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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEVEN MUNZ

Appeal 2011-005149
Application 11/892,213
Technology Center 3700

Before: CHARLES N. GREENHUT, MICHELLE R. OSINSKI, and
WILLIAM A. CAPP, *Administrative Patent Judges*.

GREENHUT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellant appeals under 35 U.S.C. § 134 from a rejection of claims 1-6. App. Br. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

The claims are directed to a bottle with separated mix drink beverage component container. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A bottle for storing internally separated mix drink beverage components that can be mixed on demand, comprising:

a storage bottle having a wide mouth opening constructed to facilitate drinking of said mix drink beverage components, a gently flaring neck portion and a generally cylindrical bottom portion;

a mix storage container fixedly secured to an inner side wall of said gently flaring neck portion and positioned such that said mix storage container is near said storage bottle wide mouth opening and is accessible through said mouth opening, said mix storage container having a top and a bottom opening;

a first film membrane attached to closing the bottom opening of said mix storage container;

a first pre-measured drink mix component disposed within said mix storage container;

a second film membrane attached to and closing the top opening of said mix storage container;

a removable bottle top;

a second pre-measured drink mix component disposed within said storage bottle outside said mix storage container; and

a mixer removably attached to said removable bottle top, wherein the first pre-measured mix component within said mix storage container can be mixed with the second pre-measured mix component within said storage bottle by removal of the bottle top, detachment of said mixer from said bottle top, and insertion of said mixer through said first and second film

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membranes enclosing said mix storage container so as to rupture said membranes.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Brina	US 4,177,938	Dec. 11, 1979
Wainberg	US 4,265,372	May 5, 1981
Lizerbram	US 6,705,490 B1	Mar. 16, 2004

REJECTION

Claims 1-6 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Brina, Lizerbram, and Wainberg. Ans. 3.

OPINION

The rejection under 35 U.S.C. § 103(a) is affirmed.

Appellant argues claims 1-6 as a group. App. Br. 6-11. We select claim 1 as representative. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2011).

The Examiner found, and Appellant does not dispute, that Brina discloses the claimed container except for the top and bottom surfaces of the cartridge being film membranes and the mix storage container being fixedly secured to the inner side wall of the flaring neck portion of the bottle. Ans. 3-5. The Examiner found, and Appellant does not dispute, that Lizerbram teaches top and bottom surfaces of a cartridge that are film membranes. Ans. 4, *citing* Lizerbram col. 6, ll. 30-39. The Examiner found, and Appellant does not dispute, that Wainberg teaches a mix storage container that is fixedly secured to an inner side wall of the flaring neck portion of the

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bottle. Ans. 4-5, *citing* Wainberg col 10, ll. 28-35 and fig. 22. Appellant argues that the subject matter of claim 1 would not have been obvious in view of the combination of Brina, Lizerbram and Wainberg.

Appellant argues generally that “[n]one of the references the Examiner relied upon disclose[s] this combination of features.” App. Br. 7. This argument is unpersuasive. A determination of obviousness does not require the claimed invention to be expressly suggested by any one or all of the references. *See, e.g., In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Obviousness must be judged in light of the combined teachings of the prior art references. As to Appellant’s arguments that Brina fails to “disclose either a mix container mounted to an inner sidewall of the storage bottle or a mix storage container having predefined top and bottom openings, both of which are sealed by a thin, rupturable membrane” (App. Br. 8), the Examiner never alleges that Brina does disclose those elements.

With regard to Appellant’s characterization of Wainberg, it is directed to the same problem addressed in Brina; namely, separately storing a secondary substance to be combined with a primary substance in a single container. While Wainberg discloses a different means to combine the two substances, a pump 140, the Examiner merely relied on Wainberg to demonstrate that the technique of “fixedly secur[ing]” or “integrally form[ing]” a pocket 137, or “mix storage container” with an inner side wall of a storage bottle 132 was known in the art.. *See* Ans. 4, *citing* Wainberg col. 10, ll. 28-35, fig. 22. Wainberg’s teaching of a pump in no way negates Wainberg’s teaching regarding the arrangement of the secondary container. Nor is inclusion of the pump necessary to effectuate Wainberg’s teachings regarding the pocket. *Contra* App. Br. 9.

Appellant's argument (App. Br. 10) concerning the Lizerbram reference's failure to provide a suggestion or motivation to relocate the mix storage container is misplaced. The Examiner never relies on the Lizerbram reference to disclose the specific location of the mix storage container (*see* Ans. 4), therefore it is of no consequence whether the Lizerbram reference does, or does not, provide a suggestion to relocate the mix storage container.

The Examiner concluded that it would have been obvious to one of ordinary skill in the art to substitute the frangible walls of Lizerbram in Brina's device to allow for easy piercing of the container, as well as preventing pieces of the mix container from breaking off into the combined mixture in the bottle. Ans. 4. Appellant argues that the claimed subject matter would not have been obvious in view of these teachings because Brina disfavors the use of rupturable membranes. App. Br. 7-8, *citing* Brina col. 1, ll. 15-23. While the portion of Brina cited by Appellant mentions the shortcomings of prior art devices using rupturable membranes, Brina does not identify any specific causal relationship between these shortcomings and rupturable membrane structures themselves. In any case, foil membranes are favored by Lizerbram as they are used in the preferred embodiment.

When prior art contains apparently conflicting references, the Board must weigh each reference for its power to suggest solutions to an artisan of ordinary skill. The Board must consider all disclosures of the prior art, *In re Lamberti*, 545 F.2d 747, 750 (CCPA 1976), to the extent that the references are, as here, in analogous fields of endeavor and thus would have been considered by a person of ordinary skill in the field of the invention. The Board, in weighing the suggestive power of each reference, must consider the degree to which one reference might accurately discredit another.

In re Young, 927 F.2d 588, 591 (Fed. Cir. 1991).

In light of the combined teachings of the prior art before us, which evidences that frangible membranes may have advantages and disadvantages, and the fact that the cited portion of Brina merely notes that devices are known to have premature leaking but that leaking is not necessarily the fault of the membranes themselves, we find that one skilled in the art would not have been led away from the frangible membranes of Lizerbram.

Appellant additionally argues that the combination would not have been obvious because one of the rationales relied on by the Examiner, “ease of manufacture,” is incorrect. Reply Br. 2-3. Even if making a single-piece bottle containing an integral mix storage container, as Wainberg suggests, results in a single container that is more difficult to manufacture, it obviates the need to make two separate containers. At best, this amounts to a design tradeoff. Our reviewing court has recognized that a given course of action often has simultaneous advantages and disadvantages, and this does not necessarily obviate any or all reasons to combine teachings. *See Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n. 8 (Fed. Cir. 2000). Furthermore, the rationale that Appellant is arguing is just one of two rationales provided by the Examiner. *See* Ans. 4-5. The Examiner additionally notes that one would be motivated to use the integral mix storage container of Wainberg “to more securely attach the container to the bottle, preventing any unwanted movement of the container within the bottle.” Ans. 4. The Examiner found, and Appellant does not dispute, that preventing unwanted movement between the two containers, by forming them integrally, would facilitate piercing the container. Ans. 4-5. Thus, the Examiner’s finding that one of ordinary skill in the art would be motivated

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to fixedly secure the mix storage container to the neck portion to predictably obtain this advantage stands uncontroverted.

DECISION

The Examiner's rejection of claims 1-6 is affirmed.

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

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