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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JASON C. COHEN, KENNETH THOMAS BOROWSKI, RODNEY LEE MILLER, JR., MARTIN JOSEPH GAROFALO, DAVID WILLIAM KOENIG, TATUM MARIE JELENC and ERIC DONALD JOHNSON

Appeal 2010-002556
Application 11/198,139
Technology Center 3700

Before MICHAEL L. HOELTER, LYNNE H. BROWNE and BART A. GERSTENBLITH, *Administrative Patent Judges*.

BROWNE, *Administrative Patent Judge*

DECISION ON APPEAL

STATEMENT OF THE CASE

Jason C. Cohen et al., (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision finally rejecting claims 9-12, 15 and 21 under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Reece (US 2004/0092901 A1, pub. May 13, 2004) and any one of Hubbard (US 2,971,359, iss. Feb. 14. 1961), MacCaffray (US 2,891,396, iss. Jun. 23, 1959) or Ploch (US 3,442,101, iss. May 6, 1969). Claims 3 and 14 are cancelled. Br. 1. Claims 1, 2, 4-8, 13 and 16-20 are withdrawn from consideration. *Id.* We have jurisdiction under 35 U.S.C. § 6(b).

We Reverse.

THE INVENTION

Claim 9, reproduced below, is illustrative of the subject matter on appeal.

> 9. An absorbent article having a front portion and a rear portion, the absorbent article comprising:
>
> a. an outercover;
>
> b. a bodyside liner;
>
> c. an absorbent core positioned between the outercover and the bodyside liner;
>
> d. a fastening system comprising a pair of hook fasteners operatively joined to the absorbent article in the rear portion and a loop fastener landing material operatively joined to the outercover in the front portion, the loop fastener landing material being adapted to engage the hook fasteners to hold the article on a wearer, *the loop fastener landing material being joined about a periphery to the outercover to form an enclosure*,
>
> e. the enclosure defining a pocket and having at least one pull open seam, a closed condition and an open condition, the pull open

> seam being manually separable and adapted to transition the enclosure from the closed condition to the open condition upon separation; and
>
> f. at least one wipe disposed within the pocket, the wipe being inaccessible when the enclosure is in the closed condition, the wipe being accessible when the enclosure is in the open condition.

Br. 9 (emphasis added).

OPINION

The Examiner finds that Reece discloses all the elements of claims 9 and 21except that "Reece does not teach that the fastener material is partially joined to the outer cover to form an enclosure." Ans. 4. The Examiner further finds "some wearers will be smaller than others" and determines "thus the fasteners 200,215 *may need* to extend beyond the positions 220,225 to secure the diaper around the wearer in a snug fit." *Id.* at 5 (emphasis added). The Examiner notes that in Reece "extending the fastening tabs 200,215 beyond the attachment positions does not allow for secure attachment because the attachment locations are bypassed but instead involves placing the fastening tabs over or directly above and adjacent the opening to the compartment." *Id*. The Examiner then reasons

> If the compartment material were made of a material that either had loops or [from which] loops could easily [be] created as disclosed by any of Hubbard, Ploch and Maccaffray, this would provide a larger area laterally inward from the attachment locations and joined to the outer cover about a periphery that would serve as an alternate or extended landing zone for the fasteners 200,215. The loop fastener material defining the compartment 230 would then form an enclosure.

Id. The Examiner concludes that Reece "thus renders the limitation 'the loop fastener landing material being joined about a periphery to the outercover to form an enclosure' obvious." *Id.* at 5-6.

Appellants argue "[t]he Examiner has failed to provide adequate reasoning as to why one skilled in the art would use the container 230 as a loop landing material." Br. 6. Appellants further argue "absent hindsight bias, one skilled in the art would not be motivated to redesign the container 230 of Reece to perform a function (loop landing material) that was not taught or suggested by Reece when a fully functional material (exterior surface 120) already exists." *Id.*

The Federal Circuit has stated that "rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), cited with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Appellants' arguments are persuasive because the Examiner's articulated reasoning lacks rational underpinning. Although, the Examiner explains how one of ordinary skill in the art could make the pocket from loop landing material and finds that such material exists as taught by Hubbard, Ploch and MacCaffray (Ans. 5), the Examiner has not sufficiently explained why one of ordinary skill in the art would solve the problem of an absorbent article that is too big by making the landing area larger, rather than, for instance, providing Reece's device in multiple sizes.

Rejections based on § 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the

prior art. The examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967), *cert. denied*, 389 U.S. 1057 (1968). The Examiner's determination that because some potential wearers of the article will be smaller than others, it follows that the fasteners "may" need to extend beyond the positions described by Reece is speculative and rests on unfounded assumptions. Absent the teachings of Appellants' Specification, there appears to be no basis for modifying Reece in the manner suggested by the Examiner. Hubbard, MacCaffray and Ploch do not cure this deficiency. Accordingly, we do not sustain the Examiner's rejection of claims 9 and 21 and claims 10-12 and 15 which depend from claim 9.

DECISION

We reverse the Examiner's rejection of claims 9-12, 15 and 21 under 35 U.S.C. § 103(a).

REVERSED

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