

UNITED STATES PATENT AND TRADEMARK OFFICE

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

Ex parte

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THOMAS PATRICK KEENAN, MARY LOU MCDANIEL, HEATHER
ANN SOREBO, MICHELLE MAY SRODA, and
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Appeal 2008-4450
Application 10/744,145
Technology Center 3700

Decided: November 17, 2008

Before, TONI R. SCHEINER, DEMETRA J. MILLS, and JEFFREY N.
FREDMAN, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for anticipation and obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF CASE

The following claims are representative.

1. A packaged absorbent article, comprising:
 - a package comprising a first end, a second end, and package sides extending from the first end to the second end, wherein the first end is folded along a first fold axis toward the second end such that the package sides fold over toward an inner major surface to form a pouch with pouch sides, the second end folded along a second fold axis toward the pouch to form a flap;
 - an absorbent article comprising a fluid permeable cover disposed over an absorbent member,
 - wherein the article is folded along a longitudinal axis:
 - wherein the folded absorbent article is disposed in the pouch with the fluid permeable cover disposed adjacent the inner major surface and the longitudinal axis of the absorbent article is parallel with first and second ends of the package; and
 - wherein the flap engages at least a portion of the pouch.
2. The article of Claim 1, wherein the absorbent article further comprises an article tab extending from a longitudinal edge, and wherein at least a portion of the article tab protrudes from the pouch, past the first end.
3. The article of Claim 1, wherein the package further comprises a film layer forming the inner major surface and adhered to a fibrous material layer forming an outer major surface of the package.
4. The article of Claim 1, wherein the absorbent article further comprises a liquid impermeable baffle, wherein the absorbent member is disposed between the fluid permeable cover and the liquid impermeable baffle.
5. The article of Claim 1, wherein the flap further comprises a flap tab and wherein the package further comprises a resealable adhesive disposed on at least one of the flap and the pouch such that the flap can be adhered to the pouch.
6. The article of Claim 1, wherein the package further comprises a resealable adhesive disposed on at least one of the flap and the pouch such that the flap can be adhered to the pouch, and wherein the resealable adhesive is selected

from the group consisting of tapes, glues, snaps, hook and loop, thermal bonds, and a combination comprising at least one of the foregoing resealable adhesives.

7. The article of Claim 1, wherein the package further comprises a pocket disposed between the engagement of the flap and the pouch and the adjacent package side.

8. The article of Claim 1, wherein the package further comprises perforations along at least a portion of the flap such that the flap can be detached from the pouch.

9. The article of Claim 1, wherein the flap further comprises a tab protruding from the second end in a direction opposite the first end.

10. The article of Claim 1, wherein the absorbent member further comprises a superabsorbent polymer.

11. The article of Claim 1, wherein the absorbent article is an interlabial device.

12. A packaged absorbent article, comprising:
a package comprising a first end, a second end, and package sides extending from the first end to the second end, wherein the first end is folded along a first fold axis toward the second end such that the package sides fold over toward an inner major surface to form a pouch with pouch sides, the second end folded along a second fold axis toward the pouch to form a flap;

an absorbent article comprising a fluid permeable cover, an absorbent member, and a fluid impermeable baffle,

wherein the absorbent member is disposed between the fluid permeable cover and the fluid impermeable baffle, and an article tab extending from a longitudinal edge of the absorbent article;

wherein the folded absorbent article is disposed in the pouch with the fluid permeable cover disposed adjacent the inner major surface;

wherein at least a portion of the article tab protrudes from the pouch past the first end; and

wherein the flap removably engages at least a portion of the pouch.

13. The article of Claim 12, wherein the package further comprises a film layer forming the inner major surface and adhered to a fibrous material layer forming an outer major surface of the package.

Cited References

Farris et al.	US 6,131,736	Oct. 17, 2000
Brown et al.	US 6,183,456 B1	Feb. 6, 2001

Grounds of Rejection

1. The Examiner rejected claims 1, 4, 7, and 9-11 under 35 U.S.C. 102(b) as being anticipated by Brown.
2. The Examiner rejected claims 2, 3, 5, 6, 8, and 12-20 under 35 U.S.C. 103(a) as being obvious in view of Brown in view of Farris.

ISSUE

1. Claims 1, 4, 7, and 9-11 stand rejected under 35 U.S.C. 102(b) as being anticipated by Brown.

The Examiner contends that Brown discloses a packaged absorbent article wherein the first end is folded along a first fold axis toward the second end such that the package sides fold over toward an inner major surface to form a pouch with pouch sides, the second end folded along a second fold axis toward the pouch to form a flap, and that the limitation requiring that the longitudinal axis of the absorbent article is parallel with the first and second ends is taught by Brown, as claimed. (Ans. 3-4.)

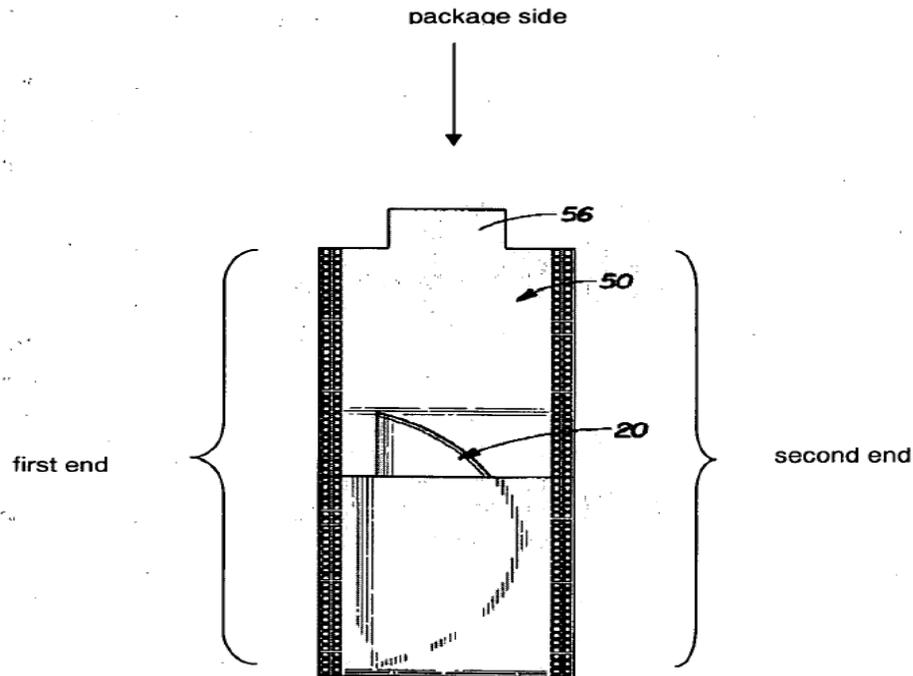
Appellants contend that the first end of Brown is not folded toward Brown's second end, and that the limitation requiring that the longitudinal

According to Appellants, the Specification Figure 4 shows:

The packaged absorbent article includes a package (60) including a first end (48), a second end (50), and package sides (54) extending from the first end (48) to the second end (50). ... The first end (48) is folded along a first fold axis (46) toward the second end (50) such that the package sides (54) fold over toward an inner major surface (14) to form a pouch (40) with pouch sides (36). ... The second end (50) is folded along a second fold axis (44) toward the pouch (40) to form a flap (42). ... The packaged absorbent article also includes an absorbent article (20) including a fluid permeable cover (25) disposed over an absorbent member (21). ... The article (20) is folded along a longitudinal axis (29). ... The folded absorbent article (20) is disposed in the pouch (40) with the fluid permeable cover (25) disposed adjacent the inner major surface (14) and the longitudinal axis (29) of the absorbent article (20) is parallel with first and second ends (48, 50) of the package (60). ... The flap (42) engages at least a portion of the pouch (40).

(App. Br. 3, *see also* Spec. 10.)

2. Brown discloses a packaged absorbent article. (Brown, abstract.)
3. Brown, Figure 9 as annotated by the Examiner appears below.



Brown, Figure 9 showing a package having first and second ends, as annotated by the Examiner. (Ans. 4.)

4. Defining the first end and second end of Brown as annotated by the Examiner, the first end does not fold over the second end.
5. Brown discloses first end 56 which folds over second end depicted in Figure 9 as the top portion of the pouch. (Brown, Fig. 9.)
6. Brown does not disclose the longitudinal axis of the absorbent article is parallel with the first and second ends of the package. (Brown, Fig. 9.)

PRINCIPLES OF LAW AND ANALYSIS

The standard under § 102 is one of strict identity. "Under 35 U.S.C. § 102, every limitation of a claim must identically appear in a single prior art reference for it to anticipate the claim." *Gechter v. Davidson*, 116 F.3d 1454, 1457 (Fed. Cir. 1997). "Every element of the claimed invention must be

literally present, arranged as in the claim." *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989).

We do not find the Examiner has provided sufficient evidence to support a prima facie case of anticipation. We agree with Appellants that the Examiner's characterization of Brown's first and second end fails to evidence the first end is folded along a first axis toward the second end, as claimed. Brown does not disclose the longitudinal axis of the absorbent article is parallel with first and second ends of the package, as claimed.

CONCLUSION OF LAW AND DECISION

We conclude that the Examiner has not established a prima facie case of anticipation. The Examiner's characterization of Brown's first and second end fails to evidence the first end is folded along a first axis toward the second end, as claimed. Brown does not disclose the longitudinal axis of the absorbent article is parallel with first and second ends of the package, as claimed. The rejection of claims 1, 4, 7, and 9-11 is reversed.

ISSUE

2. Claims 1-20 are rejected under 35 U.S.C. 103(a) as being obvious in view of Brown in view of Farris. Claims 2, 3, 5, 6, 8, and 12-20 were originally the subject of this rejection. Upon further review we have added additional claims 1, 4, 7, and 9-11 to this rejection and thus designate the rejection as a new ground of rejection.

In general, Appellants contend that the Examiner has failed to establish a prima facie case of obviousness because the Examiner fails to

provide a reason why the prior art would suggest modification of the references. (App. Br. 7.)

The Examiner finds various reasons for combining the cited references at pages 5-8 of the Answer.

Is there a reason based on the prior art that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does?

FINDINGS OF FACT (CONT.)

7. With respect to claim 1, Brown, Figure 9 discloses a packaged absorbent article including a package comprising a first end 56, a second end (top of pouch), and package sides extending from the first end to the second end, wherein the first end is folded along a first fold axis toward the second end such that the package sides fold over toward an inner major surface to form a pouch with pouch sides, the second end folded along a second fold axis toward the pouch to form a flap; an absorbent article comprising a fluid permeable cover disposed over an absorbent member, a folded absorbent article is disposed in the pouch with the fluid permeable cover disposed adjacent the inner major surface and wherein the flap engages at least a portion of the pouch. (Brown, Fig. 9.)

8. Brown discloses the absorbent article in a vertical orientation with the longitudinal axis perpendicular to the first and second ends of the package. (Brown, Fig. 9.)

9. Thus, Brown does not disclose the absorbent article is folded along a longitudinal axis or that the longitudinal axis of the absorbent article is parallel with first and second ends of the package. (Brown, Fig. 9.)

10. Farris discloses a packaging device for an absorbent article in a pouch wherein the article is folded along a longitudinal axis and wherein the longitudinal axis of the absorbent article is parallel with the ends of the package. (Farris, Fig. 6B.)

PRINCIPLES OF LAW

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). As the Supreme Court pointed out,

it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1741 (2007). Thus, “[i]n determining whether obviousness is established by combining the teachings of the prior art, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *In re GPAC Inc.*, 57 F.3d 1573, 1581 (Fed. Cir. 1995) (internal quotations omitted).

Furthermore “obviousness requires a suggestion of all limitations in a claim.” *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)). Additionally, “when the question is whether a patent claiming the combination of elements of prior art is obvious” the relevant question is “whether the improvement is

more than the predictable use of prior art elements according to their established functions.” *KSR*, 127 S. Ct. at 1740. “When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 1731. For the same reason, “if 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. ...[A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.*

Claim 1

ANALYSIS

With respect to claim 1, we conclude it would have been obvious to one of ordinary skill in the art at the time of the present invention to substitute the vertically oriented absorbent article of Brown with the horizontally oriented absorbent article as disclosed in Farris as a known alternative means for orienting an absorbent article in a package. Such an improvement is no more than the predictable use of prior art elements according to their established functions. *See KSR*, 127 S. Ct. at 1740.

CONCLUSION OF LAW

The prior art identifies a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.

Claim 2 and 12-20

FINDINGS OF FACT (CONT.)

11. Brown discloses an article with a tab 52, but does not disclose that the tab protrudes from the pouch. (Brown, Fig. 3.)

12. Farris discloses an article tab 28 which protrudes from the article 28, but not from the pouch. (Farris, Fig. 1 and Ans. 5.)

ISSUE

The Examiner argues that if the pouch of Farris is torn at a lower location than the tab the limitations of claim 2 and 12 are met. (Ans. 5.)

Appellants argue that the tab of Farris does not extend beyond the end of the pouch, even when the pouch is opened. (App. Br. 7.)

Does the combined prior art describe an article tab extending from a longitudinal edge, and wherein at least a portion of the article tab protrudes from the pouch, past the first end?

ANALYSIS

We do not find that the Examiner has provided evidence that the prior art describes an article tab extending from a longitudinal edge, and wherein at least a portion of the article tab protrudes from the pouch, past the first end. We do not find the Examiner has provided a reason why one of ordinary skill in the art would design the tab of Brown or Farris to extend beyond the end of the pouch.

CONCLUSION OF LAW

The combined prior art does not describe an article tab extending from a longitudinal edge, and wherein at least a portion of the article tab protrudes from the pouch, past the first end. The rejection of claims 2 and 12-20 is reversed.

Claim 3

FINDINGS OF FACT (CONT.)

13. Brown does not disclose a package wherein the package further comprises a film layer forming the inner major surface and adhered to a fibrous material layer forming an outer major surface of the package. (Ans. 7.)

14. The Examiner relies on Farris as teaching a package which further comprises a film layer forming the inner major surface and adhered to a fibrous material layer forming an outer major surface of the package. Farris discloses a package which is a laminate of tissue and a film. (Farris, col. 12, ll. 1-7.)

15. The Examiner has provided sufficient evidence to support a prima facie case of obviousness of claim 3.

16. Appellants do not address claim 3 specifically in the Brief, but lump the claim 3 with claims 2-20 and argue that the Examiner has failed to provide a reason why one skilled in the art would look to Farris to resolve the differences between Brown and the present claims. (App. Br. 7.)

ISSUE

The Examiner finds, that

it would have been obvious to one of ordinary skill in the art to modify the package of Brown to include a film layer forming the inner major surface of the package which is adhered to a fibrous material layer forming an outer major surface of the package because such a configuration provides a protective covering for the interlabial device during transport and storage and, in turn, maintains a hygienic environment for the device before and during use as taught by Farris in col. 11, lines 59-67.

(Ans. 7.)

Appellants present no rebuttal.

Have Appellants demonstrated reversible error on the part of the Examiner with respect to the determination it would have been obvious to add a film layer to the package of Brown?

ANALYSIS AND CONCLUSION

Appellants have not identified an error with respect to the Examiner's analysis and the obviousness rejection of claim 3 is summarily affirmed.

Claims 4, 7 and 9-11

ISSUE

Does the prior art provide a reasonable basis to reject claims 4, 7, and 9-11 for obviousness?

FINDINGS OF FACT (CONT.)

17. As to claim 4, Brown discloses an absorbent article including “a liquid impermeable baffle (38), wherein the absorbent member (44) is disposed

between the fluid permeable cover (42) and the liquid impermeable baffle (44).” (Brown, Figure 2; *id.* at 6.)

18. As to claim 7, Brown discloses an article wherein the package further comprises a pocket disposed between the engagement of the flap and the pouch and the adjacent package side as set forth in Figure 9.

19. With reference to claim 9, Brown discloses an article wherein the flap further comprises a tab (56) protruding from the second end in a direction opposite the first end as set forth in Figure 9.

20. As shown in annotated Figure 9, Brown discloses the tab 56 protrudes from the top of the package which is a direction opposite the bottommost portion of the first end. (Ans. 7)

21. “As to claim 10, Brown discloses an article wherein the absorbent member further comprises a superabsorbent polymer as set forth in col. 8, lines 23 - 36.” (Ans. 5.)

22. “With reference to claim 11, Brown discloses an article wherein the absorbent article is an interlabial device as set forth in the abstract.” (*Id.*)

ANALYSIS AND CONCLUSION

As discussed herein with respect to claim 1, there is a reason to combine Brown with Farris and it would have been obvious to one of ordinary skill in the art at the time of the present invention to substitute the vertically oriented absorbent article of Brown with the horizontally oriented absorbent article as disclosed in Farris as a known alternative means for orienting an absorbent article in a package. Brown further discloses the subject matter of claims 4, 7, and 9-11. (FF 19-22.) We conclude that the

prior art provides a reasonable basis to reject claims 4, 7 and 9-11 for obviousness.

Claims 5, 6, and 8

FINDINGS OF FACT (CONT.)

23. The difference between Brown and claim 5 is the provision that the package further comprises a resealable adhesive disposed on at least one of the flap and the pouch such that the flap can be adhered to the pouch.

24. Farris teaches a package with a resealing member which may be a tape or pressure sensitive glue in col. 4, lines 60 - 67.

25. The Examiner concludes that it would have been obvious to one of ordinary skill in the art to modify the package of Brown to include a resealable adhesive on either the flap or the pouch such that the flap can be adhered to the pouch in order to contain and dispose of the - absorbent article after use as taught by Farris in col. 4, lines 46 - 50.

26. The difference between Brown and claim 6 is the provision that the package further comprises a specific resealable adhesive disposed on at least one of the flap and the pouch such that the flap can be adhered to the pouch.

27. Farris teaches a package that includes a resealable adhesive in the form of tape asset forth in col. 4, lines 60 - 67.

28. The Examiner concludes that it would have been obvious to one of ordinary skill in the art to modify the package of Brown to include a resealable adhesive on either the flap or the pouch such that the flap can be adhered to the pouch in order to contain and dispose of the absorbent article after use as taught by Farris in col. 4, lines 46 - 50.

29. The difference between Brown and claim 8 is the provision that the package further comprises perforations along at least a portion of the flap such that the flap can be detached from the pouch.

30. Farris teaches such a package as set forth in col. 9, lines 7 - 18.

31. The Examiner concludes that it would have been obvious to one of ordinary skill in the art to modify the package of Brown to include perforations in order to facilitate opening of the package which provides a readily retrievable article as taught by Farris in col. 8, line 65 to col. 9, lines 7-18.

32. Appellants do not provide specific argument with respect to claims 5, 6, and 8.

ISSUE

Appellants generally contend that the Examiner has failed to provide a rationale as to why it would have been obvious to modify Brown in view of Farris, but provides no specific argument with respect to claims 5, 6, and 8. (App. Br. 7.)

Have Appellants demonstrated reversible error on the part of the Examiner with respect to the obviousness of claims 5, 6, and 8?

ANALYSIS AND CONCLUSION

We conclude the Appellants have failed to present a reversible error on the part of the Examiner with respect to claims 5, 6, and 8, and the rejection is affirmed.

SUMMARY

We reverse the anticipation rejection over Brown.

We affirm the obviousness rejection of claims 1 and 3-11. We designate this affirmance a new ground of rejection.

We reverse the obviousness rejection of claims 2 and 12-20.

The decision of the Examiner is affirmed-in-part.

TIME PERIOD FOR RESPONSE

Regarding the affirmed rejection(s), 37 CFR § 41.52(a)(1) provides "[a]ppellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the Examiner's rejection(s) of one or more claims, this opinion contains a new ground of rejection pursuant to 37 CFR § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 CFR § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Appeal 2008-4450
Application 10/744,145

Should the appellant elect to prosecute further before the examiner pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellant elects prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

AFFIRMED-IN-PART, 37 C.F.R. § 41.50(b)

cdc

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