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DINSMORE & SHOHL LLP 900 WILSHIRE DRIVE SUITE 300 TROY, MI 48084			ATTEL, NINA KAY	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte R. CHARLES MURRAY

Appeal 2019-003281
Application 14/742,166
Technology Center 3700

Before STEFAN STAICOVICI, ANNETTE R. REIMERS, and
JEREMY M. PLENZLER, *Administrative Patent Judges*.

PLENZLER, *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, 2, 4, 5, 7–13, and 21. An oral hearing was held on July 29, 2020. A transcript of that hearing (“Tr.”) is included in the record. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Pouch Pac Innovations, LLC. Appeal Br. 2.

CLAIMED SUBJECT MATTER

The claims are directed to a flexible pouch. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A flexible pouch adapted to stand unsupported, the pouch having a product storage area for containing a carbonated beverage, the flexible pouch comprising:

a pair of walls sealed together at a top edge seal and a pair of side edge seals;

a one way pressure relief valve mounted in the top portion of one of the pair of walls, the pressure relief value adapted to permit gas produced by the beverage to flow only out of the product storage area; and

a U-shaped seal formed in the pair of walls positioned between the pair of side edge seals, the U-shaped seal having a curved portion extending between a pair of spaced apart portions, each of the pair of the spaced apart portions having an end spaced apart from the top edge seal, the pressure relief valve positioned between the pair of spaced apart portions, the U-shaped seal positioned adjacent the top seal so as to block product in the product storage area from interfering with operation of the pressure relief valve and permit gas to flow through gaps formed between the top edge seal and U-shaped seal.

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Anderson	US 2006/0131328 A1	June 22, 2006
Murray	US 2007/0217717 A1	Sept. 20, 2007
Reilly	US 2011/0103716 A1	May 5, 2011
Kuribayashi ²	JP 08198274 A	Aug. 8, 1996

² An English language machine translation is provided by the Examiner.

REJECTIONS

Claims 1, 2, 4, 5, 7–9, 13, and 21 are rejected under 35 U.S.C. § 103 as being unpatentable over Anderson, Reilly, and Kuribayashi.

Claims 10–12 are rejected under 35 U.S.C. § 103 as being unpatentable over Anderson, Reilly, Kuribayashi, and Murray.

OPINION

Appellant argues claims 1, 2, 4, 5, 7–9, 13, and 21 as a group. Appeal Br. 4–6. We select claim 1 as representative. Claims 2, 4, 5, 7–9, 13, and 21 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv). Claims 10–12 ultimately depend from claim 1. Appellant does not present separate argument for those claims.

Initially, we note that arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv); *In re Jung*, 637 F.3d 1356, 1365–66 (Fed. Cir. 2011); *Ex parte Frye*, 94 USPQ2d 1072, 1075–76 (BPAI 2010 (precedential)). As explained below, we have enough of the Examiner’s findings and rationale unrebutted to warrant affirmance on that basis alone.

The Examiner finds that Anderson teaches the majority of features recited in claim 1, but does not teach its “flexible pouch being adapted to stand unsupported.” Non-Final Act. 2–3. The Examiner finds that Reilly teaches this feature and reasons that “it would have been obvious . . . to have modified Anderson by configuring the pouch with a gusseted bottom, as taught by Reilly, in order to form a pouch that is adapted to stand upright.” *Id.* at 3. Appellant acknowledges that “Reilly discloses a stand up pouch,” but contends that Reilly’s pouch is “for transportation of carry out food from a restaurant” and does not include other features of the claim, such as a one way valve. Appeal Br. 5. Appellant’s contentions are not persuasive

because they do not address the Examiner’s findings or rationale for modifying Anderson’s teachings based on those from Reilly. Moreover, Appellant acknowledged at oral hearing that the “stand unsupported” feature recited in the preamble is not even a structural limitation of claim 1. *See* Tr. 5:18–6:21.

The Examiner finds that Anderson does not teach the specific U-shaped seal arrangement including the positioning recited in claim 1. Non-Final Act. 3–4. The Examiner finds that Kuribayashi teaches the U-shaped seal features missing from Anderson. *Id.* at 4. The Examiner reasons that

it would have been obvious . . . to have modified Anderson by replacing the U-Shaped seal with the U-Shaped seal as taught by Kuribayashi, such that the U-shaped seal is additionally positioned between the pair of sealed edges and configured with a curved portion extending between a pair of spaced apart portions, and such that the U-shaped seal is configured to permit gas to flow through gaps formed between the top edge seal and each of the spaced apart portions of the U-shaped seal, as the substitution of one known evacuation mechanism for an alternative known evacuation mechanism to achieve the equivalent and predictable results.

Id. at 4–5. The Examiner also provides an alternate basis for modifying Anderson’s seal, explaining that “changing the shape of a seal around a pressure relief valve in order to create a functionally equivalent barrier and fluid pathway would have been obvious.” *Id.* at 5 (citing *In re Dailey*, 357 F.2d 669 (CCPA 1966)).

A change in shape is obvious as a matter of design choice where an appellant does not show the shape was significant or beyond what was obvious to perform the same function. *In re Dailey*, 357 F.2d at 672–73. Notably, Appellant does not address this alternate rationale provided by the

Examiner, leaving this portion of the rejection un rebutted. For this reason alone, we are not apprised of error in the Examiner's reasoning to modify Anderson's seal in the manner proposed to meet the U-shaped seal arrangement and location recited in claim 1.

Appellant's Specification makes clear that no particular significance is attached to the U-shape, and that "barrier seal 45 could take different shapes," such as "a simple line shape covering a minimal area, . . . generally V-shaped or C-shaped, . . . a 3 sided box, or any other shape[] known to those skilled in the art that would assist in keeping product away from the valve 40." Spec. ¶ 16. There is no dispute that Anderson's seal would assist in keeping product away from its valve. Appellant fails to apprise us of any persuasive reason as to why the proposed modification to Anderson's seal is anything more than design choice. *See, e.g.*, Tr. 8:23–10:9 (acknowledging that the Appeal Brief did not address the design choice rationale).

Moreover, we are not apprised of error in the Examiner's findings regarding Kurabayashi or the reasons to modify Anderson's teachings based on those of Kurabayashi. Rather than addressing the actual findings or rationale relied on by the Examiner, Appellant's contentions address the location of Kuribayashi's valve and the substitution of that valve including its location in Anderson's pouch, which is not the basis for the Examiner's rejection. Appeal Br. 4–5.

To the extent Appellant also disputes whether Reilly or Kuribayashi is analogous art, those contentions, too, are unpersuasive. *See* Appeal Br. 5 (never mentioning the analogous art test, but alleging that none "of the references directed to the problem solved by Appellant's invention"). We see no dispute that the cited references are in the same field of endeavor as

Appellant's invention. Indeed, there is no dispute that each of the cited references relates to flexible packaging with valves.

CONCLUSION

The Examiner's rejections are affirmed.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 4, 5, 7-9, 13, 21	103	Anderson, Reilly, Kuribayashi	1, 2, 4, 5, 7-9, 13, 21	
10-12	103	Anderson, Reilly, Kuribayashi, Murray	10-12	
Overall Outcome			1, 2, 4, 5, 7-13, 21	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED