

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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*Ex parte CHRISTINE GAIL STEGER and DENNIS ALLEN DARBY*

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Appeal 2008-1272  
Application 11/118,893  
Technology Center 3700

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Decided: April 22, 2008

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Before ERIC GRIMES, RICHARD M. LEBOVITZ and JEFFREY N. FREDMAN, *Administrative Patent Judges*.

FREDMAN, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal under 35 U.S.C. § 134 involving claims to a sanitary napkin packaged with a wipe which the Examiner has rejected as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

*Background*

“Sanitary napkins having flaps extending outwardly from the longitudinal side margins are well known in the art” (Spec. 1). The Specification notes that to maintain “the flaps in the desired position prior to

first use . . . a sanitary napkin [is] packaged with flaps folded over to the topsheet and a unitary release strip bridging the adhesive of the flaps" (Spec. 2). According to the Specification, the prior art also "discloses an individually packaged sanitary napkin having a cleansing wipe packaged therewith. The wipe can be packaged in flaps located on various different portions of the wrapper" (Spec. 2).

*Statement of the Case*

*The Claims*

Claims 1-17 are on appeal. We will focus on claims 1 and 5 which are representative and read as follows:

1. An absorbent article having a body-facing side, a garment-facing side, a length, a width, two longitudinal side margins, said absorbent article further comprising:
  - a liquid pervious topsheet;
  - a liquid impervious backsheet joined to said topsheet;
  - an absorbent core positioned between said topsheet and said backsheet;
  - a pair of flaps, each said flap extending from a longitudinal side margin;
  - each of said flaps being folded over said topsheet in a topsheet facing relationship;
  - a release strip maintaining said flaps in said topsheet facing relationship; and
  - a wipe article enclosed in a pouch, said pouch being joined to said release strip.
5. The absorbent article of Claim 1, wherein said pouch is hermetically sealed and said wipe article is a pre-moistened cleansing wipe.

*The prior art*

The Examiner relies on the following prior art reference to show unpatentability:

Fisher            US 5,569,230            Oct. 29, 1996

*The issues*

The rejections as presented by the Examiner are as follows:

- A. Claims 5, 11 and 16 stand rejected under 35 U.S.C. § 112, first paragraph, as being nonenabled.
- B. Claim 1-17 stand rejected under 35 U.S.C. § 102(b), as being anticipated by Fisher.

*A. 35 U.S.C. § 112, first paragraph rejection*

The Examiner argues that “[c]laims 5, 11 and 16 are rejected under 35 U.S.C[.] 112, first paragraph, as based on a disclosure which is not enabling. An impervious pouch critical or essential to the practice of the invention, but not included in the claim(s) is not enabled by the disclosure” (Ans. 3). The Examiner contends that “the claim only recites the seal of the pouch is hermetic when the wipe is a wet wipe not that the pouch is liquid impervious as required when the wipe is a wet wipe” (Ans. 5).

Appellants respond to the rejection that “[c]laims 5, 11, and 16 recite that the pouch is hermetically sealed” (App. Br. 4).

In view of these apparently conflicting positions, we frame the enablement issue before us as follows:

Is claim 5 nonenabled as lacking a critical element because the claim does not require that the pouch is liquid impervious?

*Findings of Fact*

1. The Brief Summary of the Invention in the Specification states that in “a preferred embodiment the means for maintaining the flaps in the topsheet facing relationship comprises a release strip and the wipe article comprises a wet wipe” (Spec. 3:27-29).

2. The Specification states that in “a further embodiment, the absorbent article is an individually packaged sanitary napkin having a releasable wrapper affixed to the backsheet adhesive, and provided in a tri-folded package” (Spec 3:29-31).

3. The Specification teaches that the cleansing wipe 80 of the present invention is beneficially associated with the means for . . . maintaining the flaps 28 in the topsheet facing relationship. In one embodiment, the wipe 80 is enclosed in a pouch 70, a portion of which comprises the unitary release strip 46'. In another embodiment, the wipe pouch itself, whether or not considered to by "unitary" also serves as the release strip (Spec. 13:27-31).

4. The Specification teaches that if the wipe “is a wet wipe, i.e., a pre-moistened wipe, the pouch cover 72 (and pouch 70) must be liquid impervious. The wipe may be a dry wipe, in which case the pouch cover can be made of a fluid pervious material such as a soft, pliable nonwoven web material” (Spec. 16:20-23).

*Discussion of 35 U.S.C. § 112, first paragraph rejection*

Where the specification shows a particular feature to be required, a claim that omits that feature is not enabled. “Although appellant now strenuously argues that the cooling bath is optional, his specification not

only fails to support this contention, but leads us, as it did the examiner and the board, to believe that both it and its location are essential. We therefore conclude that claims which fail to recite the use of a cooling zone, specially located, are not supported by an enabling disclosure.” *In re Mayhew*, 527 F.2d 1229, 1233 (CCPA 1976).

In this instance, the Specification generically discusses wipes that are attached to the sanitary napkin (*see* FF 1-3). We find that the Specification teaches that when using “a pre-moistened wipe, the pouch cover 72 (and pouch 70) must be liquid impervious” (Spec. 16:20-22; FF 4). We also find that claims 5, 11, and 16 comprise a “pre-moistened cleansing wipes” in a hermetically sealed pouch (*see* Claim 5), but do not require that pouch be impervious. A hermetically sealed (or airtight) pouch is not necessarily liquid impervious, since an airtight pouch can be composed of materials such as paper which can form airtight pouches but not liquid impervious ones. We conclude that in the context of the three dependent claims 5, 11, and 16, which expressly place the moistened wipe in a hermetically sealed pouch, Appellants’ own Specification requires that the pouch is “liquid impervious”, rendering this a critical element.

We therefore affirm the Examiner’s rejection of claims 5, 11, and 16 under 35 U.S.C. § 112, first paragraph.

*B. 35 U.S.C. § 102(b) rejection over Fisher*

The Examiner argues that “Fisher '230 teaches the claimed invention, i.e. a pouch being ‘joined’ to a release strip.” (Ans. 5). The Examiner contends that this case differs from the parent case in that “the instant claim 1 requires [that] a release strip maintain the flaps in a topsheet facing

relationship and a pouch be joined to such release strip, i.e. the claim language in this child application does not require the same combination” (Ans. 6).

Appellants argue that the “Office Action does not state where in Fisher is found any disclosure, teaching, or other suggestion for a ‘pouch being joined to said release strip’” (App. Br. 4). Appellants rely upon the decision in the parent application and contend “the Examiner has not explained exactly how Fisher '230 teaches the claimed invention, such as, for example, a release strip maintaining said flaps in said topsheet facing relationship and a wipe article enclosed in a pouch, said pouch being joined to said release strip” (App. Br. 5).

In view of these apparently conflicting positions, we frame the anticipation issue before us as follows:

Does Fisher teach a sanitary napkin with a pouch containing a wipe article in which the pouch is joined to a release strip?

*Findings of Fact*

5. Fisher teaches a sanitary napkin which has “a body-facing side or face 20a and an opposed garment-facing side or face 20b” (Fisher 3:65-66).

6. Fisher teaches that the sanitary napkin has “a liquid pervious topsheet 22, a liquid impervious backsheet 24, and an absorbent core 26 intermediate the topsheet 22 and the backsheet 24” (Fisher 3:67-4:3).

7. Fisher teaches that the sanitary napkin has flaps, “preferably two symmetrically opposite flaps 28, one extending from each longitudinal side margin 30 of the sanitary napkin 20” (Fisher 4:9-11).

8. Fisher teaches that the “flaps 28 are folded over the topsheet 22 so that the flaps 28 are in the topsheet facing relationship” (Fisher 8:12-13).

9. Fisher teaches that the “pressure sensitive adhesive patches 40b on the flaps 28 are bridged by a single unitary release strip 35” (Fisher 22:9-11).

10. Fisher teaches that the “releasable wrapper 34 shown in FIG. 13 can be provided with an optional perforation line at the place designated “e” which connects to a pouch 53 holding a wipe 80. This will allow the user to tear off the pouch 53 containing the cleansing wipe 80” (Fisher 21:63-66).

11. Fisher teaches that “any suitable means for releasably affixing the pouch 53 to the remainder of the releasable wrapper can be used instead of a perforation line” (Fisher 22:1-3).

12. The Specification defines the term “joined”, stating that the term “joined” refers to the condition where a first member or component is affixed, or connected, to a second member or component either directly; or indirectly, where the first member or component is affixed, or connected, to an intermediate member or component which in turn is affixed, or connected, to the second member or component

(Spec 7:26-30).

*Discussion of 35 U.S.C. § 102(b) rejection over Fisher*

Fisher teaches a sanitary napkin with wings, with a release strip that holds the wings in a topsheet facing relationship (FF 5-9). Fisher further teaches a wipe article in a pouch which is associated with the releasable wrapper (FF 10-11).

The disputed difference between Fisher and the claim 1 sanitary napkin is whether the pouch is joined to the release strip. In analyzing this

difference, we first interpret the claims. The term “joined” in claim 1 is expressly defined by the Specification as either a direct or indirect connection (*see FF 12*). Consistent with this definition in the Specification, we give this term the broadest reasonable interpretation. *See, e.g., In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000) (“[D]uring examination proceedings, claims are given their broadest reasonable interpretation consistent with the specification.”).

Applying the Specification definition of “joined”, it is clear that Fisher teaches a pouch which is, at least, affixed indirectly to release strips (i.e., the pressure sensitive patches) through the flaps of the sanitary napkin (*see FF 9-11*). This is an express teaching of a “pouch being joined” to a release strips as required by the claims. We therefore conclude that the Examiner has set forth a *prima facie* case that claim 1 is anticipated by Fisher.

We are not persuaded by Appellants’ argument relying upon the Board decision in the parent case, Appeal 2004-0694, because the claims at issue in that case were different than the current claims. In the Appeal 2004-0694, the Board expressly understood the independent claim 1 as requiring “an enclosed pouch maintaining said flaps in said topsheet facing relationship” and “said enclosed pouch being releasably affixed to said flaps” (*see Evidence Appendix 5-6*). Neither of those limitations is present in the current claim 1, which does not require that the pouch maintains the flaps in the topsheet facing direction nor that the pouch is releasably affixed to the flaps (*see Claim 1*). Consequently, the basis for the previous decision is not found in the current claims.

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We affirm the rejection of claim 1 as anticipated by Fisher. Pursuant to 37 C.F.R. § 41.37(c)(1)(vii)(2006), we also affirm the rejections of claims 2-17 as these claims were not argued separately.

#### CONCLUSION

In summary, we affirm the rejection of claims 5, 11, and 16 under 35 U.S.C. § 112, first paragraph. We also affirm the rejection of claim 1 under 35 U.S.C. § 102(b). Pursuant to 37 C.F.R. § 41.37(c)(1)(vii)(2006), we also affirm the rejections of claims 2-4, 8 and 12-18 as these claims were not argued separately.

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)(2006).

AFFIRMED

Ssc:

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