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Paper 9
Entered: May 30, 2014

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 IPR2014-00169
Patent 8,579,876 B2

Before TONI. R. SCHEINER, LORA M. GREEN, and
DENISE M. POTHIER, *Administrative Patent Judges*.

SCHEINER, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

First Quality Baby Products, LLC (“Petitioner”) filed a Petition (Paper 1, “Pet.”) on November 19, 2013, requesting an *inter partes* review of claims 15-22 of U.S. Patent No. 8,579,876 (Ex. 1001, “the ’876 patent”). Kimberly-Clark Worldwide, Inc. (“Patent Owner”) filed a Preliminary Response (Paper 6, “Prelim. Resp.”) on March 5, 2014. We have jurisdiction under 35 U.S.C. § 314.

The standard for instituting an *inter partes* review is set forth in 35 U.S.C. § 314(a), which provides as follows:

THRESHOLD.—The Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 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.

On consideration of the information presented in the Petition and the Preliminary Response, we are persuaded that there is a reasonable likelihood that Petitioner would prevail in showing that claims 15-22 of the ’876 patent are unpatentable. Accordingly, we institute an *inter partes* review of those claims.

A. Related Proceedings

The parties do not identify any judicial or administrative matters that would affect, or be affected by, a decision in this proceeding. Pet. 6; Paper 5.

B. The Asserted Grounds of Unpatentability

Petitioner asserts the challenged claims are unpatentable based on ten grounds, as follows. Pet. 8-9.

Reference(s)	Basis	Claims Challenged
Schmitz ¹ and Toyo ²	§ 103(a)	15-20 and 22
Widlund ³ and Toyo	§ 103(a)	15-20 and 22
Fletcher ⁴ and Toyo	§ 103(a)	15-22
Toyo and Widlund	§ 103(a)	15-20 and 22
Toyo and Schmitz	§ 103(a)	15-20 and 22
Toyo and Fletcher	§ 103(a)	15-22
Schmitz, Toyo, and Kuske ⁵	§ 103(a)	21
Widlund, Toyo, and Kuske	§ 103(a)	21
Toyo, Schmitz, and Kuske	§ 103(a)	21
Toyo, Widlund, and Kuske	§ 103(a)	21

¹ US Patent No. 5,779,831 (issued July 14, 1998) (Ex. 1002).

² JP 3021190 (published Feb. 16, 1996) (Ex. 1005) (a certified English translation begins on page 12 of the exhibit).

³ WO 95/27462 (published Oct. 19, 1995) (Ex. 1003).

⁴ WO 00/37009 (published June 29, 2000) (Ex. 1004).

⁵ WO 97/49618 (published Dec. 31, 1997) (Ex. 1007).

C. The '876 Patent

The '876 patent, titled “Tucked Fastener for Improved Fastener Performance,” relates to pants-like absorbent garments, e.g., children’s diapers and training pants, with refastenable side seams. Ex. 1001, 1:14-15; 2:2-4.

The '876 patent explains that portions of these garments are typically folded, or tucked, “to create a more compact orientation” for packaging, but “fastener performance can be compromised when a resilient fastening component in a refastenable seam is creased during processing or compression in preparation for or during packaging.” *Id.* at 7:50-52; 8:35-38.

Figure 18 of the '876 patent is reproduced below.

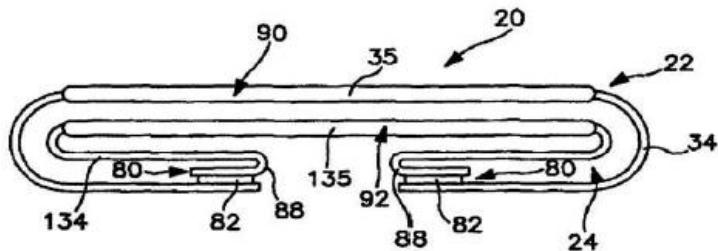


FIG. 18

Figure 18 is a top view of the waist region of absorbent garment 20, showing front side panels 34 and back side panels 134 folded over back panel 135. As shown in the figure, each back side panel 134 has two folds, one at or near the edge of back panel 135, and another at or near the edge of fastening component 82; each front side panel 34 has only one fold. Ex. 1001, 17:56–18:10. In that configuration, refastenable seams 80 and fastening components 82 lie flat in a plane parallel to front waist region 90 and back waist region 92. *Id.*

According to the '876 patent, “[a] flat orientation of resilient fastening components in the tucked position prevents creases from occurring in the fastening components, thereby preserving the available fastener seam strength and making the fasteners less likely to disengage during product application and wear.” *Id.* at 7:62-67.

D. Illustrative Claims

Petitioner challenges claims 15-22 of the '876 patent. Claim 15 is the sole independent claim of the challenged claims. Claims 15 and 16, reproduced below, are illustrative.

15. A folded disposable absorbent garment comprising:
 - an absorbent chassis including a bodyside liner, an outer cover, and an absorbent assembly positioned between the bodyside liner and the outer cover, a front region, a back region, a crotch region extending between and interconnecting the front and back regions, a waist opening and a pair of leg openings, the front region having first and second front side panels, and the back region having first and second back side panels;
 - a first refastenable seam being defined by a resilient fastening component being releasably secured to a mating fastening component, the resilient fastening component being disposed on one of the first front side panel and the first back side panel and the mating fastening component being disposed on the other one of the first front side panel and the first back side panel, the first front side panel and the first back side panel being folded such that the first refastenable seam lies in a plane generally parallel to a plane in which at least a portion of the absorbent assembly lies; and

a second refastenable seam being defined by a resilient fastening component being releasably secured to a mating fastening component, the resilient fastening component being disposed on one of the second front side panel and the second back side panel and the mating fastening component being disposed on the other one of the second front side panel and the second back side panel, the second front side panel and the second back side panel being folded such that the second refastenable seam lies in a plane generally parallel to a plane in which at least a portion of the absorbent assembly lies and in substantially the same plane as the first refastenable seam.

16. The folded disposable absorbent garment of claim 15 wherein the resilient fastening component of the first refastenable seam is disposed on the first front side panel and the mating fastening component of the first refastenable [seam] is disposed on the first back side panel, the first back side panel being folded twice and the first front side panel being folded once, the resilient fastening component of the second refastenable seam being disposed on the second front side panel and the mating fastening component of the second refastenable seam being disposed on the second back side panel, the second refastenable seam overlying the absorbent assembly in the back region of the chassis, the second back side panel being folded twice and the second front side panel being folded once.

Ex. 1001, 20:45–21:23.

II. ANALYSIS

A. *Claim Construction*

In an *inter partes* review, claim terms in an unexpired patent are interpreted according to their broadest reasonable construction in light of the specification of

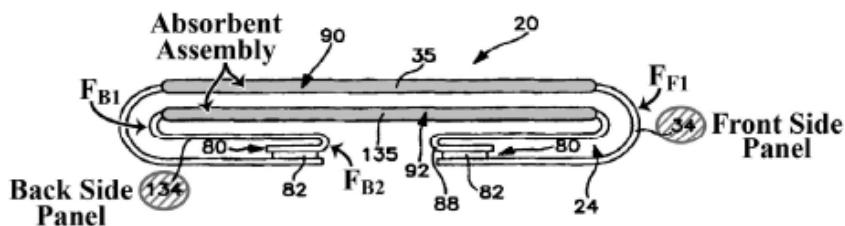
the patent in which they appear. 37 C.F.R. § 42.100(b); Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,766 (Aug. 14, 2012). Under that standard, claim terms are given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

Claim 16 recites “the first back side panel being folded twice and the first front side panel being folded once” and “the second back side panel being folded twice and the second front side panel being folded once.”

Petitioner proposes that those claim terms—which are identical, except that the first refers to the first front and back side panels, while the second refers to the second front and back side panels—“should be interpreted to mean ‘the front and back side panels each have a first fold where the side panels are folded over the absorbent assembly, and the back side panel has a second fold different from the first fold in the back side panel.’” Pet. 15.⁶

Petitioner provides an annotated version of Figure 18, which illustrates graphically Petitioner’s interpretation of the relevant folds in back side panels 134 and front side panels 34 of diaper 20. Figure 18, as annotated by Petitioner, is reproduced below.

⁶ Patent Owner has not proposed a construction for either claim term at this point in the proceeding.



**FIG. 18
ANNOTATED**

Annotated Figure 18 shows two folds, labeled F_{B1} , F_{B2} by Petitioner, in each back side panel 134, and one fold F_{F1} in each back side panel 34. Pet. 11-12.

Claim 16 depends from claim 15, which requires that “the first refastenable seam lies in a plane generally parallel to a plane in which at least a portion of the absorbent assembly lies,” and that “the second refastenable seam lies in a plane generally parallel to a plane in which at least a portion of the absorbent assembly lies.” The Specification, in describing Figure 18, indicates that the requisite parallel configuration is achieved by folding the front side panels twice, and the back side panels once, or vice versa. Ex. 1001, 17:56–18:10.

Accordingly, on this record, we determine that Petitioner’s proposed interpretation of “the first back side panel being folded twice and the first front side panel being folded once” as meaning that “the front and back side panels each have a first fold where the side panels are folded over the absorbent assembly, and the back side panel has a second fold different from the first fold in the back side panel” is the broadest reasonable construction of the claim term in light of the Specification.

We determine that no express claim construction is necessary for any other claim term for purposes of this decision.

B. Obviousness over Widlund and Toyo

Petitioner asserts that the folded absorbent garment of claims 15-20 and 22 is unpatentable under 35 U.S.C. § 103, given the combined disclosures of Widlund and Toyo. Essentially, Petitioner asserts that it would have been obvious for one of ordinary skill in the art to fold Widlund's absorbent garment as instructed by Toyo, resulting in a garment meeting all the limitations of the claims. Pet. 26-30.

Petitioner presents a claim chart identifying where the individual features of the challenged claims can be found in the cited references. Pet. 30-33. In relevant part, Widlund discloses "a pants-type diaper," depicted in Figure 5, reproduced below.

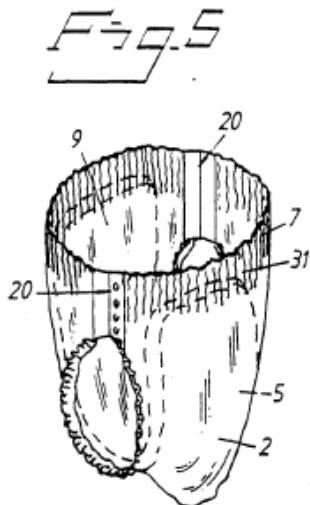
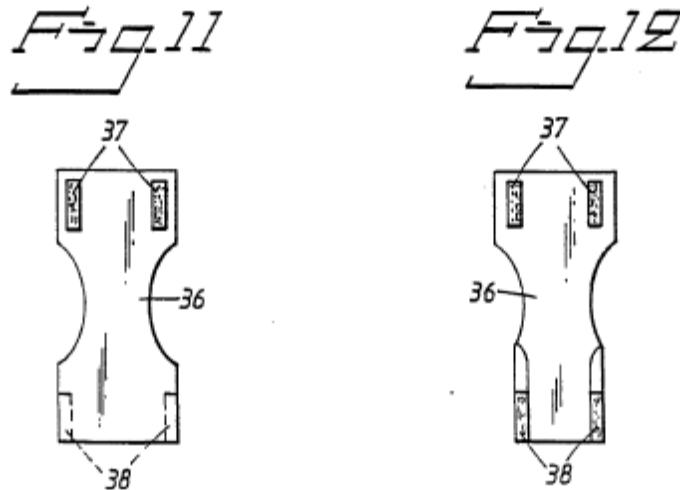


Figure 5 of Widlund is a perspective view of pants-type diaper 20 comprising absorbent body 5 enclosed between inner and outer casing sheets 9 and 2, respectively. Ex. 1003, 8:34 – 9:1. As shown in the figure, "the front and rear side parts of the pant diaper are joined together by means of a releasable and refastenable fastener means 20." *Id.* at 10:18-20.

Figures 11 and 12 of Widlund are reproduced below.



Figures 11 and 12 of Widlund “illustrate schematically a pants-type diaper blank 36 in which . . . a fastener element is comprised of two mutually coacting parts 37, 38.” Ex. 1003, 14:30-33. Figures 11 and 12 show that parts 37 “are fastened respectively to the inner surface of the blank [36] at the front side parts thereof, while the other part[s] 38 of the fastener elements . . . [are] fastened to the outer surface of the blank at the rear side parts thereof.” *Id.* at 14:33-37.

Widlund additionally discloses:

In order to produce a finished pants-type diaper [e.g., the diaper shown in Figure 5] from a blank that has the configuration illustrated in Figure 11, those parts of the rear side parts of the blank 36 that contain the parts 38 of the fastener elements are folded against the inner surface of the blank, so as to provide a blank 36 having the configuration shown in Figure 12. The blank is then folded so that the front and the rear side parts thereof are placed edge-to-edge, and the coacting parts 37, 38 are pressed firmly against one another.

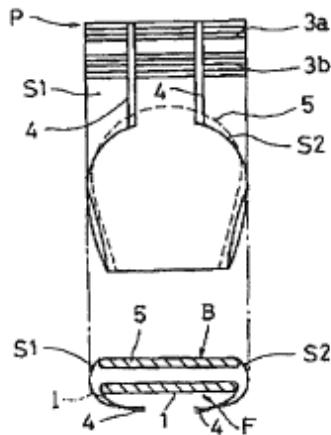
Id. at 15:6-15.

Widlund discloses that the finished diapers are “conveyed . . . to a packaging station in which they are packaged,” but does not provide any folding or packaging instructions.⁷ *Id.* at 7:34-35.

Toyo discloses disposable underpants, similar to Widlund’s pants-type diaper, except that “both side edges [of Toyo’s underpants] are adhered” permanently (Ex. 1005 ¶ 0002), rather than being releasable and refastenable. Toyo discloses a method of folding the disposable underpants “compactly into a rectangle” in preparation for packaging, so that “even when stacking a . . . number of disposable underpants, there is no abnormal bulging or protrusion, and a cubic package can be smoothly achieved.” Ex. 1005 ¶¶ 0002, 0018.

Figure 2 of Toyo is reproduced below.

Figure 2

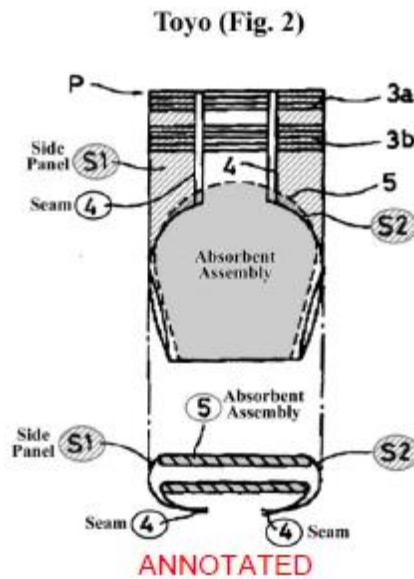


⁷ On this record, we are persuaded that Petitioner’s claim charts (Pet. 30-33) demonstrate that the limitations recited in dependent claims 17-20 and 22 are disclosed by Widlund.

Figure 2 of Toyo depicts an embodiment “wherein both selvages S1 and S2 of disposable underpants P are folded up towards the front of the front panel F.”

Ex. 1005 ¶ 0016. Alternatively, “selvages S1 and S2 can be folded to the outside of the back panel B of the underpants.” *Id.*

Petitioner asserts that “the refastenable training pant of Widlund has all of the elements of the absorbent garment of Claims 15-20 and 22, with the exception that the side panels are not folded over the absorbent assembly.” Pet. 27 (internal footnote omitted). Petitioner asserts, “[h]owever, in Toyo, the side panels S1 and S2 of the training pant P are folded such that the seams 4 are parallel to the absorbent assembly and lie in the same plane as each other, as shown” in Figure 2 of Toyo (*id.* at 27-28), reproduced below, as annotated by Petitioner.



Annotated Figure 2 of Toyo depicts side panels S1 and S2 folded over, and lying in a plane parallel to, the absorbent assembly of training pant P. Pet. 28.

Petitioner asserts that it would have been obvious for one of ordinary skill in the art to fold the side panels of Widlund's training pants over the absorbent assembly in preparation for packaging because "there were only 'a finite number of identified, predictable solutions' for positioning side panels of training pants in a package," and Toyo "recommends folding the side panels over the absorbent body" (*id.* at 29), to avoid "'protrusions' which cause the package of training pants to swell" (*id.* at 28). Petitioner further asserts that folding Widlund's training pants in that manner "will result in the 'refastenable' seams 20 being parallel to the absorbent assembly 5 and lying [in] the same plane as each other" (*id.* at 29), as recited in claim 15.

In addition, Petitioner argues "as shown . . . in Figure 12 of Widlund, the back side panels are folded over" before the refastenable seams are fastened, "and thus, include the 'first' fold of Claim 16." *Id.* Petitioner asserts that folding the side panels of Widlund's training pants over the absorbent assembly in preparation for packaging, as instructed by Toyo, will meet the limitations of claim 16, as "the front side panels will have a 'first' fold and the back side panel will have a 'second' fold located near the absorbent chassis." *Id.*

Patent Owner argues that two references "claim[ing] priority to the Widlund reference (Exhibit 1003)" and "includ[ing] the same subject matter" were submitted in an Information Disclosure Statement during prosecution of the application that issued as the '876 patent. Prelim. Resp. 5-6. In addition, Patent Owner argues that the '876 patent "discloses that absorbent garments having non-refastenable side panels were known to have the side panels tucked into the center

of the product for packaging purposes.” *Id.* at 7. Patent Owner argues, therefore, that Widlund and Toyo “disclose[] subject matter already considered by the Examiner during prosecution of the application that issued as the [’876] patent.” *Id.* at 5.

35 U.S.C. § 325(d) provides:

In determining whether to institute or order a proceeding under . . . chapter [32], chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

We decline to exercise our discretion under § 325(d) to deny the Petition merely because certain evidence advanced by the Petitioner was also before the Examiner during prosecution of the application that issued as the ’876 patent.

Patent Owner also argues that the ’876 patent “is directed to solving the problem of poor fastener performance” (Prelim. Resp. 7), but “[n]one of the references relied on by Petitioner discloses or even suggests that such a problem existed . . . nor do the references suggest a solution to such a problem or otherwise disclose a folding and packaging scheme that would inherently solve such a problem” (*id.* at 8). Patent Owner contends that “Petitioner fails . . . to explain or provide any evidence as to how the refastenable seams of Widlund would be anything other than creased . . . even if Widlund is tucked in the manner disclosed by Toyo.” *Id.* at 18.

Patent Owner’s arguments are not persuasive. On this record, Patent Owner has not explained why Petitioner’s rationale for combining the references is

flawed. It is well settled that “any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 420 (2007). As long as some suggestion to combine the elements is provided by the prior art as a whole, the law does not require that they be combined for the reason or advantage contemplated by the inventor. *In re Beattie*, 974 F.2d 1309, 1312 (Fed. Cir. 1992); *In re Kronig*, 539 F.2d 1300, 1304 (CCPA 1976). Thus, it is irrelevant that the references neither disclose nor address the problem of poor fastener performance.

Moreover, on this record, Patent Owner does not point to anything in Widlund to indicate that fastener elements 38 are folded or creased when the rear side parts of blank 36 are folded into the configuration shown in Figure 12 of Widlund. On the contrary, Figure 12 of Widlund appears to show a fold in blank 36 next to, but not in, fastener element 38. Nor does Patent Owner point to anything in Widlund to indicate that pressing co-acting parts 37, 38 together when forming blank 36 into a finished pants shape would fold or crease the fastener elements. Likewise, Patent Owner does not point to anything to indicate that the side seams of Toyo’s underpants do not lie flat, in a plane parallel to back panel B, when selvages S1 and S2 are folded over the outside of back panel B in preparation for packaging (as shown in Figure 2 of Toyo). Thus, on this record, Patent Owner has not explained why folding the “side parts” of Widlund’s assembled pants-type diaper in the manner disclosed by Toyo would not result in side seams that lie flat, in a plane parallel to the absorbent assembly, as required by the challenged claims.

Based on the information presented in the Petition, and Patent Owner's Preliminary Response, Petitioner has demonstrated a reasonable likelihood that it would prevail in showing challenged claims 15-20 and 22 are unpatentable over Widlund and Toyo.

C. Obviousness over Widlund, Toyo, and Kuske

Claim 21 requires a graphic on the outer cover of the disposable absorbent garment of claim 15. Petitioner acknowledges that neither Widlund nor Toyo discloses training pants with graphics. However, Petitioner asserts that it would have been obvious for one of ordinary skill in the art to include a graphic on the outer cover of Widlund's pants-type diaper because Kuske discloses it is desirable "to include aesthetically pleasing graphics on . . . children's training pant[s]." Pet. 58, 59.

On the present record, Petitioner has demonstrated a reasonable likelihood that it would prevail in showing challenged claim 21 is unpatentable over Widlund, Toyo, and Kuske.

D. Remaining Asserted Grounds of Unpatentability

Petitioner asserts the challenged claims are unpatentable based on eight additional grounds, listed above in Section I(B). We determine that these additional grounds are redundant in light of our determination that there is a reasonable likelihood that claims 15-22 of the '876 patent are unpatentable based on the grounds of unpatentability on which we institute an *inter partes* review. *See* 37 C.F.R. § 42.108(a).

III. CONCLUSION

For the foregoing reasons, we are persuaded that the Petition establishes a reasonable likelihood that Petitioner would prevail in showing claims 15-22 of the '876 patent are unpatentable under 35 U.S.C. § 103(a).

The Board has not made a final determination on the patentability of any challenged claim.

IV. ORDER

Accordingly, it is

ORDERED that pursuant to 35 U.S.C. § 314, an *inter partes* review of the '876 patent is hereby instituted as to the following claims and grounds:

Claims 15-20 and 22 under 35 U.S.C. § 103(a) as unpatentable over Widlund and Toyo; and

Claim 21 under 35 U.S.C. § 103(a) as unpatentable over Widlund, Toyo, and Kuske.

FURTHER ORDERED that no challenge other than that specifically granted above is authorized for the *inter partes* review; and

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

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