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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CURTIS TAYLOR, DOUGLAS E. WHITNER, and
MARC LOUIS VITANTONIO

Appeal 2010-005477
Application 11/410,764
Technology Center 3700

Before KEN B. BARRETT, GAY ANN SPAHN, and
MICHAEL C. ASTORINO, *Administrative Patent Judges*.

SPAHN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Curtis Taylor et al. (Appellants) seek our review under 35 U.S.C. § 134 of the Examiner's rejection of claims 45-95. Appellants cancelled claims 1-44. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

The Claimed Subject Matter

The claimed subject matter relates to “a portable warming device . . . for warming one or more towels.” Spec. 1, para. [0002]. Claims 45, 65, and 87 are independent and claim 45, reproduced below, with emphasis added, is illustrative of the subject matter on appeal.

45. A portable textile warmer designed to dry heat warm a textile comprising:

a housing body having a bottom portion, a top portion, an inner shell, and a lid; said inner shell having an inner surface that at least partially forms a warming cavity; said warming cavity having a base wall and a side wall; *said warming cavity having a volume to hold at least one standard bath towel*; said lid positionable on said top portion of said housing; said lid movable between an open and a closed position wherein said lid in the closed position causing said one or more textiles in said warming cavity to be substantially encapsulated by said warming cavity; said lid in the open position enabling one or more textiles to be inserted and removed from said warming cavity; and

a heating arrangement designed to dry heat one or more textiles positioned in said warming cavity; said heating arrangement including a resistive heating element, a heating controller, a current connector, and an activation switch; said resistive heating element positioned on an outer surface of said inner shell and about said side wall of said warming cavity, in close proximity to said outer surface of said inner shell and about said side wall of said warming cavity, and combinations thereof; said resistive heating element designed to heat said inner surface of said inner shell; said current connector designed to connect to a current source to provide current to said resistive heating

element; said heating controller terminating a flow of current to said resistive heating element once a predetermined period of time has passed since said activation switch has been actuated by a user, after a temperature sensor senses a predetermined temperature after a user has actuated said activation switch, and combinations thereof.

The Rejections

The following Examiner's rejections are before us for review:

- I. claims 45-95 under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention;
- II. claims 45, 46, 48-51, 56, 60, 62, and 64 under 35 U.S.C. § 102(b) as anticipated by Warren (US 5,231,266, issued Jul. 27, 1993);
- III. claim 47 under 35 U.S.C. § 103(a) as unpatentable over Warren, DeMars '146 (US 4,694,146, issued Sep. 15, 1987), and Ferguson (WO 03/053101 A1, published Jun. 26, 2003);
- IV. claims 52, 54, 57, 61, and 64 under 35 U.S.C. § 103(a) as unpatentable over Warren and Lovett (US 4,927,995, issued May 22, 1990);
- V. claims 53 and 54 under 35 U.S.C. § 103(a) as unpatentable over Warren and Watchman (US 4,644,136, issued Feb. 17, 1987);
- VI. claims 52 and 55 under 35 U.S.C. § 103(a) as unpatentable over Warren and Swanson (US 5,569,403, issued Oct. 29, 1996);
- VII. claim 58 under 35 U.S.C. § 103(a) as unpatentable over Warren and Cayley (US 4,117,309, issued Sep. 26, 1978);
- VIII. claim 59 under 35 U.S.C. § 103(a) as unpatentable over Warren and Maruca (US 7,191,546 B2, issued Mar. 20, 2007);

IX. claim 63 under 35 U.S.C. § 103(a) as unpatentable over Warren and DeMars '290 (US 4,918,290, issued Apr. 17, 1990);

X. claims 65, 68-70, 72, 73, 76-79, and 81-86 under 35 U.S.C. § 103(a) as unpatentable over Warren and, Lovett, Cayley, and Maruca, as evidenced by Governale (US 3,626,152, issued Dec. 7. 1971);

XI. claims 66 and 71 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, Ferguson, and Braun (US 4,794,228, issued Dec. 27, 1988), as evidenced by Governale;

XII. claim 67 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars '146, as evidenced by Governale;

XIII. claim 74 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Watchman, as evidenced by Governale;

XIV. claim 75 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Swanson, as evidenced by Governale;

XV. claim 80 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars '290, as evidenced by Governale;

XVI. claim 87 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Rose (US 4,694,973, issued Sep. 22, 1987), as evidenced by Governale; and

XVII. claims 88-95 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, Rose, Ferguson, and Braun, as evidenced by Governale.

OPINION

Rejection I – Indefiniteness

Claims 45-86 and 89-95

Appellants argue claims 45-86 and 89-95 as a group and we select independent claim 45 as the representative claim. *See* App. Br. 12-15 and Reply Br. 2-5; *see also* 37 C.F.R. § 41.37(c)(1)(vii) (2011). Claims 46-86 and 89-95 stand or fall with claim 45.

The Examiner determines that claims 45-86 and 89-95 are indefinite for including a limitation reciting a plurality of elements together with the phrase “and combinations thereof,” wherein the elements and the phrase “and combinations thereof” are not recited in the alternative. Ans. 4 and 31-32.

Appellants argue that all of the claim limitations including a plurality of elements together with the phrase “and combinations thereof” recite the elements and the phrase “and combinations thereof” in the alternative and thus, present no uncertainty or ambiguity with respect to the question of scope or clarity of the claims. App. Br. 13. For example, Appellants argue that claim 45’s limitation of “said resistive heating element positioned on an outer surface of said inner shell and about said side wall of said warming cavity, in close proximity to said outer surface of said inner shell and about said side wall of said warming cavity, and combinations thereof” is an “alternative limitation directed to the position of the resistive heating element.” App. Br. 13-14. Appellants also argue that “[t]he limitation requires that the resistive heating element can be positioned ‘on an outer surface of said inner shell and about said side wall of said warming cavity’ and/or ‘in close proximity to said outer surface of said inner shell and about

said side wall of said warming cavity,” and “this is the only reading for this limitation.”

We are not persuaded by Appellants’ arguments that the claim limitations including a plurality of elements together with the phrase “and combinations thereof” are recited in the alternative in order to present no uncertainty or ambiguity as to claim scope. Although Appellants are correct that a claim limitation need not be written in Markush group format in order to be considered an alternative limitation, we note that Appellants’ limitations including a plurality of elements together with the phrase “and combinations thereof” are not alternative limitations because they do not contain “or” or “optionally” terminology. *See* the Manual of Patent Examining Procedure (MPEP) § 2173.05(h) II and III. Thus, we agree with the Examiner that all of Appellants’ claims reciting a limitation including a plurality of elements together with the phrase “and combinations thereof” are indefinite as not being recited in the alternative and thus, presenting uncertainty or ambiguity as to claim scope.

Accordingly, we sustain the Examiner’s rejection of claims 45-86 and 89-95 under 35 U.S.C. § 112, second paragraph, as being indefinite.

Claims 87 and 88

Appellants correctly note that claims 87 and 88 do not contain any disputed alternative limitations. App. Br. 15. Accordingly, we do not sustain the Examiner’s rejection of claims 87 and 88 under 35 U.S.C. § 112, second paragraph, as being indefinite.

Rejection II – Anticipation based on Warren

The Examiner finds that Warren discloses each and every limitation to anticipate independent claim 45. Ans. 4-6. In particular, the Examiner finds

that Warren discloses a portable textile warmer including, *inter alia*, a warming cavity “having a volume to hold at least one standard bath towel (towelettes are used for cleansing which is equivalent to bathing and Figure 2 discloses a plurality of towelettes; column 1, lines 19-26).” Ans. 4-5. The Examiner explains that “the recitation [of] . . . ‘the at least one towel’ (i.e.,] standard towel) [is] not part of the invention and [is] intended/functional use.” Ans. 34. The Examiner further explains that Warren’s towelettes are considered to be standard under the broadest reasonable interpretation, and because “there is no recitation to size, thickness, or volume of a standard towel recited in any of the claims,” Warren meets the claim language. Ans. 34-35.

Appellants argue that “the volume limitation is part of claim 45 and is not merely a functional limitation that can be ignored,” and “claim 45 does require that the warming cavity have a volume large enough to hold a standard bath towel.” App. Br. 19; Reply Br. 6. Appellants note that the Specification defines the term “standard bath towel” as “a bath towel that is ‘about 27-30" by 52-60" and has a thickness of about 0.125-025", thus having an average volume of about 175-450 cubic inches.” App. Br. 16 (quoting Spec. 3, para. [0008]). Thus, Appellants also argue that “Warren does not disclose the volume of the towelette warmer,” and “Warren does not disclose a towelette warmer having a cavity that can hold at least one bath towel.” Reply Br. 6.

We agree with Appellants that Warren fails to disclose that its towelette warmer satisfies the claim limitation of “said warming cavity having a volume to hold at least one standard bath towel.” Warren’s towelette warmer is disclosed as being “for warming and dispensing pre-

moistened, prepackaged disposable towelettes.” Warren, Abst. The towelette warmer has a body 1, and inside the body 1, the towelette warmer has a watertight vessel 11. Warren, col. 2, ll. 11-12 and 18-20. The vessel 11 is shaped to accept either round or rectangular towelette dispensers 12. Warren, col. 2, ll. 21-23. However, Warren does not explicitly disclose any volume for vessel 11 and it is not implicit that a vessel shaped to accept either a round or rectangular towelette dispenser is large enough to hold a standard bath towel defined as having an average volume of about 175-450 cubic inches.

Accordingly, we do not sustain the Examiner’s rejection of independent claim 45, and claims 46, 48-51, 56, 60, 62, and 64 dependent thereon, under 35 U.S.C. § 102(b) as anticipated by Warren.

Rejections III-IX – Obviousness based on Warren/DeMars ’146/ Ferguson, Warren/Lovett, Warren/Watchman, Warren/Swanson, Warren/Cayley, Warren/Maruca, and Warren/DeMars ’290, respectively

The Examiner’s rejections of claims 47, 52-55, 57-59, 61, 63, and 64 under 35 U.S.C. § 103(a) all rely upon the erroneous finding that Warren teaches “said warming cavity having a volume to hold at least one standard bath towel.” Accordingly, for the reasons discussed *supra* with respect to independent claim 45, we do not sustain the Examiner’s rejections, under 35 U.S.C. § 103(a), of: claim 47 as unpatentable over Warren, DeMars ’146, and Ferguson; claims 52, 54, 57, 61, and 64 as unpatentable over Warren and Lovett; claims 53 and 54 as unpatentable over Warren and Watchman; claims 52 and 55 as unpatentable over Warren and Swanson; claim 58 as unpatentable over Warren and Cayley; claim 59 as unpatentable over Warren and Maruca; and claim 63 under 35 U.S.C. § 103(a) as unpatentable over Warren and DeMars ’290.

*Rejection X – Obviousness based on Warren,
Lovett, Cayley, and Maruca, as evidenced by Governale*

The Examiner finds that Warren discloses “said warming cavity having a volume to hold at least one standard bath towel and up to two standard bath towels.” Ans. 5 and 58-59. Appellants argue that this limitation “is not taught, disclosed or made obvious from the teachings of Warren.” App. Br. 40. For the reasons discussed *supra* with respect to independent claim 45, we do not sustain the Examiner’s rejection of independent claim 65, and claims 68-70, 72, 73, 76-79, and 81-86 dependent thereon, under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, and Maruca, as evidenced by Governale.

*Rejections XI-XV – Obviousness based on
Warren/Lovett/Cayley/Maruca in combination with any
one of Ferguson/Braun, DeMars ’146, Watchman, Swanson,
and DeMars ’290, respectively, all as evidenced by Governale*

The Examiner’s rejections of claims 66, 67, 71, 74, 75, and 80 under 35 U.S.C. § 103(a) all rely upon the erroneous finding that Warren teaches “said warming cavity having a volume to hold at least one standard bath towel and up to two standard bath towels.” Accordingly, for the reasons discussed *supra* with respect to independent claim 45, we do not sustain the Examiner’s rejections, under 35 U.S.C. § 103(a), of: claims 66 and 71 as unpatentable over Warren, Lovett, Cayley, Maruca, Ferguson, and Braun, as evidenced by Governale; claim 67 as unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars ’146, as evidenced by Governale; claim 74 as unpatentable over Warren, Lovett, Cayley, Maruca, and Watchman, as evidenced by Governale; claim 75 as unpatentable over Warren, Lovett, Cayley, Maruca, and Swanson, as evidenced by Governale; and claim 80 as

unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars '290, as evidenced by Governale.

*Rejection XVI – Obviousness based on Warren,
Lovett, Cayley, Maruca, and Rose, as evidenced by Governale*

The Examiner finds that Warren discloses a portable textile warmer including, *inter alia*, “a lid (first lid 5; see Figures 1, 2).” Ans. 4-5.

Appellants note that “Warren discloses a towelette warmer that includes two lids 5, 7.” App. Br. 39 (citing Warren, col. 2, ll. 11-17). Appellants argue that the Examiner’s analysis is “factually and legally unsound in view of the teachings of Warren,” because claim 87 requires that the portable towel warmer includes only a single lid. App. Br. 39 and Reply Br. 26.

The Examiner replies that because claim 87 uses the transitional phrase “comprising” which is open-ended and does not exclude additional, unrecited elements, Warren fully meets the claim recitation of “a single lid” giving the claim its broadest reasonable interpretation.

We agree with Appellants. The recitation of “a single lid” is construed in view of the ordinary and customary meaning of the word “single.” The ordinary and customary meaning of the word “single” is “ONLY, SOLE.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, Merriam-Webster, Inc., © 1993.¹ A person of ordinary skill in the art would understand that claim 87 is reciting one and only one lid. Thus, the Examiner has incorrectly applied the broadest reasonable interpretation of the word “comprising” to mean that Warren’s two lids satisfies the claim recitation of a single lid. *See In re Skvorecz*, 580 F.3d

¹ Accessed at <http://lionreference.chadwyck.com/searchRefShelf.do> (last viewed February 3, 2013).

1262, 1268 (Fed. Cir. 2009) (holding that “the examination expedient of ‘broadest reasonable interpretation’ was incorrectly applied to interpret ‘comprising’ to mean that not all the Skvorecz wire legs need have offsets, despite the claims that state that ‘each wire leg’ has an offset.”).

Accordingly, we do not sustain the Examiner’s rejection of claim 87 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Rose, as evidenced by Governale.

Rejection XVII – Obviousness based on Warren, Lovett, Cayley, Maruca, Rose, Ferguson, and Braun, as evidenced by Governale

The Examiner’s rejection of claims 88-95 under 35 U.S.C. § 103(a) relies upon the erroneous finding that Warren teaches “a single lid.” Accordingly, for the reasons discussed *supra* with respect to independent claim 87, we do not sustain the Examiner’s rejection of claims 88-95 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, Ferguson, and Braun, as evidenced by Governale.

DECISION

We AFFIRM the Examiner’s rejection of claims 45-86 and 89-95 under 35 U.S.C. § 112, second paragraph, as indefinite.

We REVERSE the Examiner’s rejection of: claims 87 and 88 under 35 U.S.C. § 112, second paragraph, as indefinite; claims 45, 46, 48-51, 56, 60, 62, and 64 under 35 U.S.C. § 102(b) as anticipated by Warren; claim 47 under 35 U.S.C. § 103(a) as unpatentable over Warren, DeMars ’146, and Ferguson; claims 52, 54, 57, 61, and 64 under 35 U.S.C. § 103(a) as unpatentable over Warren and Lovett; claims 53 and 54 under 35 U.S.C. § 103(a) as unpatentable over Warren and Watchman; claims 52 and 55

under 35 U.S.C. § 103(a) as unpatentable over Warren and Swanson; claim 58 under 35 U.S.C. § 103(a) as unpatentable over Warren and Cayley; claim 59 under 35 U.S.C. § 103(a) as unpatentable over Warren and Maruca; claim 63 under 35 U.S.C. § 103(a) as unpatentable over Warren and DeMars '290; claims 65, 68-70, 72, 73, 76-79, 81-86 under 35 U.S.C. § 103(a) as unpatentable over Warren and, Lovett, Cayley, and Maruca, as evidenced by Governale; claims 66 and 71 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, Ferguson, and Braun, as evidenced by Governale; claim 67 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars '146, as evidenced by Governale; claim 74 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Watchman, as evidenced by Governale; claim 75 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Swanson, as evidenced by Governale; claim 80 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and DeMars '290, as evidenced by Governale; claim 87 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, and Rose, as evidenced by Governale; and claims 88-95 under 35 U.S.C. § 103(a) as unpatentable over Warren, Lovett, Cayley, Maruca, Rose, Ferguson, and Braun, as evidenced by Governale.

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

AFFIRMED-IN-PART

Klh