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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* ERIC FITZGERALD KLOSKY

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Appeal 2017-004714<sup>1</sup>  
Application 14/473,261<sup>2</sup>  
Technology Center 3700

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Before NINA L. MEDLOCK, BRUCE T. WIEDER, and  
BRADLEY B. BAYAT, *Administrative Patent Judges*.

MEDLOCK, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner’s final rejection of claims 1, 2, and 4–27. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Our decision references Appellant’s Appeal Brief (“App. Br.,” filed May 2, 2016) and Reply Brief (“Reply Br.,” filed January 18, 2017), and the Examiner’s Answer (“Ans.,” mailed November 18, 2016), Advisory Action (“Adv. Act.,” mailed November 6, 2015), and Final Office Action (“Final Act.,” mailed August 26, 2015).

<sup>2</sup> Appellant identifies IdeaStream Consumer Products, LLC as the real party in interest. App. Br. 3.

## CLAIMED INVENTION

Appellant's claimed invention relates to folders that "are sized, oriented, and configured to be used to hold papers inside backpacks, i.e., school backpacks" (Spec. 5 (Appendix)).

Claims 1 and 2 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A folder for a backpack comprising:
  - a front panel and a rear panel connected along at least a portion of respective bottom edges and at least a portion of at least one respective side edge while being open at their top edges;
    - wherein the front panel has an upper portion that is about ten and three-quarters inches or shorter above the bottom edge to permit the top of 8.5x11" paper inside the folder to be exposed;
    - wherein the front panel has a width that is larger than eight and a half inches to cover the side edge of 8.5x11" paper inside the folder;
    - wherein the rear panel has an un-tabbed upper portion that is about eleven and one-quarter inches or taller above the bottom edge to cover from behind the top of 8.5x11" paper inside the folder; and
    - wherein the rear panel includes a tab extending at least a half inch above the un-tabbed upper portion of the rear panel, the tab being one of a left tab, a center tab, and a right tab, the left tab leaving space for a center tab and right tab of other folders, the center tab leaving space for a left tab and right tab of other folders, the right tab leaving space for a left tab and a center tab of other folders; and
    - wherein the rear panel side edge is longer than the rear panel bottom edge, and, thus, the rear panel has its longitudinal axis oriented vertically with the tab along the top for use in a backpack.

App. Br. 22–23; Claims Appendix.

### REJECTIONS<sup>3</sup>

Claims 1, 2, 4, 5, and 10–27 are rejected under 35 U.S.C. § 103(a) as unpatentable over Black (US 6,082,612, iss. July 4, 2000), Goodfellow et al. (US 2009/0178320 A1, pub. July 16, 2009) (“Goodfellow”), and Rose et al. (US 2005/0236452 A1, pub. Oct. 27, 2005) (“Rose”).

Claims 6 and 7 are rejected under 35 U.S.C. § 103(a) as unpatentable over Black, Goodfellow, Rose, and Bauman et al. (US 6,409,409 B2, iss. June 25, 2002) (“Bauman”).

Claims 8 and 9 are rejected under 35 U.S.C. § 103(a) as unpatentable over Black, Goodfellow, Rose, and Henrikson et al. (US 6,209,778 B1, iss. Apr. 3, 2001) (“Henrikson”).

### ANALYSIS

#### *Independent Claims 1 and 2, and Dependent Claims 4, 5, and 10–27*

Appellant argues claims 1, 2, 4, 5, and 10–27 as a group (App. Br. 12–21). We select independent claim 1 as representative. The remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

By way of background, Black is directed to an integrated pocket folder for holding an article, such as a computer diskette, or the like. (Black, Abstract), and, as shown in Figure 1, the folder has a vertical orientation. Black discloses, with reference to Figure 1, that, in one embodiment, the

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<sup>3</sup> The rejections are those presented in the Advisory Action mailed November 6, 2015, which supersede the rejections set forth in the Final Office Action. These rejections resulted from Appellant’s Amendment After Final under 37 C.F.R. § 1.116(b) filed October 13, 2015, and the Examiner’s review thereof under the After Final Consideration Pilot 2.0 (AFCP 2.0) program. *See* Notice of After Final Consideration Pilot Program 2.0, 78 Fed. Reg. 29117 (2013).

folder is in the form of a slash jacket 10 having a front cover 14 and a rear cover 12 (Black col. 2, l. 4 – col. 3, l. 3). Front cover 14 is attached to rear cover 12 along portions of the bottom edge 16, the left edge 18, and the right edge 20, forming a pocket between the front and rear covers; cover 14 covers the lower part of rear cover 12 so that the top portions of any documents contained in slash jacket 10 are visible to the user without having to remove the documents from the jacket (*id.* at col. 3, ll. 4–16). Black discloses that the slash jacket may also be provided with an index tab 28 along a portion of right edge 20 (*id.* at col. 3, ll. 22–23).

Goodfellow is directed to a filing device, e.g., a folder, having retractable tabs (Goodfellow ¶ 5). Goodfellow, thus, discloses a folder 10, with reference to Figure 1, having three retractable tabs 50 disposed along a top edge 18 of the folder; tabs 50 are configured to be movable between a retracted position (where the tab does not extend beyond edge 18) and an extended position (where the tab extends beyond edge 18), as shown by the middle tab in Figure 1 (*id.* ¶¶ 20, 25).

Rose discloses a backpack with “separate compartments in the backpack for storing papers, binders, file folders, books, and the like” (Rose ¶ 3). Rose discloses, with reference to Figures 1 and 2, that the backpack includes a divider unit 30 (*see id.*, Fig. 1) or a divider insert 60 (*see id.*, Fig. 2) having a plurality of dividers 34, forming separate compartments 36 (*id.* ¶ 31). An identification tab 32 is connected at the top of each divider 34, near the opening of the backpack, for identifying the content stored in compartment 36 (*id.*).

In rejecting independent claim 1 under 35 U.S.C. § 103(a), the Examiner finds that Black discloses all the limitations of claim 1, except that

“Black does not disclose a tab or backpack as claimed” (Adv. Act. 2). The Examiner cites Goodfellow and Rose to cure the deficiency of Black (*id.*). In particular, the Examiner finds that Goodfellow discloses left, right, and center tabs disposed along the top edge of a folder, and that Rose discloses using a tabbed folder in a backpack (*id.*). The Examiner, thus, concludes that it would have been obvious to a person of ordinary skill in the art at the time of Appellant’s invention “to use the tabs of Goodfellow on the rear panel of Black and place the folder having a longer side edge than a bottom edge in a backpack, as disclosed by Rose, in order to transport the folder and identify the contents of the folder while in the backpack” (*id.*).

Appellant first argues that the Examiner’s rejection cannot be sustained because the folders of Black and Goodfellow include tabs that prevent them from being useful as backpack folders” (App. Br. 12–15). Appellant asserts that Black discloses a tab disposed along the side edge of a folder, and that “[t]he retractable tabs of Goodfellow are shown on a long top edge of a file folder, a type of folder that is used in the horizontal orientation” (*id.* at 15). Therefore, according to Appellant, if the folders disclosed in Black and Goodfellow were placed in a backpack, the tabs would “be off to the side” and, therefore, “unseen, unhelpful, and easily damaged” (*id.* at 12–13).

Appellant’s argument is not persuasive of Examiner error at least because it is not responsive to the Examiner’s rejection. The Examiner determined that it would have been obvious “to use the tabs of Goodfellow on the rear panel of Black and [to] place the folder . . . in a backpack, as disclosed by Rose” (Adv. Act. 2). In other words, the Examiner’s position is that it would have been obvious to modify the vertical folder disclosed in

Black to include tabs along the top edge, as disclosed in Goodfellow, and to place the folder in a backpack, as disclosed in Rose, oriented with the tabs at the top edge of the folder for easier viewing while the folder is in the backpack, i.e., when the backpack is open and the folders are viewed from above. Appellant's arguments are not persuasive of Examiner error because they do not address the Examiner's proposed modification.

Appellant next argues that “[t]he Examiner mischaracterizes the dividers of Rose as tabbed folders” (App. Br. 16 (emphasis omitted)). Yet, it is clear from the Advisory Action that the Examiner relies on Black, not Rose, as disclosing a folder, as called for in claim 1 (*see* Adv. Act. 2 (“Black discloses a folder”; “Rose discloses *using* a tabbed folder . . . in a backpack”) (emphasis added))).

We also are not persuaded of Examiner error by Appellant's argument that combining tabbed folders, as disclosed in Black and Goodfellow, and tabbed dividers, as disclosed in Rose, would render each unsatisfactory for its intended purpose, i.e., identifying the stored contents (App. Br. 17–18). Appellant maintains, in particular, that “[t]he tabs of the dividers and folders would conflict if those folders included a tab along their top edge: one set of tabs would block the view of tabs [of] the other, and/or the labels of the different sets of tabs would be confused” (*id.* at 18). We disagree.

As described above, the Examiner proposes to modify Black's folder to include tabs, as disclosed in Goodfellow, disposed along the top edge of the folder (*see* Adv. Act. 2). Goodfellow discloses three extendable tabs 50 disposed at left, right, and center positions (*see, e.g.,* Goodfellow Fig. 1). Rose discloses a backpack with dividers 34 having identification tabs 32, similarly connected at the top of each divider 34 and disposed at left, right,

and center positions (*see, e.g.*, Rose Fig. 2). In our view, it would have been obvious to a person of ordinary skill in the art at the time of Appellant's invention to appropriately extend or retract the left/right/center tabs on the tabbed folders to avoid conflict when using the folders with the tabbed dividers. For example, when placing a folder in a compartment having a divider with an identification tab in the center, it would have been obvious to extend the left and/or right tabs on the folder to avoid any conflict (*see* Goodfellow ¶ 19 (“a plurality of same or different types of filing devices with retractable tabs can be included in a filing system, such that different ones of the devices can selectively have tabs extended at different positions along the edges thereof for organizing the filing system”)).

Modifying Black's folder for use in a backpack, as the Examiner proposes, is no more than a combination of prior art elements according to their established functions, and yields a predictable result. Therefore, it would have been obvious at the time of Appellant's invention to a person of ordinary skill in the art. *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 416 (2007) (“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results”).

Appellant notes that the Examiner states in the Advisory Action, “Rose discloses a tabbed folder with a side edge being longer than a bottom edge in a backpack” (App. Br. 18 (citing Adv. Act. 2)), and Appellant argues that “[t]he dividers of Rose are not taller than they are wide” (*id.* (emphasis omitted)). Relying on an annotated version of Figure 1 of Rose, Appellant, thus, asserts that the backpack disclosed in Rose is “nearly square in proportion” (*id.* at 19).

Appellant's argument is not persuasive of Examiner error because, as described above, the Examiner relies on Black, not Rose, as disclosing a folder as called for in claim 1, i.e., a folder with a side edge longer than a bottom edge. The Examiner cites Rose as disclosing *using* a tabbed folder in a backpack (Adv. Act. 2).

Rose discloses, “[t]ypically, a backpack is quasirectangular in shape” (Rose ¶ 6). But even if Rose's backpack is “nearly square,” as Appellant maintains, we fail to see why, and Appellant does not explain why, a vertical, rectangular folder, as disclosed in Black (i.e., a folder having a “rear panel side edge [that] is longer than the rear panel bottom edge,” as called for in claim 1), cannot be used in a square backpack. As the Examiner points out, “backpacks come in a variety of shapes and sizes” (Ans. 2). Appellant has not explained, for example, why Black's rectangular folder could not be used in a vertical orientation in a backpack provided the folder's height is less than the height of the backpack.

Finally, we are not persuaded of error on the part of the Examiner by Appellant's argument that “[n]one of the references cited by the Examiner provide[s] a reason for one of ordinary skill in the art to add a tab along a top edge of a folder that has a bottom edge that is shorter than its side edge” (App. Br. 20). Indeed, to the extent Appellant seeks an explicit suggestion or teaching in the references themselves, the Supreme Court made clear in *KSR* that no such explicit suggestion or teaching is required. *See KSR*, 550 U.S. at 419. Moreover, Appellant cannot reasonably deny that placing the tabs at the top of the folder, near the opening at the top of the backpack, would make it easier to view the tabs on the folder.

Appellant argues for the first time in the Reply Brief that various limitations of dependent claims 4, 5, and 10–15 are not disclosed or suggested by the cited references (Reply Br. 5). That argument is untimely, and is waived here in the absence of any showing of good cause why the argument could not have been timely presented in Appellant’s Appeal Brief. *See In re Hyatt*, 211 F.3d 1367, 1373 (Fed. Cir. 2000) (noting that an argument not first raised in the brief to the Board is waived on appeal); *Ex parte Nakashima*, 93 USPQ2d 1834, 1837 (BPAI 2010) (informative) (explaining that arguments and evidence not timely presented in the Principal Brief, will not be considered when filed in a Reply Brief, absent a showing of good cause explaining why the argument could not have been presented in the Principal Brief); *Ex parte Borden*, 93 USPQ2d 1473, 1477 (BPAI 2010) (informative) (“Properly interpreted, the Rules do not require the Board to take up a belated argument that has not been addressed by the Examiner, absent a showing of good cause.”).

In view of the foregoing, we sustain the Examiner’s rejection of claim 1 under 35 U.S.C. § 103(a). We also sustain the rejection of claims 2, 4, 5, and 10–27, which fall with claim 1.

#### *Dependent Claims 6–9*

Appellant does not present any arguments in the Appeal Brief in support of the patentability of any of dependent claims 6–9, and, to the extent that Appellant presents such arguments in the Reply Brief, those arguments are untimely and will not be considered.

Therefore, we sustain the Examiner’s rejections of claims 6–9 under 35 U.S.C. § 103(a).

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DECISION

The Examiner's rejections of claims 1, 2, and 4–27 under 35 U.S.C. § 103(a) are 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)(1)(iv).

AFFIRMED