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Paper No. \_\_\_\_

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MUNCHKIN, INC.

Petitioner

v.

SKIP HOP, INC.

Patent Owner

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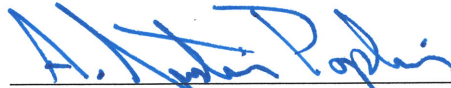
Case IPR 2015-00\_\_\_\_

Patent 9,060,653

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**PETITION FOR *INTER PARTES* REVIEW**

Respectfully submitted,  
LATHROP & GAGE LLP



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## **I. Introduction**

Petitioner seeks *inter partes* review to invalidate claims 12–21 of U.S. Pat. No. 9,060,653 titled “BATH SPOUT COVER.” A copy of the ‘653 Patent is attached as Ex. 1002.<sup>1</sup> The technology at issue pertains to child safety devices, and more particularly to bathtub devices for infants and small children. (1002-005 at 1:10–56).<sup>2</sup> The ‘653 Patent was filed April 16, 2013, claims priority to a nonprovisional application filed July 29, 2009, issued June 23, 2015, and has not yet expired.

## **II. Threshold issues**

### **II.A. Challenge/relief request – Rules 42.22(a)(1) and 42.104(b)(1)–(2)**

Petitioner respectfully requests *inter partes* review and invalidation of claims 12–21 of the ‘653 Patent. More particularly, Petitioner requests:

- (a) invalidation of claims 12–14 under 35 U.S.C. § 103 as obvious over Thorne (Ex. 1005)<sup>3</sup> in view of Lerner (Ex. 1006)<sup>4</sup> and Daniels (Ex.

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<sup>1</sup> A full listing of exhibits, per Rule 42.63(e), is provided as Ex. 1001.

<sup>2</sup> Exhibit citations in this paper have as a general format “XXXX-YYY” where XXXX is the exhibit number and YYY is the sequential page number of that document. Additional column, line, paragraph, or other information is further provided as appropriate.

<sup>3</sup> U.S. Pat. Pub. 2007/0130688.

<sup>4</sup> U.S. Pat. No. 4,709,429.

1009);<sup>5</sup>

- (b) invalidation of claims 12–14 under 35 U.S.C. § 103 as obvious over Thorne (Ex. 1005) in view of Lerner (Ex. 1006) and Lister (Ex. 1007);<sup>6</sup>
- (c) invalidation of claims 15–21 under 35 U.S.C. § 103 as obvious over Thorne (Ex. 1005) in view of Daniels (Ex. 1009); and
- (d) invalidation of claims 15–21 under 35 U.S.C. § 103 as obvious over Thorne (Ex. 1005) in view of Lister (Ex. 1007) and Morris (Ex. 1008).<sup>7</sup>

## **II.B. Standing – Rule 42.104(a)**

Petitioner certifies that the patent for which review is sought is available for *inter partes* review, and that Petitioner is not barred or estopped from requesting an *inter partes* review challenging the patent claims on the grounds identified herein.

## **II.C. Real party in interest – Rule 42.8(b)(1)**

Petitioner certifies that the real parties in interest are: (a) MUNCHKIN, INC., a Delaware company having a headquarters at 7835 Gloria Avenue, Van Nuys, California 91406; and (b) BRICA, INC., a Florida company having a headquarters at 500 West 5th Street, Charlotte, North Carolina 28202. Munchkin acquired Brica in or about January 2014.

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<sup>5</sup> U.S. Pat. Pub. 2007/0175531.

<sup>6</sup> U.S. Pat. No. 5,599,063.

<sup>7</sup> U.S. Pat. No. 3,910,634.

#### **II.D. Other proceedings – Rule 42.8(b)(2)**

Skip Hop has sued Munchkin and Brica, alleging infringement of the ‘653 Patent. *Skip Hop Inc. v. Munchkin Inc.*, No. 2:15-cv-06339 (C.D. Cal.).

#### **II.E. Counsel – Rule 42.8(b)(3)**

Petitioner designates lead counsel as follows:

- A. Justin Poplin (Reg. No. 53,476)

Petitioner designates back-up counsel as follows:

- Robert Evora (Reg. No. 47,356);
- Hissan Anis (Reg. No. 65,943); and
- Anna Quinn (Reg. No. 72,744).

#### **II.F. Service – Rule 42.8(b)(4)**

Petitioner may be served as follows:

Lathrop & Gage LLP

IP Docketing, Inter Partes Review

2345 Grand Blvd., Suite 2400

Kansas City, MO 64108

[patent@LathropGage.com](mailto:patent@LathropGage.com); [JPoplin@LathropGage.com](mailto:JPoplin@LathropGage.com)

Petitioner’s lead counsel may also be contacted by phone at 913-451-5130.

#### **II.G. Fees – Rule 42.103**

The USPTO is authorized to charge the required fees as well as any additional fees that might be due from Petitioner to Deposit Account No. 12-0600, with reference to attorney docket number 578642.

## **II.H. Certification of service – Rules 42.6(e)(4)(iii) and 42.105(a)**

Petitioner certifies that a copy of this Petition has been served in its entirety on Patent Owner at the address provided for in 37 C.F.R. 42.6(e)(3). Specifically, this Petition for *inter partes* review is being served on the correspondent of record for the ‘653 Patent: STITES & HARBISON PLLC; 1800 Diagonal Road; Suite 325; Alexandria, VA 22314.

## **III. Claim construction – Rule 42.104(b)**

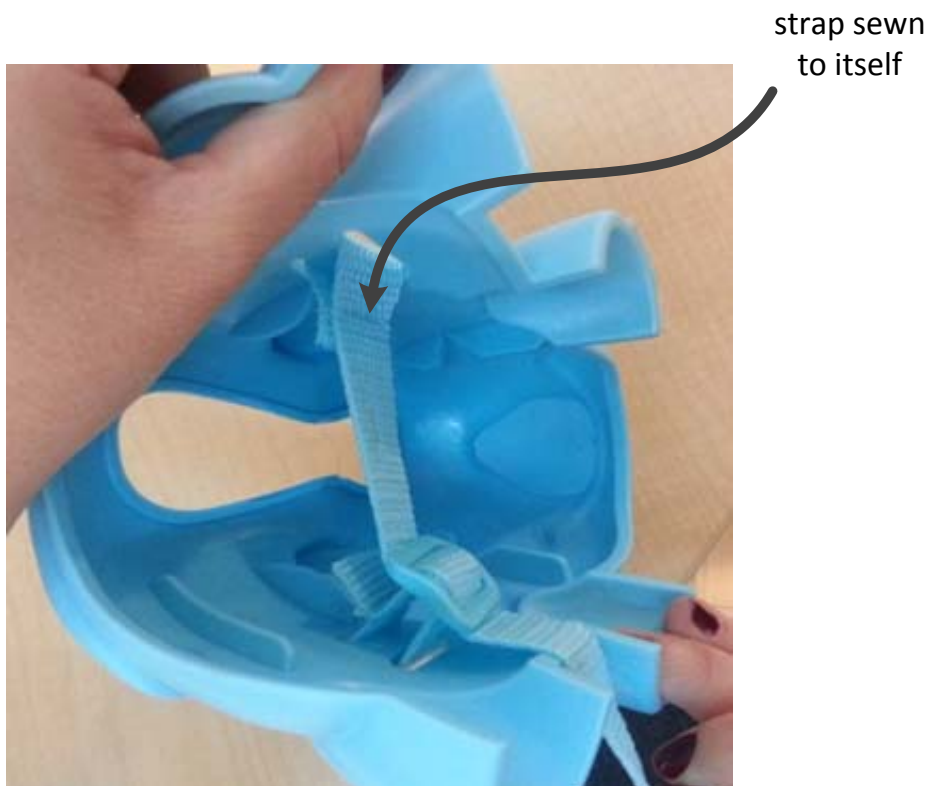
### **III.A. Legal standard in *inter partes* review**

The USPTO interprets claims differently than a court would interpret claims in an infringement suit. The “PTO applies...the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

### **III.B. “end of the strap”**

In the ‘653 Patent, the “ends” of the strap restrict the strap from separating from the side portions. (1002-006 at 4:2–51). Accordingly, the ends are disclosed as being enlarged relative to the rest of the strap, and may be angularly offset relative to the rest of the strap. (1002-006 at 4:2–51). No other ends are disclosed or enabled in the ‘653 Patent. However, Patent Owner has accused a Munchkin product that does not have any such enlarged or offset portion of infringing claims

12–14.<sup>8</sup> A picture of the accused Munchkin product follows and appears in Exhibit 1010. As can be seen, Munchkin’s strap is merely sewn to itself.



Therefore, Patent Owner takes the position that no enlargement or angular offset should be required of the strap ends. Under the USPTO’s “broadest reasonable” construction standard, Munchkin accepts Patent Owner’s construction of “end of the strap” in this regard. As a result, no enlargement or angular offset should be required of the strap ends in claims 12–14.<sup>9</sup>

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<sup>8</sup> (1004-007 at ¶¶ 33-34).

<sup>9</sup> But this construction is not consistent with *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc).



### **III.C. “opening adapted to fit over a bath spout shower diverter”**

This language appears in claim 14. In the ‘653 Patent, the elongated void 35 is integrated with the opening 34, which is adapted to fit over a bath spout shower diverter. (1002-002–004 at FIGs. 1, 3, 4, and 6; 1002-006 at 4:60–62). And the elongated void 35 does not extend along substantially an entire length of the upper portion (as claimed) unless the opening 34 is also considered to be part of the elongated void 35. Accordingly, the claimed opening 34 adapted to fit over a bath spout shower diverter need not be separate from the claimed elongated void 35.

### **III.D. “elastomeric material”**

This language appears in claims 18–21. The ‘653 Patent explains that the body structure and strap may be fabricated from “a deformable material, such as an elastomeric material.” (1002-007 at 5:10–11). Exemplary elastomeric materials include “rubbers, plastics, or the like.” (1002-007 at 5:13–15). Thus, the claimed elastomeric material encompasses, *inter alia*, deformable rubbers and plastics.

## **IV. Statement of reasons for the relief requested showing that there is a reasonable likelihood that Petitioner will prevail – Rules 42.22(a)(2) and 104(b)(4); 35 U.S.C. § 314(a)**

### **IV.A. Background and introduction**

The challenged claims are directed to safety devices for infants and small children. (1002-005 at 1:10–56). Yet those claims do not further the art of safety devices for infants and small children, and are obvious in view of the prior art.

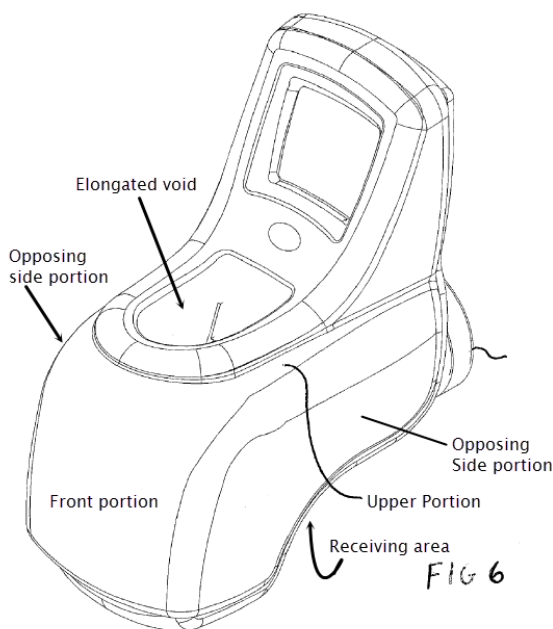
Thorne (US 2007/0130688) discloses a strap-on bath spout cover designed to prevent impact injuries among children from bumping against bath spouts. (1005–001, 1005-014–016 at Abstract, [0003], [0016], [0032], and [0037]). Thorne

specifically recognizes that it is desirable for spout covers to be “temporary and easily removable by adults, and not by toddlers.” (1005-014 at [0007]). And it therefore utilizes a strap. (1005-014–015 at [0016] and [0037]). Thorne further teaches that a spout cover should have “universal acceptance to the largest variety of commercially available bath spouts.” (1005-014 at [0011]).

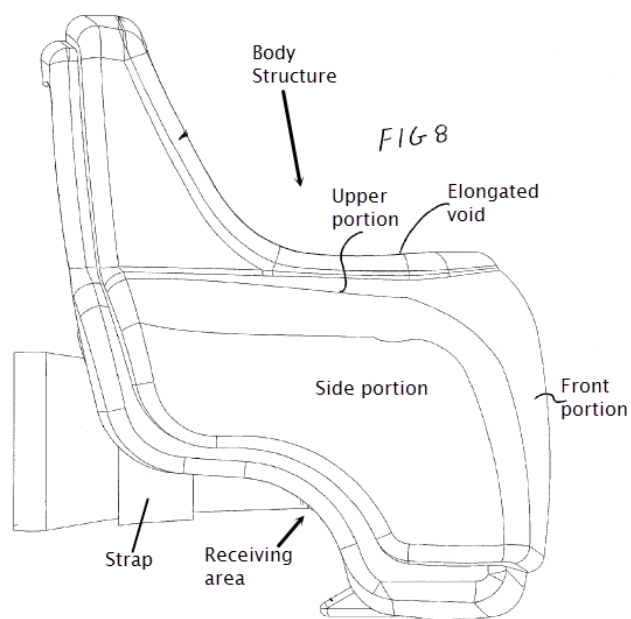
The examiner previously found, and Patent Owner did not dispute, that Thorne meets most limitations of the ‘653 Patent. For example, the following chart and annotated Figures 6 and 8 illustrate the limitations of claim 12 and the examiner’s unrefuted findings regarding Thorne. The italicized and highlighted portions of claim 12 are the only elements that the examiner did not explicitly find in Thorne; these portions are specifically directed to the length of the upper void and the connection of the strap to the body:

<b>Claim 12</b>	<b>Thorne disclosure cited by examiner during prosecution of the ‘653 Patent</b>
A bath spout cover, comprising:	
a body structure having an upper portion, two opposing side portions, and a front portion;	“Thorne et al disclose a body structure 10 having an upper portion 18, two opposing side portions 20, and a front portion 16.” (1003-035 at first paragraph).
a receiving area defined between the upper portion, the two opposing side portions, and the front portion,	“a receiving area defined between the upper portion, the two opposing side portions, and the front portion” (1003-035 at first paragraph).

the upper portion defines an elongated void extending along <i>substantially an entire length of the upper portion</i> ;	“the upper portion 18 defining an elongated void 32 extending along a length of the upper portion (shown in Figs. 1 and 6” (1003-035 at first paragraph).
a strap operably connected to the two opposing side portions, said strap for securing the bath spout cover to a bath spout; and	“and a strap 26 spanning the two opposing side portions, the strap for securing the bath spout cover to a bath spout 14.” (1003-035 at first paragraph).
<i>at least one aperture defined by one of the side portions of the body structure, said aperture for receiving an end of the strap.</i>	



Annotated Thorne FIG. 6



Annotated Thorne FIG. 8

As addressed in detail below, the highlighted limitations in the above chart are not new—and the combination of elements present in independent claim 12 is obvious in view of the prior art. Independent claim 15 and dependent claims 13, 14, and 16–21 similarly add nothing patentable and should also be invalidated.

This Petition relies on various combinations of Thorne (Ex. 1005), Lerner (Ex. 1006), Daniels (Ex. 1009), Lister (Ex. 1007), and Morris (Ex. 1008). Each reference is prior art to the ‘653 Patent under 35 U.S.C. § 102(b).<sup>10</sup> Only Thorne was reviewed by the examiner before the ‘653 Patent was allowed, and the remainder of the references are not cumulative to references addressed by the examiner. The challenged claims would not have issued over these references.

#### **IV.B. Grounds of rejection**

The following discussion generally proceeds element by element for each claim at issue. The exact claim language is presented as headings in italics, and Petitioner states with particularity where each element is found in the combination of references and why the references would be combined as proposed.

The discussion is from the viewpoint of one of ordinary skill in the art at the time of the invention claimed in the ‘653 Patent. A person of ordinary skill in the

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<sup>10</sup> Thorne was published June 14, 2007 (1005-001). Lerner was issued Dec. 1, 1987. (1006-001). Daniels was published Aug. 2, 2007. (1009-001). Lister was issued Feb. 4, 1997. (1007-001). Morris was issued Oct. 7, 1975. (1008-001). Each of these dates is more than one year before the ‘653 Patent’s earliest claimed priority date, July 29, 2009.

art would have had at least the qualification of or equivalent to: (a) 3 years of experience regarding the design and manufacture of plastic molded products and plumbing fixtures, including experience regarding the design and manufacture of child safety devices; or (b) a bachelor's degree in mechanical engineering, industrial design, or a related field and two years of experience regarding the design and manufacture of child safety devices. One of ordinary skill in the art would be familiar with bathtub devices for infants and small children, and would also be familiar with water spout devices.

Petitioner submits these qualifications based upon the types of problems encountered in the art of the patent, the prior art solutions to those problems, and the nature of the technology at issue. This definition of ordinary skill is also supported by Petitioner's expert, Michael C. Thuma. (1011 at Section IV.A.). However, a person of lesser skill would also have found the relevant claims obvious, and the level of ordinary skill in the art is not viewed as likely to affect the analysis or outcome in this matter.

**IV.B.1. Ground 1: Claims 12–14 are obvious over Thorne in view of Lerner and Daniels<sup>11</sup>**

**IV.B.1.a. Claim 12**

***12. A bath spout cover, comprising:***

Thorne discloses a bath spout cover 10. (1005-001 at Abstract; 1005-014 at [0003]; 1005-015 at [0032]).

***a body structure having an upper portion, two opposing side portions, and a front portion;***

Thorne discloses a body structure 10 (more particularly, 12) having an upper portion 18, two opposing side portions 20 and 22, and a front portion 16. (1005-006 at FIG. 6; 1005-016 at [0034]). The examiner previously found that Thorne discloses these elements, and Patent Owner did not dispute that finding. (1003-035 at first paragraph; *see generally* 1003-018–025).

***a receiving area defined between the upper portion, the two opposing side portions, and the front portion,***

Thorne discloses a receiving area defined between the upper portion 18, the two opposing side portions 20 and 22, and the front portion 16. (1005-003 at FIG. 2; 1005-016 at [0035] (describing the body as “a three sided, open bottom cover”)). The examiner previously found that Thorne discloses these elements, and Patent

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<sup>11</sup> The analysis and conclusions regarding obviousness set forth below are further supported by Petitioner’s expert, Michael C. Thuma. (1011). Mr. Thuma has roughly 24 years of experience in relevant technology. (1011 at Section III). Mr. Thuma specifically has experience in the design, development, and manufacture of child safety products and plumbing fixtures. (*Id.*).

Owner did not dispute that finding. (1003-035 at first paragraph; *see generally* 1003-018–025).

***the upper portion defines an elongated void extending along substantially an entire length of the upper portion;***

Thorne’s upper portion 18 defines an elongated void 32 extending along a length of the upper portion. (1005-002 at FIG. 1; 1005-006 at FIG. 6). The examiner previously found that Thorne discloses an elongated void extending along the upper portion, and Patent Owner did not dispute that finding. (1003-035 at first paragraph; *see generally* 1003-018–025). But Thorne’s elongated void arguably does not extend along *substantially an entire length* of the upper portion.

Lerner, like Thorne, discloses a bath spout cover to protect children from becoming injured on a bath spout during a fall. (1005-001 at Abstract; 1005-014 at [0003]; 1005-015 at [0032]; 1006-004 at 1:5–20, 1:44–47; 1006-005 at 4:7–17). And, like the Thorne void 32, Lerner provides a void 34 for allowing access to the spout’s diverter valve (or “shower control knob”)<sup>12</sup> when the spout cover is installed. (1005-016 at [0039]; 1006-004 at 2:55–57). Lerner teaches that the void 34 should be elongated such that it extends along substantially an entire length of the upper portion in order to allow the spout cover to be used with bath spouts having shower control knobs in different positions along their length. (1006-002–003 at FIGs. 1 and 3, 1006-004 at 2:60–62).

One of ordinary skill in the art at the time of the invention claimed in the ‘653 Patent would have modified Thorne to extend the void 32 along substantially

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<sup>12</sup> (1011 at 13 & n.1).

an entire length of the upper portion as taught by Lerner, to obtain the same benefit taught by Lerner—i.e., to allow the spout cover to be used with bath spouts having diverter valves in different positions along their length. (1011 at Section VIII.B.1.). Indeed, Thorne specifically teaches that “universal acceptance” is desirable “to the largest variety of commercially available bath spouts.” (1005-014 at [0011]).

In other words, the Thorne void would be extended as taught by Lerner to yield entirely predictable—and legally obvious—results (i.e., a more-universal spout cover that could be used with more spouts). *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (“[I]f 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.”); (1011 at Section VIII.B.1.). It further represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section VIII.B.1.).

***a strap operably connected to the two opposing side portions, said strap for securing the bath spout cover to a bath spout; and***

Thorne has a strap 26 operably connected to the two opposing side portions 20 and 22. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037]). The strap 26 is used to secure the bath spout cover 10 to a bath spout. (1005-003 at FIGs. 2 and 4; 1005-16 at [0037], [0040]).

***at least one aperture defined by one of the side portions of the body structure, said aperture for receiving an end of the strap.***

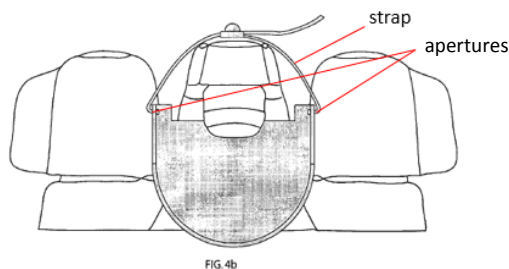
Thorne’s strap 26 extends from the side portions of its body structure (as



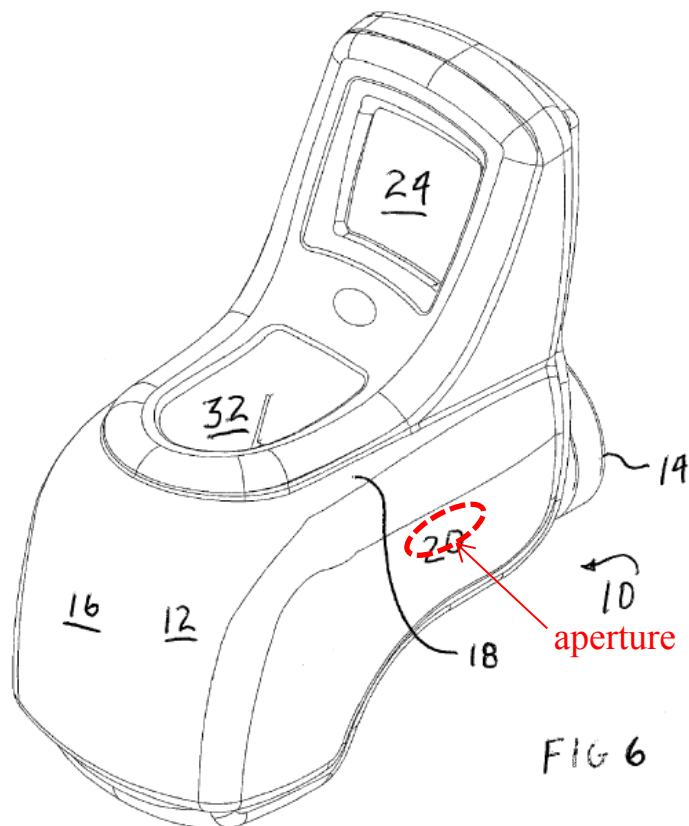
shown in FIGs. 2 and 4), but Thorne does not disclose exactly how the strap 26 is coupled to the body 12. Unlike the ‘653 Patent, Thorne does not disclose a completely enclosed opening defined by one of the side portions of the body structure, the aperture being for receiving an end of the strap.

To see how straps may be attached, one of ordinary skill in the art would look to other devices with straps—and particularly to other child safety, bathtub, and water spout devices with straps—and would incorporate those teachings into Thorne. *See KSR*, 550 U.S. at 417; (1011 at Section VIII.B.1.). This is particularly true when, as here, the incorporation represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section VIII.B.1.).

One of ordinary skill in the art of the ‘653 Patent (i.e., child safety and bathtub devices for infants and small children, and devices that attach to water spouts) would be aware of water spout extenders for sinks such as those set forth in Daniels. (1011 at Section VIII.B.1.). And they would recognize that passing an end of a strap through an aperture in a side portion (as in Daniels) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section VIII.B.1.). Figure 4b of Daniels is reproduced below with annotation:



The resulting combination of Thorne with Daniels (and Lerner, as discussed above) would accordingly include an aperture defined by one of the side portions of the body structure, the aperture being to receive an end of the strap. (1011 at VIII.B.1.). A drawing illustrating where the aperture would be located in Thorne (and where an end of the strap would pass through) is shown in Mr. Thuma's declaration (1011 at VIII.B.1.) and is reproduced below:



#### **IV.B.1.b. Claim 13**

***13. The bath spout cover of claim 12, further comprising a second aperture defined by the other side portion of the body structure, said second aperture for receiving the other end of the strap.***

Claim 12 is met as set forth above in Section IV.B.1.a. Both ends of Daniels' strap pass through respective apertures, with an aperture being on each side portion. (1009-003 at FIG. 2b; 1009-005 at FIG. 4b; 1009-006 at FIG. 5b; and 1009-007 at FIG. 6a). Just as one of ordinary skill in the art would include one of the Daniels side apertures and pass a strap therethrough (as discussed above regarding claim 12), one of ordinary skill in the art would attach both ends of the strap using respective apertures as taught by Daniels. (1011 at Section VIII.B.2.). Passing both ends of the strap through respective side portion apertures (as in Daniels, and as claimed) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section VIII.B.2.).

Moreover, using two apertures and passing the ends of the strap therethrough, as taught by Daniels, would be well within the ordinary skill in the art and would be recognized as a technique used to improve one device (Daniels) that would improve another (Thorne) in the same way—and thus would be legally obvious. *See KSR*, 550 U.S. at 417; (1011 at Section VIII.B.2.). And the incorporation of Daniels represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section VIII.B.2.). The combination is also an unpatentable duplication of parts with no new or unexpected results. *See* MPEP 2144.04(VI)(B)

(citing *In re Harza*, 274 F.2d 669 (C.C.P.A. 1960); (1011 at Section VIII.B.2.)).<sup>13</sup>

#### **IV.B.1.c. Claim 14**

***14. The bath spout cover of claim 13, wherein the upper portion further defines an opening adapted to fit over a bath spout shower diverter.***

Claim 13 is met as set forth above in Section IV.B.1.b. And, as discussed above in Section III.C., the claimed opening need not be separate from the claimed elongated void. In the combination of Thorne with Lerner (and Daniels) as set forth above, the elongated void 32 is still “adapted to allow access to and operation of a diverter valve 34 of the spout 14 when the spout cover 10 is installed.” (1005-016 at [0039]; 1011 at Section VIII.B.2.). The figures make it abundantly clear that the void 32 is over the diverter. (1005-005 at FIG. 5). Thus, the claim language is met.

#### **IV.B.2. Ground 2: Claims 12–14 are obvious over Thorne in view of Lerner and Lister<sup>14</sup>**

##### **IV.B.2.a. Claim 12**

***12. A bath spout cover, comprising:***

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<sup>13</sup> The MPEP is appropriately referenced in this paper, as the USPTO is bound by the MPEP. *See Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1425 (Fed. Cir. 1988) (“The PTO conducts its proceedings in accordance with regulations set out in Title 37 of the Code of Federal Regulations, and the MPEP.”); *see also Mars, Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1375 (Fed. Cir. 2004); *In re Kaghan*, 387 F.2d 398, 401 (C.C.P.A. 1967).

<sup>14</sup> The analysis and conclusions in the Ground 2 invalidity challenges are supported by Petitioner’s expert, Mr. Thuma. (1011 at Section VIII.A.).

***a body structure having an upper portion, two opposing side portions, and a front portion; a receiving area defined between the upper portion, the two opposing side portions, and the front portion, the upper portion defines an elongated void extending along substantially an entire length of the upper portion; a strap operably connected to the two opposing side portions, said strap for securing the bath spout cover to a bath spout; and***

The combination of Thorne and Lerner meets these limitations, as set forth above in Section IV.B.1.a.

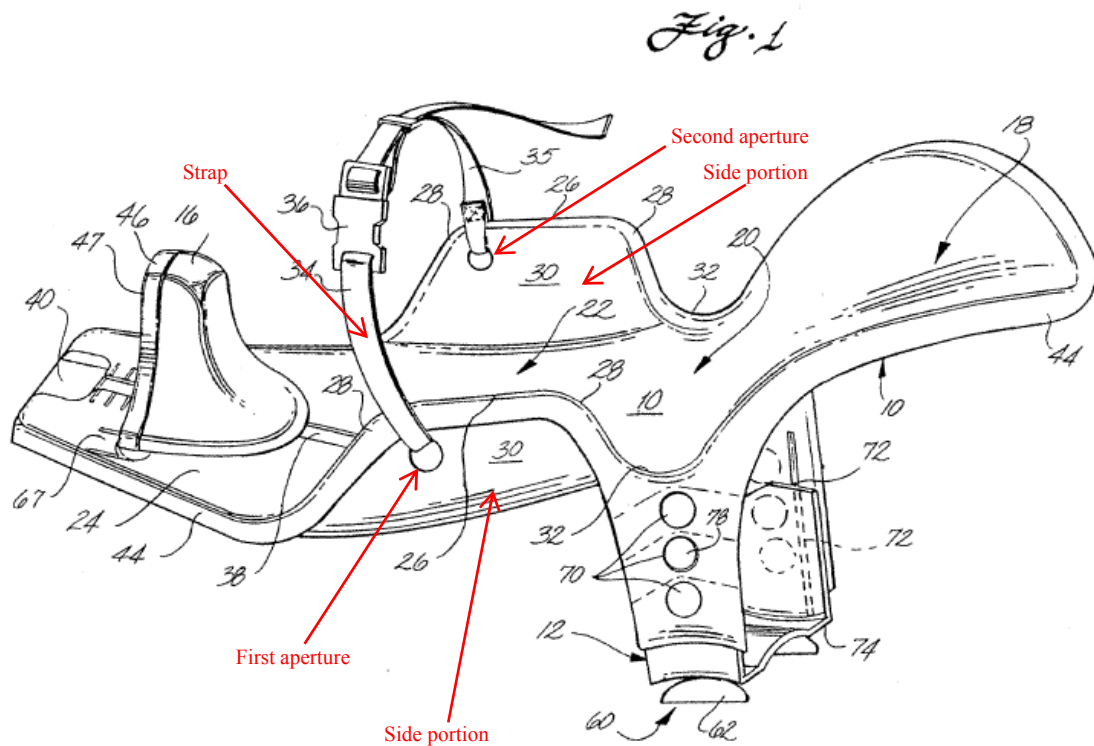
***at least one aperture defined by one of the side portions of the body structure, said aperture for receiving an end of the strap.***

Thorne's strap extends from the side portions of its body structure (as shown in Figures 2 and 4), but Thorne does not disclose exactly how the strap 26 is coupled to the body 12. Unlike the '653 Patent, Thorne does not disclose a completely enclosed opening defined by one of the side portions of the body structure, the aperture being for receiving an end of the strap.

To see how straps may be attached, one of ordinary skill in the art would look to other devices with straps—and particularly to other child safety, bathtub, and water spout devices with straps—and would incorporate those teachings into Thorne. *See KSR*, 550 U.S. at 417; (1011 at Section VIII.A.1.). This is particularly true when, as here, the incorporation represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section VIII.A.1.).

One of ordinary skill in the art of the '653 Patent (i.e., child safety and bathtub devices for infants and small children, and devices that attach to water

spouts) would be aware of baby bathing chairs such as those set forth in Lister.<sup>15</sup> (1011 at Section VIII.A.1.). And they would recognize that passing an end of a strap through an aperture in a side portion (as in Lister) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section VIII.A.1.). Figure 1 of Lister is reproduced below with annotation:



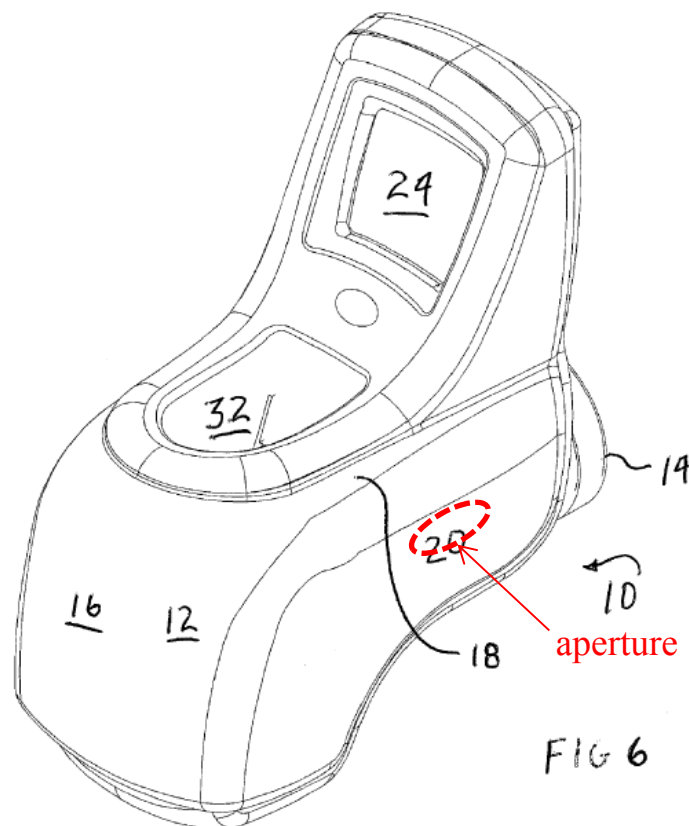
Annotated Lister FIG. 1

The resulting combination of Thorne with Lister (and Lerner, as discussed

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<sup>15</sup> Lister, like Thorne, addresses the safety risks involved with bathing an infant in a bath tub. (1007-008 at 1:10–17). Lister’s bathing chair may be positioned in a bathtub to reduce injury. (1007-001 at Abstract; 1007-008 at 1:13–17, 1:57–58, and 1:63–67).

above) would accordingly include an aperture defined by one of the side portions of the body structure, the aperture being to receive an end of the strap. (1011 at Section VIII.A.1.). A drawing illustrating where the aperture would be located in Thorne (and where an end of the strap would pass through) is shown in Mr. Thuma's declaration (1011 at Section VIII.A.1.) and is reproduced below:



#### IV.B.2.b. Claim 13

***13. The bath spout cover of claim 12, further comprising a second aperture defined by the other side portion of the body structure, said second aperture for receiving the other end of the strap.***

Claim 12 is met as set forth above in Section IV.B.2.a. The annotated Figure 1 from Lister appearing above on page 19 shows that both ends of Lister's strap

pass through respective apertures, with one aperture being on each side portion. Just as one of ordinary skill in the art would include one of the Lister side apertures and pass a strap therethrough (as discussed above regarding claim 12), one of ordinary skill in the art would attach both ends of the strap using respective apertures as taught by Lister. (1011 at Section VIII.A.2.). Passing both ends of the strap through respective side portion apertures (as in Lister, and as claimed) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section VIII.A.2.).

Moreover, using two apertures and passing the ends of the strap therethrough, as taught by Lister, would be well within the ordinary skill in the art and would be recognized as a technique used to improve one device (Lister) that would improve another (Thorne) in the same way—and thus would be legally obvious. *See KSR*, 550 U.S. at 417; (1011 at Section VIII.A.2.). And the incorporation of Lister represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section VIII.A.2.). The combination is also an unpatentable duplication of parts with no new or unexpected results. *See* MPEP 2144.04(VI)(B) (citing *Harza*, 274 F.2d 669); (1011 at Section VIII.A.2.).

#### **IV.B.2.c. Claim 14**

***14. The bath spout cover of claim 13, wherein the upper portion further defines an opening adapted to fit over a bath spout shower diverter.***

Claim 13 is met as set forth above in Section IV.B.2.b. And, as discussed above in Section III.C., the claimed opening need not be separate from the claimed



elongated void. In the combination of Thorne with Lerner (and Lister) as set forth above, the elongated void 32 is still “adapted to allow access to and operation of a diverter valve 34 of the spout 14 when the spout cover 10 is installed.” (1005-016 at [0039]; 1011 at Section VIII.A.3.). The figures make it abundantly clear that the void 32 is over the diverter. (1005-005 at FIG. 5). Thus, the claim language is met.

**IV.B.3. Ground 3: Claims 15–21 are obvious over Thorne in view of Daniels<sup>16</sup>**

**IV.B.3.a. Claim 15**

***15. A bath spout cover, comprising:***

Thorne discloses a bath spout cover 10. (1005-001 at Abstract; 1005-014 at [0003]; 1005-015 at [0032]).

***a body structure with an exterior facing surface, the body structure having an upper portion, two opposing side portions, and a front portion;***

Thorne discloses a body structure 10 (more particularly, 12) having an exterior facing surface (labeled in annotated Figure 6 of Thorne, as shown in Mr. Thuma’s declaration (1011 at Section IX.B.1.)), an upper portion 18, two opposing side portions 20 and 22, and a front portion 16. (1005-006 at FIG. 6; 1005-016 at [0034]). The examiner previously found that Thorne discloses these elements, and Patent Owner did not dispute that finding. (1003-035 at first paragraph; *see generally* 1003-018–025).

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<sup>16</sup> The analysis and conclusions in the Ground 3 invalidity challenges are supported by Petitioner’s expert, Mr. Thuma. (1011 at Section IX.B.).

***a receiving area defined between the upper portion, the two opposing side portions, and the front portion,***

Thorne discloses a receiving area defined between the upper portion 18, the two opposing side portions 20 and 22, and the front portion 16. (1005-003 at FIG. 2; 1005-016 at [0035] (describing the body as “a three sided, open bottom cover”)). The examiner previously found that Thorne discloses these elements, and Patent Owner did not dispute that finding. (1003-035 at first paragraph; *see generally* 1003-018–025).

***at least one aperture through one of the side portions, and a strap spanning the two opposing side portions and traversing the at least aperture*<sup>17</sup>**

Thorne has a strap 26 operably connected to (and spanning) the two opposing side portions 20 and 22. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037]). The strap 26 is used to secure the bath spout cover 10 to a bath spout. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037], [0040]).

Thorne’s strap extends from the side portions of its body structure (as shown in Figures 2 and 4), but Thorne does not disclose exactly how the strap 26 is coupled to the body 12. Unlike the ‘653 Patent, Thorne does not disclose a

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<sup>17</sup> Although this limitation (“the at least aperture”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding, *see* 35 U.S.C. § 311(b), Petitioner construes this limitation as “the at least one aperture.” Should Patent Owner desire this construction in litigation, it should file for a Certificate of Correction. This construction is admittedly at odds with dependent claim 17, which says “the at least two apertures.” However, dependent claim 16 says “the at least one aperture.”

completely enclosed opening through one of the side portions of the body structure through which a strap spanning the two opposing side portions traverses.

To see how straps may be attached, one of ordinary skill in the art would look to other devices with straps—and particularly to other child safety, bathtub, and water spout devices with straps—and would incorporate those teachings into Thorne. *See KSR*, 550 U.S. at 417; (1011 at Section IX.B.1.). This is particularly true when, as here, the incorporation represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section IX.B.1.).

One of ordinary skill in the art of the ‘653 Patent (i.e., child safety and bathtub devices for infants and small children, and devices that attach to water spouts) would be aware of water spout extenders for sinks such as those set forth in Daniels. (1011 at Section IX.B.1.). And they would recognize that passing a strap through an aperture in a side portion (as in Daniels) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section IX.B.1.). Figure 5b of Daniels is reproduced below with annotation:

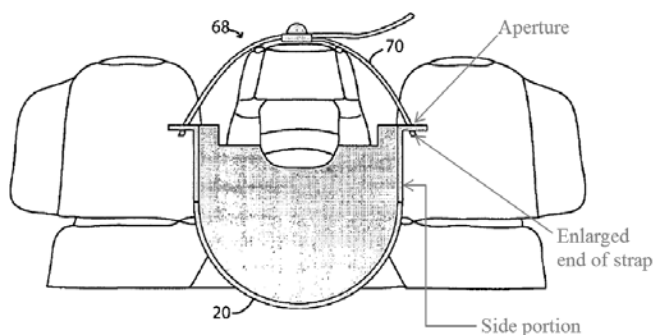
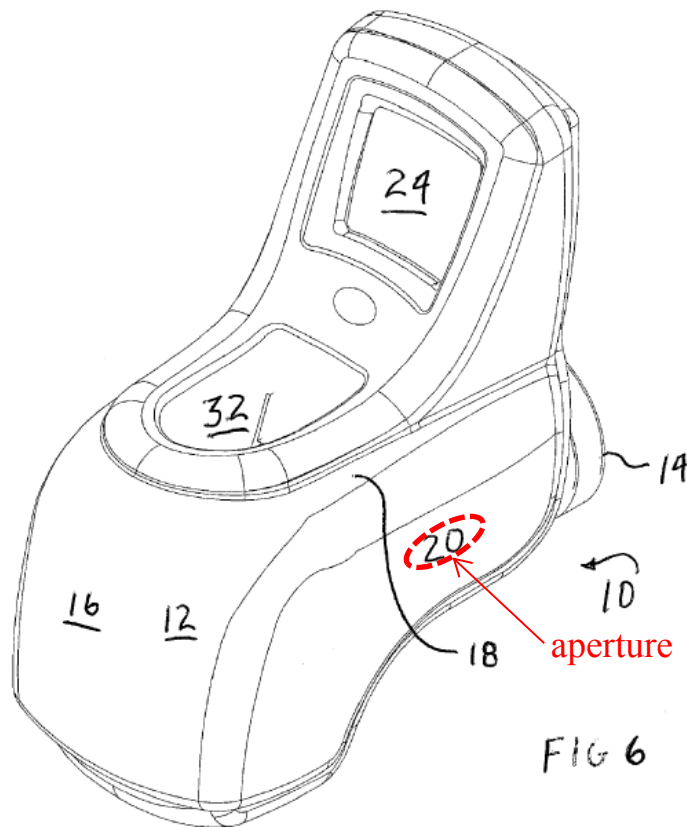


FIG. 5b

Annotated Daniels FIG. 5b

The resulting combination of Thorne with Daniels would accordingly include an aperture through one of the side portions of the body structure through which a strap spanning the two opposing side portions traverses. (1011 at Section IX.B.1.). A drawing illustrating where the aperture would be located in Thorne (and where a strap would traverse the aperture) is shown in Mr. Thuma's declaration (1011 at Section IX.B.1.) and is reproduced below:



*an end portion of the strap having a dimension larger than a dimension of the aperture, said end portion extending through said aperture and extending along the exterior facing surface of the body wherein part of the end portion abuts the exterior facing surface of the body structure, thereby holding the strap in place,*

Daniels teaches that an end portion of a strap can have a dimension larger than a dimension of the aperture, such that the end portion extends through the

aperture and extends along the exterior facing surface of the body wherein part of the end portion abuts the exterior facing surface of the body structure and holds the strap in place. This is illustrated in Figure 5b of Daniels,<sup>18</sup> a portion of which is reproduced below with annotation:

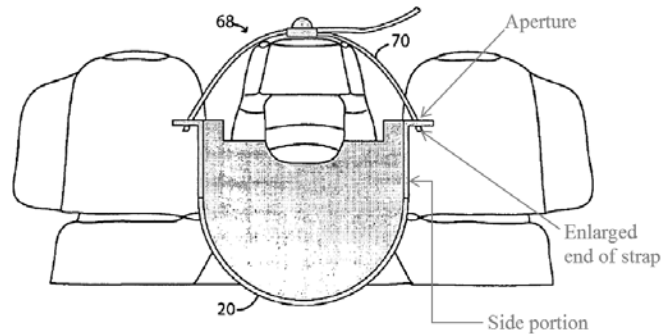


FIG. 5b  
Annotated Daniels FIG. 5b

One of ordinary skill in the art would incorporate the Daniels strap into the Thorne/Daniels combination, complete with its enlarged end, such that the enlarged end extends through the aperture and along the exterior facing surface of the body wherein part of the end portion abuts the exterior facing surface of the body structure and thereby holds the strap in place. Doing so would be a satisfactory, low-cost method of attaching a strap that is equally applicable to the Thorne/Daniels combination as to Daniels. *See KSR*, 550 U.S. at 417; (1011 at Section IX.B.1.). This is particularly true when, as here, the incorporation

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<sup>18</sup> (*See also* 1009-009 at [0028]–[0034] (noting that the strap supports the device 10 from the spout, which could not happen if the strap were allowed to separate from the device 10)).

represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section IX.B.1.).

***said strap for securing the bath spout cover to a bath spout.***

Thorne’s strap 26 is used to secure the bath spout cover 10 to a bath spout. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037], [0040]). And the Daniels strap incorporated into the Thorne/Daniels combination would be used in the same way. (1011 at Section IX.B.1.).

#### **IV.B.3.b. Claim 16**

***16. The bath spout cover of claim 15, wherein the end portion abutting the exterior surface prevents the strap from sliding back through the at least one aperture.***<sup>19</sup>

Claim 15 is met as set forth above in Section IV.B.3.a. And, as discussed above in Section IV.B.3.a., using the Daniels strap in the Thorne/Daniels combination would prevent the strap from sliding back through the aperture. Preventing a strap from sliding back through an aperture is, after all, the same thing that the enlarged end portions are used for in Daniels (and the reason why the Daniels end portions are a familiar—and obvious—substitute in the Thorne/Daniels combination). (1009-008 at [0020], [0021]; 1009-009 at [0028];

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<sup>19</sup> This limitation (“the at least one aperture”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding. *See* 35 U.S.C. § 311(b). As noted above, a related problem exists with respect to independent claim 15. *See supra* note 17.

1011 at Section IX.B.2.).

#### **IV.B.3.c. Claim 17**

***17. The bath spout cover of claim 15, wherein the at least two apertures<sup>20</sup> comprised two apertures, one on each opposing side portion.***

Claim 15 is met as set forth above in Section IV.B.3.a. The combination of Thorne and Daniels discussed above regarding claim 15 would include one aperture on each side of the Thorne body 12. Additionally, the incorporated strap would extend through each of those apertures to secure the Thorne bath spout cover 10 to a bath spout. Finally, the Daniels end portion would be used on each end of the incorporated strap to hold the strap in place. (1011 at Section IX.B.3.). As such, the Thorne/Daniels combination would include one aperture on each opposing side portion. (1011 at Section IX.B.3.).

#### **IV.B.3.d. Claim 18**

***18. The bath spout cover of claim 15, wherein the body structure is comprised of an elastomeric material.***

Claim 15 is met as set forth above in Section IV.B.3.a. And, as discussed above in Section III.D., deformable rubbers and plastics meet the “elastomeric material” limitation. The Thorne body structure 12 is comprised of a deformable material—it is “cushioned” and made of soft rubber, flexible foam, or soft plastics, for example. (1005-015 at [0017], [0032]; 1011 at Section IX.B.4.).

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<sup>20</sup> This limitation (“the at least two apertures”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding. *See* 35 U.S.C. § 311(b). As noted above, a related problem exists with respect to independent claim 15 and dependent claim 16. *See supra* notes 17 and 19.

#### **IV.B.3.e. Claim 19**

***19. The bath spout cover of claim 15, wherein the strap is comprised of an elastomeric material.***

Claim 15 is met as set forth above in Section IV.B.3.a. And, as discussed above in Section III.D., deformable rubbers and plastics meet the “elastomeric material” limitation. As set forth in Thorne, the strap 26 may be an elastic band. (1005-016 at [0037]; 1011 at Section IX.B.5.). Thus, the claim language is met.

#### **IV.B.3.f. Claim 20**

***20. The bath spout cover of claim 15, wherein the body structure is comprised of an elastomeric material having a Shore A hardness of about 55 to about 95.***

Claim 15 is met as set forth above in Section IV.B.3.a. And Thorne teaches that the body structure should preferably have a Shore hardness of at least 20 (OO Scale). *See* 1005-015 at [0017]. A Shore A hardness of about 55 to 95 is at least 20 on the Shore OO hardness scale. (1011 at Section IX.B.6.). The examiner previously found that it would have been obvious to one of ordinary skill in the art to select a material for the Thorne spout cover having a Shore A hardness within this range, and Patent Owner did not dispute that finding. (*See* 1003-036 at ¶ 4; *see generally id.* at 018–025; 1011 at Section IX.B.6.).

#### **IV.B.3.g. Claim 21**

***21. The bath spout cover of claim 20, wherein the elastomeric material has a Shore A hardness of about 75 to about 85.***

Claim 20 is met as set forth above in Section IV.B.3.f. And Thorne teaches that the body structure should preferably have a Shore hardness of at least 20 (OO Scale). (*See* 1005-015 at [0017]). A Shore A hardness of about 75 to 85 is at least 20 on the Shore OO hardness scale. (1011 at Section IX.B.7.). The examiner



previously found that it would have been obvious to one of ordinary skill in the art to select a material for the Thorne spout cover having a Shore A hardness within this range, and Patent Owner did not dispute that finding. (*See* 1003-036 at ¶ 4; *see generally id.* at 018–025; 1011 at Section IX.B.7.).

**IV.B.4. Ground 4: Claims 15–21 are obvious over Thorne in view of Lister and Morris<sup>21</sup>**

**IV.B.4.a. Claim 15**

***15. A bath spout cover, comprising:  
a body structure with an exterior facing surface, the body structure having an upper portion, two opposing side portions, and a front portion;  
a receiving area defined between the upper portion, the two opposing side portions, and the front portion,***

Thorne meets these limitations as set forth above in Section IV.B.3.a.

***at least one aperture through one of the side portions, and a strap spanning the two opposing side portions and traversing the at least aperture<sup>22</sup>***

Thorne has a strap 26 operably connected to (and spanning) the two

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<sup>21</sup> The analysis and conclusions in the Ground 4 invalidity challenges are supported by Petitioner’s expert, Mr. Thuma. (1011 at Section IX.A.).

<sup>22</sup> Although this limitation (“the at least aperture”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding, *see* 35 U.S.C. § 311(b), Petitioner construes this limitation as “the at least one aperture.” Should Patent Owner desire this construction in litigation, it should file for a Certificate of Correction. This construction is admittedly at odds with dependent claim 17, which says “the at least two apertures.” However, dependent claim 16 says “the at least one aperture.”

opposing side portions 20 and 22. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037]). The strap 26 is used to secure the bath spout cover 10 to a bath spout. (1005-003 at FIGs. 2 and 4; 1004-016 at [0037], [0040]).

Thorne's strap extends from the side portions of its body structure (as shown in FIGs. 2 and 4). Thorne does not disclose exactly how the strap 26 is coupled to the body 12 and does not disclose an aperture through one of the side portions of the body structure through which a strap spanning the two opposing side portions traverses.

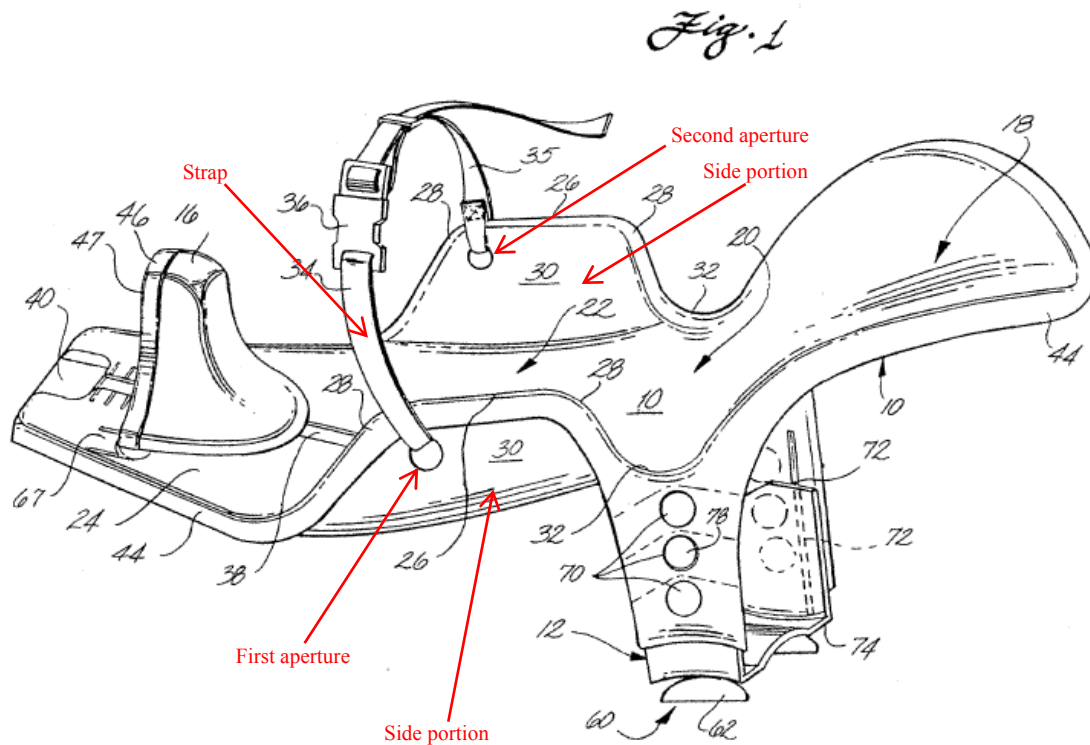
To see how straps may be attached, one of ordinary skill in the art would look to other devices with straps—and particularly to other child safety, bathtub, and water spout devices with straps—and would incorporate those teachings into Thorne. *See KSR*, 550 U.S. at 417; (1011 at Section IX.A.1.). This is particularly true when, as here, the incorporation represents nothing more than a “combination of familiar elements according to known methods” to yield predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section IX.A.1.).

One of ordinary skill in the art of the '653 Patent (i.e., child safety and bathtub devices for infants and small children, and devices that attach to water spouts) would be aware of baby bathing chairs such as those set forth in Lister.<sup>23</sup>

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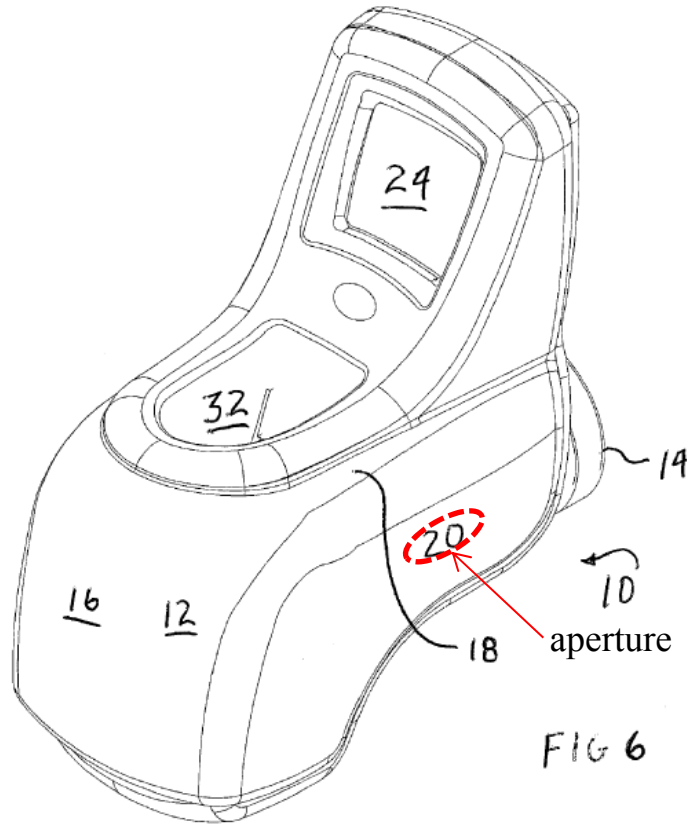
<sup>23</sup> Lister, like Thorne, addresses the safety risks involved with bathing an infant in a bath tub. (1007-008 at 1:10–17). Lister's bathing chair may be positioned in a bathtub to reduce injury. (1007-001 at Abstract; 1007-008 at 1:13–17, 1:57–58, 1:63–67).

(1011 at Section IX.A.1.). And they would recognize that passing a strap through an aperture in a side portion (as in Lister) would be a satisfactory, low-cost method of attaching a strap that is equally applicable to Thorne. (1011 at Section IX.A.1.). Figure 1 of Lister is reproduced below with annotation:



Annotated Lister FIG. 1

The resulting combination of Thorne with Lister would accordingly include an aperture through one of the side portions of the body structure through which a strap spanning the two opposing side portions traverses. (1011 at Section IX.A.1.). A drawing illustrating where the aperture would be located in Thorne (and where a strap would traverse the aperture) is shown in Mr. Thuma's declaration (1011 at Section VIII.A.1.) and is reproduced below:



*an end portion of the strap having a dimension larger than a dimension of the aperture, said end portion extending through said aperture and extending along the exterior facing surface of the body wherein part of the end portion abuts the exterior facing surface of the body structure, thereby holding the strap in place,*

The strap in Lister is indistinguishable from the Munchkin strap shown above in Section III.B., and neither has the claimed end portion. One of ordinary skill in the art would understand, however, that the strap in the Thorne/Lister combination could be substituted for other straps. Indeed, one of ordinary skill in the art would look to other devices with straps—and particularly to other child safety devices with straps—and would incorporate those teachings into the Thorne/Lister combination. *See KSR*, 550 U.S. at 417; (1011 at Section IX.A.1.). This is particularly true when, as here, the incorporation represents nothing more than a “combination of familiar elements according to known methods” to yield

predictable results. *See KSR*, 550 U.S. at 416; (1011 at Section IX.A.1.).

One of ordinary skill in the art of the ‘653 Patent (i.e., child safety and bathtub devices for infants and small children, and devices that attach to water spouts) would be aware of child safety seats such as those set forth in Morris. (1011 at Section IX.A.1.). And they would recognize that using the Morris end portion 19 “which is too large to be pulled through the slot” would be a satisfactory, low-cost method of attaching a strap that is equally applicable to the Thorne/Lister combination. (1008-005 at 2:4–23; 1011 at Section IX.A.1.).

As Mr. Thuma explains, using the enlarged end portion of Morris in the Thorne/Lister combination would result in the enlarged end portion extending through the aperture from Lister and along the exterior facing surface of the Thorne body 12, with the enlarged end abutting the exterior facing surface of the Thorne body 12 to hold the strap in place. (1011 at Section IX.A.1.).

***said strap for securing the bath spout cover to a bath spout.***

Thorne’s strap 26 is used to secure the bath spout cover 10 to a bath spout. (1005-003 at FIGs. 2 and 4; 1005-016 at [0037], [0040]). And any strap incorporated into Thorne would be used in the same way.

#### **IV.B.4.b. Claim 16**

***16. The bath spout cover of claim 15, wherein the end portion abutting the exterior surface prevents the strap from sliding back through the at least one aperture.***<sup>24</sup>

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<sup>24</sup> This limitation (“the at least one aperture”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding. *See* 35 U.S.C. § 311(b).

Claim 15 is met as set forth above in Section IV.B.4.a. And, as discussed above in Section IV.B.4.a., using the end portion 19 from Morris in the Thorne/Lister combination would prevent the strap from sliding back through the aperture. Preventing a strap from sliding back through an aperture is, after all, the same thing that the end portion 19 is used for in Morris (and the reason why the Morris end portion 19 is a familiar—and obvious—substitute in the Thorne/Lister combination). (1008-005 at 2:4–23; 1011 at Section IX.A.2.).

#### **IV.B.4.c. Claim 17**

***17. The bath spout cover of claim 15, wherein the at least two apertures<sup>25</sup> comprised two apertures, one on each opposing side portion.***

Claim 15 is met as set forth above in Section IV.B.4.a. The combination of Thorne, Lister, and Morris discussed above regarding claim 15 would include one aperture on each side of the Thorne body 12. Additionally, the incorporated strap would extend through each of those apertures to secure the bath spout cover 10 to a bath spout. Finally, the Morris end portion 19 would be used on each end of the strap to hold the strap in place. (1011 at Section IX.A.3.). As such, the Thorne/Lister/Morris combination would include one aperture on each opposing

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As noted above, a related problem exists with respect to independent claim 15. *See supra* note 22.

<sup>25</sup> This limitation (“the at least two apertures”) raises issues under 35 U.S.C. § 112 that cannot be addressed in this USPTO proceeding. *See* 35 U.S.C. § 311(b). As noted above, a related problem exists with respect to independent claim 15 and dependent claim 16. *See supra* notes 22 and 24.

side portion. (1011 at Section IX.A.3.).

#### **IV.B.4.d. Claim 18**

***18. The bath spout cover of claim 15, wherein the body structure is comprised of an elastomeric material.***

Claim 15 is met as set forth above in Section IV.B.4.a. And, as discussed above in Section III.D., deformable rubbers and plastics meet the “elastomeric material” limitation. The Thorne body structure 12 is comprised of a deformable material—it is “cushioned” and made of soft rubber, flexible foam, or soft plastics, for example. (1005-015 at [0017], [0032]; 1011 at Section IX.A.4.).

#### **IV.B.4.e. Claim 19**

***19. The bath spout cover of claim 15, wherein the strap is comprised of an elastomeric material.***

Claim 15 is met as set forth above in Section IV.B.4.a. And, as discussed above in Section III.D., deformable rubbers and plastics meet the “elastomeric material” limitation. As set forth in Thorne, the strap 26 may be an elastic band. (1005-016 at [0037]; 1011 at Section IX.A.5.). Thus, the claim language is met.

#### **IV.B.4.f. Claim 20**

***20. The bath spout cover of claim 15, wherein the body structure is comprised of an elastomeric material having a Shore A hardness of about 55 to about 95.***

Claim 15 is met as set forth above in Section IV.B.4.a. And Thorne teaches that the body structure should preferably have a Shore hardness of at least 20 (OO Scale). (See 1005-015 at [0017]). A Shore A hardness of about 55 to 95 is at least 20 on the Shore OO hardness scale. (1011 at Section IX.A.6.). The examiner previously found that it would have been obvious to one of ordinary skill in the art to select a material for the Thorne spout cover having a Shore A hardness within

this range, and Patent Owner did not dispute that finding. (*See* 1003-036 at ¶ 4; *see generally id.* at 018–025; 1011 at Section IX.A.6.).

#### **IV.B.4.g. Claim 21**

***21. The bath spout cover of claim 20, wherein the elastomeric material has a Shore A hardness of about 75 to about 85.***

Claim 20 is met as set forth above in Section IV.B.4.f. And Thorne teaches that the body structure should preferably have a Shore hardness of at least 20 (OO Scale). (*See* 1005-015 at [0017]). A Shore A hardness of about 75 to 85 is at least 20 on the Shore OO hardness scale. (1011 at Section IX.A.7.). The examiner previously found that it would have been obvious to one of ordinary skill in the art to select a material for the Thorne spout cover having a Shore A hardness within this range, and Patent Owner did not dispute that finding. (*See* 1003-036 at ¶ 4; *see generally id.* at 018–025; 1011 at Section IX.A.7.).

#### **V. Conclusion**

For all of the foregoing reasons, it is reasonably likely that at least one claim of the ‘653 Patent will be found to be unpatentable based on the prior art cited in this Petition. Petitioner respectfully requests that the USPTO grant this Petition and invalidate the challenged claims.



UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MUNCHKIN, INC.

Petitioner

v.

SKIP HOP, INC.

Patent Owner

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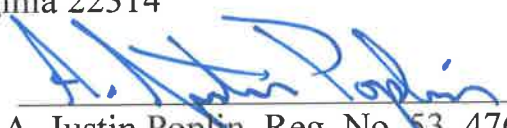
Case IPR 2015-00  
Patent 9,060,653

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the Petitioner's Petition for *Inter Partes* Review, Exhibits 1001-1011, and Certificate of Service was served on Patent Owner on January 29, 2015, by sending a copy via Express Mail to the Correspondent of Record at the following address:

STITES & HARBISON  
Attn: Mr. Stephen J. Weyer  
1800 Diagonal Road, Suite 325  
Alexandria, Virginia 22314



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