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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* SEAN CAROLAN and TIANNA JAISAARD

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Appeal 2017-008975  
Application 14/163,693  
Technology Center 1600

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Before RICHARD M. LEBOVITZ, ULRIKE W. JENKS, and  
RYAN H. FLAX, *Administrative Patent Judges*.

JENKS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants<sup>1</sup> submit this appeal<sup>2</sup> under 35 U.S.C. § 134(a) involving claims directed to a method of applying hair treatment. Examiner rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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<sup>1</sup> Appellants identify the Real Party in Interest as Sean Carolan and Tianna Jaissard. Appeal Br. 1.

<sup>2</sup> This opinion considers the Final Office Action mailed June 2, 2016 (“Final Act.”), the Appeal Brief submitted December 19, 2016 (“Appeal Br.”), the revised Claims Appendix submitted January 25, 2017 (“Claims Appendix”), the Examiner’s Answer mailed April 6, 2017 (“Ans.”), and the Reply Brief submitted June 5, 2017 (“Reply Br.”).

### STATEMENT OF THE CASE

In beauty regimes “[h]eat is widely considered synonymous with absorption or penetration, with an[] example being massage oils, which are typically heated before application to the skin and body.” Spec. 1:10–12. Examples of other heat treatments include: hot oil hair treatment, hot wax treatment for hair removal, or moisturizing treatment. *Id.* at 7:20–22.

Claims 23–31 are on appeal, and can be found in the Claims Appendix. Claim 23 is representative of the claims on appeal, and reads as follows:

23. A method for application of a treatment material to head hair of a user comprising:

supplying the treatment material in a closed package containing the treatment material;

wherein the package is formed of a flexible plastics material which is impermeable and *is impermeably closed or sealed around all edges to form a fully sealed pouch*;

wherein the package includes reverse-printing of instructions information inside of the plastics material;

the package being formed of a laminate of plastic materials:

which is foil free;

which has an oxygen transfer rate (OTR) for it *to be heated correctly and consistently in a microwave oven or in a hot water bath without bursting and without escape of the treatment material while the package remains sealed*;

while the package remains sealed with the treatment material contained therein,

warming the material in a microwave oven;

forming an opening in the package;

removing the warmed treatment material from the package;

and applying the removed warmed treatment material directly onto the head hair of the user.

Claims Appendix 2 (emphasis added).

The claims stand rejected as follows:

- I. Claims 23, 24, 27, 29, and 31 under 35 U.S.C. § 103(a) as unpatentable over Boratyn,<sup>3</sup> Huffer,<sup>4</sup> and Utley.<sup>5</sup>
- II. Claims 26, 28, and 30 under 35 U.S.C. § 103(a) as unpatentable over Boratyn, Huffer, Utley, and Pineda.<sup>6</sup>
- III. Claim 25 under 35 U.S.C. § 103(a) as unpatentable over Boratyn, Huffer, Utley, and Lin.<sup>7</sup>

*Obviousness over Boratyn, Huffer, and Utley*

Appellants contend that the combination of references does not teach or suggest a bag made of flexible plastic material that “is impermeable and is impermeably closed or sealed around its edges to form a [fully] sealed pouch.” Appeal Br. 6; *see* Reply Br. 2. Appellants contend that “[a] vented package is of course NOT sealed.” Appeal Br. 6.

The dispositive issue on appeal is whether the preponderance of evidence of record supports Examiner’s conclusion that the combination of references renders obvious a package made of a flexible plastic material that is closed or sealed around all edges to form a fully sealed pouch that contains treatment material.

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<sup>3</sup> Diane C. Boratyn, US 6,136,329, issued October 24, 2000 (“Boratyn”).

<sup>4</sup> Scott Huffer, US 2003/0152296 A1, published August 14, 2003 (“Huffer”).

<sup>5</sup> Wayne S. Utley, US 5,410,857, issued May 2, 1995 (“Utley”).

<sup>6</sup> Edwin H. Pineda, US 2003/0211177 A1, published November 13, 2003 (“Pineda”).

<sup>7</sup> Irene H. Lin, US 2004/0069157 A1, published April 15, 2004 (“Lin”).

*Findings of Fact*

FF1. Boratyn teaches the use of an intra-lamellar gel, produced from marine algae, to enhance the condition of skin and hair. Boratyn Abstract. In addition to the intra-lamellar gel the composition can also contain milt. *Id.* “The isolated milt, typically 4–5 ml, can [be] placed in any suitable container, such as [] small plastic bags, and is preferably flooded with oxygen and sealed.” *Id.* at 8:12–14. To avoid deterioration the milt can be frozen and thawed by microwaving. *Id.* at 8:23–26.

FF2. Huffer teaches a plastic bag with a seal and vent. Figure 1, reproduced below, shows such a bag.

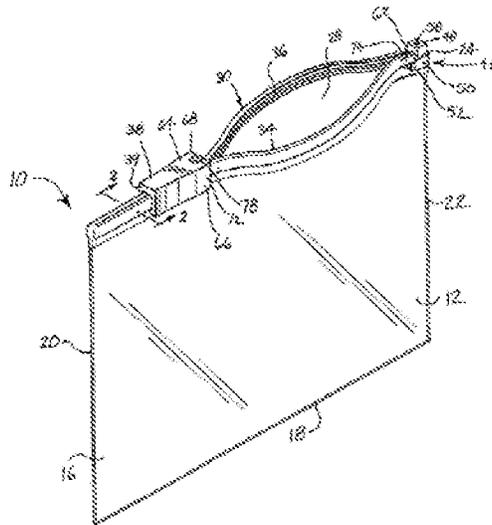


Figure 1, shows container 10 that includes two rectangular panels (12, 14) that are secured to gather to form bag 16. Huffer ¶ 19. The panels have an upper edge that allows access to the bags interior. *Id.* The materials that make up panels 12 and 14 need to be sufficiently flexible and capable of withstanding conditions imposed by microwave cooking of the contained substance. *Id.* ¶ 20. Valve

assembly 46 includes vent member 48. *Id.* ¶ 27. The vent member includes an

internal passage 54 of the venting member 48 provides an exit flow path for discharge of a pressurized fluid from the interior of the bag 16 to an exterior location. . . . The vent member 48 of valve assembly 46 therefore prevents bursting of the bag 16 by providing for venting of pressurized fluid from the bag interior.

*Id.* ¶ 28.

*Principle of Law*

A prima facie case for obviousness “requires a suggestion of all limitations in a claim,” *CFMT, Inc. v. Yieldup Int’l Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) and “a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

*Analysis*

Examiner finds that Boratyn teaches treating hair with a material that may be placed in a plastic bag. Ans. 5. Examiner acknowledges that “Boratyn does not teach limitations to the plastic bag such as the oxygen transfer rate or reverse printing (a way to label the bag with instructions).” *Id.* Examiner looks to the teachings of Huffer to disclose a bag that remains sealed while being heated. *Id.*, *see also id.* at 6 (“Huffer provides for a way of venting the sealed bag so that microwave heating can be accomplished without having pressure build up in the bag (which would cause it to explode).”).

Appellants contend that “[a] vented package is of course NOT sealed.” Appeal Br. 6.

We find Appellants' argument persuasive. A bag that has a valve which allows for the escape of pressurized air or fluids in order to prevent the bag from exploding, reasonably suggests that the bag itself is not fully sealed because fluid can exit from inside the bag. *See* FF2.

Examiner takes the position that “[t]he instant claim does not indicate that a valve or another structure cannot be present for the release of pressurized fluids while allowing the bag to remain sealed during heating. It is noted that the bag of Huffer will not burst during heating.” Ans. 11. Here, the reason that Huffer's bag will not burst during microwave heating is that it contains a vent member. FF2. The vent member includes an internal passage and provides an exit flow path for discharge of pressurized air or pressurized fluid from the interior of the bag to an exterior location and thereby prevents the bag from bursting. FF2. Although we agree with Examiner's position that Huffer's bag is designed to prevent bursting if the bag is heated in a microwave, this advantage comes with the required design of having a vent which is an opening between the interior and exterior of the bag.

The claim, however, recites a package that “is impermeably closed or sealed around all edges to form a fully sealed pouch.” The Specification does not provide a definition for “impermeable,” but the ordinary and customary meaning of impermeable<sup>8</sup> is “not permitting passage (as of a fluid) through its substance.” Therefore, a reasonable interpretation of something that is impermeably closed would suggest that it does not allow

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<sup>8</sup> Definition of “impermeable,” <https://www.merriam-webster.com/dictionary/impermeable>, last visited January 16, 2019.

fluid to pass. Huffer's bag does not meet this impermeable limitation because fluid can escape through the vent. FF2.

Even if we were to interpret that the claim limitation of "sealed around all edges to form a fully sealed pouch" could encompass a bag that includes a vent as suggest by Examiner, the bag disclosed in Huffer still would not meet the claim limitation "which has an oxygen transfer rate (OTR) for it to be heated correctly and consistently in a microwave oven or in a hot water bath without bursting and *without escape of the treatment material while the package remains sealed*" as claimed. Here, Huffer's vent clearly is taught to release fluid in the event pressure inside the bad gets too high. FF2. However, the claim does not allow for the escape of treatment material while the package remains sealed, and Huffer's bag does not meet this limitation. FF2.

The preponderance of the evidence of record does not support Examiner's conclusion that the combination of Boratyn, Huffer, and Utlely discloses a method having all limitations of independent claim 23 and dependent claims thereto. We thus reverse the rejections under 35 U.S.C. § 103(a) that rely on the teachings of Boratyn, Huffer, and Utlely.

#### SUMMARY

We reverse the rejection of all claims.

REVERSED