

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD D. MOSBACHER,
CHARLES P. KEUHN, JR.,
and
DUANE G. KRZYSIK,
Appellants

Appeal 2008-3695
Application 10/931,700¹
Technology Center 3700

Decided: August 06, 2008

Before CAROL A. SPIEGEL, ERIC GRIMES, and MARK NAGUMO,
Administrative Patent Judges.

SPIEGEL, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ Application 10/931,700, filed 1 September 2004, is said to be a continuation-in-part of application 10/836,610, filed 30 April 2004. The real party in interest is said to be KIMBERLY-CLARK WORLDWIDE, INC. (Appeal Brief under 37 C.F.R. § 41.37, filed 23 July 2007 (App. Br.), 2).

I. Statement of the Case

This is an appeal under 35 U.S.C. § 134 from a final rejection of claims 1-38, all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

The subject matter on appeal is directed to a diaper changing system comprising a diaper and a surface disinfectant secured to a common holder, and a method comprising delivering the system to a day care provider.

Claims 1, 19, 23, and 35 are illustrative and read (App. Br. 25, 27, 28, and 30):

1. A system for supplying day care providers with products related to diaper changing, the system comprising:
 - a holder;
 - a diaper secured to the holder; and
 - a surface disinfectant that disinfects surfaces as opposed to skin, the surface disinfectant being secured to the holder.

19. A system for supplying day care providers with products related to diaper changing, the system comprising:
 - a holder;
 - a plurality of diapers;
 - a plurality of surface disinfectants where each surface disinfectant disinfects surfaces as opposed to skin; and
 - a plurality of receptacles, each receptacle being secured to the holder and including at least one of the diapers and at least one of the surface disinfectants.

23. A method of supplying day care providers with products related to diaper changing, the method comprising:
 - securing a diaper to a holder;
 - securing a surface disinfectant that disinfects surfaces as opposed to skin to the holder; and

delivering the holder to a day care provider.

35. A method of supplying day care providers with products related to diaper changing, the method comprising:

securing a plurality of diapers to a plurality of receptacles;

securing a plurality of surface disinfectants to the plurality of receptacles such that there is a diaper and a surface disinfectant secured to each of the receptacles where each surface disinfectant disinfects surfaces as opposed to skin;

securing the plurality of receptacles to a holder; and
delivering the holder to a day care provider.

The Examiner relies on the following prior art² of record:

Finkel	4,702,378	Oct. 1987
Jonese	5,443,161	Aug. 1995
Habib	6,723,080 B1	Apr. 2004
Khan	2002/0004656 A1	Jan. 2002
Silvers	2002/0179462 A1	Dec. 2002
Snell	2005/0143706 A1	Jun. 2005

The Examiner has rejected the claims as follows:

- (1) claims 1, 2, and 6-8 under 35 U.S.C. § 102(b) as anticipated by Finkel (FR³ 2-3; Ans.⁴ 3-4);
- (2) claims 3 and 9 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Habib (FR 3; Ans. 4);
- (3) claim 4 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Khan (FR 3-4; Ans. 5);
- (4) claim 5 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Snell (FR 4; Ans. 5);

² No references to *et al.* are made in this Decision.

³ Final Office action mailed 18 April 2007 (FR).

⁴ Examiner's Answer mailed 26 September 2007 (Ans.).

- (5) claims 10-12, 14, 16, 17, 28, and 31-34 under 35 U.S.C. § 103(a) as unpatentable over Jonese in view of Finkel (FR 4-6; Ans. 5-7);
- (6) claims 10, 13-16, and 18 under 35 U.S.C. § 103(a) as unpatentable over Silvers in view of Finkel (FR 6-7; Ans. 7-8);
- (7) claims 19-22 and 35-38 under 35 U.S.C. § 103(a) as unpatentable over Snell in view of Finkel (FR 7-8; Ans. 8-9);
- (8) claims 23, 24, 26, and 27 under 35 U.S.C. § 103(a) as unpatentable over Finkel (FR 8-9; Ans. 9-10);
- (9) claim 25 under 35 U.S.C. § 103(a) over Finkel in view of Habib (FR 9; Ans. 10); and,
- (10) claims 29 and 30 under 35 U.S.C. § 103(a) as unpatentable over Joneses and Finkel in view of Habib (FR 9-10; Ans. 10-11).

Appellants do not contest the provisional final rejection of claims 1-38 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claims 34-61 of copending application 10/836,610 in view of either Finkel or Snell (FR 10-11; Ans. 11; App. 22-23).

At issue, then is whether Appellants have shown reversible error by the Examiner in any one or more of the remaining ten rejections (1)-(10) based upon the relied upon prior art.

II. Findings of Fact (FF)

The following findings of fact are supported by a preponderance of the evidence of record.

A. Appellants' invention

- [1] Appellants' specification (the 700 specification (Spec.)) describes a system including a diaper secured to a holder and a surface disinfectant secured to the same holder (Spec. 4:21-24).

- [2] "Secured" is defined as "containing, constraining, enclosing, holding, compressing, contacting or supporting within, upon and/or against the holder by any method" (Spec. 4:24-26).
- [3] The holder may be any type of container or storage device, including a box, a can, a jar, a rack, a bag, a pouch, a cubby, a shelf, a drawer, a dispenser, a spindle, a core, a cupboard, a closet, a clip, a cabinet, a crate, a trunk, a tote and/or a tub (Spec. 4:27-31).
- [4] The holder may itself be used as a shipping container or to perform other functions (Spec. 5:2-3).
- [5] Exemplary "surface disinfectants include sprays, soaps, aerosols, pumps, dispensers (e.g., non-contact dispensers)" (Spec. 5:27-28).
- [6] "The surface disinfectant . . . may also be placed onto some type of medium (e.g., a wipe)" (Spec. 5:28-29).
- [7] Surface disinfectants may include active ingredients such as bleach, chlorohehexidine [sic, chlorhexidine], iodine/iodophor, hydrogen peroxide, phenols, quaternium ammonium compounds, aldehydes, and mixtures of anionic and organic acids, e.g., sodium lauryl sulfate and citric acid (Spec. 5:27-6:20).

B. Prior art

- [8] Finkel discloses a sealed 12, disposable kit (system) 10 comprising multiple compartments containing a disposable diaper 80, soap (surface disinfectant) 78, a wet towel packet/hand sanitizer 76, and a dry towel/changing pad 72 (Finkel 3:67-4:6; Fig. 4).
- [9] Seal 12 of Finkel is a pressure-sensitive label that not only retains kit 10 in its sealed, sanitary condition, but also recites the various products contained in the kit (Finkel 3:1-8).

- [10] According to Finkel, kit 10 effectively folds over itself and thereby securely retaining the contents of the kit within the interior of the kit in a sanitary fashion (Finkel 4:12-16).
- [11] Finkel suggests a ready commercial market among parents, babysitters, nurseries, hospitals, day care centers, etc. for reasonably priced disposable sanitary diaper changing kits (Finkel 1:8-29; 2:8-24).
- [12] Habib discloses a prepackaged diaper changing kit 10 comprising disposable diaper 12, prepackaged moist baby wipe 14, baby liner 16 which can be used as a changing pad, prepackaged instant hand sanitizer 18, and disposable plastic bag 20, which are all prepackaged in exterior packaging 22 (Habib 3:18-22; 3:67-4:2).
- [13] According to Habib, the prepackaged diaper changing kit may be dispensed from conventional vending machines or sold in 6-, 12- and/or 24-packs, etc. at various retailers or by mail order or over the internet (Habib 5:26-49).
- [14] Khan discloses a disposable diaper system or kit 4 comprising a diaper 12 and first and second storage compartments 14 and 16 for storing an integrated disposable bag 14a and glove set 16a for reducing feces and/or body fluid contamination during diaper removal (Khan ¶¶ 9 and 20).
- [15] Snell discloses a diaper changing kit comprising a diaper and related accessories including moist or dry wipes, baby powder, medicament, swab, lotion and/or a disposal bag for a dirty diaper (Snell ¶¶ 18 and 74).

- [16] Snell, like Habib, suggests packaging a plurality of diaper kits together in a master container (Snell ¶ 83).
- [17] Jonese discloses a diaper changing kit 10 having an enclosure 12 housing a plurality of supplies including plural diapers 24, 25, plural disposal bags 22, 23, plural wipes 20, 21, plural baby powder 34, 35, and plural baby cream 36, 37 (Jonese 3:52-54; 4:31-49).
- [18] In particular, Jonese discloses a kit 10 including a sufficient number of baby care items for two diaper changes (Jonese 2:67-3:3).
- [19] Figure 5 in Jonese is said to illustrate a plurality of kits 10 stacked upon each other, e.g., for bulk retailing (Jonese 4:66-68).
- [20] Silvers discloses a portable diaper caddy 10 comprising a tray 12, a pad compartment 26 containing a baby pad 28, a diaper compartment 30 containing a plurality of diapers 32, a wipe compartment 34 containing a plurality of wet baby wipes 36, a swab compartment 74 containing a plurality of swabs 76, a cotton ball compartment 78 containing a plurality of cotton balls 80, an ointment compartment 82 containing a vessel of ointment 84, a powder compartment 86 containing a vessel of baby powder 88, and a miscellaneous compartment 90 for other necessary items (Silvers ¶¶ 3, 17 and 24). Other findings of fact follow below.

III. Anticipation

A. Legal standard

To anticipate in terms of § 102, a single prior art reference must describe every element of the claimed subject matter. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990); *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 677 (Fed. Cir. 1988).

B. Findings of the Examiner

The Examiner found Finkel discloses a system comprising a holder 10 having secured thereto a diaper 80, a surface disinfectant, i.e., soap 78, a child-cleaning wipe 72, and a hand sanitizer 76, wherein holder 10 is a container (Figs. 1 and 4) and includes informational indicia 12 (Ans. 3-4). The Examiner found claims 1, 2, and 6-8 anticipated by Finkel (Ans. 3).

C. Arguments of the Appellants

Appellants argue that "even though Finkel discloses a soap, Finkel does not disclose a surface disinfectant as recited in the claims" (Reply Br.⁵ 2, original emphasis) (see also App. Br. 9).

D. Analysis

During patent prosecution, claims are given their broadest reasonable interpretation consistent with the specification, as the claim language would have been read by one of ordinary skill in the art in view of the specification. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989); *In re Sneed*, 710 F.2d 1544, 1548 (Fed. Cir. 1983). Furthermore, "[a]bsent an express definition in their specification, the fact that appellants can point to definitions or usages that conform to their interpretation does not make the PTO's definition unreasonable when the PTO can point to other sources that support its interpretation." *In re Morris*, 127 F.3d 1048, 1056 (Fed. Cir. 1997).

Appellants' specification does not contain a definition of the term "a surface disinfectant that disinfects surfaces as opposed to skin." Appellants argue their specification "teaches away from a surface disinfectant that engages skin" (App. Br. 9). However, the claims are not limited to a surface disinfectant that is incompatible with a skin surface. The intended use of the

⁵ Reply Brief under 37 C.F.R. § 41.41 filed 26 November 2007 (Reply Br.).

surface disinfectant on a surface as opposed to skin is not a positive limitation on the surface disinfectant *per se*. Moreover, Appellants' specification expressly lists soap as an exemplary surface disinfectant (FF 5). Indeed, as pointed out by the Examiner (Ans. 11), Appellants' specification states the surface disinfectant "may be any type of surface disinfectant known now or discovered in the future" (Spec. 5:22-23). Finally, none of claims 1, 2, and 6-8 are method of use claims. Therefore, we conclude the prior art "soap" reads on the claimed "surface disinfectant."

E. Conclusion

Accordingly, we sustain the rejection of claims 1, 2, and 6-8 under § 102 over Finkel.

IV. Obviousness

A. Legal standard

A claimed invention is not patentable if the subject matter of the invention would have been obvious to a person having ordinary skill in the art at the time the invention was made. 35 U.S.C. § 103(a); *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007); *Graham v. John Deere Co.*, 383 U.S. 1 (1966). Facts relevant to a determination of obviousness include (1) the scope and content of the prior art, (2) any differences between the claimed invention and the prior art, (3) the level of ordinary skill in the art, and (4) any relevant objective evidence of obviousness or nonobviousness. *KSR*, 127 S.Ct. at 1734; *Graham*, 383 U.S. at 17-18.

A combination of known elements with no change in their respective functions is likely to be obvious when it does not more than yield predictable results. *KSR*, 127 S.Ct. at 1739-41.

One of ordinary skill in the art is presumed to have skills apart from what the prior art references expressly disclose. *In re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985). A person of ordinary skill is also a person of ordinary creativity, not an automaton. *KSR*, 127 S.Ct. at 1742.

In *KSR*, the Supreme Court explained that a "rigid" teaching, suggestion, motivation ("TSM") test is "incompatible with our precedents." *KSR*, 127 S.Ct. at 1747. A rigid requirement of relying on only what is written in a prior art reference would unduly confine the use of the knowledge and creativity within the ordinary grasp of an ordinarily skilled artisan. *Id.* at 1742.

B. Findings and conclusions of the Examiner

Claims 3-5 and 9 depend from claim 1. The Examiner found the system of Finkel lacked the disposal bag, the pair of gloves, the lotion, and the changing pad recited in claims 3-5 and 9, respectively (Ans. 4-5).

rejection (2) under § 103 over Finkel and Habib

The Examiner found Habib discloses a disposal bag 20 for disposal of used wipes and other packaging material (Habib 4:22-33) and a changing pad 16 for providing a surface on which to place a baby (Habib 3:61-4:4). As to claims 3 and 9, the Examiner concluded it would have been obvious to provide the system of Finkel with a disposal bag and a changing pad, as taught by Habib, in order to dispose of used wipes and other packaging materials and to provide a surface on which to place a baby (Ans. 4).

rejection (3) under § 103 over Finkel and Khan

The Examiner found Khan teaches the desirability of supplying a pair of gloves in a diaper changing system to reduce fecal and/or body fluid contamination (Khan ¶ 9). As to claim 4, the Examiner concluded it would

have been obvious to provide the system of Finkel with a pair of gloves, as taught by Khan, in order to reduce fecal and/or bodily fluid contamination when changing diapers (Ans. 4).

rejection (4) under § 103 over Finkel and Snell

The Examiner found Snell teaches providing a lotion in a diaper changing system. As to claim 5, the Examiner concluded it would have been obvious to provide the system of Finkel with a lotion, as taught by Snell, in order to soothe any chafed skin on the baby or changer (Ans. 5).

rejection (5) under § 103 over Jonese and Finkel

As to claims 10-12, 14, 16, 17, 28, and 31-34, the Examiner found Jonese discloses a diaper changing system 10 with a holder 12, a plurality of diapers 24/25, a plurality of disposal bags 22/23, and a plurality of child cleaning wipes 20/21. The Examiner further found the combined teachings of Jonese and Finkel disclose a method of securing a plurality of diapers (Jonese 24/25) and a surface disinfectant (Finkel 78) to a holder upon closing of the holder, which thereby functioned as a container. The Examiner still further found Finkel teaches the desirability of having diaper-changing systems at a day care provider (Ans. 6). As to claims 10 and 14, the Examiner concluded it would have been obvious to provide the system of Jonese not only with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing, but also with two surface disinfectants given Jonese's teaching of providing two of all retained items (Ans. 6). As to claims 11 and 12, the Examiner concluded it would have been obvious to provide the system of Jonese not only with a changing pad, as taught by Finkel, to provide a ready surface on which to change a baby, but also with two changing pads given Jonese's teaching of

providing two of all retained items (Ans. 6). As to claims 28, 33 and 34, the Examiner concluded it would have been obvious to deliver the Jonese-Finkel system to a day care provider in order to maintain sanitary conditions at the center (Ans. 7). As to claims 31 and 32, the Examiner concluded it would have been obvious to deliver a Jonese-Finkel system containing two surface disinfectants for the reasons given for claims 10 and 14 (Ans. 7).

rejection (6) under § 103 over Silvers and Finkel

As to claims 10, 13-16, and 18, the Examiner found Silvers discloses a system 10 comprising a holder 12 with a plurality of diapers 32 and accessory items, such as child cleaning wipes 34, secured to the holder in various compartments (dispensers), e.g., 30, 80, and 34 (Ans. 7-8). As to claims 10, 13, 16, and 18, the Examiner concluded it would have been obvious to provide the system of Silvers with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing (Ans. 7-8). As to claims 14 and 15, the Examiner similarly concluded it would have been obvious to provide a plurality of surface disinfectants dispensed from miscellaneous compartment 90 in the system of Silver (Ans. 7-8).

rejection (7) under § 103 over Snell and Finkel

As to claims 19-22 and 35-38, the Examiner found Snell discloses a system (Fig. 8) comprising a holder 60, a plurality of diapers 10, and a plurality of receptacles 44 and suggests that a variety of items may be included in each receptacle (see Snell ¶ 74, referring to Fig. 5) (Ans. 8). The Examiner further found that Snell discloses moist or dry wipes (Snell ¶ 74) which satisfy Appellants' definition of a hand sanitizer including a wipe (see Spec. 6:30-31) and of a child-cleaning wipe (see Spec. 6:22-24). The

Examiner also found Finkel discloses indicia 12 identifying the products in a kit (Ans. 8). The Examiner further found the combined teachings of Snell and Finkel disclose a method of securing the above items to receptacles 44 and securing the receptacles to holder 60. The Examiner still further found Finkel teaches the desirability of having diaper-changing systems at a day care provider (Ans. 9). As to claims 19, 20, and 22, the Examiner concluded it would have been obvious to provide each of the receptacles of Snell with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing (Ans. 8). As to claim 21, the Examiner concluded it would have been obvious to include indicia, as taught by Finkel, on each receptacle of Snell in order to identify its contents (Ans. 8-9). As to claims 35-38, the Examiner concluded it would have been obvious to deliver the Snell-Finkel system to a day care provider in order to maintain sanitary conditions at the center (Ans. 9).

rejection (8) under § 103 over Finkel

As to claims 23, 24, 26, and 27, the Examiner found Finkel discloses a method of securing a diaper 80, a surface disinfectant 78, and a child-cleaning wipe 72 to a holder 10 upon closing of the holder 10, i.e., container, and placing indicia 12 on the holder. The Examiner further found Finkel teaches the desirability of having diaper-changing systems at a day care provider (Ans. 9-10). The Examiner concluded it would have been obvious to deliver the Finkel system to a day care provider in order to maintain sanitary conditions at the center (Ans. 9).

rejection (9) under § 103 over Finkel and Habib

As to claim 25 which adds a step of securing a changing pad to the holder recited in claim 23, the Examiner found Habib discloses providing a

changing pad 16 within a holder 22 for providing a surface on which to place a baby (Habib 3:61-4:4). The Examiner concluded it would have been obvious to deliver the Finkel system to the day care center with a changing pad, as taught by Habib, in order to provide a surface on which to place a baby (Ans. 10).

rejection (10) under § 103 over Jonese, Finkel, and Habib

As to claims 29 and 30 which depend from claim 28, the Examiner found the combined teachings of Jonese and Finkel disclose the claimed method but for providing changing pads and hand sanitizer (Ans. 10). The Examiner concluded it would have been obvious to deliver the Jonese-Finkel system to the day care center with hand sanitizer 18 and changing pad 16, as taught by Habib, in order to clean the changer's hands and provide a ready surface for diaper changing (Ans. 10-11). The Examiner further concluded it would have been obvious to deliver the Jonese-Finkel system with two hand sanitizers and two changing pads secured to the holder given Jonese's teaching of providing two of all retained items (Ans. 11).

C. Arguments of the Appellants

As to each rejection (2)-(10) under § 103 discussed above, Appellants argue none of the applied prior art references describe "a surface disinfectant that disinfects surfaces as opposed to skin" (App. Br. 11-22; Reply Br. 2).

As to rejections (2)-(7), (9), and (10), Appellants further argue there is no motivation to combine the prior art references and the Examiner's reasoning in each of rejection is merely a conclusory statement analogous to the situation in *In re Lee*, 277 F.3d 1338 (Fed. Cir. 2002) (App. Br. 11-22). According to Appellants, the Examiner has failed to provide objective evidence as to securing the combination of items recited in claims 3-5 and 9-

22 or the combination of items plus delivery thereof recited in claims 25 and 28 -38 (App. Br. 11-22; Reply Br. 3-6).

Finally, Appellants argue the combinations recited in the claims are more than the predictable use of prior art elements. Appellants note only their specification describes at page 2, line 11, through page 3, line 7, particular benefits associated with the claimed combinations⁶ (Reply Br. 6-7).

D. Analysis

First, none of claims 3-5 and 9-38 are method of use claims. The broadest reasonable interpretation of "a surface disinfectant that disinfects surfaces as opposed to skin" in light of Appellants' specification

⁶ According to Appellants' specification,

The system and method may supply day care providers with products such that day care providers are able to conveniently perform multiple diaper changes per day under disinfected conditions and in compliance with government regulations. The system and method may also reduce the need to purchase and store excessive inventories of products that are used to change diapers. [Spec. 2:11-16.]

. . . Supplying a diaper and disinfectant in one holder allows day care providers to more conveniently perform each diaper change under disinfected conditions. [Spec. 2:19-21.]

. . . Since each receptacle includes everything that may be needed for at least one diaper change, the system makes it easier for day care providers to inventory the products that are used to change diapers. [Spec. 2:30-3:2.]

. . . In addition, the cost for each receptacle may be readily passed along to clients of the day care provider. [Spec. 3:21-22.]

encompasses the soap component of the Finkel system for the reasons discussed in the analysis of anticipation rejection (1) above. Since Finkel is relied upon, in relevant part, for its disclosure of a soap component in a diaper changing kit or system in each of rejections (2)-(10) under § 103, the argument that soap is not a surface disinfectant within the scope of the claimed subject matter is unpersuasive of reversible error in the Examiner's conclusion of obviousness in any of rejections (2)-(10) under § 103.

Second, the diaper changing system recited in claims 3-5 and 9-22 (as well as in claims 1, 2, and 6-8) is a combination of a diaper, a surface disinfectant and other items known to be associated with diaper changing, such as wipes, lotion, changing pad, etc., with no change in their respective functions. Method claims 23-38 comprise packaging/securing the diaper changing system and delivering it to a day care provider. A combination of known elements with no change in their respective functions is likely to be obvious when it does not more than yield predictable results. *KSR*, 127 S.Ct. at 1739-41. Appellants have not submitted relevant evidence of nonobviousness, such as commercial success due to the claimed invention.

Third, we find that the Examiner has provided ample reasons why the collective teachings of the references would have suggested their combination in each of rejections (2)-(7), (9), and (10) under § 103.

Specifically, the Examiner concluded it would have been *prima facie* obvious to one of ordinary skill in the art, as to

(2) claims 3 and 9, to provide the system of Finkel with a disposal bag and a changing pad, as taught by Habib, in order to dispose of used wipes and other packaging materials and to provide a surface on which to place a baby (Ans. 4);

- (3) claim 4, to provide the system of Finkel with a pair of gloves, as taught by Khan, in order to reduce fecal and/or bodily fluid contamination when changing diapers (Ans. 4);
- (4) claim 5, to provide the system of Finkel with a lotion, as taught by Snell, in order to soothe any chafed skin on the baby or changer (Ans. 5);
- (5) (i) claims 10 and 14, to provide the system of Jonese not only with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing, but also with two surface disinfectants given Jonese's teaching of providing two of all retained items (Ans. 6), (ii) claims 11 and 12, not only with a changing pad, as taught by Finkel, to provide a ready surface on which to change a baby, but also with two changing pads given Jonese's teaching of providing two of all retained items (Ans. 6), (iii) claims 28, 33 and 34, to deliver the Jonese-Finkel system to a day care provider in order to maintain sanitary conditions at the center (Ans. 7), and (iv) claims 31 and 32, to deliver a Jonese-Finkel system containing two surface disinfectants for the reasons given for claims 10 and 14 (Ans. 7);
- (6) (i) claims 10, 13, 16, and 18, to provide the system of Silvers with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing (Ans. 7-8), and (ii) claims 14 and 15, to provide similarly a plurality of surface disinfectants dispensed from miscellaneous compartment 90 in the system of Silver (Ans. 7-8);
- (7) (i) claims 19, 20, and 22, to provide each of the receptacles of Snell with a surface disinfectant, as taught by Finkel, in order to enable the cleaning of surfaces before or after diaper changing (Ans. 8), (ii) claim 21, to include indicia, as taught by Finkel, on each receptacle of Snell in order to

identify its contents (Ans. 8-9), and (iii) claims 35-38, to deliver the Snell-Finkel system to a day care provider in order to maintain sanitary conditions at the center (Ans. 9);

(9) claim 25, to deliver the Finkel system to the day care center with a changing pad, as taught by Habib, in order to provide a surface on which to place a baby (Ans. 10); and,

(10) (i) claim 29 to deliver the Jonese-Finkel system to the day care center with hand sanitizer 18 and changing pad 16, as taught by Habib, in order to clean the changer's hands and provide a ready surface for diaper changing (Ans. 10-11) and (ii) claim 30, to deliver the Jonese-Finkel system with two hand sanitizers and two changing pads secured to the holder given Jonese's teaching of providing two of all retained items (Ans. 11).

The fact that the Examiner's reason for combining prior art references is not the same as the reasons set forth in Appellants' specification at page 2, line 11, through page 3, line 7, is insufficient to rebut the conclusion of obviousness presented by the Examiner. *KSR*, 127 S.Ct. at 1741; *In re Dillon*, 919 F.2d 688, 693-94 (Fed. Cir. 1990). Furthermore, it is settled law that the teaching or suggestion to combine reference disclosures need not be explicitly stated in the prior art, but may be implicit from the state of the art considered as a whole. *In re Khan*, 441 F.3d 977, 988 (Fed. Cir. 2006); cited with approval in *KSR*, 127 S.Ct. at 1741.

In re Lee is not controlling precedent under the facts of this case. In *In re Lee*, 277 F.3d at 1343-44, our reviewing court expressed skepticism about invoking the knowledge of a skilled artisan to supply the motivation to combine references on a scanty record. That is not the situation here where the Examiner has made *Graham* factor findings and expressly explained

why the "common sense" of an ordinary artisan seeking to solve the problem at hand would have led the artisan to combine the references. For the most part, the Examiner relied on express teachings in the references as a reason to combine them. For example, Khan expressly discloses a diaper kit comprising a glove set and disposable bag for reducing feces and/or body fluid contamination during diaper removal (FF 14). However, to the extent the Examiner relied on "common sense" as motivation to combine, he expressly explained why. For example, the Examiner explained it would have been obvious to include a lotion as taught by Snell in the diaper changing system of Finkel for the common sense reason of soothing any chafed skin on the baby or changer (Ans. 5). Therefore, the Examiner's reason for combining reference teachings in each of rejections (2)-(7), (9), and (10) under § 103 is factually supported and not analogous to the conclusory statements found in *In re Lee*.

We note another example of "common sense" would be to clean a surface area before and after diaper changing to minimize transfer of bacteria and germs from/to the environment to/from an infant, e.g., using a disinfecting soap.

Finally, as noted above, Appellants have not submitted relevant evidence of nonobviousness to rebut the Examiner's conclusion of *prima facie* obviousness. We also note the disclosure in Habib of selling multi-pack diaper changing kits by mail or over the internet (FF 12) is cumulative to the disclosure in Finkel of a commercial market in day care centers, etc. for reasonably priced disposable sanitary diaper changing kits (FF 11) relied on by the Examiner.

E. Conclusion

Based on the foregoing, we sustain each of rejections (2)-(10) of the appealed claims under § 103 over the teachings of Finkel, Jonese, Habib, Khan, Silvers, and/or Snell.

V. Provisional Obviousness-type Double Patenting

Appellants have not appealed the provisional rejection of claims 1-38 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claims 34-61 of copending application 10/836,610 in view of either Finkel or Snell (App. Br. 22-23). Therefore, we summarily sustain this rejection.

VI. Order

Upon consideration of the record, and for the reasons given, it is

ORDER that the decision of the Examiner to reject claims 1, 2, and 6-8 under 35 U.S.C. § 102(b) as anticipated by Finkel is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claims 3 and 9 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Habib is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claim 4 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Khan is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claim 5 under 35 U.S.C. § 103(a) as unpatentable over Finkel in view of Snell is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claims 10-12, 14, 16, 17, 28, and 31-34 under 35 U.S.C. § 103(a) as unpatentable over Jonese in view of Finkel is AFFIRMED;

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FURTHER ORDERED that the decision of the Examiner to reject claims 10, 13-16, and 18 under 35 U.S.C. § 103(a) as unpatentable over Silvers in view of Finkel is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claims 19-22 and 35-38 under 35 U.S.C. § 103(a) as unpatentable over Snell in view of Finkel is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claims 23, 24, 26, and 27 under 35 U.S.C. § 103(a) as unpatentable over Finkel is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claim 25 under 35 U.S.C. § 103(a) over Finkel in view of Habib is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to reject claims 29 and 30 under 35 U.S.C. § 103(a) as unpatentable over Joneses and Finkel in view of Habib is AFFIRMED;

FURTHER ORDERED that the decision of the Examiner to provisionally reject claims 1-38 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claims 34-61 of copending application 10/836,610 in view of either Finkel or Snell is AFFIRMED; and,

FURTHER ORDERED that no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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MAT

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