

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.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. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL J. FAULKES, PAUL J. SERBIAK
and JODY D. SUPRISE

Appeal No. 1999-0369
Application No. 08/575,926

HEARD: January 11, 2001

Before STAAB, MCQUADE, and BAHR, Administrative Patent Judges.
STAAB, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 1-12, 14-16, 19, 21-24, 26-42 and 44-51.¹ Upon further consideration, the examiner now views dependent

¹See the second final rejection, mailed December 9, 1997 (Paper No. 14).

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claims 4, 23 and 39 as "patentably distinguishing over the prior art of record" (answer, page 7, under the heading "*Allowable Subject Matter*"). Presumably, the examiner means by this that claims 4, 23 and 39 would be allowable if rewritten in independent form to include all the limitations of the base claims and any intervening claims from which they depend. Accordingly, the appeal as to claims 4, 23 and 39 is dismissed, leaving for our consideration only claims 1-3, 5-12, 14-16, 19, 21, 22, 24, 26-38, 40-42 and 44-51. No other claims are pending.

Appellants' invention pertains to an absorbent article such as an infant diaper, training pants, adult incontinence product, and the like, and in particular to an absorbent article having a rear reservoir which includes a rear waist flap to contain body exudates. Of particular interest to appellants is the provision of a spacer in the rear reservoir to maintain a sufficient void volume in the reservoir. Independent claims 1, 19 and 34, copies of which are found in an appendix to appellants' main brief, are illustrative of the appealed subject matter.

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The references relied upon by the examiner in support of the final rejection of the appealed claims are:

Foreman	4,938,755	Jul. 3, 1990
Roe et al. (Roe)	5,514,121	May 7, 1996

Claims 1, 5, 6, 9-12, 14, 15, 19, 27-31, 33-36, 42, 44 and 47-51 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Foreman.²

Claims 2, 3, 7, 8, 21, 22, 24, 26, 37, 38, 40, 41, 45 and 48-51 stand rejected under 35 U.S.C. § 103 as being unpatentable over Foreman.

Claims 1, 5, 6, 16, 19, 32, 34-36, 46 and 48-51 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Roe.

The examiner's rationale in rejecting the appealed claims is found in the second final rejection (Paper No. 14) and the answer (Paper No. 18).

²In the final rejection and the answer, the examiner inadvertently included canceled claim 20 in the statement of this rejection.

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Appellants' arguments in opposition to the positions taken by the examiner in rejecting the appealed claims is found in the main and reply briefs (Paper Nos. 11 and 17).

The rejections based on Foreman

Foreman is directed to a disposable absorbent article such as a diaper comprising, in pertinent part, first barrier cuffs 62 (see Figure 2) disposed adjacent each longitudinal side edge and second barrier cuffs 262 (see Figure 3) disposed adjacent at least one and preferably adjacent each end edge. The barrier cuffs overlie the liquid-receiving surface 40 of the topsheet 38 in the area of absorbent core 44 and are spaced from surface 40 to define channels 96. With respect to first barrier cuffs 62 disposed adjacent the longitudinal edges of the absorbent article, Foreman states:

As shown in FIG.2, the first distal edge 66 is formed by folding the end of the first barrier cuff member back upon itself and securing it to another segment of the first barrier cuff member by the distal attachment means 93 to form a tunnel. A spacing means 76 such as a spacing elastic member 77 is enclosed in the tunnel that is formed when the end of the first barrier cuff member is folded back upon itself; the spacing elastic member 77 being secured in the first barrier cuff 62 by the spacing elastic attachment means 94. *The first distal edge 66 is thus spaced away from the liquid-receiving*

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surface 40 by the elastic gathering action of the spacing elastic members 77; a channel 96 thereby being formed by at least the first proximal edge 64, the first distal edge 66 and the inboard surface 68 of the first barrier cuff 62. The channel 96 is shown as being open and ready to restrain, contain and hold body exudates until the diaper 20 is removed from the wearer. [Column 4, line 59 through column 5, line 8; emphasis added.]

Concerning the second barrier cuffs 262 disposed adjacent the end edges of the absorbent article, Figure 3 does not illustrate the tunnel of these cuffs as being provided with spacing means. However, Foreman explains that such a construction is contemplated. Specifically, Foreman states:

A spacing means 76 such as a spacing elastic member 77 is preferably not disposed in the second barrier cuff 262 because the gathering action of the spacing elastic members 77 along the first distal edge 66 raises both the first and the second distal edge above the liquid-receiving surface 40 to form a channel 96; however, in alternative embodiments such a construction is contemplated. [Column 5, lines 61-68; emphasis added.]

Thus, the examiner considers, and appellants do not dispute, that Foreman discloses an unillustrated embodiment wherein the second barrier cuffs 262 are provided with spacing means like those provided in the first barrier cuffs 62. It

is this unillustrated embodiment that the examiner relies upon in rejecting the claims as being anticipated by Foreman.

With respect to the anticipation rejection of claim 19 based on Foreman, the last paragraph of claim 19 requires that the spacer maintain the volume of the reservoir by effectively occupying space in the rear reservoir. On the other hand, the spacing means 76, 77 of Foreman, when incorporated into the tunnel of the second barrier cuff 262, maintains the spacing of the channel 96 by virtue of the "elastic gathering action of spacing elastic member 77" (column 5, lines 2-3). Even if it can be successfully argued that an artisan would consider Foreman's elastic member 77 as occupying space "in" the channel (reservoir) as called for in paragraph (d) of claim 18, a proposition we consider to be unlikely,³ Foreman's elastic member 77 does not *by that action* function to space the barrier cuff 262 from liquid-receiving surface 40 to thereby maintain a void volume in the channel 96 sufficient

³Foreman states at column 5, lines 3-6, that channel 96 is formed, in part, by first proximal edge 64, first distal edge 66 and *the inboard surface 68* of the first barrier cuff 62. Based on this description of what constitutes Foreman's channel, it is doubtful that an artisan would consider Foreman's spacing means 76 as being located "in" the channel.

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for its intended purpose of receiving exudate. Stated differently, we view claim 19 as implicitly requiring that the spacer physically occupy a portion of the reservoir in a manner that causes a sufficient void volume in the reservoir to be maintained. This clearly is not the case in Foreman. Instead, as pointed out above, Foreman's spacing means 76, 77 functions to maintain a sufficient void volume in the reservoir by means of an "elastic gathering action" (column 5, lines 2-3) that causes the material of the tunnel to pucker and thereby stand away from surface 40.

Accordingly, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of independent claim 19, or claims 27-31, 33, 48 and 50 that depend therefrom, as being anticipated by Foreman.

Independent claim 1 sets forth the relationship between the spacer and the reservoir in essentially the same terms as claim 19, and additionally requires that the spacer is compressible to a limited degree by the body of the user. Hence, for at least the reasons set forth above in our treatment of claim 19, we shall not sustain the standing 35

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U.S.C. § 102(b) rejection of independent claim 1, or claims 5, 6, 9-12, 14, 15 and 49 that depend therefrom, as being anticipated by Foreman.

Turning to the rejection of independent claim 34 as being anticipated by Foreman, claim 34 differs somewhat from independent claims 1 and 19 in how it sets forth the relationship between the spacer and the reservoir. Specifically, paragraph (d) of claim 34 calls for a spacer having a thickness, said spacer being disposed at at least one of the rear portion and rear waist flap, and the rear waist flap "being spaced from said rear portion by the thickness of said spacer." While the spacing means 76 of Foreman has at least a nominal thickness, the rear waist flap (barrier cuff 262) is not spaced from the rear portion (surface 40) "by the thickness of the spacer" as required by claim 34. Instead, and as noted above, the barrier cuff 262 of Foreman is spaced from the surface 40 by the gathering action of elastic members 77 of the spacing means. Hence, the absorbent article of Foreman does not correspond to the subject matter of claim 34.

We therefore also shall not sustain the standing 35
U.S.C.

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§ 102(b) rejection of independent claim 34, or claims 35, 36, 42, 44, 47 and 51 that depend therefrom, as being anticipated by Foreman.

Claims 2, 3, 7, 8, 21, 22, 24, 26, 37, 38, 40, 41, 45 and 48-51 stand rejected under 35 U.S.C. § 103 as being unpatentable over Foreman. The examiner does not propose, and it is not apparent to us, how the absorbent article of Foreman could be modified to provide the relationship between the spacer and the reservoir called for in independent claims 1, 19 and 34. Hence, even if we were to agree with the examiner that it would have been obvious to provide the absorbent article of Foreman with the features set forth in dependent claims 2, 3, 7, 8, 21, 22, 24, 26, 37, 38, 40, 41, 45 and 48-51, the rejection of these claims under 35 U.S.C. § 103 as being unpatentable over Foreman is not sustainable.

The rejection based on Roe

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Roe is directed to a disposable absorbent article 20 having a liquid pervious topsheet 24, a liquid impervious backsheet 26, and an intermediate absorbent core 28. Of particular interest to Roe is the provision of an expulsive spacer 30 attached to the topsheet for receiving and collecting fecal matter. As explained by Roe at column 4, line 63, through column 5, line 11,

The spacer 30 of the present invention may either be releasably attached to the outwardly oriented face of the topsheet 24, or may be permanently joined thereto, depending upon the particular embodiment. The spacer 30 collects and receives fecal material, thereby preventing it from excessively spreading and smearing against the skin of the wearer. . . .

The spacer 30 according to the present invention is "expulsive." By expulsive it is meant the spacer 30 moves from a first position to a second position and thereby expels or releases at least a portion of the fetal material contained therein from the diaper 20. The movement may or may not detach the expulsive spacer 30 from the diaper 20.

In Figures 2 and 3, Roe shows the spacer as being attached to the rear portion of the topsheet at a location spaced from the rear waist band area.

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Independent claims 1 and 19 each call for an absorbent article having a rear portion including a rear edge, and a rear waist flap "extending from the vicinity of said rear edge of said rear portion . . . to thereby define a rear reservoir between said rear waist flap and said rear portion." Each of these claims also calls for a spacer mounted to at least one of said rear portion and said rear waist flap "effectively occupying space in said rear reservoir." Independent claim 34 defines the reservoir in similar language, but requires that the spacer is disposed at at least one of said rear portion and said rear waist flap, and "spac[es] said rear waist flap from said rear portion . . . by the thickness of said spacer."

In attempting to read appellants' claims on Roe, the examiner equates Roe's liner 38 to the claimed spacer. In particular, the examiner posits that "the liner 38 can be considered the spacer and the spacer 30 can be considered to be the rear waist flap" (answer, page 6). We do not agree.

While we appreciate that during patent prosecution claims should be given their broadest reasonable interpretation, we can think of no circumstances under which the above noted limitations of the independent claims can be fairly read on

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the spacer 30 and spacer liner 38 of Roe. First, it is simply not reasonable to consider the spacer 30 as corresponding to the claimed "rear waist flap" as the examiner has done here. Further, the spacer 30 of Roe does not occupy space in a reservoir defined by a rear portion of the absorbent article and a rear waist flap extending from the vicinity of the rear edge of the absorbent article, as required by claims 1 and 19; nor is spacer 30 of Roe disposed so as to space a rear waist flap extending from the vicinity of the rear edge of the absorbent article from the absorbent article's rear portion, as required by claim 34.

Therefore, we shall not sustain the standing 35 U.S.C. § 102(e) rejection of independent claims 1, 19 and 34, or claims 5, 6, 16, 32, 35, 36, 46 and 48-51 that depend therefrom, as being anticipated by Roe.

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Summary

Each of the examiner's rejections is reversed.

The decision of the examiner is reversed.

REVERSED

LAWRENCE J. STAAB)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN P. MCQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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JENNIFER D. BAHR)	
Administrative Patent Judge)	

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APJ STAAB

APJ MCQUADE

APJ BAHR

DECISION: REVERSED
Send Reference(s): Yes No
or Translation (s)
Panel Change: Yes No
Index Sheet-2901 Rejection(s):

Prepared: January 22, 2002

Draft Final

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OB/HD GAU: 3700

PALM / ACTS 2 / BOOK
DISK (FOIA) / REPORT