

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL J. McMAHON, ART MALIN, STEVE AUSNIT,
DONALD L. CREVIER, DAVID J. MATTHEWS, and JOEL JOHNSON

Appeal No. 2006-0335
Application No. 10/301,308

ON BRIEF

Before FRANKFORT, CRAWFORD, and NAPPI, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 34 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59, all of the claims remaining in the application. Claims 1 through 33, 43, 46, 49 and 52 have been canceled.

As noted on page 1 of the specification, appellants' invention relates to methods of making reclosable packages having slide zippers on horizontal form-fill-seal (HFFS) machines. In general, it appears that independent claim 34 is directed to embodiments of the invention like that shown in

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Figures 14-16 of the application drawings, while independent claim 53 is somewhat broader and thus readable on other embodiments as well. Claims 34 and 53 are representative of the subject matter on appeal and a copy of those claims can be found in the Appendix attached to appellants' brief.

The prior art references relied upon by the examiner in rejecting the appealed claims are:

Herz	3,790,992	Feb. 12, 1974
Smith	5,664,406	Sep. 9, 1997
Dobreski	5,682,730	Nov. 4, 1997
Todd et al. (Todd)	6,195,967	Mar. 6, 2001

Claims 37 through 41, 45, 48 and 51 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 34 through 37, 40 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Todd in view of Herz.

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Claims 38 and 39 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Todd in view of Herz, as applied above, and further in view of Dobreski or Smith.¹

¹Claims 34 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59 also stand rejected under the judicially created doctrine of

obviousness-type double patenting as being unpatentable over various pending applications and prior U.S. Patents. See pages 2-4 of the final rejection mailed August 29, 2003 for the details of these rejections. According to appellants' statement in the brief filed May 3, 2004 (page 4), such rejections "will be resolved, if necessary, by terminal disclaimers, after the various applications have been otherwise allowed." Thus, it is apparent that appellants have not contested the examiner's various obviousness-type double patenting rejections. Given that no terminal disclaimer has been filed and no argument on the merits made with respect to the double patenting rejections, we summarily sustain the examiner's rejections of claims 34 through

Rather than attempt to reiterate the examiner's full commentary with regard to the rejections set forth in the answer and the conflicting viewpoints advanced by the examiner and appellants regarding those rejections, we make reference to the examiner's answer (mailed June 24, 2004) for the reasoning in support of the rejections, and to appellants' brief (filed May 3, 2004) and reply brief (filed August 26, 2004) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

42, 44, 45, 47, 48, 50, 51 and 53 through 59 based on obviousness-type double patenting.

Regarding the rejection of claims 37 through 41, 45, 48 and 51 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement, the examiner is of the view that appellants' disclosure does not support an embodiment like that set forth in the above-enumerated claims which has both sequential sealing of the zipper to the package walls, as is evident in the embodiment of Figures 14-16 of the application drawings, and opening of the zipper for the subsequent filling of the package, as generally disclosed regarding the embodiments of Figures 12 and 13 of the application. Appellants respond by merely urging (brief, page 5) that

it is not inappropriate to claim features of different disclosed embodiments, particularly when the disclosed embodiments are similar, the additional elements are added in dependent claims, and unreasonable experimentation would not be required after review of the disclosure to combine the various elements.

Absent any meaningful explanation directed to the specific circumstances and facts of this case, appellants' generalized assertions in the brief and reply brief concerning the examiner's

35 U.S.C. § 112, first paragraph, rejection are not persuasive. Like the examiner, it appears to us that independent claim 34 is directed to the embodiment of Figures 14-16 of the application drawings, wherein the first and second zipper flanges (40, 42) are sequentially sealed to the package walls (116, 118) so that filling between the zipper and the package wall (118) that is not sealed to a zipper flange (referred to by appellants on pages 6 and 7 of the brief as "behind the zipper" filling) can occur without opening of the zipper (see, particularly specification, page 11, line 13 thru page 12, line 11). By contrast, claim 37, which depends from claim 34, appears to be directed to the embodiment of Figures 12 and 13, wherein the zipper flanges are apparently simultaneously sealed to the package walls (at the first sealing station 90) and the closed zipper is subsequently opened at slider opening station (96) to allow filling of the package through the reclosable zipper. Appellants have provided no explanation as to why one of ordinary skill in the art would have attempted to combine such apparently incompatible aspects of these two different embodiments of the disclosed invention into one embodiment, and have not explained why the specification

would have reasonably conveyed to one skilled in the art that appellants, at the time of filing the application, had possession of such a hybrid embodiment.

Based on the foregoing, we will sustain the examiner's rejection of claims 37 through 41, 45, 48 and 51 under 35 U.S.C. § 112, first paragraph.

Regarding the examiner's rejection of claims 34 through 37, 40 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59 under 35 U.S.C. § 103(a) as being unpatentable over Todd in view of Herz, we agree with the examiner's assessment of Todd set forth on page 4 of the answer. More specifically, we agree that Todd teaches a process of making a reclosable package comprising the steps of feeding a supply of package film (14) in a package forming direction, folding the film about a bottom crease (at plow assembly 24) to form opposing package walls or panels (26), feeding a supply of reclosable zipper material from supply reel (191) between the opposing package walls (26) and sealing the zipper to the package walls at the same time that a bottom seal is applied to the package at seal station (32). See column 5,

lines 40-49 of Todd. Todd also discloses the step of cross-sealing the folded film at package-width intervals (at station 38, via seal bars 42) to form a chain of packages and subsequently cutting each of the packages or pouches (12) from the chain of packages (at 46).

As recognized by the examiner, Todd does not disclose the use of a slider with the zipper material of the package therein, and does not teach or suggest sequential sealing of the zipper material to the package walls, as required in appellants' claims on appeal. To account for the first of these differences, the examiner turns to Herz, urging that this patent provides adequate teaching and suggestion for one of ordinary skill in the art at the time of appellants' invention to have provided the packages of Todd with a slider to provide an aid for opening and closing the packages. Appellants have not contested this aspect of the examiner's rejection.

Regarding the second difference, the examiner contends that it would have been an obvious matter of design choice to

sequentially seal the zipper flanges in Todd to the package walls because appellants have allegedly "not disclosed that such sealing provides an advantage, is used for a particular purpose, or solves a stated problem" (answer, page 4). It is this aspect of the rejection which appellants have challenged in their brief (pages 6-7). Given that the disclosure in Todd specifically indicates that the zipper material is sealed to the package walls (26) in the same operation that the bottom seal is formed on the package at seal station (32), which teachings evidence a desire for simultaneous sealing of the zipper material by zipper seal bars (190), and given the lack of any disclosure in either Todd or Herz concerning any other manner of sealing the zipper to the package, we find the examiner's bare assertion of obvious design choice to be without foundation. Moreover, it is apparent that appellants' have refuted the examiner's assertions in the answer that the sequential sealing of the zipper halves as required in the claims on appeal is not disclosed by appellants to provide an advantage and/or not used for a particular purpose.

In view of the foregoing, the examiner's rejection of claims 34 through 37, 40 through 42, 44, 45, 47, 48, 50, 51 and 53

through 59 under 35 U.S.C. § 103(a) as being unpatentable over Todd in view of Herz is not sustained.

We have also reviewed the additional patents to Dobreski and Smith applied against dependent claims 38 and 39, but find nothing in those references which would provide response for or otherwise overcome the deficiencies in the basic combination as noted above. Accordingly, the examiner's rejection of claims 38 and 39 under 35 U.S.C. § 103(a) as being unpatentable over Todd in view of Herz and Dobreski or Smith is not sustained.

To summarize, the decision of the examiner to reject claims 34 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59 under the judicially created doctrine of obviousness-type double patenting is affirmed. In addition, the examiner's decision to reject claims 37 through 41, 45, 48 and 51 under 35 U.S.C. § 112, first paragraph, is affirmed. The decision to reject claims 34 through 42, 44, 45, 47, 48, 50, 51 and 53 through 59 under 35 U.S.C. § 103(a) is reversed. Since at least one rejection of each of

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the claims remaining in the application and on appeal has been affirmed it follows that the decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

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