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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* JOHN SOUSA, MARKUS HESS, and CAMERON DOUGALL

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Appeal 2018-002428  
Application 13/779,971  
Technology Center 3600

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Before LARRY J. HUME, NORMAN H. BEAMER, and  
STEVEN M. AMUNDSON, *Administrative Patent Judges*.

HUME, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant,<sup>1</sup> Sousa Truck Trailer Repair Ltd., appeals from the Examiner's decision rejecting claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31, which are all claims pending in the application. Appellant has canceled claims 2–5 and 18, and has withdrawn claims 8, 11–13, 15, 20–24, and 27–29 from consideration. Appeal Br. 5. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Sousa Truck Trailer Repair LTD. Appeal Br. 3.

## STATEMENT OF THE CASE<sup>2</sup>

The claims are directed to a worker safety device and method. *See* Spec. (Title). In particular, Appellant’s disclosed embodiments and claimed invention “relate[] to the field of worker safety, and in particular, the field of devices and methods for improving worker safety.” Spec. ¶ 1.

Claim 1, reproduced below, is representative of the subject matter on appeal (*italics* and formatting added to contested prior-art limitations under obviousness Rejection R3; underlining added to pertinent limitation under written-description Rejection R1; and **bold font** added to the pertinent limitation under indefiniteness Rejection R2):

### *Exemplary Claim*

1. A worker safety device for use with an object having a person support surface and first and second sides extending downward from said surface, the device comprising:

a first holding element for holding the worker safety device on the object at the first side, and a second holding element for holding the worker safety device on the object at the second side;

a device frame attached to and extending between the first and second holding elements so as to position the worker safety device above the person support surface when the worker safety device is held on the object;

the holding elements and device frame being configured to permit the selective increasing and decreasing of a distance between the holding elements;

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<sup>2</sup> Our decision relies upon Appellant’s Appeal Brief (“Appeal Br.,” filed Sept. 5, 2017); Reply Brief (“Reply Br.,” filed Dec. 22, 2017); Examiner’s Answer (“Ans.,” mailed Oct. 26, 2017); Final Office Action (“Final Act.,” mailed Apr. 4, 2017); and the original Specification (“Spec.,” filed Feb. 28, 2013).

a holder, configured to cooperate with the first and second holding elements, configured to detachably hold the device on the object by holding the first holding element on the object at the first side, and the second holding element on the object at the second side;

an attachment means comprising a first end and a second end, the attachment means attached to the first holding element on the first end and the second holding element on the second end and further configured to attach a personal fall-prevention device, the attachment means positioned above the worker safety device when the worker safety device is held on the object,

*wherein the attachment means is attached to the first and second holding elements such that a force applied to the attachment means is distributed to the first and second holding elements and **the force applied to the attachment means is not distributed to the device frame;***

*a movement facilitator, coupled to the device frame, to facilitate movement of said device along said object while the device is held on the object;*

whereby a person on said surface using the fall-prevention device can prevent a fall from said surface by attaching the fall-prevention device to the attachment means.

*Prior Art*

The Examiner relies upon the following prior art as evidence in rejecting the claims on appeal:

Friday	US 4,828,073	May 9, 1989
Crocker et al. (“Crocker”)	US 5,036,949	Aug. 6, 1991
Rhodes	US 5,092,426	Mar. 3, 1992
Preusser et al. (“Preusser”)	US 6,302,238 B1	Oct. 16, 2001
Goldie et al. (“Goldie”)	US 2002/0056590 A1	May 16, 2002
Konitz	DE 296 02 057 U1	Feb. 7, 1996

*Rejections on Appeal*

R1. Claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 stand rejected under 35 U.S.C. § 112, first paragraph, as lacking written description support. Final Act. 2.

R2. Claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. Final Act. 3.

R3. Claims 1, 6, 7, 9, 10, 16, 17, 19, 25, 26, 30, and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Rhodes, Crocker, and either Friday, Goldie, or Preusser. Final Act. 4.

R4. Claim 14 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of Rhodes, Crocker, and either Friday, Goldie, or Preusser, in view of Konitz. Final Act. 8.

CLAIM GROUPING

Based on Appellant's arguments (Appeal Br. ) and our discretion under 37 C.F.R. § 41.37(c)(1)(iv), we decide the appeal of obviousness Rejection R3 of claims 1, 6, 7, 9, 10, 16, 17, 19, 25, 26, 30, and 31 on the basis of representative claim 1. We address Rejections R1 and R2 under § 112 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 and 31, *infra*, and also select claim 1 as being representative.

Remaining claim 14 in Rejection R4, not argued separately, stands or falls with the independent claim 1 from which it depends.<sup>3</sup>

#### ISSUES AND ANALYSIS

In reaching this decision, we consider all evidence presented and all arguments actually made by Appellant. To the extent Appellant has not advanced separate, substantive arguments for particular claims, or other issues, such arguments are waived. 37 C.F.R. § 41.37(c)(1)(iv).

We agree with particular arguments made by Appellant with respect to Rejection R2 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 under 35 U.S.C. § 112(b).

However, we disagree with Appellant's arguments with respect to Rejections R1, R3, and R4 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 and, unless otherwise noted, we incorporate by reference herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken, and (2) the reasons and rebuttals set forth in the Examiner's Answer in response to Appellant's arguments. We highlight and address specific findings and arguments regarding claim 1 for emphasis as follows.

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<sup>3</sup> “Notwithstanding any other provision of this paragraph, the failure of appellant to separately argue claims which appellant has grouped together shall constitute a waiver of any argument that the Board must consider the patentability of any grouped claim separately.” 37 C.F.R. § 41.37(c)(1)(iv). In addition, when Appellant does not separately argue the patentability of dependent claims, the claims stand or fall with the claims from which they depend. *In re King*, 801 F.2d 1324, 1325 (Fed. Cir. 1986).

1. § 112¶ 1 Written Description Rejection R1 of Claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31

Issue 1

Appellant argues (Appeal Br. 10–13; Reply Br. 2–4) the Examiner’s rejection of claim 1 under 35 U.S.C. § 112, first paragraph, as lacking written description support is in error. These contentions present us with the following issue:

Did the Examiner err in finding the originally filed disclosure lacks written description support for the limitation of “the force applied to the attachment means is not distributed to the device frame,” as recited in claim 1?

Principles of Law

The test for compliance with the written description requirement is “whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). “[T]he level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.*

Further, “[n]egative claim limitations are adequately supported when the specification describes a reason to exclude the relevant limitation. Such written description support need not rise to the level of disclaimer. In fact, it is possible for the patentee to support both the inclusion and exclusion of the

same material.” *Santarus, Inc. v. Par Pharm., Inc.*, 694 F.3d 1344, 1351 (Fed. Cir. 2012).

Analysis

The Examiner finds the originally filed Specification does not provide support for the disputed negative limitation of claim 1, and further objected, under 35 U.S.C. § 132(a), to the amendment filed by Appellant on January 13, 2017 because it introduced new matter into the disclosure. Final Act. 3.

Appellant argues paragraph 33 of the Specification discusses various ways attachment means (e.g., ring 68) may be attached to frame 26. Appeal Br. 10. According to Appellant, “this paragraph explains the benefits of arranging the attachment means and the device frame *such that less force is applied to the device frame upon a fall.*” *Id.* (emphasis added).

Paragraph 33 of the Specification discloses:

It will be appreciated that the attachment of the ring 68 to the frame 26 at opposed ends 38, 40, though preferred, is not required. Other modes of attachment are comprehended by the invention. The above-described form of attachment is preferred because it has been found that having two widely distributed attachment points distributes the force on those attachment points, and on the device frame 26, in a beneficial manner in the event that a worker is falling and is thus exerting a force on the device frame 26. By having the ring 68 attached to the frame 26 at the opposed ends 38, 40, the force on the frame 26 acts at points adjacent to the fastening points of the device frame 26 to the trailer body 12. Thus, *the amount of twisting force and torque applied to the device frame 26 is reduced*, thus reducing the risk that the device would not operate properly.

Spec. ¶ 33 (emphasis added).

The Examiner finds:

Thus from the above paragraph it is clear that the specification stated that force is distributed to the device frame (26), and while the twisting force and torque applied to the device frame (26) *is reduced*, it does not state that **no force is distributed to the device frame (26)**, as claimed. Paragraph [0033] cited by appellant only recites *reduced* force. Examiner can find nothing in the original disclosure supporting no force is applied to the frame. Per MPEP 2173.05(i):

*Any negative limitation or exclusionary proviso must have basis in the original disclosure.*

Ans. 5.

We agree with the Examiner's finding because *reducing* the applied force, as disclosed, is not equivalent to the negative limitation of "not distribut[ing force] to the device frame," as recited.

We further agree with the Examiner because we find that Appellant's cited support in the Specification at paragraph 33 does not identify any "descri[ption of] a reason to exclude the relevant limitation." *Santarus*, 694 F.3d at 1351.

Therefore, based upon the findings above, on this record, we are not persuaded of error in the Examiner's finding that the contested negative limitation lacks written description support, such that we sustain the Examiner's written description Rejection R1 of independent claim 1, and grouped claims 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 which depend from claim 1 and fall therewith. *See Claim Grouping, supra.*

2. § 112, ¶ 2 Indefiniteness Rejection R2 of Claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31

Issue 2

Appellant argues (Appeal Br. 13–15; Reply Br. 4) the Examiner’s rejection of claim 1 under 35 U.S.C. § 112, second paragraph, as being indefinite is in error. These contentions present us with the following issue:

Did the Examiner err in finding claim 1 lacks definiteness by the recitation of “the force applied to the attachment means is not distributed to the device frame,” as recited in claim 1?

Principles of Law

“[A] patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). Further, we give pending claims “their broadest reasonable interpretation consistent with the specification” and “in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Analysis

The Examiner concludes, “[i]t is unclear how the force applied to the attachment means is not distributed to the device frame, as set forth in claim 1, as it is noted that the holding elements are attached to the device frame.” Final Act. 4.

We disagree with the Examiner’s conclusion that claim 1 is indefinite because, different from the holding in *Nautilus*, cited *supra*, we are able to

ascertain the meaning of the disputed claim limitation. This is quite different from written description Rejection R1. It appears the Examiner has conflated the written description requirement in Rejection R1 with the requirement for definiteness under 35 U.S.C. § 112, second paragraph.

Therefore, based upon the findings above, on this record, we are persuaded of at least one error in the Examiner's conclusion that the contested limitation lacks definiteness, such that we do not sustain the Examiner's indefiniteness Rejection R2 of independent claim 1, and grouped claims 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 which depend from and stand therewith. *See Claim Grouping, supra.*

3. § 103 Rejection R3 of Claims 1, 6, 7, 9, 10, 16, 17, 19, 25, 26, 30, and 31

Issue 3

Appellant argues (Appeal Br. 15–25; Reply Br. 4–8) the Examiner's rejection of claim 1 under 35 U.S.C. § 103(a) as being obvious over the combination of Rhodes, Crocker, and either Friday, Goldie, or Preusser, in view of Konitz is in error. These contentions present us with the following issues:

Did the Examiner err in finding the cited prior art combination renders obvious the “worker safety device for use with an object having a person support surface and first and second sides extending downward from said surface” of claim 1 because, allegedly:

- (a) The reference combination does not teach or suggest the recited “movement facilitator” because Rhodes purportedly teaches away from the use of such a device;

(b) The reference combination does not teach or suggest the recited “attachment means” for which the force applied thereto “is not distributed to the device frame”; and

(c) One of ordinary skill would not have reached the design of the present invention based on the disclosures of Rhodes and Crocker due to Rhodes teaching away and due to the use of impermissible hindsight?

Principles of Law

“[O]ne cannot show non-obviousness by attacking references individually where . . . the rejections are based on combinations of references.” *In re Keller*, 642 F.2d 413, 426 (CCPA 1981). “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference . . . . Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art.” *Id.* at 425.

In *KSR*, the Supreme Court stated “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007).

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. . . . [A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

*Id.* at 417.

Further, the relevant inquiry is whether the Examiner has set forth “some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (*cited with approval in KSR*, 550 U.S. at 418).

“A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *Ricoh Co. v. Quanta Computer, Inc.*, 550 F.3d 1325, 1332 (Fed. Cir. 2008) (citations omitted). A reference does not teach away if it merely expresses a general preference for an alternative invention from amongst options available to the ordinarily skilled artisan, and the reference does not discredit or discourage investigation into the invention claimed. *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004).

#### Analysis

##### *(a) The recited “movement facilitator” is taught or suggested*

The Examiner finds that each of Friday, Goldie, and Preusser teaches or suggests the recited “movement facilitator” that is “coupled to the device frame, to facilitate movement of said device along an object while the device is held on the object and to allow locking against movement at desired locations.” Final Act. 7.

The Examiner further finds:

All the claimed elements were known in the prior art as evidenced above, and one of ordinary skill in the art could have combined the elements as claimed, or substituted one known

element for another, using known methods with no change in their respective functions. Such a combination would have yielded predictable results to one of ordinary skill in the art at the time the invention was made, since the elements perform as expected and thus the results would be expected. It would have been obvious to one of ordinary skill in the art at the time of the invention to have provided Rhodes with an attachment means, as taught by Crocker, and to have substituted a movement facilitator with a lock, as taught by either Friday, Goldie or Preusser, in lieu of the friction pads of Rhodes, since it would have provided the predictable results of allowing a user to directly attach to the holding elements, and to facilitate movement while enabling locking at desired location, respectively.

Final Act. 7–8.

In response, Appellant argues, “[o]ne of ordinary skill, having considered the disclosure of Rhodes, would not have included the alleged movement facilitators in Friday, Goldie, or Preusser because Rhodes teaches away from the use of a movement facilitator.” Appeal Br. 16. Further,

Rhodes expressly discloses that the clamping members include resilient pads of rubber or other suitable material. These pads are used to facilitate frictional grip of the clamping members against the container (*see* col. 3, 11. 16–22). From this teaching, Rhodes indicates that it is undesirable for the clamping members to move relative to the container, and that it is instead desirable for the clamping members to remain fixed relative to the container. The pads facilitating frictional grip between the clamping members and the container perform the exact opposite function of the movement facilitator of claim 1, which facilitates movement of the device along the object.

Appeal Br. 17. Appellant also contends “[t]herefore, based on the disclosure of Rhodes, its safety device is designed to remain fixed relative to the object and resilient pads are provided to ensure maximal friction between the

clamping members and object so that the safety device remains fixed. From this arrangement, one of ordinary skill in the art would not have considered including a movement facilitator in the design of Rhodes.” Appeal Br. 18.

The Examiner finds, “Rhodes does not in any way discourage or discredit a movement facilitator, but instead employs a stationary device.” Ans. 11 (citing *Fulton*, 391 F.3d at 1201).

We agree with the Examiner’s findings. See *Keller*, 642 F.2d at 426 (“[O]ne cannot show non-obviousness by attacking references individually where . . . the rejections are based on combinations of references.”); and see *Ricoh*, 550 F.3d at 1332 (citations omitted) (“A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.”).

*(b) The recited “attachment means” is taught or suggested*

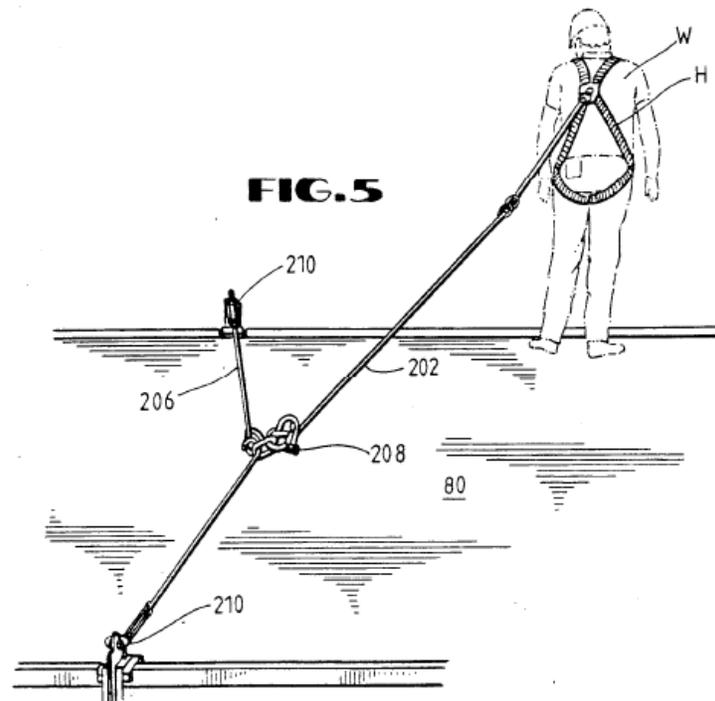
The Examiner finds Crocker, in Figure 5, teaches or suggests an “attachment means” as claimed. Final Act. 6–7.

Crocker shows an attachment means (206) with ring attachment member (208), as set forth in claim 30, and comprising a first end and a second end, the attachment means attached to a first holding element (at 210) on the first end and a second holding element (at 21) on the second end and further configured to attach a personal fall-prevention device (202,H), the attachment means positioned above the worker safety device when the worker safety device is held on the object (80), wherein the attachment means is attached to the first and second holding elements such that a force applied to the attachment means is distributed to the first and second holding elements

and the force applied to the attachment means is not distributed to a device frame.

*Id.*

Figure 5 of Crocker is reproduced below:



“FIG. 5 is a top perspective view of a motion stopping safety system according to the present invention.” Crocker, col. 3, ll. 30–31.

Appellant contends, “in Rhodes, the worker is attached directly to the component analogous to the device frame. FIG. 1 of Rhodes shows the worker attached directly to the center of a device frame.” Appeal Br. 20 (underlining omitted). Further, “Crocker is directed to a safety device for workers that is distinguishable from the present invention and Rhodes. Rather than including a device frame, the safety device of Crocker is attached to its object (such as a roof) using two independent gripping anchors.” *Id.* “One having ordinary skill in the art, having considered

Rhodes and Crocker, would not have considered combining the features of the two references to avoid a force being exerted on the elongated members (a device frame) of Rhodes.” Appeal Br. 21. “Crocker does not even include a device frame at all.” Appeal Br. 22.

In response, the Examiner finds:

Crocker functions as Appellant’s device as stated by Appellant **wherein his device is functional without a device frame as the device frame is not necessary when clamped to the object.** The examiner also notes that Rhodes, Crocker and the claimed invention are all art of the same field of endeavor and it is proper and warranted to modify the primary reference (Rhodes) in view of the teaching reference (Crocker) for the purpose disclosed by the teaching reference in resolving the difference at hand between the primary reference (Rhodes) and the claimed invention.

Ans. 15–16. The Examiner further finds Crocker is not being used “to teach a device frame; that limitation is in the base reference to Rhodes.” Ans. 18.

We agree with the Examiner because, again, Appellant is arguing the references separately, when the rejection is for obviousness and what the combination of references would have suggested. “The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference . . . . Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art.” *Keller*, 642 F.2d at 425 (citations omitted).

*(c) The Examiner did not engage in impermissible hindsight*

Appellant contends:

One of ordinary skill would not have conceived to both include a device frame and attach the worker to holding elements (similar to the gripping anchors) at the ends of the object to prevent force from being exerted on the device frame. Neither reference suggests this combination of features of the present invention, and to assert that one of ordinary skill would have developed the combination based merely on Rhodes and Crocker constitutes impermissible hindsight.

Instead, one having ordinary skill, having considered Rhodes and Crocker, would have considered one of two possibilities. First, he may have considered including a device frame and attaching the worker directly to the device frame (from Rhodes). Alternatively, he may have considered attaching the worker to gripping anchors on the ends of the object and forgone the device frame altogether (Crocker). Nothing in these references teaches or suggests to one of ordinary skill to combine these features, and doing so constitutes impermissible hindsight.

Appeal Br. 22 (underlining omitted).

In response, the Examiner determined “it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant’s disclosure, such a reconstruction is proper.” Ans. 16 (citation omitted).

We agree with the Examiner and add the following for emphasis. First, as explained in *McLaughlin*:

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

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

Our review of the record establishes that the Examiner's case for obviousness is only based on knowledge which was within the level of ordinary skill at the time of Appellant's invention and does not include knowledge gleaned only from the Appellant's disclosure.

Second, the Examiner identifies the relevant portions of each of the references relied on throughout the Examiner's Answer. *See* Ans. 9–19. To the extent the Examiner relies on the knowledge of one of ordinary skill in the art to combine the teachings of the references, this practice is consistent with current case law. For example, the Supreme Court explains:

Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit. *See In re Kahn*, 441 F.3d 977, 988 (C.A.Fed.2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”). As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences

and creative steps that a person of ordinary skill in the art would employ.

*KSR*, 550 U.S. at 418.

In this case, the Examiner's conclusions of obviousness are clearly articulated and are based on detailed factual findings that are supported by the references of record. *See* Ans. 9–19. Thus, we agree with the Examiner's findings and conclusions.

Therefore, based upon the findings above, on this record, we are not persuaded of error in the Examiner's reliance on the cited prior art combination to teach or suggest the disputed limitations of claim 1, nor do we find error in the Examiner's resulting legal conclusion of obviousness.

Accordingly, we sustain the Examiner's obviousness rejection of independent claim 1, and grouped claims 6, 7, 9, 10, 16, 17, 19, 25, 26, 30, and 31 which fall therewith. *See* Claim Grouping, *supra*.

4. § 103 Rejection R4 of Claim 14

In view of the lack of any substantive or separate arguments directed to obviousness Rejection R4 of claim 14 under § 103 (*see* Appeal Br. 25), we sustain the Examiner's rejection of these claims. Arguments not made are waived.<sup>4</sup>

## REPLY BRIEF

To the extent Appellant *may* advance new arguments in the Reply Brief (Reply Br. 2–8) not in response to a shift in the Examiner's position in

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<sup>4</sup> Appellant merely argues, “[c]laim 14 is not obvious over the cited art for at least the reasons provided above with respect to claim 1. Therefore, the obviousness rejection of claim 14 must be reversed.” Appeal Br. 25.

the Answer, arguments raised in a Reply Brief that were not raised in the Appeal Brief or are not responsive to arguments raised in the Examiner's Answer will not be considered except for good cause (*see* 37 C.F.R. § 41.41(b)(2)), which Appellant has not shown.

#### CONCLUSIONS

(1) The Examiner did not err with respect to written description Rejection R1 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 under 35 U.S.C. § 112, first paragraph, and we sustain the rejection.

(2) The Examiner erred with respect to indefiniteness Rejection R2 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 under 35 U.S.C. § 112, second paragraph, and we do not sustain the rejection.

(3) The Examiner did not err with respect to obviousness Rejections R3 and R4 of claims 1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30, and 31 under 35 U.S.C. § 103(a) over the cited prior art combinations of record, and we sustain the rejections.

Because we have affirmed at least one ground of rejection with respect to each claim on appeal, we affirm the Examiner's decision. *See* 37 C.F.R. § 41.50(a)(1).

DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Basis / References</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 31	112 ¶ 1	Written Description	1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 31	
1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 31	112 ¶ 2	Indefiniteness		1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 31
1, 6, 7, 9, 10, 16, 17, 19, 25, 26, 30 31	103	Obviousness: Rhodes, Crocker, Friday, Goldie, Preusser	1, 6, 7, 9, 10, 16, 17, 19, 25, 26, 30 31	
14	103	Obviousness: Rhodes, Crocker, Friday, Goldie, Preusser, Konitz	14	
<b>Overall Outcome</b>			1, 6, 7, 9, 10, 14, 16, 17, 19, 25, 26, 30 31	

FINALITY AND RESPONSE

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). *See* 37 C.F.R. § 41.50(f).

AFFIRMED