



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
**United States Patent and Trademark Office**  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/689,707	08/29/2017	Paul Scirica	H- US-02886.USC17(203-7871)	6645
50855	7590	09/26/2019	EXAMINER	
Covidien LP 60 Middletown Avenue Mailstop 54, Legal Dept. North Haven, CT 06473			JALLOW, EYAMINDAE CHOSSAN	
			ART UNIT	PAPER NUMBER
			3731	
			NOTIFICATION DATE	DELIVERY MODE
			09/26/2019	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

docket@carterdeluca.com  
rs.patents.two@medtronic.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* PAUL SCIRICA and DAVID RACENET

---

Appeal 2019-002963  
Application 15/689,707<sup>1</sup>  
Technology Center 3700

---

Before MICHAEL C. ASTORINO, JAMES A. WORTH, and  
BRADLEY B. BAYAT, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), the Appellants appeal from the Examiner’s decision rejecting claims 2–18. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We REVERSE.

---

<sup>1</sup> “The real party in interest is the assignee of the entire interest in this patent application, Covidien LP, which is a wholly-owned subsidiary of Medtronic PLC.” Appeal Br. 1.

## STATEMENT OF THE CASE

### *Related Appeal*

In a related application, US Patent Application Number 13/207,653 (now US 9,750,502 B2, iss. Sept. 5, 2017), the Appellants appealed the Examiner's decision rejecting claims 1–4, 6–9, 11, 14–24, and 26–29.

Appeal No. 2015-003854 (“Decision”), at 1, 3 (mailed Feb. 1, 2017); Spec.

¶ 1. In that related appeal, the Board reversed the Examiner's decision. Decision 1, 4–5.

### *Claimed Subject Matter*

Claim 2, the sole independent claim, is representative of the subject matter on appeal and is reproduced below.

2. A surgical stapler end effector, comprising:

a circular anvil assembly having a center rod with a proximal end for connection to an approximation mechanism and a distal end attached to an anvil head, the anvil head having an anvil plate with a tissue contact surface, and at least two circular rows of staple forming pockets, the staple forming pockets having a curved length; and

a staple cartridge assembly having three circular rows of staple retaining slots corresponding to the rows of staple forming pockets, wherein one of the circular rows of staple retaining slots is nested with an adjacent row of staple retaining slots.

### *Rejection*

Claims 2–18 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Holsten et al. (US 2007/0034666 A1, pub. Feb. 15, 2007) (“Holsten”) in view of Sauer et al. (US 5,839,639, iss. Nov. 24, 1998) (“Sauer”).

## ANALYSIS

The Appellants argue that the Examiner's rejection fails to establish that combined teachings of Holsten and Sauer teach "staple forming pockets having a curved length," as recited in independent claim 2. Appeal Br. 3; *see id.* at 4–5; Reply Br. 2–3.

The Examiner's rejection of claim 2 is based on the finding that Sauer's teachings remedy Holsten's failure to teach staple forming pockets having a curved length. Final Act. 3. The Examiner finds "Sauer teaches the staple forming pockets (87) having a curved length." *Id.* Sauer's element number 87 refers to "staple clinching buckets," which are provided as part of a segmented staple clinching ring 85. Sauer, col. 5, ll. 9–11, Figs. 6, 9. Staple clinching ring 85 is affixed to the proximal ends of anvil segments 72 and 74. *Id.* at col. 5, ll. 7–9, Figs. 3, 5, 8.

On this record, it appears that the Examiner supports the finding that staple clinching buckets 87 have a curved length solely by relying on a copy of a portion of Sauer's Figure 6 that is augmented in size as well as rotated. *Compare id.* at Fig. 6, with Final Act. 4 (Annotated Fig. 1). The Examiner annotates this augmented figure by drawing a tangent line along the length of an edge of the outline of one of Sauer's staple clinching buckets. *Id.* at 3, 4; *see* Ans. 3. From this augmented and annotated figure the Examiner determines that Sauer's staple clinching bucket is curved. Ans. 4.

The Appellants contend that "an illusory appearance of curvature in the buckets 87 of Sauer may become evident to the viewer only after augmenting FIG. 6 as the Examiner has done." Reply Br. 2; *see* Appeal Br. 4. The Appellants' argument is persuasive.

At the outset, we note that the Examiner does not support the finding that staple clinching buckets 87 have a curved length by citing to the description in Sauer's Specification. *See also* Appeal Br. 5. Moreover, we do not understand Sauer to describe staple clinching buckets 87 as having a curved length. Sauer does describe staple clinching buckets 87 being used with a circular surgical stapler. *See, e.g.*, Sauer, col. 8, ll. 30–33. However, one of ordinary skill in the art would understand that a circular surgical stapler may have staple forming pockets with a straight or linear shape, and therefore lack a curved length. *See* Spec. ¶¶ 76–77, Figs. 2–6 (prior art drawings).

After carefully considering the Examiner's finding and support, we determine that Sauer's drawings do not show clearly staple clinching buckets 87 as having a curved length. *See In re Mraz*, 455 F.2d 1069, 1072 (CCPA 1972); *see also In re Aslanian*, 590 F.2d 911, 914 (CCPA 1979); Manual of Patent Examining Procedure (MPEP) § 2125 ("Drawings as Prior Art"). Although a space between the tangent line and the edge of staple clinching bucket is apparent in the Examiner's annotated figure (Final Act. 4), we cannot discount the fact that the space appears to be the result of the significantly augmented size of the figure. Notably, the annotated figure is enhanced to a size where the tangent line and outline of the staple clinching bucket are broken up into pixels. *See* Final Act. 4. In an unaltered format of Figures 6 and 9, the staple clinching buckets are not shown clearly as curved. Accordingly, we find on this set of facts that Examiner's use of a tangent line — after significantly augmenting the figure — is inadequate evidence to support the Examiner's finding that staple clinching buckets 87 have a curved length.

Appeal 2019-002963  
Application 15/689,707

Thus, we do not sustain the Examiner's rejection of claims 2–18 as unpatentable over Holsten and Sauer.

**DECISION**

We REVERSE the Examiner's decision rejecting claims 2–18.

**REVERSED**