex region" differ in many ways. Ex. 2008, 26. The District Court provides detailed analysis of the term, before concluding that the term "flex region" means "a region having surface characteristics that control flexing." *Id.*

For purposes of this Decision, we adopt the District Court's construction, which is supported by a thorough and reasoned explanation of the construction, citing evidence and argument submitted by both parties. 37 C.F.R. § 42.100(b). If either party disagrees with this construction, that party shall explain why the construction is in error in its next substantive brief.

2. "mouthpiece"

Petitioner construes the term "mouthpiece" to mean "teat portion, i.e., the entire part projecting generally perpendicular to the mouth of the vessel, disposed above the areola portion, which extends into a baby's mouth for feeding." Pet. 16 (citing Ex. 1018, 24). In the District Court, Patent Owner proposes that the term should be construed to mean "part projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion." *See* Ex. 1018, 24; Ex. 1019, 9.

In the *Markman* Order, the District Court explains that "parties agree that 'mouthpiece' should be construed the same way as 'teat portion.'" Ex. 2008, 25, 5 ("During the Markman hearing, the parties agreed to the following construction – [teat portion means] 'the entire part projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion.'" (citing transcript from *Markman* hearing)). The District Court, therefore, construed the term "mouthpiece" to mean "the entire part

projecting generally perpendicular to the mouth of the vessel and disposed above the areola portion.” *Id.* at 25–26.

For purposes of this Decision, we adopt the District Court’s construction, which is supported by a thorough and reasoned explanation of the construction, citing evidence and argument submitted by both parties. 37 C.F.R. § 42.100(b). If either party disagrees with this construction, that party shall explain why the construction is in error in its next substantive brief.

3. “*flex of the mouthpiece towards and away from a lower portion of the nipple*”

Petitioner construes this phrase “teat portion, i.e., the entire part projecting generally perpendicular to the mouth of the vessel, disposed above the areola portion, which extends into a baby’s mouth for feeding” to mean “up and down movement of the mouthpiece relative to a lower portion of the nipple.” Pet. 16 (citing Ex. 1018 ¶ 25).

In the *Markman* Order, the District Court adopts the plain meaning construction of “flex of the mouthpiece towards and away from a lower portion of the nipple” Ex. 2008, 31. “The specifications describe both oscillating and reciprocating movement, which is multi-axial. . . . Towards and away from the lower portion of the nipple encompasses this multi-axial movement of the mouthpiece.” *Id.* (citing Ex. 1003, 3:41–43).

For purposes of this Decision, we adopt the District Court’s construction, which is supported by a thorough and reasoned explanation of the construction, citing evidence and argument submitted by both parties. 37 C.F.R. § 42.100(b). If either party disagrees with this construction, that

party shall explain why the construction is in error in its next substantive brief.

4. “*domed shape*”

In the Petition, Petitioner does not present a claim construction for “domed shape.” *See generally* Pet. In the District Court, Petitioner proposed “dome shaped” to mean “having a rounded shape in profile.” Ex. 1018, 17.

Patent Owner acknowledges that the “parties presented competing constructions of the term ‘domed shape’ to the District Court.” Prelim. Resp. 22. In the District Court, the Patent Owner proposed that “domed shape” should be interpreted to mean “wide circular base with an arc-shaped cross-sectional profile.” Ex. 1018, 17; Ex. 1019, 5–6; Ex. 2008, 12 (“Mayborn proposes a ‘wide circular base with an arc-shaped cross-sectional profile[,]’ relying on Figure 4 and the following specification language: ‘the base portion 116 being shaped like a breast and having a wide, domed configuration.’” (citation omitted)).

The *Markman* Order provided a thorough and reasoned explanation of the construction, citing evidence and argument submitted by both parties. *See* Ex. 2008, 12–15. For purposes of this Decision, we adopt the District Court’s construction, and conclude that “domed shape” shall mean “wide circular bottom with an arc-shaped cross-sectional profile.” *Id.* at 15. We note, however, that an arc is a curve and describing something as being “arc-shaped” does not provide any indication about the slope of the curve. We also do not read “arc-shaped cross-sectional profile” to mean “an uninterrupted continuous arc.” *Compare* Ex. 1003, claim 1 (“wherein the collar and the base of the nipple together define a downward domed shape that extends outwardly and downwardly between the flex region of the

nipple and a widest circumferential edge of the collar”) *with* claim 16 (“The feeding vessel of claim 1, wherein the domed shape is continuous”). Because arc-shaped allows for interruptions, this would reasonably allow for gaps between the collar and the lower portion of the nipple that together form the domed shape.

If either party disagrees with this construction, that party shall explain why the construction is in error in its next substantive brief.

5. Other claim terms

For purposes of this Decision, we need not and do not formally construe any other claim term. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) (stating that “we need only construe terms ‘that are in controversy, and only to the extent necessary to resolve the controversy’” (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

D. Principles of Law

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102, if the differences between the subject matter sought to be patented 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. Patentability shall not be negated by the manner in which the invention was made.

35 U.S.C. § 103(a). The question of obviousness is resolved on the basis of 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 ordinary skill in the art; and (4) when in evidence,

2. Kurkjian (Ex. 1009)

Kurkjian is a U.S. Patent titled “Nursing Unit.” Ex. 1009, 1. Kurkjian describes “a resilient flanged nipple which is so constructed as to permit the nipple to be secured to the mouth of a bottle by means of a retaining cap, and permit the entrance of air into the interior of the bottle, and also prevent the nipple from collapsing inwardly of the retaining cap.” *Id.* at 1:3–8. We reproduce Figure 1 of Kurkjian, below:

Fig. 1.

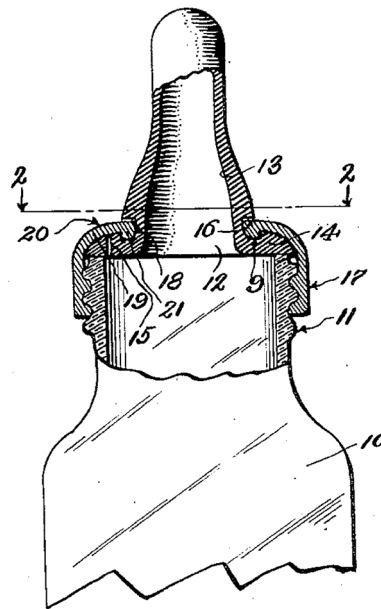


Figure 1 “is a side elevation of [Kurkjian’s] nursing unit.” *Id.* at 1:25–26. In particular, Figure 1 depicts nursing bottle 10 with threads formed near its top end. *Id.* at 1:41–43. Flexible nipple 12 fits over the open end of the bottle and includes neck 13 and annular flange 14. *Id.* at 1:45–49. Flange 14 is provided with venting aperture 15 and is integral with the body portion of the nipple. *Id.* at 1:49–52.

3. Claim 21

a. Petitioner's Contentions

Petitioner contends that Ishimaru renders a drinking vessel with an artificial nipple obvious. Pet. 30 (citing Ex. 1005 ¶¶ 362–365; Ex. 1008 ¶¶ 1–13, 43). Petitioner contends that “*Ishimaru* teaches ‘the artificial nipple [] is mounted on a feeding bottle containing, for example, milk.’” Pet. 33 (citing Ex. 1008 ¶ 43, *see also id.* ¶¶ 37, 54). Petitioner contends that “*Ishimaru*’s cover assembly further includes an artificial nipple 10 with an ‘opening 121,’ out of which opening milk may spurt and ‘be led in the direction of the epiglottis 26.’” Pet. 35 (citing Ex. 1008 ¶ 3). According to Petitioner, this “describes a mouthpiece which allows liquid, e.g., milk, to flow through the nipple to an aperture.” Pet. 35 (citing Ex. 1005 ¶ 380). Petitioner contends that Ishimaru’s figures “disclose at least the teat portion of the nipple extending into the baby’s mouth for feeding.” Pet. 34 (citing Ex. 1008, Figs. 5–9, 20); *id.* at 37 (Ishimaru disclosing “an infant ‘biting’ a region of the mouthpiece with its upper palate.” (citing Ex. 1008 ¶¶ 3, 44, 47, Figs. 5, 8, 20; Ex. 1005 ¶¶ 392–398)).

Petitioner contends that “*Ishimaru* discloses that the nipple further includes a flex region, as shown by the thin-walled portions 122 and inner surfaces 123 of the nipple, which are designed to be flexible.” Pet. 36 (citing Ex. 1008 ¶ 41, Fig. 1). Petitioner contends that Ishimaru teaches the thin-walled portions to elongate and thereby constituting a flex region. Pet. 36 (citing Ex. 1008 ¶ 46; Ex. 1005 ¶¶ 388–389).

Petitioner contends that “*Ishimaru* discloses ‘a flange portion for connecting to a feeding bottle main body’ which is part of the ‘base portion 112.’” Pet. 38 (citing Ex. 1008, Fig. 1; Ex. 1005 ¶ 399). Petitioner contends

that Ishimaru's Figure 1 teaches “using a detachable feeding bottle mounting cap (not shown in the figure), which is used when mounting the artificial nipple 200 to the feeding bottle,’ . . . which allows for easy separation and cleaning.” Pet. 39–40 (citing Ex. 1008 ¶ 54, Fig. 1; Ex. 1005 ¶¶ 405-411).

Petitioner acknowledges that Ishimaru does not explicitly disclose a container but finds that attaching a nipple to a vessel is suggested by Ishimaru and that vessels with multiple circumferences are taught by Kurkjian. Pet. 31 (citing Ex. 1005 ¶ 368; Ex. 1009, 1:1–10). Petitioner relies on Kurkjian for teaching that a nipple can be secured to a bottle. *Id.* (citing Ex. 1009, 3:42–47, Fig. 6).

Petitioner concludes that a POSA would have been motivated to design an artificial nipple that has a “shape similar to a mother's breast and nipple.” Pet. 41 (citing Ex. 1005 ¶ 444; Ex. 1008 ¶¶ 5, 44). Petitioner concludes that “[s]uch a design would represent a more domed, smoothly curved shape that more closely resembles a mother's breast.” *Id.* “A POSA would be motivated to modify or combine the nipples of *Ishimaru* with one [or] more of the nipple embodiments of *Kurkjian* because they all teach analogous solutions for, and describe the benefits of, realistic, human-like nipples with air vents and collars to provide a durable design that relieves negative pressure in the nipple.” Pet. 24 (citing Ex. 1005 ¶¶ 355–356; Ex. 1009, 2:35–49, 2:54–3:10; Ex. 1008 ¶¶ 5, 19, 48, 61).

b. Patent Owner's Contentions

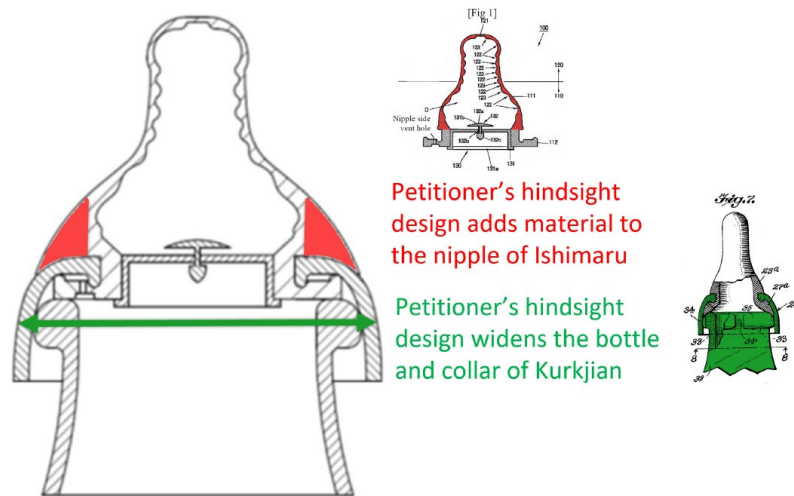
Patent Owner argues that the Petition fails to establish that the combination of references renders obvious the limitation of claim element 21(H) reciting “wherein the collar and the lower portion of the nipple

together define a downward domed shape” that extends outwardly and downwardly from the flex region of the nipple towards a widest circumferential edge of the collar. Prelim. Resp. 21. Patent Owner contends that “[t]he proposed construction requires a ‘wide’ structure ‘with an arc-shaped cross-sectional profile’ because that is what a human breast looks like, and it is also what the ’244 Patent illustrates.” *Id.* at 23 (citing Ex. 1003, 4:3–5 Fig. 4; Ex. 1017, 18).

Patent Owner argues that Petitioner has not provided “argument and evidence as to how the prior art applies to the construed term ‘domed shape.’” Prelim. Resp. 26. Patent Owner contends that “Ishimaru’s ‘elongation portion’ and other developments toward a more breast-like bottle feeding solution concern only the nipple” and says nothing at all about how the collar secures the nipple to the bottle. *Id.* at 27 (citing Ex. 1008 ¶¶ 41, 54, Fig. 1). Patent Owner contends that Kurkjian solves “how to secure a nipple to a bottle using a retaining cap (or ‘collar’) that allows air intake and prevents the nipple from collapsing during use.” *Id.* at 28 (citing Ex. 1009, 1:1–15). Patent Owner contends that Petitioner never explains “how Kurkjian’s narrow nipple and collar shapes are ‘domed’ under the parties’ respective constructions.” Prelim. Resp. 29. Patent Owner contends that Petitioner uses hindsight in arriving at the conclusion that the combination of the prior art would have rendered the claims obvious. Prelim. Resp. 31.

According to Patent Owner, “[t]he Petition provides no explanation at all as to why or how the POSITA would have arrived at the specific designs Petitioner proposes for the Ishimaru-Kurkjian” combination. Prelim. Resp. 33. Patent Owner contends that Petitioner’s hindsight design adds material to the nipple of Ishimaru and widens the bottle collar of Kurkjian. Prelim. Resp. 34. Patent Owner’s annotation of Petitioner’s figure based on

the combined teachings of Ishimaru and Kurkjian is reproduced below
(Prelim. Resp. 34):

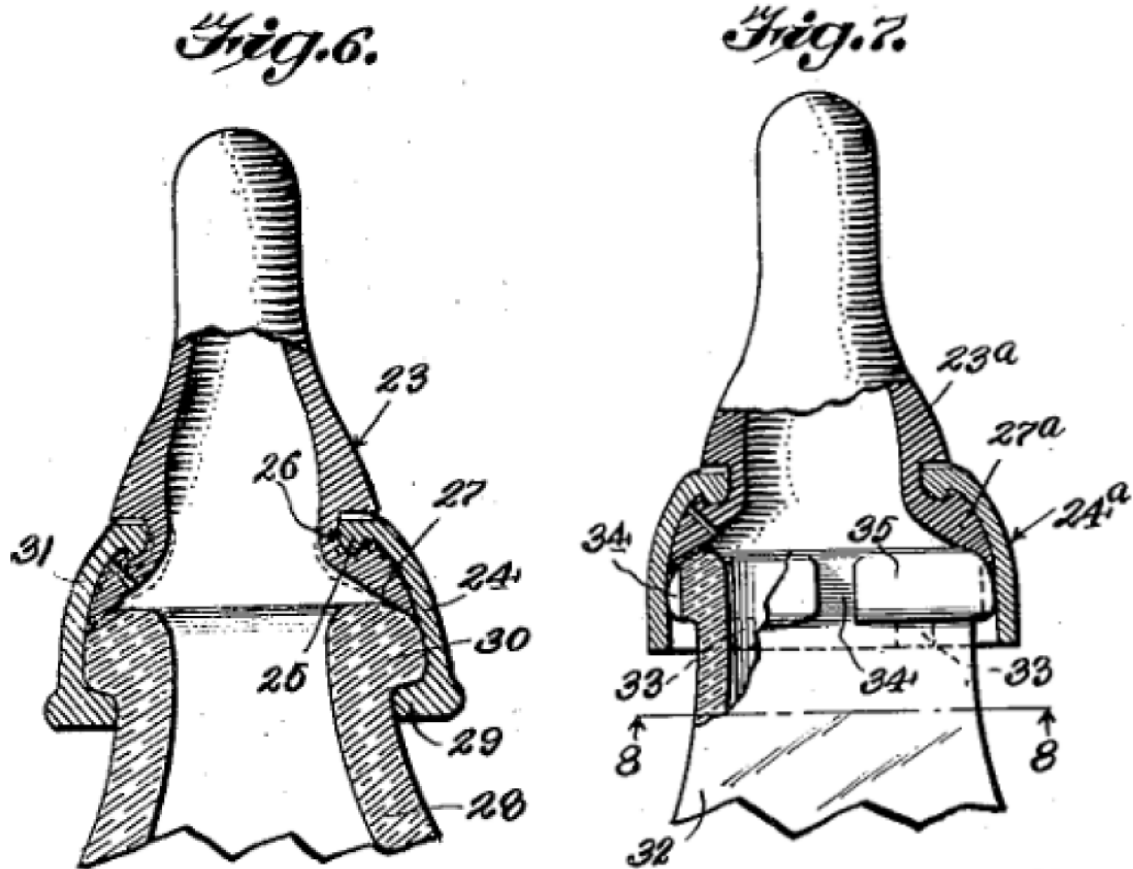


bowl-shaped nipple trunk 110 equivalent to a mother's breast and a teat portion 120 equivalent to a mother's nipple, which is connected to the nipple trunk 110.” *Id.* ¶ 37. Ishimaru explains that “the boundary between the thin-walled portion 122 [as shown in Fig. 1 (reproduced above *II.E.1*)] and the inner surface of the artificial nipple 123 forms a gentle wave shape. . . . Therefore, the artificial nipple 100 of this embodiment elongates in the same way as the mother's nipple.” *Id.* ¶ 48.

Ishimaru teaches that “[c]onventional artificial nipples are mounted to feeding bottles, for example, and are used for infants, etc. to drink milk or other liquids contained in the feeding bottles. . . . [T]he artificial nipple [] is made of silicone rubber, and has a hollow portion [] inside which milk or other liquids flow from a feeding bottle or the like.” Ex. 1008 ¶ 2. Ishimaru teaches that instead of using an adhesive to secure the nipple to the bottle, the nipple “can also be fixed using a detachable feeding bottle mounting cap . . . , which is used when mounting the artificial nipple 200 to the feeding bottle.” Ex. 1008 ¶ 54. Ishimaru explains that the nipple has “a flange portion for connecting to a feeding bottle main body.” *Id.* ¶ 37. Ishimaru, therefore, teaches that nipples can be mounted to feeding bottles. *Id.* ¶¶ 2, 54.

Petitioner acknowledges, and we agree, that Ishimaru does not explicitly disclose a bottle with varying internal circumference or a collar to attach the nipple to the bottle. Pet. 31. Petitioner relies on Kurkjian for teaching a bottle and mounting collar.

Figures 6 and 7 of Kurkjian are reproduced below:



Figures 6 and 7 each shows a vertical section of a nursing unit. Figure 6 shows “cap 24 may be formed of soft rubber and consists of a conical body of a thimble like structure. The cap 24 is provided with a bead 25 adjacent the central aperture 26 through which the nipple 23 extends, the bead portion gripping the flange 21 of the nipple 23 in a manner similar to . . . Figure 1 [shown above *III.E.2*].” Ex. 1009, 3:35–41; Ex. 1005 ¶ 357 (“*Kurkjian* discloses a securing cap that forms a downwardly domed shape with the nipple of *Kurkjian* that a POSA would recognize more closely simulates the rounded appearance of a human breast.”). Figure 7 shows that “the cap 24a is preferably formed of hard or vulcanized rubber, bakelite, or other similar material. This cap 24a may be secured in any suitable or desired manner to the neck, or to the bottle 32.” Ex. 1009, 3:55–59. *Kurkjian* teaches that

“[t]he outer face of the cap 24 preferably *conforms to the contour of the nipple 23 and constitutes a continuation thereof* to provide a streamline type connection between the nipple 23 and the bottle 28.” Ex. 1009, 3:41–46 (emphasis added), *see also id.* at 2:16–20 (“Another object of this invention is the production of a nursing unit wherein a nipple retaining cap is constructed in a manner as to present a *streamline type of connection* between the bottle and the nipple.” (emphasis added)).

Patent Owner contends that the combined references (i) lack a nipple and collar having a downward dome shape, and (ii) that Petitioner’s hindsight reasoning adds material to Ishimaru’s nipple but provides no explanation of why a POSA would have arrived at that particular design. We address Patent Owner’s contentions below.

(i) Domed Shape

We are not persuaded by Patent Owner’s repeated arguments that Kurkjian is a narrow nipple and bottle design and thereby cannot meet the dome shaped limitation as recited in claim element 21(H) (Prelim. Resp. 29, 34, 38); and that Petitioner has not provided “argument and evidence as to how the prior art applies to the construed term ‘domed shape.’” *See* Prelim. Resp. 26.

Petitioner identifies that Kurkjian has a nipple and collar design where “the edge of the collar that has the widest circumference” and a sloping outer contour, thereby, meeting the domed shape limitation. Pet. 41 (citing Ex. 1005 ¶ 415). Changes in the size and proportion do not render a product patentable unless it performs differently. *See In re Rose*, 220 F.2d 459, 463 (CCPA 1955) (Claims directed to a lumber package “of appreciable size and weight [] requiring handling by a lift truck” were held unpatentable over

prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.).

The '244 patent Specification does not define “wide” but suggests that the base portion of the teat be shaped like a breast. Ex. 1003, 4:3–5 (“The shape of the teat is also similar to the human breast, the base portion 116 being shaped like a breast and having a wide, domed configuration.”), *see also id.* at 7:17, 8:19. Suggesting that the design is intended to be shaped like a natural breast says nothing about the requisite width of the dome because breasts come in all shapes and sizes. Increasing the diameter of Kurkjian’s bottle and corresponding nipple and collar would not be expected to change the function of the feeding bottle.

We are not persuaded by Patent Owner’s contention that the combination of nipple and collar as suggested by Petitioner based on the teachings of Ishimaru and Kurkjian lacks a downward dome shape. *See* Prelim. Resp. 26–31. As explained above, we construe “domed shape” to mean “wide circular bottom with an arc-shaped cross-sectional profile.” *See above III.C.4.* Petitioner argues, and we agree, that Kurkjian’s nipple collar design already suggests a downward dome shape. Pet 40–41 (citing Ex. 1009, 3:42–47, Figure 6; Ex. 1005 ¶¶ 411–415). Petitioner explains that “*Kurjian* describes its ‘securing cap’ as having an outer face that ‘conforms to the contour of the nipple and constitutes a continuation thereof to provide a streamline type connection between the nipple 23 and the bottle 28,’ and accordingly is shown in Figure 6 [] as having a sloping outer contour, that together with the nipple, define a downward domed shape.” Pet. 40 (citing Ex. 1009, 3:42–47, Figure 6) (emphasis omitted). Therefore, Patent Owner’s

argument that Petitioner has not sufficiently articulated how the references map the construed term for “dome shaped” is not persuasive.

(ii) Hindsight

Patent Owner argues that Petitioner is filling gaps and “provides no explanation at all as to why or how the POSITA would have arrived at the specific designs Petitioner proposes for the Ishimaru-Kurkjian” combination. Prelim. Resp. 33.

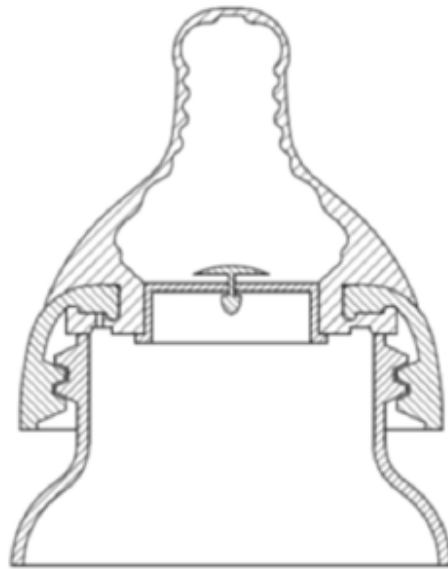
We do not find Patent Owner’s hindsight argument persuasive. While we are fully aware that hindsight bias often plagues determinations of obviousness, *Graham*, 383 U.S. at 36, we are also mindful that the Supreme Court has clearly stated that the “combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007).

Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant’s disclosure, such a reconstruction is proper.

In re McLaughlin, 443 F.2d 1392, 1395 (CCPA 1971).

According to Petitioner, Kurkjian “discloses a securing and ret[ra]ining cap that connects the nipple to the vessel of *Kurkjian*. The ‘outer face of the cap 24 [FIG. 1 of Ishimaru] preferably conforms to the contour of the nipple 23 and constitutes a continuation thereof to provide a streamline type connection between the nipple 23 and the bottle 28.’” Pet. 25–26 (citing Ex. 1009, 1:48–53, Fig. 6). Mr. Silver testifies that in order to create a nipple that is more like the human breast, “[a] POSA would understand this to include a wide, dome-shaped that would appear to a baby or child to imitate

a human breast. A POSA reviewing *Ishimaru* and intending to design a breast-like structure would understand that an abrupt change in slope between the nipple and collar would not optimally imitate the human breast.” Ex. 1005 ¶ 413. Petitioner proposes that a combination of *Ishimaru* and *Kurkjian* could result in a feeding vessel having a nipple and collar as shown in the figure below:



The figure combines elements from *Ishimaru*’s nipple with *Kurkjian*’s collar. Pet. 51; Ex. 1005 ¶¶ 351–353. Petitioner’s combination adds the nipple of *Ishimaru* to the collar of *Kurkjian* to arrive at a structure that has a wide bottom with an arc-shaped profile. *See* Pet. 30, 40–41.

Petitioner’s drawing showing *Ishimaru*’s nipple and *Kurkjian*’s collar provides a streamlined transition which is taught by *Kurkjian* as being desirable. *See* Pet. 30 (citing Ex. 1005 ¶ 353 (“[T]his design is largely the breast-like nipple of *Ishimaru* with its stated advantages secured to an ergonomic vessel of *Kurkjian* with its associated teachings regarding collar shape for attaching a nipple to the ergonomic vessel, with its stated

advantages, working as expected.”)); *id.* at 40 (“conforms to the contour of the nipple”).

Kurkjian suggests that the outer face of the cap (i.e., collar) conforms to the contour of the nipple forming a streamline connection. Ex. 1009, 3:41–46 (“The outer face of the cap 24 preferably conforms to the contour of the nipple 23 and constitutes a continuation thereof to provide a streamline type connection between the nipple 23 and the bottle 28.”); *see also id.* at 1:16–20 (“a nipple retaining cap is constructed in a manner as to present a streamline type of connection between the bottle and the nipple”); Pet. 40 (describing Kurkjian Figure 6 “as having a sloping outer contour, that together with the nipple, define a downward domed shape”); Ex. 1005 ¶¶ 411–415.

Based on these disclosures in Kurkjian, we agree with Petitioner that Kurkjian reasonably suggests a downward dome shape between nipple and collar and provides motivation to ensure that the transition between the collar and nipple follows the same contour as the nipple.

The ’244 patent Specification does not define “wide” but suggests that the base portion of the teat be shaped like a breast. Ex. 1003, 4:3–5. Mr. Silver testifies that “[a] vessel with multiple diameters would optimize vessel volume, user ergonomics, and aesthetic appearance, while also facilitating attachment of a wider, more breast-like nipple though a wide vessel mouth.” Ex. 1005 ¶¶ 357–359. Petitioner’s reason for providing a wider bottle, therefore, is for improving user ergonomics. Pet. 28 (“[I]ncorporating *Kurkjian*’s design with varying diameters to improve the nipple and vessel design would result in a vessel with multiple diameters that would optimize vessel volume, user ergonomics, and aesthetic

appearance, while also facilitating attachment of a wider, more breast-like nipple though a wide vessel mouth.”).

Accordingly, we are not persuaded by Patent Owner’s contention that there is no explanation or support for making the specific designs proposed by Petitioner.

d. Summary of Claim 21

Upon review of the parties’ arguments and supporting evidence, we determine on this record that Petitioner has shown a reasonable likelihood that claim 21 would have been obvious over Ishimaru and Kurkjian.

4. Dependent Claim 24

Claim 24 depends from claim 21 and further recites, “wherein the cover assembly further comprises an air vent apart from the mouthpiece.” Ex. 1003, 8:25–27.

Petitioner submits that “*Ishimaru* discloses the cover assembly having ‘an air vent apart from the mouthpiece,’ as illustrated by the ‘nipple side vent hole’ at the base of the nipple trunk, which vent hole is separate from the teat opening 121.” Pet. 42 (citing Ex. 1008 ¶ 37; Ex. 1005 ¶¶ 422–427).

Patent Owner does not specifically address this claim.

At this stage of the proceeding, Petitioner has shown a reasonable likelihood that the combination of Ishimaru and Kurkjian satisfies the limitation recited in dependent claim 24.

5. Dependent Claim 26

Claim 26 depends from claim 21 and further recites, “wherein the mouthpiece is located in the center of the nipple.” Ex. 1003, 8:30–31.

Petitioner submits that “*Ishimaru* discloses the mouthpiece being located in the center of the nipple.” Pet. 43 (citing Ex. 1008, Figs. 1, 3, 4, 13; 1005 ¶¶ 428–432).

Patent Owner does not specifically address this claim.

At this stage of the proceeding, Petitioner has shown a reasonable likelihood that the combination of *Ishimaru* and *Kurkjian* satisfies the limitation recited in dependent claim 26.

6. Dependent Claim 27

Claim 27 depends from claim 21 and further recites, “wherein the teat portion comprises a resilient material.” Ex. 1003, 8:32–33.

Petitioner submits that *Ishimaru* teaches an artificial nipple made of silicone rubber, and the *Kurkjian* teaches nipples made of flexible material such as rubber. Pet. 44 (citing Ex. 1008 ¶ 2; Ex. 1009, 1:50–54; Ex. 1005 ¶¶ 433–437). Petitioner concludes that a “POSA would consider silicone rubber to represent a resilient material.” Pet. 44 (citing Ex. 1005 ¶ 434).

Patent Owner does not specifically address this claim.

At this stage of the proceeding, Petitioner has shown a reasonable likelihood that the combination of *Ishimaru* and *Kurkjian* satisfies the limitation recited in dependent claim 27.

7. Summary of Ground I

At this stage of the proceeding, Petitioner has shown a reasonable likelihood that *Ishimaru*, as modified based on the teachings of *Kurkjian*, would have rendered claims 21, 24, 26, and 27 obvious.

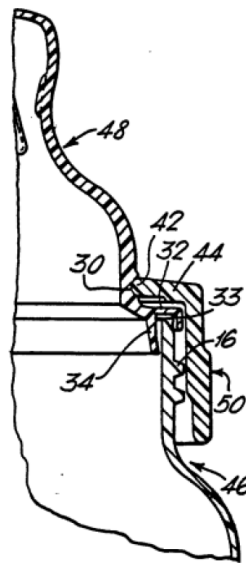
F. Ground II: Ishimaru and Atkin

Petitioner submits that claims 21–24, 26, and 27 are unpatentable as obvious over Ishimaru in view of Atkin. Pet. 44–60.

1. Atkin (Ex. 1010)

Atkin is a European patent application titled “Improvements in baby feed bottles.” Ex. 1010, code (54). Atkin purports to disclose “a baby feed bottle and also . . . a baby feed bottle combination which comprises bottle, teat and teat fitting cap and may also include other components such as a dormal cap.” *Id.* 1:3–7.

Figure 7A and 7B of Atkin is reproduced below:



“Figure 7A shows the annular cap 50 (which carries the teat 48) screwed loosely on to the bottle neck [(46)]. The teat flange 32 and inner depending lip 34 are undistorted, with the lip 34 spaced so with small radial clearance within the neck of the bottle.” Ex. 1010, 5:57–62. “[T]he cap has an annular end face which at its internal peripheral rim seats in an external annular groove in the teat to locate and hold said teat relative to the cap.” *Id.* at 2:29–32. “[T]he undersurface of the external annular flange is formed with

at least one recess adapted to permit the passage of air from the exterior to the interior of a baby feed bottle when fitted to the rim of the neck of said bottle.” *Id.* at 4:1–5.

Atkin’s “preferred bottle has a capacity in the range 30 to 35 ml per cm height The preferred dimensions are a mean diameter of not less than 6 cm for the main cylindrical portion and a neck portion diameter of not less than 4.25 cm. . . . [Because the bottle] is shorter and squatter than known bottles[, it] therefore sits more stably when stood on its base, and is less liable to being tipped over.” *Id.* at 3:10–10.

Most importantly, “a larger diameter neck [in Atkin’s bottle] enables the use of a larger teat, enabling use of the bottle by the baby more closely resembling natural feeding.” *Id.* at 3:24–27. Atkin further describes that “[t]he use of silicone rubber as the teat material is preferred . . . , because whereas a teat of conventional rubber tends to ‘grow’ as it ages, a silicon rubber teat has a much reduced tendency to do so with the result that its critical shaping and dimensioning is retained throughout the life of the teat.” *Id.* at 6:34–41.

2. Claim 21

a. Petitioner’s Contentions

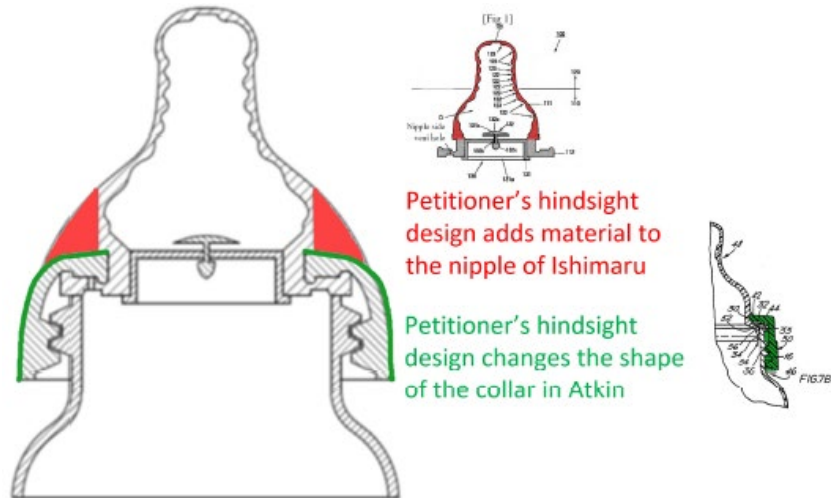
Petitioner provides a detailed explanation of how elements 21(pre)–21(G) are taught by the combination of Ishimaru and Atkin. Pet. 51–55. Petitioner acknowledges that Ishimaru does not explicitly disclose a nipple and collar that together “define a downward dome shape” as recited in claim element 21(H). *See* Pet. 55. Petitioner, however, argues that such a modification would have been obvious because it “would further advance

Ishimaru’s goal of designing a nipple similar to a human breast (e.g., one with a general domed shape).” Pet. 56 (citing Ex. 1005 ¶¶ 498–499).

Petitioner relies on Atkin for teaching a baby bottle with a larger diameter neck, explaining that “a larger diameter neck enables the use of a larger teat, enabling use of the bottle by the baby more closely resembling natural feeding.” Pet. 56 (citing Ex. 1010, 3:10–27) (emphasis removed). In other words, Petitioner’s position is that a larger teat would more closely resemble a natural breast. “Such a design would represent a more domed, smoothly curved shape that more closely resembles a mother’s breast.” *Id.* at 57.

b. Patent Owner’s Contentions

Patent Owner contends that “Atkin lacks Kurkjian’s teaching to provide a ‘streamlined’ nipple-collar assembly where the contour of the collar matches that of the nipple.” Prelim. Resp. 39. Specifically, “on the right, Atkin’s collar has vertical sides and is not even remotely ‘domed’—it certainly does not form an arc-shape or a hemisphere in profile.” *Id.* at 40. Patent Owner contends that “Ishimaru is particularly concerned with achieving a specific movement pattern while the infant is sucking on the nipple Petitioner’s addition of peripheral wings in this elongation region would plainly impact the movement of Ishimaru’s nipple by changing one or more of the thin-walled portions into thick-walled portions.” *Id.* at 41. Patent Owner’s annotated figure of Petitioner’s proposed combination of Ishimaru and Atkin is reproduced below:



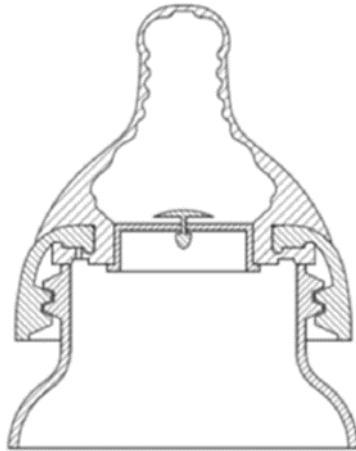
The figure above is a copy of Petitioner's proposed figure (Pet. 51) as annotated by Patent Owner. Prelim. Resp. 35 (citing Ex. 1005 ¶ 353). The figure shows in red the added material in Petitioner's drawing from Ishimaru's nipple and depicts in green the widening of Atkin's bottle and collar. *Id.*

3. Analysis

On the current record, the dispute between the parties is whether the combination of Ishimaru and Atkin would have rendered obvious the limitation as recited in element 21(H) "wherein the collar and the lower portion of the nipple together define a downward domed shape that extends outwardly and downwardly from the flex region of the nipple towards a widest circumferential edge of the collar." Ex. 1003, 8:16–20.

Patent Owner argues that the proposed combination does not satisfy a nipple and collar having a downward "dome shape" as recited in claim 21. *See* Prelim. Resp. 39–41. At this stage of the proceeding, we agree with Patent Owner.

Petitioner's proposed figure based on the teachings on Ishimaru and Atkin is reproduced below:



The figure shows a nipple, collar, bottle combination. Pet. 51 (citing Ex. 1005 ¶ 439). We understand why Petitioner desires to combine these embodiments—to fully address the “dome shaped” claim limitation. What is not clear to us, however, is why a skilled artisan would have made the particular modification to Atkin’s collar. Mr. Silver testifies that “a POSA reading Ishimaru in view of Atkin would be motivated to design a continuous, downward dome shape between the lower portion of the nipple and the annular cap.” Ex. 1005, 498. Just because an artisan could make the modification as proposed does not provide us with a reason to do so.

Petitioner appears to rely on “design choice” (Pet. 57), yet this reasoning does not appear to be supported by rational underpinnings. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), cited with approval in *KSR*, 550 U.S. at 418 (“[R]ejections on obvious grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”). Specifically, widening Ishimaru’s teat to fit onto Atkin’s bottle neck does not explain why a POSA would have additionally changed the shape of Atkin’s collar at the same time. Pet. 56 (“[A] larger diameter

neck enables the use of a larger teat, enabling use of the bottle by the baby more closely resembling natural feeding.” (emphasis removed)).

We understand that the parties have not had the opportunity to fully brief this issue, and the parties should understand that our opinion on this matter is merely preliminary, and that we may change our position once briefing is complete.

At this stage of the proceeding, however, Petitioner has not shown a reasonable likelihood that Atkin teaches a “collar and the lower portion of the nipple together define a downward domed shape that extends outwardly and downwardly from the flex region of the nipple towards a widest circumferential edge of the collar.”

a. Conclusion

Petitioner, therefore, has not shown a reasonable likelihood that independent claim 21, and dependent claims 22–24, 26, and 27, would have been obvious over Ishimaru and Atkin.

IV. CONCLUSION

After considering the evidence and arguments presented in the Petition and Preliminary Response, we determine that the information presented shows a reasonable likelihood that Petitioner would prevail in establishing that claims 21, 24, 26, and 27 would have been obvious over Ishimaru and Kurkjian.

Because we institute *inter partes* review of the Challenged Claims under Ground I, we also institute *inter partes* review of the Challenged Claims under Ground II challenging claims 21–24, 26, and 27 based on the combination of Ishimaru and Atkin. Patent Trial and Appeal Board

Consolidated Trial Practice Guide⁵ 5 (“In instituting a trial, the Board will either (1) institute as to all claims challenged in the petition and on all grounds in the petition, or (2) institute on no claims and deny institution.”); 37 CFR 42.108(a).

V. ORDER

Accordingly, it is

ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted for claims 21–24, 26, and 27 of the ’244 patent on the unpatentability grounds asserted in the Petition; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial, which commences on the entry date of this decision.

⁵ Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

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Patent 11,207,244 B2

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