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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
11/605,228	11/29/2006	Matthias Nederegger	2005P21878US01	5185
79912	7590	03/15/2013	EXAMINER	
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			ART UNIT	PAPER NUMBER
			3753	
			MAIL DATE	DELIVERY MODE
			03/15/2013	PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MATTHIAS NEDEREGGER,
THOMAS SIPPEL, and SABINE REICHEL

Appeal 2010-009481
Application 11/605,228
Technology Center 3700

Before: PHILLIP J. KAUFFMAN, BENJAMIN D. M. WOOD and
BRADFORD E. KILE, *Administrative Patent Judges.*

KILE, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Matthias Nederegger et al. (Appellants¹) appeal under 35 U.S.C. § 134(a) from a final rejection of claims 1-4, 6-12, 14, and 15. Claims 5, 13, and 16 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ Appellants identify the real party in interest as Continental Automotive Systems US Inc., formerly Siemens VDO Automotive Corporation.

THE CLAIMED INVENTION

The claimed invention relates to a fuel supply unit for diesel fueled vehicles. Spec., para. [0004]. Claims 1, 8, and 9 are the independent claims on appeal.

Independent claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A reservoir structure of a fuel delivery structure for a diesel vehicle, the reservoir structure including:

a fuel reservoir having a bottom surface,

a primary fill opening in the bottom surface for permitting fuel to pass from a fuel tank of the vehicle into the reservoir,

a secondary fill opening in the reservoir that is elevated from the bottom surface, the secondary fill opening communicating the fuel tank with the reservoir for permitting fuel to pass from the fuel tank directly into the reservoir,

a first valve member associated with the primary fill opening constructed and arranged to close the primary fill opening under certain pressure conditions in the reservoir and, under pressure conditions in the reservoir different from the certain pressure conditions, to permit fuel to enter the reservoir through the primary fill opening, and

a second valve member associated with the secondary fill opening constructed and arranged to close the secondary fill opening under certain pressure conditions in the reservoir and, under pressure conditions in the reservoir different from the certain pressure conditions, to permit fuel to enter the reservoir through

the secondary fill opening in the event the primary opening is substantially blocked,

wherein the reservoir structure is in combination with a suction tube in the reservoir, the suction tube being constructed and arranged to be coupled with a suction unit to draw fuel under certain conditions into the reservoir via the first fill opening and, when the first fill opening is substantially blocked, via the secondary fill opening.

THE REJECTIONS

1. Claims 1, 3, 4, 9, 11, and 12 stand rejected as unpatentable under 35 U.S.C. § 103(a) over Sawert (US 5,647,330, issued Jul. 15, 1997) in view of Schmitt (US 2005/0011558 A1, pub. Jan. 20, 2005).

2. Claims 2 and 10 stand rejected as unpatentable under 35 U.S.C. § 103(a) over Sawert and Schmitt and further in view of Braun (DE 10303390 A1, pub. Aug. 5, 2004).

3. Claims 6, 7, 14, and 15 stand rejected as unpatentable under 35 U.S.C. § 103(a) over Sawert and Schmitt and further in view of Briggs (US 2005/0103805 A1, pub. May 19, 2005).

4. Claim 8 stands rejected as anticipated under 35 U.S.C. § 102(b) over Sawert.

OPINION

A. Claims 1-4, 6, 7, 9-12, 14, and 15

1. *Claims 1, 3, 4, 9, 11, and 12*²

The Examiner found that the Sawert patent disclosed essentially all of the limitations of claim 1. Ans. 5-8. The Examiner specifically noted that there is nothing precluding the use of Sawert in gasoline type applications. *Id.* at 7. The Examiner also noted that Sawert does not specifically “disclose wherein the fuel pump is a suction unit.” *Id.* The Examiner found, however, that Schmitt teaches use of a suction unit in a fuel reservoir assembly and that it would have been obvious to modify the fuel pump disclosed by Sawert to be a suction unit, as taught by Schmitt, to insure that sufficient fuel is provided in the reservoir.

Appellants make three arguments with respect to the obviousness of claim 1. First, Appellants assert that the fuel sender of Sawert is for gasoline type applications and includes a venturi throat 62. App. Br. 6-7. Second, Appellants submit that Sawert does not include a suction tube associated with first and second fill openings and that in a conventional diesel suction unit no fuel pump is employed and thus no venturi throat is used. *Id.* Third, Appellants contend that Sawert only discloses fuel filling via fill opening 66 and that it is done passively by gravity feed. *Id.* at 8.

We are not persuaded by Appellants’ arguments. With respect to the first point, we agree with the Examiner that the Sawert patent disclosure is

² Appellants present a single argument for independent claims 1 and 9 without distinguishing between the subject matter of the claims and do not present separate argument for claims 3, 4, 11, and 12. App. Br. 7-8. We select independent claim 1 as a representative claim. *See* 37 C.F.R. § 41.37(c)(1)(vii)(2012).

not limited by the patent disclosure to gasoline applications. Although Appellants dispute this finding, no Declaration evidence has been submitted with respect to this appeal. Appellants do refer to United States Schmitt patent No. 7,191,767 which discloses that an electric pump assembly and a fuel suction unit may be structurally designed to be interchangeably received within a reservoir. Schmitt, col.1, ll. 43-48. This patent *per se*, however, does not convince us that the Examiner's conclusion is incorrect. Further argument by counsel is not an adequate substitute for persuasive evidence. *See Perfect Web Technologies, Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009); *see, e.g.*, 1 *Wigmore on Evidence*, § 1(b), at p. 7 (Tillers rev. 1983). We note that Appellants fail to identify a distinction between the fuel reservoir assembly of Sawert and that of the subject matter of claim 1. *In re Schreiber*, 128 F.3d 1473, 1477-78 (Fed. Cir. 1997) (claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function).

With respect to the second and third related points the Sawert suction tube 106 is open to reservoir 40 which in turn is in fluid communication with primary fill passage 66 as well as an elevated secondary fill port 44. As a matter of logic if gravity is available to passively fill reservoir 40 via 66 gravity is available to fill reservoir 40 via part 44 if port 66 is blocked. The fact that Sawert also discloses an active venturi system associated with port 44 does not mean that both ports do not also admit fresh fuel into chamber 40 from the surrounding reservoir passively by gravity, and by suction via tube 106, if one of the inlet ports happens to be blocked.³

³ *See also* analysis of claim 8, *infra*.

Appellants have not convinced us of error in the Examiner's analysis or conclusions. We affirm the Examiner's rejection of claims 1-5 and 9.

2. Claims 2 and 10

Claims 2 and 10, which depend from claims 1 and 9 respectively, have only been argued as being dependent from their parent claims - which Appellants consider to be allowable. App. Br. 8.

The point of the Examiner's rejection of claims 1 having been determined above we affirm the Examiner's rejection of claims 2 and 10 (Ans. 8) and repeat by reference our reasons articulated in section 1 above.

3. Claims 6, 7, 14, and 15

Appellants assert, and we agree, that claims 6 and 14 call for the reservoir to rest on the bottom of the fuel tank. *See* App. Br. 9. The Examiner found that Briggs disclosed a reservoir with legs that rest on the bottom surface of a fuel tank. Ans. 9. The Examiner reasoned that it would have been obvious to "modify the reservoir disclosed by Sawert et al. to rest on a bottom surface of the fuel tank . . . for the purpose of ensuring proper spacing between the reservoir and the fuel tank." *Id.* Although Appellants note that the Sawert disclosure includes a strainer that does not convince us that it would not have been obvious to rest the reservoir on the bottom of the fuel tank with legs of a length to accommodate the existence of strainer for the purpose of spacing and support as found by the Examiner. *See* Ans. 11 (explaining that legs as disclosed by Briggs may be sized to accommodate Sawert's strainer). We affirm the Examiner's rejection of claims 6 and 14.

With respect to claims 7 and 15 the Examiner's reasoning and analysis are stated in the Answer at 9 and 11. The Examiner found that opening 44 and the bottom of suction tube 64 are generally at the same level.

Ans. 9. Appellants contend that item 64 is not a suction tube as the Examiner contends, but is a perforation and that in any event perforation 64 is substantially above this opening. App. Br. 9.

With respect to Appellants' analysis of the Examiner's rejection of claims 7 and 15 we agree with Appellants. The Examiner has failed to convince us of the correctness of the rejection and the Examiner's rejection is therefore reversed.

B. Claim 8

Claim 8 stands rejected by the Examiner as being anticipated by the Sawert patent disclosure. A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. *See, e.g., Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 715 (Fed.Cir.1984); *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 771 (Fed.Cir.1983), cert. denied, 465 U.S. 1026 (1984); *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631(Fed. Cir. 1987).

Appellants assert that Sewart's fuel pump (pump assembly 104) draws fuel from the reservoir (interior volume 40) rather than drawing fuel into the reservoir, and therefore does not draw fuel directly into the reservoir as called for in claim 8. App. Br. 6-7; Reply Br. 2.

The Examiner found that by drawing fuel from the reservoir (interior volume 40), Sewart's fuel pump (pump assembly 104) thereby causes more fuel to be drawn into the reservoir. Ans. 4, 9-10. Claim 8 does not require that the fuel pump draw fuel directly into the reservoir. For that reason, Appellants' argument is unpersuasive because it is not commensurate in

scope with claim 8. Further, Appellants' argument is also unpersuasive in that it does not address the rejection as articulated by the Examiner.

Appellants also assert that if fill-opening 66 is blocked the volume 40 cannot be filled with fuel by gravity and thus fuel pump 104 would not have a fuel supply to operate. App. Br. 7; Reply Br. 2. Appellants' conclusory assertion that opening 44 does not permit gravity flow is not accompanied by a cogent explanation of why that is the case when Figures 3 and 6 disclose a direct fluid communication path for gravity feed of fuel from the surrounding reservoir through valve opening 44 and into chamber 40 just as gravity feeds fuel through the primary fill valve opening 66. We further note that to some extent, Appellants' argument is not commensurate in scope with claim 8. Claim 8 requires the second fill opening (inlet port 44) to permit fuel to enter the reservoir when the primary opening is substantially blocked, and does not more specifically require that such flow be gravity fed.

The Examiner responded, "opening 44 is connected to the reservoir volume 40 via port 56, and thereby would operate in the same fashion as port 66." Ans. 10. "Should inlet 66 become blocked, fuel would still be permitted to flow into interior volume 40 via passage 44. . . ." *Id.* We find that the Examiner's decision is based on preponderance of the evidence and Appellants have failed to persuade us that the Examiner's analysis and conclusion are incorrect. We affirm the Examiner's rejection of claim 8.

Appeal 2010-009481
Application 11/605,228

DECISION

The decision of the Examiner to reject claims 1-4, 6, 8-12, and 14 is AFFIRMED. The decision of the Examiner to reject claims 7 and 15 is REVERSED.

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)(2012).

AFFIRMED-IN-PART

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