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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* EDUARD EDWARDS, DAVID LESTAGE,  
STEPHEN D. TYNER, and PATRICK RYAN WINDLEY

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Appeal 2019–000767  
Application 14/446,094  
Technology Center 1700

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Before JEFFREY T. SMITH, KAREN M. HASTINGS, and  
MICHAEL G. MCMANUS, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant appeals from the Examiner’s final decision to reject claims 1, 3–11, 17, and 19.<sup>1</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 Frito-Lay North America, Inc. as the real party in interest. Appeal Br. 2.

The following rejections are presented for appeal: <sup>2</sup>

I. Claims 1, 3, 5–11, 17 and 19 are rejected under 35 USC § 103 as unpatentable over Craddock (Craddock et al., US 3,079,062, issued Feb. 26, 1963, hereinafter “Craddock”) in view of Wollen (Wollen et al., WO 96/22230, published July 25, 1996, hereinafter “Wollen”), Unilever (DE 7838633, issued Nov. 7, 1978 (Espacenet Translation) hereinafter “Unilever”), Hix (Hix et al., US 4,139,643, issued Feb. 13, 1979, hereinafter “Hix”), Chapman (US 2,143,646, issued Jan. 10, 1939), Connolly et al. (US 2005/0069610, Mar. 31, 2005, hereinafter “Connolly”), as further evidenced by Zinke (US 6,213,387 B1, Apr. 10, 2001).

II. Claim 4 is rejected under 35 USC § 103 as being unpatentable over Craddock, Wollen, Unilever, Hix, Chapman, Connolly, Zinke and further in view of Goldstein (US 3,339,721, issued Sept. 5, 1967).

Appellant’s invention relates to a snack container with a three dimensional base and a two dimensional top. (Spec. ¶ 1.) Claim 1 is illustrative of the subject matter on appeal and is reproduced below:

1. A snack container having a base, side walls, and a top edge, said top edge having a left side and a right side, said container comprising:
  - a substantially square base, said base having left, right, front, and back corners;
  - a first straight line fold starting at the left corner of said base and terminating at the left side of the top edge of the container;
  - a second straight line fold starting at the right corner of said base and terminating at the right side of the top edge of the container;

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<sup>2</sup> The complete statement of the rejection on appeal appears in the Final Office Action (mailed Feb. 28, 2018 (“Final Act.”)). (Final Act. 3–17).

a first “V” shaped crease starting at the front corner of said base and terminating at the first and second folds at points in the same horizontal plane below the top edge of the container, the first “V” shaped crease formed of straight lines;

a second “V” shaped crease starting at the back corner of said base and terminating at the first and second folds at points in the same horizontal plane as the top of the first “V” shaped crease, the second “V” shaped crease formed of straight lines;

a flat top seal extending horizontally across the top edge of the container, the flat top seal comprising registering upper ends of two opposed isosceles triangle shaped side walls in direct interfacial and planar contact with each other;

a horizontal crease extending across the container and spaced above termination points of the first and second V shaped creases;

a horizontal tear feature extending along at least one side wall, said tear feature located below the top seal and below the horizontal crease and above the termination points of the “V” shaped creases; and

a flat portion extending from below the horizontal crease to the termination points of the first and second V shaped creases, when the container is sealed closed;.

wherein, below the termination points of the top of the “V” shaped creases, the folds and “V” shaped creases define two pairs of right-triangle shaped side walls, with each pair of right-triangle shaped side walls separated by one of the two opposed isosceles triangle shaped side walls;

wherein an inwardly tapered base flap extends from a base of each of the right triangle shaped side walls and each of the isosceles triangle shaped side walls, the inwardly tapered trapezoidal base flaps of equal vertical height and width to each other and folded to form the substantially square base;

wherein when the container is opened by tearing along the horizontal tear feature, the container opens to allow access to contents therein upon squeezing the first and the second straight line folds, and recloses when the squeezing ceases; and

whereby the sealed snack container promotes shelf stability of a contained snack product.

Appeal Br. 23, Claims App.

#### OPINION<sup>3</sup>

Upon consideration of the evidence of record and each of Appellant's contentions as set forth in the Appeal Brief, as well as the Reply Brief, we determine that Appellant has not demonstrated reversible error in the Examiner's rejections of claims 1, 3–11, and 17–19. *In re Jung*, 637 F.3d 1356, 1365–66 (Fed. Cir. 2011) (explaining the Board's long-held practice of requiring Appellant(s) to identify the alleged error in the Examiner's rejection). We sustain the rejections of these claims generally for the reasons expressed by the Examiner in the Final Office Action and the Answer. (Ans. 3–14; *see also* Final Act. 3–17.) We have reviewed each of

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<sup>3</sup> We limit our discussion to the independent claim 1 as argued by Appellant. 37 C.F.R. § 41.37(c)(1)(iv). Claims 3, 5–11, and 17–19 stand or fall with independent claim 1. Appellant has failed to present arguments addressing separately rejected dependent claim 4. The patentability of depending claim 4 will also stand or fall with independent claim 1.

Appellant’s arguments for patentability. We add the following primarily for emphasis.

The Examiner finds Craddock describes a tapered container comprising first and second “V” shaped creases starting at the base and terminating at the first and second fold points in the same horizontal plane as the top of the first and second “V” creases. (Final Act. 4 (citing Figs. 1–2).) The Examiner recognizes Craddock fails to provide a specific embodiment that describes all of the elements required by independent claim 1. The Examiner relies upon the various embodiments included in Craddock as well as the descriptions of Wollen, Unilever, Hix and Chapman, Conley and Zinke to establish that these features were well known and recognized arrangements in the container art. (Final Act. 3–17).

Appellants argue the features identified below are not suggested or motivated from the prior art cited by the Examiner. (Appeal Br. 18; *see also* Reply Br. 2–3). Appellant specifically states:

As to the first finding, there are several combinations of features that the combination of selected bits and pieces from 7 references do not show or motivate that are recited in Claim 1. These include:

- (1) The combination of straight fold lines and a flat top seal comprising two co-extensive isosceles triangular side walls in direct and opposed planar contact with each other, and with a tear feature below the top seal to open the container
- (2) The combination of straight fold lines, a flat top seal comprising two coextensive side walls in direct and opposed planar contact with each other, with a tear feature below the seal to open the container, and four equal (height and width) trapezoidal (See, FIG. 1) inward tapered flaps extending from the square base
- (3) = (1) and (2) above along with wherein the container is opened by tearing along the horizontal tear feature,

the container opens to allow access to contents therein upon squeezing the first and the second straight line folds, and recloses when the squeezing ceases

- (4) The combination fails to show the vertical distance between the top ends of the V-shaped side walls and the top of the container (for which Zinke is cited)

Appeal Br. 18.

We perceive no convincing merit in Appellant’s argument that the number of references cited by the Examiner is evidence that the invention is not obvious. (Appeal Br. *generally*.) This is because the test for obviousness is not the number of references, but what they would have meant to a person of ordinary skill in the field of the invention. *In re Gorman*, 933 F. 2d 982, 986 (Fed. Cir. 1991).

It has been established that the predictable use of known prior art elements performing the same functions they have been known to perform is normally obvious, and the combination of familiar elements is likely to be obvious when it does no more than yield predictable results. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (“[T]he [obviousness] analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”). *See also In re Fritch*, 972 F.2d 1260, 1264–65 (Fed. Cir. 1992) (a reference stands for all of the specific teachings thereof as well as the inferences one of ordinary skill in the art would have reasonably been expected to draw therefrom).

Appellant argues the combination of straight fold lines and a flat top seal comprising two co-extensive isosceles triangular side walls in direct and opposed planar contact with each other, and with a tear feature below the top

seal to open the container is not taught or suggested by the applied prior art.

Appellant’s argument does not dispute the Examiner’s finding that Craddock describes a container including a flat portion extending from below the horizontal crease to the termination points of the “V” shaped creases, when the container is sealed closed. (Final Act. 4.) The Examiner finds Craddock describes in another embodiment the container comprises a flat portion extending from below the closure of the container to the termination points of the “V” shaped creases when the container is closed (space between 55 and 42). (Final Act. 4 (citing Craddock Fig. 3, Fig. 4).) Appellant has not disputed the Examiner’s position that Wollen is evidence that various techniques for closing or sealing a container were known to persons of ordinary skill in the art. (Final Act. 6 (citing Wollen Figs 5, 5A).) A person of ordinary skill in the art would have recognized the suitability of adding a flat top seal comprising two coextensive side walls in direct and opposed planar contact with each other, with a tear feature below the seal to open the container.

Appellant argues the container comprises four equal height and width trapezoidal inward tapered flaps extending from the square base as depicted in Figure 1.

Craddock discloses a tapered container that comprises a square base including flaps 34–37. (Craddock 2, ll. 24–35, Fig. 1.) Appellant has not disputed that the use of trapezoidal inward tapering flaps to seal a container is known to persons of ordinary skill in the art and described by Chapman. (Chapman 2 paragraph bridging columns 1 and 2, Fig. 1.) A person of ordinary skill in the art would have reasonably expected that the use of trapezoidal inward tapering flaps would have been suitable for sealing the

bottom portion of a tapered container such as described by Craddock. Appellant has not directed us to evidence that the trapezoidal inward tapering flaps provide unexpected results.

Appellants argue the claimed invention is characterized by the container being opened by tearing along the horizontal tear feature, the container opens to allow access to contents therein upon squeezing the first and the second straight line folds, and recloses when the squeezing ceases.

The container of Craddock comprises first and the second straight line folds, 11 and 14, that are opposite of one another and would result an opening of the container upon squeezing. (Craddock Figures 1–4.) Appellant has not explained that the container described by Craddock is incapable of opening by squeezing the first and the second straight line folds, and recloses when the squeezing ceases. Appellant’s arguments regarding the horizontal tear feature have been addressed above.

Appellant argues the combination fails to show the vertical distance between the top ends of the V-shaped side walls and the top of the container.

The Examiner relied upon the teachings of Wollen as evidence that it would have been obvious to include a flat top seal comprising a tear feature below the top seal to open the container. The addition of the flat top seal would have been located between the top ends of the V-shaped side walls and the top of the container. In the absence of unexpected results, a person of ordinary skill in the art would have sufficient skill to determine the appropriate vertical distance between the top ends of the V-shaped side walls and the top of the container.

It has been established that obviousness does not require absolute predictability of success; all that is required is a reasonable expectation of

success. *In re Kubin*, 561 F.3d 1351, 1360 (Fed. Cir. 2009). Furthermore, inasmuch as tapered containers comprising first and second “V” shaped creases in combination with straight fold lines; containers comprising a flat top seal comprising a tear feature below the seal to open the container; and the use of four equal trapezoidal flaps to seal the container were all known to persons of ordinary skill in the art, it is incumbent upon Appellant to establish that the present inventors had to resort to more than routine experimentation to determine if these features would have been effective to form a container especially in light of the teachings of the references cited by the Examiner. However, no such evidence is of record.<sup>4</sup>

Thus, Appellant has not shown reversible error in the Examiner’s obviousness determination of claims 1, 3–11, 17, and 19. *See KSR*, 550 U.S. at 417 (the predictable use of known prior art elements or steps performing the same functions they have been known to perform is normally obvious; the combination of familiar elements/steps is likely to be obvious when it does no more than yield predictable results); *see also In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (“Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.”); and *In re Sneed*, 710

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<sup>4</sup> It has also been generally held that ordinarily changes in shapes of known elements are within the level of skill in that art, especially in the absence of unexpected results or criticality. *Cf. In re Dailey*, 357 F.2d 669, 676 (CCPA 1966) (change in shape ordinarily prima facie obvious). Thus to the extent the shape of the claimed container may differ from any one of the exemplified prior art containers, this is not indicative of nonobviousness absent evidence of criticality, especially in light of the myriad of known container shapers exemplified in the applied prior art.

F.2d 1544, 1550 (Fed. Cir. 1983) (“[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review.”).

### DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 3, 5–11, 17–19	103	Craddock, Wollen, Unilever, Hix, Chapman, Connolly, Zinke	1, 3, 5–11, 17–19	
4	103	Craddock, Wollen, Unilever, Hix, Chapman, Connolly, Zinke, Goldstein	4	
<b>Overall Outcome</b>			1, 3–11, 17–19	

AFFIRMED