

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ATTENDS HEALTHCARE PRODUCTS, INC.,

Petitioner

v.

PAUL HARTMANN AG,

Patent Owner

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Case IPR2020-01479  
Patent 8,771,249 B2

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**PETITIONER'S MOTION TO FILE CORRECTED PETITION**

**Petitioner's Exhibit List**

<b>Ex.</b>	<b>Shorthand</b>	<b>Description</b>
1001	'249 Patent	U.S. Patent No. 8,771,249
1002	Benning	U.S. Patent App. Pub. No. 2005/0256496
1003	Karami '772	U.S. Patent App. Pub. No. 2006/0058772
1004	Karami '626	U.S. Patent App. Pub. No. 2003/0220626
1005	Miyamoto '499	U.S. Patent App. Pub. No. 2004/0016499
1006	Kleinschmidt	U.S. Patent No. 6,547,773
1007	Jacobs	U.S. Patent No. 5,814,178
1008	Anderson	U.S. Patent No. 6,605,172
1009	Stupperich	Certified Translation of German Patent Application DE 10 2004 053 469 A1, Certificate of Translation, and Original German-Language Document
1010	Mandzsu	WO Patent Pub. No. 2006/099000
1011	Cree	U.S. Patent No. 6,255,236
1012	Jezzi	Declaration of Arrigo "Rick" Jezzi
1013	EDANA	Davis Dyer, <i>Seven Decades of Disposable Diapers: A Record of Continuous Innovation and Expanding Benefit</i> (EDANA, Aug. 2005)
1014	Huggies	USA Volume 2 Huggies
1015	Glaug	U.S. Patent No. 6,514,233
1016	Rohrl	U.S. Patent App. Pub. No. 2006/0282053
1017	Karami '341	U.S. Patent App. Pub. No. 2001/0023341
1018	Fries	U.S. Patent No. 5,549,592
1019	McCormack	U.S. Patent No. 5,695,868
1020	Horn	U.S. Patent App. Pub. No. 2004/0158957
1021	INDA Glossary	INDA Nonwovens Glossary (INDA 2002)
1022	Young	U.S. Patent No. 5,626,571
1023	Sun	U.S. Patent No. 6,852,904
1024	Zoia	U.S. Patent No. 5,053,028

<b>Ex.</b>	<b>Shorthand</b>	<b>Description</b>
1025	Braverman	WO Patent Pub. No. 2006/071211
1026	Neugebauer	U.S. Patent App. Pub. No. 2007/0134489
1027	Igaue	U.S. Patent App. Pub. No. 2004/0236303
1028	Damaghi	U.S. Patent App. Pub. No. 2005/0261650
1029	O'Connell	U.S. Patent No. 6,235,011
1030	Karami '584	U.S. Patent App. Pub. No. 2001/0042584
1031	Miller	U.S. Patent No. 5,845,375
1032		Omitted
1033		Omitted
1034	ASTM D5169	ASTM D5169-98 (1998)
1035	ASTM D5170	ASTM D5170-98 (1998)
1036	Miyamoto '930	U.S. Patent 6,840,930
1037	Couillard	U.S. Patent App. Pub. No. 2002/0174931
1038		Omitted
1039	Brady	U.S. Patent No. 6,843,949
1040	Gorman	U.S. Patent No. 5,256,231
1041	Tao	U.S. Patent No. 6,569,136
1042	Roe	U.S. Patent App. Pub. No. 2004/0224132
1043	FileHistory	File History Excerpts - '249 Patent
1044	Gehring	U.S. Patent No. 6,854,297
1045	Fernfors	U.S. Patent App. Pub. No. 2002/0193776
1046	Huang	EP0734243B1
1047	Hari	<i>Types and properties of fibres and yarns used in weaving</i> , P.K. Hari, Chapter 1 of K.L. Gandhi, <i>Woven Textiles Principles, Technologies and Applications</i> (Series in Textiles, 2012, pg. 3-34)
1048	Chhabra	U.S. Patent App. Pub. No. 2004/0137200
1049	Kauschke	U.S. Patent No. 6,537,644
1050		Redlined Corrected Petition
1051	Robinson	Declaration of Eagle H. Robinson

<b>Ex.</b>	<b>Shorthand</b>	<b>Description</b>
1052		December 2, 2020 Correspondence Between the Parties

Pursuant to the Board's order (Paper 8 at 5), Petitioner moves to correct its Petition under Rule 104(c) to: (1) shift certain cross-references from Section VIII.B.2 to Section VIII.B.3; (2) explicitly address Limitations 31, 32, 45, 47, and 48 in Ground 1 as was intended (*see* Petition at iii, 4, and 20) by citing to existing Ground 1 arguments and evidence; (3) shift Limitations 46[a]-[b]'s dependency and pin-cite; and (4) remove an errant "s" in the signature block.<sup>1</sup> *See* EX1050 (redlined Petition showing the corrections).

Rule 104(c) "is remedial and is therefore entitled to a liberal interpretation." *ABB Inc. v. ROY-G-BIV Corp.*, IPR2013-00063, slip op. at 7 (PTAB Jan. 16, 2013) (Paper 21). The Board should grant the requested relief because errors (1)-(3) are clerical, Petitioner diligently sought to correct them, and permitting correction would neither prejudice Patent Owner ("PO") nor negatively impact this proceeding.<sup>2</sup>

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<sup>1</sup> Petitioner found Errors (2)-(4) preparing this Motion (EX1051, ¶¶11, 13) and believes that requesting their correction is within the scope of authorized briefing. Paper 8 at 3, 5.

<sup>2</sup> To the extent PO argues that Rule 104(c) is somehow inapplicable, the Board can also grant the requested relief under Rule 42.5; this Motion establishes both good cause to do so and that it is in the interest of justice. *See Unified Patents Inc. v.*

## **I. THE ERRORS ARE CLERICAL**

Error (1)—cross-referencing Section VIII.B.2 instead of Section VIII.B.3—occurred when Ground 2’s description of the obvious modification of Benning’s diaper to include a film-nonwoven backsheet and hook-type fasteners like Karami ’626’s (now Section VIII.B.1), and the mapping of that modified diaper to certain claims (now Section VIII.B.2) were separated from one subsection into two. *See* Petition at iii; EX1051, ¶¶5, 10. This caused what was previously Section VIII.B.2 to shift to Section VIII.B.3. EX1051, ¶10. And despite Petitioner’s pre-filing review of the Petition, cross-references to Section VIII.B.2 on Petition pages 86, 90, 93, and 94 were not updated accordingly. *Id.*, ¶¶4, 10.

The Petition confirms this is a clerical error. On Petition page 86, the citation to Section VIII.B.2 is explicitly linked to the Petition’s claim 5 arguments and evidence (“Claim 5 was obvious:”), which appear in Section VIII.B.3. The same is true on Petition pages 90, 93, and 94, with reference to claims 7 or 17 rather than 5.

Moreover, the Board has found this type of error to be clerical and permitted its correction. *NetApp, Inc. v. Intellectual Ventures II LLC*, IPR2017-00276, slip op. at 2-3 (PTAB May 5, 2017) (Paper 12).

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*Universal Secure Registry LLC*, IPR2018-00067, slip op. at 5, n. 6 (PTAB Mar. 14, 2018) (Paper 11).

As to Error (2), Ground 1 covers claims 31, 32, 45, 47, and 48. Petition at iii, 4, and 20; EX1051, ¶11. And Ground 1 addresses claims 31 and 32 directly (*id.* at 36) as well as limitations that are identical to Limitations 31, 32, 45, 47, and 48. *Id.* at 39 and 42 (addressing claims 14, 39, and 53, which recite Limitation 31), at 39 and 42 (addressing claims 15, 40, and 54, which recite Limitation 32), at 41 and 45-47 (addressing claims 12, 19, and 38, which recite Limitation 45), at 47 (addressing claim 23, which recites Limitation 47), and at 45-47 (addressing claims 12, 21, and 38, which recite Limitation 48); EX1051, ¶12.

But Limitations 31, 32, 45, 47, and 48 were not referenced in Ground 1’s explanation (*see* Petition at §§VIII.A.3-4), which is a clerical error, as confirmed by Ground 1’s application to these claims and mapping of identical limitations. EX1051, ¶12. This error occurred when similar explanations from the related ’1477 Proceeding were re-structured to address the ’249 Patent’s unique claim dependencies and was not caught in the Petition’s pre-filing review. *Id.*, ¶¶4, 11.

At most, Error (2) “relate[s] only to the location of certain discussion within the Petition and not the content of that discussion [and is thus] a clerical mistake.” *See Unified Patents* at 4; *see also Sand Revolution II, LLC v. Cont’l Intermodal Grp. – Trucking LLC*, IPR2019-01393, slip op. at 3-4 (PTAB Jan. 15, 2020) (Paper 11) (omission of a claim from a ground was correctable clerical error, where referenced in the petition’s introduction and similar to other claims in that ground).

Error (3) is plainly clerical, as evidenced by claims 46 and 12 themselves and the Petition’s listing of their limitations. Petition at viii and xiv (Limitation 46[a] depends from “claim 45,” not 44, and Limitations 46[a]-[b] are identical to Limitations 12[b]-[c], not 12[a]-[b]); EX1051, ¶¶4, 13.

Error (4) is also plainly clerical, as the mis-typed “s” below the signature and above “*Counsel for Petitioner*” clearly does not belong.

## **II. PETITIONER ACTED DILIGENTLY TO CORRECT THE ERRORS**

Petitioner learned of Error (1) when reviewing Patent Owner’s Preliminary Response (“POPR”) on November 25, 2020. POPR at 11. Within a week, which included Thanksgiving, Petitioner contacted PO seeking to correct it. EX1052. Errors (2) and (3) were discovered when preparing this Motion. EX1051, ¶¶11, 13.

## **III. CORRECTING THE ERRORS WILL NOT PREJUDICE PO**

PO recognized Error (1) as an error (POPR at 11) and understood its cure, as evidenced by the POPR in the related ’1477 Proceeding (*see* ’1477 Proceeding’s POPR at 11 (recognizing that a cross-reference associated with a claim should have been to the petition section addressing that claim)). This undermines any claim of prejudice by PO. *See NetApp* at 2-3 (finding no prejudice to a patent owner that “recognized the incorrect cross-reference citations as clerical errors, and was able to understand the underlying facts and arguments in the Petition in making arguments in its Preliminary Response”).



And, assuming institution, even if Error (2) is not corrected, PO will have to address Ground 1's challenges to limitations that are identical to the omitted limitations (*supra* at 3) as well as Ground 2's challenges to the omitted limitations (Petition at 4), leaving PO substantively no better off. Moreover, PO argued for discretionary denial (POPR at §III) and against the independent claim challenges (*id.* at §§IV and V) in its POPR, without independently addressing any dependent claim challenges (*see, e.g., id.* at 23-24). *See also id.* at 54 (nearly 2,000 words left). Error (2) only affects dependent claims (*supra* at 3), establishing that its earlier correction would not have impacted the POPR.

Finally, Petitioner is not time-barred (*see* Petition at 1) and could file another petition to seek the requested corrections. But that route is wasteful of Petitioner's, PO's, and the Board's resources. *See Unified Patents* at 4-5, incl. n. 6 ("avoiding the need for Petitioner to file a new petition ... will best effect efficiency").

#### **IV. CORRECTING THE ERRORS WILL NOT HARM THE IPR**

This proceeding can be instituted based on uncorrected parts of the Petition. *See, e.g.,* Petition at §§VIII.A.2, VIII.B.2 (unchanged claim 1 analyses).

Dated: December 28, 2020

Respectfully submitted,

/Eagle H. Robinson/

Eagle H. Robinson

*Lead Counsel for Petitioner*

**CERTIFICATE OF SERVICE**

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on December 28, 2020, copies of PETITIONER'S MOTION TO FILE CORRECTED PETITION and EX1050-EX1052 were served on Lead and Backup Counsel for Patent Owner via email (by consent) to:

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