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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* RORY I. WILSON and MARCUS HUMPHREY

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Appeal 2019-000806  
Application 13/759,433  
Technology Center 3700

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Before DANIEL S. SONG, CHARLES N. GREENHUT, and  
JAMES P. CALVE, *Administrative Patent Judges*.

SONG, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant<sup>1</sup> appeals under 35 U.S.C. § 134(a) from the Examiner’s Final Office Action (“Final Act.”) rejecting claims 1–4, 7, 9–15, 18–20, and 22–27 in the present application. We have jurisdiction under 35 U.S.C. §§ 6(b) and 134(a). In addition to its briefs, the Appellant relies on a Third Declaration of Keith A. Jackson filed December 12, 2017 (“Jackson 3rd Decl.”).

We REVERSE.

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<sup>1</sup> The Appellant is Packaging Corporation of America, which is identified as the real party in interest. Appeal Brief (“App. Br.”) 2.

The claimed invention is directed to a chambered container. Title.  
Representative independent claim 1 reads as follows:

1. A container formed from a blank having a plurality of panels, the container comprising:

a bottom;

a top opposing the bottom;

a plurality of sides extending from the bottom to the top, the bottom, the top and the plurality of sides defining an enclosure;

a partition panel extending from a first one of the plurality of sides to a second one of the plurality of sides thereby dividing the enclosure into a first chamber and a second chamber, the second one of the plurality of sides opposing the first one of the plurality of sides, the first chamber having a plurality of side walls, at least two of the plurality of side walls each having a thickness of a single panel, at least a portion of the partition panel extending from the bottom to the top;

a first pass-through opening in the partition panel configured to permit flow of contents from the second chamber into the first chamber, the first pass-through opening being defined by at least the partition panel, the bottom and at least one of the sides of the container, the first and the second chambers being in constant communication with each other via the first pass-through opening; and

a pour spout configured to permit egress of the contents from the first chamber out of the enclosure.

App. Br., Claims App'x A1.

## REJECTIONS

1. The Examiner rejects claims 1–4, 7, 9–15, 18, 20, and 22–27 under 35 U.S.C. § 103(a) as unpatentable over Hennessey (US 3,235,163,

iss. Feb. 15, 1966) in view of Turpin (US 2,980,540, iss. Apr. 18, 1961) and Fassard (FR2667574, pub. Apr. 10, 1992).

2. The Examiner rejects claim 19 under 35 U.S.C. § 103(a) as unpatentable over Hennessey in view of Turpin and Gordon-Ross (US 3,758,021, iss. Sept. 11, 1973).

## ANALYSIS

### Rejection 1

The Examiner rejects claims 1–4, 7, 9–15, 18, 20, and 22–27 as unpatentable over Hennessey in view of Turpin and Fassard. As to the independent claims 1 and 4, the Examiner finds that Hennessey discloses a container substantially as claimed, but fails to disclose “at least a portion of the partition panel extending from the bottom to the top,” the recited location of the pass-through opening, and a pour spout. Final Act. 3. The Examiner relies on Turpin for disclosing container having a partition panel that extends from the bottom to the top, the partition panel having opening 18, and the container further including a pour spout. Final Act. 3.

Based on these findings, the Examiner concludes that

It would have been obvious to one of ordinary skill in the art to substitute a partition panel as, for example, taught by the Turpin reference for the partition panel of the Hennessey device, for the predictable result of providing a package that is inexpensive since it is easier to manufacture and assemble.

Final Act. 4.

The Examiner also relies on Fassard for disclosing a container “having a pass-through opening as claimed” (Final Act. 4), and concludes that it would have been obvious to one of ordinary skill to “rearrange[] the

location of the opening” as in Fassard “since the opening performs the same function whether located as shown in fig. 3 of Turpin or at other locations on the partition panel 16.” Final Act. 4. The Examiner sets forth the same reasoning in rejecting independent claim 14. Final Act. 6–8.

*Claims 1–3, 7, 9–13, and 24–26*

As to independent claim 1, the Appellant argues that a person of ordinary skill in the art would not have extended the panel of Hennessey to the bottom because this will cause the lower horizontal strap to be discontinuous. App. Br. 11–12, citing Jackson 3rd Decl. ¶ 13. The Appellant also argues that the water-soluble panel 19 does not extend to the top, to the bottom, or across the container. App. Br. 13, citing Jackson 3rd Decl. ¶ 18. These arguments are unpersuasive because they fail to address the rejection, which relies on substituting the partition of Hennessey with the divider wall 16 of Turpin, without the overlying panel 19. Final Act. 4; Ans. 4 (“it is noted that the water-soluble panel 19 of Turpin is not part of the modified device of Hennessey.”); *see also* Ans. 2.

The Appellant also argues that a person of ordinary skill would not substitute the openings 18 of Turpin for Fassard’s opening 8 because “the location and size of the two large openings 18 in Turpin have a specific purpose,” would increase material cost, and would require watertight sealing on two perpendicular surfaces. App. Br. 16, citing Jackson 3rd Decl. ¶ 26. However, these arguments are unpersuasive because they again fail to address the rejection, which is to relocate the opening so as to be positioned at the bottom of the partition, not to substitute the opening of Turpin. Final Act. 4.

Nonetheless, we agree with the Appellant that the Examiner “is relying on impermissible hindsight on cobbling references together in an attempt to read on claim 1 of the patent application.” Reply Br. 4. As explained by the Supreme Court “[obviousness] analysis should be made explicit.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]jections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”)). As also explained by the Court, “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art,” and “it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *Id.* The Court also warned that the “factfinder should be aware . . . of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” *Id.* at 421.

As the Appellant argues, the rejection does not adequately establish why a person of ordinary skill in the art would have sought to “separate the attached structure of the divider wall 16 and the water-soluble panel 19 of Turpin in the manner used in the Final Office Action.” App. Br. 9, citing Jackson 3rd Decl. ¶¶ 6–7. Although the Examiner explains that “the partition panel of Turpin does achieve the objective of being used as a reinforcing structure” (Ans. 3), the Appellant is correct that “[t]he Examiner has provided no reason on why one skilled in the art would look to a

reference and divide out layers of the [partition] wall to be combined with other references. This is impermissible hindsight.” Reply Br. 2.

In addition, we agree with the Appellant that the Examiner has not sufficiently supported the assertion that “using the divider wall 16 and/or water-soluble panel 19 of Turpin in Hennessey as a partition panel would be less expensive to manufacture or less expensive to assemble.” App. Br. 14, Jackson 3rd Decl. ¶ 22. As the Appellant notes, the divider wall 16 of Turpin extends the length of the box between upper and lower flap structures 12 and uses more material than the panel 44 of Hennessey, which extends just half the height of the box to prevent bulging of the lower half of the box. App. Br. 10–11 (citing Hennessey, 2:6–24), 12–13 (citing Turpin, 2:9–12), 14–15 (citing Hennessey, Fig. 1 and Turpin, Fig. 3). Moreover, the package of Turpin appears to be assembled in a manner similar to the carton of Hennessey, wherein the partition is part of the blank that is folded over into the interior of the package. *See* Turpin, Fig. 3 (lower right hand corner indicating single blank construction). Thus, there is inadequate support for the Examiner’s assertion that such substitution would be less expensive, easier to manufacture, and easier to assemble.

Finally, although the Examiner relies on Fassard to suggest moving the opening 18 of Turpin’s divider wall 16 to the bottom of the package as required by claim 1, we observe that Hennessey already provides a gap between its partition panel 44 and its bottom wall, which is the size of the lower horizontal strap 40. *See* Hennessey, Figs. 1, 3.

Therefore, for the reasons noted above, we find the articulated rejection of independent claim 1 to be inadequately supported by rational underpinnings, and instead, appears to be based on impermissible hindsight.

Hence, we reverse the rejection of claim 1. Claims 2, 3, 7, 9–13, and 24–26 ultimately depend from claim 1. Thus, we reverse the rejection of these claims as well. *See In re Fine*, 837 F.2d 1071, 1076 (Fed. Cir. 1988) (“Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious.”).

*Claims 4, 14, 15, 18, 20, 22, 23, and 27*

Independent claims 4 and 14 recite substantively the same limitations addressed above with respect to claim 1. App. Br., Claims App’x A2–A4. Therefore, we reverse the rejection as to claims 4 and 14 for the same reasons discussed above. Claims 15, 18, 20, 22, 23, and 27 ultimately depend from claim 14. Thus, we reverse the rejection of these claims as well. *See In re Fine*, 837 F.2d at 1076.

Rejection 2

The Examiner rejects claim 19 as unpatentable over Hennessey in view of Turpin and Gordon-Ross. Claim 19 depends from independent claim 14. The Examiner’s application of Gordon-Ross does not address the deficiency in the combination of Hennessey and Turpin discussed above relative to Rejection 1. Final Act. 10. Accordingly, we reverse this rejection as well. *See In re Fine*, 837 F.2d 1076.

CONCLUSION

The rejections are REVERSED.

REVERSED