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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* DONALD VERNA, DOUGLAS T. COX, and  
DOUGLAS HOOD

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Appeal 2013-001000  
Application 11/508,114  
Patent US 6,886,710 B2  
Technology Center 3700

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Before: GAY ANN SPAHN, BRETT C. MARTIN, and  
RICHARD E. RICE, *Administrative Patent Judges*.

MARTIN, *Administrative Patent Judge*.

DECISION ON APPEAL

## STATEMENT OF CASE

Donald Verna, et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1-33 in reissue application 11/508,114. This reissue application seeks to reissue US Patent 6,886,710 B2, issued May 3, 2005, based on Application 10/174,698, filed June 19, 2002. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

## THE INVENTION

Appellants' invention is directed generally to “[p]lastic trays that are stackable and/or nestable.” Spec., col. 1, l. 19. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A multi-purpose tray comprising:

    a front wall having a front apron and a front channel defined by the front wall and the front apron;

    a back wall spaced from the front wall and having a back apron and a back channel defined by the back wall and the back apron;

    first and second sides each having an outer face and an inner face;

    at least one foot extending from the outer face of one of the first and second sides, the at least one foot including a surface facing forward toward the front wall and adjoining the outer face and an outward facing surface adjoining the forward facing surface, the entire outward facing surface spaced away from and outboard of the outer face;

    at least one pocket recessed into the inner face of a corresponding one of the first and second sides, the at least one pocket including a forward facing surface adjoining the inner surface and an inward facing surface adjoining the forward facing surface, the entire inward facing surface spaced away from and outboard of the inner face, where the at least one

pocket is correspondingly shaped with respect to the at least one foot;

a bottom extending between the front wall and the back wall and between the first and second sides, where the front wall, back wall, first and second sides, and the bottom are integrally formed; and

a plurality of ribs disposed along the inward facing surface of the at least one pocket, the ribs engageable with the outward facing surface of the at least one foot when two like trays are stacked in opposite directions rotated 180° with respect to one another.

#### REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Bridenstine	US 3,613,943	Oct. 19, 1971
Madan	US 4,982,844	Jan. 8, 1991
Stahl	US 5,287,966	Feb. 22, 1994
Beauchamp	US 5,582,296	Dec. 10, 1996
Ackermann	US 5,881,902	Mar. 16, 1999

#### THE REJECTIONS<sup>1</sup>

Claims 1-12, 14-16, and 20-30 stand rejected under 35 U.S.C. § 112, second paragraph as being indefinite. Non-Final Rej. 6.<sup>2</sup>

Claims 1-12, 15-24, and 30-33 stand rejected under 35 U.S.C. § 112, first paragraph as failing to comply with the written description requirement. Non-Final Rej. 4.

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<sup>1</sup> We alter the order of the rejections from that of the Answer in order to facilitate our analysis.

<sup>2</sup> All references to “Non-Final Rej.” are to the Non-Final Office Action mailed November 16, 2011, which is the action from which Appellants appeal. *See* App. Br. 1 and 2.

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Claims 13-15 and 25-30 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Stahl. Non-Final Rej. 9.

Claim 31-33 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Beauchamp. Non-Final Rej. 11.

Claims 1-12 and 17-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Stahl, Madan, and Bridenstine. Non-Final Rej. 12.

Claims 1-12 and 17-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ackermann, Madan, and Bridenstine. Non-Final Rej. 14.

## ANALYSIS

### *Rejection under 112, Second Paragraph*

#### Claims 1, 15, 20, and 30 – “Same Tray”

Similar to claim 1, independent claim 20 is directed to a multi-purpose tray and calls for, *inter alia*, the identical subject matter of the last paragraph of the body of claim 1 as quoted *supra*. Independent claims 15 and 30 are also each directed to a multi-purpose tray including, as recited in the last paragraph of the body of each claim, “at least one slot formed in the back of the tray to receive the beam when two trays are stacked in opposite directions with respect to one another.”

The Examiner determines that the language of the last paragraph of the body of claims 1, 15, 20, and 30 is indefinite, because the ribs 114, 116 cannot engage the outward facing surface of the at least one foot 120 of the same tray, and the slot 78 cannot receive the beam 76 of the same tray. Non-Final Rej. 5-6.

The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (citations omitted); *see also In re Hammack*, 427 F.2d 1378, 1382 (CCPA 1970) (“the essence of [the] requirement [under 35 U.S.C. § 112, second paragraph] is that the language of the claims must make it clear what subject matter they encompass”).

Here, in light of the Specification, a person of ordinary skill in the art would understand claims 1 and 20 to require that the rib 114, 116 of one tray is engageable with the foot 120 of another tray when the two trays are stacked. A person of ordinary skill in the art would also understand claims 15 and 30 to require that the slot 78 of one tray receives the beam 76 of another tray when the two trays are stacked. *See Spec.*, col. 4, ll. 53-65, and col. 9, ll. 4-30.

Accordingly, we do not sustain the rejection of independent claims 1, 15, 20, and 30 or of any the claims dependent therefrom.

#### Claims 3 and 4

The Examiner determines that claims 3 and 4 lack antecedent basis for the term “the rib.” Non-Final Rej. 6-7. Appellants argue that “claim 3 calls for ‘at least one rib disposed in the channel for...,’ not ‘the rib.’” App. Br. 11. The reference to “the rib” in claim 4 refers to the at least one rib of claim 3. Accordingly, we do not sustain the Examiner’s rejection of claims 3 and 4, nor of claim 5 dependent on claim 3.

#### Claim 14

The Examiner determines that claim 14 is unclear because the phrase “one tray relative to the other tray” is “not consistent with the terminology of claim 13 from which it depends,” in that claim 13 refers to a “top tray” and a “bottom tray.” Non-Final Rej. 7. Appellants argue that “[i]n each instance (in both claim 13 and claim 14), it is clear what tray is being referred to.” App. Br. 11. We agree with Appellants that a person of ordinary skill in the art would understand that by the term “one tray,” claim 14 requires sliding movement of one of the top and bottom trays recited in claim 13 and by the term “the other,” claim 14 requires sliding movement of the other of the top and bottom trays in the second direction. Accordingly, we do not sustain the rejection of claim 14.

Claims 20 and 25 – “Like Tray”

The Examiner determines that claims 20 and 25 are indefinite due to the use of the term “two like trays.” Non-Final Rej. 7. We agree with Appellants that it is clear that “the term ‘like’ simply refers to two trays having the same features required in the claim to enable such stacking.” App. Br. 12. Accordingly, we do not sustain the rejection of claims 20 and 25, nor any of the claims dependent thereon.

Claims 22 and 23

The Examiner determines that claims 22 and 23 lack antecedent basis for the term “the top tray” and claim 23 lacks antecedent basis for the term “the bottom tray.” Non-Final Rej. 8. Claim 22 first refers to “a top tray” before referring to “the top tray” and thus, there is no improper antecedent basis. With respect to claim 23, Appellants argue that “it is clear from the context of the claim (e.g., use of the word ‘engageable’), that the tray is

configured to vertically stack with another like tray” which “will necessarily make one tray the top tray and the other a bottom tray.” App. Br. 13. As a person of ordinary skill in the art would understand claims 22 and 23, we do not sustain the rejection of claims 22 and 23, nor of claim 24 dependent upon claim 23.

Claims 25 and 27

The Examiner determines that claims 25 and 27 are indefinite for usage of terms such as “like tray,” “top tray,” and “bottom tray.” Appellants argue that “the present application is directed to a tray that includes features that enable it to stack (vertically) with another like tray.” App. Br. 13. In light of the Specification, a person of ordinary skill in the art would understand Appellants’ use of the disputed claim terms. Further, contrary to the Examiner’s assertion that it is unclear whether Appellants are claiming a single tray or multiple stacked trays (Non-Final Rej. 8), it is clear that Appellants only ever claim a single tray. Appellants merely have chosen to describe tray elements with reference to how they would engage with other trays when stacked. Accordingly, we do not sustain the rejection of claims 25 or 27, and the claims dependent thereon.

Claim 29

The Examiner determines that claim 29 as indefinite for referring to “each front” and “each back” because there is only a single tray. Non-Final Rej. 9. As Appellants state, and we agree, “the word ‘each’ can also be used to mean the front and back being claimed in claim 27” and therefore, would not be indefinite. App. Br. 14. Accordingly, we do not sustain the rejection of claim 29.

*Rejections under 112, First Paragraph*

Claims 1 and 20 - “outboard of the outer face”

The Examiner determines that claims 1 and 20 lack written description, because the claim language of “outboard of the outer face” is “not properly supported or described by the [S]pecification and disclosure.” Non-Final Rej. 4. The Examiner finds that the “entire outward facing surface (surface 124, outer face of foot 120, for example) spaced away from and outboard of the outer face (82)” is not shown, because “planar surface 126[,] a part of the outer face 82 (as shown in Fig. 5 and as discussed in column 5, lines 56-57 of the 6886710 patent) is outward of the outward facing surface 124 of the foot in contradiction of the claim 1 language.” *Id.* Although the Examiner is correct that element 126 is outboard of element 124 as seen in Figure 5, nonetheless, as Appellants point out, the claim language at issue is properly supported by outer surface 136 of front foot 120 being outboard of outwardly facing surface 124. Reply Br. 4-5. The confusion appears to stem from the fact that Appellants chose to refer to element 124 as an “outer face” in the claims, but as an “outwardly facing surface” in the Specification, while also referring to element 82 as an “outer face” in the Specification. *See e.g.*, Spec., col. 5, ll. 50-60. Despite the inconsistent nomenclature, Appellants are correct that the language is properly supported. Accordingly, the rejection of independent claims 1 and 20 cannot be sustained, nor any of claims 2-12 and 21-24 dependent thereon.

Claims 1, 15, 20, and 30 – “Same Tray”

The Examiner also rejects claims 1, 15, 20, and 30 for lack of written description because the Specification does not describe an embodiment

wherein a single tray has ribs 114, 116 engageable with the foot 120, nor a slot 78 that receives a beam 76 as discussed *supra*. Non-Final Rej. 4-6. Based upon our interpretation *supra* that a person of ordinary skill in the art would understand claims 1 and 20 to call for ribs of one tray engageable with the foot of another tray when the two trays are stacked, and claims 15 and 30 to call for the slot of one tray to receive the beam of another tray when the two trays are stacked, we cannot sustain this rejection of independent claims 1, 15, 20, and 30, nor any of claims 2-12, 16, and 21-24 dependent thereon.

Claim 15 – “Path”

The Examiner determines that claim 15 lacks written descriptive support in the Specification for the recitation of “a bottom extending along a first path between front and back and along second path between first and second sides” and claims 16-19 and 31-33 also lack written descriptive support for the same or similar language. Non-Final Rej. 5. In particular, the Examiner notes that the “first and second paths are not elements represented by a reference numeral.” *Id.* There is no requirement that each element of a claim be represented by a reference numeral in the Specification and Drawing Figures. Furthermore, as Appellants point out, original claim 1 included the limitation at issue and therefore, this subject matter is included in the originally filed disclosure. One of ordinary skill in the art would understand from the Specification and Drawings that the term “path” as used in the claims refers generally to the shape or profile of the tray bottom as it extends from the front to the back or from one side to the

other (or both). Accordingly, we do not sustain this rejection as it applies to claims 15-19 and 31-33.<sup>3</sup>

*Rejection of Claims 13-15 and 25-30 as Anticipated by Stahl*

Claim 13

With respect to claim 13, the Examiner finds that, *inter alia*, Stahl's stacking platform 92 constitutes the claimed "stop" and that the stacking platform 92 "is disposed within the recessed channel of a bottom tray for limiting sliding movement of a top tray relative to the bottom tray in a first vertical direction when the top tray is lowered to rest upon the bottom tray." Non-Final Rej. 9-10. As Appellants argue, however, Stahl teaches other elements that perform the claimed anti-sliding features such as stacking lugs 104 and 106. App. Br. 14-15 (citing Stahl, col. 8, ll. 14-28 and Figs. 1-4 and 8). Appellants further argue that nesting ledges 78, upon which stacking platforms 92 rest when in a nested configuration, are wider than stacking platforms 92 such that the vertical sides of platforms 92 would not contact the stacking posts 74 in a manner to prevent lateral sliding. App. Br. 15-16.

We are persuaded by Appellants' arguments because the Examiner's interpretation that platforms 92 prevent vertical sliding ignores the fact that the sliding at issue is when the trays are stacked relative to one another.

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<sup>3</sup> The Examiner also objected to the Drawing Figures and Specification for a similar reason. Although objections are generally petitionable matters (*see the Manual of Patent Examining Procedure* (MPEP) §§ 1002 and 1201(8th Ed., Rev. 9, Aug. 2012)), to the extent that our reversal of the rejection of claims 15 and 30 here resolves the drawing and Specification objections, our decision with respect to the rejection is dispositive as to the corresponding objections.

Once the trays are stacked, vertical sliding is prevented. Moreover, the context of the overall claim makes it clear that lateral sliding is the type of sliding claimed. As such, we agree with Appellants that Stahl's stacking platform 92 does not amount to the claimed stop. Accordingly, we do not sustain the rejection of claim 13, or dependent claim 14, as anticipated by Stahl.

Claim 25

As Appellants point out, claim 25 includes the same kind of stop as disclosed in claim 13 and is not anticipated by Stahl for the same reasons. App. Br. 18. Accordingly we do not sustain the rejection of claim 25, and dependent claim 26.

Claim 15

With respect to claim 15, the Examiner asserts that Stahl's web 98 equates to the claimed "at least one beam" and that it extends "from the front of the tray." Non-Final Rej. 10. The Examiner further explains that it extends as such because it "is positioned [in] the front half of the tray." Ans. 9. As Appellants point out, however, "[c]laim 15 defines the front as including a wall, an apron and a channel defined by the wall and apron." Reply Br. 7-8. Accordingly, "extending from the front of the tray" has a more specific meaning in claim 15 than simply being in the front half, and we agree with Appellants that web 98 does not extend from the "front" of the tray as claimed. We therefore do not sustain the rejection of claim 15 as anticipated by Stahl.

Claims 27 and 30

As Appellants point out, claims 27 and 30 are each directed to a beam that extends from the front of the tray and are not anticipated by Stahl for the same reasons as stated with respect to claim 15 *supra*. App. Br. 18. Accordingly, we do not sustain the rejection of either of independent claims 27 or 30, and claims 28 and 29, which depend from claim 27, as anticipated by Stahl.

*Rejection of Claims 31-33 as Anticipated by Beauchamp*

The Examiner finds that Beauchamp teaches each and every limitation to anticipate claims 31-33. Non-Final Rej. 11. More particularly, the Examiner finds that Beauchamp teaches the claimed “arcuate” nature of the path of the bottom of the tray. *Id.* Indeed, the Examiner broadly interprets Beauchamp to disclose “many arcuate paths.” Ans. 10. While claims are to be given their broadest reasonable interpretation, it is clear that as used in the claims, the term “path” is intended to generally describe the shape or profile of the bottom of the tray. *See e.g.*, App. Br. 7. Claims 31 and 33 specifically describe this path as being “arcuate,” an example of which is depicted in Figure 25, illustrating a domed path, i.e., arcuate along both front-to-back and side-to-side directions. *See Reply Br. 6.* While the Examiner may broadly interpret Beauchamp as having many arcuate paths in the abstract, Beauchamp teaches a flat-bottomed tray and therefore, does not disclose the claimed arcuate paths. Accordingly, we cannot sustain the rejection of claims 31-33 as anticipated by Beauchamp.

*Rejection of Claims 1-12 and 17-24*

*as Obvious over Stahl, Madan, and Bridenstine*

Claims 1 and 20

The Examiner finds that “Madan and Bridenstine teach the pocket configuration and ribs of the pocket of a bottom tray engageable with the outward facing surface of the at least one foot of a top tray when stacked.” Non-Final Rej. 12. We agree with Appellants, however, that neither Madan nor Bridenstine teaches ribs in a lower tray that would engage with the outer wall of the foot of an upper tray when the trays are stacked as claimed in independent claims 1 and 20. *See* App. Br. 19-24.

More particularly, the Examiner asserts that the ribs 66 and 68 of Madan engage the foot of a top tray (Ans. 11); however, as seen in the Figures, ribs 66 and 68 are configured to engage a bottom of the foot and would not engage the “outward facing surface” of the foot as necessary to satisfy the language of claims 1 and 20. With regard to Bridenstine, we agree with Appellants that reinforcing gussets 28, which the Examiner asserts are the claimed ribs, “do not engage an outward facing surface of outwardly extending wall portion (16) when two trays are positioned in a nested position, as shown in Figure 5.” App. Br. 22. It is also clear that when in a stacked position, as shown in Figure 6, gusset 28 is spaced even further from wall 16.

Accordingly, neither Bridenstine nor Madan teaches the limitation for which the Examiner’s rejection relies upon them and therefore, we cannot sustain the rejections of claims 1-12 and 20-24 over Stahl, Madan, and Bridenstine.

Claims 17 and 19

Independent claims 17 and 19 are each directed to a multi-purpose tray including, *inter alia*, “at least one foot extending from the outer portion and at least one pocket defined by the inner portion where the at least one foot is correspondingly shaped with respect to the at least one pocket.”

The Examiner finds that Stahl substantially discloses the subject matter of independent claims 17 and 19; however, Stahl fails to disclose “the pocket configuration wherein the pocket being recessed into the inner face of one of the sides and ribs disposed along the inwardly facing surface of the pocket.” Non-Final Rej. 12. To cure the deficiency of Stahl, the Examiner turns to either Bridenstine or Madan to teach “the pocket configuration and the ribs of the pocket. *Id.* The Examiner concludes that it would have been obvious to one of ordinary skill in the art

to modify the pocket configuration to be recessed in the inner face and to modify the pocket to include ribs by adding ribs to the inwardly facing surface of the pockets to extend within the pockets in order to maintain a tight fit while allowing better access to the inside of the pockets to prevent debris from becoming trapped in the pocket and to allow easier more accessible cleaning of the pocket.

Non-Final Rej. 12-13.

Appellants argue that “[i]t would . . . not have been obvious to modify the pocket configuration disclosed in Stahl to be recessed into the inner face of sidewalls (82) and (86), or to add ribs to the inwardly facing surface of the resulting pockets.” App. Br. 20.

We are persuaded by Appellants’ argument that the Examiner’s reason for modifying Stahl by Bridenstine or Madan lacks rational underpinning. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (holding 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.”). As argued by Appellants, modifying Stahl’s inner wall panels 82, 86 in the manner suggested by the Examiner would create breaks in the otherwise continuous inner wall panels 82, 86 and multiple breaks in the uninterrupted portions of upper edges 116, 118 of inner wall panels 82, 86 would eliminate the slide-on feature of tray 10. *See App. Br. 20.*

Accordingly, we do not sustain the Examiner’s rejection of independent claims 17 and 19, and claim 18 dependent on claim 17, under 35 U.S.C. § 103(a) as unpatentable over Stahl, Bridenstine, and Madan.

*Rejection of Claims 1-12 and 17-24  
as Obvious over Ackermann, Madan, and Bridenstine*

Claims 1 and 20

With respect to claims 1 and 20, the Examiner finds that “Ackermann discloses the invention except for the rib configuration”; however, either of “Madan and Bridenstine teach the rib configuration.” Non-Final Rej. 14. The Examiner concludes that it would have been obvious to one of ordinary skill in the art “to modify the pocket to include ribs to provide a tighter fit.” *Id.*

Appellants argue that “[n]one of the references, however, taken individually or in any permissible combination . . . teach, or suggest a tray having . . . a plurality of ribs positioned along an inner surface of the recessed pocket, the ribs being engageable with an outward facing surface of the foot. App. Br. 22.

For the same reason as discussed *supra* with respect to claim 1 and 20 and the obviousness rejection based on Stahl, Madan, and Bridenstine, we do not sustain the rejections of independent claims 1 and 20, and claims 2-12 and 21-24 dependent thereon, under 35 U.S.C. § 103(a) as unpatentable over Ackermann, Madan, and Bridenstine.

Claims 17 and 19

The Examiner finds that “Ackermann discloses the invention except for the transverse rib and longitudinal rib”; however, “Bridenstine teaches transverse and longitudinal ribs.” Non-Final Rej. 14. The Examiner concludes that it would have been obvious to one of ordinary skill in the art “to replace the diagonal ribs with transverse and longitudinal ribs as a matter of design choice.” *Id.*

Appellants incorporate the arguments set forth for claim 1 as applicable against claims 17 and 19. App. Br. 24. Thus, with respect to claims 17 and 19, Appellants argue that “[n]one of the cited references . . . teach, or suggest a tray having a foot extending from an outer surface of a sidewall and a correspondingly shaped pocket recessed into an inner face of the sidewall of the tray.” App. Br. 22.

We are persuaded by Appellants’ argument. While the Examiner stated that Ackermann disclosed the invention except for the transverse and longitudinal ribs of claims 17 and 19, respectively, the Examiner provided no specific findings as to where Ackermann taught “at least one foot extending from the outer portion and at least one pocket defined by the inner portion where the at least one foot is correspondingly shaped with respect to

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the at least one pocket” as is recited in both claims 17 and 19. The Examiner also made no findings whatsoever with respect to Madan and only found that Bridenstine disclosed traverse and longitudinal ribs. In rejecting claims under 35 U.S.C. § 103(a), the Examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992); *see also In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). Here, we find that the Examiner has not met the burden.

Accordingly, we do not sustain the Examiner’s rejection of independent claims 17 and 19, and claims 18 dependent on claim 17, under 35 U.S.C. § 103(a) as unpatentable over Ackermann, Madan, and Bridenstine.

#### DECISION

For the above reasons, we REVERSE the Examiner’s decision to reject claims 1-33.

REVERSED

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