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TAROLLI, SUNDHEIM, COVELL & TUMMINO L.L.P. 1300 EAST NINTH STREET, SUITE 1700 CLEVELAND, OH 44114			HENKEL, DANIELLE B	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIAN M. SULLIVAN
and DENES L. ZSOLNAY

Appeal 2011-010438
Application 11/508,598
Technology Center 1700

Before ROMULO H. DELMENDO, MICHAEL P. COLAIANNI, and
GRACE KARAFFA OBERMANN, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants seek relief under 35 U.S.C. § 134 from the rejection of claims 9-16 directed to an apparatus for detecting the presence of a bioagent on a person. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

STATEMENT OF THE CASE

Claim 9 is illustrative of the subject matter on appeal:

9. Apparatus for detecting the presence of a bioagent on a person, comprising:

a spout for dispensing wash fluid;

a basin for collecting spent wash fluid, the spent wash fluid comprising the wash fluid that has been dispensed onto a body portion of the person or has been mixed with saliva or phlegm of the person in the basin;

a controller;

an automated bioagent tester for testing spent wash fluid when commanded by the controller;

a first electrical pump for pumping the wash fluid through the spout when energized by the controller;

a second electrical pump for pumping a portion of the spent wash fluid from the basin into the automated bioagent tester, when energized by the controller.

THE REJECTIONS

Appellants seek review of the following rejections, which we refer to by number in our analysis:

Rejection 1. Claims 9-11 and 14 as anticipated by Sais (US 6,706,243 B1 issued Mar. 16, 2004) under 35 U.S.C. § 102(e);

Rejection 2. Claim 16 as unpatentable over Sais under 35 U.S.C. § 103(a); and

Rejection 3. Claims 12-13 and 15 as unpatentable over Sias in view of Fernie (US 5,860,437 issued Jan. 19, 1999) under 35 U.S.C. § 103(a).

ANALYSIS

Appellants' arguments focus on limitations in claim 9. App. Br. 9-16. We select claim 9 as representative of the claims that are the subject of Rejection 1. Claims 10-11 and 14 stand or fall with claim 9. 37 C.F.R. § 41.37(c)(1)(vii). As to Rejections 2 and 3, Appellants rely solely on arguments made regarding claim 9 in the context of Rejection 1. App. Br. 17. Our analysis of claim 9 is thus dispositive of all issues raised by Appellants in this appeal.

Appellants contend that the Examiner errs in finding that Sais anticipates the limitation of claim 9 that requires "an automated bioagent tester for testing spent wash fluid when commanded by the controller." App. Br. 9. Specifically, Appellants challenge the Examiner's finding that Sias' "particle count/chemical sensor is a bioagent tester, such that it can test bioagents in the spent wash fluid." App. Br. 10. The Appellants argue that "[i]nstead, the device of Sais can either count a number of particles or provide chemical information of the vented gas." *Id.* A question thus arises as to the meaning of the term "bioagent" in claim 9, and whether Sais' sensor tests a "bioagent" within the meaning of claim 9.

The Specification explains that "chemical and biological weapons" are "bioagents." Spec. [0005]. Sais relates to "chemical and biological contaminants" on a gloved or ungloved hand, for example, contaminants that transmit infections in medical or dental settings or diseases in food-service settings. Sais 1:15-22; 63-2:1. Appellants come forward with no convincing evidence establishing error in the Examiner's conclusion that the term "bioagent" in claim 9 is broad enough to embrace Sias' "chemical and biological contaminants." Sais 1:65-66; Ans. 8; App. Br. 10-11.

Nor do Appellants come forward with any evidence that Sias' sensor is not a "bioagent tester" within the meaning of claim 9. App. Br. 10-11. Sais describes a sensor that "gives particle counts" and identifies "chemical constituents . . . in real time." Sais 6:30-49. The mere fact that "Sias provides no indication that the particle count/chemical sensor is a bioagent tester" is not dispositive. App. Br. 10. Appellants identify no structural difference between Sais' sensor and the "bioagent tester" of claim 9. *Id.* at 10-11. On this record, a preponderance of evidence supports the Examiner's view that Sias' sensor is a "bioagent tester capable of testing bioagents" as required by claim 9. Ans. 8; *see In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997) (affirming anticipation rejection based on Board's factual finding that spout disclosed for dispensing oil from an oil can would be capable of dispensing popcorn in the manner set forth in Appellant's claim).

Appellants challenge the Examiner's further finding that "Sias discloses a second electrical pump for pumping *a portion* of the spent wash fluid from the basin into the automated bioagent tester, when energized by the controller, as recited in claim 9." App. Br. 12 (emphasis added) (citation omitted). Specifically, Appellants point out that Sais discloses an apparatus wherein "all of the vent gas is pumped to the particle counter/chemical sensor," and thus fails to disclose "pumping a portion of the" spent wash fluid as required by claim 9. *Id.* (citing Sais 6:30-32). The Examiner responds, without challenge from Appellants, that "[t]he broadest reasonable interpretation of the term 'portion'" includes "all fluid (vent gas)." Ans. 9. We agree with the Examiner that the term "portion" is broad enough to embrace either a partial share or a whole share of the vent gas. Appellants

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come forward with no persuasive evidence or argument refuting this broadest reasonable interpretation of the term “portion.” App. Br. 12-16.

No persuasive argument or evidence of reversible error having been brought forward by Appellants, we affirm the rejection of claim 9 as anticipated by Sais.

CONCLUSION

For the above reasons, we affirm the rejections of claims 9-16.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136.

AFFIRMED

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