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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,638	06/02/2011	Mark Hartzell	63833-249	4750
32642	7590	01/31/2013	EXAMINER	
STOEL RIVES LLP - SLC 201 SOUTH MAIN STREET, SUITE 1100 ONE UTAH CENTER SALT LAKE CITY, UT 84111			GELLNER, JEFFREY L	
			ART UNIT	PAPER NUMBER
			3993	
			MAIL DATE	DELIVERY MODE
			01/31/2013	PAPER

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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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GRAPHIC PACKAGING INTERNATIONAL, INC.  
Requester, Appellant

v.

EXOPACK-TECHNOLOGY, LLC.<sup>1</sup>  
Patent Owner, Respondent

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Appeal 2013-000116  
*Inter partes* Reexamination Control 95/001,638  
Patent US 7,090,904 B2<sup>2</sup>  
Technology Center 3900

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*Before* LINDA E. HORNER, DANIEL S. SONG and  
KEN B. BARRETT, *Administrative Patent Judges*.

SONG, *Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> Exopack-Technology, LLC. is the Patent Owner and the real party in interest (Respondent Brief of Patent Owner (hereinafter "Resp. Br.") 2).

<sup>2</sup> Patent US 7,090,904 B2 (hereinafter "'904 patent") issued August 15, 2006 to Hartzell et al.

## STATEMENT OF THE CASE

Claims 16-29 have been confirmed by the Examiner (Appeal Brief of Requester 2; *see also* Right of Appeal Notice<sup>3</sup> 1). In its Appeal Brief (hereinafter "App. Br."), the Requester appeals under 35 U.S.C. §§ 134 and 315 from the Examiner's refusal to adopt certain proposed rejections. The Requester also relies on its Rebuttal Brief (hereinafter "Rebut. Br.") in support of its positions. The Patent Owner relies on its Respondent Brief (hereinafter "Resp. Br.") in support of the Examiner's refusal. We have jurisdiction under 35 U.S.C. §§ 134 and 315.

The following proceedings have been identified as being related to subject '904 patent (App. Br. 1-2; Resp. Br. 2):

1. Reexamination Control 95/001,639 (Appeal 2013-000117) for U.S. Patent No. 6,979,482 which issued from application number 10/290,681 that is parent to the continuation-in-part application that issued as the subject '904 patent;
2. Reexamination Control 95/001,640 (Appeal 2013-002432) for U.S. Patent No. 7,544,403 which issued from a continuation application of parent application number 10/290,681; and
3. *Exopack-Technology, LLC v. Graphic Packaging Holding Co. et al.*, Civil Action No. 7:11-cv-00337-TMC (D.S.C.) in which the subject '904 patent, and related U.S. Patent Nos. 6,979,482 and 7,544,403 have been asserted. This legal action has been stayed pending this reexamination proceeding.

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<sup>3</sup> The Examiner's Answer mailed May 4, 2012 merely incorporates by reference the Right of Appeal Notice (hereinafter "RAN") mailed December 15, 2011, and thus, we cite to the RAN herein.

An oral hearing with the representatives of the Requester and the Patent Owner was held before the Patent Trial and Appeal Board on January 9, 2013, with respect to the present, and related, reexamination appeals. The transcript of the oral hearing will be entered into the electronic record in due course.

We AFFIRM the Examiner's refusal to adopt the proposed rejections.

### THE INVENTION

The '904 patent is directed to a multiwall bag having a slider zipper and fin combination (Abstract). Claim 16 is the sole independent claim on appeal and it reads as follows (Claims Appendix, italics added):

16. A multiwall bag of tubular form comprising:
  - a tube body having at least one inner layer of polymeric material and at least one outer layer of paper material positioned to substantially surround outer surfaces of the inner layer of polymeric material, the tube body having a pair of opposing tube ends, an outer front wall region positioned between the pair of opposing tube ends, an outer back wall region positioned to face opposite the outer front wall region and between the pair of opposing tube ends;
    - a bag seal zone formed adjacent one of the pair of tube ends so that an inner surface of the at least one layer of polymeric material of the front wall of the inner tube abuttingly contacts and seals to an inner surface of the back wall of the tube body;*
    - a fin member adhesively connected to the bag seal zone and extending substantially the entire lateral extent thereof, the fin member including at least a pair of spaced-apart elongate fin strips positioned to face opposite each other and each positioned to extend along one of the either the outer front or back wall regions;*

a zipper track connected to each of the pair of elongate fin strips of the fin member, the zipper track including a first track strip and a second track strip, the first and second track strips being adapted to be positioned between an open position defined by the first and second track strips being spaced apart to allow access to inner portions of the bag and a sealingly closed position defined by the first and second track strips abuttingly contacting each other to prevent ready access to the inner portions of the bag; and

a zipper block connected to the zipper track to allow the zipper block to slidably move along the zipper track and move the first and second track strips between the open position and the closed position.

#### PROPOSED REJECTIONS NOT ADOPTED<sup>4</sup>

1. Claims 16, 17, 20, 21, 23, 24 and 29 under 35 U.S.C. § 102(b) as anticipated by Sullivan.<sup>5</sup>
2. Claims 18, 25 and 26 under 35 U.S.C. § 103(a) as unpatentable over Sullivan in view of PSSMA<sup>6</sup> and Frisk.<sup>7</sup>
3. Claim 19 under 35 U.S.C. § 103(a) as unpatentable over Sullivan in view of St. Phillips.<sup>8</sup>
4. Claims 22, 27 and 28 under 35 U.S.C. § 103(a) as unpatentable over Sullivan in view of Hustad.<sup>9</sup>

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<sup>4</sup> As discussed *infra* in Footnote 13, there is some uncertainty in the record as to whether Proposed Rejection 5 of claims 27 and 28 based on the combination of Sullivan in view of Hustad and Grindrod was actually proposed.

<sup>5</sup> U.S. Patent No. 4,637,063 issued to Sullivan et al. on January 13, 1987.

<sup>6</sup> *Reference Guide For The Paper Shipping Sack Industry*, Paper Shipping Sack Manufacturers' Association, Inc., pages 9-13 (1991).

<sup>7</sup> U.S. Patent No. 6,974,612 issued to Frisk et al. on December 13, 2005.

<sup>8</sup> U.S. Patent No. 5,964,532 issued to St. Phillips et al. on October 12, 1999.

5. Claims 27 and 28 under 35 U.S.C. § 103(a) as unpatentable over Sullivan in view of Hustad and Grindrod.<sup>10</sup>

### ISSUE

The dispositive issue is whether Sullivan discloses "a fin member adhesively connected to the bag seal zone."

### PRINCIPLES OF LAW

Claims are to be given their broadest reasonable interpretation consistent with the specification, reading the claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). This is the standard for claim interpretation in both original examination and re-examination. *See In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984).

### FINDINGS OF FACT

1. A. Annotated Figures 5 and 7 of the '904 patent as provided by the Patent Owner with additional reference numerals are reproduced below (Resp. Br. 7).

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<sup>9</sup> U.S. Patent No. 5,456,928 issued to Hustad et al. on October 10, 1995.

<sup>10</sup> U.S. Patent No. 3,740,237 issued to Grindrod et al. on June 19, 1973.

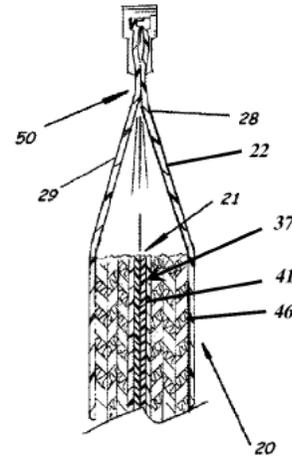
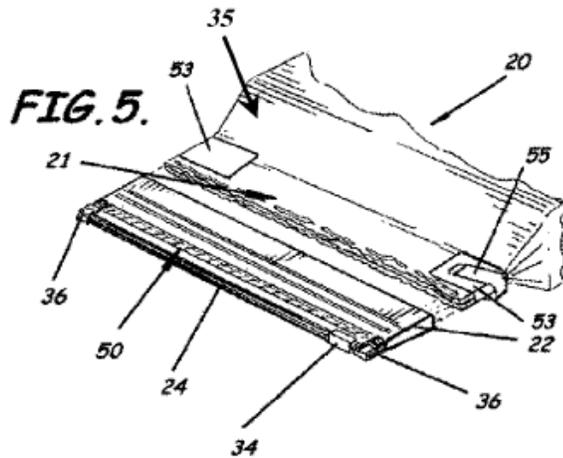


FIG. 7

Figure 5 shows a fragmentary perspective view of multiwall bag 20 with a bag seal zone 21 to which a combination of a fin member 22, a zipper track 24, and a zipper block 34 is connected (col. 4, ll. 64-67; col. 6, ll. 18-24). Figure 7 is a fragmentary sectional view of the zipper/fin member combination connected to the bag seal zone 21, the fin member having fin strips 28, 29 (col. 5, ll. 5-8; col. 7, ll. 37-41).

B. The specification of the '904 patent states "[t]he fin member is formed of a plastic material and is connected to the bag seal zone." (Col. 2, ll. 53-54).

C. The specification of the '904 patent also states "[a] combination of a fin member, a zipper track connected to the fin member, and a zipper block connected to the zipper track are connected to or attached to the bag seal zone of bag." (Col. 4, ll. 19-22).

D. The specification of the '904 patent also states:

FIG. 5 is a fragmentary perspective view of a tube body with a bag seal zone being connected to a slider zipper and fin combination according to an embodiment of the present invention;

FIG. 6 is an enlarged perspective fragmentary view of a slider zipper and fin combination connected to the bag seal zone of a multiwall bag according to an embodiment of the present invention[.]

(Col. 4, l. 64-col. 5, l. 4).

E. As to Figures 5 and 6, the specification of the '904 patent states:

As shown in FIGS. 5 and 6, the fin member **22** is formed of a plastic material and is connected to or attached to the bag seal zone **21**. This connection or attachment, for example, can be on the outer surface of the outer tube **35** such as by use of an adhesive material as illustrated or by attachment to one of the inner layer **41** of the inner tube **37** or to any layers **42, 47, 48** therebetween (see FIGS. 2, 5 and 7).

(Col. 7, ll. 28-35).

F. The specification of the '904 patent further states that "[t]he fin member **22** is preferably formed of a plastic material that can be connected to or attached to the bag **20** using a heat seal, such as shown in FIG. 4."

(Col. 7, ll. 19-21).

G. The specification of the '904 patent further states:

The combination of the fin member **22**, the zipper track **24**, and the zipper block **34** can be connected to the bag seal

zone **21** by several methods. If the outer surfaces of the tube body **40** contain a polymeric material, then the combination of the fin member **22**, the zipper track **24**, and the zipper block **34** can be connected by forming a heat seal between the fin member **22** and the outer surfaces of the tube body **40**. Other methods of connecting the combination of the fin member **22**, the zipper track **24**, and the zipper block **34** can include at least one of the following: applying an adhesive material between inner surfaces of the fin member **22** and outer surfaces of the tube body **40** in the bag seal zone **21**, adhering the fin member **22** to the tube body **40** between the at least one polymeric layer **41** and the at least one paper layer **46**, and adhering the fin member **22** to inner surfaces of the tube body **40**. *Other methods for connected [sic, connecting] the combination to the bag seal zone **21** will be known of ordinary skill in the art and are to be considered within the scope of the present invention.* (Col. 13, l. 58-col. 14, l. 9, emphasis added).

2. A. Sullivan discloses a reclosable bag with a sealed laminated liner (Title; Abst.). Figures 4 and 6 of Sullivan are reproduced below.

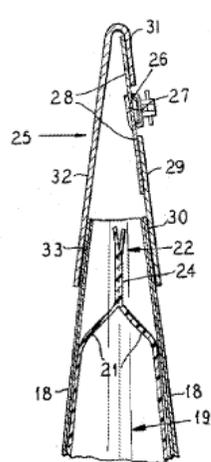


FIG. 4

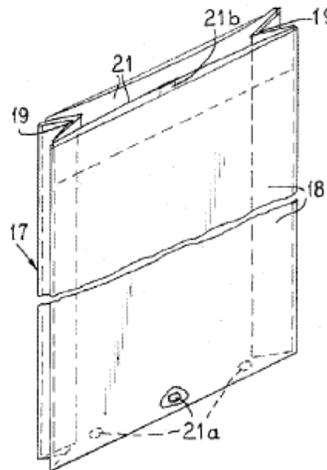


FIG. 6

Figure 4 of Sullivan shows a sectional view of a bag including a wall panel 18 and a plastic liner 21 having a hermetic seal 24 (col. 2,

ll. 22-23, 39-42, 57-62; col. 2, l. 66-col. 3, l. 4; col. 3, ll. 14-19).

Figure 4 also shows a top closure 25 with a zipper 26, slider 27, and attachment flanges 29, 32 that secure the top closure 25 to the wall panel 18 via adhesive 30, 33 (col. 3, ll. 48-59). Figure 6 of Sullivan shows a perspective view of bag body 17 with the wall panel 18, the liner 21 being spot sealed to the inside paper layer of the bag body 17 via adhesive spots 21a (col. 3, ll. 36-42).

B. Sullivan also states:

In order to avoid any tearing loose of fibers from the contiguous paper layer of the bag during manipulations of the liner **21**, the liner is maintained free from the paper throughout at least its upper primary closure portion. For maximum assurance against fiber contamination, only the lower end portion of the liner **21** may be spot sealed to the inside paper layer of the bag body as by means of adhesive spots **21a** (FIG. **6**) (such as a starch/dextrine glue) similarly as the layers of the bag body may be tacked in order to avoid displacement during bottom end filling of the bag. (Col. 3, ll. 32-42).

C. Sullivan further states:

In a preferred construction, the top closure **25** comprises a zipper **26** having a slider **27** for manipulating the same and equipped with stringers **28**. One of the stringers **28** is adhesively attached to an attachment flange **29** which in turn is attached as by means of adhesive **30** to the top end of one of the bag panels **18**. The other stringers **28** is attached as by means of adhesive to a return bent flange **31** of an attachment flange **32** of the closure **25** and which is attached as by means of adhesive **33** to the top end portion of the other of the wall panels **18** of the bag body. (Col. 3, ll. 48-59).

## ANALYSIS

### Proposed Rejection 1

In Proposed Rejection 1, the Requester asserts that Sullivan discloses every limitation of claim 16 and that the Examiner erred in refusing to adopt the proposed rejection of claims 16, 17, 20, 21, 23, 24 and 29 as being anticipated by Sullivan (App. Br. 9-12).

The Examiner finds that Sullivan does not disclose the limitation that the fin member be "connected to" the bag seal zone as recited in claim 16 because in Figures 2 and 4, the fin strips 29 and 32 are shown to be unconnected to, and separated from, the bag seal zone 24 (RAN 4, 10). The Examiner also states that the adhesives 30, 33 do not appear to be "involved with the bag seal zone 24," and that the specification of Sullivan teaches away from the fin member being connected to the bag seal zone (RAN 5). The Patent Owner agrees with the Examiner and argues that the Requester applies a claim construction of "connected to" which is unreasonably broad in view of the specification of the '904 patent (Resp. Br. 9-13).

The Requester argues that in Sullivan, the attachment flanges 29, 32 (i.e. fin strips) are connected to the hermetic seal 24 (i.e. bag seal zone) as recited in claim 16 because the attachment flanges 29, 32 are connected via adhesive 30, 33 to the wall panels 18, which in turn are connected by adhesive spots 21a to liner 21, which is connected to the hermetic seal 24 (App. Br. 12; Reb. Br. 2). The Requester argues that the specification of the '904 patent does not set forth a definition of "connected to" that would limit

Appeal 2013-000116  
Reexamination Control 95/001,638  
Patent US 7,090,904 B2

its scope, and the Examiner has improperly imported limitations from the specification in applying a narrower construction (App. Br. 13-14; Reb. Br. 2). The Requester's arguments with respect to the disclosure of Sullivan are substantively the same as those presented with respect to the related Reexamination Control 95/001,639 (Appeal 2013-000117) for U.S. Patent No. 6,979,482.

We agree with the Examiner's finding that Sullivan does not disclose a fin member that is adhesively connected to the bag seal zone for substantively the same reasons discussed in our decision of Appeal 2013-000117 concurrently mailed herewith. As noted, the Requester relies on the wall panels 18, the adhesive spots 21a, and the liner 21 that intervene between the attachment flanges 29, 32 and the hermetic seal 24 of Sullivan in its proposed rejection. However, we find the Requester's proposed "connection" via a relatively lengthy and circuitous route through the various bag components of Sullivan to be strained and based on an unreasonable interpretation of the claim term "connected to" which does not take into proper consideration how one of ordinary skill in the art would understand the claim in view of the specification of the '904 patent.

The specification of the '904 patent explains that an embodiment having a connection between the fin member and the bag seal zone is shown in Figures 5 and 6 (FF 1A, 1D). The textual description of these figures, in addition to the figures themselves, gives an indication of the connection contemplated by the claim (FF 1A, 1D, 1E). Whereas an intervening component in the form of an adhesive material is contemplated and described in the specification of the '904 patent (FF 1E, 1F) and implicitly

recited by the limitation "adhesively connected to," we observe that the adhesive material is the mechanism for attachment of the fin member to the bag seal zone. In this regard, we further observe that the specification of the '904 patent utilizes the terms "connected to" and "attached to" synonymously (FF 1C-1F). Nowhere in the specification of the '904 patent does it describe or suggest a connection through a series of intervening components that do not relate to the attachment of the fin member to the bag seal zone.

Whereas the claim recites that the fin member be adhesively "connected to the bag seal zone," the Requester relies on numerous intervening structures in the bag of Sullivan to argue that the attachment flanges are "connected to" the hermetic seal. However, the degree of separation between the between the attachment flanges 29, 32 and the hermetic seal 24 is very large and the multiple intervening components of the bag in Sullivan cannot be reasonably characterized as part of an attachment mechanism. Stated in another way, any "connectedness" between the attachment flanges 29, 32 and the hermetic seal 24 is severely attenuated due to the intervening components so that it would be unreasonable to describe the arrangement of the attachment flanges 29, 32 with respect to the hermetic seal 24 of Sullivan as being "connected to" each other in a manner encompassed by claim 16. In this regard, even the Requester's characterization of Sullivan seems to undermine its argument, the Requester stating that the attachment flanges 29, 32 "are connected to *the panels 18* of the outer tube 17 of the tube body by adhesive 30, 33," and the bag walls 18 are "connected to" *the liner 21* by adhesive spots 21a (App. Br. 12, emphasis added).

The Requester refers to the statement in the specification of the '904 patent that other methods for connecting the fin member to the bag seal zone will be known to a person of ordinary skill in the art in support of the assertion that the arrangement of the bag components as disclosed in Sullivan is encompassed by claim 16 (App. Br. 13; FF 1G). However, mere mention of "other methods" does not eliminate the requirement that the fin member be "connected to the bag seal zone" recited in the claim. In this regard, even the statement relied upon by the Requester limits its scope to methods for connecting the combination *to the bag seal zone* (FF 1G). While the Requester asserts that it is applying the broadest reasonable interpretation, with the exception of the above noted statement regarding "other methods," the Requester does not appear to take into any substantive consideration the specification of the '904 patent in asserting that Sullivan discloses the pertinent limitation.

In addition, the Requester cites various legal precedents in support of its position that "connected to" should be given a broader interpretation (App. Br. 12-13; Reb. Br. 2-4), while the Patent Owner cites other precedent in support of the Examiner's position (Resp. Br. 9-11). These arguments merely highlight the fact that claim interpretation is fact specific, and in the cases before the Office, what may be considered "reasonable" in one case may not be reasonable in another. In accordance with the Requester's overly broad interpretation, all components of the bag would be connected to each other, thereby rendering the limitation "connected to" essentially meaningless. Thus, while the Requester's interpretation is "broad," it is not "reasonable." *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d at 1364. We find

no reasonable basis to conclude that this limitation of claim 1 would be understood by one of ordinary skill in the art in the manner advocated by the Requester so as to encompass the bag of Sullivan when reviewing the specification of the '904 patent, and the Requester has not set forth any persuasive evidence that supports a different conclusion.<sup>11</sup>

The Requester further takes issue with the Examiner's statement that Sullivan "appears to specifically teach away from the fin member adhesively connected to the bag seal zone" (App. Br. 18; RAN 5), and argues that the alleged teaching away by Sullivan is not relevant to the question of whether Sullivan, "unmodified, discloses this limitation when the claim is correctly construed." (App. Br. 16). We agree with the Requester that teaching away is not pertinent to the present anticipation rejection and what Sullivan actually discloses. Nonetheless, this statement of the Examiner is inconsequential because we agree with the Examiner's fact finding that Sullivan does not disclose a fin member "connected to" the bag seal zone as discussed *supra*.

As to the asserted confusion by the Requester as to the Examiner's comments regarding references Hustad, Tilman and St. Phillips (App. Br. 14, *citing* RAN 10), we observe that these references are not pertinent to the disposition of the present appeal.

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<sup>11</sup> Our decision should not be read as requiring *direct* joining of components. We simply find that Requestor's proposed path in this appeal to be so indirect and attenuated that one of ordinary skill in the art would not consider the parts to be "connected to" each other as claimed.

Finally, the Requester also argues that the Examiner has changed his mind as to Sullivan in the related Reexamination Control 95/001,640 (Appeal 2013-002432) for U.S. Patent No. 7,544,403, and thus, "in effect, [held] that the claims of the '904 patent are unpatentable over *Sullivan*."<sup>12</sup> (App. Br. 15-16). However, the pertinent statement does not impact our finding. Firstly, the statement was not made in the reexamination of the '904 patent which is the subject of the present appeal. Secondly, based on our review of the record in the Appeal 2013-002432, we do not agree that the Examiner, in fact, "changed his mind" with respect to the scope of Sullivan.<sup>13</sup> Thirdly, for the reasons discussed *supra*, we disagree that Sullivan discloses a fin member "connected to the bag seal zone."

In view of the above, we are not persuaded that the Examiner erred in refusing to reject independent claim 16 as proposed by the Requester.

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<sup>12</sup> The Requester's assertion is based on the statement "Examiner considers that Sullivan's fin members are connected to the bag seal zone through the bag walls, liner, and adhesive spots" which was made by the Examiner in the related Reexamination Control 95/001,640 (hereinafter "Reexam. '640") (RAN 20 of Appeal 2013-002432).

<sup>13</sup> It is evident that the Examiner's statement in Reexam. '640 regarding the fin members of Sullivan being connected to the bag seal zone is a misstatement. The record of Reexam. '640 clearly indicates that the Examiner's position is that Sullivan does not disclose a fin member "attached to the bag seal zone" and the Examiner refused to adopt the proposed rejection based on Sullivan based on this deficiency (RAN 20, 39, 41 of Appeal 2013-002432). While the language "attached to" at issue in Reexam. '640 differs from "connected to" at issue in the present appeal, the Examiner also stated in Reexam. '640 that he is "making no distinction" between these terms (RAN 39 of Appeal 2013-002432), a position with which we agree in view of their synonymous use in the subject '904 patent, the specification of which includes the specification of the U.S. Patent No. 7,544,403 therein.

Appeal 2013-000116  
Reexamination Control 95/001,638  
Patent US 7,090,904 B2

Claims 17, 20, 21, 23, 24 and 29 of Proposed Rejection 1 ultimately depend from claim 16. Thus, we sustain the Examiner's refusal to adopt the Requester's Proposed Rejection 1.

Proposed Rejections 2-4

All of the claims involved in these proposed rejections ultimately depend from independent claim 16. The Requester contends that various dependent claims are rendered obvious by Sullivan in combination with various secondary references which are asserted to disclose the additional limitations recited in the dependent claims (*see* App. Br. 17-23). The Requester relies on Sullivan as disclosing the limitation "a fin member adhesively connected to the bag seal zone," and states that whether the dependent claims should be rejected as proposed "depends on whether claim 16 should be rejected over Sullivan." (App. Br. 19, 21, 23; *see also* RAN 4). Hence, because we agree with the Examiner that Sullivan does not disclose this limitation within the meaning of the '904 patent, the Examiner's refusal to adopt Proposed Rejections 2-4 is sustained.

Proposed Rejection 5<sup>14</sup>

The Requester asserts that the Examiner has never taken a position on this proposed rejection of claims 27 and 28 over the combination of Sullivan, Hustad and Grindrod, and requests the Board to consider and adopt this proposed rejection (App. Br. 23). The Requester states "[p]resumably it is not adopted, for the same reasons" as Proposed Rejection 4, and further states that "[i]f one assumes that the Examiner intended not to adopt the rejection because claims 27 and 28 depend on claim 16, Appellant asserts that since claim 16 is unpatentable over *Sullivan* for the reasons discussed

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<sup>14</sup> Proposed Rejection 4 also proposes rejecting claims 27 and 28 over the combination of Sullivan and Hustad, but without Grindrod relied upon in Proposed Rejection 5. The Requester took the position in Proposed Rejection 4 that "[t]he peelable seal 16 disclosed by *Hustad* is considered to be the 'adhesive seal' called for by these claims." (Request for *Inter Partes* Reexamination, filed June 2, 2011, pgs. 14-15). The text of Proposed Rejection 5 states "[t]o the extent that it may be considered that claims 27 and 28 require the presence of a separate adhesive, *Grindrod* discloses ..." the use of an adhesive (*Id.* at 15; *see also* App. Br. 23). Hence, it is clear that Proposed Rejection 5 was conditioned upon the Examiner determining that claims 27 and 28 require a "separate adhesive" and also refusing to adopt Proposed Rejection 4 based on absence of a separate adhesive in the combination of Sullivan and Hustad as suggested in Proposed Rejection 4.

However, neither of these conditions precedent occurred since the Examiner refused to adopt Proposed Rejection 4 based on the finding that Sullivan does not disclose "a fin member adhesively connected to the bag seal zone." Thus, under these circumstances, it is not clear that Proposed Rejection 5 was a proposed rejection at all. Nevertheless, to any extent that Proposed Rejection 5 can be deemed as actually proposed, it follows that the same rationale for not adopting Proposed Rejection 4, and all of the other proposed rejections in the appeal, would apply equally to Proposed Rejection 5.

Appeal 2013-000116  
Reexamination Control 95/001,638  
Patent US 7,090,904 B2

above, dependent claims 27 and 28 are likewise unpatentable, and should be rejected." (App. Br. 23-24).

We find that to any extent that Proposed Rejection 5 was actually made, the record is sufficiently clear that the Examiner refused to adopt it for the same reasons as Rejection 4, and all of the proposed rejections in this appeal. In particular, as discussed *supra*, we agree with the Examiner that Sullivan does not disclose "a fin member adhesively connected to the bag seal zone" as required by claim 16 from which claims 27 and 28 ultimately depend.

#### CONCLUSION

The Examiner's refusal to adopt Proposed Rejections 1-5 is  
AFFIRMED.

Requests for extensions of time in this *inter partes* reexamination proceeding are governed by 37 C.F.R. §§ 1.956 and 41.77(g).

AFFIRMED

Appeal 2013-000116  
Reexamination Control 95/001,638  
Patent US 7,090,904 B2

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