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11/852,479	09/10/2007	ERNEST W. MOODY	MOODY 69	1319
24258	7590	01/30/2013	EXAMINER	
JOHN EDWARD ROETHEL 5220 Haven Street, Suite 107 Las Vegas, NV 89119			COLLINS, DOLORES R	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERNEST W. MOODY

Appeal 2010-009420
Application 11/852,479
Technology Center 3700

Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and
MEREDITH C. PETRAVICK, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 1 to 3. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

BACKGROUND

Appellant's invention is directed to a declare device that is used in poker games.

Claim 1 is illustrative:

1. A declare device used in a poker game having a Hi-Lo wager component comprising:
 - a) a lower section having a generally flat bottom surface and a generally flat top surface;
 - b) an upper section having a generally flat bottom surface and a generally flat top surface;
 - c) the top surface of the lower section being provided with indicia indicating HI, LO and BOTH;
 - d) the upper section having a missing segment so that one of the indicia on the lower section may be uncovered by the upper section; and
 - e) an axle positioned in the upper section so that the upper section may be rotated relative to the lower section.

PRIOR ART

The Examiner relies on the following prior art reference as evidence of unpatentability:

Krebs	US 4,261,468	Apr. 14, 1981
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REJECTION

Appellant appeals the following rejection:

Claims 1-3 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Krebs.

FACTUAL FINDINGS

We adopt all the Examiner's findings as our own. Ans. 4 to 5.
Additional findings of fact may appear in the Analysis that follows.

ANALYSIS

We are not persuaded of error on the part of the Examiner by Appellant argues that Krebs does not disclose an upper surface on the lower section because Krebs is a pill dispenser that requires the lower section to be open so that pills may be dispensed. We agree with the Examiner that the lower section 64 of the Krebs has a lower section with a flat bottom surface that is the bottom of the container and a flat upper surface which forms the inside bottom of the container. This flat upper surface is a surface on which pills disposed in the container rest.

We are not persuaded of error on the part of the Examiner by Appellant's argument that Krebs does not disclose that the top surface of the lower section being provided with indicia indicating HI, LO and BOTH. We agree with the Examiner that the indicia relates only to the intended use of the assembly. We also agree with the Examiner that the indicia recited is printed matter because it is not functionally related to the upper surface of the bottom section. Nonfunctional descriptive material cannot render nonobvious an invention that otherwise would have been obvious. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004); cf. *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability). In this regard, the indicia is not related to how the assembly functions.

In view of the foregoing, we will sustain the Examiner's rejection.

DECISION

We affirm the Examiner's decision to reject claims 1-3 under 35 U.S.C. § 103(a).

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2012).

ORDER

AFFIRMED

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