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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte AHREN BONNEMA and COLLEEN MARIE HANLEN

Appeal 2018-006442
Application 29/497,580
Technology Center 2900

Before RAE LYNN P. GUEST, GRACE KARAFFA OBERMANN,
and MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks review under 35 U.S.C. § 134(a) of the Examiner's Final Action rejecting the sole claim in Appellant's design patent application. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ The real party-in-interest is JanSport Apparel Corporation. App. Br. 2.

THE CLAIMED DESIGN

Appellant claims an ornamental design for an accessory pouch. Orig. Spec. 3.² Seven (7) figures depict various views of the accessory pouch and define the scope of the claimed design. Amended Spec., Figs. 1–7 (replacement sheets). The Examiner in the Final Action focuses on Figures 1 and 4, reproduced below:

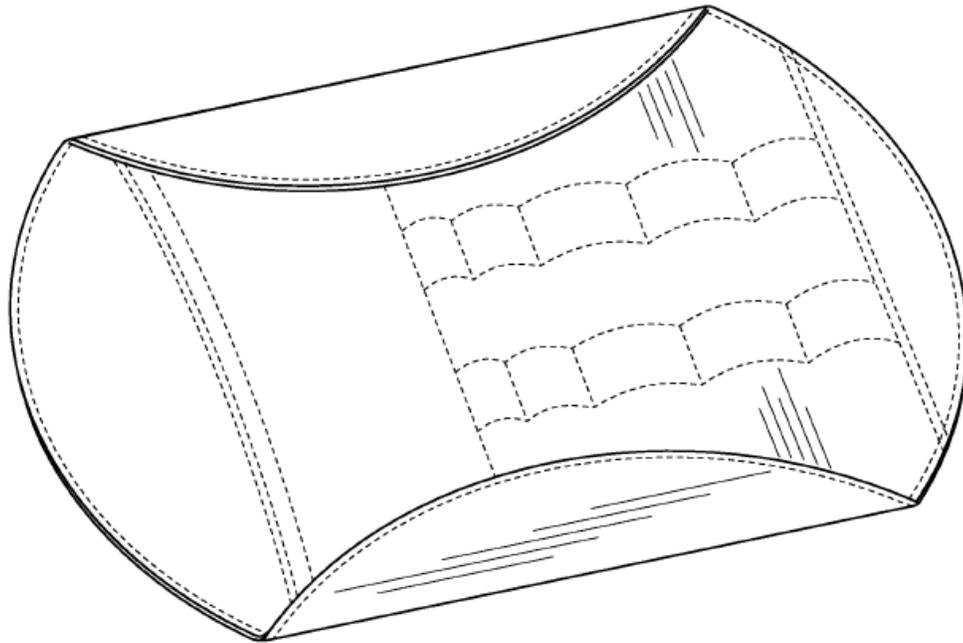


FIG. 1

² We refer to the Original Specification filed July 25, 2014, as “Orig. Spec.” and the Amended Specification filed April 7, 2016, as “Amended Spec.” The Examiner identifies July 25, 2014, as the effective filing date of Appellant’s application. Final Action 2.



FIG. 4

Amended Spec. Figs. 1, 4 (replacement sheets); Final Action 2. Figures 1 and 4, respectively, are a top-right perspective view and a left side view of the claimed accessory pouch. We observe that “broken lines shown in all views of the accessory pouch” are for illustrative purposes only and form no part of the claimed design. Orig. Spec. 3.

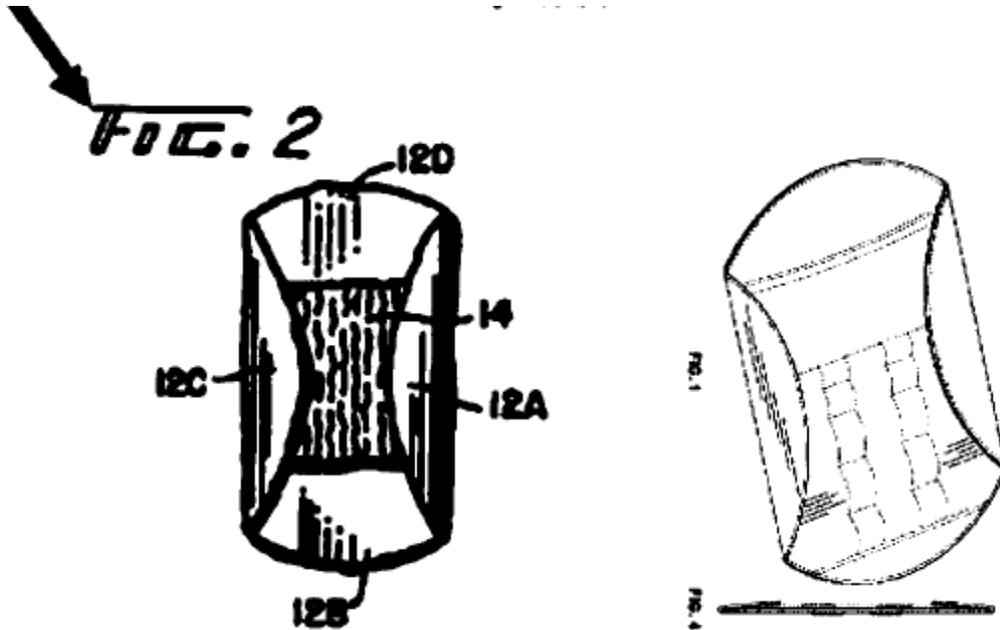
THE REJECTION

The Examiner rejects the design claim under 35 U.S.C. § 102(a)(2) as anticipated by Wilson (U.S. Patent No. 3,143,424), a utility patent that, according to the Examiner, discloses a design that was publicly available by August 4, 1964, well before the critical date. Final Action 2. Appellant does not dispute the prior art status of Wilson’s disclosure. App. Br. 2–6.

ANALYSIS

Wilson concerns a method for making a fried sandwich. Wilson, 1:1–15, Fig. 2. In the Examiner’s view, “[t]he shape and appearance of” Wilson’s sandwich, shown during an intermediate stage of formation, “is identical in all material respects to that of the claimed design” for an accessory pouch. Final Action 3. Significantly, in making that finding, the Examiner compares a top view of Wilson’s fried sandwich (Wilson Fig. 2) to top and side views of the claimed accessory pouch (Appellant’s Figs. 1 and 4). *Id.* at 2. Although the Examiner cites a side view of the claimed design, which reveals an accessory pouch having a long, thin profile, the Final Action does not explain how or why the intermediate fried sandwich as disclosed in Wilson meets that perspective of the claimed design. *See* Final Action 2–4 (nowhere discussing a side view of Wilson’s fried sandwich or otherwise explaining how or why the intermediate fried sandwich depicted in Wilson discloses the side view of the claimed design as depicted in Figure 4 of the Amended Specification). We agree with Appellant that this lack of analysis represents reversible error.

Specifically, the Examiner relies on the following comparison of Figure 2 from Wilson (on the left) and Figures 1 and 4 of the claimed design (on the right):

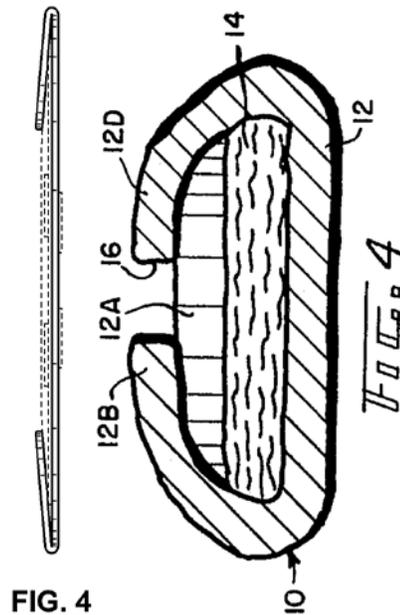


Final Action 2 (arrow added by the Examiner). The above illustration is a side-by-side comparison of Wilson's Figure 2 (illustrating a top plan view of a fried sandwich in an intermediate stage of formation) and Figure 1 from the Amended Specification (illustrating a top-right perspective view of an accessory pouch) positioned above Figure 4 from the Amended Specification (illustrating a left side view of the claimed design).

Although the Examiner reproduces Appellant's Figure 4 (on the bottom right in the above side-by-side comparison), the Examiner does not explain why Wilson's fried sandwich as disclosed meets the scope of the

claimed design as reflected in Figure 4. That failure undercuts the Examiner's finding that Wilson's fried sandwich "is identical in all material respects to" the accessory pouch "of the claimed design." Ans. 4; Final Action 3.

All of the figures included in the Amended Specification bear upon the correct construction and scope of the claimed design. *See* Amended Spec, Figs 1–7 (including, for example, Figure 4, illustrating a left side view of an accessory pouch characterized by a long, thin profile); Reply 2–5 (discussing the Examiner's failure to take account adequately of the side view perspective of the claimed design). The Examiner states, without citing any objective support, that "[t]he scope of the Wilson reference is also a thin folded material." Ans. 4. Wilson, in fact, does not disclose "a thin folded material" having an "appearance" that is "identical in all material respects to that of the claimed design." Ans. 4. On the contrary, even a cursory comparison of Figure 4 from the Amended Specification to Figure 4 from Wilson reveals significant differences between the two designs. We reproduce those views below with Wilson's Figure 4 rotated counterclockwise by ninety degrees in the comparison:



See Reply 3–4 (reproducing Figure 4 from the Amended Specification and Wilson’s Figure 4). The above illustration is a side-by-side comparison of a left side view of the claimed design for an accessory pouch and a cross-sectional view of Wilson’s fried sandwich along a line 4–4 of the final folded sandwich product of Figure 3 of Wilson. We note that Figure 4 is not a side view of the sandwich of Wilson in the intermediate stage of Figure 2. The only side view presented in Wilson is of the final sandwich product in Figures 5–8, which illustrate methods of preparing and storing the sandwich product. Wilson 1:49–54, Figs. 5–8.

We agree with Appellant that the Examiner fails to take account of the entirety of the claimed design, including the side view of the accessory pouch illustrated in Figure 4 of the Amended Specification. Reply 2–5. As Appellant observes, “Wilson’s sandwich is no such thin folded material.” Reply 3–4 (reproducing for comparison Appellant’s Figure 4 and Wilson’s Figure 4); see Final Action 2 (reproducing Wilson’s Figure 2 only, in a side-by-side comparison to Appellant’s Figures 1 and Figure 4). Appellant also

correctly observes that, unlike the long, thin profile illustrated in Figure 4 from the Amended Specification, “Wilson’s sandwich is roughly half as thick as it is long.” Reply 3. The claimed design, when viewed from the side, has a “length and width . . . at least an order of magnitude greater than its thickness.” *Id.* at 2 (reproducing Figures 4–7 of the claimed design); 4 (reproducing Wilson’s Figure 4).

In sum, the Examiner does not adequately demonstrate that Wilson’s intermediate sandwich describes the aspect of the claimed design shown in Figure 4 of the application at issue. Accordingly, we determine that the Examiner misconstrues the scope of the claimed design in determining that “[t]he scope of the Wilson reference is also a thin folded material.” Ans. 4. The Examiner has not shown that Wilson’s design is “identical in all material respects to that of the claimed design.” *Id.*; *see* Final Action 3 (same). Accordingly, we cannot sustain the Examiner’s finding that Wilson’s fried sandwich describes, with anticipatory specificity, the side view perspective of the claimed design as depicted, for example, in Figure 4 from the Amended Specification.

The decision of the Examiner rejecting the design claim under 35 U.S.C. § 102(a)(2) is reversed.

CONCLUSION

Claims Rejected	Basis	Affirmed	Reversed
Design Claim	§ 102(a)(2) over Wilson		Design Claim
Overall Outcome			Design Claim

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Application 29/497,580

REVERSED