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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/001,639	06/02/2011	6979482	63833-250	4835

32642 7590 01/31/2013

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ART UNIT	**PAPER NUMBER**
3993	

MAIL DATE	DELIVERY MODE
01/31/2013	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GRAPHIC PACKAGING INTERNATIONAL, INC.
Requester, Appellant

v.

EXOPACK-TECHNOLOGY, LLC.[1]
Patent Owner, Respondent

Appeal 2013-000117
Inter partes Reexamination Control 95/001,639
Patent US 6,979,482 B2[2]
Technology Center 3900

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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[1] Exopack-Technology, LLC. is the Patent Owner and the real party in interest (Respondent Brief of Patent Owner (hereinafter "Resp. Br.") 2).
[2] Patent US 6,979,482 B2 (hereinafter "482 patent") issued Dec. 27, 2005 to Hartzell et al.

STATEMENT OF THE CASE

Claims 1-16 have been confirmed by the Examiner (Appeal Brief of Requester 2; *see also* Right of Appeal Notice[3] 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 '482 patent (App. Br. 2; Resp. Br. 2):

1. Reexamination Control 95/001,638 (Appeal 2013-000116) for U.S. Patent No. 7,090,904 which issued from a continuation-in-part application of the application that issued as the subject '482 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 the application that issued as the subject '482 patent; 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 '482 patent, and related U.S. Patent Nos. 7,090,904 and 7,544,403 have been asserted. This legal action has been stayed pending this reexamination proceeding.

[3] The Examiner's Answer mailed March 2, 2012 merely incorporates by reference the Right of Appeal Notice (hereinafter "RAN") mailed October 21, 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, the transcript of which will be entered into the electronic record in due course.

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

THE INVENTION

The '482 patent is directed to a multiwall bag having a slider zipper and fin combination (Abstract). Independent claim 1 is representative and reads as follows (Claims Appendix, italics added):

> 1. A multiwall bottom-filled bag of tubular form comprising:
>
> an inner tube having at least one layer of polymeric material including an inner front wall region and an inner back wall region positioned to face opposite the inner front wall region;
>
> an outer tube having at least one layer of paper material and positioned to substantially surround outer surfaces of the inner tube, the outer tube having an open end region, a closed end region being initially in an open position, adapted to receive filling material therethrough, and then sealingly closed to a closed position, an outer front wall region positioned between the open end region and the closed end region, and an outer back wall region positioned between the open end region and the closed end region and positioned to face opposite the outer front wall region;
>
> *a bag seal zone* formed adjacent the open end of the outer tube so that the at least one layer of polymeric material of inner surfaces of the inner front wall region of the inner tube abuttingly contacts and seals to inner surfaces of the inner back wall region of the inner tube, *the bag seal zone comprising a heat seal* so that inner surfaces of the polymeric material of the inner front wall region are heatingly sealed to the inner surfaces

> of the polymeric material of the inner back wall region, *the heat seal allowing the inner surfaces of the inner front wall and inner back wall regions to peelingly separate and unseal* the inner surfaces of the inner front and back wall regions without substantial damage to the inner surfaces thereof when initially opening the bag and further remaining unsealed after initial opening even when the zipper block is in the closed position to thereby indicate that initial opening has occurred and indicate that tampering with the opening of the bag may have occurred;
>
> *a fin member formed of a plastic material and connected to the bag seal zone* and extending substantially the entire lateral extent of and along the outer front and back wall regions, the fin member including at least a pair of spaced-apart elongate fin strips positioned to face opposite each other;
>
> 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 positioned 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 slidably 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, the fin member, the zipper track, and the zipper block defining a slider zipper and fin combination, so that when the bag is filled the heat seal enhances protection of at least portions of the slider zipper and fin combination by operating as a stop region for the filling material and thereby enhancing filling performance of the bag.

Independent claim 9 similarly recites "a fin member connected to the bag seal zone."

PROPOSED REJECTIONS NOT ADOPTED

1. Claims 1-4 and 7 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sullivan,[4] Hustad[5] and Tilman.[6]

2. Claims 5 and 6 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sullivan, Hustad and Tilman in view of PSSMA[7] and Frisk.[8]

3. Claim 8 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sullivan, Hustad and Tilman in view of St. Phillips.[9]

4. Claims 9-12 and 15 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sullivan and Hustad.

5. Claims 13 and 14 under 35 U.S.C. § 103(a) as unpatentable over the combination of Sullivan and Hustad in view of PSSMA and Frisk.

6. Claim 16 under 35 U.S.C. § 103(a) as unpatentable over Sullivan and Hustad in view of St. Phillips.

ISSUE

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

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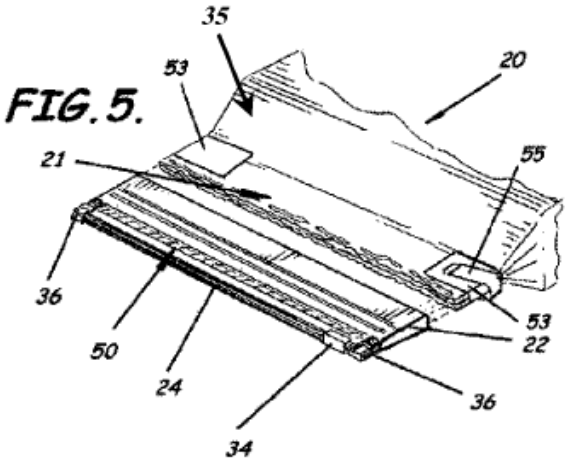
[4] U.S. Patent No. 4,637,063 issued to Sullivan et al. on January 13, 1987.
[5] U.S. Patent No. 5,456,928 issued to Hustad et al. on October 10, 1995.
[6] U.S. Patent No. 5,211,482 issued to Tilman on May 18, 1993.
[7] *Reference Guide For The Paper Shipping Sack Industry*, Paper Shipping Sack Manufacturers' Association, Inc., pages 9-13 (1991).
[8] U.S. Patent No. 6,974,612 B1 issued to Frisk et al. on December 13, 2005.
[9] U.S. Patent No. 5,964,532 issued to St. Phillips et al. on October 12, 1999.

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 '482 patent as provided by the Patent Owner with additional reference numerals are reproduced below (Resp. Br. 10).



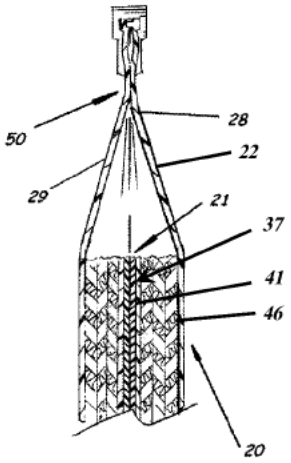


FIG. 7

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. 1-4, 54-56). 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. 4, ll. 5-8; col. 5, ll. 14-25).

B. The specification of the '482 patent states "[t]he fin member is formed of a plastic material and is connected to the bag seal zone." (Col. 2, ll. 36-37).

C. The specification of the '482 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. 3, ll. 24-27).

D. The specification of the '482 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, ll. 1-8).

E. As to Figures 5 and 6, the specification of the '482 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. 5, ll. 14-21).

F. The specification of the '482 patent further states

The combination of the fin member, the zipper track, and the zipper block can be connected to the bag seal zone **21** by several methods. Such methods 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. 8, l. 65-col. 9, l. 9, emphasis added).

2. A. Sullivan discloses a reclosable bag with a sealed laminated liner (Title; Abst.). Figures 4 and 5 of Sullivan are reproduced below.

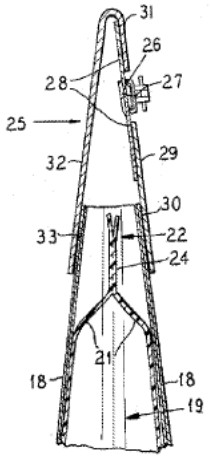


FIG. 4

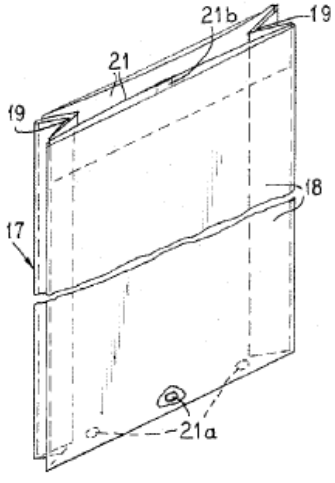


FIG.6

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 **21***a* (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 1 except for the heat seal 24 being peelingly separable, and a fin member "formed of a plastic material." (App. Br. 14). The Requester argues that it would have been obvious to combine Sullivan with Hustad which discloses a peelable seal and Tilman which discloses a polyethylene zipper strip having integral fin strips (App. Br. 14-15).

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 1 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, 5, 12). The Examiner also observes that the adhesives 30, 33 that connects to the attachment flanges 29, 32 do not appear to be "involved with the bag seal zone 24" and that the specification of the '482 patent teaches away from the fin member being connected to the bag seal zone (RAN 5). The Examiner also states that the Requester relies exclusively on Sullivan for this limitation (RAN 4-5), but nonetheless observes that neither Hustad nor Tilman discloses a fin member connected to the seal zone (RAN 12, 13). The Patent Owner agrees with the Examiner and argues that the Requester applies a claim construction of the limitation "connected to" which is unreasonably broad in view of the specification of the '482 patent (Resp. Br. 9-10).

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 1 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. 15-16; Reb. Br. 2). The Requester argues that the specification of the '482 patent does not provide a definition of "connected to" that would limit its scope, and the Examiner has improperly applied a narrow construction importing limitations from the specification (App. Br. 16; 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 95/001,638 (Appeal 2013-000116) for U.S. Patent No. 7,090,904.

We agree with the Examiner's finding that Sullivan does not disclose a fin member that is connected to the bag seal zone for substantively the same reasons discussed in our decision of Appeal 2013-000116. As noted, the Requester relies on the adhesive 30, 33, wall panels 18, adhesive spots 21a, and the liner 21 that intervene between the attachment flanges 29, 32 and the hermetic seal 24. However, we find the Requester's circuitous application of the various bag components of Sullivan to be strained and the Requester's arguments to be based on an unreasonable interpretation of the claim that 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 '482 patent.

The specification of the '482 patent explains that the recited 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 inventor (FF 1A, 1D, 1E). Nowhere in the specification of the '482 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 an intervening structure in the form of an adhesive material is contemplated and described in the specification of the '482 patent (FF 1E, 1F), 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 '482 patent utilizes the terms "connected to" and "attached to" synonymously (FF 1C-1E).

Whereas the claim recites that the fin member be "connected to the bag seal zone," the Requester relies on four 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 too great and the connection between is too attenuated by the intervening structures which includes the wall panels 18, adhesive spots 21a, and the liner 21 so that the arrangement of the bag components in Sullivan can be considered to "connect" the attachment flanges 29, 32 and the hermetic seal 24 in a manner encompassed by claim 1. In this regard, the multiple intervening components or parts of the bag relied upon by the Requester cannot be reasonably characterized as part of an attachment mechanism. Even the Requester's characterization of Sullivan seems to undermine its position, the Requester stating that the attachment flanges 29, 32 "are connected to *the*

panels 18 of the outer tube (bag body) 17 by adhesive 30, 33," and the bag walls 18 are "connected to" the liner 21 by adhesive spots 21a (App. Br. 15 (emphasis added)).

The Requester refers to the statement in the specification of the '482 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 bag components as disclosed in Sullivan is encompassed by claim 1 (Reb. Br. 3; FF 1F). 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 1F). The Requester asserts that it is applying the broadest reasonable interpretation but with the exception of the above noted statement regarding "other methods," the Requester does not appear to take in to any substantive consideration, the specification of the '482 patent in asserting that Sullivan discloses the pertinent limitation.

While the Requester cites to various legal precedent in support of its position that "connected to" should be given a broader interpretation (App. Br. 16; Reb. Br. 2, 3), the Patent Owner cites to other precedent in support of the Examiner's position (Resp. Br. 9, 10). 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. The Requester's overly broad interpretation of the limitation "connected to" essentially renders the limitation meaningless as all

components or parts of the bag would be attached to each other by multiple intervening components or parts. While we agree that the Requester's interpretation is "broad," we disagree that it is "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 when reviewing the specification of the '482 patent so as to encompass the bag of Sullivan, and the Requester has not set forth any persuasive evidence that supports a different conclusion.

The Requester further takes issue with the Examiner's statement that Sullivan "'appears to specifically teach away from the fin member connected to the bag seal zone'" (App. Br. 15; RAN 12, citing Sullivan, col. 3, ll. 32-42) based on its teaching that fiber contamination during tearing of the paper layer should be avoided by providing a spot seal only at the lower end portion of the liner 21 using adhesive spots 21a. The Requester 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. 18). While we agree with the Requester on this point, this error 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. 16-17, citing RAN 12-13), we observe that these references are not pertinent

to the disposition of the present appeal, the Requester having relied on Sullivan for disclosing the "connected to" limitation at issue.

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 '482 patent are unpatentable over *Sullivan*."[10] (App. Br. 17-18). However, the pertinent statement does not impact our finding. Firstly, the statement was not made in the reexamination of the '482 patent which is 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.[11] Thirdly, for the reasons discussed *supra*, we disagree that Sullivan discloses a fin member "connected to the bag seal zone."

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[10] 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).

[11] 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 is clear 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 adopted 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 '482 patent which has the same specification as the U.S. Patent No. 7,544,403.

In view of the above, we are not persuaded that the Examiner erred in refusing to reject independent claim 1 for the reasons proposed by the Request. Claims 2-4 and 7 ultimately depend from claim 1, and the Requester states that "[w]hether claims 2-4 and 7 should be rejected as unpatentable over *Sullivan* in view of *Hustad* and *Tilman* depends on whether claim 1 should be so rejected." (App. Br. 20-21). Hence, we sustain the Examiner's refusal to adopt the Requester's Proposed Rejection 1.

Proposed Rejections 2-6

The Requester also appealed the Examiner's refusal to adopt these proposed rejections (App. Br. 21-32). However, the dispositive issue with respect to these proposed Rejections is the same as Proposed Rejection 1, namely, whether the bag disclosed in Sullivan satisfies the limitation "a fin member […] connected to the bag seal zone." (*See* App. Br. 23, 24, 28, 30-32). Because we find that Sullivan does not disclose a fin member that is connected to the bag seal zone as discussed *supra*, we similarly sustain the Examiner's refusal to adopt the Proposed Rejections 2-6 as well.

CONCLUSION

The Examiner's refusal to adopt Proposed Rejections 1-6 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

alw

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