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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERIKA BUCK and LARRY BUCK

Appeal 2019-005848
Application 15/601,763
Technology Center 3600

Before MICHAEL C. ASTORINO, KENNETH G. SCHOPFER, and
BRADLEY B. BAYAT, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), the Appellant¹ appeals from the Examiner's decision to reject claims 1–4, 6–14, 16, 17, 23, and 24. We have jurisdiction under 35 U.S.C. § 6(b). The Appellant's arguments were heard in an oral hearing held on September 11, 2020.

We REVERSE.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. The Appellant identifies “[t]he real party in interest in this appeal is Erica Buck and Larry Buck, inventors of the captioned application.” Appeal Br. 2.

STATEMENT OF THE CASE

Claimed Subject Matter

Claims 1 and 10 are the independent claims on appeal. Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A food serving apparatus, comprising:
a bottom surface integrally formed with opposed first and second perimeter side walls configured to be resiliently deformable toward each other automatically in response to insertion of said food serving apparatus into an open snack bag so as to maintain the opening of the snack bag in an expanded configuration, and without rupturing the sides of said snack bag, the bottom surface substantially flat over at least a major portion of the distance between said first and second perimeter side walls.

Appeal Br., Claims App.

References

The prior art relied upon by the Examiner is:

Name	Reference	Date
Graham	US 3,740,238	June 19, 1973
Schelling	US D674,569 S	Jan. 15, 2013

Rejections

Claims 1, 2, 4, 6–9, and 23 are rejected under 35 U.S.C. § 103 as unpatentable over Prior Art² and Graham. Ans. 3–5.

Claim 3 is rejected under 35 U.S.C. § 103 as unpatentable over Prior Art, Graham, and Schelling. *Id.* at 5–6.

Claims 10–14, 16, 17, and 24 are rejected under 35 U.S.C. § 103 as unpatentable over Schelling and Graham. Final Act. 6–8.

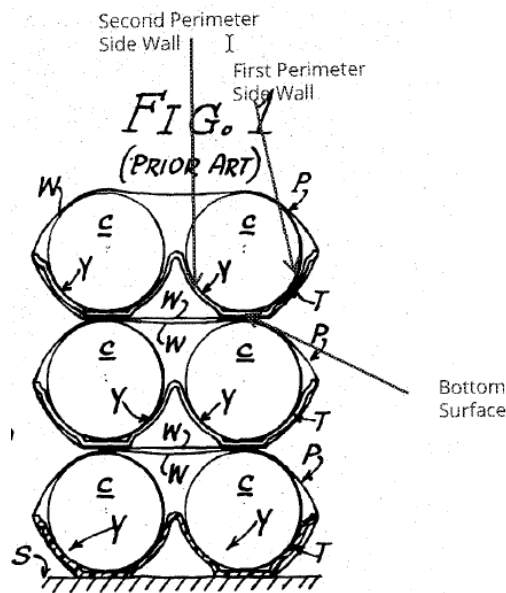
² “Prior Art” refers to Graham’s Figure 1, which “illustrates a stack of packages exemplary of the prior art.” Graham col. 2, ll. 37–38.

ANALYSIS

Independent Claim 1 and Dependent Claims 2–4, 6–9, and 23

The food serving apparatus of claim 1 includes “opposed first and second perimeter side walls” that are “configured to be resiliently deformable toward each other automatically in response to insertion of said food serving apparatus into an open snack bag so as to maintain the opening of the snack bag in an expanded configuration, and without rupturing the sides of said snack bag.” Appeal Br., Claims App.

The Examiner finds that Prior Art (i.e., “Graham’s Figure 1”) teaches food serving apparatus T, which includes opposed first and second perimeter side walls. Ans. 3. The Examiner’s application of Graham’s Figure 1 to the subject matter of claim 1 is best shown in Exhibit 5.³ Exhibit 5 is a copy of the first page of Graham’s patent with annotations added to Figure 1, which depicts “a stack of packages exemplary of the prior art.” The annotated version of Figure 1 is reproduced below.



³ The Examiner’s Answer includes Exhibit 5 as an attachment. Ans. 3.

Figure 1 shows a stack of packages P, with each package P including tray T enclosed by lightweight intermediate flexible wrap W. Graham col. 2, ll. 37–48. Each tray T defines a pair of elongate compartments Y for cookies C, and each compartment Y includes a floor, an inner side wall, and an outer side wall. *See id.* The Examiner’s annotations include an identification of the outer side wall of compartment Y as a first perimeter side wall and the inner side wall of the same compartment Y as a second perimeter side wall. Notably, the outer side wall is in contact with wrap W, but the inner side wall is not in contact with wrap W.

The Examiner also finds that Graham’s Figure 1 “does not show that the first and second perimeter side walls are configured to be resiliently deformable toward each other automatically in response to insertion of said food serving apparatus into an open snack bag (W).” Ans. 3. To remedy this deficiency the Examiner turns to Graham’s improved cookie package, which teaches the use of thin, resiliently flexible tray 12, made of plastic (e.g., polypropylene) to contain cookies. Graham col. 2, ll. 21–22, 59–61. The Examiner finds that Graham’s tray 12 includes:

opposed first and second perimeter side walls (24,26) configured to be resiliently deformable (constructed of polystyrene, polypropylene to provide resiliently flexible characteristic properties . . .) toward each other automatically in response to insertion of said food serving apparatus into an open snack bag (14) . . . so as to maintain the opening of the snack bag in an expanded configuration . . . , and without rupturing the sides of said snack bag.

Ans. 4 (citing Graham col. 3, ll. 50–63). The Examiner determines it would have been obvious to modify the food serving apparatus T shown in Graham’s Figure 1 with the resiliently flexible materials, as taught by

Graham, to allow the body of tray T to be resiliently flexible for easy insertion back into wrap W. *See id.*

The Appellant argues Graham fails to disclose “opposed first and second perimeter side walls configured to be resiliently deformable toward each other automatically in response to insertion of said food serving apparatus into an open snack bag so as to maintain the opening of the snack bag in an expanded configuration, and without rupturing the sides of said snack bag,” as recited in claim 1. *See* Appeal Br. 8–9; Reply Br. 3–5. The Appellant asserts that “the flexibility of [Graham’s improved] tray need only be sufficient to absorb vertical impact shocks to keep the cookies from bottoming out and contacting the top of cookies stacked below.” Reply Br. 4; *see* Appeal Br. 9 (citing Graham col. 3, ll. 50–62). The Appellant submits that “insertion of the tray of Graham into the wrapper enclosing it would not appear to deform the side walls of the tray at all, let alone do so in a manner that does not rupture the sides of the wrapper.” Appeal Br. 9. The Appellant’s argument is persuasive.

The Examiner’s determination that the outer and inner side walls of elongated compartment Y, as modified to be resiliently flexible, corresponds to the claimed “opposed first and second perimeter side walls” and that wrap W corresponds to the claimed “open snack bag” (*see* Ans. 4) appears to be based on speculation. First, we note that the Examiner fails to adequately explain on the record how wrap W applies a force to tray T and more specifically, to the outer and inner side walls of compartment Y, such that the walls would deform. In this regard, Graham does not describe lightweight intermediate flexible wrap W as being able to apply a force to tray T or the side walls of compartment Y. Moreover, Graham’s improved

cookie package is described as having a somewhat loose wrapping. *See* Graham col. 3, ll. 42–44 (“The interposed somewhat loose layers of very thin flexible wrap **14** do not interfere with such nesting nor with the action of the base and ribs **44**.”); Reply Br. 4. Second, the Examiner fails to adequately explain on the record how the inner side wall of compartment Y, which is not shown as being in contact with wrap W, would be affected by wrap W upon inserting tray T into wrap W.

In view of the foregoing, we determine that the Examiner fails to adequately explain how the outer and inner side walls of elongated compartment Y are “configured to be resiliently deformable toward each other automatically in response to insertion of said food serving apparatus into an open snack bag so as to maintain the opening of the snack bag in an expanded configuration, and without rupturing the sides of said snack bag,” as claimed.

Thus, we do not sustain the Examiner’s rejection of independent claim 1 and claims 2, 4, 6–9, and 23, which depend therefrom. Further, the Examiner fails to rely on Schelling in any manner that would remedy the deficiency in the Examiner’s rejection of claim 1 as discussed above. Therefore, we do not sustain the Examiner’s rejection of claim 3.

Independent Claim 10 and Dependent Claims 11–14, 16, 17, and 24

Independent claim 10 recites, among other things, “two resiliently deformable triangular-shaped side walls, . . . wherein each side wall is capable of bending toward the other side wall in response to lateral pressure from a snack bag upon insertion into the snack bag.” Appeal Br., Claims App.

The Examiner finds that Schelling teaches substantially all of the subject matter of claim 10, including two triangular-shaped side walls, but fails to teach if the side walls are resiliently deformable. *See* Final Act. 6. To remedy this deficiency the Examiner turns to the teachings of Graham. *Id.* at 7 (citing Graham col. 3, ll. 50–62). The Examiner reasons that “one skilled in the art would have readily recognized that constructing the triangular-shaped side walls to be resiliently deformable in Schelling would provide durability of the serving apparatus to withstand accidental side impacts.” *Id.*

The Appellant submits that “Schelling is simply a design patent for a crumb tray, which is a tray intended to catch the crumbs from ovens or toaster ovens.” Appeal Br. 10. Moreover, “[b]ecause of the heat to which the cited crumb tray is to be exposed, the crumb tray of Schelling naturally cannot be fabricated from the type of resilient material that might be deformable under the pressure of the wrapper of a snack bag, as claimed.” *Id.* at 10–11.

The Examiner responds that “Schelling doesn’t designate or disclose that his crumb tray has to be used for ovens or toaster ovens.” Ans. 8. The Examiner finds that crumb trays, in general, may be used without ovens or toaster ovens. *Id.* The Examiner supports this general finding by citing to an example of an automotive tray that includes a crumb tray. *Id.* (citing Heneghan (US 2009/0020450 A1, pub. Jan. 22, 2009)).⁴ The Examiner

⁴ Heneghan teaches a crumb tray for receiving crumbs and other small food remains when auto tray 100 is used for eating. Heneghan ¶ 29.

determines that “a crumb tray is not automatically for ovens or toaster ovens and can be constructed of different materials.” *Id.*

The Appellant argues that the Examiner’s rejection fails to be adequately supported because “[t]he Examiner . . . does not even know that the crumb tray of Schelling is a serving apparatus, let alone one that is typically subjected to ‘accidental side impacts.’” Reply Br. 8; *see* Appeal Br. 11. The Appellant’s argument is persuasive.

At the outset, we note that the Examiner fails to establish the specific uses of Schelling’s crumb tray. Although the Examiner explains that a crumb tray may be of a type that is not designed to be subject to the internal temperatures of an oven or a toaster over, the Examiner does not explain on the record — or even clearly suggest — that Schelling’s crumb tray is of that type. Similarly, the Examiner’s reasoning relies on the notion it would have been obvious to one of ordinary skill in the art to modify the side walls of Schelling’s crumb tray to be resiliently deformable in order to provide durability to withstand accidental side impacts. Final Act. 7. The Examiner, however, fails to establish on the record a scenario in which the side walls of Schelling’s crumb tray would be subject to accidental side impacts. More importantly, how the pressure involved in these asserted accidental side impacts compare to the “lateral pressure from a snack bag upon insertion into the snack bag,” as recited in claim 10. Accordingly, the Examiner’s rejection appears to be the result of impermissible hindsight, rather than being based on some articulated reasoning with some rational underpinning. *See in re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds . . . [require] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”)

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(cited with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)).

Thus, we do not sustain the Examiner's rejection of independent claim 10 and claims 11–14, 16, 17, and 24, which depend therefrom.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 2, 4, 6–9, 23	103	Prior Art, Graham		1, 2, 4, 6–9, 23
3	103	Prior Art, Graham, Schelling		3
10–14, 16, 17, 24	103	Schelling, Graham		10–14, 16, 17, 24
Overall Outcome				1–4, 6–14, 16, 17, 23, 24

REVERSED