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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte HEINE HEININGA

Appeal 2019-006670
Application 13/441,358
Technology Center 3700

Before JOHN C. KERINS, MICHAEL L. HOELTER, and
WILLIAM A. CAPP, *Administrative Patent Judges*.

HOELTER, *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 1–3, 5, 6, 15, 25, 27, 29, 32, 37, 52–54,

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 “Polytex Fibers Corporation.” Appeal Br. 3.

and 58–72, which constitute all the claims pending in this application.² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

The disclosed subject matter “relates to bags with one or more easy open features.” Spec. ¶ 6. Apparatus claim 1 and method claim 32 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A bag having a top, a bottom, a first side, a second side, an interior surface and an exterior surface, the bag comprising:
 - a first panel comprising a first layer laminated to a second layer and having a top end, a bottom end, a first side, a second side, an exterior surface and an interior surface,
 - a first side panel comprising a first layer laminated to a second layer, and having a top end, a bottom end, a first side, a second side, an exterior surface and an interior surface, the first side of the first side panel attached to the second side of the first panel;
 - a second panel comprising a first layer laminated to a second layer, and having a top end, a bottom end, a first side, a second side, an exterior surface and an interior surface, the first side of the second panel attached to the second side of the first side panel, wherein the top end of the second panel extends further than the top end of the first panel, forming a flap that enables the top end of the second panel to fold over the top end of the first panel;
 - a second side panel comprising a first layer laminated to a second layer, and having a top end, a bottom end, a first side, a second side, an exterior surface and an interior surface, the first side of the second side panel attached to the second side of

² The Examiner included a reference to claims 55–57 (*see* Final Act. 1-Office Action Summary) but these claims have been canceled. *See* Appeal Br. 26 (Claims Appendix).

the second panel and the second side of the second side panel attached to the first side of the first panel, the first panel, first side panel, second panel and second side panel defining a first opening proximal to the top end of the first panel and a second opening proximal to the bottom end of the first panel; and

an easy open feature attached to one of the exterior surface of the first panel and the interior surface of the second panel, the easy open feature enabled to be attached to the other one of the exterior surface of the first panel and the interior surface of the second panel to close the first opening using the flap, the easy open feature comprising an elongated polymer member having a first end proximate the first side of the first panel and a second end proximate the second side of the first panel;

wherein the elongated polymer member is enabled to preferentially tear apart to open the bag when the flap is pulled away;

wherein each of the first layers comprise a woven polymer, and each of the second layers comprise an oriented polymer film; and

wherein the bag is adapted to be filled with from 10 to 100 pounds of solid contents.

EVIDENCE

Name	Reference	Date
Provost	US 5,172,980	Dec. 22, 1992
Calvert et al. ("Calvert")	US 6,047,883	Apr. 11, 2000
Thrall	US 6,478,465 B1	Nov. 12, 2002
Floyd, JR.	US 2007/0104905 A1	May 10, 2007
Clune et al. ("Clune")	USA 7,406,810 B2	Aug. 5, 2008
Lin et al. ("Lin")	US 7,731,425 B2	Jun. 8, 2010

REJECTIONS³

Claims 1, 3, 5, 6, 15, 25, 27, 29, 52–54, and 59–61 are rejected under 35 U.S.C. §103(a) as unpatentable over Floyd, Clune, Provost, and Thrall.

Claim 2 is rejected under 35 U.S.C. § 103(a) as unpatentable over Floyd, Clune, Provost, Thrall, and Calvert.

Claims 32, 37, 63–68, and 70–72 are rejected under 35 U.S.C. § 103(a) as unpatentable over Floyd, Clune, and Provost.

Claim 62 is rejected under 35 U.S.C. § 103(a) as unpatentable over Floyd, Clune, Provost, and Thrall.

Claims 58 and 69 are rejected under 35 U.S.C. §103(a) as unpatentable over Floyd, Clune, Provost, Thrall, and Lin.

ANALYSIS

The rejection of claims 1, 3, 5, 6, 15, 25, 27, 29, 52–54, and 59–61 as unpatentable over Floyd, Clune, Provost, and Thrall

Appellant argues all these claims together. *See* Appeal Br. 9–19. We select claim 1 for review, with the remaining claims standing or falling with claim 1. *See* 37 C.F.R. § 1.37(c)(1)(iv).

The Examiner primarily relies on the teachings of Floyd for disclosing much of the recited bag structure, but acknowledges that “Floyd does not disclose an easy open feature” or that “the bag is adapted to be filled with from 10 to 100 pounds of solid content” as claimed. Final Act. 4–5. Clune is relied on for disclosing the recited “easy open feature,” as well as its

³ The rejection of claim 5 as being indefinite under 35 U.S.C. § 112(b) has been withdrawn. *See* Ans. 15.

associated “elongated polymer member.”⁴ Final Act. 5 (specifically referencing the Fig. 34A embodiment employing hook and loop bands). The Examiner, however, notes that Clune discloses this “easy open feature” as “attached to the *interior* surface of the second panel (at 330)” and relies on Provost for teaching “the ability to have an easy open feature attached to an *exterior* surface.”⁵ Final Act. 5 (referencing Provost Fig. 6) (emphasis added). The Examiner relies on Thrall for teaching the scaling of the bag “to contain between 10 and 100 pounds” because “to scale the bag [is] known in the industry.”⁶ Final Act. 6.

Appellant initially contests the Examiner’s combination of Floyd’s bag with Clune’s easy open feature. *See* Appeal Br. 9–10. Although acknowledging that Floyd discloses a “pinched closure” type bag (*see* Floyd ¶ 2), Appellant contends that modifying Floyd with Clune’s hook and loop system “is substantially different and is not contemplated by *Floyd*.” Appeal Br. 10.

This contention is not persuasive because although Floyd is relatively silent as to any detail regarding a bag closure system (Floyd is instead

⁴ The Examiner reasons that it would have been obvious to employ Clune’s “easy open and reclosable feature in order to allow the user to open and then subsequently close the bag thereby protecting the internal contents from the outside environment.” Final Act. 5.

⁵ The Examiner reasons that it would have been obvious to “attach the easy open feature to an exterior surface of the first panel” as recited “because such a change would require a mere choice between a finite number of configurations with predictable results,” i.e., attachment to “the exterior surface rather than the interior surface.” Final Act. 5–6.

⁶ The Examiner also reasons that “such a change would allow the bags to carry a specific amount of materials that are suitable to a prospective user.” Final Act. 6.

directed to bag material), Floyd clearly discloses use of a “pinched closure” system with the bag. *See* Floyd ¶¶ 2, 26. Further, Appellant does not explain how or why Clune’s easy open feature employing hook and loop bands 104 and 106 is not of the “pinched closure” type briefly described in Floyd, or how such bands cannot also be easily opened. *See, e.g.*, Clune’s discussion of Figure 34A. Hence, Appellant’s contention that Clune’s bands and Floyd’s closure are “substantially different and [] not contemplated by *Floyd*” is not persuasive.

Appellant also challenges the Examiner’s reliance on Clune for teaching the “elongated polymer member” limitation. *See* Appeal Br. 10, 12. Appellant focuses on Clune’s teaching of a barrier layer that may be made of a polymer (*see* Clune 8:27–30) contending “[t]he ‘barrier layer’ in Clune does not teach or suggest [] ‘the elongated polymer member.’” Appeal Br. 12. However, the Examiner additionally finds that Clune teaches a closure system wherein “the closure strip is advantageously formed of the same material as the substrate.” Ans. 17 (referencing Clune 2:57–58). The Examiner notes that Clune specifically identifies one example of suitable material as “polypropylene, polyester or nylon . . . and copolymers and compatible mixtures that include at least one of such resins.” Ans. 18 (referencing Clune 2:59–64); *see also* Clune 15:23–24 (“parallel bands **104** and **106** of loops and fastener elements”); 15:40–41 (“[b]and **104** of loops consists of a preformed, non-woven web of polymer fibers”). Hence, Appellant is not persuasive that the Examiner erred in relying on Clune for teaching this “elongated polymer member” limitation.

Appellant also contends that combining the teachings of Floyd and Clune would involve “substantial modification.” Appeal Br. 11; *see also id.*

at 12–14. Appellant alleges that “the Office has not demonstrated how the ‘parallel bands 104 and 106 of loops and fastener elements . . . on . . . front face 108’ (see *Clune* col 15, ln 20–25) could ever be properly modified to be operable with the ‘pinched closure’ in *Floyd*.” Appeal Br. 11. This contention is not persuasive since it is clear that “[t]he modification is intended to take the bag mouth of *Floyd* as shown in Figure 1 [] and attach a known easy open feature in the form of the easy open and reclosable strip (444) as demonstrated by *Clune* Fig. 34A.” Ans. 15–16. Appellant does not explain what “substantial modification” might be involved in employing *Clune*’s hook and loop closure system into the “pinched closure” system described and illustrated in *Floyd*. See *Floyd* ¶¶ 2, 26, Fig. 1. As such, Appellant’s contention is not persuasive of Examiner error.

Further, Appellant alleges that employing *Clune*’s closure “is an additional workpiece in addition to the bag itself.” Appeal Br. 12. However, even though it appears that Appellant’s own easy open feature 120 is likewise “an additional workpiece in addition to the bag itself” (see Appellant’s Figures 2A, 2B, 3), we have been instructed that a given course of action often has simultaneous advantages and disadvantages, and this does not necessarily obviate any or all reasons to combine teachings. See *Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349, n. 8 (Fed. Cir. 2000). Thus, we are not persuaded by Appellant’s contention that because *Clune*’s closure “is an additional workpiece,” the references should not have been combined. In short, we are not persuaded of Examiner error on this point.

Appellant also relies on the embodiment of “figure 41A of *Clune*” as support that *Clune* requires tearing of the bag yet “*Floyd* **never discloses**

tearing the bag itself.” Appeal Br. 12. This contention is not persuasive because the Examiner did not rely on this embodiment of Clune, but instead on the Figure 34A embodiment. *See* Final Act. 5. Further, claim 1 is silent as to how the bag is opened, only that there is “an easy open feature” which is “enabled . . . to close the . . . opening using the flap.” On this latter point of enabling closure, Appellant does not explain how Clune’s easy open feature fails to likewise be so enabled.

Appellant also contends that the hook and loop bands “in *Clune* are not a singular ‘member’ that ‘tears apart’, as required by claim 1.” Appeal Br. 12. This argument is likewise not persuasive because claim 1 is silent as to any singularity of the easy open feature. In fact, claim 1 recites this easy open feature being “attached” to both an “exterior surface of the first panel and the interior surface of the second panel” so that an opening can be closed “using the flap.” Hence, it is not clear how Appellant can attempt to distinguish Clune because Clune is “not a singular ‘member’” when this is not a claimed feature. Appellant also does not explain how Clune’s hook and loop closure system fails to be “enabled to preferentially tear apart to open the bag when the flap is pulled away” as recited. Hence, we are not appraised on Examiner error on this point.

Appellant further contends that “a closure device is a key technical and economic feature of a commercial bag that involves substantially more consideration and technical skill than ‘a mere choice of a known disclosure device’ to implement.” Appeal Br. 13. However, Appellant does not explain how, in view of the teachings of Floyd, Clune, and Provost, the recited easy open feature would not have been rendered obvious to a skilled person, albeit as a technical and economic feature.

Appellant additionally contends that “the respective closure used in *Floyd* and *Clune* teach away from each other, because they are not compatible with each other.” Appeal Br. 15; *see also id.* at 14. However, as the Examiner explains, Appellant “fails to disclose exactly how any of the references teach away or discourage a solution taught from one another.” Ans. 19. The Examiner “notes that the cited closures are different from one another” but regardless, “they demonstrate different known bag closures.” Ans. 19–20. In other words, Appellant does not make clear how Clune’s closure system is precluded from being combined with Floyd’s bag. *See* Ans. 19–20.

Appellant also contends “that *Floyd* would be rendered unsatisfactory for its intended purpose, which is to provide a bag that can be torn open.” Appeal Br. 15. However, Appellant does not make clear how Clune’s hook and loop closure system cannot likewise be “torn open” as desired, and thereafter still be enabled “to close the first opening” as also recited.

Appellant addresses Provost by attempting to incorporate additional structure into the Examiner’s use of this reference. *See* Appeal Br. 15–17. However, this contention is likewise without merit because, as the Examiner clearly states, “the overall bag structure of Provost is not intended to be bodily included into the modification.” Ans. 20. Instead, “Provost is relied on only to teach the ability to attach a closure strip to outer surfaces of a bag as shown in figure 6.” Ans. 20. Thus, Appellant’s attempt to bodily incorporate more from Provost than the Examiner expressed, is not persuasive of Examiner error.

Nor are we persuaded that the Examiner’s reliance on Provost was “motivated by no other source than the teachings of claim 1 itself.” Appeal

Br. 16; *see also id.* at 17 (“Such an explanation is evidence of improper hindsight reasoning.”). This is because, as expressed by the Examiner, Clune teaches attachment to an interior surface and Provost teaches attachment to an exterior surface, such that the Examiner relied on “a mere choice between a finite number of configurations,” which is not indicative of hindsight reasoning, or of Examiner error. Final Act. 5; *see also* Ans. 20.

Regarding Thrall, as indicated above, the Examiner stated that scaling the bag to accommodate a certain weight is “known in the industry.” Final Act. 6; *see also* Appeal Br. 18. Appellant, however, believes otherwise stating “that it is not obvious to ‘scale the bag’, because redesigning commercial bags for different loads and capacities is a complex engineering problem that is not trivial.” Appeal Br. 18. Appellant seems to assert that a skilled person would undertake the “complex engineering problem” involved in designing a new bag rather than take advantage of bags already designed, and scale a desired bag accordingly. In view of these two competing assertions, we are of the opinion that the Examiner has the better position (i.e., a skilled person would be more inclined to “scale” from an existing bag rather than address “the complex engineering problem” encountered when starting from scratch).

Appellant also contends, “*Thrall* does not enable any weight capacity greater than ‘20 pounds’” (Appeal Br. 18), but this is not responsive to the Examiner’s rejection regarding scaling from a bag already known. *See* Final Act. 6. It is also a misunderstanding of the teachings of Thrall. To be clear, Thrall teaches a weight range within the recited range of “from 10 to 100 pounds.” *See* Thrall 10:1–2 (“in the range of from about 10 to 20 pounds”). Additionally, regarding a variation in weight capacity, Thrall teaches that

“the invention is not limited to any particular size bag” and that Thrall’s tab assembly “may accordingly be varied *to accommodate different bag sizes and bag ply thicknesses, strengths and the like.*” Thrall 10:2–6 (emphasis added).

In summation, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 1, 3, 5, 6, 15, 25, 27, 29, 52–54, and 59–61 as unpatentable over Floyd, Clune, Provost, and Thrall. We sustain the Examiner rejection of these claims.

The rejection of (a) claim 2 as unpatentable over Floyd, Clune, Provost, Thrall, and Calvert; (b) claims 32, 37, 63–68, and 70–72 as unpatentable over Floyd, Clune, and Provost; (c) claim 62 as unpatentable over Floyd, Clune, Provost, and Thrall; and, (d) claims 58 and 69 as unpatentable over Floyd, Clune, Provost, Thrall, and Lin

Appellant does not separately argue these claims, but instead contends that for the reasons presented above regarding claim 1, these claims should be allowed. *See* Appeal Br. 20. We are not persuaded of Examiner error regarding the rejection of claim 1. Consequently, we likewise sustain the Examiner’s rejections of these claims as well.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1, 3, 5, 6, 15, 25, 27, 29, 52–54, 59–61	103(a)	Floyd, Clune, Provost, Thrall	1, 3, 5, 6, 15, 25, 27, 29, 52–54, 59–61	

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
2	103(a)	Floyd, Clune, Provost, Thrall, Calvert	2	
32, 37, 63–68, 70–72	103(a)	Floyd, Clune, Provost	32, 37, 63–68, 70–72	
62	103(a)	Floyd, Clune, Provost, Thrall	62	
58, 69	103(a)	Floyd, Clune, Provost, Thrall, Lin	58, 69	
Overall Outcome			1–3, 5, 6, 15, 25, 27, 29, 32, 37, 52–54, 58–72	

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

AFFIRMED