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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte WAYNE CASTLEBERRY

Appeal 2010-012235
Application 11/239,344
Technology Center 3600

Before PHILLIP J. KAUFFMAN, JAMES P. CALVE, and WILLIAM A. CAPP, *Administrative Patent Judges*.

CALVE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134 from the rejection of claims 1-6, 8-12, 15, 16, and 21-23. App. Br. 2. Claims 7, 13, 14, and 17-20 are withdrawn. *Id.* We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

CLAIMED SUBJECT MATTER

Claims 1, 15, and 23 are independent. Claim 1 is reproduced below:

1. A horticultural cut flower container assembly comprising:

a triangular shaped member of flexible polyurethane foam material, the ends of the triangular shaped foam material being adapted to be folded over the stem ends of a bunch of piece of cut flowers and a band encircling said folded foam material to hold said foam material in a wrapped configuration and an outer plastic bag placed over said folded foam material.

REJECTIONS

Claims 1-6, 8-12, 15, 16, and 21-23 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 1, 5, 6, 9-12, 15, and 23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Benoist (US 3,657,840; iss. Apr. 25, 1972), Weder (US 6,295,758 B1; iss. Oct. 2, 2001), and Hori (US 4,972,627; iss. Nov. 27, 1990).

Claims 2-4, 16, 21, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Benoist, Weder, Hori, and Heller (US 4,469,502; iss. Sep. 4, 1984).

Claim 8 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Benoist, Weder, Hori, and Denicola (US 2005/0086862 A1; pub. Apr. 28, 2005).

ANALYSIS

Claims 1-6, 8-12, 15, 16, and 21-23 lack an adequate written description

The Examiner found that the term "polyurethane" in claim 1 is not supported by a disclosure of this material in the Specification. Ans. 4. The Examiner rejected claims 2-6 and 8-12 because they depend from claim 1. We agree with Appellant that the disclosure of aromatic diphenylmethane diisocyanate (MDI) foam materials (Spec. 3, 5-6) supports this limitation because MDI is associated with polyurethane chemistry and is a urethane chemical. *See* App. Br. 8 (citing BASF *Polyurethane MDI Handbook* at Evid. App'x.); Spec. 3, 5-6.

The Examiner also found that a foam material thickness of 1/8 inch in claims 10 and 12 is not supported in the Specification, which only lists a thickness of ¼ inch to 1 ½ inch. Ans. 4, 12-13. However, original claims 10 and 12 are part of Appellant's original disclosure and recite a foam material thickness ranging from 1/8 to ½ inch and about 1/8 inch. *See* App. Br. 8.

The Examiner also found that "unfilled polyurethane" in claim 15 is not supported by the Specification's disclosure of no fillers because it is questionable whether unfilled and no filler are the same or equivalent. Ans. 4, 13. We agree with Appellant that a skilled artisan would understand that an unfilled polyurethane is a polyurethane with no filler material. *See* App. Br. 8-9; *see* Spec. 5. Claimed subject matter need not be described literally or using the same terms as the disclosure to satisfy the description requirement. *See Manual for Patent Examining Procedure*, 8th ed., rev. 9, August 2012, § 2163.02. Accordingly, we cannot sustain the rejection of claims 1-6, 8-12, 15, 16, and 21-23 for lack of a written description.

Claims 1, 5, 6, 9-12, 15, and 23 unpatentable over Benoist, Weder, and Hori

Appellant argues claims 1, 5, 6, 11, and 12 as a group. App. Br. 9-14. We select claim 1 as representative (*see* 37 C.F.R. § 41.37(c)(1)(vii) (2011)) and address Appellant's separate arguments for claims 9, 10, 15, and 23.

Claims 1, 5, 6, 11, and 12

The Examiner found that Benoist discloses a rectangular shaped member of flexible porous material, the ends of which are adapted to be folded over the stem ends of a bunch of cut flowers, a band 3 encircling the material to hold the material in a wrapped configuration, and an outer plastic bag 4. Ans. 5-6 (citing fig. 2). The Examiner found that Benoist does not disclose a triangular flexible porous material made of a polyurethane foam. Ans. 6. The Examiner found that Weder discloses a flower wrapper that can be made in various shapes to include triangular shapes, and Hori discloses a flower wrapper made of a polyurethane foam material. Ans. 6.

Appellant argues that Benoist discloses a porous cardboard wrapper but not any other porous material and does not contemplate the addition of preserving or fertilizing liquid, which would degrade the cardboard material, or the addition of adjuvants that prolong the life of cut stems. App. Br. 10-11. These arguments are not persuasive because the Examiner relied on Hori to disclose a polyurethane foam material, and claim 1 does not call for the material to contain preserving or fertilizing liquid or adjuvants. *See* Ans. 14. This argument also does not persuade us of error in the Examiner's determination that it would have been obvious to include polyurethane foam material of Hori because the material is gas permeable and has good water retention as an equivalent to the porous material of Benoist. Ans. 6, 14; *see*

also Benoist, col. 2, ll. 37-42 (wrapped cut flowers may be placed in a vase of water for transportation and the cardboard strip will become impregnated with water and diffuse humidity for the stem and leaves in the plastic bag); Hori, col. 2, ll. 2-5.

Appellant argues that Weder discloses a flower bag with an open top and bottom where the shape of the sheet may be triangular. This argument is not persuasive because the Examiner relied on Benoist to disclose the use of a sheet adapted to be folded over the stem ends of cut flowers. Nor does this argument persuade us of error in the Examiner's determination that it would have been obvious to form Benoist's sheet as a triangle, as taught by Weder, to save material and for aesthetic reasons. Ans. 6.

Appellant also argues that Hori discloses a soil substitute made from materials that include a polyurethane foam to provide a soil-less method of propagating plants and is inapplicable to the present invention. App. Br. 12-13. This argument does not persuade us of error in the Examiner's finding that Hori discloses a wrapper made of a polyurethane material that provides high gas permeability and good water retention for plants and flowers and that it would have been obvious to make Benoist's flexible porous material of polyurethane foam, as taught by Hori, to provide a porous, flexible, gas permeable material with good water retention. Ans. 6. This argument is an individual attack on the references where the Examiner has relied on the combined teachings of Benoist, Weder, and Hori. Moreover, Hori discloses the use of the polyurethane foam material to transport stemmed flowers. Col. 2, ll. 38-48; figs. 6, 7.

Accordingly, we sustain the rejection of claims 1, 5, 6, 11, and 12.

Claims 9, 10, 15, and 23

Claims 9 and 10 depend from claim 1 and recite that the triangular shaped wrap is a right isosceles triangle (claim 9) with sides ranging from 9 inches to 12 inches in length (claim 10). Claim 15 recites an isosceles triangle shaped member. Claim 23 recites a right isosceles triangle shaped member. The Examiner found that Weder discloses a triangular shaped flower wrap and that it would have been obvious to select a right isosceles triangle for saving material and aesthetic reasons and a mere change in size or shape of a component is generally within the level of skill in the art. Ans. 7-8. The Examiner also determined that the claimed dimensions would have been arrived at as a matter of routine testing and experimentation for discovering an optimum or workable range or size for a porous material for water retention. Ans. 8.

Appellants argue that the "specific shape entails minimal waste during manufacture, thereby minimizing cost, while maximizing the surface area available for hydration." App. Br. 12. Appellant's attorney argument does not establish the criticality or unexpected results obtained from the claimed configuration, particularly as compared to the closest prior art of Weder's triangle-shaped flower wrapper. *See* Ans. 15-16. Appellant's Specification discloses that the foam material has a triangle shape and "preferably that of an isosceles triangle with equal sides ranging from 9 inches to 12 inches." Spec. 7. As such, we sustain the rejection of claims 9, 10, 15, and 23.

Claims 2-4, 16, 21, and 22 unpatentable Benoist, Weder, Hori, and Heller

Claims 2-4, 16, 21, and 22 depend from claims 1 and 15, respectively. Claims 1 and 15 recite that the foam is a flexible diphenylmethane

diisocyanate foam material or taken from a group consisting of various other such polymers. The Examiner found that Heller discloses such materials and their formulas. Ans. 10, 17. We agree with Appellant that Heller does not disclose foam materials but instead discloses the use of polyurethane coatings of granules of fertilizer and the polyurethane coatings do not have a cellular structure. App. Br. 17 (citing col. 6, ll. 29-31); *see also* col. 6, ll. 16-20. As such, we cannot sustain the rejection of claims 2-4, 16, 21, and 22.

Claim 8 unpatentable over Benoist, Weder, Hori, and Denicola

Claim 8 depends from claim 1 and recites that the outer plastic bag is polyethylene. The Examiner found that Denicola discloses the use of polyethylene as a plant wrapper and determined that it would have been obvious to use this known material on the modified device of Benoist to provide a material that is flexible and tear resistant. Ans. 11 (citing Spec. para. [0008]). Appellants argue that Denicola is a perforated bag used as a physical barrier to protect bulbs and seedlings from rodents and burrowing vermin and the use of such a perforated bag in the present invention would render it useless. App. Br. 22. This argument is not persuasive because the Examiner relied on Benoist to disclose a bag for containing wrapped flowers and Denicola to a teach polyethylene as a suitable material for such flower and plant bags. Ans. 18. As such, we sustain the rejection of claim 8.

DECISION

We REVERSE the rejection of claims 1-6, 8-12, 15, 16, and 21-23 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

We AFFIRM the rejection of claims 1, 5, 6, 9-12, 15, and 23 under 35 U.S.C. § 103(a) as being unpatentable over Benoist, Weder, and Hori.

We REVERSE the rejection of claims 2-4, 16, 21, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable Benoist, Weder, Hori, and Heller.

We AFFIRM the rejection of claim 8 under 35 U.S.C. § 103(a) as being unpatentable over Benoist, Weder, Hori, and Denicola.

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)(iv).

AFFIRMED-IN-PART

JRG