

United States District Court,
D. Massachusetts.

MHB INDUSTRIES CORP,

v.

DENNIS GARBERG ASSOCIATES, INC.

No. CIV. A. 95-10199-GAO

July 25, 1996.

MEMORANDUM AND ORDER

O'TOOLE, District Judge.

The plaintiff MHB Industries Corp. ("MHB") and the defendant Dennis Garberg & Associates, Inc., d/b/a The Sunflower Group ("Sunflower"), both have developed methods for enclosing small commercial product samples within a sealed pocket on the outside of a larger plastic bag of the kind commonly used to wrap newspapers for home delivery. MHB owns two patents relating to its process, and in this action it alleges that Sunflower has infringed those patents and continues to do so. MHB moved for a preliminary injunction and while that motion was under consideration, both parties moved for summary judgment. For the reasons that follow, the Court concludes that Sunflower has not infringed either of MHB's patents as a matter of law and accordingly grants Sunflower's motion for judgment of noninfringement. MHB's motions are denied.

MHB's Method

Perhaps the best place to start is at the end. When the process involved in these patents is finished, the result will be a number of plastic bags into which newspapers or other similar home delivery items can be put, each bag having a product sample (breakfast cereal, shampoo, detergent, or the like) sealed into a pocket on the outside of the bag. When the bag is delivered, the customer gets not only her morning newspaper, but the promotional sample as well.

MHB's patents disclose a method for putting the samples into the pockets and then sealing the pockets. A number of bags with empty pockets are assembled and held together at the top by what the patents call a "header," which is essentially a cardboard bracket. The group or "plurality" of bags together is called a "wicket" of bags. A wicket of bags is laid on a platform so that the pocket side of each individual bag faces down. The free end of the top most individual bag is then lifted separately and moved across the header so that the pocket side that previously lay face down is exposed face up on the opposite side of the header, resting there upon a horizontal support plate. The pocket is then opened and the sample is inserted. The opening in the pocket is sealed and the bag is removed from the support plate to make way for the next bag. The process continues until each empty bag in the wicket has been transferred across the header, its pocket has been opened, the sample has been inserted, the pocket has been sealed and the finished bag has been removed from the support plate.

Sunflower's Method(s)

Sunflower accomplishes the same task by the method or methods that are accused of infringing MHB's patents. FN1 Sunflower's "prior method" involved assembling a plurality of bags with pockets to be filled into a wicket, secured at one end by a cardboard header. The operator would sit at a work table and hang the wicket from hooks facing him at the end of the table, so that the wicket of bags would hang suspended vertically from the hooks. There was a hole in the work table on the other side of the hooks. After hanging the wicket on the hooks, the operator would pass all the bags underneath the surface of the table, up through the hole, and back toward himself over the top of the header as it hung from the hooks. In other words, the group of bags was curled under the table, up through the opening, and back over the header. The operator would then take one bag at a time, open the pocket that was located at the end of the bag, and insert the sample. The operator would then move the bag across the header to a sealing device located on the other side of the hole, seal the pocket, and release the completed bag and let it drop back through the hole and come to rest hanging vertically from the wicket.

FN1. MHB's affidavits assert that Sunflower modified its method after MHB complained that it infringed, so there were in effect two Sunflower methods: the "prior method" and the "present method." *See Khan and Powers Affs.* For the purpose of the present motions, these assertions will be assumed to be true.

Sunflower's "present method" is substantially similar to its prior method, but there are two principal differences. The first is that after the bags are curled up through the hole in the work table, they do not rest on the header but rather on a structure, like a wire frame, placed at the edge of the hole nearer the operator. The second difference is that in the method as presently practiced, Sunflower does not use pre-formed bags but rather "sleeves," open at both ends. The step of sealing the pocket also entails sealing one end of the sleeve to make it into a bag. Otherwise, the present and prior methods are the same.

The Issues

MHB asserts that Sunflower's prior and present methods both infringe certain claims in its patents. To decide whether a patent has been infringed requires a two step analysis. "The first step is determining the meaning and scope of the patent claims asserted to be infringed.... The second step is comparing the properly construed claims to the [method] accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd* 116 S.Ct. 1384 (1996) (citations omitted). The first task, construing the patent claims, presents a question of law to be answered by the Court. *Markman*, 116 S.Ct. at 1387. The question of infringement then is ordinarily a factual one for a jury, but where the relevant material facts are not genuinely in dispute, the question of literal infringement may be one that, as a practical matter, "collapses to one of claim construction and is thus amenable to summary judgment." *Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1578 (Fed.Cir.1996). In an appropriate case where the material facts are undisputed, even the question of infringement under the doctrine of equivalents may be answered upon a motion for summary judgment. *Id.* at 1582-83.

Construing the Patent Claims

The '409 Patent.

MHB's first patent, United States Patent No. 5,249,409 (the "'409 patent"), issued October 5, 1993. It

discloses a "Method and Apparatus for Manufacture of Wicketed Bags with an Encapsulated Article and the Bags Formed Thereby." The '409 patent contains a total of twenty-six claims. Claims 1 through 18 and claim 26 pertain to an apparatus for performing the encapsulating process. Claim 19 and claims 20 through 25, which depend from it, pertain to the method at issue in this suit. As the sole independent claim pertaining to the method, the focus thus is on the construction of claim 19. Claim 19 reads:

A method for encapsulating a three-dimensional article on at least one side of a bag of a wicket of bags, the bags joined to a common header, the wicket of bags having a top bag, which bag is characterized by a pocket on one side thereof, the pocket having a free edge which includes:

transferring the top bag of the wicket across and over the header from a platform to a support plate without separating the transferred bag from the wicket while keeping the wicket on the platform;

billowing the pocket;

inserting the three-dimensional article into the pocket;

sealing the free edge to encapsulate the three-dimensional article in the pocket; and

removing the bag from the support plate without separating the bag from the wicket.

Sunflower contends that its method does not literally infringe this claim for several reasons, including these reasons that depend upon a construction of the terms used in the patent claim: (a) it does not employ "bags" at the beginning of the process, but rather sleeves that are open at both ends and do not become "bags" until one open end is sealed in the same step that seals the sample pocket; (b) its method does not involve transferring the bag to a "support plate"; (c) its method does not involve "billowing" the pocket; and (e) its method does not have a step of "removing" the finished bag from the support plate.

The terms in quotation marks need to be construed. In construing a claim, "words of the claim are generally given their ordinary and accustomed meaning, unless it appears from the specification or the file history that they were used differently by the inventor." *In re Paulsen*, 30 F.3d 1475, 1480 (Fed.Cir.1994). The construction of the terms may be further aided by the specification of the claim in the patent, the patent's prosecution history, the inventor's testimony about his intended meaning of the term, and evidence of the meaning of the term in general to one skilled in the art. *Markman*, 52 F.3d at 979-80.

(a) " Bag " In ordinary usage, a bag is a container, usually flexible, for holding or carrying something. *See Webster's Third New International Dictionary* 162 (G. & C. Merriam Co.1981) (defining "bag" as "a container made of paper, cloth, mesh, metal foil, plastic, or other flexible material and usu. closed on all sides except for an opening that may be closed (as by folding, pasting, tying, or sewing), being of sizes ranging from small to very large and being specially designed and treated for properly holding, storing, carrying, shipping, or distributing any material or product"); *Webster's College Dictionary* 103 (Random House 1992) ("bag" defined as "a container or receptacle made of some pliant material and capable of being closed at the mouth"). Describing it as a "container" implies its ability to contain or hold, and this ability normally depends on its having only one open end. This construction of "bag" is also consistent with the specification of the patent. Moreover, the inventor acknowledged in deposition testimony that he understood a "bag" to have a continuous sidewall and a closed bottom. Def.'s Ex. 28 at 149-50. In contrast, a "sleeve" is a tubular configuration, open at both ends. *See Merriam-Webster's Collegiate Dictionary* 1103 (10th ed.

1993) (defining "sleeve" to include "an open-ended flat or tubular packaging or cover").

Accordingly, the word "bag" as used in the '409 patent must be construed to mean a flexible container sealed on all sides but one.

(b) " *Support plate* " A support plate must be a physical structure. A "plate" suggests a more or less flat surface. A "support" plate is a plate that serves as a "foundation, prop, brace or stay." *See Webster's College Dictionary* 1343 (Random House 1992) (defining the noun "support"). It must be sturdy and large enough to bear up, or prevent from falling free, the object or objects it is designed to "support."

(c) " *Billowing* " In general usage, to "billow" means "to swell out, puff up, etc." *Webster's College Dictionary* 136 (Random House 1992); "to bulge or swell out in billows (as through the action of the wind)" *Webster's Third New International Dictionary* 216 (G. & C. Merriam Co.1981). The specification in the '409 patent describes a process of causing the pocket to open by means of a puff of air: "The nozzle 90 discharges an air jet blast which billows the pocket 26 such that the article 88 may be received therein." '409 patent, col. 3, lines 64-66.

"Billowing" the pocket, as the term is used in the '409 patent, must be construed to mean causing the pocket to swell or bulge open by use of a puff or gust of air. It is fair (and sensible) to conclude that, in using the word "billowing," the inventor meant to say something more than, and different from, merely "opening." The use of the particular word refers to a specific way of opening the pocket.

(d) " *Removing* " In general usage, to "remove" means "to move by lifting, pushing aside, or taking away or off," *Merriam-Webster's Collegiate Dictionary* 990 (10th ed. 1993), or "to move or shift from a place or position," *Webster's College Dictionary* 1139 (Random House 1992). "Removing" an object thus means the purposeful application of motive force to change the location of the object, under circumstances where, without the application of such motive force, the object would tend to stay in its original place.

The '578 Patent

MHB's second patent, No. 5,467,578 (the "'578 patent"), issued November 21, 1995. It resulted from a "file wrapper continuing application" that grew out of the application for the '409 patent. The '578 patent asserts only two claims, one independent and the other dependent:

1. A method of encapsulating an article within a pocket formed as an integral part of a bag, said bag being connected at a common header to a plurality of other bags to form a wicket, said pocket being bordered by a free edge defining an aperture communicating with the interior of said pocket, said method comprising the steps of:

locating said wicket at a first station with said common header positioned between said first station and an adjacent second station;

opening said aperture to gain access to the interior of the pocket;

inserting the article into the pocket through the thus opened aperture; and

sealing the free edge to close said aperture and to encapsulate the article in the pocket;

said method additionally comprising a step of transferring said bag and its integral pocket across said common header from said first station to said second station at which the free edge is sealed, the aforesaid steps of opening, inserting, sealing, and transferring being performed while the bag remains connected at said common header to said other bags.

2. The method as claimed in claim 1, wherein said bag is removed from said second station to a third station.

The parties disagree about the meaning of the "locating" step and the "transferring" step in claim 1, and these limitations must therefore be construed before the question of infringement can be reached.

(a) "*Locating said wicket at a first station with said common header positioned between said first station and an adjacent second station.*"

As used in the patent, "station" refers to the physical place or location of the wicket of bags or of an individual bag. The station is a place relevant to the process in some way. That is, the bag or bags are at the "station" for a purpose in the course of the full process. *See* Sineath Aff. para. 45. As described in the patent, the wicket of bags is located at the "first station" so the individual bags may be taken one by one and worked on. The individual bag is taken from the wicket group and moved so that, after the sample has been inserted, the pocket can be sealed at the "second station." The wicket remains at the first station until all the individual bags in it have been transferred to the second station for sealing. The individual bags will not necessarily remain very long at the second station. But what makes the location a station is not that the bag or bags rest there for any minimum amount of time, but rather that the location advances in some distinct way the method described in the patent. The patent clearly indicates that the sealing of an individual bag is done at a different location or station from the place where the bags await processing.

The other important feature expressed in this limitation is the description that the wicket's header lies "between" the two stations. The word "between" in this context has its usual meaning: that is, lying in the space or interval that separates. *See Merriam-Webster's Collegiate Dictionary* 109 (10th ed. 1993). To say that the header is between the stations is to say that one station is on one side of the header, and one on the other.

(b) "*Transferring said bag and its integral pocket across said common header from said first station to said second station at which the free edge is sealed.*"

The parties argue vigorously about whether the limitation "across" is equivalent to "over" (or "across and over," as the step was described in the '409 patent). It is fair to say that, in general usage, "across" connotes "over" commonly, perhaps even usually, though not invariably. *See Webster's Third New International Dictionary* 20 (G. & C. Merriam Co.1981) ("across prep 1a: from one side to the opposite side of : over"). In general human experience, when we think of going "across" something, we normally think of going over it. So, when we talk of going across a street, across a field, across a line, we generally mean to say that we pass over the surface, or above, the thing in question. FN2

FN2. It is true that it is sometimes possible to go across a river by riding the subway underneath it, but in normal usage, if one were to speak of going across a body of water, a listener would ordinarily understand it to have been a voyage above the surface, unless the contrary were expressed.

Common usage thus tends to favor Sunflower's position that the limitation "across the header" means "across and over the header." Significantly, so does the patent specification. The method disclosed calls for the transfer to occur by bringing the bag *over* the header. The patent office examiner interpreted the claim that way. In his Statement of Reasons for Allowance he noted that the claim referred to "transferring the bag *over* the common wicket header." *See* Def.'s Ex. 3, Tab U (emphasis added). As Sunflower notes, that interpretation was never challenged or corrected by MHB. Indeed, in the apparatus described as the preferred embodiment, it is not physically possible to transfer the bag across and *under* the header.

Accordingly, this claim must be construed to mean that the individual bag is transferred across and *over* the header of the wicket.

The Sequence of the Steps

Another question of construction exists with respect to both patents. Each describes its claimed method in a sequence of steps. Ordinarily, the recitation of steps in sequence suggests strongly that the steps are to be taken chronologically in the order described. *See* Loral Fairchild Corp. v. Victor Co. of Japan, Ltd., 906 F.Supp. 798, 805 (E.D.N.Y.1995). These patents describe a method, and a method by its nature involves a sequence of steps. The described sequence is necessarily a limitation of the claimed method. *See id.* at 804-806.

In the '409 patent, the order of the steps described is as follows: *transferring* an individual bag, *billowing* (or opening) the pocket, *inserting* the sample, *sealing* the pocket, and *removing* the bag from the support plate.

In the '578 patent, the sequence description is slightly different: *locating* the wicket, *opening* the aperture (or pocket), *inserting* the article, and *sealing* the edge of the pocket. The claim then adds that the method "additionally compris[es] a step of transferring said bag and its integral pocket across said common header from said first station to said second station at which the free edge is sealed." In the '409 patent, the transferring step is plainly described as occurring not only before the sealing, but also before the opening and inserting. The description in the '578 patent is less clear, however. Since the sealing occurs at the second station, at least that step must follow the transferring step. The claim language is ambiguous as to whether the opening and inserting steps also must occur before the transferring. The specification cures the ambiguity, however. FN3 As the examiner noted in rejecting an earlier version of the claim, "[I]n the disclosed system the opening and insertion *cannot* occur prior to the transfer since the pocket is on the bottom of the bag prior to the transfer." Def.'s Ex. 3, Tab Q, para. 3 (emphasis in original). The sequence of steps in both patents, then, must be construed to be the same: (1) transferring the bag across the header; (2) opening (in the '578 patent) or billowing (in the '409 patent) the pocket; (3) inserting the article; (4) sealing the pocket; and, in the '409 patent, removing the bag from the support plate.

FN3. "While ... the specification does not necessarily limit the claims, [the] specification references inform the claim's meaning." Loral, 906 F.Supp. at 805.

Infringement

With the claims thus construed, it is clear that the Sunflower method, prior or present, does not infringe either the '409 or the '578 patent. "To show infringement, the plaintiff must establish that the accused device

includes every limitation of the claim or an equivalent of each limitation." *Dolly, Inc. v. Spalding & Evenflo Cos., Inc.*, 16 F.3d 394, 397 (Fed.Cir.1994) (citing *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 796 (Fed.Cir.1990)). If at least one structural limitation is not found exactly or equivalently in the accused method, then summary judgment of noninfringement may be entered. *Becton Dickinson*, 922 F.2d at 798.

A. Literal Infringement

Sunflower's present method avoids literal infringement of more than one of the limitations of each patent. First, the present method does not use "bags," but rather "sleeves." The distinction is not a trivial one. The common definitions of those terms are different. Moreover, the definitional difference is confirmed in this particular context. In the Sunflower process, the bags do not have to be completely formed in advance. The sealing step not only completes the encapsulation of the product sample in the pocket but also completes the formation of the larger host bag. Thus, in the overall process of producing newspaper bags with enclosed samples, two steps are combined. Using sleeves rather than bags may have implications, perhaps efficiencies, for the larger manufacturing process.

Second, the sequence of steps in the two methods is literally different. In Sunflower's method, the process begins when the operator locates the bundle or wicket with the header on the hooks at the end of the table and with either the bundle of bags looped up through the worktable hole and over the header (in the prior method) or the bundle of sleeves looped up through the hole and over a support frame at the edge of the hole (in the present method). The next steps are the same in both the prior and the present methods. The operator manually opens the pocket and inserts the sample article. In the prior method, the operator then manually extends or transfers the individual bag to the sealer and seals the pocket. In the present method, the operator manually extends the sleeve to the sealer and seals both the pocket and the sleeve to complete the bag. In both methods, the completed bag with sealed pocket is then dropped by the operator back through the hole. When the whole bundle has been completed, the header is taken off the hooks and the next is located there. Thus, using the terms of the patents, the Sunflower steps are: locating, opening, inserting, transferring, and sealing. This sequence differs from the patents' described sequence, in which the bags are transferred before opening or insertion.

There are other literal differences as well. With respect to the '409 patent, neither Sunflower method uses a support plate to rest the bag or sleeve on while the steps of opening, inserting, or sealing are performed. Rather, the operator holds the bag or sleeve in her hands to do those tasks, and when they are done, she lets go and the bag drops. Nor does this release of the bag also constitute an affirmative step of "removing" the completed bag, as the '409 patent describes. As noted above, the common understanding of "removing" would require that the operator use some physical force—lifting, pushing, carrying—to move the object. In the Sunflower method, the operator just lets go. That is effective to get the bag out of the way of the next one, but it does not amount to "removing" the bag, as that step has been construed. Neither Sunflower method used air to "billow" the pocket, as described in the '409 patent.

In addition, neither Sunflower method positions the wicket of sleeves or bags so that the header is located between a first and second station as described in the '578 patent. In the first position or station at which the bags or sleeves are located, the header is on hooks and the bundle of bags is curled up through the table and draped over either the header itself (in the prior method) or the support frame (in the present method). The wicket thus positioned, the header does not lie between the bags and the second (sealing) station. Finally, the present Sunflower method is also different from the methods described in the '409 and '578 patents in

that it does not transfer the sleeve "across" the header, as that has been construed.

Because of all these significant differences, neither Sunflower method infringes either patent literally.

B. Doctrine of Equivalents

Even so, the question must be asked whether a reasonable jury could conclude that there has been infringement by application of the doctrine of equivalents. To prove infringement under this doctrine, the plaintiff must show, as for literal infringement, that each limitation in the claim is present in the accused method because the elements of the accused method, while perhaps not literally identical to the patent's, are substantially equivalent to them. *See* Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1518 (Fed.Cir.1995). "[A] finding of infringement under the doctrine of equivalents requires proof of insubstantial differences between the claimed and accused products or processes." *Id.* at 1521-22. The doctrine "prevents a copyist from evading patent claims with insubstantial changes." *Valmont Indus., Inc. v. Reinke Mfg. Co.*, 983 F.2d 1039, 1043 (Fed.Cir.1993). "An equivalent under the doctrine of equivalents results from an insubstantial change which, from the perspective of one of ordinary skill in the art, adds nothing of significance to the claimed invention." *Id.* On the other hand, "[t]hrough the doctrine of equivalents is designed to do equity, and to relieve an inventor from a semantic strait jacket when equity requires, it is not designed to permit wholesale redrafting of a claim to cover non-equivalent devices, i.e., to permit a claim expansion that would encompass more than an insubstantial change." *Perkin-Elmer Corp. v. Westinghouse Elec. Corp.*, 822 F.2d 1528, 1532 (Fed.Cir.1987).

Infringement may be found if the accused method performs substantially the same overall function or work, in substantially the same way, to obtain substantially the same overall result as the claimed invention. *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931, 934 (Fed.Cir.1987). The converse is also true. "[E]xamination of function, way, and result often discloses the substantiality of the differences between the accused and claimed products or processes," *Hilton Davis*, 62 F.3d at 1520, and may "suffice to show the extent of the differences." *Id.* at 1522. So it does here.

Because the "all limitations rule" applies to claims of infringement under the doctrine of equivalents as well as to claims of literal infringement, *Dolly*, 16 F.3d at 398; *Becton-Dickinson*, 922 F.2d at 797-98, it is sufficient to defeat MHB's equivalents claim to show that only one of the limitations in MHB's method is not present by a substantial equivalent in the accused method. That is shown in this case by the difference in the sequence of the steps in the MHB and Sunflower methods. Both MHB patents describe their method as a series of steps. As noted above, the sequence in which the steps are arranged to constitute the method is a limitation of the claimed invention. Neither the prior nor present Sunflower method has the sequence of steps arranged in the same way as the MHB patents. While a jury might conclude that the Sunflower method performed substantially the same overall *function* to achieve the same overall *result*, it could not conclude that the accused method did so in substantially the same *way*. Where the sequence is an important feature of the method, a distinctly different sequence cannot be considered substantially equivalent under the doctrine of equivalents, as a matter of law.

This proposition can be illustrated by considering the home run in baseball. The *function* the player performs is going around the bases. The *result* he achieves is returning to home plate, and thereby scoring a run. The *way* he does it is by proceeding in a prescribed sequence around the bases, touching first base, second, and third before stepping on home plate. FN4 A player might, starting from home, touch all the bases and end up back at home by employing a different sequence of base-touching. For example, after clouting the ball,

he might follow its flight and head straight to second, then run over to third, across to first, and back to home. In that case, he would be using a different *way* of going around the bases, while still performing equivalently the same function and achieving equivalently the same objective, that is, arriving at home plate.
FN5

FN4. *See* Rule 7.02, *Official Rules of Major League Baseball* 103 (Triumph Books 1995) ("In advancing, a runner shall touch first, second, third and home base *in order*.") (emphasis added). This is the "disclosed method."

FN5. There would be one significant difference in the actual "result," of course. The batter who made up his own sequence of rounding the bases would be called "out." The sequence matters to the integrity of the method, and it might actually produce a different result.

In the MHB patented method, one could think of the prescribed steps of transferring, opening, inserting, and sealing as the runner going from first to second to third to home. However, in Sunflower's method, the first step is opening, equivalent to MHB's second base in the baseball illustration. Sunflower's next step is inserting (third base), then transferring (first base), and finally sealing (back to home). The way through those steps is clearly not the same in the two processes.

Could a jury call the difference insubstantial? In describing the method as it did, MHB has not regarded the sequence as an insubstantial feature of its claims. Rather, the order in which the steps of the method are performed is clearly significant in the patents' claims. The patents do not claim that the method can be performed in any other sequence. Indeed, as the examiner noted, given the physical structure described in the patent, the steps cannot be performed in the same order that they are in the Sunflower method. As originally filed, the application did not, in the examiner's view, specifically describe the steps to be taken, FN6 and the sequence was thereafter described in an amendment to meet the objection. *See* Def.'s Ex. 3, Tabs Q, U. To consider that the claims cover some other undescribed, and physically unlikely, sequence as well as the one literally set forth would amount to an extension or expansion of the patent claims. "The doctrine of equivalents cannot extend or enlarge the scope of the claims." *Dolly*, 16 F.3d at 398. It "is not a license to ignore or 'erase ... structural and functional limitations of the claim,' limitations 'on which the public is entitled to rely in avoiding infringement.' " *Athletic Alternatives*, 73 F.3d at 1582 (quoting *Perkin-Elmer*, 822 F.2d at 1532).

FN6. The examiner wrote: The specification is objected to under 35 U.S.C. s. 112, first paragraph, as the specification, as originally filed, does not provide support for the invention as is now claimed. Specifically, there is no support for opening the pocket and inserting the article *before* transferring the bag across the header from the first station to the second station as set forth at claim 41, lines 8-12 and claim 42. Further, lines 12-14 of claim 40 failure to set forth the transfer as occurring prior to the opening step results in a lack of support for the possible transfer at other stages of the method. Note that in the disclosed system the opening and insertion *cannot* occur prior to the transfer since the pocket is on the bottom of the bag prior to the transfer.

Def.'s Ex. 3, Tab Q (Examiner's Statement of Reasons at para. 3) (emphasis in original).

Conclusion

Accordingly, the claims having been construed as set forth above, and the material facts having been considered, where disputed, favorably to MHB, the Court concludes that the Sunflower method, prior or present, does not infringe either the '409 or the '578 patent, and Sunflower is entitled to a judgment of noninfringement as a matter of law.

The defendant's motion for summary judgment is *GRANTED*. The plaintiff's motions for a preliminary injunction and for summary judgment are *DENIED*.

It is SO ORDERED.

D.Mass.,1996.

MHB Industries Corp. v. Dennis Garberg & Associates, Inc.

Produced by Sans Paper, LLC.