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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/995,682	01/14/2016	Suzanne Whitfield Clark	15548 PUS; 67080-653PUS1	2519
26096	7590	03/25/2020	EXAMINER	
CARLSON, GASKEY & OLDS, P.C. 400 WEST MAPLE ROAD SUITE 350 BIRMINGHAM, MI 48009			ACKUN, JACOB K	
			ART UNIT	PAPER NUMBER
			3736	
			NOTIFICATION DATE	DELIVERY MODE
			03/25/2020	ELECTRONIC

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SUZANNE WHITFIELD CLARK and WILLIAM P. APPS

Appeal 2019-003147
Application 14/995,682
Technology Center 3700

Before LISA M. GUIJT, NATHAN A. ENGELS, and LEE L. STEPINA,
Administrative Patent Judges.

STEPINA, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–25. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM IN PART.

CLAIMED SUBJECT MATTER

The claims are directed to nestable beverage crates. Spec. ¶ 1.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Rehrig Pacific Company. Appeal Br. 1.

Claims 1, 13, and 24 are independent, and claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A nestable crate comprising:
 - a base;
 - a pair of opposed side walls extending upward from the base;
 - a pair of opposed end walls extending upward from the base, wherein the side walls and end walls include an upper band portion and a lower portion connecting the base to the upper band portion; and
 - a center structure extending from one of the end walls to the other of the end walls, the center structure including a plurality of center column portions extending down to the base, the center structure further including an upper handle portion partially defining a handle opening therebelow, wherein the upper handle portion includes spaced-apart handle side walls defining openings upward.

Appeal Br. 34 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Reiner	US 3,587,915	June 28, 1971
Hirota	US 3,991,879	Nov. 16, 1976
Wood	US 4,373,627	Feb. 15, 1983
Flink	US 6,039,205	Mar. 21, 2000
Mayo	US 8,746,513 B2	June 10, 2014

REJECTIONS^{2,3}

I. Claims 1–25 are rejected under 35 U.S.C. § 103 as unpatentable over Reiner and either Flink or Mayo.

II. Claims 1–25 are rejected under 35 U.S.C. § 103 as unpatentable over Wood or Hirota and either Flink or Mayo.

OPINION⁴

Rejection I–Reiner and either Flink or Mayo

Claim 1

Upper Band Portion

The Examiner finds that Reiner, in Figures 1–5, discloses many of the elements recited in claim 1, but relies on either of Flink and Mayo “to show

² In the Answer, the Examiner withdrew rejections of claims 1–12 under 35 U.S.C. §§ 112(a) and 112(b). *See* Ans. 2; Final Act. 5–6. The Examiner also withdrew rejections of claims 1–25 under 35 U.S.C. § 103 as unpatentable over each of Reiner, Wood, and Hirota. *See* Ans. 2; Final Act. 6–9.

³ Appellant indicates that various Examiner objections to the drawings and Specification were the subject of a Petition, but that the Petition was dismissed as implicating rejections of claims 1, 3, 4, 13, 15, and 24 under 35 U.S.C. §§ 112(a) and (b). Appeal Br. 5; *see also* Petition under 37 CFR § 1.181 (filed March 16, 2018); Final Act. 2–4. Appellant asserts that, in light of the Decision on Petition (dated May 25, 2018), these objections should be considered along with the other issues subject to this Appeal. Appeal Br. 5. However, the Examiner has now withdrawn the rejections of these claims under 35 U.S.C. §§ 112(a) and 112(b). *See* Ans. 2. As objections are usually not addressed on appeal (*see* MPEP § 706.01), and any rejections associated with the objections in the Final Office Action (*see* Final Act. 2–4) are not before the Patent Trial and Appeal Board, we do not address the objections to the drawings and Specification.

⁴ Before addressing the Examiner’s rejections specifically, Appellant states, “Appellant objects to the numerous alternative rejections,” and “[i]f the Board believes the record is unclear, perhaps the Board should require the

a handle structure constructed to have the features of the one shown in [A]pplicant's drawings." Final Act. 8 (citing Flink Fig. 4, Mayo Figs. 4 and 6). The Examiner reasons that it would have been obvious to provide a handle as disclosed by Flink and Mayo in the carrier of Reiner to make the handle easier to grasp and more comfortable to hold. *Id.*

Appellant argues that Reiner fails to disclose an upper band portion as recited, and the Examiner failed to address whether this would have been obvious in light of the teachings of Flink and Mayo. Appeal Br. 25.

In response, the Examiner finds that Reiner discloses the desirability of providing a carrier having high stability "in any dimension," and this stability is provided by simple additional elements. *See* Ans. 3–4 (citing Reiner 1:15–30). The Examiner finds transverse member 3 and transverse stiffener 4 of Reiner are two such elements, and Reiner contemplates the addition of more. *Id.* The Examiner also finds "[o]ne way of accomplishing goals such as these, as shown in the prior art of record is to have an upper band portion on all walls of a four wall carrier, not just on the end walls." *Id.* at 4.

Appellant replies that there would be no reason to add an upper band portion to the side walls of Reiner because Reiner achieves sufficient stability in its carrier by using transverse member 3 without such an upper band, in other words, transverse member 3 satisfies Reiner's requirement for

Examiner to limit the rejection to a reasonable number of fully-developed rejections, or at least provide a clearer demarcation for each rejection." Appeal Br. 4. However, to the extent the Examiner did not follow instructions in the Manual of Patent Examining Procedure (MPEP), such failure is not, in and of itself, an appealable matter. The Patent Trial and Appeal Board does not exercise supervisory authority over the Primary Examiner.

stability on its own. Reply Br. 4. Appellant also states, “the Examiner should cite a specific reference with a specific upper band portion so that the obviousness rejection could be analyzed for the specific structure disclosed and the specific reasons (if any) for that structure.”⁵ *Id.* at 5. Appellant also asserts, “[i]n response to this vague rejection, Appellant can only argue that adding an upper band portion to the side walls of Reiner would not add any benefit.” *Id.*

We do not agree with Appellant that the addition of an upper band portion to the side walls of the carrier in Reiner would not provide any benefit. Reiner states, “[i]t is an object of the invention to make a bottle carrier which has the W shape defined herein before and which is made from plastic material and has a high stability by the provision of simple additional elements.” Reiner 1:15–18. Thus, the Examiner’s finding that Reiner is concerned with the stability of its carrier is supported by a preponderance of the evidence. Reiner also teaches that transverse member 3 stabilizes the carrier in virtually any dimension. *Id.* at 1:21–23. Thus, Reiner teaches that such structure provides the benefit of stability. Even assuming for the sake of argument that transverse member 3 provides *sufficient* stability for one type of bottle to be carried, the Examiner’s proposed modification amounts to an improvement, *increasing* stability, which, as discussed above, is a

⁵ Appellant admits that support walls of this nature are disclosed in the prior art, stating, “[t]o be clear, there are many prior art crates with upper band portions, such as Apps (7,604,122, mentioned by the Examiner[, hereinafter, “Apps ’122”]), but Apps [’122] is a very different type of crate.” Reply Br. 5. Appellant attempts to differentiate this reference, stating, “Apps [’122] discloses a crate for carrying 24 bottles with handles at each end, while Reiner only carries 8 bottles with a single handle in the middle.” *Id.*

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concern disclosed by Reiner. Accordingly, the proposed modification to add an upper band portion to the side walls in Reiner's carrier would merely be a repetition of a technique Reiner already applies to its end walls, and, notably, a technique Appellant admits is disclosed in the prior art (*see* Reply Br. 5, discussing Apps '122).

Handle

Appellant next argues that, because Reiner forms its carrier from a single sheet of material, a person of ordinary skill in the art could not modify its handle to include openings facing upward, as proposed by the Examiner. Appeal Br. 26. Specifically, Appellant states,

the handle of the Reiner carrier could not be modified in this manner because the Reiner carrier is formed of a flat plastic sheet formed into a "W-shape." In order to form the two double walls 4a, 4b, the handle must open downward. The handle is continuous with the two double walls 4a, 4b. Therefore, the handle must always open downward of the carrier.

Id. Appellant argues that the handles of Flink and Mayo are injection molded, and, therefore, incompatible with the manufacturing technique used in Reiner. *Id.* at 26–27.

The Examiner replies that a person of ordinary skill in the art would have had "the skill to make the handle open upwardly, downwardly or both given a sheet plastic construction." Ans. 6. The Examiner further finds "it would also have occurred to one having ordinary skill in the relevant art to mold the crate of Reiner, given the express teaching in the reference to construct the carrier from plastic material," and "many similar crates in the prior art of record that are also made from plastic are expressly taught in their references to be molded, such as injection molded." *Id.*

Appellant replies that one object of Reiner is to make a bottle carrier that has a W shape, and, “[i]n order to form a handle in the middle of a W shape, the handle must open downward. If the middle of the bottle carrier had two walls opening upward, the carrier would not have a W shape.”

Reply Br. 4.

The Examiner has the better position because we agree that a person of ordinary skill in the art would have been able to form a handle with spaced-apart handle side walls defining openings upward. Appellant’s argument that a person of ordinary skill in the art would have been required to use a sheet, and that this would have prevented having a handle with spaced-apart handle side walls with upward facing openings is not supported by the record. In this regard, as the Examiner notes, Reiner’s discussion of using a *sheet* to make a bottle carrier relates to the sheet metal carrier discussed in Reiner’s background section, not to the plastic carrier Reiner describes as its invention. *See* Reiner 1:3–45. In any event, the Examiner’s rejection does not rely on an actual, physical implementation of Reiner’s carrier (including the alleged sheet-related method of manufacturing the carrier). Rather, we see no reason a person of ordinary skill in the art would have been precluded from using injection molding, or other manufacturing techniques, to provide the recited spaced-apart handle side walls that define upward facing openings.

We have considered all of Appellant’s arguments in support of the patentability of claim 1, but find them unavailing. Accordingly, we sustain the rejection of claim 1 as unpatentable over Reiner and Flink or Mayo.

Claims 2–10, 12, and 21–23 depend from claim 1. With respect to Rejection I, Appellant does not make arguments for the patentability of claims 2–10, 12, and 21–23 aside from those discussed above regarding

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claim 1. *See* Appeal Br. 24–29. Accordingly, for the same reasons, we sustain the rejection of claims 2–10, 12, and 21–23 as unpatentable over Reiner and either of Flink or Mayo.

Claim 11

Claim 11 depends from dependent claim 10, which requires a plurality bottles received in the bottle receiving pockets. Appeal Br. 35 (Claims App.). Claim 11 specifies that “the bottles are taller than the center structure” recited in claim 1. *Id.*

Appellant argues that Reiner teaches away from this arrangement by stating its extended walls *must* have at least the same height as a bottle. Appeal Br. 27–28.

The Examiner presents two retorts. First, the Examiner finds “in the case of one using the Reiner apparatus to simply transport or store some bottles one happened to have, the patent to *Reiner would likely not be consulted by a user o[f] the Reiner crate.*” Ans. 8 (emphasis added). Therefore, according to the Examiner, “the teaching in Reiner to provide for the carrier to be higher or as high as the bottles would not be known to such a user of the Reiner crate.” *Id.* Second, the Examiner states, “such a user would have found it obvious to ignore the teaching in the patent (should that person have had access to the patent) based on the need for something to transport and store the bottles in and the suitability of the Reiner carrier to do so.” *Id.*

Appellant has the better position. Reiner states that its

extended walls *must* have at least the same height as a bottle so that a next upper carrier in a stack of carriers will not rest on the bottles when the carriers are stacked with the walls of an upper carrier extending in a direction transverse to similar walls of two subjacent carriers.

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Reiner 2:17–21 (emphasis added). Thus, Appellant’s assertion that Reiner teaches away from the arrangement recited in dependent claim 11 is supported by Reiner’s explicit disclosure. Further, the Examiner cites Reiner (the patent, not the device itself) in the rejection of claim 11. *See* Final Act. 6–7. Thus, the Examiner’s contention that a person of ordinary skill in the art would not have consulted “the patent to Reiner” contradicts the Examiner’s statement of the rejection. Finally, the Examiner’s contention that a person of ordinary skill in the art would have ignored the teachings of Reiner is inconsistent with guidance provided by our reviewing court. “[A] reference ‘must be considered for all it taught, disclosures that diverged and taught away from the invention at hand as well as disclosures that pointed towards and taught the invention at hand.’” *Polaris Industries, Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1069 (Fed. Cir. 2018) (quoting *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 296 (Fed. Cir. 1985)). Accordingly, we do not sustain the Examiner’s rejection of claim 11 as unpatentable over Reiner and Flink or Mayo.

Claim 13

Independent claim 13 recites, in part, “base walls including a plurality of vertical ribs.” Appeal Br. 36 (Claims App.). Appellant argues that Reiner fails to disclose that each of the plurality of base walls includes a plurality of vertical ribs as required by independent claim 13. Appeal Br. 28. Appellant also asserts that the Examiner did not determine that it would have been obvious to add such ribs to the carrier disclosed by Reiner, and, further, such a modification would not have been obvious (or even possible) because Reiner’s carrier is “thermoformed from a flat plastic sheet.” *Id.*

The Examiner responds by noting that Appellant admitted that such ribs are extremely common in beverage crates. Ans. 9 (citing Appeal Brief

22). The Examiner reasons that it would have been obvious to add such ribs to the carrier disclosed by Reiner “to provide the crate therein with the feature for strengthening or stability purposes.” *Id.*

Appellant replies that such ribs “are not common in the bottle carriers of the type disclosed by Reiner.” Reply Br. 7. Appellant also argues that, because “Reiner[’s] carrier is made from a flat plastic sheet, it would not be possible to form vertical ribs in the base.” *Id.*

In its discussion of the now-withdrawn rejection of claim 13 as failing to comply with the written description requirement, Appellant admits that the recited vertical ribs are “extremely common in beverage crates.” Appeal Br. 22. Appellant reproduces a portion of Figure 5 and identifies the recited ribs in the bottom of the carrier. *Id.* We do not agree with Appellant’s argument that providing such ribs in the carrier disclosed by Reiner “would not be possible” inasmuch as Appellant’s argument relies on the faulty premise that Reiner requires manufacture via the use *only* of a flat sheet. We see no such requirement in Reiner. Accordingly, we sustain the Examiner’s rejection of claim 13 as unpatentable over Reiner and Flink or Mayo.

Claims 14, 16, 19, and 20 each depend from claim 13, and Appellant’ makes no additional arguments for the patentability of these claims. *See* Appeal Br. 28–29. Accordingly, these claims fall with claim 13.

Claim 15

Claim 15 depends indirectly from claim 13 and recites, “the lower portion of the end walls and the side walls includes a plurality of outer column portions extending from the upper band portion to the base, wherein the outer column portions and the center column portions partially define the plurality of bottle-receiving pockets.” Appeal Br. 36 (Claims App.).

Appellant argues that the Examiner has not made clear which portions of the

cited references (or even which references) are relied upon to teach the recited claim elements. *Id.* at 28.

In reply, the Examiner refers to page 7, lines 2–4 of the Final Office Action and states “[t]he ‘outer column portions’ and ‘center column portions’ (troughs 2 in the outer wall and their opposite in the center structure, respectively) in Reiner clearly partially defining the pockets in which the bottles in the reference are received.”⁶ Ans. 9.

We sustain the Examiner’s rejection of claim 15 because Figures 1 and 3 of Reiner each depict what appear to be tall, narrow structures separating various locations where bottles are intended to be stored in Reiner’s carrier. Appellant does not indicate why such structures fail to meet the requirements of claim 15 for “a plurality of outer column portions extending from the upper band portion to the base . . . the outer column portions and the center column portions partially defin[ing] the plurality of bottle-receiving pockets.”

Claim 17

Appellant argues

Claim 17 depends indirectly from claim 13 and further recites, “wherein the bottles are taller than the center structure.” Again, as stated above with respect to claims 11 and 18, it would not be obvious to modify Reiner to carry bottles that are taller than the handle when Reiner specifically teaches not to do this.

Claim 17, from Appellant’s Claim Appendix, recites, “[t]he nestable crate of claim 16 further including a plurality of bottles, each bottle received in one of the plurality of bottle-receiving pockets.” Appeal Br. 37 (Claims App.). This correctly reflects the language of claim 17 as filed with the Amendment

⁶ Appellant does not re-address this claim in the Reply Brief.

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dated November 22, 2017. Accordingly, Appellant's argument regarding claim 17 is not commensurate with the scope of this claim, and, therefore we sustain the rejection of claim 17 as unpatentable over Reiner and either of Flink and Mayo.

Claim 18

Claim 18 depends from claim 13 and adds limitations substantially similar to those discussed above regarding claim 11. *See* Appeal Br. 35, 37 (Claims App.). For the same reasons, we do not sustain the rejection of claim 18 as unpatentable over Reiner and either of Flink and Mayo.

Claim 24

Independent claim 24 recites, in part, “[a] nestable crate comprising . . . a pair of opposed end walls . . . each end wall including a plurality of end columns projecting into the crate, each end column partially defining two of the plurality of bottle-receiving pockets.” Appeal Br. 38 (Claims App.).

Appellant argues, “the Examiner does not mention any prior art references in particular or argue which ones would make it obvious to modify Reiner to have a plurality of end columns on each end wall projecting into the crate.” Appeal Br. 29. Appellant also asserts that the Examiner states no rationale for modifying Reiner to include such a feature. *Id.*

In response, the Examiner states, “the longitudinal troughs 2 in Reiner and their opposite meet the requirements in the claims for ‘outer column portions’ and ‘center column portions’” and “Reiner clearly shows each end wall including a plurality of columns projecting into the crate and each end column partially defining bottle receiving pockets.”⁷ Ans. 10. The

⁷ The Examiner also refers to Apps '122, Hassell, Apps '885, Hammett

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Examiner also refers to Apps, Hassell (U.S. 7,322,475, iss. Jan. 29, 2008), Apps (U.S. 6,892,885, iss. May 17, 2005, hereinafter “Apps ’885”), Hammett (U.S. 6,749,065, iss. June 15, 2004) and finds that “[m]ost if not all of these have some of the end columns partially defining two bottle receiving pockets (**two** as additionally argued by appellant).” *Id.* Further, the Examiner states:

Reiner clearly has substantially the same structure at the Reiner end wall (whether it be at least two columns partially defining pockets and the upper band portion). *So again what is the appellant’s argument? It would not have been obvious to modify Reiner to provide for three or four pockets against each end wall with at least some of the end columns at least partially defining two bottle receiving pockets?* Note the Brief at page 29. *The examiner simply disagrees with this argument.* Applicant’s often argue that examiners are considering prior art, or a particular application disclosure, without taking into consideration the knowledge of one having ordinary skill in the relevant art. In this patent application, this appears to be what the applicant is doing.

Id. at 11 (emphasis added). Thus, the Examiner finds that Reiner discloses many of the elements recited in claim 24, but relies on Apps ’122, Hassell Apps ’885, and Hammett to teach that each end column partially defines two of the plurality of bottle-receiving pockets. The Examiner provides no rationale for implementing these features in the carrier disclosed by Reiner. Instead, the Examiner places the burden on Appellant to explain why a person of ordinary skill in the art would not have found it obvious to make the modifications necessary for Reiner’s carrier to meet all the requirements of claim 24. Accordingly, we do not sustain the Examiner’s rejection of claim 24, and claim 25 depending therefrom, based on Reiner and Flink or Mayo.

Rejection II—Wood or Hirota and Flink or Mayo

Claim 1

The Examiner relies on either of Wood and Hirota to teach many of the elements recited in claim 1, but relies on either Flink or Mayo to teach a spaced-apart handle side walls that form openings facing upward. Final Act. 8. The Examiner determines it would have been obvious “to provide the apparatus of either [Wood or Hirota] with the [handles of Flink or Mayo], for the purpose of providing a handle that was more easily grasped, more comfortable to hold and/or as a matter of obvious choice of design.” *Id.* at 8–9.

Wood

Appellant argues that the Examiner’s proposed modification would (i) prevent proper nesting of the handle of the carrier disclosed by Wood, and (ii) fail to result in improved comfort because Wood provides a flange at a lower portion of its handle. Appeal Br. 31. Appellant also asserts that the handle disclosed by Wood is formed of a flat sheet of plastic, and, therefore, “[a] handle such as shown in Mayo could not be formed from the [Wood] crate without significant, non-obvious modifications to the entire Reiner crate.” *Id.* In the Reply Brief, Appellant contends that the Examiner’s proposed modification would require making the handle in Wood wider, and “[t]his would require further significant, non-obvious modifications.” Reply Br. 10–11.

We do not agree with Appellant’s arguments. Appellant provides no persuasive technical argument or objective evidence that including openings in the top of the handle in Wood would present any problem with nesting. Indeed, Figure 7 of Wood depicts nested carriers with significant portions of handles 15 of each carrier separated by a large gap. This means that at least

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a portion on the top of each handle remains out of contact with, and relatively unencumbered by, structure located on the adjacent carrier. Thus, we see no reason providing openings on the upper surfaces of these handles would prevent proper nesting as asserted by Appellant.

As for Appellant's allegation that the proposed modification would not enhance a user's comfort, this argument is undermined by the teaching in Flink that handles comprising thin strips are uncomfortable and that providing Flink's gripping surface 52 improves comfort. *See* Flink 1:26–30; 4:49–59. Although Flink's gripping surface 52, by itself, does not provide spaced-apart handle side walls defining openings upward, it is closely associated with this structure. *See id.* at 4:49–59. Thus, implementing the portion of Flink's handle that improves comfort would reasonably include implementing the open structure that creates this portion.

As for Appellant's contention that the handle disclosed by Wood is formed of a flat sheet of plastic, and this would have made the Examiner's proposed modification non-obvious, we do not agree that Wood's carrier is limited to any particular method of manufacture, much less that it be formed from a single plastic sheet. *See* Wood 2:4–22 (discussing manufacturing the carrier via attachment of *strips* of material). Accordingly, for the reasons set forth above, we sustain the Examiner's rejection of claim 1 as unpatentable over Wood and either of Flink and Mayo.

Appellant does not make additional arguments for the patentability of claims 2–12 and 21–23, which depend from claim 1. Accordingly, for the same reasons, we sustain the rejection of these claims as unpatentable over Wood and Flink or Mayo.

Hirota

Following Appellant’s arguments against the rejection of claim 1 based on Wood, Appellant turns to the rejection based on Hirota, stating, “[a]gain, it would not be obvious to modify Hirota to have ‘spaced apart handle side walls defining openings upward.’ Flink does not even disclose this feature. Modifying Hirota in view of Flink would prevent nesting, without serious, nonobvious redesign.” Appeal Br. 31–32.

We do not agree with Appellant that the Examiner’s proposed modification to the handle of Hirota would prevent nesting, absent non-obvious redesign. As shown in Figure 4 of Hirota, significant portions of the handles of nested carriers are out of contact with each other. Appellant provides no persuasive technical evidence or argument as to why providing such handles with openings as recited in claim 1 would present any difficulty to a person of ordinary skill in the art.

We also disagree with Appellant’s contention that Flink does not disclose spaced apart handle side walls defining openings facing upward. *See* Flink Figs. 4, 6. Appellant’s arguments directed to the rejection based on Hirota do not explain why the handle disclosed by Flink fails to meet requirement for “spaced-apart handle side walls defining openings upward” as recited in claim 1. Accordingly, we sustain the rejection of claim 1, and claims 2–12 and 21–23 depending therefrom, as unpatentable over either of Wood and Hirota in combination with either of Flink and Mayo.

Claim 13

Independent claim 13 recites, in part, “each of the plurality of base walls including a plurality of vertical ribs, a plurality of connecting ribs connecting the plurality of base walls to one another.”

Appellant argues, “Wood and Hirota could not be modified to include ribs connecting the base walls to one another because Wood and Hirota have *dividers* between each of the pockets that are designed to be received between the base walls of an identical crate nested thereon” and “[c]onnecting the base walls to one another would prevent the carriers from nesting with one another when empty.” Appeal Br. 31 (emphasis added). Appellant also asserts that Wood, Hirota, Flink, and Mayo fail to disclose a plurality of base walls each including a plurality of vertical ribs. *Id.*

The Examiner replies that Appellant has admitted that such ribs are “extremely common,” providing such ribs increases stability, and a person of ordinary skill in the art would have been able to implement such ribs in the carriers of Wood and Hirota while also allowing for the carriers to nest. *See* Ans. 12–14. The Examiner finds that the dividers noted by Appellant could be replaced with ribs. *Id.* at 13 (“there would be no need for the dividers between the pockets were the references modified to include the connecting ribs between the pockets.”).

Appellant replies that “these ribs are common in beverage crates (like Apps), but not in the bottle carriers like Wood and Hirota.” Reply Br. 12. Appellant also contends that replacing the dividers between pockets with ribs would amount to “a significant, non-obvious modification not supported by any cited prior art or any stated rationale.” *Id.* at 13.

The Examiner has the better position on this point because the purpose of ribs,⁸ such as those discussed in Appellant’s admission and in Apps ’122, is to strengthen or stiffen the structure in which they are

⁸ Referring to ribs 46 and 48 on the bottom of carrier crate 210 in Figure 9, Apps ’122 states, “[s]uch ribs help provide stiffness to bottom **212**.” Apps ’122 5:13–14.

disposed. *See* Apps '122 5:13–14. Thus, the Examiner's reasoning is supported by rational underpinnings. Further, we do not agree with Appellant's conclusory statement (Reply Br. 13) that such a modification would have been "significant, non-obvious modification" because Appellant provides no persuasive explanation in support of this assertion. For the same reason, we do not agree that the Examiner's proposed modification would prevent nesting, as asserted by Appellant. Accordingly, we sustain the rejection of claim 13, and claims 14–20 depending therefrom, as unpatentable over either of Wood and Hirota in combination with either of Flink and Mayo.

Claim 24

Appellant argues, "[n]one of the cited references discloses a plurality of end columns on each end wall projecting into the crate. Nor do they disclose each of the plurality of end columns partially defining two bottle-receiving pockets, which would require at least three or four pockets against each end wall." Appeal Br. 32. Appellant further contends, "there is no prima facie obviousness rejection of claim 24 over Wood alone, Hirota alone, or Wood over Flink, or Wood over Mayo, or Hirota over Flink, or Hirota over Mayo[, and] Appellant would just have to guess to respond to each of these rejections." *Id.*

In response, the Examiner states, "Wood and Hirota clearly show end walls including end columns projecting into the crate in exactly the same manner as apparently disclosed in the subject application, and as also shown in Reiner." Ans. 14. The Examiner then states:

Appellant argues that this would mean three or four pockets at each end of the carton . . . The examiner disagrees since a relatively wide column could clearly support two bottle receiving

pockets on either side thereof, however, even if necessary go ahead and provide the three or four pockets at each end in the crates of Wood and Hirota. *What is unobvious about doing this? The advantage would clearly be the ability to hold more bottles.* There is a prima facie obviousness rejection of claim 24 over Wood or Hirota in view of Mayo or Flink.

Id. at 14 (emphasis added).

We agree with Appellant that the Examiner failed to articulate an adequate rationale for modifying the carrier of either Wood or Hirota to include end columns each partially defining two of the plurality of bottle-receiving pockets. The Examiner sets forth no rationale in the statement of the rejection in the Final Office Action regarding such a modification. *See* Final Act. 8–9. The Examiner’s belated attempt to provide a rationale in the Answer merely concludes that a modification would have provided the ability to hold more bottles without explaining what the specific modification is or how it is connected with such a benefit. *See* Ans. 14. Accordingly, we do not sustain the rejection of claim 24, and claim 25 depending therefrom, as unpatentable over Wood or Hirota in combination with either of Flink and Mayo.

CONCLUSION

The Examiner’s rejections are AFFIRMED IN PART.

DECISION SUMMARY

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
1-25	103	Reiner, Flink, Mayo	1-10, 12-17, 19-23	11, 18, 24, 25
1-25	103	Wood, Hirota, Flink, Mayo	1-23	24, 25
Overall Outcome			1-23	24, 25

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART