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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* CURTIS H. HUBMANN, ROBERT C. HALSTEAD,  
MATTHEW E. YOUNG, ELIZABETH A. SLATER,  
RICHARD I. SIMPSON, REUBEN WU,  
and JOHN A. BOTICKI

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Appeal 2014-009016  
Application 13/619,800  
Technology Center 3700

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Before ANNETTE R. REIMERS, LISA M. GUIJT, and  
GORDON D. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from the Examiner's Non-Final rejection of claims 1–4 and 31–33. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

### CLAIMED SUBJECT MATTER

The claims are directed a dispenser chemical concentrates. Claim 1, reproduced below, illustrates the claimed subject matter:

1. A dispenser for dispensing different concentrations of chemical concentrate into a stream of water from a concentrate container at different flow rates comprising:

a body member having a through bore with an inlet end adapted to be connected to a source of pressurized water at one end and an outlet at the opposite end connected to the inlet end; and

an eductor at least partially disposed in the bore, the eductor being in fluid communication with a source of chemical concentrate and including a plurality of spaced apertures through which chemical concentrate flows, the eductor movable to different positions relative to the body member to provide control of both different concentrations of chemical concentrate and different flow rates of water and chemical concentrate to the outlet.

### REFERENCES

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

Ketcham et al. ("Ketcham")	US 6,425,534 B2	July 30, 2002
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### REJECTIONS

The Examiner rejected claims 1–4 and 31–33 under 35 U.S.C. § 103(a) as being obvious in view of Ketcham.

OPINION

Claims 1 and 31 are the only independent claims on appeal. Appellants present arguments directed to these two claims only. Pending claims 5–7 and 21–25 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Non-Final Act. 3.

*Claim 1 — Obviousness in view of Ketcham*

A. Appellants argue first that the control knob 4 and gear wheel 21 of Ketcham are not part of the control plate 17, and so cannot meet the limitation of “the eductor movable to different positions.” Appeal Br. 6–7. Similarly, Appellants argue that the valve 24 is not part of the eductor disclosed in Ketcham. *Id.* We decline to decide these issues as they are not relevant to our decision.

B. Appellants next argue that Ketcham does not disclose a device (*e.g.*, control plates 17, 17a, 17b, 17c, and 17d) movable to provide control of both different concentrations of chemical concentrate and different flow rates of water and chemical concentrate to an outlet as required by claim 1. Appeal Br. 7. Appellants contend that the control plate of Ketcham only slides to vary the volume of chemical concentrate, and it does not provide control of both different concentrations of chemical concentrates and different flow rates of water. *Id.*

The Examiner finds that Ketcham can supply a powdered concentrate and that the mixture of water and concentrate will become thicker as more

powder is mixed with the water, and this will also vary the flow rate of the mixture.<sup>1</sup> Non-Final Act. 4; *see also* Ans. 4 (citing Ketcham 7:29–30).

Beyond denying that Ketcham fails to meet the claim 1 limitation that the educator be moveable “to provide control of both different concentrations of chemical concentrate and different flow rates of water and chemical concentrate to the outlet” (Appeal Br. 12 (Claims App.)), Appellants provide no explanation for their contention. *See* Appeal Br. 7; *see also* Reply 4–5. *See In re Lovin*, 652 F.3d 1349, 1357 (37 C.F.R. § 41.37 requires “more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”). Instead, Appellants challenge the Examiner’s finding as inadequate because it allegedly relies on insufficiently established inherency. *See* Reply Br. 4–5.

The Examiner’s finding on varying “thickness” was clearly made in the Non-Final Action. Non-Final Act. 4. Appellants’ inherency argument was not raised until the Reply Brief. Reply 4–5. We need not consider arguments first raised in a Reply Brief that could have been raised earlier, and we decline to do so here. *See* 37 CFR § 41.41(b)(2) (Good cause required to consider argument first raised in reply brief.). Here, no good cause is shown why we should consider this argument, and the absence of any opportunity for the Examiner to respond to this untimely argument precludes meaningful appellate review.

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<sup>1</sup> “Thickness” appears to be an informal concept that corresponds to the viscosity of a fluid. *See* <https://en.wikipedia.org/wiki/Viscosity>.

C. Claim 1 includes the limitation that an eductor is “at least partially disposed in the bore” of a body member. Appeal Br. 12 (Claims App.). The Examiner finds that “it would have been a matter of design choice to have modified the device of Ketcham et al. by moving the eductor at least partially in the bore since the eductor will still carry [out] its intended task if placed in that location.” Non-Final Act. 2–3. Appellants argue that the Examiner is required to provide “a convincing line of reasoning for obviousness (i.e., convincing reasons why one of ordinary skill in the art would consider the claimed invention obvious).” Appeal Br. 8. They point out that the “Examiner’s rejection is devoid of any reasoning as to why repositioning Ketcham’s control plate would have performed equally well as Appellants’ claimed invention. . . . The Examiner has provided no reasoning, supported by Ketcham, as to how the control plate or even a portion of the control plate could be placed in the flow passage. . . . [T]he Examiner has not provided any rational basis, considering the Examiner’s proposed modification, as to how the modified device of Ketcham would have worked or that the device would work at all.” Appeal Br. 8–9. With respect to the Examiner’s “design choice” conclusion, we note that design choice may be an acceptable rationale for an obviousness rejection when a claimed product merely arranges known elements in a configuration recognized as functionally equivalent to a known configuration. *See In re Kuhle*, 526 F.2d 553, 555 (CCPA 1975) (“The manner in which electrical contact is made for Smith's battery would be an obvious matter of design choice within the skill of the art. . . . As the board pointed out, use of a spring-loaded contact in the manner claimed is well known with the common flashlight.”). Here, the Examiner has not provided any evidence,

much less persuasive evidence, that placing the eductor in the passage was a rearrangement recognized in the art as functionally equivalent to the prior art Ketcham structure where the control plate 17 is entirely separated from the bore.

Although minor differences between the prior art and a claimed device may be a matter of design choice absent evidence to the contrary, (*see In re Rice*, 341 F.2d 309, 314 (CCPA 1965)), the difference proposed by the Examiner is not minor. The Examiner has provided no explanation of how it would be possible to place the control plate at least partially in the bore, still have the plate function to regulate the concentration of chemical concentrate, and allow the flow through the bore necessary to draw concentrate through the metering orifice in the plate. *See Reply Brief 5*. Accordingly, we do not agree that moving the control plate of Ketcham — even partially placed into the bore — is a mere design choice that can be supposed without any evidentiary support.

For the foregoing reasons and on the record presented, we do not sustain the rejection of independent claim 1, and claims 2–4 depending therefrom.

*Claim 31 – Obviousness in view of Ketcham*

Similar to claim 1, independent claim 31 requires “[an] educator movable to different positions . . . to provide control of both different concentrations of chemical concentrate and different flow rates of water and chemical concentrate to the outlet.” Appeal Br. 15 (Claims App.).

Appellants argue that the Examiner’s finding that it would have been an obvious matter of design choice to place the control plate of Ketcham at least partially in the bore, as required by claim 31, has insufficient support to establish a *prima facie* case of obviousness. We agree with Appellants for

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the same reasons stated above in connection with claim 1. In view of the foregoing and on the record presented, we do not sustain the rejection of independent claim 31, and claims 32 and 33 depending therefrom.

**DECISION**

For the above reasons, the Examiner's rejection of claims 1–4 and 31–33 is reversed.

**REVERSED**