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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSEPH SULLIVAN JR., JOE WANNER,
ROBERT BUCHENAN, and STEVE GOSLING

Appeal 2019-005128
Application 14/493,320
Technology Center 3700

Before ANNETTE R. REIMERS, JEREMY M. PLENZLER, and
GEORGE R. HOSKINS, *Administrative Patent Judges*.

REIMERS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ appeals under 35 U.S.C. § 134(a) from the Examiner's decision to reject under 35 U.S.C. § 103: (1) claims 1–7, 12, 25, 26, 31, and 34 as unpatentable over Moehlenbrock (US 7,681,732 B2, issued Mar. 23, 2010) and Sierra-Gomez (US 6,918,532 B2, issued July 19, 2005); and (2) claims 6, 10–12, 28, and 29 as unpatentable over Moehlenbrock, Sierra-Gomez, and Gordon (US 4,141,466, issued Feb. 27, 1979). Claims 27 and

¹We 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 “CDF Corporation.” Appeal Brief (“Appeal Br.”) 3, filed Jan. 24, 2019.

30 have been withdrawn from consideration. Claims 8, 9, 13–24, 32, and 33 have been canceled.² We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

CLAIMED SUBJECT MATTER

The claimed subject matter “relates to packaging and more particularly to a sustainable packaging system including a carton and a sealed liner assembly for shipping liquid, viscous, or particulate products.” Spec. ¶ 3, Figs. 8, 10. Claims 1 and 34 are independent.

Claim 1 is illustrative of the claimed subject matter and recites:

1. A shippable material system, comprising:
 - a self-supporting liner for holding contents therein and having a side wall, a closed bottom end characterized by a bottom wall formed integral with the side wall, and an open top end having an outwardly-projecting rim, the rim comprising a flange portion; and
 - a peel and reseal lidding assembly that is heat-sealed to the self-supporting liner at the open top end

² The Examiner rejected claims 13, 32, and 33 under 35 U.S.C. § 112(a) for lack of enablement. *See* Non-Final Office Action (“Non-Final Act.”) 3–4. In a Response, Appellant canceled claims 13, 32, and 33. *See* Response to Non-Final Office Action, filed January 24, 2019. The Examiner entered Appellant’s Response and stated Appellant’s “amendment appears to only have canceled claims 13, 32, 33. The above results in removal of the 112 rejection of claims 13, 32, 33.” Advisory Action, dated Feb. 6, 2019; *see also* Examiner’s Answer (“Ans.”) 6, dated Apr. 18, 2019. As claims 13, 32, and 33 have been canceled, the Examiner’s rejection of those claims under 35 U.S.C. § 103 as unpatentable over Moehlenbrock, Sierra-Gomez, and Alpern (US 4,482,053, issued Nov. 13, 1984) is moot and not before us for review. *See* Non-Final Act. 8–9; *see also* Ans. 6. Additionally, we note that canceled claim 33 is not listed in the Claims Appendix. *See* Appeal Br. 30 (Claims App.).

operably sealing the contents therein, the peel and reseal lidding assembly including:

a first lidding material defined by at least one edge and having a center portion movable to form an opening through the first lidding material and a remaining portion, with the center portion being at least partially detached from the remaining portion along at least one edge of the center portion; and

a second lidding material covering the opening, wherein the center portion is movable to expose the second lidding material thereunder; and

a third lidding material defined by at least one edge that is sealed to the remaining portion and the center portion across the detached edge, wherein the third lidding material is resealable to seal the contents in the self-supporting liner when the second lidding material is broken.

ANALYSIS

Obviousness over Moehlenbrock and Sierra-Gomez

Claims 1–7, 12, 25, 26, 31, and 34

Independent claim 1 is directed to a shippable material system having a lidding assembly that includes first, second, and third lidding materials. Appeal Br. 27 (Claims App.). The Examiner finds that Moehlenbrock discloses the shippable material system of claim 1 substantially as claimed including first and third lidding materials. Non-Final Act. 4. The Examiner looks to the teachings of Sierra-Gomez for the second lidding material. In particular, the Examiner finds that “Sierra-Gomez discloses a second material/tamper evident layer thereunder (‘film’ col. 1: 63-col. 2: 5[]).” *Id.* The Examiner reasons that it would have been obvious “to modify Moehlenbrock in view of Sierra-Gomez (by providing that a second lidding

material attached to the bottom of a lidding material) to provide tamper evidence.” Non-Final Act. 5 (citing Sierra-Gomez 1:63–2:5).

Appellant contends that a skilled artisan reviewing the Moehlenbrock reference “would not have looked for another reference to disclose a tamper evidence device, since such a device is already disclosed in Moehlenbrock.” Appeal Br. 24. According to Appellant, “[a] basic purpose of the tamper evidence systems/devices in both [Moehlenbrock] and Sierra-Gomez is to prove to a consumer that the contents of the container have not been tampered with or accessed since manufacturing” and “[t]here is no motivation ‘to provide tamper evidence’ when tamper evidence devices are already disclosed.” Appeal Br. 24; *see also id.* at 9 (“[T]he combination of Moehlenbrock and Sierra-Gomez is improper at least because the combined prior art elements are redundant.”). Appellant further contends that “[o]ne tamper evidence device is sufficient to prove to a buyer that the contents of the container have not been tampered with or accessed since manufacturing and to provide additional tamper evidence devices is redundant without any added benefit.” Appeal Br. 24.

In response to Appellant’s contentions, the Examiner states that Moehlenbrock discloses “the layer including 27/106/59 being pealed as the 3rd/outer material/layer and the layer with 29 as the 1st/central material/layer.” Ans. 7, 12. The Examiner reasons that “[w]hile Moehlenbrock discloses tamper evidence on the top of the peel-reseal lidding material, Moehlenbrock does not disclose tamper evidence below the peel-reseal lidding material.” *Id.* at 8, 13. As such, the Examiner further reasons that a skilled artisan would look to the teachings of Sierra-Gomez in order to provide tamper evidence below the peel-reseal lidding material and

“[r]egardless of cost and complexity, additional tamper evidence for the system would enhance the system by providing further guidance to the user as to whether or not the device is safe or not for the user to access and use the intended contents.” Ans. 8, 13.

As far as we understand, the Examiner is proposing to modify Moehlenbrock by including the second lidding layer of Sierra-Gomez below peel-reseal lidding material (surface 27) of Moehlenbrock. *See* Ans. 7–8, 12–13. Thus, according to the Examiner’s proposed modification, the second lidding material (layer) would be located *below* the third lidding material (surface 27) and *above* the first lidding material (surface 29) of Moehlenbrock. *See id.* However, claim 1 requires the second lidding material to be “below” not “above” the first lidding material. *See* Appeal Br. 27 (Claims App.) (“[A] second lidding material covering the opening [of the first lidding material], wherein the center portion [of the first lidding material] is movable to expose the second lidding material *thereunder*.”) (emphasis added). For these reasons, the Examiner fails to establish by a preponderance of the evidence that the combined teachings of Moehlenbrock and Sierra-Gomez disclose the “lidding assembly” of claim 1.

Further, as correctly pointed out by Appellant, both Moehlenbrock and Sierra-Gomez disclose that “the tamper evidence layer provides an indication to a user that a package has been previously opened or tampered with.” Reply Br. 3³; *see also* Moehlenbrock 2:38–40, 7:21–25; Sierra-Gomez 3:57–60. We agree with Appellant that “the tamper evidence layer [of either Moehlenbrock or Sierra-Gomez] serves the same general purpose

³ Reply Brief (“Reply Br.”), filed June 18, 2019.

of providing an indication that a package has been previously opened or tampered with, such that providing the additional tamper evidence layer with the Moehlenbrock container is . . . redundant” in that “[i]t is unnecessary to provide a second tamper evidence layer that provides the same information to a user (e.g., that a package has been previously opened or tampered with) as the first tamper evidence layer.” Reply Br. 3.

We also agree with Appellant that “a second tamper evidence layer does not ‘enhance security,’ as suggested by the Examiner.” Reply Br. 3; *see also* Ans. 8, 13. As correctly noted by Appellant, “[i]f the first layer shows tampering or opening, the purpose of warning a user has already been accomplished. A second warning by tampering of a second layer would provide *no added benefit* since a user would already know the package has been tampered with based on the first layer.” Reply Br. 4 (emphasis added).

Appellant also correctly notes that “neither [Moehlenbrock nor Sierra-Gomez] discloses the use of two tamper evidence layers. . . . As such, there is no teaching, suggestion, or motivation found in either reference to provide a second tamper evidence layer.” Reply Br. 4; *see also* Moehlenbrock and Sierra-Gomez, *passim*. Additionally, the Examiner fails to provide sufficient evidence or technical reasoning to establish that the tamper evidence of Moehlenbrock is inadequate for appropriately warning a user that a package has been previously opened or tampered with, such that additional tamper evidence is necessary or beneficial. *See* Non-Final Act. 4–5; *see also* Ans. 8, 13. For these reasons, we agree with Appellant that a skilled artisan “would not have been motivated to include a second tamper evidence layer in any location on the Moehlenbrock container since the

container already includes a tamper evidence device that provides sufficient indication to a user of any tampering with the container.” Reply Br. 3.

Like claim 1, independent claim 34 is directed to a shippable material system and includes similar language to a “lidding assembly” as that discussed above for claim 1. *See* Appeal Br. 27, 30 (Claims App.). The Examiner relies on the same unsupported findings in Moehlenbrock and Sierra-Gomez for claim 34 as those discussed above for claim 1. *See* Non-Final Act. 4–5. As such, the Examiner’s findings with regard to Moehlenbrock and Sierra-Gomez are deficient for claim 34 as well.

Accordingly, we do not sustain the Examiner’s rejection of claims 1–7, 12, 25, 26, 31, and 34 as unpatentable over Moehlenbrock and Sierra-Gomez.

*Obviousness over Moehlenbrock, Sierra-Gomez, and Gordon
Claims 6, 10–12, 28, and 29*

The Examiner’s rejection of claims 6, 10–12, 28, and 29 as unpatentable over Moehlenbrock, Sierra-Gomez, and Gordon is based on the same unsupported findings discussed above with respect to independent claim 1. *See* Non-Final Act. 7–8. The Examiner does not rely on the teachings of Gordon to remedy the deficiencies of Moehlenbrock and Sierra-Gomez. Accordingly, for reasons similar to those discussed above for claim 1, we do not sustain the Examiner’s rejection of claims 6, 10–12, 28, and 29 as unpatentable over Moehlenbrock, Sierra-Gomez, and Gordon.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-7, 12, 25, 26, 31, 34	103	Moehlenbrock and Sierra-Gomez		1-7, 12, 25, 26, 31, 34
6, 10-12, 28, 29	103	Moehlenbrock, Sierra-Gomez, and Gordon		6, 10-12, 28, 29
Overall Outcome				1-7, 10-12, 25, 26, 28, 29, 31, 34

REVERSED