

THIS OPINION IS NOT BINDING PRECEDENT OF THE BOARD

Entered: September 30, 2003

Paper No. 72

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAURO F.C. CORREA, THELMA SINICIO,
and FERNANDA S. ACHCAR

Junior Party,
(Patent 5,490,847),

v.

JOHN D. ROBERTS and CLAUDE P. MANCEL

Senior Party,
(Application 08/788,799)

Patent Interference No. 105,019

Before LEE, SPIEGEL and MEDLEY, Administrative Patent Judges.

LEE, Administrative Patent Judge.

**DECISION ON PRELIMINARY MOTIONS,
RE-DECLARATION OF INTERFERENCE,
AND
JUDGMENT**

Summary of Motions Decisions

Correa's Preliminary Motion 1 is **Dismissed**.

Correa's Preliminary Motion 2 is **Granted**.

Correa's Preliminary Motion 3 is **Granted**.

Interference No. 105,019
Correa v. Roberts

Correa's Preliminary Motion 4 is **Dismissed**.

Correa's Preliminary Motion 5 is **Denied**.

Roberts' Preliminary Motion 1 is **Granted**.

Background Facts

1. This interference was declared on September 17, 2002.
2. Junior party Correa is involved in this interference on the basis of its Patent No. 5,490,847, which issued from Application 08/156,191, filed on November 22, 1993.
3. Senior party Roberts is involved in this interference on the basis of its Application 08/788,799, filed on January 22, 1997.
4. Senior party Roberts has been accorded the benefit of EPO Application 92870052.5, filed on March 31, 1992; PCT Application US93/02448, filed on March 15, 1993; and Patent No. 5,649,917, which issued from Application 08/307,672, filed on September 22, 1994. Its earliest accorded benefit date is March 31, 1992.
5. The real party in interest of junior party Correa is Johnson & Johnson Industria E Comercio Ltda., of Brazil.
6. The real party in interest of senior party Roberts is Proctor & Gamble Co.
7. The Count of this interference is:

Claim 20 of Roberts' Application 08/788,799
or
Claim 1 of Correa's Patent No. 5,490,847
8. Claim 20 of Roberts reads as follows:

A sanitary napkin comprising:

an absorbent core having a body-facing surface, a garment-facing surface, and longitudinal edges;

a liquid impervious topsheet overlying said body-facing side of said absorbent core,

at least one flap, each said flap being comprised of continuous extensions of said topsheet and said backsheet; and

a pair of barrier elements comprising a layer of absorbent material overlying said topsheet and joined thereto along said longitudinal edges, wherein, when the sanitary napkin assumes a shape when worn, said barrier elements stand up to form channels for containing body fluid.

9. Claim 1 of Correa reads as follows:

Disposable intimate feminine absorbent comprising:

an upper liquid permeable sheet;

a lower liquid impermeable lining sheet;

a liquid absorbent core between said sheets;

at least one absorbent cuff comprised of a layer of hydrophilic material disposed on top of the upper liquid permeable sheet and affixed along at least one edge of said absorbent; and

at least one lateral wing comprised of continuous extension of said upper liquid permeable sheet, said lower liquid impermeable sheet, and said layer of hydrophilic material;

said cuff when flexed moving away from said upper sheet to provide a region for containing liquid.

10. Roberts' claims corresponding to the count are claims 14, 15, 16, 18, 19, 20, 22 and 23, of which claims 14 and 20 are independent claims.

Interference No. 105,019
Correa v. Roberts

11. Each of Roberts' claims 15, 16, 18 and 19 depend from Roberts' claim 14, and each of Roberts' claims 22 and 23 depend from Roberts' claim 20.

12. Correa's claims corresponding to the count, as indicated in the Notice Declaring Interference, are claims 1-3, 5, 6, 9 and 10..

13. The parties are in agreement that one with ordinary skill in the field of designing disposable absorbent articles typically possesses at least a bachelor's degree in chemistry or chemical engineering, material science or other fields of engineering such as mechanical engineering and three to five years of experience in industry.

Discussion

A. Correa's Preliminary Motion 1

By this preliminary motion, Correa seeks to be accorded the benefit of the filing date of its Brazilian priority application PI 9204863-3, filed November 25, 1992. This preliminary motion is not opposed.

We note that in the Notice Declaring Interference, senior party Roberts was accorded the benefit of EPO Application 92870052.5, filed March 31, 1992. That accorded benefit date of senior party Roberts has not been attacked by junior party Correa. Note also that in its preliminary statement junior party Correa states:

Junior party Correa does not intend to present evidence to prove a conception or actual reduction to practice and intends to rely solely on the filing date of Brazilian application No. 9204863, filed November 25, 1992, to prove a constructive reduction to practice of the invention of Count 1.

Interference No. 105,019
Correa v. Roberts

Even if this preliminary motion is granted, junior party Correa would remain as the junior party because party Roberts has an even earlier accorded benefit date. Moreover, because junior party Correa has not alleged a date of invention or conception prior to the March 31, 1992 benefit date of senior party Roberts, it is not necessary to decide whether party Correa is entitled to be accorded the benefit of the November 25, 1992 filing date of its Brazilian priority application, which is still subsequent to Roberts' accorded benefit date of March 31, 1992.

Based on the foregoing, Correa's Preliminary Motion 1 is **dismissed**.

B. Correa's Preliminary Motion 2

By this preliminary motion, Correa asserts that claims 14-16, 18-20 and 22 of Roberts are unpatentable under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,695,278 ("Lawson '278") (Exhibit 2002).

Few matters in patent law are as well established as the principle that anticipation under 35 U.S.C. § 102 requires the disclosure in a single piece of prior art each and every limitation of a claimed invention. E.g., Apple Computer, Inc. v. Articulate Systems, Inc., 234 F.3d 14, 20, 57 USPQ2d 1057, 1061 (Fed. Cir. 2000); Glaxo, Inc. v. Novopharm, Ltd., 52 F.3d 1043, 1047, 34 USPQ2d 1565, 1567 (Fed. Cir. 1995). That certainty, however, does not make anticipation a simple matter, because in certain situations not everything recited in a claim is necessarily a feature which must be met by the applied prior art reference. For instance, citing seven cases spanning over forty years, the Court of Appeals for the Federal Circuit stated, in In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997): "It is well settled that the

Interference No. 105,019
Correa v. Roberts

recitation of a new intended use for an old product does not make a claim to that old product patentable." More specifically, the Court stated, id.:

Although Schreiber is correct that Harz does not address the use of the disclosed structure to dispense popcorn, the absence of a disclosure relating to function does not defeat the Board's finding of anticipation. It is well settled that the recitation of a new intended use for an old product does not make a claim to that old product patentable. (Citations omitted.) (Emphasis added.)

As will be discussed in detail below, the determinative issue with respect to Correa's Preliminary Motion 2 is whether the recitation of a "sanitary napkin" in the preamble of Roberts' independent claims 14 and 20 are only a statement of intended use and add nothing to the structure already defined in the body of those claims. As a matter of claim interpretation, we answer that question in the affirmative. At the outset, however, we first consider each recited limitations in the body of claims 20 and 14.

The first claim feature following the preamble of claim 20 is "an absorbent core having a body-facing surface, a garment facing surface, and longitudinal edges." According to Correa's preliminary motion Fact ¶ 42, Lawson '278 discloses an absorbent core 44 disposed between a topsheet 38 and a backsheet 42, and the backsheet is disposed away from the body of the wearer. Also according to Correa's preliminary motion, the absorbent article is intended to be worn inside clothing. Roberts does not dispute these alleged facts. Based on Correa's Fact ¶ 42 and parts of Lawson '278 cited in that paragraph, we find that Lawson '278 discloses an absorbent core having a body-facing surface, a garment facing surface, and longitudinal edges.

Interference No. 105,019
Correa v. Roberts

The next claim feature in claim 20 is "a liquid impervious backsheet overlying said garment-facing side of said absorbent core." According to Correa's preliminary motion Fact ¶ 43, Lawson '278 discloses a liquid impervious backsheet 42 which overlies the side of the absorbent core away from the body of the wearer. Roberts does not dispute these alleged facts. Based on Correa's Fact ¶ 43 and parts of Lawson '278 cited in that paragraph, we find that Lawson '278 further discloses a liquid impervious backsheet overlying said garment-facing side of said absorbent core.

The next feature in claim 20 is "a liquid pervious topsheet overlying said body-facing side of said absorbent core." According to Correa's preliminary motion Fact ¶ 44, Lawson '278 discloses a liquid pervious topsheet 38 which overlies the side of the absorbent contacting the body of the wearer. Roberts does not dispute these alleged facts. Based on Correa's Fact ¶ 44 and parts of Lawson '278 cited in that paragraph, we find that Lawson '278 further discloses a liquid pervious topsheet overlying said body-facing side of said absorbent core.

The next feature in claim 20 is "at least one flap, each said flap being comprised of continuous extensions of said topsheet and said backsheet." According to Correa's preliminary motion Fact ¶ 45, Lawson '278 discloses two flaps formed from continuous extensions of the backsheet and the topsheet. Roberts does not dispute these alleged facts. Based on Correa's Fact ¶ 45 and parts of Lawson '278 cited in that paragraph, we find that Lawson '278 further discloses at least one flap, each said flap being comprised of continuous extensions of said topsheet and said backsheet.

The next feature in claim 20 is "a pair of barrier elements comprising a layer of absorbent material overlying said topsheet and joined thereto along said longitudinal edges, wherein, when the sanitary napkin assumes a shape when worn, said barrier elements stand up to form channels for containing body fluid." According to Correa's preliminary motion Fact ¶ 46(b), citing to various parts of the Lawson '278 reference, Lawson '278 discloses a pair of barrier elements comprising a layer of absorbent material overlying said topsheet and joined thereto along said longitudinal edges. While Roberts denies Correa's Fact ¶ 46(b), we are unpersuaded by the arguments contained in Robert's opposition as to why the portions of Lawson '278 cited in Correa's Fact ¶ 46(b) do not satisfy the requirement of a pair of barrier elements comprising a layer of absorbent material overlying said topsheet and joined thereto along said longitudinal edges. As is pointed out by Correa, Lawson '278 describes barrier cuffs 62, one on either side, separately secured to the topsheet 38 along longitudinal edges and which may be provided with absorbent means therein. Column 10, lines 34-36; column 9, lines 47-49; column 4, 19-22; column 4, lines 5-8; Figures 3 and 4. Roberts' argument is not that barrier cuffs 62 of Lawson '278 are not barrier elements comprising a layer of absorbent material overlying the top sheet and joined thereto along longitudinal edges, but that the overall article disclosed by Lawson '278 is a diaper while the claimed article of Roberts is a sanitary napkin. According to Roberts (Opp. at 15), the recitation of "sanitary napkin" in Roberts' claim 20 takes on structural significance which cannot be ignored in conducting an anticipation analysis. The argument is rejected.

The preamble of claim 20 of Roberts recites: "A sanitary napkin comprising:"; Roberts' specification does not provide any special definition for the term "sanitary napkin." Thus, we

Interference No. 105,019
Correa v. Roberts

regard the term as having its ordinary meaning in the English language. In The Random House College Dictionary, Revised Edition (1982), the term "sanitary napkin" is defined as:

an absorbent pad for wear by women during menstruation to absorb the uterine flow.

The only structure required by a "sanitary napkin" is an absorbent pad. The rest of the definition is directed to an intended use for the pad, i.e., worn by women during menstruation to absorb the uterine flow. All of the structural significance of a "sanitary napkin" is already met by the disclosure in Lawson '278 of an absorbent core having a body-facing surface, a garment-facing surface, and longitudinal edges. The barrier cuffs 62 of Lawson '278 do not cease to be barrier elements simply because the overall article is a "diaper" not necessarily worn by women during menstruation to absorb uterine flow. Note further that the "diaper" disclosed in Lawson '278 is not strictly for infants. The Lawson '278 reference defines the term "diaper" as follows (column 3, lines 4-6):

As used herein, the term "diaper" refers to a garment generally worn by infants **and incontinent persons** that is worn about the lower torso of the wearer.
(Emphasis added.)

We find that Lawson '278 discloses diapers of sufficient size to fit an adult female as well as diapers for infants, both having the structure described in its disclosure and shown in its Figures.

According to Correa's preliminary motion Fact ¶ 47, citing to various parts of the Lawson '278 reference, Lawson '278 discloses that when the "sanitary napkin" assumes a shape when worn, the barrier elements stand up to form channels for containing body fluids. Roberts does not dispute these alleged facts. Based on Correa's Fact ¶ 47 and parts of Lawson '278 cited in

Interference No. 105,019
Correa v. Roberts

that paragraph, we find that Lawson '278 discloses that when its disclosed article assumes a shape when worn, the barrier elements stand up to form channels for containing body fluid.

The only item not accounted for, then, is the "sanitary napkin" recited in the preamble of Roberts' claim 20. As is noted above, a "sanitary napkin" is merely an absorbent pad for wear by women during menstruation to absorb the uterine flow, and the requirement for an absorbent pad is already accounted for by the disclosure of the Lawson '278 reference. We hold that the term adds nothing of structural significance to the features recited in the body of the claim. Rather, it adds only a statement of the intended use for the claimed article.

As is explained by the Federal Circuit in Apple Computer Inc., 234 F.3d at 22, 57 USPQ2d at 1063:

Language in a claim preamble, however, acts as a claim limitation only when such language serves to "give meaning to a claim and properly define the invention," **not when the preamble merely states a purpose or intended use of the invention.** In re Paulsen, 30 F.3d 1475, 1479, 31 USPQ2d 1671, 1673 (Fed. Cir. 1994)(quoting DeGeorge v. Bernier, 768 F.2d 1318, 1322 n.3, 226 USPQ 758, 764 n.3 (Fed. Cir. 1985)). (Emphasis added.)

As is further explained by the Federal Circuit in Catalina Marketing International v. Coolsavings.Com, Inc., 289 F.3d 801, 808, 62 USPQ2d 1781, 1784 (Fed. Cir. 2002):

In general, a preamble limits the invention if it recites essential structure or steps, or if it is "necessary to give life, meaning, and vitality" to the claim. Pitney Bowes, 182 F.3d at 1305. Conversely, **a preamble is not limiting "where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention."** Rowe v. Dror, 112 F.3d 473, 478, 42 USPQ2d 1550, 1553 (Fed. Cir. 1997). (Emphasis added.)

Interference No. 105,019
Correa v. Roberts

Such is the case here. The body of the claim already defines an absorbent core with a backsheet and a topsheet, which constitutes a pad, usable for absorbing and containing body fluid. The recitation of "sanitary napkin" in the preamble only further specifies the inventor's purpose or intended use for the claimed structure. The structure defined in the body of the claim is not further limited by the recitation of a "sanitary napkin" in the preamble. The circumstance is like that in Catalina Marketing International, 289 F.3d at 810, 62 USPQ2d at 1786-87. The invention as defined in the body of the claim has its own life, meaning, and vitality, without regard to the intended use specified in the preamble, and treating the intended use as a limitation would effectively impose a method limitation on an apparatus claim without justification.

We recognize that the term "sanitary napkin" appears once more in the body of claim 20 where Roberts is referring to use of the article being claimed. That second recitation does not change the structure or manner of operation of the claimed article. It reaffirms the intended use indicated in the preamble, and is only a reference to the article being claimed, adding nothing further to the pre-existing structural and operational requirements. Contrary to an apparent suggestion by party Roberts, the cases of Catalina Marketing International, supra, and Bell Communications Research, Inc. v. Vitalink Communications Corp., 55 F.3d 615, 34 USPQ2d 1816 (Fed. Cir. 1995), do not stand for the inflexible proposition that so long as the preamble term at issue appears at least once in the body of the claim it takes on more than an intended use significance. As is stated in Catalina Marketing International, 289 F.3d at 808, 62 USPQ2d at 1785: "No litmus test defines when a preamble limits claim scope." Every case depends on its own facts, e.g., how the reiteration of the same term in the body of the claim affects the structure

Interference No. 105,019
Correa v. Roberts

and operation of the claimed device. Here, the second appearance of "sanitary napkin" adds no structural or operational limitation to the claim but reaffirms the intended use first indicated in the preamble. In Catalina Marketing International, 289 F.3d at 811, 62 USPQ2d at 1787, it was determined that the phrase at issue in claim 25 contained a process aspect in the claimed system, i.e., "a coupon dispensing entity must designate a location for a terminal **before** placing it [the terminal] at that site (Emphasis added)." Party Roberts has not explained or established any similar process feature for the claimed "sanitary napkin" beyond simply the intended use for the article.

At oral argument on July 31, 2003, the motions panel asked counsel for Roberts just what structural feature is required by the recitation of "sanitary napkin" in the preamble, which is not found in the Lawson '278 reference. Counsel for Roberts' response was that a sanitary napkin must have the ability to be placed in an undergarment and have flaps that wrap around the edges of the undergarment, while also having cuffs that stand up from the top sheet (Oral Argument Transcript at 32). The problem is that the assertion of Roberts' counsel is not supported by sufficient evidence in the record. Party Roberts did not submit the testimony of any technical witness which represents that a "sanitary napkin" is a term of art understood by one with ordinary skill as necessarily having flaps which wrap around the edges of an undergarment.

The specification of Roberts does not define "sanitary napkin," and as noted above, the dictionary definition of "sanitary napkin" is simply an absorbent pad for wear by women during menstruation to absorb the uterine flow. Furthermore, in proceedings before the USPTO, claim terms in applications are properly construed according to their broadest reasonable interpretation

Interference No. 105,019
Correa v. Roberts

not inconsistent with the specification. In re Yamamoto, 740 F.2d 1569, 1571-72, 222 USPQ 934, 936-937 (Fed. Cir. 1984); In re Sneed, 710 F.2d 1544, 1548, 218 USPQ 385, 389 (Fed. Cir. 1983). Here, the broadest reasonable interpretation for a "sanitary napkin" not inconsistent with the specification is just what the dictionary defines, "an absorbent pad for wear by women during menstruation to absorb the uterine flow," not the narrow construction urged by party Roberts without justification, i.e., that it must have the specific kind of flaps having a structure capable of wrapping around the edges of the undergarment of the wear. Moreover, if the issue is mere "capability," as counsel for Roberts suggested during oral argument, we find that the flaps of Lawson '278 are capable of being used to wrap around the edges of an undergarment notwithstanding that that may not be the intended use of the flaps in Lawson '278.

Regarding claim 14, party Roberts admits and does not dispute that the recited (1) "a liquid pervious topsheet," (2) "a liquid impervious backsheet joined with said top sheet," and (3) "an absorbent core positioned between said top sheet and said backsheet" are present or disclosed in the Lawson '278 reference. Claim 14 further recites: "at least one barrier element joined to said topsheet." Roberts admits and does not dispute that the Lawson '278 reference discloses a barrier cuff 62 joined to the topsheet 38 as shown in Figure 3. In that regard, we find that the barrier cuff 62 is a barrier element. Claim 14 further recites: "said barrier element having a proximal edge joined to said topsheet." Roberts admits and does not dispute that barrier cuffs 62 of the Lawson '278 reference each has a proximal edge 64 joined to the topsheet. Claim 14 further recites that the at least one barrier element has "a free edge spaced away from said proximal edge and being free from securement to at least a portion of said topsheet." Roberts

Interference No. 105,019
Correa v. Roberts

admits and does not dispute that the distal edge 66 of the barrier cuff of the Lawson '278 reference is spaced away from the proximal edge and that the Lawson '278 reference discloses that the distal edge 66 is preferably not secured to any element at least in the crotch region so that it may be spaced away from the top surface 40 of the topsheet 38. Claim 14 further recites: said at least one barrier element comprising an absorbent material for absorbing and containing body fluids which contact said barrier element." Roberts admits and does not dispute that the Lawson '278 reference discloses that the barrier cuffs may additionally be provided with absorbent means to absorb and contain exudates which contact the barrier buff. On that basis, we find that the barrier cuffs of the Lawson '278 reference comprises absorbent material for absorbing and containing body fluids which contact the barrier cuffs. In this context, we find that absorbable "exudates" is another term for body fluids, and Roberts makes no contention that it is not.

Claim 14 additionally recites: "at least one lateral flap comprised of an extension of said topsheet and said backsheet." Roberts admits and does not dispute that as disclosed in the Lawson '278 reference side flaps 58 are formed from the extension of the backsheet 42 and the topsheet 38. We find that side flap 58 as shown in Figures 2 and 3 of the Lawson '278 reference are comprised of an extension of the topsheet and the backsheet. In that regard, note column 7, lines 55-56 of the Lawson '278 reference, which states that the side flaps 58 are formed from the extension of the backsheet 42 and the topsheet 38. Claim 14 further recites that at least a portion of the barrier element is coextensive with the topsheet where it is joined thereto. We find that as is shown in Figure 3 of the Lawson '278 reference, a portion of the barrier cuff 62 in the bottom area joined to the top sheet 38 is coextensive with the topsheet, just as Roberts has identified

Interference No. 105,019
Correa v. Roberts

item 64 in its Figure 7 as the portion of the barrier element that is coextensive with its topsheet (See Roberts Clean Copy of Claims – Exhibit 2005). Finally, claim 14 recites that "wherein, during use, said barrier element is spaced away from said topsheet so as to stand up to contain fluids." Roberts admits and does not dispute that the Lawson '278 reference discloses that during use, the distal edge of the barrier cuff is sufficiently spaced away from the topsheet top surface 40 so that a channel 96 is formed to restrain, contain and hold body exudates. We find that as is shown in Figure 3 of the Lawson '278 reference and discussed in Lawson '278's column 8, line 64 - column 9, line 1, the distal edge 66 of the barrier cuff 62 is sufficiently spaced away from the topsheet so that a channel is formed to restrain, contain and hold body exudates, and that such a channel inherently restrains, contains, and holds body fluids. The effect is the same as that identified by Roberts in its Clean Copy of Claims (Exhibit 2005), by reference to Item 109 of Figures 2 and 7 of Roberts' specification, in connection with the wherein clause of claim 14.

The argument set forth by Roberts with respect to claim 14 is much the same as that it made with respect to claim 20. Roberts argues that the preamble of claim 14 sets forth that the claimed article is a sanitary napkin, whereas the Lawson '278 reference discloses a diaper, not a sanitary napkin. This argument is rejected for the same reasons we already discussed above in the context of claim 20. In short, the intended use of the article as a sanitary napkin does not change the structural configuration of the claimed article or the cooperative relationships of all its components, and that the term "sanitary napkin," when construed as broadly as reasonably permitted, means only an absorbent pad for wear by women during menstruation to absorb the

Interference No. 105,019
Correa v. Roberts

uterine flow. The "diaper" of the Lawson '278 reference is also for wear by incontinent persons generally and is not limited to wear by infants or toddlers.

Claim 14 does additionally recite in its preamble that the sanitary napkin is of the type for placement in an undergarment. No evidence has been submitted by Roberts to show that such sanitary napkins for placement within an undergarment must or must not have certain particular structural features. Roberts also has not referenced any part of its specification which sets forth that such type of sanitary napkin must or must not have a certain structural feature. Roberts further has not argued that such "type" of sanitary napkins must or must not have any special structural features as distinguished from other types of sanitary napkins. Construing the term as broadly as reasonably permitted, we take it to mean that the article is worn directly against the body of the wearer rather than separated therefrom by an undergarment. The absorbent article disclosed by the Lawson '278 reference satisfies this requirement.

Relying on the testimony of party Correa's own technical witness, party Roberts argues that while lateral flaps in sanitary napkins have the function of wrapping the sanitary napkin to the undergarment of the wearer, flaps in the context of diapers have the different function of gasketing structures and do not serve as ties. We have reviewed the cited testimony of Ms. Catherine E. Salerno (Exhibit 2008 on page 5, paragraph 9) and do not find that testimony sufficient to establish what party Roberts asserts. Ms. Salerno nowhere indicates that structural extensions which serve to tie the sanitary napkin to an undergarment are the only thing that can or should be referred to as a flap or lateral flap in the context of a sanitary napkin. Ms. Salerno also nowhere indicates that gasketing structures are the only thing that can or should be referred

Interference No. 105,019
Correa v. Roberts

to as a flap or side flap in the context of a diaper. Ms. Salerno merely gave two examples of flaps in an absorbent article, one being a tie in a sanitary napkin and the other being a gasketing structure in a diaper. Her testimony does not establish that a "lateral flap" or "flap" in a sanitary napkin is necessarily a tie that wraps to an undergarment and cannot, in any instance, be a gasketing structure, or that a "side flap" or "flap" in a diaper is necessarily a gasketing structure and cannot, in any instance, be a tie. We take the term "flap" to have a meaning according to its ordinary usage in the English language, such as that defined in The Random House College Dictionary, Revised Edition (1982): "something broad and flexible, or flat and thin, that hangs loosely, attached at one side only." That meaning comports to and is consistent with the parties' understanding that the term "flap" as applied to absorbent articles has long been understood to denote the elongated structures extending from the sides of the main body of the absorbent article, albeit what is referred to as "the elongated structures" by the parties is not entirely clear. Neither party presented evidence that the term "flap" has a special meaning in the art that is contrary to its ordinary meaning or usage in the English language. To the extent party Roberts has argued for such a special meaning, the argument is rejected.

Claim 14 does not specify the particular function of the recited flaps. Accordingly, flaps which serve as ties or flaps which provide a gasketing function are both adequate to meet the recitation. Senior party Roberts had ample opportunity to amend its application claims as a response to junior party's preliminary motion 2 to recite particularly that the flaps tie the sanitary napkin to the undergarment. Had it done so, the Lawson '278 reference would not be sufficient to meet what is claimed. But that is not the circumstance now before us.

Interference No. 105,019
Correa v. Roberts

With regard to claims 15, 16 and 18, each of which depends from claim 14, Roberts does not dispute that the Lawson '278 reference discloses the features additionally recited in those claims relative to independent claim 14. Claim 19 depends from claim 14 and further recites that said flap is an extension of the topsheet and the backsheet. Roberts admits and does not dispute Correa's statement that the Lawson '278 reference discloses that the side flaps 58 are formed from the extension of the backsheet 42 and the topsheet 38. We find that the feature set forth in claim 19 is indeed met by the Lawson '278 reference, which in column 7, lines 56-57, states "the side flaps 58 are formed from the extension of the backsheet 42 and the topsheet 38" Claim 22 depends from claim 20 and further recites that the barrier elements comprise a layer of foam. Roberts admits and does not dispute Correa's statement, citing to column 9, lines 1-4, that the Lawson '278 reference discloses that the barrier cuff 62 may be manufactured from foam. We find that the feature set forth in claim 22 is indeed met by the Lawson '278 reference, which in column 9, lines 1-4, states "The barrier cuff 62 may be manufactured from a wide variety of materials such as polypropylene, polyester, rayon, nylon, foams, plastic films, formed films, and elastic foams."

For the foregoing reasons, junior party Correa has shown that claims 14-16, 18-20 and 22 of Roberts are unpatentable under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,695,278.

As for the patentability of Correa's own claims corresponding to the count over the Lawson '278 reference, we express no view. The issue need not be decided, because judgment is concurrently entered herewith against junior party Correa on the ground of priority. Even if

Interference No. 105,019
Correa v. Roberts

Correa's claims are patentable over the prior art asserted by Correa against Roberts, Correa still would not be entitled to these claims.

C. Correa's Preliminary Motion 3

By this preliminary motion, Correa asserts that claim 23 of Roberts is unpatentable under 35 U.S.C. § 112, first paragraph, for lack of written description in the specification. Claim 23 depends from claim 20 and recites as follows:

23. The sanitary napkin of Claim 20 further comprising a pair of flaps said flaps comprising said topsheet, said backsheet, and said barrier elements.

There is no assertion by Correa that base claim 20 of Roberts is without written description support in the specification. The issue here is focused on the requirement that "said flaps comprising said topsheet, said backsheet, and said barrier elements."

According to Correa, the feature "said flaps comprising said topsheet, said backsheet, and said barrier elements" means that the barrier elements must also extend along with the other parts of the flap, i.e., the topsheet and the backsheet. We have already determined that based on its dictionary definition, "flap" means "something broad and flexible, or flat and thin, that hangs loosely, attached at one side only." For the flaps to comprise the topsheet, backsheet, and the barrier elements as is recited in Roberts' claim 23, we agree with Correa that the barrier elements must also reach out along the direction of extension of the flap, together with the topsheet and the backsheet. In other words, the barrier elements must take part in the nature of the flaps as flaps. An opposing view would not be reasonable. It is not necessary that all such extensions terminate at the same end point. However, they must each take part in the extension of the flaps as flaps.

We reject Roberts' argument that mere attachment of the barrier elements to the flaps satisfies the claim requirement of said flaps comprising said topsheet, said backsheet, and said barrier elements. Mere attachment is a concept so broad that it does not imply an extension or reach in any particular direction, including the direction of extension of the flap. For example, in the last paragraph beginning on page 25 of Robert's specification, it is stated:

The embodiment of the sanitary napkin shown in FIG 7 is provided with the barrier means 62 joined to the topsheet 38. The term "joined" includes any means for fixing the barrier means [62] to the sanitary napkin and includes embodiments wherein the barrier means 62 is a separate element having the proximal edge 64 directly or indirectly attached to the topsheet 38 (i.e. integral) or embodiments wherein the barrier means 62 is made from the same element or material as the topsheet 38 so that the proximal edge 64 is a continuous and undivided element of the topsheet (i.e. unitary). **The barrier means 62 may alternatively be joined to the side flap 58, the backsheet 42, the absorbent core 44, the topsheet 38 or any combination of these or other elements of the sanitary napkin. (Emphasis added.)**

The above-quoted disclosure does not require the barrier element to have any extension in the direction of extension of the flap. The disclosure is much broader than what the claim requires.

We recognize that in Roberts' Figure 7, barrier element 62 is attached to the topsheet 38 in a surface area of the topsheet at the fixed end of flap 58, and the manner of attachment, shown by reference numeral 92 representing adhesive, appears to reveal a very small extension of the barrier element in the direction of the free end of the flap 58. But it is our view that when considered in light of the specification, and particularly the above-quoted portion of the specification, what is shown in Figure 7 is merely that the contact between the barrier element and the topsheet is no more than that necessary for applying adhesive 92 for joining the two. To

Interference No. 105,019
Correa v. Roberts

say that the barrier element is included as a part of the flap, in that context, is without adequate basis, speculative, and reflects hindsight reconstruction in light of the content of claim 23.

To satisfy the written description requirement under 35 U.S.C. § 112, first paragraph, the specification must convey with reasonable clarity to those skilled in the art that, as of the filing date of the application, the inventor was in possession of the invention now claimed. See, e.g., Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1563-64, 19 USPQ2d 1111, 1117, (Fed. Cir. 1991); In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983); In re Smythe, 480 F.2d 1376, 1382, 178 USPQ 279, 284 (CCPA 1973); In re Anderson, 471 F.2d 1237, 1240, 176 USPQ 331, 333 (CCPA 1973). The issue is whether the specification reasonably conveys to the artisan that the inventor had possession at the earlier time of the later claimed subject matter. Ralston Purina Co. v. Far-Mar-Co., 772 F.2d 1570, 1575, 227 USPQ 177, 179 (Fed. Cir. 1985).

Based on the foregoing, at the time of filing of its involved application Roberts was not in possession of the idea that the flap, i.e., something broad and flexible, or flat and thin, that hangs loosely, attached at one side only, is comprised of the topsheet, the backsheet, and also the barrier element. The specification of Roberts does describe that the barrier element can be attached to the flap, but that does not constitute written description of the flap's being comprised of the topsheet, the backsheet, and also the barrier element. Not every means of attachment necessarily results in the barrier element's taking part in the nature of flaps as flaps, and no means of attachment sufficient to meet the claimed recitation is disclosed in the specification.

For the foregoing reasons, Correa's preliminary motion 3 is **granted**.

D. Correa's Preliminary Motion 4

Interference No. 105,019
Correa v. Roberts

By this preliminary motion, Correa asserts that claim 23 of Roberts is unpatentable under 35 U.S.C. § 102(a) and/or 102(e) over Correa's own involved patent, Patent No. 5,490,847. The underlying basis of this preliminary motion is similar to that of Correa's preliminary motion 3. The issue in dispute is not anticipation but written description in Roberts' parent application. Correa asserts that because claim 23 of Roberts is without written description in Roberts' parent application, the effective filing date for that claim is the actual filing date of Roberts' involved application and thus Correa's involved patent is applicable prior art under 35 U.S.C. § 102(a) or § 102(e). The arguments about lack of written description is essentially the same as that made in the context of Correa's preliminary motion 3, albeit here the specification under scrutiny is that of Roberts' parent application and not Robert's involved application.

Much of the pertinent analysis, if made, would be the same as that discussed in the context of Correa's preliminary motion 3. We do not, however, regard as efficient use of resources to address this preliminary motion because Correa's preliminary motion 3 has already been granted and claim 23 of Roberts has been determined as unpatentable under 35 U.S.C. § 112, first paragraph, for lack of written description in the specification.

Accordingly, we do not reach the merits of Correa's preliminary motion 4, which is hereby **dismissed** as moot.

E. Correa's Preliminary Motion 5

By this preliminary motion, Correa seeks to have its claims 5 and 6 designated as not corresponding to the count. That means Correa must establish that its claims 5 and 6 are directed to subject matter that is not the same patentable invention as any of Roberts' claims whose

Interference No. 105,019
Correa v. Roberts

correspondence to the count Correa does not dispute. Standing Order, Paragraph 26(j). The term "same patentable invention" is defined in 37 CFR § 601(n) which sets forth that invention A is the same patentable invention as invention B when invention A is either anticipated by or obvious in view of invention B, assuming that invention B is prior art to invention A.

Correa's claims 5 and 6 are reproduced below:

5. Disposable intimate feminine absorbent according to claim 1, in which said lateral cuff has between approximately 2% to around 35 % of the width of said absorbent core.

6. Disposable intimate feminine absorbent according to claim 1, in which said lateral cuff has between approximately 5% to around 15% of the width of said absorbent core.

Correa asserts, and Roberts admits, that none of Roberts' claims 14-16, 18-20, 22 and 23 gives any indication of what the width of the lateral cuff should be, either in dimensions or in terms relative to the width of the absorbent core. Evidently, the requirement that the barrier cuff width must be within a certain range of the core width is the only difference asserted by Correa between its claims 5 and 6 and Roberts' claims as prior art. Regarding additional prior art which potentially may be combined with any claim of Roberts to arrive at Correa's claim 5 or claim 6, Correa cites to Patent No. 5,308,346 ("the "Sneller" reference), a reference disclosing a sanitary napkin invention which provides a raised barrier on the edges of side flaps to help control or prevent leakage and which specifies the width of the barrier element. Correa indicates that the barrier shown in Sneller has a width of about 15mm but dismisses this reference, however, on the ground that "it does not refer to any core width or state any ideal or preferred cuff width relative to the width of the core," and that "Sneller's drawings are not to scale and cannot be used to

Interference No. 105,019
Correa v. Roberts

derive ratios of cuff width to core width." In short, Correa's position is that because Sneller does not specify the width of the core, it is not known whether the 15mm wide barrier is within 2% to 35% of the width of the absorbent core as is recited in Correa's claim 5, or within 5% to 15% of the width of the absorbent core as is recited in Correa's claim 6.

It appears that Correa has not fully appreciated (1) that the prior art need not teach the range or "spread" recited in claims 5 and 6 but only something falling within the recited range to meet those claims, and (2) that it, as the moving party, bears the burden of prove as is indicated in 37 CFR § 1.637(a). Correa makes no mention of what was the standard or conventional width of the absorbent core for a sanitary napkin of various types, at the time of filing of Correa's involved application on November 22, 1993. Correa makes no mention of the width of the absorbent core for sanitary napkins of various types which were sold on the open market at the time of filing of Correa's involved application on November 22, 1993. While it is true that Sneller does not specify the width of its absorbent core in conjunction with its raised barrier which is 15mm wide, it cannot be reasonably disputed that one with ordinary skill in the art, who according to the parties typically possesses at least a bachelor's degree in chemistry or chemical engineering, material science or other fields of engineering such as mechanical engineering and three to five years of experience in industry, would not see fit to use a width for the absorbent core that is consistent with what was standard, conventional, or generally available at the time.

What is before us is not an obviousness rejection from an examiner in an ex parte appeal, where it is the examiner who bears the initial burden of showing prima facie obviousness. Here, the initial designation of claims as corresponding or not corresponding to the count in the Notice

Interference No. 105,019
Correa v. Roberts

Declaring Interference is presumed to be correct and it is party Correa as the moving party seeking to change the status quo who bears the burden of prove to show nonobviousness. In that context, the silence of Correa's Preliminary Motion 5 with regard to the standard or conventional core width in the industry or what was generally available on the market is deafening. To be persuasive, Correa must account for the standard or conventional width of the absorbent core. As the moving party, Correa may not simply presume that applying the standard or conventional width of absorbent cores for sanitary napkins at the time of filing of Correa's involved application to Sneller's sanitary napkin will not result in dimensions which fit within the 2% to 35% range specified in Correa's claim 5, or the 5% to 15% range specified in Correa's claim 6.

We have read Paragraph 24 of the declaration of Ms. Catherine Salerno (Exhibit 2008), a technical witness having sufficient skill as a person of ordinary skill in the art, which states:

24. There is no reason I can see from Correa's claims or Roberts' claims as a person experienced in this field why a person of ordinary skill in the art as of 1992 or 1993 would have chosen the widths of the cuffs relative to the width of the absorbent core set forth in Correa claims 5 and 6. Although I agree that persons of ordinary skill in this field might experiment with cuff widths, and would not choose cuffs that are so wide as to occlude a major portion of the core, I am not aware of anything known to the public prior to 1992 or 1993 that would have given any worker in this field a reason to choose the particular cuff widths of Correa claims 5 and 6.

The testimony of Ms. Salerno is unconvincing, for several reasons. First, it appears that Ms. Salerno directs her analysis to the particular ranges recited in Correa's claims 5 and 6 rather than a specific instance of core width measurement that falls within those ranges. It is not necessary that the prior art teaches a "range" extending from a lower end to an upper end as is recited in Correa's claims 5 and 6. Secondly, Ms. Salerno does not provide or indicate the known core

Interference No. 105,019
Correa v. Roberts

widths of sanitary napkins available at the time of filing of Correa's involved application. Lastly, Ms. Salerno does not express what core width would have been considered standard or conventional at the time. Ms. Salerno's testimony is too vague to be accorded the significance desired by party Correa. We have substantial doubt that Ms. Salerno's testimony is that a core width chosen from what would have been considered standard range or conventional range of core widths at the time would have been a fit within the broad ranges recited in Correa's claims 5 and 6, or that no known core widths at the time of filing of Correa's involved application would have been a fit within the broad ranges recited in Correa's claims 5 and 6.

For the foregoing reasons, we hold that Correa has not met its burden of prove

Because Correa's preliminary motion 5 does not set forth a prima facie basis for entitlement to relief, we need not consider Roberts' opposition or Correa's reply. We do note, however, that in the Csillag reference cited by Roberts, i.e., Patent No. 4,015,604, the narrow longitudinally extending zones 28 are not barrier "cuffs" and thus the width of that zone is not readily applicable to the width of a barrier cuff, and that the Roman-Hess reference, i.e., Patent No. 4,655,759, does not disclose any specific core width or relationship between cuff width and core width. Also, to the extent that the part of the napkin of the Romans-Hess reference that folds up is deemed a cuff, the reference indicates the width of the fold line and not the cuff width.

Correa's preliminary motion 5 is **denied**.

F. Roberts' Preliminary Motion 1

By this preliminary motion, Roberts seeks to have claims 7, 8, 11, 12 and 13 of Correa designated as corresponding to the count. Under 37 CFR § 1.637(c)(3)(ii), Roberts as the

Interference No. 105,019
Correa v. Roberts

moving party must show that these claims define the same patentable invention as another claim whose designation as corresponding to the count the moving party does not dispute. Roberts has the burden of prove. 37 CFR § 1.637(a). In that connection, Roberts selects Correa's claim 1, whose correspondence to the count Roberts does not dispute, as the "another claim." The issue is whether Roberts has shown that Correa's claims 7-8 and 11-13 define the same patentable invention as Correa's claim 1. As already noted above, the meaning of "same patentable invention" is defined in 37 CFR § 1.601(n). Roberts has to establish that Correa's claims 7-8 and 11-13 are either anticipated by or would have been obvious over Correa's claim 1. Roberts asserts only that Correa's claims 7-8 and 11-13 are each obvious over claim 1 of Correa.

Claim 7 of Correa reads as follows:

Disposable intimate feminine absorbent according to claim 1, in which said lateral cuff has between approximately 5% to around 80% of the length of said absorbent core.

Claim 8 of Roberts reads as follows:

Disposable intimate feminine absorbent according to claim 1, in which said lateral cuff has between approximately 15% to around 60% of the length of said absorbent core.

Because in the appropriate analysis the subject matter of Correa's claim 1 is presumed as prior art, the only difference between each of claims 7 and 8 and the prior art is the particular length of the cuff recited in these dependent claims, i.e., within a range from 5% to 80% of the core length in the case of Correa's claim 7, and within a range from 15% to 60% of the core length in the case of Correa's claim 8.

At the outset, we note that Roberts need not demonstrate that the invention including the particular and precise ranges specified in Correa's claims 7 and 8 relative to the core length would have been obvious. Rather, it is necessary for Roberts to establish only the obviousness of the article having a cuff length to core length ratio that is anywhere within the specified ranges. It is not the entire range which must be taught or suggested by prior art, but only some point within. Note also that within the obviousness analysis, the proper perspective is that of a hypothetical person having ordinary skill in the art and the parties are in agreement that such a person typically possesses at least a bachelor's degree in chemistry or chemical engineering, material science or other fields of engineering such as mechanical engineering and three to five years of experience in industry.

Correa's claim 1 already specifies that the absorbent cuff has a layer of hydrophilic material, is affixed along an edge of the absorbent article, and moves away from an upper sheet when flexed "to provide a region for containing fluid." Thus, the prior art already provides that the cuff is to serve as a barrier along an edge of the article for containing liquid therein. The question becomes whether one with ordinary skill in the art would have deemed obvious to have a cuff or barrier length that is not the entire length of the core but within a range of 5% to 80% of the core length according to claim 7, and within a range of 15% to 60% of the core length according to claim 8.

In our view, even in the absence of any additional prior art to combine with Correa's claim 1, it would have been obvious to one with ordinary skill in the art that to have some useful barrier function, the cuff need not extend to cover the entire length of the core. It is unreasonable

Interference No. 105,019
Correa v. Roberts

to conclude that someone possessing a bachelor's degree in chemistry or chemical engineering, material science or other fields of engineering such as mechanical engineering and three to five years of experience in industry would think that unless the cuff extended the full length of the core it would have no useful value as a barrier element for containing liquid. Some skill in the art is presumed. In re Sovish, 769 F.2d 738, 743, 226 USPQ 771, 774 (Fed. Cir. 1985). The shorter the barrier cuff along the edge of the core, the less the barrier can contain liquid, and vice versa. The recognition of that relationship derives from common sense and is certainly within the scope of the basic or fundamental skills of one with ordinary skill in the art. Note also that a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. In re Bozek, 416 F.2d 1385, 163 USPQ 545, 549 (CCPA 1969). On that basis, we conclude it would have been within the ordinary skill in the art to have a cuff length that is anywhere between 0% and 100% of the core length, such as 50% or 60% of the core length, albeit with the recognition that a shorter length barrier cuff would have a correspondingly lower ability to serve as barrier for containing liquid. Since the core is liquid absorbent, liquid blocked by the partial barrier could get absorbed by portions of the core before flowing out around the barrier cuff. It is not well grounded to suggest that one with ordinary skill would insist that the barrier cuff must extend the entire length of the core. Correa's claims 7 and 8 would have been obvious over Correa's claim 1 as prior art even in the absence of any additional prior art reference.

Alternatively, Roberts has provided an additional item of prior art, U.S. Patent No. 4,743,246 (Exhibit 1008, "the Lawson '246 reference"), which brings forth the teaching that

Interference No. 105,019
Correa v. Roberts

gasketing cuffs 56 along the edges of the absorbent core of an absorbent article such as a diaper or an incontinent brief need not extend the entire length of the absorbent core (Exhibit 1008, Figure 1). The gasketing cuffs 56 of the Lawson '246 reference are also for containing liquid within the boundaries of the absorbent article (Column 2, lines 31-33). Roberts has further provided another item of prior art, U.S. Patent No. 4,655,759 (Exhibit 1006, "the Romans-Hess reference"), which discloses the use of embossed channels along the longitudinal edges of a sanitary napkin to contain liquid and prevent leakage by directing the edge of the sanitary napkin upwards during use (Column 2, lines 55-68). It is evident from Figures 1 and 2 that the portion folding up during use does not extend the entire length of the sanitary napkin. In column 5, lines 27-31, it is stated: "Wells are formed and an occlusive container is formed thereby allowing the sanitary napkin to hold more exudate while minimizing side leakage of fluid from the central region of the sanitary napkin." As is the case of the recited cuff in Correa's claim 1, which is to provide a region for containing liquid, the folding-up portion of the sanitary napkin of the Romans-Hess reference is used to contain liquid.

In light of the above-noted teachings of the Lawson '246 reference and the Romans-Hess reference, and in recognition of the level of ordinary skill agreed to by the parties, we conclude that the application of a cuff length to core length ratio within the range specified in Correa's claims 7 and 8 to the subject matter of Correa's claim 1 which is regarded as prior art would have been obvious over either the Lawson '246 reference or the Romans-Hess reference. It is not necessary that the gasketing cuffs 56 of the Lawson '246 reference or the embossed channels 3 of the Romans-hess reference be identical to the cuffs of Correa's claim 1. The teaching needed is

Interference No. 105,019
Correa v. Roberts

more general and simply that a cuff or folding-up portion along the edge of the absorbent core need not extend the entire length of the absorbent core to be useful in containing liquid or exudates. Given that the cuff need not extend the entire length and given the level of ordinary skill in the art, we are of the view that it would have been obvious to one with ordinary skill in the art to put in place a cuff having an extent within the broad ranges specified in Correa's claim 7 (5% to 80% of the core length) and Correa's claim 8 (15% to 60% of core length).¹

As for Correa's claim 11, the parties are in agreement that the differences between Correa's claim 11 and Correa's claim 1 is simply that (Motion ¶¶ 24) "claim 11 in addition to claiming [an] absorbent cuff running along at least one edge of the absorbent, also claims at least one end cuff overlying the upper permeable sheet," and that "claim 11 does not expressly recite a lateral wing like claim 1 does."

Correa's claim 12 reads as follows:

Disposable intimate feminine absorbent according to claim 11, in which there are two end cuffs.

Correa's claim 13 reads as follows:

¹ The other items of prior art cited by Roberts, i.e., U.S. Patent No. 4,936,839 ("Molee"), U.S. Patent No. 4,015,604 ("Csillag"), and U.S. Patent No. 4,589,876 ("Van Tilburg") are not very pertinent. Csillag and Van Tilburg appear to use barrier or seal elements along the entire length of the absorbent core. As for Molee, while it is true that barrier means 65 does not extend to cover the entire length of the absorbent core (Figure 5), full length coverage there is not necessary because Molee also employs transverse compressed channels 24 and 26 to keep fluids from reaching the upper and lower ends. Because Correa's claims 7 and 8 do not require something like Molee's elements 24 and 26, it cannot be said that partial length coverage without also requiring transverse barriers would have been obvious.

Interference No. 105,019
Correa v. Roberts

Disposable intimate feminine absorbent according to claim 11, in which said opening of said end cuff extends across the width of the said absorbent core.

In Correa's specification, end cuffs are cuffs in the transverse direction which are useful for preventing longitudinal leakages (Elements 330 and 340 in Figures 9 and 10; Column 8, lines 18-23). Claim 11 specifically requires at least one end cuff overlying the upper permeable sheet, as compared to Correa's claim 1 as prior art. The question here is whether Roberts has shown that given Correa's claim 1 as prior art it would have been obvious to one with ordinary skill in the art to add at least one end cuff (claim 11), to include two end cuffs (claim 12), and to have the opening of the at least one end cuff extend across the width of the absorbent core (claim 13).

Correa cites the two references Molee and Csillag as each, in combination with the subject matter of Correa's claim 1, rendering obvious Correa's claims 11, 12, and 13. There appears to be no dispute between the parties as to the scope and content of Molee and Csillag with regard to the content thereof which is relied on by Correa to render obvious Correa's claims 11-13. Roberts acknowledges that Molee does not disclose raised or stand-up barrier cuffs which move away from the permeable sheet when the article is flexed to contain fluids or exudates, but compressed channels or other fluid impervious or repellant material impregnated into the absorbent core. (Motion page 17, line 21, to page 18, line 4) Roberts further acknowledges that both Molee and Csillag describe barriers which are incorporated into the core itself rather than barriers disposed on the top facing permeable sheet and which stand away from such sheet as is required by Correa's claims 11-13. (Motion at 20, lines 15-17)

Accordingly, the issue is simply the legal conclusion of obviousness or unobviousness where all the underlying factual inquiries are not in dispute, because the parties have also agreed as to the level of ordinary skill in the art. We agree with Roberts that Correa's claims 11-13 would have been obvious over Correa's claim 1 in view of either Molee or Csillag.

Although the barriers of Molee and Csillag have a different structure than that required by Correa's claim 11, they are there for the same purpose, i.e., to keep body liquids or exudates from leaking out of the absorbent article. Csillag's invention is directed to absorbent products used for absorbing and retaining body fluids and worn in contact with the body such as diapers, sanitary napkins, dressings and the like, and Molee's invention is directed to a sanitary napkin. The only teaching needed from either Molee or Csillag to combine with Correa's claim 1 is the recognition that body fluids or exudates can leak from the absorbent product in the longitudinal direction as well as in the lateral direction. Both Csillag and Molee clearly provide that teaching. Molee discloses use of transverse compressed channels 24 and 26 extending across the width of the absorbent article to control leakage in the longitudinal direction (Figure 5 and column 4, lines 61-68), and Csillag discloses use of transverse narrow zones 30 impregnated with hydrophobic material to retard leakage in the longitudinal direction (Figure 1 and column 5, lines 19-22; Figures 6 and 8 and column 7, lines 11-20). That the structure of the barrier of Csillag and Molee is different from that required by Correa's claim 11 is of no moment, the structure of the required barrier is already provided by Correa's claim 1 as prior art.

Correa's claim 11 requires at least one end cuff. Correa's claim 12 requires two end cuffs. Correa's claim 13 requires that the end cuff of claim 11 extend across the width of the absorbent

Interference No. 105,019
Correa v. Roberts

article. The transverse barrier zone of both Molee and Csillag are two in number and both extend across the width of the absorbent article (Molee Figure 1 and Csillag Figure 1). For reasons discussed above, the subject matter of these claims would have been obvious in view of the combination of Correa's claim 1 and either Molee or Csillag. The motivation to combine stems from the indication in Correa's claim 1 that the absorbent cuff is for containing liquid and also from the indication in Molee that the transverse barrier is for inhibiting the transmission of body fluid to the ends of the article (column 4, lines 62-66) and in Csillag that the impregnated narrow zones are for providing an effective barrier to leakage (column 5, lines 53-55). The nature of the problem is revealed in both Molee and Csillag as well as Correa's claim 1 as prior art. Any improper reliance by Roberts on the specification of Correa in that regard is of no consequence.

Although not cited by Roberts in connection with its preliminary Motion 1, we find it appropriate to note, but not relying thereon for our decision, the following passage of the Lawson '246 reference (Exhibit 1008) in column 7, lines 30-37:

The elastically contractible gasketing cuffs 56 are disposed adjacent the periphery 28 of the diaper 20, preferably along each longitudinal edge 30 so that the gasketing cuffs 56 tend to draw and hold the diaper 20 against the leg of the wearer. Alternatively, a gasketing cuff 56 may be disposed adjacent either or both of the end [upper and lower] edges 32 of the diaper 20 to provide a waistcuff rather than leg cuffs.

Roberts need not have relied on the Lawson '246 reference, because Molee and Csillag already provide the necessary suggestion to have barriers on the longitudinal ends which extend across the width of the absorbent article.

Roberts' Preliminary Motion 1 is **granted**.

Interference No. 105,019
Correa v. Roberts

Re-Declaration of Interference

This interference is herein re-declared as follows:

The parties' claims corresponding to the count are:

Correa's application claims 1-3, and 5-13

Roberts' claims 14-16, 18-20, 22, and 23

Priority of Invention

Junior party Correa has not alleged a date of invention or conception with respect to the subject matter of the count prior to the senior party's earliest accorded benefit date of March 31, 1992. Junior party Correa also has not attacked the accorded benefit dates of senior party Roberts. Accordingly, it is time appropriate to enter judgment against junior party Correa. It is

ORDERED that judgment as to the subject matter of the count is herein entered against junior party MAURO F.C. CORREA, TELMA SINICIO and FERNANDA S. ACHCAR;

FURTHER ORDERED junior party MAURO F.C. CORREA, TELMA SINICIO and FERNANDA S. ACHCAR is not entitled to its claims 1-3 and 5-13 which correspond to the count;

FURTHER ORDERED that senior party JOHN D. ROBERTS and CLAUDE P. MANCEL are not entitled to its patent claims 14-16, 18-20, 22 and 23;

FURTHER ORDERED that if there is a settlement agreement, the parties should note the requirements of 35 U.S.C. § 135(c) and 37 CFR § 1.666; and

Interference No. 105,019
Correa v. Roberts

FURTHER ORDERED that a copy of this judgment be filed in the respective involved application or patent of the parties.

Jameson Lee)	
Administrative Patent Judge)	
)	BOARD OF PATENT
Carol A. Spiegel)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
Sally C. Medley)	
Administrative Patent Judge)	

Counsel for Senior Party Roberts: Mathew P. Fitzpatrick, Esq.
Counsel for Junior Party Correa: Barry E. Bretschneider, Esq.