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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* BRIAN D. JOHNSON and GLEN V. THORNE

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Appeal 2019-006861<sup>1</sup>  
Application 14/737,740  
Technology Center 3600

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Before PHILLIP J. KAUFFMAN, TARAL HUTCHINGS, and  
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

FINAMORE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> appeals from the Examiner's decision to reject claims 1, 4–11, 13, 14, and 17. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> The citations herein refer to the Specification filed June 12, 2015 (“Spec.”), Final Office Action mailed May 1, 2018 (“Final Act.”), Appeal Brief filed April 29, 2019 (“Appeal Br.”), Examiner’s Answer mailed August 9, 2019 (“Ans.”), and Reply Brief filed September 19, 2019 (“Reply Br.”).

<sup>2</sup> “Appellant” refers to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Weatherhaven Global Resources Ltd. Appeal Br. 3.

SUBJECT MATTER ON APPEAL

The invention relates to “freight shipping containers, portable shelters and more particularly collapsible portable shelters having both rigid frame and flexible fabric sections which collapse to . . . rigid shipping container[s] for transporting.” Spec. ¶2. Claims 1 and 14 are independent. Appeal Br., Claims App. Independent claim 1, reproduced below, is illustrative of the claimed subject matter.

Claim 1: A portable, collapsible shelter comprising:

- a) a rigid, hollow container having an interior and comprising opposed ends, opposed vertical sides, a horizontal top and bottom and four corner posts, and wherein said corner posts each comprise outer and inner telescopic elements, each said inner element having an upper end and being secured at its upper end to said horizontal top and being reversibly telescopically slidable within said outer element between a lowered position for transit and an extended position when not in transit; said ends, sides, top and bottom being secured to form said rigid container having ISO Series 1 freight container external dimensions and corner fitting locations when said inner telescopic elements are in said lowered transit position;
- b) at least one of said vertical sides comprising a pivoting wall portion having a lower edge and hingedly connected to said vertical side along the lower edge of said pivoting wall portion to pivot between a closed vertical position whereby said pivoting wall portion forms part of said at least one of said vertical sides of the container when said inner telescopic elements are in said lowered position for transit and an open horizontal position, said pivoting wall portion having an outer edge, and whereby an opening is formed in said vertical side when said pivoting wall portion is in the horizontal position;

- c) means associated with said container and with said pivoting wall portion for releasably securing said pivoting wall portion in said vertical position;
- d) means adapted to support said pivoting wall portion for releasably maintaining said pivoting wall portion in said horizontal position;
- e) a collapsible frame for supporting a flexible cover above said pivoting wall portion while said pivoting wall portion is in said lowered horizontal position and said inner element is in said extended position, said collapsible frame being removably attached to said outer edge of said pivoting wall portion and to said container when said pivoting wall portion is in said lowered horizontal position; and
- f) said flexible cover being secured to said collapsible frame, to the edges of said pivoting wall portion and to the edges of said opening in said vertical side to be thereby supported above said pivoting wall portion when said pivoting wall portion is in said lowered horizontal position thereby forming an enclosed space above said pivoting wall portion open to the interior of said container when said pivoting wall portion is lowered to the horizontal position; and
- g) a hydraulic cylinder located within each said corner post and connected at its upper end to said inner telescopic element of said corner post and at its lower end to said outer telescopic element of said corner post for reversibly telescopically lowering and extending each said inner element within said outer element.

*Id.*

## REJECTIONS

Claim(s) Rejected	35 U.S.C. §	References/Basis
1, 4–11, 14, 17	103(a)	Johnson, <sup>3</sup> Morrow, <sup>4</sup> Kim, <sup>5</sup> Oudelaar, <sup>6</sup> Ju <sup>7</sup>
13	103(a)	Johnson, Morrow, Kim, Oudelaar, Ju, Davis <sup>8</sup>

## ANALYSIS

### *Obviousness Based on Johnson, Morrow, Kim, Oudelaar, and Ju*

Appellant argues claims 1, 4–11, 14, and 17 as a group. Appeal Br. 9–14; Reply Br. 2–5. We select independent claim 1 as representative, and claims 4–11, 14, and 17 stand or fall with independent claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

In rejecting independent claim 1, the Examiner finds Johnson discloses the invention substantially as claimed. Final Act. 2–3. In particular, the Examiner finds Johnson discloses container 10, having opposed ends 16, opposed vertical sides, i.e., side walls 12, horizontal top, i.e., roof 14, and four corner posts, i.e., vertical rails 24. *Id.* at 2.

The Examiner acknowledges Johnson discloses a fixed top and, thus, does not disclose telescopic elements within the posts to raise and lower the horizontal top. *Id.* at 3. The Examiner finds Morrow teaches an extendable height container/shelter having corner posts comprising outer and inner

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<sup>3</sup> Johnson et al., US 5,761,854, issued June 9, 1998 (“Johnson”).

<sup>4</sup> Morrow, US 2003/0115808 A1, published June 26, 2003.

<sup>5</sup> Kim, US 6,227,397 B1, issued May 8, 2001.

<sup>6</sup> Oudelaar, US 7,171,890 B2, issued Feb. 6, 2007.

<sup>7</sup> Ju, US 2006/0180190 A1, published Aug. 17, 2006.

<sup>8</sup> Davis, US 3,321,233, issued May 23, 1967.

telescopic elements, i.e., telescoping guide cylinders 78. The Examiner further finds Morrow teaches a hydraulic cylinder, i.e., central hydraulic jack 76, for reversibly telescopically lowering and extending each inner telescopic element within the respective outer telescopic element. *Id.* The Examiner determines it would have been obvious to one having ordinary skill in the art to modify Johnson's disclosure to include Morrow's hydraulic cylinder and corner posts comprised of outer and inner telescopic elements to allow the shelter be collapsed into a smaller size for easier transport of the shelter and expanded to more comfortably function as a shelter. *Id.*

Although Morrow teaches a hydraulic cylinder, the Examiner acknowledges Morrow does not teach a hydraulic cylinder within each of the four corner posts. *Id.* at 3–4. The Examiner finds Kim teaches an extendible shipping container having, at each of the four corners, an outer telescopic element, i.e., fixed post 14, and an inner telescopic element, i.e., mobile post 16, that is raised and lowered by a hydraulic cylinder. *Id.* at 4. The Examiner determines it would have been obvious to replace a centrally-located hydraulic cylinder, as Morrow teaches, with a hydraulic cylinder in each of the four corners, as Kim teaches, because the location of a hydraulic cylinder is a matter of design choice. *Id.* The Examiner also determines such a replacement would have been obvious to free the interior of the shelter from obstructions. *Id.*

The Examiner also acknowledges that Morrow's inner telescopic element is at the bottom of the container, and that the outer telescopic element is at the top. *Id.* The Examiner finds Kim's inner and outer telescopic elements are located at the top and bottom, respectively. The Examiner determines providing a telescopic element at the top or the bottom

of the container is a matter of obvious design choice. *Id.* The Examiner also determines it would have been obvious to provide the inner telescopic element at the top of the container to allow the larger outer element to be at the bottom and provide a stronger support for the roof. *Id.*

Although both Morrow and Kim teach using a hydraulic cylinder to raise the height of a structure, the Examiner acknowledges they do not teach the cylinder being connected at its upper end to the inner telescopic element and at its lower end to the outer telescopic element. *Id.* at 4–5. The Examiner finds Oudelaar teaches a hydraulic cylinder, i.e., actuator 20, connected at its upper and lower ends to the inner telescopic element, i.e., tube section 4, and outer telescopic element, i.e., tube section 2, respectively. *Id.* at 5. According to the Examiner, it would have been obvious to incorporate a hydraulic cylinder connected at its upper and lower ends to the inner and outer telescopic elements, respectively, because the upper end of the cylinder would push the inner element upwardly to lift the top of the shelter. *Id.*

Lastly, the Examiner acknowledges Johnson does not disclose the frame is collapsible. *Id.* The Examiner finds Ju teaches a collapsible frame, and determines it would have been obvious to substitute Johnson’s frame for Ju’s collapsible one to make storage, assembly, and transport easier. *Id.* (citing Johnson 4:18–21).

Appellant asserts that the Examiner fails to consider the claimed invention as a whole. Reply Br. 4. We disagree. The Examiner does not impermissibly generalize the claimed invention, but instead identifies each claim limitation in the prior art and provides reasons why a person of

ordinary skill would have combined the prior art to result in the claimed invention. Final Act. 2–5.

Appellant also contends Morrow teaches away from using hydraulic cylinders in conjunction with and connected to telescopic elements in the corner posts for raising and lowering the roof of the container. Appeal Br. 10–11. According to Appellant, an important feature of Morrow is that its construction fully supports the roof and upper walls and keeps them elevated during use without the need for hydraulics or other supports. *Id.* at 10 (citing Morrow ¶¶ 1, 2, 5). Appellant further alleges Morrow teaches the use of a central hydraulic cylinder to raise all of the roof elements at the same time, until the upper wall and roof portions can be supported on the lower end walls. *Id.* at 11 (citing Morrow, Figs. 4–7).

We agree with Appellant that Morrow’s construction does not rely on hydraulics or other supports to keep the roof and upper walls elevated. The Examiner, however, is proposing to modify Johnson, not Morrow, to use hydraulic cylinders connected to the telescopic elements in the corner posts, as taught by Kim and Oudelaar. Final Act. 4–5. Moreover, “[a] reference does not teach away . . . if it merely expresses a general preference for an alternative invention but does not ‘criticize, discredit, or otherwise discourage’ investigation into the invention claimed.” *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (quoting *In re Fulton*, 391 F.3d 1195, 1201 (Fed. Cir. 2004)). Morrow’s objective to provide a structure that supports the roof and upper walls in the elevated position without hydraulics does not discredit incorporating hydraulic cylinders with the telescopic elements in the corner posts to raise

and lower a roof. Morrow, therefore, does not teach away from the Examiner's proposed combination.

Appellant additionally argues the Examiner misinterprets Morrow and Kim. Reply Br. 2–4. Appellant contends: “[T]he guide cylinders 78 disclosed in Morrow only function to align the top 14 and bottom 16. They do not cause the roof of the container to be extended to provide additional space. That is done by the central hydraulic jack [76].” *Id.* at 2. Appellant also argues Kim does not specify the location of its hydraulic cylinders nor explain why a particular location would be advantageous. *Id.* at 3. Per Appellant, “[b]y unjustifiably attributing teachings to Kim and Morrow which are not disclosed in those references, the Examiner is clearly applying hindsight with knowledge of Applicant’s disclosure.” *Id.* at 4.

Beginning with Morrow, the Examiner is not proposing to modify Johnson to include only Morrow’s guide cylinders 78 to raise and lower the roof, as Appellant’s argument suggests. Rather, the Examiner relies on Morrow’s guide cylinders 78 in conjunction with hydraulic jack 76, and reasons it would have been obvious to modify Johnson’s disclosure to include Morrow’s outer and inner telescopic elements, i.e., guide cylinders 78, and hydraulic cylinder to allow the shelter be collapsed into a smaller size for easier transport of the shelter and expanded to more comfortably function as a shelter. Final Act. 3. Indeed, Morrow teaches central hydraulic jack 76 raises roof section 18 as telescoping guide cylinders 78 align top 14 and bottom 16 of structure 12. Morrow ¶ 59. As hydraulic jack 76 and guide cylinders 78 enable roof 18 to be raised and thereby expand structure 12, the Examiner’s reason for combining the

teachings of Johnson and Morrow is based on Morrow's disclosure, not hindsight.

Turning to Kim, Figure 3 shows fixed post 14 and mobile post 16 located in each of the four corners of container 10. Kim, Fig. 3. Kim further teaches a hydraulic cylinder may be used to adjust mobile post 16 along fixed post 14. *Id.* at 3:48–53. As Kim teaches a hydraulic cylinder to move mobile post 16 relative to fixed post 14, both of which are located in a corner, a person of ordinary skill in the art would have understood that the hydraulic cylinder is likewise located in the corner. The Examiner reasons it would have been obvious to a person of ordinary skill in the art to replace a centrally-located hydraulic cylinder, as Morrow teaches, with a hydraulic cylinder in each of the four corners, as Kim teaches, to free the interior of the shelter from obstructions. Final Act. 4. The Examiner's reason is not premised on hindsight, but instead on the teachings of Kim and the common knowledge of a person of ordinary skill in the art.

Appellant alleges the Examiner does not provide a reasonable motivation to combine the prior art teachings. Reply Br. 4–5. Specifically, Appellant argues:

Here the Examiner misconstrues Kim to come to the conclusion that the person skilled in the art would look to Kim to resolve the problem of load on the central hydraulic cylinder in Morrow by replacing Morrow's central load-bearing hydraulic cylinder for raising the roof with load-bearing hydraulic cylinders in the corner posts of Kim, whereas in Kim the hydraulic cylinders are not load-bearing nor is their location specified, nor are they connected to a roof.

*Id.*

Contrary to Appellant's argument, the Examiner is not relying on Kim to resolve the problem of load on Morrow's central hydraulic cylinder.

Rather, the Examiner determines it would have been obvious to replace a centrally-located hydraulic cylinder, as Morrow teaches, with a hydraulic cylinder in each of the four corners, as Kim teaches, to free the interior of the shelter from obstructions. Final Act. 4. Appellant's argument misconstrues the Examiner's rejection and is not persuasive of error.

Appellant further argues that a person skilled in the art would not look to Kim to modify Morrow because Kim solves a problem that is different from the problem Morrow addresses. Appeal Br. 11–12. According to Appellant, Kim discloses a flat rack container comprising a bottom plate, but no top or lateral sides, to carry freight. *Id.* at 11 (citing Kim 1:29–32, 3:31–33, Fig. 3). Kim's flat rack container addresses the problem of an over-height freight container interfering with a spreader that hooks to the tops of the four corner posts. *Id.* (citing Kim 1:48–52). When the freight exceeds the height of fixed corner post 14, mobile post 16 is extended so that the top of the freight does not contact the spreader coupled to corner casts 18. *Id.* (citing Kim 4:28–48). Appellant contends that a person skilled in the art would not look to Kim to modify Morrow because Morrow's central roof section 18 must be raised uniformly with all of the roof elements at the same time. *Id.* at 12. For similar reasons, Appellant alleges the Examiner's proposed combination would be inoperable. Reply Br. 5. According to Appellant, Kim's corner posts, which are adjusted independently, would not be workable in Morrow where the raising and lowering of central roof section 18 raises and lowers cooperatively engaged side top sections 50A, 50B and roof panels 54. *Id.* (citing Kim 4:22–27; Morrow ¶ 59).

Appellant, however, acknowledges that Kim's corner posts could be moved simultaneously, for example, via extension plates installed between pairs of mobile posts 16. Kim 4:22–27; Ans. 5. Nonetheless, Appellant's arguments are unconvincing because they mischaracterize the Examiner's rejection. The Examiner is proposing to modify Johnson, not Morrow, to include Kim's telescopic corner posts. Final Act. 4.

Appellant also argues that the Examiner's proposed combination of prior art would not have resulted in

a hydraulic cylinder located within each said corner post and connected at its upper end to said inner telescopic element of said corner post and at its lower end to said outer telescopic element of said corner post for reversibly telescopically lowering and extending each said inner element within said outer element, as recited in independent claim 1, because Oudelaar does not teach this limitation. Appeal Br. 12. Appellant contends Oudelaar's actuator 20 comprises two cylinder-piston units 30, 40. Appellant asserts lower end 33a of first cylinder-piston unit 30 is connected to the outer telescopic element, i.e., tube section 2. *Id.* (citing Oudelaar 3:28–32). Appellant further asserts the upper end of first cylinder-piston 30 is not connected to the inner telescopic element, i.e., tube section 4, but, rather, the upper end of second cylinder-piston unit 40 is connected thereto. *Id.* (citing Oudelaar 3:23–27).

Although Oudelaar's actuator 20 comprises two cylinder-piston units 30, 40, the Examiner relies on actuator 20, in its entirety, for teaching the hydraulic cylinder recited in this limitation of independent claim 1. Final Act. 5. As Appellant does not address the Examiner's finding that Oudelaar's actuator 20 teaches the hydraulic cylinder recited in this limitation, Appellant does not apprise us of error in the finding.

Appellant further contends that “the person skilled in the art of transporting military shelters by ISO channels would not look to the art of lifting devices for operating room tables.” Appeal Br. 12–13. Yet, as the Examiner explains in the Answer, a reference that is not in the field of an applicant’s endeavor may still be analogous art if it is reasonably pertinent to the particular problem with which the applicant was concerned. Ans. 6 (citing *In re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992)). The Examiner finds the applicant was concerned with the problem of using hydraulic cylinders to lift telescoping elements. *Id.* The Examiner also finds Oudelaar is reasonably pertinent to this problem because it teaches a telescopic lifting column having hydraulic means. *Id.* Appellant does not address these findings and does not apprise us of error in the Examiner’s reliance on Oudelaar as analogous art.

Appellant additionally argues the Examiner’s proposed combination of the prior art to include Oudelaar’s hydraulic cylinder is the result of hindsight. Appeal Br. 13. We disagree. The Examiner determines it would have been obvious to incorporate a hydraulic cylinder connected at its upper and lower ends to inner and outer telescopic elements, respectively, as taught by Oudelaar, into each of the four roof-supporting corner posts resulting from the combination of Johnson, Morrow, and Kim, because the upper end of the cylinder would push the inner element upwardly to lift the top of the shelter. Final Act. 5. Indeed, Oudelaar teaches the upper end of the hydraulic cylinder, i.e., actuator 20, pushes upwardly inner telescopic element, i.e., tube section 4. Oudelaar 4:45–53, Fig. 2. A person of ordinary skill in the art would have understood that the upward movement of the inner telescopic element would result in the upward movement of anything

attached thereto, such as a roof. Thus, the Examiner's reason is not premised on hindsight, but instead on the teachings of Oudelaar and the common knowledge of a person of ordinary skill in the art.

In view of the foregoing, Appellant does not apprise us of error in the Examiner's determination that the combined teachings of Johnson, Morrow, Kim, Oudelaar, and Ju renders obvious the subject matter of independent claim 1. We, therefore, sustain the rejection of independent claim 1, with claims 4–11, 14, and 17 falling therewith.

*Obviousness Based on Johnson, Morrow, Kim, Oudelaar, Ju, and Davis*

Appellant does not present arguments for claim 13 apart from its arguments for independent claim 1. Appeal Br. 9–14; Reply Br. 2–5. For the reasons set forth above for independent claim 1, Appellant does not apprise us of error, and we likewise sustain the rejection of claim 13.

CONCLUSION

We sustain the rejection of claims 1, 4–11, 14, and 17 under 35 U.S.C. § 103(a) as unpatentable over Johnson, Morrow, Kim, Oudelaar, and Ju. We similarly sustain the rejection of claim 13 under 35 U.S.C. § 103(a) as unpatentable over Johnson, Morrow, Kim, Oudelaar, Ju, and Davis.

DECISION SUMMARY

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 4–11, 14, 17	103(a)	Johnson, Morrow, Kim, Oudelaar, Ju	1, 4–11, 14, 17	

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13	103(a)	Johnson, Morrow, Kim, Oudelaar, Ju, Davis	13	
<b>Overall Outcome</b>			1, 4–11, 13, 14, 17	

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). 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED