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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRUNO SADI HENRI DELANDE

Appeal 2014-003400
Application 12/742,350
Technology Center 3700

Before MICHELLE R. OSINSKI, JEFFREY A. STEPHENS, and GORDON D. KINDER, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant[1] seeks our review under 35 U.S.C. § 134(a) from the Examiner's Final Office Action ("Final Act.") rejecting claims 1–12. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] The real party in interest is identified as Nestec S.A. App. Br. 2.

Claimed Subject Matter

Claim 1, reproduced below with disputed limitations emphasized, illustrates the claimed subject matter.

> 1. A dispensing device for the delivery of at least one edible product comprising:
>
> a support having means for generating compressed gas,
>
> at least one container containing the edible product, the container having walls comprising at least two layers such that when the container is connected to the support and the means are operated to generate compressed gas, the compressed gas fills the space between the layers so as to press the product out of the container, *the container having a base comprising a channel to conduct compressed gas from the means for generating compressed gas to a space between the layers of the walls of the container*,
>
> the dispensing device further comprises fitment means for establishing a fluid connection between the container and the support in a removable and leak-tight manner, the fitment means comprising:
>
> at least one orifice having a shape selected from the group consisting of cylindrical, conical and frusto-conical located on the container or on the support, the orifice having an ovoid cross-section and comprising at least one groove or protrusion disposed parallel the longitudinal axis of the orifice,
>
> a one-way valve to allow compressed air generated by the gas-compression means to flow only from the support to the container, and
>
> at least one corresponding plug located on the support, or respectively on the container, for removably fitting the orifice in a leak-tight manner.

Rejection

Claims 1–12 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Maas et al. (WO 2007/039167 A1, published Apr. 12, 2007), Wauters et al. (US 7,810,679 B2, issued Oct. 12, 2010), Kreczko et al. (US

4,982,761, issued Jan. 8, 1991), and Erb (WO 2006/013248 A1, published Feb. 9, 2006).

ANALYSIS

We have reviewed the Examiner's rejection in light of Appellant's arguments (App. Br. 5–14; Reply Br. 2–4). We are not persuaded by Appellant's arguments. We adopt as our own the findings and reasons set forth by the Examiner in the action from which this appeal is taken, in the Advisory Action, and in the Answer (*see* Ans. 5–8). We highlight and address specific arguments and findings for emphasis as follows.

Claims 1, 3–9, 11, and 12

Appellant argues Maas, Wauters, Kreczko, and Erb, alone or in combination, fail to disclose or suggest "the container having a base comprising a channel to conduct compressed gas from the means for generating compressed gas to a space between the layers of the walls of the container," as recited in claim 1. App. Br. 7. We are not persuaded.

In particular, Appellant contends that Maas's supply line 13 does not conduct compressed gas to a space between the layers of the walls of the container 2 because the Examiner concedes that Maas does not disclose two layers of the walls of the container. App. Br. 8 (citing Final Act. 2; Maas Fig. 18). Although Maas states that its form-retaining container includes "a chamber for the displacing medium that is separated from the part of the container containing the product by means of a flexible diaphragm" (Maas 1:14–16), the Examiner finds Maas does not teach walls with at least two layers (Final Act. 2). For the "two layers" limitation, the Examiner relies on

Wauters. *Id.* (referring to Wauters's layers 40, 55). We agree with the Examiner that Wauters teaches walls having at least two layers. Regarding Wauters, Appellant does not specifically challenge the Examiner's finding relating to the claimed two layers or one-way valve, and instead focuses on whether Wauters remedies the alleged deficiencies of Maas by teaching a channel in a base of the container. App. Br. 8–9. Thus, Appellant's arguments do not apprise us of error in the Examiner's finding that Wauters teaches the claimed layers and one-way valve.

Appellant also argues that Maas's supply line 13 is located in a frame 4 of the dispensing device 1, not a base of the container 2, and thus cannot be the claimed channel in the base of the container. App. Br. 8 (citing Maas Fig. 18); Reply Br. 2. In the Answer, however, the Examiner identifies the supply line or channel as elements 13, 14, and 28 in Maas. Ans. 5 (citing Maas 7:26–31, 8:27–31, Figs 16, 17).

The cited portions of Maas support, by a preponderance of the evidence, the Examiner's finding that Maas's container has a "base comprising a channel to conduct compressed gas," as recited in claim 1. Maas explains that supply line 13 runs from the pump to a connector 14. Maas 7:26–29. "During use this connector 14 is connected to a supply port that is arranged in the neck 15 of the container 2." Maas 7:29–31. Maas describes in further detail that connector 14 is part of fitting 26 attached to frame 4, and that connector 14 "is connected to a corresponding connector 28 in the dispensing adapter 27, which in turn is connected to the supply port for the displacing medium arranged in the container neck." Maas 8:23–31. Maas's dispensing adapter 27 is separate from frame 4 and attaches to the container. We agree with the Examiner (Ans. 5) that dispensing adapter 27

is a base of Maas's container, and Appellant has not persuasively rebutted this finding.

In addition, Appellant has not persuasively explained why at least the portion of Maas's frame 4 that receives container 2 may not also be the base belonging to the container claimed in claim 1, which recites a "container having a base." In the Reply Brief, Appellant contends that the Examiner interprets the base in claim 1 to include a base that is merely associated with the container, and contends that the Specification describes the base as a portion of the container. Reply Br. 2 (citing Spec. 5:9 and 6:8–9 (referring to "base portion 12")). As the Examiner finds, the base may be a separate element from the container. Ans. 6 (citing Spec. 5:11 ("The base 12 is assembled as a separate element to the bottom side of the container 5.")). Appellant acknowledges that the base may be separable from the container, but suggests there is a distinction between being "separable" and "separate *from*" the container. Reply Br. 2. To the extent there is a distinction, which is not explained by Appellant, we note that page 5, line 11, of the Specification does not use the term "separable," and instead states that base 12 is "assembled as a separate element to the bottom side of the container 5." To the extent Appellant is arguing that the base must at least be in contact with the container in order to be considered a base of the container, Maas teaches that "frame 4 includes an upright part or fitting 26 having a closed circumference, thus defining an opening for accommodating the neck 15 of the container 2." Maas 8:23–25. Thus, even if there may be elements "associated with" the container that cannot be considered its base, the elements relied on by the Examiner in Maas are engaged with the container and properly considered its base.

Accordingly, for the reasons discussed above and by the Examiner, we are not apprised of error in the Examiner's rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Maas, Wauters, Kreczko, and Erb. Thus, we sustain the rejection of claim 1, and, for the same reasons, the rejection of claims 3–8, 11, and 12, which are not argued separately (*see* App. Br. 7).

Appellant's arguments relating to claim 9 present the same issues presented with respect to claim 1. App. Br. 12–13. Thus, for the same reasons, we sustain the rejection of claim 9.

Claims 2 and 10

Appellant argues Maas, Wauters, Kreczko, and Erb, alone or in combination, fail to disclose or suggest "a channel in the base of the container to conduct compressed gas from the orifice to a space between the layers of the walls of the container, the channel in the base of the container comprising the one-way valve," as recited in independent claim 2. App. Br. 10. For the reasons discussed above for claim 1, we are not persuaded by the argument as to the location of the channel and identity of the base in Maas.

Claim 2, however, is narrower than claim 1 in that it specifies that "the channel in the base of the container compris[es] the one-way valve." Appellant argues that Wauters' "tubing 94 is external to the container 22, and the tubing 94 merely connects at one end to the reservoir 92 of the base and at the other end to the valve 98 that is mounted on the top portion 42 of the container 22." App. Br. 10. As Appellant's argument acknowledges, Wauters' valve 98 is mounted on the top portion 42 of the container 22, and

is thus a part of the container. *See also* Ans. 6 ("Wauters teaches placing the one-way valve in a collar (46), which corresponds to the dispensing adapter (27) of Maas that constitutes a portion of the base and gas supply channel as discussed above."); Wauters col. 5, ll. 33–35 ("The air valve 98 is located within the collar 46 of the keg in a standardized location.").

To the extent Appellant is arguing that the "top" of the container cannot be considered its "base," we agree with the Examiner (Ans. 6) that claim 2 does not specify a particular location of the base on the container. Appellant also has not pointed to any definition of the term "base" in the Specification that would limit the particular location. Ans. 6–7.

We also agree with the Examiner that "[e]ven if the claims did require that the base be located on the bottom of the container opposite a dispensing outlet at the top as implied by the Appellant, Maas teaches that the gas supply port may be arranged on the bottom of the container opposite the discharge outlet (page 13, lines 11–17)." Ans. 7. Thus, we agree with the Examiner that it would have been obvious "to rearrange the channel and its associated structure (i.e., the base, one-way valve, etc.) on the bottom of the container opposite the discharge outlet because it is a known alternative arrangement as taught by Maas and would not have affected the functionality of the apparatus." *Id.*

Appellant responds that "one skilled in the art would understand from the disclosure of *Maas* that, regardless of the arrangement of the supply port, the supply port is still located in the frame 4 of the dispensing device at all times." Reply Br. 4. Appellant's contention is incorrect. The supply port referred to on page 13 of Maas is "arranged in the neck 15 of the container 2." Maas 7:30–31. Maas explicitly teaches that when this port "is arranged

at a different location, e.g. opposite the outflow opening, the connector may be rearranged accordingly." Maas 13:15–17. As Maas recognizes, this arrangement is one example showing "it is not always necessary to arrange the connector for supplying the displacing medium next to the outflow control means." Maas 13:11–13. Thus, even if claim 2 required the base to be opposite the dispensing opening on the container, which is not the case, we agree with the Examiner (Ans. 7–8) that Maas explicitly teaches such an arrangement and would, therefore, benefit from any technical advantage associated with it.

Accordingly, for the reasons discussed above and by the Examiner, we are not apprised of error in the Examiner's rejection of claim 2 under 35 U.S.C. § 103(a) as unpatentable over Maas, Wauters, Kreczko, and Erb. Thus, we sustain the rejection of claim 2.

Appellant's arguments relating to claim 10 present the same issues presented with respect to claim 2. App. Br. 13–14. Thus, for the same reasons, we sustain the rejection of claim 10.

DECISION

We affirm the Examiner's decision to reject claims 1–12.

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