

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTINE GAIL STEGER and DENIS ALLEN DARBY

Appeal No. 2004-0694
Application 09/839,741

ON BRIEF

Before COHEN, ABRAMS, and FRANKFORT, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 3, 6, 8, 11 through 13, 16 and 18, which are all of the claims remaining in this application. Claims 4, 5, 7, 9, 10, 14, 15, 17 and 19 through 21 have been canceled.

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Appellants' invention is directed to an absorbent article or sanitary napkin having flaps and, more particularly, to the packaging of such an article having a cleansing wipe associated therewith. As can be seen in Figures 1-3 and 6-8 of the application drawings, when packaged or in folded form just prior to use, the flaps (28) of the sanitary napkin are folded over the topsheet (22) in a topsheet facing relationship that promotes the cleanliness of the topsheet, at least in a central area thereof, and are maintained in that folded disposition by an enclosed pouch (70) releasably affixed to the flaps. The enclosed pouch has a cleansing wipe article (80) disposed therein. Independent claims 1 and 11 are representative of the subject matter on appeal and a copy of those claims may be found in the Appendix to appellants' brief.

The sole prior art reference relied upon by the examiner in rejecting the appealed claims is:

Fisher et al. (Fisher '230) 5,569,230 Oct. 29, 1996

Claims 1 through 3, 6, 8, 11 through 13, 16 and 18 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Fisher '230.

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Rather than attempt to reiterate the examiner's full commentary with regard to the above-noted rejection and the conflicting viewpoints advanced by the examiner and appellants regarding that rejection, we make reference to the examiner's answer (Paper No. 11, mailed April 9, 2003) for the reasoning in support of the rejection, and to appellants' brief (Paper No. 10, filed March 11, 2003) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art reference, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determination which follows.

In rejecting the claims before us on appeal under 35 U.S.C. § 102(b) as being anticipated by Fisher '230 the examiner has found that this patent discloses an absorbent article like that defined in appellants' claims on appeal having flaps (28) folded over the topsheet (22) in a topsheet facing relationship (see, for example, Figs. 1-3, 10-12, and 13A of Fisher '230). In

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addition, the examiner has determined that Fisher '230 discloses an enclosed pouch (34 and 53) which maintains the flaps in a topsheet facing relationship, is releasably attached to the flaps, and has a wipe article (80) disposed therein. In that regard, the examiner analogizes the wrapper (34) of Fisher '230 to appellants' release strip (46, 46') and the flap/pouch (53) of the Fisher patent, attached to the wrapper (34), to appellants' pouch (70), urging that the Fisher '230 combination (34, 53)

maintain the flaps in the topsheet facing relationship, has a wipe disposed therein and may be attached and separated from the flaps without destruction of or undue distortion of either the flaps or the combination 34, 53, i.e. "releasably affixed". (answer, page 5)

Appellants' argument for patentability of the claims on appeal is found on page 3 of the brief and the essence of that argument can be distilled down to the following statements:

[w]hile Fisher, et al. does use a similar pouch, this pouch is not releasably affixed **to the flaps of the absorbent article** as claimed. Instead the pouch of Fisher is disposed on one of the faces of the wrapper.

As noted in MPEP § 1208, when preparing an Examiner's answer, for each rejection under 35 U.S.C. § 102, the examiner "shall explain why the rejected claims are anticipated or not

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patentable under 35 U.S.C. § 102, pointing out where all of the specific limitations recited in the rejected claims are found in the prior art relied upon in the rejection.” In the present case, the examiner has made little or no effort to comply with this requirement by explaining exactly how the wrapper and pouch combination (34, 53) pointed to in Fisher ‘230 specifically functions to maintain the flaps (28) in the folded, topsheet facing relationship and how such combination of elements (34, 53) is “releasably affixed to said flaps.” Like appellants, we find no embodiment in Fisher ‘230 where an enclosed pouch containing a cleansing wipe article both maintains the flaps (28) in the folded, topsheet facing relationship and is releasably affixed to said flaps. Accordingly, we conclude that the examiner has not made out a *prima facie* case of anticipation based on Fisher ‘230. For that reason, we will not sustain the examiner’s rejection of claims 1 through 3, 6, 8, 11 through 13, 16 and 18 under 35 U.S.C. § 102(b) as being anticipated by Fisher ‘230.

In reaching our conclusion above vis-a-vis the examiner’s rejection of claims 1 through 3, 6, 8, 11 through 13, 16 and 18 under 35 U.S.C. § 102(b), we understand the requirements in appellants’ independent claims 1 and 11 regarding “an enclosed

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pouch maintaining said flaps in said topsheet facing relationship" and "said enclosed pouch being releasably affixed to said flaps" as limiting the claimed subject matter to the embodiments of the invention seen in Figures 3 and 7 of appellants' application, since only in those embodiments does the pouch itself actually perform the function of maintaining the flaps in the topsheet facing folded position by being releasably affixed to said flaps. In the embodiments seen in Figures 4 and 5 of appellants' application, the pouch (70) does not perform the recited maintaining function, the release strip (46'), which forms no part of the enclosed pouch, does so.

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In accord with our above determination, it follows that the decision of the examiner rejecting claims 1 through 3, 6, 8, 11 through 13, 16 and 18 of the present application is reversed.

REVERSED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
NEAL E. ABRAMS)	
Administrative Patent Judge)	APPEALS AND
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)	INTERFERENCES
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CHARLES E. FRANKFORT)	
Administrative Patent Judge)	

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