

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MATTHIAS MULLER and GUNTER BAUER

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Appeal 2007-1448  
Application 10/601,325  
Technology Center 3600

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Decided: November 29, 2007

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Before FRED E. McKELVEY, *Senior Administrative Patent Judge*,  
HUBERT C. LORIN and JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellants have filed a Request for Rehearing under 37 C.F.R. § 41.50(b)(2) (2007) and 37 C.F.R. § 41.52(a)(1) (2007) for reconsideration of our Decision of October 25, 2006. The Decision affirmed the Examiner's rejection of claims 1-7, 11-13 under 35 U.S.C. § 103(a), but did so using a different combination, namely, Pohle and Wisniewski, rather than Polhe and Misono, as applied by the Examiner.

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Appellants traverse our rejection of claims 1-7 and 11-13 based on Pohle in view of Wisniewski as follows:

1. Appellants assert that their “prior challenge to Pohle was not made as the only challenge to Pohle, but rather was made as the only challenge necessary to overcome the combination of Pohle with Misono” (Request for Rehearing 3). While Appellants may have had other challenges to assert, we responded in our Decision to only those argument(s) made by Appellants and directed to Pohle in their Appeal Brief. Arguments which Appellants could have made but choose not to make in the Brief are not considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2007).

2. Appellants assert “...that the proposed combination of Pohle and Wisniewski simply fails to disclose or suggest the elastic deformation of all three components in order to perform each of the two separate bracing functions as claimed (emphasis original)” (Request for Rehearing 4). We disagree. As we enumerated on page 11 of our Decision, “the clip 10 Wisniewski is similar to Appellants' in that it has two biasing sections each respectively responsible for: 1. holding the clip to a mounting member (76), and 2. holding a mounted member (84) to the clip using only the biasing force of the clip.” The two holding sections in Wisniewski are connected to one another by a third intermediate base/pedestal component defined by integrally formed portions 12/34. This base/pedestal component functions similarly to Appellants' flexurally rigid connection 13/14 to flexibly connect the other two components as unitary clip. Thus, Wisniewski discloses a unitary three component clip having two sections functioning to

connect different items to the clip by flexure, and a third component which flexibly connects the two sections to form the clip.

3. Further, Appellants argue that: “the elastic deformation of the radial portions 24, which deflect and collapse in an inward fashion, play no part in the connection of the engaging members 26, 28, 30, 32 in hole 90 of the second material 76” and “the elastic deformation of the engaging members 26, 28, 30, 32, which resiliently compress inwardly, play no part in the connection of the first material 74 to the radial portions 24” (Request for Rehearing 5). While we accept that the engaging members 26, 28, 30, 32 in Wisniewski function somewhat differently from that of the radial portions 24, we do not accept the notion of these portions of the same clip have “no part” in the way the other functions. This is because the engaging members 26, 28, 30, 32 are contiguous with the base/pedestal component 12/34 of the clip (Wisniewski, Figure 2) which also connects to the radial portions 24. Because of this connection, some stress would have to be transmitted to the base/pedestal component of the clip when the engaging members 26, 28, 30, 32 are compressed. Since, the radial portions 24 also are connected to the clip by the common base/pedestal component, stress realized in the base/pedestal component would have to have some affect on stresses in the radial portions 12 given the integral nature of the clip and vice versa.

4. Finally, “Appellants submit that even if one were to modify the device of Pohle in the manner suggested by the Decision, namely to include the radial portions of Wisniewski, the simple combination of claim 1 is not disclosed or suggested. As such, the proposed combination of Pohle and Wisniewski simply

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does not disclose or suggest claim 1” (Request for Rehearing 5). Appellants seem to have mischaracterized our reasoning in applying Pohle and Wisniewski under 35 U.S.C. § 103(a). First, we rely on Wisniewski only to show what the level of ordinary skill in the art was at the time of the invention.<sup>1</sup> Nowhere do we suggest in our Decision that we were modifying Pohle to “include the radial portions of Wisniewski.” Rather, the Decision is clear, the level of skill in the art is understood from, for example, Wisniewski (Decision 11, 12). Based on that understanding, a person with ordinary skill in the art would know to eliminate the weld connection in Pohle between the getter and legs 26 in favor of using the inherent bias of the legs 26 to hold the getter in place as taught by Wisniewski’s radial holding portions 24.

For the reasons above, we are not convinced that Appellants have shown with particularity points believed to have been misapprehended or overlooked by the Board in rendering its earlier decision. *See* 37 C.F.R. § 41.52(a)(1) (2007). Accordingly, Appellants’ request for rehearing is denied.

#### CONCLUSIONS OF LAW

We conclude:

Our decision to affirm the decision of the Examiner to reject the claims on appeal under 35 U.S.C. § 103(a) over prior art has not been shown to have been erroneous.

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<sup>1</sup>“Elastically deformable portions of a clip which hold another member in place on it were known at the time of the invention. One example of this is the biasing portions or fingers 24 of the clip 10 in Wisniewski which hold shaft 84 in place within the clip 10” (Decision 11, ll. 4-7).

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On the record before us, the Appellants are not entitled to a patent claiming rejected claims 1-7, and 11-13 on appeal.

This decision on rehearing is a FINAL agency action.

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) (2007).

**REHEARING DENIED**

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Charles N.J. Ruggiero, Esq.  
Ohlandt, Greeley, Ruggiero & Perle, L.L.P.  
10th Floor  
One Landmark Square  
Stamford, CT 06901-2682