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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* MICHAEL ANTHONY STOPP

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Appeal 2018-003111  
Application 14/050,712  
Technology Center 3700

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Before DANIEL S. SONG, ANNETTE R. REIMERS, and JILL D. HILL,  
*Administrative Patent Judges.*

HILL, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 11, 13–15, 23, 25, 26, 28–32, and 37–39.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Pratt Corrugated Holdings, Inc. Appeal Br. 2.

<sup>2</sup> Claims 1–10, 12, 16–22, 24, 27, 33–36, and 40 have been cancelled. Appeal Br. 34–44 (Claims App.).

## BACKGROUND

Independent claims 11, 26, and 31 are pending. Claim 11, reproduced below, illustrates the claimed invention:

11. A packaging system comprising:

a blank, the blank including

a main body comprising a top body end, a bottom body end, a left body end, and a right body end; each of the top body end and the bottom body end comprising a first portion, a second portion, and a third portion; each of the left body end and the right body end comprising a first portion and a second portion;

a first top end support comprising

a top end,

a bottom end distal from the top end,

a right end extending from the top end to the bottom end, the right end angled at a 90-degree angle with respect to the top end, and

a left end distal from the right end, proximate to the left body end, and extending from the top end to the bottom end, the left end angled at a non-90-degree angle with respect to the top end,

wherein the bottom end of the first top end support is connected to the first portion of the top body end by a bend line;

a second top end support comprising

a top end,

a bottom end distal from the top end,

a left end extending from the top end to the bottom end, the left end angled at a 90-degree angle with respect to the top end, and

a right end distal from the left end and extending from the top end to the bottom end, the right end angled at a 90-degree angle with respect to the top end,

- wherein the bottom end of the second top end support is connected to the second portion of the top body end by a bend line;
- a third top end support connected to the third portion of the top body end by a bend line;
- a first bottom end support connected to the first portion of the bottom body end by a bend line;
- a second bottom end support connected to the second portion of the bottom body end by a bend line;
- a third bottom end support connected to the third portion of the bottom body end by a bend line;
- a first left end support connected to the first portion of the left body end by a bend line;
- a second left end support connected to the second portion of the left body end by a bend line;
- a first right end support connected to the first portion of the right body end by a bend line;
- a second right end support connected to the second portion of the right body end by a bend line;
- a first top support brace connected to the top body end of the main body and positioned between the first top end support and the second top end support;
- a second top support brace connected to the top body end of the main body and positioned between the second top end support and the third top end support;
- a first bottom support brace connected to the bottom body end of the main body and positioned between the first bottom end support and the second bottom end support;
- a second bottom support brace connected to the bottom body end of the main body and positioned between the second bottom end support and the third bottom end support;

- a left support brace connected to the left body end of the main body and positioned between the first left end support and the second left end support; and
  - a right support brace connected to the right body end of the main body and positioned between the first right end support and the second right end support;
  - wherein each of the first top support brace, the second top support brace, the first bottom support brace, the second bottom support brace, the left support brace, and the right support brace comprises a plurality of adjustability contour bend lines configured to allow adjustability of the position of each support brace for various sized fragile items, each of the adjustability contour bend lines being an internal bend line;
  - a box, the box including a front side and a back side distal from the front side, wherein:
    - the blank is placed in the box such that the blank contacts each of the front side and the back side;
    - an inner surface of the main body faces a one of the front side and the back side; and
    - the main body is not in contact with the front side and the back side; and
- shrinkwrapping.

## REJECTIONS

- I. Claims 11, 13–15, 23, 25, 26, 28–32, and 37–39 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Final Act. 6.
- II. Claims 11, 13–15, 23, 25, 26, 28–32, and 37–39 stand rejected under 35 U.S.C. § 112, second paragraph, as indefinite. Final Act. 10.
- III. Claims 11, 13–15, 23, 25, 26, 28–32, and 37–39 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Sullivan (US 4,865,200,

issued Sept. 12, 1989), Carroll, Jr. (US 7,731,028 B2, issued June 8, 2010) (“Carroll”), and Smith (US 6,158,589, issued Dec. 12, 2000). Final Act. 11.

## ANALYSIS

### *Rejection I – Written Description*

The Examiner generally finds that Appellant’s non-original claim limitations specifying “angles of any kind between ends of the supports,” except for limitations encompassing the specific subject matter recited in the originally-filed Specification, “was not described in the [S]pecification so as to show possession of the claimed invention by applicant.” Final Act. 7 (emphasis omitted). The Examiner further finds that claim limitations of “non-90-degree angle” and “non-square angle” violate the written description requirement “because the claimed subject matter was not described in the [S]pecification in the manner required by the Statute.” *Id.* at 7–8. According to the Examiner, (1) “the particular ends that constitute ‘the other ends’ in the first sentence are not properly described. It is not clear which ends are being referred to”; (2) it is not clear which angle is “the angle” that is claimed to be approximately forty five degrees; and (3) it is unclear what a 0 degree angle or a 90 degree angle would be. *Id.* at 8.

“An objective standard for determining compliance with the written description requirement is, ‘does the description clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’” MPEP § 2163.02 (citing *In re Gosteli*, 872 F.2d 1008, 1012 (Fed. Cir. 1989)). An annotated version of Appellant’s originally-filed Figure 1 is presented below, wherein we have indicated the top end support “angles” recited in claim 11.



4:26–29). Figure 1 illustrates an exemplary embodiment of the angles of each free end of each end support.

While there may be additional “ends” of each support end that are not specifically accounted for in the claims and the Specification, and the term non-90-degree angle may be broad (*see* Ans. 5–8), we do not agree that these facts prevent a reasonable and definite scope of the claims being determined when the claims are read in light of Figure 1 and Appellant’s original description thereof.

The Examiner also mentions claims 37 and 38 in the written description rejection. Final Act. 10. In the Answer, the Examiner explains that the bend lines recited in claims 37 and 38 “are not numbered and are not specifically shown in any drawing.” Ans. 10. Dependent claim 37 recites “the bend line connecting the first top end support to the main body [being] offset from the bend line connecting the first top support brace to the main body.” Dependent claim 38 recites “the bend line connecting the first top support brace to the main body [being] positioned inside of the bend line connecting the first top end support to the main body relative to the top body end of the main body.”

We are not persuaded by the Examiner’s findings and conclusions. *See* Ans. 10–13. Although the various bend lines are not numbered in Appellant’s drawings, Appellant’s original Specification explains that: “[a]ll connections as described with reference to the current embodiment are by bend lines”; “the various supports (120,130,140,150,160,170 180,190,210,220) are connected to the main body 110 by bend lines”; and “the various support braces (230,240,260,270,280,290) are connected to the main body 110 by bend lines.” Spec. 5:27, 6:1–3. Given this disclosure, a

reasonable and definite scope of the claims can be determined when the claims are read in light of Figure 1 and Appellant's original description thereof.

The objective standard for determining compliance with the written description requirement is whether the description clearly allows a skilled artisan to recognize that the inventor invented what is claimed. In determining claim scope, while limitations should not be imported from the Specification into the claims, the claims are nevertheless construed in light of the Specification, rather than in a vacuum. Given Appellant's original disclosure outlined above, the Examiner's findings and conclusions do not persuade us that Appellant's written description fails to allow a skilled artisan to recognize that the inventor invented what is claimed. For this reason, we do not sustain the written description rejection.

*Rejection II – Indefiniteness*

The Examiner finds that “the noted claim limitations with regard to the various angles between the various ends . . . cannot properly be interpreted because the features encompassed thereby were not properly described in the [S]pecification.” Final Act. 10.

A decision on indefiniteness requires a determination of whether a skilled artisan would understand what is claimed when a claim is read in light of the Specification. *See Power-One, Inc. v. Artesyn Techs., Inc.*, 599 F.3d 1343, 1350 (Fed. Cir. 2010); *see also Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565 (Fed. Cir. 1986).

The Examiner makes no determination that a skilled artisan would not understand what is claimed when the rejected claims are read in light of Appellant's Specification. Lacking such a determination, we do not sustain

the indefiniteness rejection. The Examiner's arguments set forth in the written description rejection cannot support a determination of indefiniteness.

The Examiner also mentions claims 37 and 38 in the indefiniteness rejection. Final Act. 10. In the Answer the Examiner explains that the bend lines "are not numbered and are not specifically shown in any drawing." Ans. 10. As explained above, these claims are directed to bend lines between the main body and the supports/support braces. The Examiner makes no determination that a skilled artisan would not understand what is claimed when the rejected claims are read in light of Appellant's Specification. Lacking such a determination, we do not sustain the indefiniteness rejection. The Examiner's arguments set forth in the written description rejection cannot support a determination of indefiniteness.

The Examiner also finds that claim 29 is indefinite because "the references to the left and right support braces towards the end of the claim" lack antecedent basis. Final Act. 11. Because the pending version of claim 29 does not include any support braces, we discern no antecedent basis issue.

For the reasons explained above, we do not sustain the indefiniteness rejection.

### *Rejection III – Obviousness*

#### *Claims 11, 13–15, 23, and 25*

Appellant argues claims 11, 13–15, 23, and 25 as a group. Appeal Br. 26. We select independent claim 11 as representative. Claims 13–15, 23, and 25 stand or fall with claim 11.

The Examiner finds that Sullivan discloses “a blank (Fig 1, top part of the Figure) with supports (walls 19) . . . and support braces (flaps 16),” a box as shown in Figure 1, the supports 19 spacing the main body of the blank away from at least one side or main face of the box. Final Act. 11–12. The Examiner finds that Sullivan does not disclose (1) “the specific number and arrangement of the supports and support braces claimed,” (2) shrink wrapping “(the reference does teach straps 18 instead),” (3) a “non-90-degree angle,” or (4) “the spacing of the main body of the blank away from two sides or main faces of the box.” *Id.* at 12 (emphasis omitted).

The Examiner finds, however, that Carroll discloses using more than one support brace (tabs 12) “per side of a blank.” Final Act. 12 (citing Carroll 5:47–59, 6:42–49). Indeed, Carroll’s Figure 3 shows two support braces 33, 34, with bend lines, that divide its blank such that it includes three end supports along its bottom. *See* Carroll, Fig. 3, 3:32–34, 3:53–58. According to the Examiner, Carroll’s “wings 26w can correspond to the claimed supports since the panels or wings and the panels to which they are attached can be spaced apart by the support braces on the top and bottom of the blank and are folded to space the blank from a carton wall.” Final Act. 12. Carroll also discloses “stretch film wrapping around the support braces to hold the glass panel to the blank.” *Id.* Carroll additionally discloses “score lines 36 on the support braces corresponding to the claimed adjustability contour bend lines.” *Id.* at 13.

The Examiner then finds that Smith discloses

knowledge in the art of the non-90-degree feature (described above, for example, with respect to the orientation of ends 126 and 148), the folding of insert flaps to space the insert from

both sides or main faces of a box and shrinkwrapping to hold a product to a face of an insert.

*Id.*

The Examiner concludes that it would have been obvious, in view of Carroll and Smith, “to provide the apparatus of Sullivan with all of the elements of the claims as a matter of obvious choice of design” or “to provide superior protection to a packaged article in the Sullivan apparatus.”

*Id.*

Appellant argues that “none of the three cited references used in the rejection (i.e., Sullivan, Carroll, or Smith) disclose *all of*

a first top end support comprising . . . a right end extending from the top end to the bottom end [and] angled at a 90-degree angle with respect to the top end, and a left end . . . extending from the top end to the bottom end [and] *angled at a non-90-degree angle with respect to the top end.*

Appeal Br. 22 (emphasis added). Appellant continues that “the only reference showing angled edges (Smith) . . . only mentions the use of a box in the written description and not in any of the figures,” and does not identify “or describe, much less ascribe a single benefit to” and angles ends of its flaps, such that “Smith cannot properly support the contention that it would be conventional to angle the edges of a blank as claimed.” *Id.* at 22–23.

This argument is not persuasive. One cannot establish non-obviousness by attacking references individually where, as here, the rejections are based on a combinations of references. *See In re Keller*, 642 F.2d 413 (CCPA 1981); *see also In re Merck & Co.*, 800 F.2d 1091 (Fed. Cir. 1986). Appellant’s argument does not address the Examiner’s proposed combination of references, where the Examiner modifies Sullivan’s end

supports in view of, *inter alia*, Smith's end supports' tapered angle shown in its Figures 4, 5, and 8–28. That Smith does not discuss the taper shown in its Figures, or the purpose of such taper, does not negate its teaching thereof or its availability as a teaching that can be combined with Sullivan. Smith is available for what it teaches a skilled artisan, which is angled supports for a blank. Drawings can be relied on for what they reasonably disclose and suggest to one of ordinary skill in the art. *See In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972); *In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979). Appellant does not contend that a skilled artisan would not appreciate the tapering of Smith's end supports.

Appellant also argues that the Examiner's proposed combination of Sullivan, Carroll, and Smith "fails to provide an 'instant and unquestionable demonstration as to defy dispute' that incorporating a non-90-degree angle into the 'blank' . . . is 'well known' in the art." Appeal Br. 23.

The Final Action, however, does not contend that an end support having a non-90-degree angle was "well known." Rather, the Examiner finds that Smith discloses an end support with a non-90-degree angle, such that the tapering represented thereby was known in the art. Indeed, even if such a taper is not established to be "well known," it has certainly been established as "known," via the disclosure of Smith.

Appellant next argues that the Examiner's proposed combination of Sullivan, Carroll, and Smith "fails to disclose, teach, or suggest 'a third top end support connected to the third portion of the top body end by a bend line' and 'a third bottom end support connected to the third portion of the bottom body end by a bend line' as claimed." Appeal Br. 23–24. Appellant appears to base this argument on a contention that the Examiner's proposed

modification would render Carroll unsatisfactory for its intended purpose. *Id.* This argument is not persuasive, because the Examiner’s proposed combination modifies Sullivan rather than Carroll. In any event, if Appellant’s argument is that Sullivan only discloses two top end supports and two bottom end supports, this argument is unpersuasive because the rejection modifies Sullivan in view of Carroll that discloses using more than one support brace (tabs 12) per side of the blank. Final Act. 12. In that regard, we observe that when additional support braces are used on the top and bottom as suggested, a third top end support and a third bottom end support necessarily result.

Appellant further argues that the Examiner’s proposed combination “fail[s] to disclose, teach, or suggest” the claimed support braces, wherein each of the support braces “*comprises a plurality of adjustability contour bend lines* configured to allow adjustability of the position of each support brace for various sized fragile items, each of the adjustability contour bend lines being an internal bend line’ as claimed.” Appeal Br. 25.

The Examiner responds that Carroll discloses adjustability contour bend lines 36 in its Figure 3. Ans. 16. Indeed, regarding its Figure 3, Carroll discloses that “[t]he bottom edge 32 is notched at four places to form two tabs 33 and 34 with light score lines such as 36 to facilitate folding them forward.” Carroll 3:32–34. Appellant does not explain how score lines that facilitate folding differ from the claimed bend lines, and we discern no such difference or patentable distinction. Thus, we discern no error in the Examiner’s finding that Carroll discloses support braces 33, 34 having plural adjustability contour bend lines 36.

Appellant finally argues that, because “some of the Office Action’s allegations are not supported by any of the cited references and the only support provided for such a modification is Appellant’s own [S]pecification, the Office Action plainly includes impermissible hindsight reasoning.” Appeal Br. 25 (citing MPEP §§ 2142, 2145(X)(A)). According to Appellant, “[t]he benefit of using a non-90-degree angle . . . has not been cited in any of the cited references and the alleged ‘non-90-degree angle’ in Smith is not even identified in Smith by even a reference number or described in the [S]pecification.” *Id.* at 25–26.

Appellant’s argument regarding hindsight is not persuasive. To the extent that Appellant is arguing that the prior art lacking elements of the claim (as discussed above) required the Examiner to employ hindsight to “fill in the blanks,” we disagree that the prior art lacked any elements for the reasons explained above. To the extent Appellant is challenging the Examiner’s reasoning as lacking a rational basis, Appellant has not provided a sufficient explanation.

Any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant’s disclosure, such a reconstruction is proper.

*In re McLaughlin*, 443 F.2d 1392, 1395 (CCPA 1971). The Examiner concludes that it would have been obvious, in view of Carroll and Smith, “to provide the apparatus of Sullivan with all of the elements of the claims as a matter of obvious choice of design” or “to provide superior protection to a packaged article in the Sullivan apparatus.” Final Act. 13. Appellant has

not explained why this reasoning lacks a rational basis or includes knowledge gleaned only from Appellant's disclosure.

For the reasons explained above, we sustain the obviousness rejection of claim 11. Claims 13–15, 23, and 25 fall with claim 11.

*Claims 26 and 28–30*

Appellant argues claims 26 and 28–30 as a group. Appeal Br. 30. We select claim independent claim 26 as representative. Claims 28–30 stand or fall with claim 26. In arguing the patentability of independent claim 26, Appellant relies on the arguments set forth above regarding claim 11. Thus, for the reasons set forth above, we are not persuaded that the Examiner erred in determining that independent claim 26 is unpatentable over Sullivan, Carroll, and Smith. Claims 28–30 fall with claim 26.

*Claims 31, 32, and 37–39*

Appellant argues claims 31, 32, and 37–39 as a group. Appeal Br. 33. We select claim independent claim 31 as representative. Claims 32 and 37–39 stand or fall with claim 31. In arguing the patentability of independent claim 31, Appellant relies only on certain arguments set forth above regarding claim 11. Thus, for the reasons set forth above, we are not persuaded that the Examiner erred in determining that independent claim 31 is unpatentable over Sullivan, Carroll, and Smith. Claims 32 and 37–39 fall with claim 31.

DECISION SUMMARY

In summary:

| <b>Claims Rejected</b>              | <b>35 U.S.C. §</b> | <b>Basis</b>             | <b>Affirmed</b>                     | <b>Reversed</b>                     |
|-------------------------------------|--------------------|--------------------------|-------------------------------------|-------------------------------------|
| 11, 13–15, 23, 25, 26, 28–32, 37–39 | 112, ¶ 1           |                          |                                     | 11, 13–15, 23, 25, 26, 28–32, 37–39 |
| 11, 13–15, 23, 25, 26, 28–32, 37–39 | 112, ¶ 2           |                          |                                     | 11, 13–15, 23, 25, 26, 28–32, 37–39 |
| 11, 13–15, 23, 25, 26, 28–32, 37–39 | 103                | Sullivan, Carroll, Smith | 11, 13–15, 23, 25, 26, 28–32, 37–39 |                                     |
| <b>Overall Outcome</b>              |                    |                          | 11, 13–15, 23, 25, 26, 28–32, 37–39 |                                     |

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). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED