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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RICHARD L. SCHUSTER

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Appeal 2010-009477  
Application 10/575,997  
Technology Center 3700

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*Before:* PHILLIP J. KAUFFMAN, BENJAMIN D. M. WOOD and  
BRADFORD E. KILE, *Administrative Patent Judges.*

KILE, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

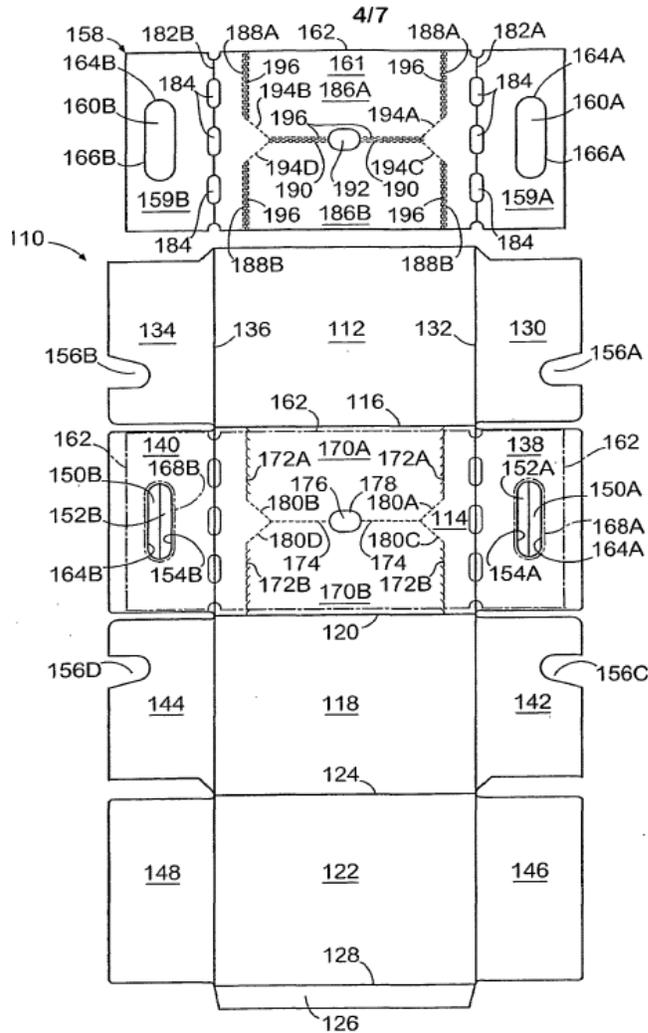
Richard L. Schuster (Appellant) appeals under 35 U.S.C. § 134(a) from a final rejection of claims 4, 5, 7-20, 36-39 and 41-46. Claims 1-3, 6, 21-35, and 40 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

### THE CLAIMED INVENTION

The claimed invention is directed to fully enclosed cartons for carrying a heavy load of containers by providing a carton with enhanced carrying handle apertures. Spec. 3, ll. 6-11.

Appellant's Figure 4 is reproduced below:



**FIG. 4**

Figure 4 is an illustration of a paperboard carton blank that includes a top panel 114 and top end flaps 138 and 140 with handle apertures 150A and B. Spec. 8, ll. 17-28. A paperboard insert 158 includes insert apertures 160A and B which are operable to be aligned with apertures 150A and B in

the top panel 114 and the insert 158 is glued or otherwise attached to the top panel 114. Spec. 9, ll. 28 – 31 and Spec. 10, 1-17.

Independent claim 4, reproduced below, is illustrative of the subject matter on appeal.

4. A paperboard carton with a first end and a second end for carrying a plurality of containers, the carton comprising:

(a) a bottom panel, top panel, a first side panel attached to the top panel by a first fold line, and a second side panel attached to the top panel by a second fold line, the first end of the carton being closed by a first top end flap attached to the top panel along a first top end fold line, a first side end flap foldably attached to the first side panel, a second side end flap foldably attached to the second side panel, a first bottom end flap foldably attached to the bottom panel, with means for securing the first top end flap, the first side end flap, the second side end flap, and the first bottom end flap at the first end of the carton in the closed position, the second end of the carton being closed by a second top end flap attached to the top panel by a second top end fold line, a third side end flap foldably attached to the first side panel, a fourth side end flap foldably attached to the second side panel, a second bottom end flap foldably attached to the bottom panel, with means for securing the second top end flap, the third side end flap, the fourth side end flap, and the second bottom end flap at the second end of the carton in the closed position;

(b) said carton having a first handle aperture in the first top end flap and a second handle aperture in the second top end flap for carrying the carton when loaded with containers with the carton secured in the closed position, the first side end flap having a first side end aperture sufficiently aligned with the first handle aperture in said first top end flap so that a person's hand can be extended through the first handle aperture in said first top

end flap and said first side end aperture in the first side end flap and the carton being defined with the third side end flap having a third side end aperture sufficiently aligned with the second handle aperture in said second top end flap so that a person's hand can be extended through the second handle aperture in said second top end flap and the third side end aperture in the second side end flap; and

(c) said carton having a paperboard insert which is secured to at least one of the first top end flap and the first side end flap on the first end of the carton and which is secured to at least one of the second top end flap and the third side end flap on the second end of the carton, said insert having a first insert aperture that is sufficiently aligned with the first handle aperture in said first top end flap and the first side end aperture in said first side end flap so that a person's hand can be inserted through the first handle aperture, the first side end aperture, and the first insert aperture when the carton is secured in the closed position and having a second insert aperture that is sufficiently aligned with the second handle aperture in said second top end flap and the third side end aperture in said second side end flap so that a person's hand can be inserted through the second handle aperture, the third side end aperture, and the second insert aperture when the carton is secured in the closed position, said paperboard insert and said first side end flap reinforcing the first top end flap to form three layers of paperboard between the first top end fold line and the first handle aperture and said paperboard insert and said third side end flap reinforcing the second top end flap to form three layers of paperboard between the second top end fold line and the second handle aperture, to preserve the integrity of said first handle aperture and said second handle aperture, respectively, when the carton is loaded with the plurality of containers; wherein the insert is secured by securing means to the first side end flap on the first end

of the carton and to the third side end flap on the second end of the carton.

### THE REJECTIONS

1. Claims 4, 5, 7, 8, 12-15, 36-39, 41, 42, and 46 are rejected as unpatentable under 35 U.S.C. § 103(a) over Brown (U.S. 5,350,109; issued Sep. 27, 1994) in view of Wilson (US 5,072,876; issued Dec. 17, 1991), either Reeser (US 2,568,204; issued Sep. 18, 1951) or Negelen (US 6,250,542 B1; issued Jun. 26, 2001), and either Sutherland (US 6,112, 977; issued Sep. 5, 2000) or Skolik (US 6,170,741 B1; issued Jan. 9, 2001).

2. Claims 36-39, 41, and 42 are rejected as unpatentable under 35 U.S.C. § 103(a) over Brown in view of Wilson, either Reeser or Negelen, and Japanese Laid-Open No. 47-7243-01.

3. Claims 9, 16, and 43 are unpatentable under 35 U.S.C. § 103(a) over Brown, Wilson, either Reeser or Negelen, either Southerland or Skolik, and further in view of Sherman (US 3,166,229; issued Jan. 19, 1965).

4. Claims 10, 11, 17-20, 44, and 45 are unpatentable under 35 U.S.C. § 103(a) over Brown, Wilson, either Reeser or Negelen, either Southerland or Skolik, Sherman, and further in view of Gilchrist (US 3,533,549; issued Oct. 13, 1970).

### OPINION

*1. Claims 4, 5, 7, 8, 12-15, 36-39, 41, 42, and 46*

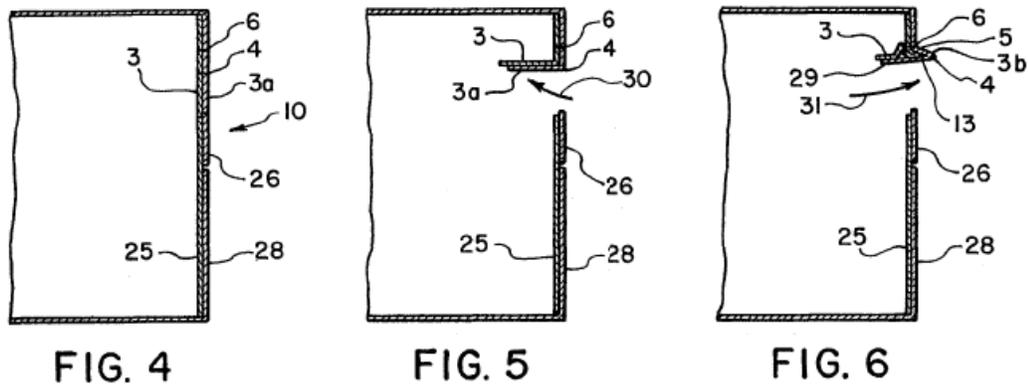
The Appellant has argued the above listed claims as a group. App. Br. 9-15. “When multiple claims subject to the same ground of rejection are argued as a group by appellant, the Board may select a single claim from the group of claims that are argued together to decide the appeal with respect to

the group of claims as to the ground of rejection on the basis of the selected claim alone.” 37 C.F.R. § 41.37(c)(1)(vii). We select independent claim 4 for specific consideration and the remaining claims in the above captioned list will rise or fall with our consideration of claim 4. *See Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008).

The Examiner rejected claim 4 as being obvious over a combination of Brown, Wilson, either Reeser or Negelen, and either Sutherland or Skolik. Ans. 3-4. The Examiner finds that Brown discloses all of the claimed structure except for an insert or inserts as claimed. Ans. 4.

The Brown patent discloses a paperboard container having handle portions with enhanced hand-holds including flaps that fold back on themselves in a concertina fashion to provide a folded load-bearing handhold. Brown, col. 1, ll. 5-10 and col. 2, ll. 5-12.

Figures 4 – 6 of the Brown patent are reproduced below:

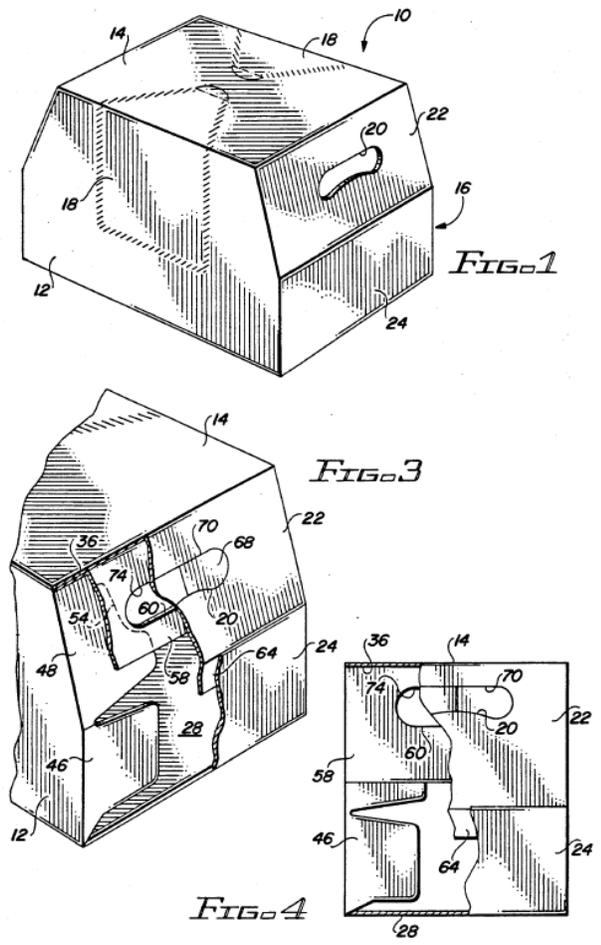


In this sequence of figures from the Brown patent handhold openings 10 of the paperboard carton include hand flaps 3 and 3a in Fig. 4 that can be pushed inward as illustrated in Fig. 5. Brown, col. 7, ll. 12-21. In Fig. 6 it is seen that score lines on the hand flaps permit reverse folding around lower

hinge line 4 to produce in a concertina fashion an enlarged stabilized handhold. *Id.* at col. 7, ll. 22-34.

With respect to an insert to increase the strength of the handgrip by an added layer of paperboard material the Examiner finds that “Wilson teaches that it is known to reinforce end handle apertures in a carton using an underlying panel insert (36, 58) . . . .” Ans. 4.

Figures 1, 3, and 4 of the Wilson patent are reproduced below:



The Wilson patent discloses enlarged hand apertures 60 fashioned through an insert panel 58 to align with an exterior hand aperture 20 in side panel 22. Wilson, col. 3, ll. 52-61. In addition, the Wilson patent discloses

tear or score lines 38 outlining tear away side panels 18 on each side of the paperboard container. *Id.* col. 3, ll. 41-44.

The Examiner points out that “Wilson teaches that it is known to reinforce end handle apertures in a carton using an underlying panel insert . . . .” Ans. 4. Further the Examiner notes that “Wilson teaches an insert where the handle apertures 60 are larger than apertures 20 which are configured for the hand of a person.” *Id.*

Appellant argues that the final rejection based on Brown and Wilson as well as secondary issues disclosed in Reeser or Negelen, and Sutherland or Skolik is flawed for three primary reasons: (A) a prima facie case has not been established, (B) Brown cannot be modified as proposed, and (C) no motivation exists to combine the art as proposed. App. Br. 10. Regarding the alleged lack of a prima facie case and the assertion that Brown may not be modified as proposed, Appellant asserts that Brown cannot be modified to add an insert around the handhold as proposed because to do so would impair the concertina folding of the Brown handhold. App. Br. 11-13; Reply Br. 2-4. According to Appellant, such modification does not have a reasonable expectation of success, would destroy the intended functionality of the Brown patent rendering it unsatisfactory for its intended purpose, and would change Brown’s principle of operation. *Id.* This line of argument is premised on Appellant’s characterization that the proposed modification would impair the concertina folding of Brown’s handhold. For the reasons that follow, we disagree.

We are not persuaded that the Examiner’s combination of Brown and Wilson would destroy or impair the functionality of the hand grip of the Brown paperboard carton. The Examiner points out that “[t]he purpose of

the support flaps in Brown et al is to form a horizontal surface for the hand . . .” and that “the purpose of the reinforcement is to reinforce the areas around the handle aperture and prevents tearing or bending of the paperboard . . . .” Continuing the Examiner finds that “it is unclear why such reinforcement would change the operation of the support flaps or would require a flap as part of the handle flap structure top operate.” Ans. 8-9.

Although the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of a primary reference, *In re Keller*, 642 F.2d 413, 425 ( CCPA 1981), in this instance, formation of a paperboard carton with handhold components formed from the disclosures of the Brown and Wilson patents are logically and operably compatible and are not mutually exclusive as suggested by Appellant. The Wilson patent discloses that the hand apertures (handle openings 60) fashioned in the end panel (end panel flaps 58) are enlarged (as illustrated in Figs. 3 – 4 above) and will operably fit around the periphery of the Brown handhold apertures without impairing the concertina action of the Brown disclosed hand grip to provide an enhanced load-bearing hand pad structure. The Brown disclosure can rationally be modified and enhanced by the addition of an insert as taught by Wilson to provide enhanced strength and support for the handgrip of the Brown paperboard carton.

Regarding the motivation for the proposed combination, Appellant asserts that none of the references suggest the proposed modification. App. Br. 14. Such a strict application of the teaching, suggestion or motivation test is not the proper standard. Further, the Examiner concluded that a person of ordinary skill in the art would have made the proposed

modification in order to increase the strength of the region of the handgrip of the paperboard container to accommodate heavy loads. *See* Ans. 5.

Appellant's assertions are unconvincing because they do not directly or cogently address this rationale.

Appellant's motivation argument, like the prior argument, is premised on the characterization that the proposed modification would impair the concertina folding of Brown's handhold. *See* Reply Br. 4-5. As explained *supra*, such characterization is inaccurate and not persuasive.

We affirm the Examiner's rejection of claims 4, 5, 7, 8, 12-15, 36-39, 41, 42, and 46 as being obvious and unpatentable in view of the prior art.

## 2. Claims 36-39, 41, and 42<sup>1</sup>

The claims in this group have additionally been rejected as being obvious over a combination of Brown, Wilson, either Reeser or Negelen, and Japanese 47-7243-01.

Appellant makes the same three arguments that this combination is not appropriate, namely: (A) a prima facie case of obviousness has not been established; (B) Brown cannot be modified as proposed; and (C) no motivation exists to combine the art. App. Br. 15-19; Reply Br. 2-5.

Appellant's reasoning with respect to this set of claims is essentially a repetition of the arguments made with respect to the first set of claims. These arguments are unpersuasive for the reasons discussed, *supra*. The Appellant has not convinced us that the Examiner's reasoning and conclusions are incorrect. The inclusion of an additional handhold insert

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<sup>1</sup> Appellant has argued the captioned claims as a group (App. Br. 15-19). We select claim 36 as being representative of the claims of this group.

with an enlarged opening 60 as taught by Wilson for enhancing the strength of the Brown paperboard container will produce a three-ply structure around the concertina handgrip of Brown with extra strength that an added layer of paperboard will necessarily provide.

We affirm the Examiner's rejection of claims 36-39, 41, and 42.

3. Claims 9, 16, and 42<sup>2</sup>

This set of claims adds the recitation of score or tear lines to enable access through the top and/or side of the paperboard container to provide access to the contents of the container.

The Examiner applied the Wilson patent against this set of claims in the sense discussed above and in addition the Examiner cited the Sherman patent for a disclosure of "a perforated tear out area (20) to facilitate easier opening of the top and dispensing the contents." Ans. 6. We further note that Wilson discloses "tear away sections 18 of the top and side panels of the carrier to be removed together." Wilson, col. 3, ll. 41.

Appellant argues that Sherman (and similarly by inference Wilson) fails to provide a teaching or suggestion for modifying Brown by failing to teach an insert with aligned score lines. App. Br. 20. The Examiner finds that "[i]t would have been obvious to make the top of the carton in modified Brown et al. with a tear out area . . . to facilitate easier access to the contents." Ans. 6-7.

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<sup>2</sup> Appellant has argued the captioned claims as a group (App. Br. 20). We select claim 9 as representative of the claims of this group.

The Appellant has failed to convince us that the Examiner's rejection is flawed and we affirm the Examiner's rejection of claims 9, 16, and 42.

4. Claims 10, 11, 17-20, 44, and 45<sup>3</sup>

Claims in this group add the provision that the tear lines are interconnected so that finger flaps can be used to tear open one or both sides of the paperboard container.

The claims stand rejected over Brown, Wilson, Reeser or Negelen, Southerland or Skolik, Sherman and Gilchrist. The Wilson patent discloses overlapping tear lines 38 on the top and sides of a paperboard carton so that either side or both sides of the carton can be exposed to gain access to the contents of the paperboard container. Wilson, col. 3, ll. 1-5. The Gilchrist patent discloses that a common or interconnected tear line or line of weakness 62 can be provided for adjacent tear open panels so that one or both of the panels can be utilized to gain access to the interior contents of a container. Gilchrist, col. 2, ll. 21-27.

The Examiner finds that Gilchrist teaches formation of perforated areas with two sections. Ans. 7. Moreover the Examiner finds that Gilchrist teaches a perforated tear out area in two sections with a finger engagement between the sections and that it would have been obvious to form a perforated tear out area in modified Brown in two sections. Ans. 7-8.

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<sup>3</sup> Appellant has argued the captioned claims as a group (App. Br. 20). We select claim 10 as representative of the claims of this group.

Appellant asserts that the prior art including Gilchrist fails to teach or suggest aligning score lines in an interior layer and exterior layer and that the combination of references cited by the Examiner should be withdrawn.

We are not persuaded by the Appellant's one paragraph argument at page 20 of the Appeal Brief. The limitations of the prior art suggested by Appellant of aligning interior and exterior score lines to facilitate removal of access panels is an application of common sense to achieve a predictable result. The Supreme Court has admonished lower courts that a combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *KSR Int'l co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). Moreover "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *Id.* at 421.

We affirm the Examiner's rejection of claims 10, 11, 17-20, and 44-45.

#### DECISION

The decision of the Examiner to reject claims 4, 5, 7-20, 36-39 and 41-46 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Klh