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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIAN C. DAIS, IMTIAZ A. MUSALIAR, BUNLIM LY,
JONATHAN DAVID HORN, PAMELA J. WEISENBERGER,
JOSE PORCHIA, CHARLES P. ALTHOFF, and ERICA EDEN COHEN

Appeal 2018-003724
Application 13/631,617
Technology Center 3700

Before JAMES P. CALVE, MICHELLE R. OSINSKI, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 9–15 and 23–29. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as S.C. Johnson & Son, Inc. Appeal Br. 3.

CLAIMED SUBJECT MATTER

The claims are directed to a storage bag. Claims 9 and 23 are independent. Claim 9, reproduced below, is illustrative of the claimed subject matter:

9. A storage bag comprising:

(a) a first side wall;

(b) a second side wall connected to the first side wall so as to form an interior of the bag with an opening to the interior;

(c) a first closure profile connected to first side wall and positioned adjacent to the opening of the bag, the first closure profile having a top edge and including a first interlocking member and a second interlocking member that both extend between a first end of the first closure profile and a second end of the first closure profile, the first closure profile including a plurality of dimples provided between the first interlocking member and the second interlocking member of the first closure profile, the first closure profile further forming a lip between the first interlocking member and the top edge of the first closure profile, with the lip comprising a single, continuous web extending a substantially constant distance H1 from the first interlocking member to the top edge of the first closure profile, wherein the lip of the first closure profile extends the substantially constant distance H1 along the length of the first closure profile starting from the first end of the first closure profile to the second end of the first closure profile;

(d) a second closure profile connected to the second side wall and positioned adjacent to the opening of the bag, the second closure profile having a top edge and including a first interlocking member and a second interlocking member that both extend between a first end of the second closure profile and a second end of the second closure profile, the first interlocking member of the second closure profile being configured to interlock with the first interlocking member of the first closure profile, and the second interlocking member of the second closure profile being configured to interlock with the second interlocking member of the first closure profile, the second

closure profile further forming a lip between the first interlocking member and the top edge of the second closure profile, the second closure profile being configured such that the lip comprises a single, continuous web with (i) a first portion of the lip extending a substantially constant distance H2 from the first interlocking member to the top edge of the second closure profile along a portion of the length of the second closure profile starting from the first end, (ii) a second portion of the lip extending a substantially constant distance H3 from the first interlocking member to the top edge of the second closure profile along a portion of the length of the second closure profile starting from the second end, and (iii) a third portion of the lip being provided between the first portion of the lip and the second portion of the lip, with the third portion extending a substantially constant distance H4 from the first interlocking member to the top edge of the second closure profile; and

(e) an extended region provided at the top edge of the second closure profile, the extended region being formed by at least a region of the third portion of the lip of the second closure profile that extends above the lip of the first closure profile, with the distance H4 being greater than the distance H1, wherein the extended region extends along a portion of the length of the second closure profile that is greater than that of at least one of the first portion of the lip of the second closure profile and the second portion of the lip of the second closure profile, such that the extended region provides a visual cue to a user as to where to grasp the lips of the first and second closure profiles in order to impart a rolling motion to the lips that facilitates separation of the first and second closure profiles and opening of the bag, and

wherein the dimples of the first closure profile are formed as a concave surface on the side of the first closure profile facing the interior of the bag and a convex surface on the side of the first closure profile on the outside of the bag in order to provide at least one of a visual cue and a tactile feedback to a user when interlocking the first interlocking member of the first closure profile with the first interlocking member of the second closure profile and the second interlocking member of the first closure profile with the second interlocking member of the second closure profile.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Naya	5,369,847	Dec. 6, 1994
Rider	5,762,231	June 9, 1998
Miller	US 2008/0063325 A1	Mar. 13, 2008
Ackerman	US 2010/0303390 A1	Dec. 2, 2010
Fish	US 2011/0044566 A1	Feb. 24, 2011

REJECTIONS

Claims 9–13 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Naya, Rider, Ackerman, and Fish.

Claims 14 and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Naya, Rider, Ackerman, Fish, and Miller.

Claims 23–29 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Naya, Rider, and Ackerman.

Claims 28 and 29 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Naya, Rider, Ackerman, and Miller.

OPINION

Appellant presents arguments directed to independent claims 9 and 23, and relies on those arguments for the patentability of the claims depending therefrom. Appeal Br. 12–25. Although claims 9 and 23 are addressed in separate rejections, the findings and rationale disputed by Appellant are the same in both rejections. *See* Final Act. 2–9, 11–18; Appeal Br. 15–24. Appellant’s arguments focus on the differing heights of the lips of the closure profiles recited in claims 9 and 23. The limitations at

issue are similar in claims 9 and 23, and Appellant's arguments do not distinguish between claims 9 and 23. For simplicity, our discussion focuses on the lips recited in claim 9, with the understanding that discussion applies equally to the similar features recited in claim 23.

Claim 9 is directed to a storage bag having "a first side wall" and "a second side wall connected to the first side wall so as to form an interior of the bag with an opening to the interior." The "first side wall" includes "a first closure profile" having a "lip" (hereinafter "the first lip") at its end. The "second side wall" includes "a second closure profile" and also has a "lip" (hereinafter "the second lip") at its end. The second lip has first and second portions at ends thereof, and a third portion between the first and second portions. The third portion of the second lip extends beyond a portion of the first lip, forming an "extended region" (i.e., "the distance H4 being greater than the distance H1"). The claim does not specify how the extent of the first and second portions (having distances H2, H3) of the second lip relates to the extent (H1) of the first lip. The claim also does not require any particular relationship between H2, H3, or H4. The "extended region" is only defined as being "extended" relative to the first lip.

Appellant's Figure 7 is reproduced below to illustrate the claim limitations at issue.

FIG. 1

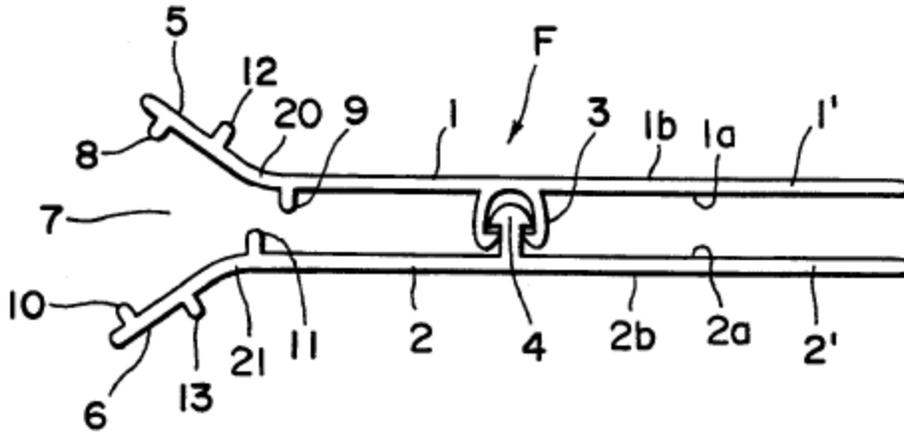
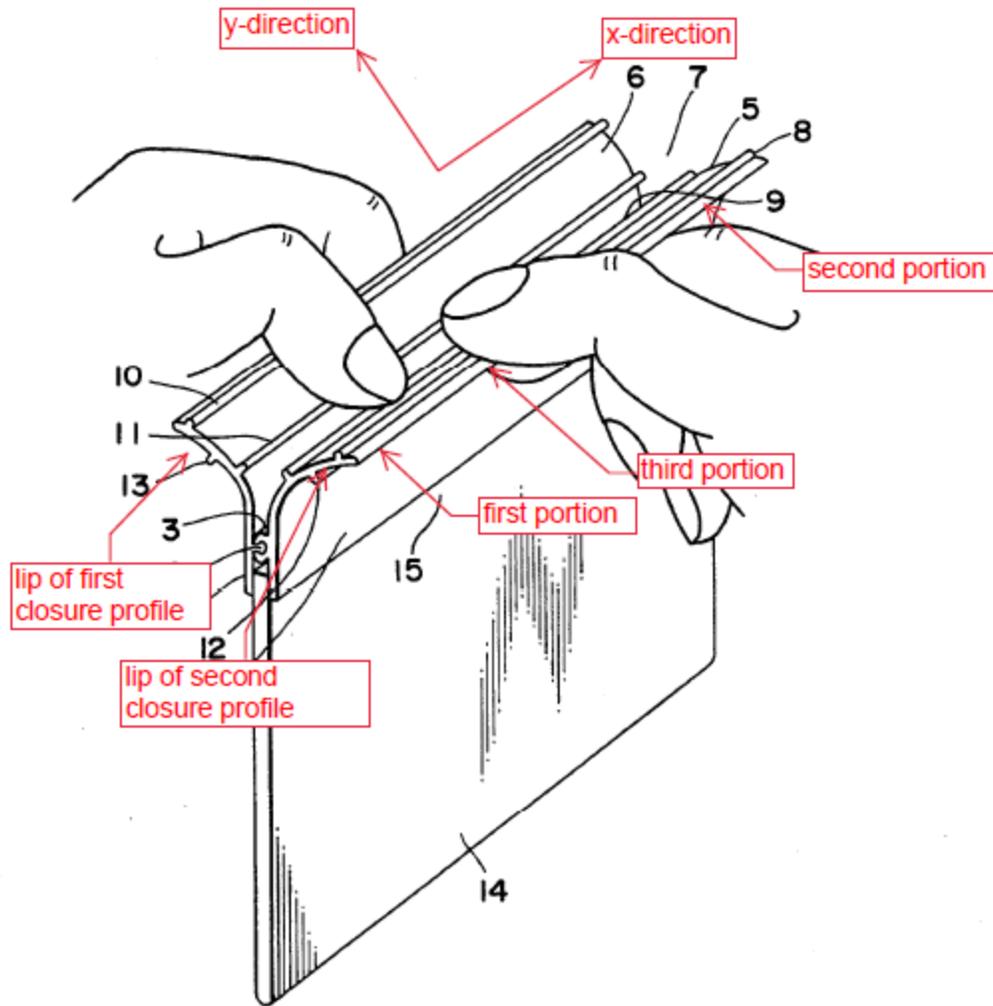


Figure 1 is a side view of the closure mechanism of Naya's bag. Naya explains that "one marginal grip portion 5 is formed shorter than the other grip portion 6." Naya 2:50-51.

FIG. 3

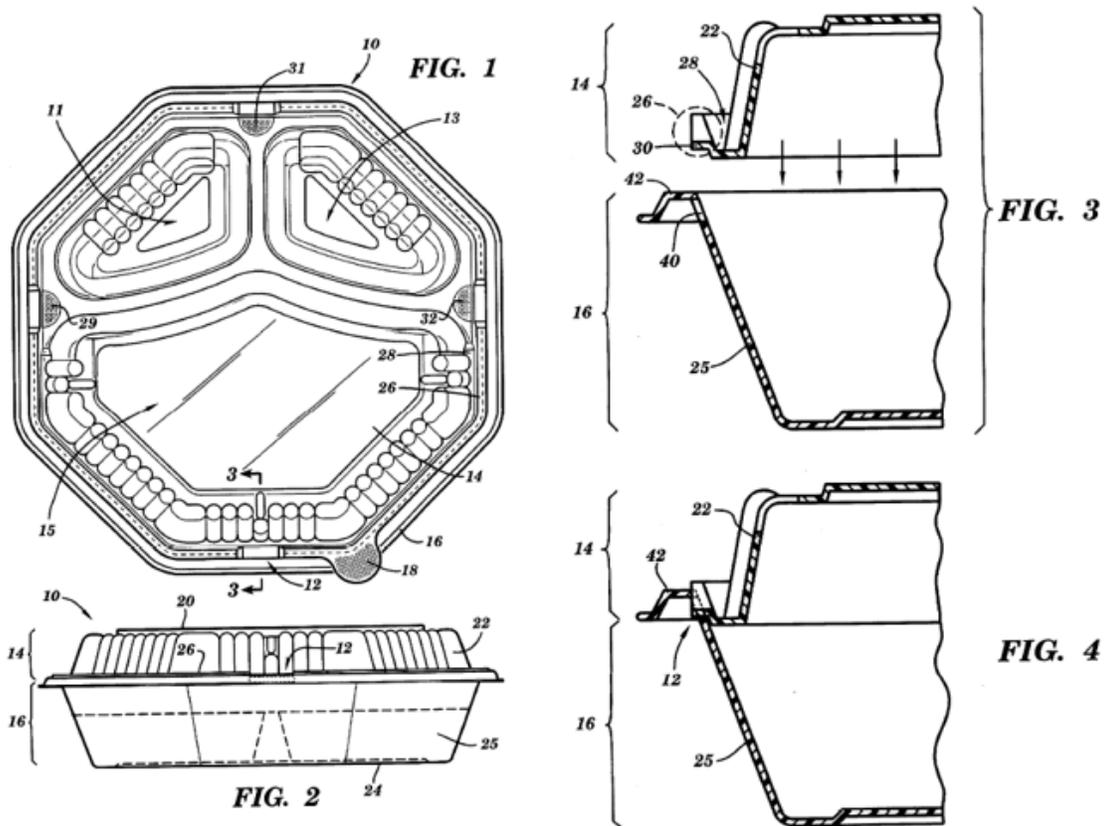


The annotated version of Naya's Figure 3 is a perspective view of Naya's bag depicting the closure mechanism of Figure 1 in use, and includes annotations indicating the features the Examiner considers to correspond to various claim elements, as well as our annotations indicating directions to facilitate discussion.

The Examiner finds that Naya teaches a first closure profile forming a lip 6 (corresponding to Appellant's first lip) and a second closure profile

forming a lip 5 (corresponding to Appellant’s second lip), and that “the lip [(5)] comprises a single, continuous web with (i) a first portion of the lip extending a substantially constant distance H2 . . . [and] a second portion of the lip extending a substantially constant distance H3.” Final Act. 3 (citing Naya 2:15–68, 3:1–16, Figs. 1 and 3).²

The Examiner finds that “Naya fails to teach . . . the lip (5) of the second closure profile having a third portion provided between the first portion . . . and the second portion . . . with the third portion extending a substantially constant distance H4 . . . greater than the distance H1.” Final Act. 4. The Examiner finds that Rider teaches these missing limitations. *Id.* at 4–5. Figures 1–4 of Rider are reproduced below.



² Because the relevant portions of the rejection of claim 23 are similar, for simplicity, we cite only to the rejection of claim 9.

Figures 1 and 2 are front and top views, respectively, of Rider's container. Figures 3 and 4 are cross-sectional views of the closure of the container shown in Figure 1 with the closure opened and closed, respectively.

The Examiner finds that Rider teaches a storage container having a "first closure profile forming a lip (42) . . . extending a substantially constant distance H1" and a "second closure profile forming a lip (26)" with "a first portion of the lip extending a substantially constant distance H2 . . . and a second portion of the lip extending a substantially constant distance H3." *Id.* at 4-5. The Examiner additionally finds that Rider teaches "a third portion (18) extending between the first and second portions of the lip . . . extending a substantially constant distance H4 . . . greater than the distance H1." *Id.* at 5 (citing Rider 3:16-23, 38-41, 53-67, 4:1-8, Figs. 1-4 and 10). The Examiner reasons:

It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the bag of Naya by configuring the second closure profile such that the lip (5) comprises a third portion between the first and second portions of the lip, wherein the third portion extends a substantially constant distance H4 . . . greater than the distance H1 as taught by Rider in order to provide the bag with an additional means for distinguishing and separating the first side surface and first lip from the second side surface and second lip.

Final Act. 5-6.

The Examiner acknowledges that Naya and Rider do not teach "the third portion of the lip of the second closure profile . . . extending along a portion of the length of the second closure profile . . . greater than that of at least one of the first portion . . . and the second portion." Final Act. 6.

However, the Examiner finds that

Rider teaches that a portion of a lip which extends a greater distance from an interlocking member to a top edge of a closure

profile than any other portion of either lip functions to provide a user with a means for distinguishing and separating a . . . first closure profile from a . . . second closure profile so as to promote easy, intuitive opening of the container and/or to provide a user with a visual means of determining where the container is to be opened.

Id. The Examiner explains, for example, that “it would have been obvious and further an obvious matter of design choice to further modify the extended region of the lip to obtain the limitations as claimed” and “such modifications would not alter any function of the second closure profile or extended region, but rather would merely alter the appearance of the second closure profile and extended region.” *Id.* at 6–7.

In response, Appellant contends that

(a) neither Naya et al. nor Rider, Jr. et al. discloses or suggests, at least, an extended region provided at the top edge of a second closure profile, the extended region being formed by at least a region of a third portion of a lip of the second closure profile that extends above a lip of a first closure profile, wherein the extended region extends along a portion of the length of the second closure profile that is greater than that of at least one of the first portion of the lip of the second closure profile and the second portion of the lip of the second closure profile, such that the extended region provides a visual cue to a user as to where to grasp the lips of the first and second closure profiles in order to impart a rolling motion to the lips that facilitates separation of the first and second closure profiles and opening of the bag and
(b) one of ordinary skill in the art would not have found it obvious to combine the container of Rider, Jr. et al. with the pouch of Naya et al.

Appeal Br. 14 (emphasis omitted). Framing the dispute in such a broad characterization like this does not apprise us of error because it does not address particular findings and rationale made by the Examiner. As Appellant notes later in the brief, with respect to contention “(a)” above, the Examiner does not rely on a single reference for the disputed limitations.

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See, e.g., id. at 16–21. Nor does Appellant dispute the Examiner’s actual rationale for the combination of Rider’s teachings with those of Naya, as asserted in contention “(b).”

Appellant does not dispute the Examiner’s findings regarding Naya or that Rider’s third portion 18 extends between the first and second portions of its lip or that third portion 18 extends a substantially constant distance beyond the lip on the adjacent side of the bag, as explained above. Although Appellant contends that “it would not have been obvious . . . to remove the rigid rim (26) that is structurally attached to the cover (14) of the container (10) of Rider . . . and attach the rim (26) in some manner to the top of the pouch (14) of Naya,” Appellant later acknowledges that “[t]he final Office Action asserts . . . that it is the ‘configuration’ of the lip of the container of Rider . . . that is being used to modify the lip of the second closure profile of Naya,” rather than a bodily incorporation of Rider’s structure. Appeal Br. 21–22 (emphasis omitted). Appellant’s subsequent contention that “it is unclear how one of ordinary skill in the art would reconfigure the marginal grip portions (5, 6) of the flexible fastener (F) of Naya . . . to comprise the configuration of the edges of the cover (14) and the base (16) of the container of Rider” is unpersuasive for the same reason. *Id.* at 22 (emphasis omitted). That is, there is no meaningful dispute with respect to the Examiner’s findings and rationale related to modifying the third portion of the lip of Naya’s second closure profile 5 to extend in the y-direction beyond the lip of first closure profile 6 (seen above in our annotated version of Naya’s Figure 3).

The real dispute appears to be with the Examiner’s determination that having the extent of the third portion of the lip of Naya’s second closure profile 5 be greater in the x-direction than the first or second portions of that

lip is a matter of design choice. *See* Appeal Br. 20. Appellant’s contentions in this regard are also unpersuasive. Appellant simply states that “the size/extent of the extended region is not an obvious matter of design choice” because “the extended region is configured (i) to lead a user to grasp the lips at a center region of the bag where one of the lips extends above the other lip, and (ii) to allow for the user to impart a rolling motion . . . to facilitate the separation.” *Id.* As discussed above relative to Naya’s Figure 1, and not disputed by Appellant, however, Naya already teaches one lip being longer than another.

Appellant further disputes the Examiner’s determination of design choice, alleging that “neither Naya . . . nor Rider . . . provides a reason or motivation to modify a lip(s) of a storage bag to comprise the first, second, and third portions, as well as the extended region, of the lip of the second closure profile.” *Id.* As noted above, however, Appellant does not dispute the Examiner’s finding regarding Rider’s extension 18 or the rationale regarding modifying Naya’s bag based on that extension 18 (i.e., “in order to provide the bag with an additional means for distinguishing and separating the first side surface and first lip from the second side surface and second lip”). Final Act. 6.

Based on the record before us, the Examiner has the better position because we are not apprised of any meaningful functionality accomplished by the recited length of the third portion relative to the first and second portions. *See In re Dailey*, 357 F.2d 669, 672–73 (CCPA 1966) (affirming design choice determination where “Appellants have presented no argument which convinces us that the particular configuration of their container is significant or is anything more than one of numerous configurations a person of ordinary skill in the art would find obvious for the purpose of providing

mating surfaces in the collapsed container”). Appellant has not explained adequately, nor pointed out where the Specification explains, that the length of the third portion of the second lip in the x-direction has any bearing on the ability of the third portion to serve as a visual cue and/or allow a user to impart a rolling motion. *In re Chu*, 66 F.3d 292, 298–99 (Fed. Cir. 1995) (“design choice” is appropriate where the applicant fails to set forth any reasons why the differences between the claimed invention and the prior art would result in a different function).

Accordingly, we are not apprised of Examiner error in the rejection of claims 9–15 and 23–29.

Moreover, to the extent a difference in height (y-direction) between opposite lips with a larger extent at the central region is somehow better, before the Examiner’s proposed modifications, Naya, itself, teaches a bag having lips with differing heights (y-direction). Each of those lips extends the *entire* length of the bag. That is, the length (x-direction) of the extended region of the lip having the greater height (y-direction), which is lip 6 in Naya, has the maximum possible length (i.e., the entire extent). Further, although the Examiner’s proposed modification involves modifying Naya’s lip 5, it could have proceeded in the opposite manner and involved modifications to lip 6, which, as noted above, already extends beyond lip 5 (y-direction) along its entire length (x-direction). Under such a scenario, no modification to the lips would even be needed to meet the relative height limitations recited in claims 9 and 23 because lip 6 (second lip) already extends beyond lip 5 (first lip) and there is no height relationship between the various portions of the second lip recited in claims 9 and 23.

CONCLUSION

The Examiner's rejections are affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
9-13	103(a)	Naya, Rider, Ackerman, Fish	9-13	
14, 15	103(a)	Naya, Rider, Ackerman, Fish, Miller	14, 15	
23-29	103(a)	Naya, Rider, Ackerman	23-29	
28, 29	103(a)	Naya, Rider, Ackerman, Miller	28, 29	
Overall Outcome			9-15, 23-29	

TIME PERIOD FOR RESPONSE

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