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EXAMINER

ALLEN, WILLIAM J

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JAMES ALLEN AUSTIN III, PATRICK WILLIAM BOEHNEN,
MATTHEW JAMES KLEIN, RICHARD L. ROETKEN, MARCUS
BOSCH, GERAINT KRUMPE and NATALIE A. SCHRAUFNAGEL

Appeal 2017-006613
Application 13/483,487¹
Technology Center 3600

Before JOSEPH A. FISCHETTI, BRUCE T. WIEDER and
AMEE A. SHAH, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134(a) of the Examiner's Non-Final Rejection of claims 1, 2, 5–11, and 21–30. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM.

¹ Appellants identify LIBERTY HARDWARE MFG. Corp. as the real party in interest. (Appeal Br. 4).

THE INVENTION

Appellants' claims relates to shower door assemblies; and retail displays and methods for displaying shower door assemblies. Spec. ¶ 1.

Claim 1 reproduced below, is representative of the subject matter on appeal.

1. A retail shower door display assembly comprising:
 - a point-of-sale display unit sized to be received within a retail store aisle;
 - an array of various shower door frames oriented within the display unit; and
 - an array of various shower door glass panes oriented within the display unit;
 - wherein each of the various shower door frames is packaged separately; and
 - wherein each of the various shower door glass panes is packaged separately.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

McCoy	US 1,841,620	Jan. 19, 1932
Ruppel et al.	US 4,429,791	Feb. 7, 1984
Kuzman	US 5,368,486	Nov. 29, 1994
Melillo et al.	US 6,102,502	Aug. 15, 2000
Wisecarver et al.	US 2008/0148692 A1	June 26, 2008
Ricereto	US 2009/0115299 A1	May 7, 2009

Non-Patent Literature:

Therma-Tru Door, *2010 Door Gallery Displays*,
www.thermatru.com/trade-professional/dpprgallerdisplays.aspx (last visited July 10, 2010). (Recovered from www.Archive.org)

The following rejections are before us for review:

Claims 1, 2, 5, 8–11, 23–26, and 29 are rejected under 35 U.S.C. § 103(a) over McCoy in view of Therma-Tru and Ricereto.

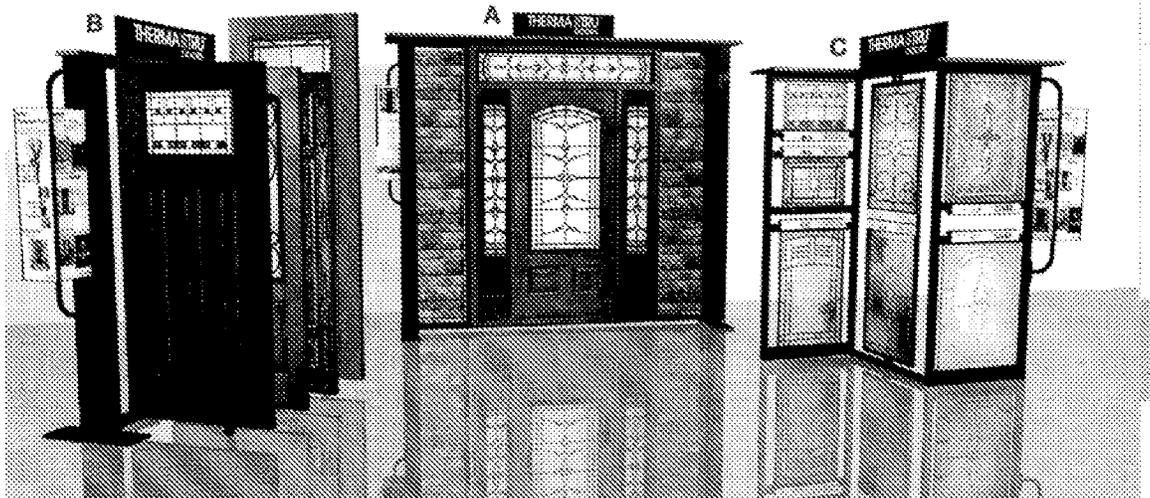
Claims 6, 7, 21, 22, 27, 28 and 30 are rejected under 35 U.S.C. § 103(a) over McCoy, in view of Therma-Tru and Ricereto, and in further view of Melillo.

Claims 1, 5–10, and 21–30 are rejected under 35 U.S.C. § 103(a) over Kurzman in view of Wisecarver and Ruppel.

Claim 11 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Kurzman in view of Wisecarver and Ruppel, and further in view of Therma-Tru.

FINDINGS OF FACT

1. We adopt the Examiner's findings as set forth on pages 3–21 (excluding findings for claim 30 on page 21–26) and on pages 27–43.
2. Therma-Tru page 6 shows an array of door and lite panel inserts as follows:



Page 6 of the Therma-Tru shown above shows an array of door gallery displays.

3. Therma-Tru page 6 of (FF. 2) discloses:

At array A, a DOOR SYSTEM UNIT of assembled entryways: “Interchangeable, exterior facade graphics frame the entryway allowing shoppers to visualize the door system in a setting similar to their own home. Choose from brick, siding, stone and stucco.”

At array B, a SWING UNIT of hinges doors: “Standard units hold four displays up to 8’, and each door can swing up to 160 degrees for a wide viewing angle. Optional hardware kit allows the unit to hold up to eight display doors.”

At array C, a LITE DISPLAY of decorative glass panels: “Flexible design holds seven or more rectangular door lites that can easily be changed.”

4. The Examiner found,

The complete display system of ThermaTru includes an array for door frames/panels [see at least: p. 1 box 1 and 4, p. 2 box 1, p. 4 box 1, p. 6 elements B-B2, p. 6 box 3] and array for glass panels appropriate for the door frames/panels [see at least: p. 1 box 3, p. 2 box 2, p. 3, p. 6 elements C-C1, p. 6 box 4]. Thus, ThermaTru discloses the retail display of door frames/panels, and their accompanying glass panels.

(Non-Final Act. 9).

5. Ricereto discloses an object of its display is to “allow for suitable interaction with the product being displayed.” (Ricereto, ¶ 3).

6. McCoy discloses that an object of its display is to present product for inspection “whereby economy of time is attained.” (Col. 2, l. 4).

ANALYSIS

35 U.S.C. § 103(a) REJECTION

Claims 1, 2, 5, 8–11, 23–26, and 29 rejected under 35 U.S.C. § 103(a) over McCoy in view of Therma-Tru and Ricereto.

The Appellants argued claims 1, 2, 5, 8–11, 23–26, and 29 as a group. (Appeal Br. 12). Claim 1 is the representative claim for this group (Appeal Br. 13), and the remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015).

Appellants argue,

This alleged motivation to combine is not supported by the record. The record supports packaging smaller commodities individually (Ricereto) and displaying larger commodities assembled (McCoy and ThermaTru). Notably, the ThermaTru reference discloses a display of an assembled door, not shower door components packaged separately as claimed.

(Appeal Br. 13).

The Examiner found,

Both McCoy and Ricereto (and ThermaTru, for that matter) exemplify exhibition of commodities in order to allow a customer to more easily and more thoroughly inspect a commodity. Ricereto, though, takes this one step further in disclosing a packaged commodity that can be purchased housed approximate [sic] to the exhibited commodity. No portion of McCoy precludes combining the display of McCoy in such a manner as to have packaged commodities nearby to the exhibited commodities. The same can be said for ThermaTru.

(Answer 37–38).

We agree with the Examiner.

First, to the extent Appellants seek an explicit suggestion or motivation in the reference itself, this is no longer the law in view of the Supreme Court's holding in *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). Since the Examiner has provided some articulated reasoning with some rational underpinning for why a person with ordinary skill in the art would modify McCoy to include the Therma-Tru displays (Non-Final Act. 9, (FF. 2–4)) and the prepackaged products of Ricereto (Non-Final Act. 10), Appellants' argument is not persuasive as to error in the rejection.

Second, the proposed combination meets the claim requirements. The Examiner found that, "McCoy discloses a retail product assembly comprising a first and second array of commodities, in this case tiles [see at least: p. 1 lines 56–63 (one series on one side, a second series on the opposite side), p. 2 lines 22–24, p. 2 lines 53–62 Fig. 1–2]." (Non-Final Act. 8). The Examiner also found that "the complete display system of ThermaTru includes an array for door frames/panels." (FF. 4). The Examiner also found that Ricereto discloses a "drawer defining a compartment adapted to contain packages of corresponding commodities [see abs, 0038, Fig. 6 (p, p2)]. . . [which] packaged commodities available for purchase are *packaged separately* and oriented adjacent to the sample commodity." (Non-Final Act. 10). Thus, the combination of McCoy, Therma-Tru, and Ricereto contains teachings which together meet the claim requirements. That the doors in Therma-Tru are outside doors, and not shower doors, is not of consequence because each is similar in terms of display requirements in that each is largely planar and requires vertical

orientation to be used and hence displayed, and each permit/restrict entry into a space.

We thus agree with the Examiner that one of ordinary skill in the art looking to the packaged items in the display of Ricereto (Figure 6) would have known to similarly package the doors and lite panel in displays A and B of Therma-Tru, because packaging would aid in ease of handling of the item as it is transported from the store to the job site.

We further disagree with Appellants that “ThermaTru, [] does not offer separately packaged door panes and frames as claimed. Therefore, ThermaTru teaches away from the combination of references.” (Appeal Br. 14). This is because the displays in Therma-Tru (FF. 2, 3), like the displays in Ricereto and McCoy (FF. 5, 6), are all concerned with presenting a consumer with flexible and efficient purchasing options while shopping. Thus, Therma-Tru does not actually discourage a person of ordinary skill “from following the path set out in the reference, or would [lead a person of ordinary skill] in a direction divergent from the path that was taken by the applicant.” *See In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

Appellants’ arguments to claims 23–26 and 29 only reference excerpts from the Specification describing problems solved by “the solutions claimed in claims 23–26 [which] are nonobvious over the combination of references”, without pointing to specific language in the claims which effect the generalized solution and without pointing to specific parts of the references which do not meet the claim language. (Appeal Br. 16). Therefore, the arguments are not persuasive. A general allegation that the art does not teach any of the claim limitations is no more than merely pointing out the claim limitations. A statement which merely points out

what a claim recites will not be considered an argument for separate patentability of the claim. 37 C.F.R. § 41.37(c)(1)(vii).

Claims 6, 7, 21, 22, 27, 28 and 30 rejected under 35 U.S.C. § 103(a) over McCoy, in view of Therma-Tru and Ricereto, and in further view of Melillo.

Appellants' arguments to claims 6, 7, 21, 22, 27, and 28 merely state that they "are nonobvious for at least the reasons stated above with reference to claim 1" (Appeal Br. 16), and therefore they are not persuasive for the same reason given for claim 1.

Appellants' specific arguments to claim 30 states "sequential ordering of products displayed" is not disclosed in the references. (Appeal Br. 19). We agree. Claim 30 recites,

wherein the first array of various shower door frames, the first array of various shower door glass panes, the second array of various shower door frames, and the second array of various shower door glass panes *are arranged sequentially in order of a prescribed selection process of shower door type, and then shower door frame and shower door glass pane* (emphasis added).

Nothing in the combination of McCoy, or Therma-Tru discloses or suggests the sequential arrangement of the claimed first and second arrays as highlighted in italics above. The Examiner's reliance on Melillo is to show that, "[e]ach array may be disposed in an appropriate housing (i.e. *point of sale display*) [see at least: p.1 line 60, p. 2 lines 13–17, p. 2 lines 25–29] the housing for use by a salesman in a showroom." (Non-Final Act. 21). It is not apparent and the Examiner has not explained how the disclosed array used by a salesman meets the claims *arranged sequentially in order of a*

prescribed selection process of shower door type, and then shower door frame and shower door glass pane. Therefore, we do not sustain the rejection of claim 30 under this rejection.

Claims 1, 5–10, and 21–30 rejected under 35 U.S.C. § 103(a) over Kurzman in view of Wisecarver and Ruppel.

The Appellants argued claims 1, 5–10, and 21–29 as a group. (Appeal Br. 19–20). Claim 1 is the representative claim for this group, and the remaining claims stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015).

Appellants argue Wisecarver teaches away because “Wisecarver packages the ‘associated hardware/header rails’ with the shower doors, not in a separate array as claimed, to be ‘secured from view, vandalism, and theft.’” (Appeal Br. 19).

We disagree with Appellants. According to Wisecarver, the disclosed packaging is to encourage sales in that it is “configured to display the panel(s) to a consumer at the time of sale while also safeguarding the panel(s) and associated hardware during transit and at the time of sale.” Wisecarver, ¶ 3. Likewise, Kurzman discloses that its display is to enable “relative[ly] unskilled workmen to select and install cabinetry in a pre-planned arrangement at lower costs.” Kurzman, col. 1, ll. 45–46. We thus find that at least because Wisecarver teaches a package “configured to display the panel(s) to a consumer at the time of sale,” it does not teach away from Kurzman’s goal of enabling workmen to select items, because both goals are consistent with each other. *See In re Gurley*, 27 F.3d at 553.

Appellants’ arguments on page 20 of the Brief to claims 23–30 only reference excerpts from the Specification describing problems solved by

“solutions to these problems [] addressed in claims 23-30” without pointing to specific language in the claims which effect the generalized solution and without pointing to specific parts of the references which do not meet the claim language. Therefore, these arguments are not persuasive. A general allegation that the art does not teach any of the claim limitations is no more than merely pointing out the claim limitations. A statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. 37 C.F.R. § 41.37(c)(1)(vii).

Appellants’ arguments to claim 11 on 6, page 20 likewise merely state that they “are nonobvious for at least the reasons stated above with reference to claim 1” and therefore they are not persuasive for the same reason given for claim 1.

CONCLUSIONS OF LAW

We conclude the Examiner did not err in rejecting claims 1, 2, 5–11, 23–26, 29 under 35 U.S.C. § 103(a) over McCoy in view of Therma-Tru and Ricereto.

We conclude the Examiner did not err in rejecting claims 6, 7, 21, 22, 27, 28, and 30 under 35 U.S.C. 103(a) over McCoy in view of Therma-Tru and Ricereto, and further in view of Melillo.

We conclude the Examiner did err in rejecting claim 30 under 35 U.S.C. § 103(a) over McCoy in view of Therma-Tru, Ricereto and Melillo.

We conclude the Examiner did not err in rejecting claims 1, 5–10, and 21–30 under 35 U.S.C. § 103(a) over Kurzman in view of Wisecarver and Ruppel.

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We conclude the Examiner did not err in rejecting claim 11 under 35 U.S.C. § 103(a) over Kurzman in view of Wisecarver and Ruppel in further view of Therma-Tru.

DECISION

The decision of the Examiner to reject claims 1, 2, 5–11 and 23–30 is affirmed.

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

AFFIRMED.