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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte FLOYD STANLEY SALSER

Appeal 2013-009874
Application 12/263,606
Technology Center 3700

Before EDWARD A. BROWN, GEORGE R. HOSKINS, and
BRANDON J. WARNER, *Administrative Patent Judges*.

BROWN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Floyd Stanley Salser (Appellant)¹ appeals under 35 U.S.C. § 134(a) from the Examiner's final decision rejecting claims 45–64.² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

INVENTION

Appellant's disclosure "relates to an apparatus and method for allowing a utility provider to interrupt water service to a first residential

¹ FC Patents, Inc., is identified as the real party in interest. Br. 3.

² Claims 1–44 have been canceled. Br. 4.

service line while not interrupting such utility service to a second residential service line associated with such utility service where both first and second residential service lines are metered to monitor resource consumption.”

Spec. 2, ll. 8–11.³ Claims 45, 51, and 57 are independent. Claim 45 is illustrative, and reads:

45. A flow control fixture configured for controlling the flow of a fluid, said flow control fixture comprising:

a one piece elongated three-way elbow comprising an elbow-input disposed between a first elbow-output and a second elbow-output and defining a first fluid communication path with said first elbow-output and a second fluid communication path with said second-elbow output, wherein said elbow-input defines a flow control fixture input that is suitably configured for being associated with a fluid source;

wherein said first elbow-output is defined at one end of said elongated three-way elbow and said second elbow-output is defined at a second end of said elongated three-way elbow so that the fluid flow paths through said outputs are perpendicular to each other;

a flow control device comprising a flow control device input and a flow control device output wherein said flow control device input is associated with said second elbow-output;

wherein said first elbow-output defines a first fixture output;

wherein said flow control device output defines a second fixture output; and

wherein said flow control device is configurable in a first state that allows the flow of a fluid through said flow control device input and out said flow control device output and a second state that prevents the flow of said fluid through said flow control device.

Br. 62–63 (Claims App.).

³ We refer to the Substitute Specification (filed May 11, 2011), as the “Specification” or “Spec.”

REJECTIONS⁴

I. Claims 45–63 are rejected under 35 U.S.C. § 102(a) as anticipated by Ford Meter Box (*Ford Meter Boxes, Section C*, The Ford Meter Box Company, Inc., Installation Manual, 72–142, web version (Nov. 17, 2006), hereinafter “Ford Meter Box”).⁵

II. Claims 48–50, 52, 54–56, and 58–64 are rejected under 35 U.S.C. § 103(a) as unpatentable over Ford Meter Box.

III. Claims 45–64 are rejected under 35 U.S.C. § 103(a) as unpatentable over Ford Meter Box, Miller (US 4,726,399, issued Feb. 23, 1988), McNab & Harlin Manufacturing Co. Catalog M-1, 149, Fig. 220 (1916), hereinafter, “McNab and Harlin,” and What you can get in Manifolds, hereinafter, “Manifolds.”

ANALYSIS

Rejection I: Anticipation of Claims 45–63

Claims 45–50

The Examiner finds that Ford Meter Box discloses all the limitations of claim 45. Final Act. 2–3. The Examiner provides a copy of the Ford Meter Box drawing with the notations “elbow” and “tee.” *Id.* at 3.

Regarding this drawing, the Examiner explains:

In the marked up copy below, the elbow and tee are collectively read as a one piece body since, when assembled, they will form a single body. It is noted that nothing in the original description explicitly defines a one piece body or even describes how the body of Figures 3-8 is formed.

⁴ A rejection of claims 50, 59, and 60 under 35 U.S.C. § 112, first paragraph, for lack of written description, has been withdrawn. Ans. 3.

⁵ A copy of the Ford Meter Box drawing is reproduced at page 70 of “Exhibit ‘J.’” Br. (Evid. App.).

Id. at 2 (emphasis added).

Appellant contests the Examiner's finding that Ford Meter Box discloses the claimed "one piece body." Br. 42–43. Appellant contends that an exemplary embodiment of "a one piece elongated three-way elbow" is depicted in Figure 7 and described as component 70 in the Specification, and also depicted in the reproduced "image" included in U.S. Provisional Application No. 60/984,782, filed on November 2, 2007 (hereinafter, "the provisional application"). *Id.* at 43. We note the "image" appears to correspond to fixture body 70 shown in Figures 7 and 8 of the present application, and to be shown at page 4 of the provisional application under the heading "Three-way elbow."

The Examiner responds that "the phrase 'one piece'" does not appear in the original specification or drawings of the present application, or in the provisional application. Ans. 6. The Examiner acknowledges the phrase "one integral piece" appears in the original specification and the provisional application in describing enclosure 10, but not the elbow. *Id.* The Examiner states:

There is no written description in the original specifications that the elongated three-way elbow is either "one-piece[,] "unitized[,] " or "integral[.]" The drawings are not determinative as to how the three-way elbow is made, that is it could be a single cast piece or it could be two or more pieces soldered, brazed, glued, or threaded together, or joined by any other method.

Ans. 6 (emphasis added).⁶

⁶ The Examiner does not reject any of the claims on appeal as failing to meet either the written description requirement or the enablement requirement of 35 U.S.C. § 112, first paragraph, based on the claims containing the limitation of "a one piece elongated three-way elbow."

Accordingly, Appellant and the Examiner disagree about the meaning of the claim term “one piece.” During examination of a patent application, claims are to be given their broadest reasonable interpretation consistent with the specification. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Under the broadest reasonable interpretation standard, claim terms are generally given their ordinary and customary meaning as would be understood by one of ordinary skill in the art in view of the specification. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

The Specification uses the term “one integral piece” in describing that “[e]nclosure (10) defines a rectangular shape comprising two sets of opposed walls in *one integral piece*.” Spec. 6, ll. 18–19; 7, ll. 7–8; and Fig. 1 (emphasis added). A dictionary definition of “one-piece” is “consisting of or made in a single undivided piece.” *Merriam-Webster’s Collegiate Dictionary* 866 (11th ed. 2003). Enclosure 10 shown in Figure 1 appears to “consist[] of or [be] made in a single undivided piece.” In other words, the use of the phrase “one integral piece” in the Specification in reference to enclosure 10 appears to be consistent with the dictionary definition of “one-piece.”

The Examiner appears to construe “a *one piece* elongated three-way elbow” as encompassing both “a single cast piece” *and* a three-way elbow with “two or more pieces.” Ans. 6 (emphasis added). It is not apparent how an elbow made of two or more pieces can be considered a “one piece” elbow, which to be consistent with the noted dictionary definition, is an elbow “consisting of or made in a single undivided piece.” The Examiner’s construction of “one piece” is also inconsistent with the use of the phrase

“one integral piece” in the Specification with reference to enclosure 10. Although the Specification does not explicitly describe fixture body 70 as being “one piece,” the Examiner does not direct us to any disclosure that would support such a broad construction of “one piece” so as to encompass “two or more pieces.”

As noted above, the Examiner finds the Ford Meter Box device includes both an elbow and a tee. Final Act. 3. The elbow and tee are two separate pieces when unassembled, and the *assembly* of the elbow and tee consists of, or is made of, *two* pieces. Accordingly, we are persuaded that one of ordinary skill in the art would not, in view of the present disclosure and the noted definition of “one-piece,” consider the Ford Meter Box device to be “a *one piece* elongated three-way elbow,” as claimed. (Emphasis added). Thus, we do not sustain the rejection of claim 45, and claims 46–50 depending therefrom, as anticipated by Ford Meter Box.

Claims 51–63

Independent claim 51 recites, *inter alia*, that “said flow control fixture comprises *a one piece elongated three-way elbow*.” Br. 64–65 (Claims App.) (emphasis added). Independent claim 57 also calls for “a one piece elongated three-way elbow.” *Id.* at 66–67 (Claims App.). Accordingly, we likewise do not sustain the rejection of claim 51 and dependent claims 52–56, or claim 57 and dependent claims 58–63, as anticipated by Ford Meter Box.

Rejection II: Obviousness of Claims 48–50, 52, 54–56, and 58–64

Claims 48, 49, 52, 54–56, 58, and 61–63, which depend from one of independent claims 45, 51, and 57, recite limitations relating to dimensions of the flow control fixture or fire control fixture. Br. 63–68 (Claims App.).

The Examiner concludes that it would have been obvious to make the Ford Meter Box device with the claimed dimensions because “it was designed for the same application as the instant device.” Final Act. 3. Claims 50 and 59 depend from claims 45 and 57, respectively, and recite a working pressure of “at least 300 pounds per square inch” for the flow control device. Br. 64, 67 (Claims App.). Claim 60 depends from claim 57 and recites this same pressure limitation for the fire service fixture. *Id.* at 67 (Claims App.). Claim 64 depends from claim 57 and adds that “said control device input and said second elbow-output each define a working pressure sufficient to meet Underwriters Laboratories certification criteria for residential fire service fixture devices.” *Id.* at 68 (Claims App.). The Examiner concludes that it would have been obvious to make the Ford Meter Box device “to hold 300 psi in view of the intended use of the device” and “to satisfy UL standards in view of the intended use of the device in the regulated field of domestic water service.” Ans. 4–5.

Alternatively, the Examiner concludes that it would have been “an obvious matter of design choice and/or engineering design to provide the Ford device with the recited features in view of the intended application of the device.” *Id.* at 5.

The Examiner’s rejection of dependent claims 48–50, 52, 54–56, and 58–64 does not cure the deficiencies of the rejection of independent claims 45, 51, and 57 over Ford Meter Box. Accordingly, we do not sustain the rejection of these dependent claims as unpatentable over Ford Meter Box.

Rejection III: Obviousness of Claims 45–64

Appellant argues claims 45–64 as a group. Br. 45–61. We select claim 45 to decide the appeal as to this ground of rejection with respect to

the group. *See* 37 C.F.R. § 41.37(c)(1)(iv). Claims 46–64 stand or fall with claim 45. *Id.* We have considered each of Appellant’s arguments presented in its Brief in relation to this rejection. *See* Br. 45–61.

Prima Facie Case of Obviousness

For this rejection, the Examiner takes the alternative position that the Ford Meter Box drawing shows the claimed device “except, arguably, a one piece body.” Final Act. 4. The Examiner relies on additional references to address this limitation. Particularly, the Examiner finds that Miller teaches an improvement over prior art, which, as shown in Figure 2, comprises threaded-together fittings. *Id.* (citing Miller, Fig. 2). The Examiner explains that “the improvement being one piece bodies of different designs which have plural ports.” *Id.* The Examiner also finds that Manifolds “shows the general equivalence of different manifolds including fitted and cast manifolds.” *Id.* The Examiner further finds that Figure 220 of McNab and Harlin “shows a one piece elbow with a third port between the angle ends and at 90 degrees to the plane of the elbow.” *Id.*

The Examiner concludes that it would have been obvious to make the Ford Meter Box “elbow and tee as a one piece body” in view of the totality of the teachings of the secondary references “that the two types of construction are equivalent and well known,” and under the rationale in *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007), “that the simple substitution of one known element for another to obtain predictable results is an indication of obviousness,” where “the predictable result is a one piece fitting suitable for use in a water supply application.” Final Act 4–5. The Examiner additionally concludes that it would have been “an obvious matter of design choice and/or engineering design to provide the Ford [Meter Box]

device, as modified, with the recited features in view of the intended application of the device.” *Id.* at 5.

The Examiner bears the initial burden of establishing a prima facie case of obviousness. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). If this burden is met, the burden shifts to Appellant to come forward with evidence or argument persuasive of the claimed invention’s non-obviousness. *Id.* The Examiner has provided factual findings in support of the rejection, and has identified reasons why one of ordinary skill in the art would have combined the prior art teachings in the manner claimed. *See KSR*, 550 U.S. at 418 (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)). Accordingly, the Examiner has carried the initial procedural burden of establishing a prima face of obviousness.

Appellant contends that the applied prior art fails to teach or render obvious all the limitations of the claimed invention, including a one piece three-way elongated elbow. Br. 46. In this regard, Appellant contends that Figure 220 of McNab and Harlin fails to teach or make obvious this element.

Id. Appellant states:

If the McNab and Harlin teachings (or any cited prior art teachings) were so compelling and widely known to everyone in the brass coupling manufacturing industry, why did Ford, a company that specializes in making McNab and Harlin type couplings, during their product development attempts spanning over at least a year of effort, not invent the [Appellant]’s claimed device using such McNab and Harlin teachings?

Id. at 46–47.

Appellant merely questions why the Ford Meter Box device does not include the teaching of McNab and Harlin. However, the relevant issue is whether it would have been obvious to one of ordinary skill in the art to combine the teachings of McNab and Harlin with those of Ford Meter Box, as proposed by the Examiner. *See* Ans. 7 (“the issue is what would be obvious to one of ordinary skill in the art”). It is the Examiner’s position that “once the structure of the Ford device is known that a hypothetical routineer in the art would find the one piece fittings of the secondary references a clear suggestion of the simple equivalent to the threaded fittings of the Ford device.” *Id.* Appellant’s contention effectively addresses McNab and Harlin individually, but not the collective teachings of the references. “Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references.” *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (citation omitted). Whether or not any particular limitation is missing from a single prior art reference is, therefore, not dispositive.

Appellant’s argument also fails to persuasively address either the Examiner’s findings for Miller and Manifolds, or the reasons why the Examiner cited each reference in concluding that the claims would have been obvious over the references’ collective teachings. *See* Br. 46–61. Consequently, Appellant does not apprise us of error in either the Examiner’s findings in relation to Miller, McNab and Harlin, or Manifolds, or the Examiner’s articulated reasons for combining the teachings of these references with Ford Meter Box. *See* Final Act. 4–5.

Appellant asserts that none of the applied references “provide[s] adequate guidance on how to construct a proper Fire Service Fixture [FSF],”

and one of ordinary skill in the art would not have considered such teachings when designing an FSF device. Br. 47. To the extent Appellant might be implying that any one of the applied references must provide enablement for this “guidance,” we disagree. “Under [35 U.S.C.] § 103, however, a reference need not be enabled; it qualifies as a prior art, regardless, for whatever is disclosed therein.” *See Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1357 (Fed. Cir. 2003) (citation omitted). Accordingly, this contention also does not apprise us of Examiner error.

Appellant also contends:

[Appellant]’s new design was different from the prior art devices in at least three material ways: (1) the elongated 3-way elbow; (2) “higher” pressure flow control device (although please note that such limitation is not in all claims); and (3) it would fit in a standard $\frac{3}{4}$ inch[] (7 inch wide) water meter box.

Br. 51–52. We note, however, that claim 45 does not recite a “higher pressure” flow control device, or require any element to “fit in a standard $\frac{3}{4}$ inch (7 inch wide) water meter box.” Hence, Appellant’s argument for “differences” (2) and (3) is not persuasive. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (limitations not appearing in a claim cannot be relied upon for patentability).

Appellant also states that “[Appellant]’s ‘one piece elongated three-way elbow’ is a part that never existed, to [Appellant]’s knowledge, before [Appellant] invented one for use in the claimed FSF device.” Br. 52. But it is *not* the Examiner’s position, for this rejection, that any *single* prior art reference discloses the claimed “one piece elongated three-way elbow”; rather, this rejection is premised on the conclusion that the combined teachings of the cited art render obvious such an elbow. Accordingly,

Appellant's statement does not apprise us of any error in the Examiner's rejection.

Appellant also states, "as disclosed in [Appellant]s' applications, the FSF device was designed to comply with Underwriters Laboratories pressure ratings so that the FSF device would pass UL[®] certification testing." Br. 52. As claim 45 does not recite any limitation regarding "UL[®] certification testing," Appellant's contention is not commensurate with the claim scope. *See Self*, 671 F.2d at 1348. Additionally, "a particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment." *See SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004). Accordingly, we do not construe claim 45 to require that the flow fixture device "would pass UL[®] certification testing."⁷

Appellant also does not persuasively address the Examiner's obvious design choice rationale for modifying Ford Meter Box. Final Act. 5. Accordingly, Appellant's contentions do not apprise us of any error in the Examiner's rejection.

Objective Indicia of Non-Obviousness (Secondary Considerations)

Appellant advances evidence of objective indicia of non-obviousness ("secondary considerations") pertaining to skepticism in the field, long-felt

⁷ Claim 64 recites the limitation of "Underwriters Laboratories certification criteria for residential fire service fixture devices." Br. 68 (Claims App.). "Notwithstanding any other provision of this paragraph, the failure of appellant to *separately argue claims* which appellant has grouped together *shall constitute a waiver of any argument* that the Board must consider the patentability of any grouped claim separately." *See* 37 C.F.R. § 41.37(c)(1)(iv) (emphasis added). Accordingly, to the extent Appellant's argument may be pertinent to claim 64, such argument has been waived.

need, failure by others, commercial success, and copying. *See* Br. 54–61. Evidence of objective indicia of non-obviousness provided in rebuttal must be considered in the determination of obviousness/non-obviousness under 35 U.S.C. § 103. *See, e.g., In re Eli Lilly & Co.*, 902 F.2d 943, 945 (Fed. Cir. 1990); *In re Huai-Hung Kao*, 639 F.3d 1057, 1067 (Fed. Cir. 2011) (“[W]hen secondary considerations are present, though they are not always dispositive, it is error not to consider them.”). That is, the rebuttal evidence must be considered along with the evidence upon which the conclusion of obviousness was reached. Accordingly, we consider anew the issue of obviousness of the claimed flow control fixture under 35 U.S.C. § 103, evaluating and weighing both the evidence relied upon by the Examiner and the objective evidence presented by Appellant.

Nexus

“For objective evidence of secondary considerations to be accorded substantial weight, its proponent must establish a nexus between the evidence and the merits of the *claimed invention*.” *Kao*, 639 F.3d at 1068 (quoting *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010)). “Evidence of secondary considerations must be reasonably commensurate with the scope of the claims.” *Id.* (citations omitted).

Skepticism in the Field

“Doubt or disbelief by skilled artisans regarding the likely success of a combination or solution weighs against the notion that one would combine elements in references to achieve the claimed invention.” *See WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1335 (Fed. Cir. 2016) (citation omitted).

Appellant contends:

With regard to skepticism, as Mr. Kebles stated in his affidavit, he approached several major manufacturers and requested they invest the research and development (R&D) funds to create a suitable FSF device. None agreed to invest such funds apparently because they were skeptical that it was commercially feasible to do so; instead, they cobble[d] together various plumbing fixtures in a weak attempt to satisfy Mr. Kebles[’s] long felt need for a FSF device. Notably, one does not invest R&D into making the “obvious” as such requires no research. [Appellant] Salser, however, agreed to invest the R&D and invented the FSF device now claimed.

Br. 55–56 (emphasis added).⁸

Appellant does not identify any specific statement in the General Affidavit of Michael J. Kebles (hereinafter, “the Kebles Affidavit”).⁹ In addition, Appellant’s statement that “several major manufacturers” did not agree to invest R&D funds to create a suitable FSF device, “*apparently because they were skeptical,*” does not offer evidence of *actual* doubt or disbelief by the manufacturers regarding the likely success of the flow control fixture recited in claim 45. Br. 55 (emphasis added). Rather, this statement represents Appellant’s opinion. Appellant’s statement that, “instead, they cobble[d] together various plumbing fixtures in a weak attempt to satisfy Mr. Kebles[’s] long felt need for a FSF device[,]” appears

⁸ Appellant addresses the issue of ownership of the present application in the Appeal Brief. See Br. 13–15. Floyd Stanley Salser and Michael J. Kebles are the named inventors in the present application, as originally filed. A Request to Correct Inventorship under 37 C.F.R. § 1.48(b) was filed on November 22, 2011, to remove Mr. Kebles as a listed inventor, leaving Mr. Salser as the sole listed inventor.

⁹ The Kebles Affidavit is at pages 2–13 of the Appeal Attachment to the Evidence Appendix.

to imply that the manufacturers made only a “weak attempt” to produce a “FSF device.” *Id.* Appellant’s statement that, “[n]otably, one does not invest R&D into making the ‘obvious’ as such requires no research[,]” appears to imply that the manufacturers did not “invest the R&D” to try to make a “suitable FSF device” they considered to be obvious. Br. 55–56; *see also* Br., Evidence Appendix attachment. If so, it is not apparent how this statement establishes skepticism in the field of Appellant’s endeavor. Moreover, it is not apparent how Appellant’s statement, “[*Appellant*] *Salsler*, however, agreed to invest the R&D and invented the FSF device now claimed,” shows skepticism of *others* skilled in the field. *Id.* at 56 (emphasis added).

For these reasons, Appellant’s evidence of skepticism of others is accorded little weight.

Commercial Success

To demonstrate non-obviousness based on commercial success, Appellant must provide evidence that establishes the existence of commercial success, and a nexus between that success and the merits of the claimed invention. *Iron Grip Barbell Co., Inc. v. USA Sports, Inc.*, 392 F.3d 1317, 1324 (Fed. Cir. 2005). The evidence is required to show that “the successful product is the invention disclosed and claimed.” *See J.T. Eaton & Co. v. Atlantic Paste & Glue Co.*, 106 F.3d 1563, 1571 (Fed. Cir. 1997). To establish a proper nexus between the claimed invention and the commercial success of a product, Appellant must offer “proof that the sales [of the product] were a direct result of the unique characteristics of the claimed invention—as opposed to other economic and commercial factors

unrelated to the quality of the patented subject matter.” *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996) (citation omitted).

Appellant states that “Salser’s FSF device enjoyed almost immediate commercial success.” Br. 56. Appellant contends that “[Appellant]’s FSF device was the first to meet LVVWD’s [(Las Vegas Water District’s)] criteria and *would have resulted in large orders* but for the political nature of the relationship between LVVWD and Ford Meter Box.” *Id.* (emphasis added). Appellant does not indicate how many units were sold, or show the sales represent a substantial quantity in the relevant market. We understand Appellant’s contention to acknowledge that Appellant’s device did *not* experience “large orders.” Moreover, “evidence related solely to the number of units sold provides a weak showing of commercial success, if any.” *Huang*, 100 F.3d at 140. Appellant’s evidence also does not show the sales “were a direct result of the unique characteristics of the claimed invention.” *Id.*

Appellant also asserts commercial success because of licensing. Br. 57. Specifically, Appellant states that “FC Patents has licensed, for a substantial sum of money, the rights to the FSF Device to another major manufacture[r], Mueller Water Products.” *Id.* A license taken under a patent “may constitute evidence of nonobviousness; however, only little weight can be attributed to such evidence if the patentee does not demonstrate ‘a nexus between the merits of the invention and the licenses of record.’” *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995) (citations omitted). “Our cases specifically require affirmative evidence of nexus where the evidence of commercial success presented is a license, because it is often ‘cheaper to take licenses than to defend infringement suits.’” *Iron*

Grip Barbell Co., 392 F.3d at 1324 (citation omitted). Here, Appellant’s contention is not supported by evidence showing the terms of the license or the circumstances under which the license was granted, or a nexus between the merits of the invention and the license. Accordingly, Appellant’s contention is inadequate.

For these reasons, Appellant’s evidence of commercial success is accorded little weight.

Copying

“[C]opying the claimed invention, rather than one within the public domain, is indicative of non-obviousness.” *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1000 (Fed. Cir. 1986) (citation omitted). “Not every competing product that arguably fails within the scope of a patent is evidence of copying. Otherwise every infringement suit would automatically confirm the nonobviousness of the patent. *Rather, copying requires the replication of a specific product.*” *Iron Grip Barbell Co.*, 392 F.3d at 1325 (emphasis added).

Appellant contends that “[a]lmost immediately after Salser submitted his current design to LVVWD, employees of LVVWD made unauthorized derivative works based on Salser’s copyright protected design drawings and sent them (and probably Salser’s actual design drawings themselves) to Ford Meter Box so that they could copy his design.” Br. 57–58. This contention does not, however, specify the structure of the “unauthorized derivative works.”

Appellant also contends:

Ford Meter Box employees requested from Salser, and received, three samples of Salser’s FSF device to take back with them for testing under the pretense that they wanted to test this FSF device

and perhaps license the rights to manufacture same. *A few months later Ford Meter Box was able to manufacturer [sic] an almost identical FSF Device* as shown in the image below (which is almost an identical copy of Salser's design).

Br. 59 (emphasis added). Appellant provides an image of what Appellant indicates is the Ford Meter Box FSF device. *Id.*

Appellant further contends that James Jones Brass, a subsidiary of Mueller Water Products, copied Mr. Salser's design. Br. 60. Appellant provides images of what Appellant indicates are the "Salser" design and the James Jones design. *Id.*

To establish copying of the claimed invention, the evidence must show that the alleged copying device(s) include(s) all claimed limitations. Although Appellant provides images of purportedly copied devices made by Ford Meter Box and James Jones Brass, Appellant does not explain that these devices include all the limitations of claim 45. Appellant asserts that the Ford Meter Box device is "almost an identical copy of Salser's design." Br. 59. However, we are unable to determine from the images that the Ford Meter Box device or the James Jones Brass device necessarily comprises all *claim* limitations.

For these reasons, Appellant's assertion of copying is accorded little weight.

Long-Felt Need

"Evidence of a long felt but unresolved need tends to show non-obviousness because it is reasonable to infer that the need would have not persisted had the solution been obvious." *WBIP*, 829 F.3d at 1332 (citation omitted). Establishing long-felt need requires objective evidence that a recognized problem existed in the art for a long period of time without

solution. *See Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567 (Fed. Cir. 1984). Once a long-felt need has been established, it must further be shown that the claimed invention satisfied the need. *See In re Cavanagh*, 436 F.2d 491, 496 (CCPA 1971). This can be demonstrated, for example, by evidence establishing commercial success and that the industry purchased the claimed invention because it satisfied the long-felt need. *See W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1555 (Fed. Cir. 1983).

Appellant contends:

Mr. Kebles noted that he was impressed with Salser's design as Salser's [sic], an individual inventor, was able to invent a FSF device that met *the long felt need as described above* while the major brass coupling manufacturers, like Ford Meter Box, with all their resources, and the same prior art available to all, were unable to do the same. (*[see]* Appeal Attachment at pp[.] 137–142)[.]

Br. 56 (emphasis added). We note Appellant describes “long-felt need” in its argument against the anticipation rejection of claims 45–63. *See* Br. 38. Although long-felt need is not relevant to anticipation, Appellant correctly recognizes that long-felt need is a secondary consideration of non-obviousness. *Id.* at 30–31, 54–55. Accordingly, we will consider Appellant's earlier argument to apply to the obviousness rejection of claim 45 (Rejection III).

Appellant states that the Kebles Affidavit and the Salser Affidavit¹⁰ note the following:

(a) There has been a *long felt need* for a fire service fixture type device. Such device has been needed from the day the first

¹⁰ A General Affidavit of Floyd Stanley Salser is provided in the Appeal Br., Evidence Appendix, as one of the Attachments (hereinafter “Salser Affidavit”).

residential sprinkler system was installed and at least from 2005. *Of course such statement assumes that the time span of YEARS qualifies as a “long felt need”*

(b) That all known devices prior to [Appellant]’s disclosed and claimed device did not adequately meet such *long felt need* as they were too big and prone to leak; (Kebles Affidavit, Appeal Attachment at pp[.] 2–12).

Br. 38 (emphasis added).

Appellant’s statement, “[t]here has been a long felt need for a fire service fixture type device[,]” does not provide adequate evidence to show that such need actually existed. Br. 38. Appellant does not direct us to any particular discussion in either the Kebles Affidavit or Salser Affidavit that supports this statement. Appellant’s statement that “[s]uch device has been needed from the day the first residential sprinkler system was installed and at least from 2005[.]” also does not provide such sufficient evidence for the same reason. *Id.*

We note that “long-felt need is analyzed as of the date of an articulated identified problem and evidence of efforts to solve that problem.” *Texas Instruments Inc. v. Int’l Trade Comm’n*, 988 F.2d 1165, 1178 (Fed. Cir. 1993). Even if the alleged “need” has existed since “at least from 2005” (i.e., about two years before the provisional application’s filing date, and about three years before the present application’s filing date), we note that a “time span of YEARS” is not, by itself, sufficient to establish a long felt need. *See Iron Grip Barbell Co.*, 392 F.3d at 1325 (“Absent a showing of long-felt need or the failure of others, the mere passage of time without the claimed invention is not evidence of nonobviousness.”). For these reasons, Appellant’s statement “(a)” does not amount to “objective evidence that a recognized problem existed in the art *for a long period of time without*

solution,” as required to establish a long-felt need. *See Vandenberg*, 740 F.2d at 1567 (emphasis added).

As for statement “(b),” pages 2–12 of the Appeal Attachment correspond to the Kebles Affidavit. However, Appellant does not direct us to any description of “long-felt need” at these pages.

We note the Salser Affidavit discusses long-felt need, as follows:

In 2007, Michael Kebles (hereafter Kebles) asked me if MARS would be interested in investing the R&D funds necessary to develop/invent a Fire Service Fixture (FSF) device. *Kebles informed me that there has been a long felt need* for a fixture that would allow the water supply to a typical home to be turned off (for non-payment, for example) without turning off the water supply to a fire suppression system (such as a fire sprinkler system). *Kebles further informed me that no known devices adequately meet such long felt need* as they were too big and prone to leak. My individual research and knowledge revealed the same state of the art regarding such fixtures.

Salser Affidavit 1–2 (emphasis added). Mr. Salser’s statement that “[Michael] Kebles informed me that there has been a long felt need” does not provide sufficient evidence that such need actually existed, when the problem was identified, or of efforts to solve the problem. *See Texas Instruments Inc.*, 988 F.2d at 1178. Mr. Salser’s statement that “[m]y individual research and knowledge revealed the same state of the art regarding such fixtures[.]” also does not provide sufficient evidence to establish a long-felt need. Salser Affidavit 2.

And even assuming Appellant has established a long-felt need, Appellant has not shown that the claimed invention satisfied the need. *See In re Cavanagh*, 436 F.2d at 496. For example, Appellant has not provided sufficient evidence to establish commercial success, or that the industry

purchased the claimed invention because it satisfied the long-felt need. *See W.L. Gore & Assocs., Inc.*, 721 F.2d at 1555.

For these reasons, Appellant’s assertion of long-felt need is accorded little weight.

Failure by Others

Failure of others to satisfy a long-felt need can provide evidence of non-obviousness. *Dow Chemical Co. v. American Cyanamid Co.*, 816 F.2d 617, 623 (Fed. Cir. 1987). Appellant asserts that “[a]s noted above, all previous attempts by Ford and others failed to produce a FSF device that complied with the desired criteria.” Br. 60. Appellant does not, however, direct us to any specific argument “noted above” that supports this contention.

As mentioned above, Appellant also contends that “the major brass coupling manufacturers, like Ford Meter Box, with all their resources, and the same prior art available to all, were unable to do the same [i.e., “invent a FSF device that met the long felt need as described above”].” *See id.* at 56. Appellant references pages 137–142 of the Appeal Attachment. *Id.* Pages 137–142 of the Appeal Brief Evidence Appendix Attachments correspond to “Exhibit A” by Michael Kebles (hereinafter, “Ex. A”). This contention appears to pertain to Appellant’s “failure by others” position.

As discussed above, the evidence Appellant advances to show a long-felt need is insufficient. Appellant does not indicate where in Exhibit A evidentiary support for Appellant’s bare attorney argument is found. In Exhibit A, Mr. Kebles states that Ford Meter Box made a “first attempt,” which produced a “solder joint assembly made up of various standard fittings an [sic] copper tubing that *was not practical* [and] was immediately

rejected by all who saw it” (*see* Ex. A 139 (emphasis added)), and a “second attempt . . . using stock brass fittings that screwed together and required separate $\frac{3}{4}$ ” and 1” size assemblies. *Although functional, it was not practical.* I received a lot of negative feedback from all who saw it” (*see* Ex. A 140 (emphasis added)). Mr. Salser also states that “[m]y original concept was for a one piece cast unit marked ‘Fire & Domestic’ with directional flow arrows but none existed. Ford Meter Box had no further interest in the project unless the District was willing to pay for the R&D time and material.” *Id.*

Accordingly, Mr. Salser acknowledges the device made in the second attempt was “functional.” Ex. A. 140. Mr. Salser does not explain in any detail why the devices produced by the first and second attempts were “not practical.” *Id.* at 139–140. The evidence does not show, for example, that the two attempts failed because the devices lacked the claimed features. *See Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1313 (Fed. Cir. 2006).

Also, Mr. Salser does not indicate that Ford Meter Box tried, but failed, to make a one-piece cast unit. Ex. A. 139–140. Rather, Mr. Salser appears to indicate that Ford Meter Box lacked sufficient interest in trying to make such one-piece cast unit.

For these reasons, Appellant’s assertion of failure by others is accorded little weight.

Conclusion

Although Appellant has provided some objective evidence of non-obviousness, the overall weight of this evidence does not outweigh the evidence of obviousness relied upon by the Examiner. *See Sud-Chemie, Inc.*

v. Multisorb Techs., Inc., 554 F.3d 1001, 1009 (Fed. Cir. 2009) (“evidence of unexpected results and other secondary considerations will not necessarily overcome a strong prima facie showing of obviousness”); *Leapfrog Enters. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (holding that objective evidence of non-obviousness presented, including substantial evidence of commercial success, praise, and long-felt need, was inadequate to overcome the strength of the prima facie obviousness showing).

Accordingly, we sustain the rejection of claim 45, and claims 46–64 falling therewith, under 35 U.S.C. § 103(a) as unpatentable over Ford Meter Box, Miller, McNab and Harlin, and Manifolds.

DECISION

We reverse the rejection of claims 45–63 under 35 U.S.C. § 102(a) as anticipated by Ford Meter Box.

We reverse the rejection of claims 48–50, 52, 54–56, and 58–64 under 35 U.S.C. § 103(a) as unpatentable over Ford Meter Box.

We affirm the rejection of claims 45–64 under 35 U.S.C. § 103(a) as unpatentable over Ford Meter Box, Miller, McNab and Harlin, and Manifolds.

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

AFFIRMED