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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/858,109	08/17/2010	Marine Roualdes	365752US41	5196
30678	7590	11/25/2016	EXAMINER	
POL SINELLI PC (DC OFFICE) 1000 Louisiana Street Fifty-Third Floor HOUSTON, TX 77002			SHAH, NIYATI DILIP	
			ART UNIT	PAPER NUMBER
			3763	
			NOTIFICATION DATE	DELIVERY MODE
			11/25/2016	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARINE ROUALDES

Appeal 2014-006998
Application 12/858,109
Technology Center 3700

Before JENNIFER D. BAHR, STEFAN STAICOVICI, and
ERIC C. JESCHKE, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Marine Roualdes (“Appellant”) seeks review under 35 U.S.C. § 134(a) of the Examiner’s decision, as set forth in the Final Office Action dated July 17, 2013 (“Final Act.”), rejecting claims 1–5 and 8–16.¹ An oral hearing was held on November 15, 2016. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

¹ Appellant identifies L’OREAL as the real party in interest. Appeal Br. 2.

BACKGROUND

The disclosed subject matter “relates to a cosmetic product applicator.” Spec. 1. Claims 1 and 16 are independent. Claim 1 is reproduced below, with emphasis added:

1. A head for dispensing and applying cosmetic product, comprising:

a base, wherein the base comprises *an upper plate*;

a first tooth having a base end;

two teeth adjacent to the first tooth, each of the two teeth protruding from a base end located on the base as far as a free end located away from the upper plate;

a product dispensing hole which opens through *an upper surface of the upper plate*, the product dispensing hole extending through the upper plate;

a retainer for the cosmetic product on the upper plate,

wherein the retainer connects the first tooth to each of the two adjacent teeth, the retainer and teeth are connected to each other by the retainer forming a partition wall having a closed contour along a directing surface of the base, wherein the partition wall protrudes from the upper surface of the upper plate beyond the dispensing hole; and wherein

the base comprises a lower passage for introducing a neck of a container;

the product dispensing hole is in fluidic communication with the lower introduction passage to allow the dispensing of product and opens downwardly in a lower surface of the base and towards the introduction passage;

the product dispensing hole is permanently open; and

the retainer partition wall protrudes beyond the dispensing hole from the upper surface of the upper plate over the whole closed contour along a directing surface of the base.

REJECTIONS

1. Claim 16 stands rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter regarded as the invention.

2. Claims 1–3, 5, 8, 10, 11, and 13–15 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Yde (US 2009/0025247 A1, published Jan. 29, 2009) and Desmond (US 2006/0289026 A1, published Dec. 28, 2006).

3. Claims 1, 4, 9, 11, and 12 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Yde and Desmond.

4. Claim 16 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Yde, Desmond, and Romano (US 5,803,093, issued Sept. 8, 1998).

DISCUSSION

Rejection 1

The Examiner rejected claim 16 under 35 U.S.C. § 112, second paragraph, stating that the following phrases lack sufficient antecedent basis: “the direction” and “the height.” Final Act. 2. Appellant does not present arguments contesting this Rejection. *See* Appeal Br. 4–5. Rather, in the Appeal Brief, Appellant sets forth certain potential amendments that,

according to Appellant, *would* overcome this Rejection. *See, e.g., id.* at 5 (“This rejection will be overcome by reciting ‘a direction’ and ‘a height’ in place of ‘the direction’ and ‘the height’, respectively.”). Because Appellant does not present arguments asserting error in this Rejection, we summarily affirm.

Rejections 2 through 4

Independent claim 1 recites an “upper plate” that includes “an upper surface,” as shown with emphasis above. *See* Appeal Br. 14 (Claims App.). Independent claim 16 also recites an “upper plate” that includes “an upper surface.” *See id.* at 16–17 (Claims App.). For each of Rejections 2, 3, and 4, the Examiner relied on the combination of elements 12, 52, 56, and 62 in Yde as the recited “upper plate.” *See* Final Act. 3 (Rejection 2), 8 (Rejection 3), 12 (Rejection 4).

Appellant contends that “Yde does not disclose an upper plate.” Appeal Br. 8 (addressing Rejection 2), 9 (relying on prior arguments to address Rejection 3), 10 (relying on the argument that “Yde does not disclose an upper plate” to address Rejection 4). According to Appellant, “[a] plate, as is well understood by those skilled in the art, consistent with [Appellant’s S]pecification, is defined as a smooth thin flat piece of material”² whereas “[t]he construction suggested by the Examiner comprises a skirt, which is tubular and a cylindrical part which is perpendicular to the cylindrical part and which is neither flat, nor thin.” *Id.* at 6.

² For this proposed construction, Appellant relies on the online version of the Merriam-Webster Dictionary. *See* Appeal Br. 6.

In response, the Examiner references Figure 5 of Yde and provides (as “Reference Figure 1”) a modified version of Figure 5 from Yde with no reference numerals. *See* Ans. 2. According to the Examiner, the modified figure “better illustrate[s] the plate according to Yde referenced by the Examiner.” *Id.* The Examiner then states: “Therefore, the partition wall according to Yde does protrude beyond the upper plate and the product dispensing hole according to Yde does open through the upper surface of the upper plate and does extend through the upper plate.” *Id.* at 3.

During examination, claims are given their broadest reasonable interpretation consistent with the specification, reading the claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Bond*, 910 F.2d 831, 833 (Fed. Cir. 1990). Here, the Examiner does not address Appellant’s proposed construction and does not propose an alternative construction of the upper “plate.” Although we do not determine that the dictionary definition provided by Appellant necessarily represents the broadest reasonable construction of the upper “plate,” we do agree with Appellant that the Examiner has not demonstrated that the relied-upon group of structures provide an upper “plate” under a reasonable construction of that term. *See, e.g.*, Yde, Fig. 6 (showing elements 12, 52, 56, and 62).³

³ Although the Specification sets forth an exemplary embodiment depicting plate 34 as a flat horizontal surface, the broadest reasonable construction of “upper plate” is not necessarily limited to that disclosed embodiment. *See* Spec. 10 (describing plate 34 as “generally perpendicular relative to the axis X-X” shown in Figures 2 and 3); *see also In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (“[L]imitations are not to be read into the claims from the specification.”).

As to the Examiner's reliance on the modified version of Figure 5 of Yde, we agree with Appellant (Reply Br. 2) that that figure does not clarify why the relied-upon structures provide an "upper plate."

For these reasons, we do not sustain the rejections of claim 1 (Rejections 2 and 3) or claim 16 (Rejection 4). As to Rejections 2 and 3, we also do not sustain the rejection of claims 2–5 and 8–15, which depend from claim 1.

DECISION

We AFFIRM the decision to reject claim 16 under 35 U.S.C. § 112, second paragraph and REVERSE the decision to reject claims 1–5 and 8–16 under 35 U.S.C. § 103(a).⁴

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

⁴ See 37 C.F.R. § 41.50(a)(1) ("The affirmance of the rejection of a claim on any of the grounds specified constitutes a general affirmance of the decision of the examiner on that claim, except as to any ground specifically reversed.").