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THE WEBB LAW FIRM, P.C. ONE GATEWAY CENTER 420 FT. DUQUESNE BLVD, SUITE 1200 PITTSBURGH, PA 15222			STEVENS, ALLAN D	
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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* JELMER JONGSMA and  
JOHAN WILLEM ROETERDINK

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Appeal 2018-004137  
Application 13/519,485  
Technology Center 3700

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Before MICHAEL L. HOELTER, BENJAMIN D. M. WOOD, and  
NATHAN A. ENGELS, *Administrative Patent Judges*.

WOOD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from a rejection of claims 1, 8–11, 14, and 18. Claims 2–7, 12, 13, 15–17, and 19 have been canceled. Appeal Br. 5. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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<sup>1</sup> “Appellant” refers to the applicant as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Ardagh MP Group Netherlands B.V. Appeal Br. 3.

## THE CLAIMED SUBJECT MATTER

The claims are directed to a foil for sealing a container. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A foil for closing an opening in a container, such as an easy opening container, comprising foil to be adhered to the container, which foil comprises a tab for releasing the foil from the container, wherein the tab is folded on the foil and connected thereto via a connector;

wherein the connector is a protrusion provided in the foil that extends into a complimentary cavity provided in the tab;

wherein the tab is provided with breakout means that encircle the connector such that upon actuating the tab a visible and irreparable broken out part is formed and adhered to the foil and a hole is formed in the tab;

wherein the breakout means are formed as at least one opening in the tab, wherein the at least one opening in the tab is formed as a first slot passing through the tab and located at a first lateral side of the connector and a second slot passing through the tab and located at a second lateral side of the connector such that the first slot and the second slot converge beyond the connector towards an end of the tab that is integrally connected to the foil and a third slot in an area between a free end of the tab and the connector, wherein the first slot extends a first length around the connector between a first tab bridge and a second tab bridge, the second slot extends a second length around the connector between the second tab bridge and a third tab bridge, and the third slot extends a third length around the connector between the third tab bridge and the first tab bridge such that the first slot, the second slot, and the third slot surround the connector, and wherein visible remnants

of the tab bridges remain with the broken out part when the tab is actuated.

#### REFERENCES

Schutz	US 5,205,454	Apr. 27, 1993
Wallis	US 7,766,183 B2	Aug. 3, 2010
Roeterdink	US 2005/0045633 A1	Mar. 3, 2005
Hamerly	US 2009/0277814 A1	Nov. 12, 2009
Jouillat	US 2011/0000914 A1	Jan. 6, 2011

#### REJECTIONS

Claims 1, 8, 9, 11, 14, and 18 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Jouillat, Hamerly, Schutz, and Roeterdink.

Claim 10 is rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Jouillat, Hamerly, Schutz, and Wallis.

#### ANALYSIS

*Claims 1, 8, 9, 11, 14, and 18—Rejected as Unpatentable over Jouillat, Hamerly, Schutz, and Roeterdink*

Each of independent claims 1 and 14 recites, *inter alia*, a foil comprising a tab connected to the foil via a connector, the tab provided with breakout means consisting of three slots, separated by tab bridges, encircling the connector. Appeal Br. 23–25 (claims appx.). Claim 11 recites a method for making the foil according to claim 1. *Id.* at 24. The Examiner finds that Jouillat teaches a foil comprising a tab connected to the foil via a connector, the tab provided with breakout means consisting of a score line (instead of the claimed three slots and bridges) encircling the connector. Final Act. 2–3. The Examiner relies on Hamerly to teach that score lines and perforations—

i.e., slots separated by bridges—were known equivalent structures for demarcating and weakening an area to be broken (*id.* at 4 (citing Hamerly ¶¶ 18, 28, Figs. 1, 4, 5)), and finds that one of ordinary skill in the art would have found it obvious to substitute Jouillat’s score line for perforations (*id.* at 4–5).

Regarding the limitation requiring three slots and bridges, the Examiner finds that “Schutz teaches towels (18) attached by perforated tear lines (16) and that the pull force required to separate the towels will vary depending on the length and number of perforations.” *Id.* (citing Schutz, 4:3–8, Fig. 3). The Examiner thus determines that:

It would have been obvious to one of ordinary skill in the art at the time that the invention was made to have arrived at three perforations (openings formed as slots) in order to ensure that less force is required to separate the temper<sup>[2]</sup> proof element (11) (broken out part) from the tab (9) than separate the membrane (7) (foil) from the container (1) when the tab (9) is actuated.

*Id.*

Appellant argues, *inter alia*, that the Examiner’s analysis relies on impermissible hindsight reasoning because “the only disclosure of using three abutting slots surrounding a tab connector to ensure that a lowest force is required to separate the breaking out tab part from the tab than to separate the membrane from the container when the tab is actuated, as the Examiner contends is the reason for combining the [Schutz] patent with the Jouillat

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<sup>2</sup> Although the invention relates to providing containers with a tamper proof mechanism, Spec. 2:1–2, Appellant’s Specification frequently refers to a “temper proof” means. *See, e.g., id.* at 2–11, 3:10–19.

publication, is in the Appellant’s own specification.” Appeal Br. 15 (citing Spec. 4:1–16).

Although we agree with the Examiner that Hamerly supports the finding that perforations and score lines were known equivalent structures for demarcating and weakening an area to be broken (and Appellant does not dispute that perforations comprise slots separated by tabs), and Schutz supports the finding that it was within ordinary skill to determine the number, size, and location of perforations such that the force required to separate the tab from the connector is less than the force required to separate the connector from the foil, we find insufficient support in the record for the Examiner’s specific finding that one of ordinary skill in the art would have settled on using the claimed *three* slots to encircle the connector absent Appellant’s disclosure. The Examiner does not point to anything in the record teaching or suggesting that three slots, arranged as claimed, would be more likely to achieve this result than any other number and arrangement of slots and tabs. Therefore, we do not sustain this rejection. We leave it to the Examiner to determine whether, instead, the limitations directed to the precise number and placement of slots and tabs are obvious design choices. *See In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975) (“Use of such a means of electrical connection in lieu of those used in the references solves no stated problem and would be an obvious matter of design choice within the skill of the art.”).

*Claim 10—Rejected as Unpatentable over  
Jouillat, Hamerly, Schutz, and Wallis*

Claim 10 depends from claim 9, which, as noted above, recites a method for making the foil according to claim 1. Appeal Br. 24 (claims

app.). Therefore, this rejection suffers the same deficiency as that discussed above regarding claim 1. Wallis is not relied on to cure the deficiency. Accordingly, we do not sustain this rejection.

### DECISION

For the above reasons, the Examiner's rejection of claims 1, 8–11, 14, and 18 is reversed.

### DECISION SUMMARY

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 8, 9, 11, 14, 18	103	Jouillat, Hamerly, Schutz, Roeterdink		1, 8, 9, 11, 14, 18
10	103	Jouillat, Hamerly, Schutz, Wallis		10
<b>Overall Outcome</b>				1, 8–11, 14, 18

REVERSED