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MICHAEL BEST & FRIEDRICH LLP (Mke)
100 E WISCONSIN AVENUE
Suite 3300
MILWAUKEE, WI 53202

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ARANT, HARRY E

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANDREW R. MCGOWAN

Appeal 2015-000832
Application 12/873,001
Technology Center 3700

Before CHARLES N. GREENHUT, MICHAEL L. HOELTER, and
THOMAS F. SMEGAL, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from a final rejection of claims 1–20. App. Br. 14–18 (Claims Appendix). We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART, and we designate one of the rejections a NEW GROUND OF REJECTION pursuant to our authority under 37 C.F.R. § 41.50(b).

THE CLAIMED SUBJECT MATTER

The disclosed subject matter “relates to a merchandiser including a product display area, and more particularly, to a merchandiser including a pan for supporting product.” Spec. ¶ 1. Claims 1, 7, and 15 are independent

claims. Claims 1 and 15 are illustrative of the claims on appeal and are reproduced below.

1. A pan apparatus for a merchandiser, the merchandiser including a case having a platform defining an opening, the pan comprising:

a bottom wall;

a plurality of sidewalls cooperating with the bottom wall to define a space for supporting product in the pan, at least two of the sidewalls each including a frame engagement member adjacent a top of the pan; and

a frame positioned adjacent a top of the sidewalls and coupled to the frame engagement members, the frame extending along at least three sidewalls of the pan and configured to engage the platform adjacent the opening to suspend the pan within the opening, and the frame having a perimeter and defining a plurality of holes spaced along at least a portion of the perimeter such that an airflow from below the pan is directed upward along the sidewalls and discharged outward through at least three sides of the frame via the holes above a top of the platform to condition the product.

15. A merchandiser comprising:

a case defining a product display area, a lower passageway in fluid communication with the product display area, a rear passageway in fluid communication with the lower passageway, and an upper passageway in fluid communication with the rear passageway and the product display area, the case including a base and a platform positioned above the base, the platform defining an opening accessible from adjacent a top of the case;

a pan coupled to the platform and disposed within the opening, the pan defined by a plurality of sidewalls and a bottom wall cooperating with the sidewalls to define a space for supporting product therein;

a frame coupled to the platform adjacent a periphery of the opening, the frame further coupled to the pan adjacent a top of at least two of the sidewalls to support the pan within the opening, and the frame including a perimeter and defining a

plurality of holes spaced along at least a portion of the perimeter;

a dividing wall coupled to the case adjacent the platform to separate the upper passageway from the pan, the dividing wall including at least one aperture in fluid communication with one of the rear passageway and the upper passageway, and the dividing wall, the pan, and the frame cooperating to define an airflow passageway along the sidewalls of the pan and in fluid communication with the holes; and

an airflow generation device coupled to the case within at least one of the lower passageway, the rear passageway, and the upper passageway to direct an airflow through the lower passageway, the rear passageway, and the upper passageway toward the product display area, at least a portion of the airflow from the airflow generation device configured to flow through the airflow passageway and through the holes to condition the product.

REFERENCES RELIED ON BY THE EXAMINER

Branz	US 5,168,719	Dec. 8, 1992
Kennedy	US 5,477,702	Dec. 26, 1995
Lee	US 6,385,990 B1	May 14, 2002

THE REJECTIONS ON APPEAL

Claims 15 and 16 are rejected under 35 U.S.C. § 102(b) as anticipated by Lee.

Claims 1–14 are rejected under 35 U.S.C. § 103(a) as obvious over Lee, Kennedy, and Branz.

Claims 17–20 are rejected under 35 U.S.C. § 103(a) as obvious over Lee and Kennedy.

ANALYSIS

The rejection of claims 15 and 16 as anticipated by Lee

Independent claim 15 (and hence dependent claim 16) includes the limitation that “the dividing wall, the pan, and the frame cooperating to define an airflow passageway along the sidewalls of the pan and in fluid communication with the holes.” For clarity, the claimed “holes” are recited as being in the frame. Hence, the three components (i.e., dividing wall, the pan, and the frame) cooperate to define an “airflow passageway” that is “in fluid communication with the holes” located in the frame.

The Examiner provides an annotated version of Figure 2 of Lee and indicates where this recited limitation can be found. Final Act. 4; *see also* Ans. 21, 22. The Examiner correlates items 40, 12, 13, 113, and 31 to, respectively, the claimed dividing wall, pan, frame, holes, and airflow passageway. Final Act. 3–4; *see also* Ans. 20–21. The Examiner specifically finds that “air flowing through Lee’s cooling plenum will flow through the openings” (i.e., “holes”). Ans. 21. Appellant disagrees and contends that “the pan and the frame of Lee do not cooperate to define the same airflow passageway. In addition, Lee’s cooling plenum 31 is not in fluid communication with the air openings in the food container support” (i.e., with the “holes” in the “frame”). App. Br. 7; *see also* Reply Br. 3–4.

Appellant’s contention has merit. As shown in Lee, the corresponding airflow passageway 31 defined by Lee’s dividing wall 40, pan 12 and frame 13 discloses an exit opening, but this exit opening (i.e., item 122) is not the exit opening of holes 113 relied on by the Examiner and which are in frame 13. *See, e.g.*, Lee Figures 2 and 4. In other words, openings 122 through which the air in passageway 31 exits is not in “frame” 13, but instead are

located in a different structure altogether. Additionally, addressing “holes” 113 identified by the Examiner (which are in frame 13), these holes 113 provide an exit for a passageway that does not involve pan 12. More specifically, claim 15 defines the “airflow passageway” as being “along the sidewalls of the pan” and yet the air exiting via holes 113 in Lee do not pass “along the sidewalls of the pan” as recited.

The Examiner seeks to explain that “[t]he frame holds the pan a certain height which directly impacts the dimensions of the airflow passageway.” Ans. 20. Although admittedly true, this ability to change a dimension of the airflow passageway does not change where it exits or what structure it extends along.¹

The Examiner also finds that “air flowing through Lee’s cooling plenum will flow through the openings.” Ans. 21. However, this would require the air in Lee’s passageway 31 to reverse course and flow upstream against the force of fan 34. Perhaps, if the direction of Lee’s fan 34 were reversed this might be the case, but then, both exits 113 and 122 would become inlets, and there is no indication that any air from passageway 31 could be discharged via (now inlet) 113, i.e., against the flow of the incoming air, as claimed. In short, the Examiner does not explain how this might occur and as such, we agree with Appellant that this statement by the Examiner “is only unsubstantiated opinion” and that “Lee does not teach or

¹ Lee’s pan 12 is formed with a lip that rests on the frame’s ledge 213. Lee 2:48–49; *see also* Lee Figs. 2 and 5. Any change in elevation of this ledge, thereby changing the elevation of the pan and the dimensions of airflow passageway 31 (as suggested by the Examiner), would not alter the exit of airflow from passageway 31 through opening 122.

suggest that air may find its way to the openings 113 from an area under the pan.” App. Br. 8; *see also* Reply Br. 3–4.

Accordingly, we agree with Appellant’s contentions to the extent that “the pan and the frame of Lee do not cooperate to define the same airflow passageway” and also that “Lee’s cooling plenum 31 is not in fluid communication with the air openings in the food container support.” App. Br. 7; *see also* Reply Br. 4. In short, the Examiner has not established by a preponderance of the evidence that Lee anticipates the claimed apparatus. We reverse the Examiner’s rejection of claims 15 and 16 as being anticipated by Lee.

The rejection of claims 17–20 as obvious over Lee and Kennedy

Claims 17–20 depend, directly or indirectly, from claim 15. As indicated *supra*, the Examiner identifies Lee’s item 13 as corresponding the claimed “frame.” Final Act. 3. The Examiner relies on the teachings of Kennedy for “providing holes around the perimeter” of this frame and that “by providing holes around the perimeter of the frame, it would allow cold air to be recirculated and thus create a more energy efficient apparatus.” Ans. 23–24; *see also* Lee 3:64–67 and Kennedy 5:22–24.

In this scenario, the analysis above regarding Lee anticipating the limitations of parent claim 1 differs. For example, placing holes around the frame’s perimeter as taught by Kennedy, rather than just along one side as in Lee, would provide another exit for airflow passageway 31 via these perimeter holes in Lee’s frame 13. Thus, in view of Kennedy’s teaching of “providing holes around the perimeter of the frame,” Appellant’s contention that “the pan and the frame of Lee do not cooperate to define the same airflow passageway” and that “Lee’s cooling plenum 31 is not in fluid

communication with the air openings in the food container support” (App. Br. 7; Reply Br. 4) are not persuasive.² This is because the inclusion of Kennedy’s perimeter holes in the frame would result in an air flow passageway 31 (defined by the dividing wall, pan and frame) which both extends “along the sidewalls of the pan” and also is “in fluid communication with the holes” as claimed. In short, Appellant is not persuasive the Examiner erred in combining Kennedy’s teaching of “holes around the perimeter” with Lee’s frame for the reasons stated. Ans. 23–24.

Further, when addressing claims 17–20, Appellant generally contends that “the combination would not teach or suggest Appellant’[s] claimed invention.” App. Br. 8–9. We are not persuaded by this argument in view of the discussion above. Appellant also contends that Kennedy’s cabinet “lacks a dividing wall as claimed by” Appellant, but the Examiner did not rely on Kennedy for teaching a dividing wall. App. Br. 9; Final Act. 12, 19; Ans. 23. Accordingly, we sustain the Examiner’s rejection of claims 17–20.

² When Appellant argues the rejection of claims 1–14 in view of Lee, Kennedy, and Branz, Appellant specifically addresses the combination of Lee and Kennedy. Reply Br. 5–6. Appellant’s argument is equally applicable here, but is not persuasive of Examiner error. Appellant argues that combining Kennedy’s teaching of perimeter holes “would at least change the principle of operation of Lee and possibly render Lee’s table unsatisfactory for its intended purpose.” Reply Br. 5–6. Appellant contends that such combination would “decrease the temperature of foodstuff in the containers.” Reply Br. 6. However, this argument is not persuasive because Kennedy is also concerned with creating “an air curtain to insulate the region about the tray 17 from the outside atmosphere.” Kennedy 5:22–24. Appellant does not explain how Kennedy’s focus on an insulating air curtain would change Lee’s principle by resulting in a “decrease [in] the temperature of foodstuff in the containers.”

New Ground of Rejection

In summary, the Examiner's rejection of parent claim 15 as being anticipated by Lee has been reversed, yet the Examiner's rejection of dependent claims 17–20 as being obvious over Lee and Kennedy has been sustained. Our reviewing court has instructed us that when a dependent claim is “found to have been obvious, the broader claims . . . must also have been obvious.” *Ormco Corp. v. Align Tech., Inc.*, 498 F.3d 1307, 1319 (Fed. Cir. 2007). To avoid any contradiction with these instructions, we enter a New Ground of Rejection of parent claim 15 (dependent claim 16 was not separately argued (*see* App. Br. 9) and hence stands or falls with parent claim 15) as being obvious over the combination of Lee and Kennedy in view of the analysis above.³ We do so to provide Appellant with a fair opportunity to respond.

The rejection of claims 1–14 as obvious over Lee, Kennedy, and Branz

Both independent claims 1 and 7 include the limitation of air being discharged through the frame via holes “above a top of the platform.” The Examiner relies on the combined teachings of Lee, Kennedy, and Branz for disclosing all the limitations of these claims but, regarding this “above a top of the platform” limitation, the Examiner solely relies upon Branz. Final Act. 5–7, 13–15. The Examiner provides an annotated version of Figure 2 of Branz where the “top” of platform 70 can be found. Final Act. 7, 15; Ans. 23. This figure of Branz also identifies holes 90, 92 the Examiner is relying upon. Final Act. 6, 14. Appellant disagrees that Branz's holes “are

³ This action is also consistent with the Board's decision in *In re Letts*, 88 USPQ2d 1854, 1859 (BPAI 2008)(informative).

positioned so that the airflow is discharged *above a top of the platform.*”
Reply Br. 5; *see also* App. Br. 10.

Branz’s plenum wall 70 is illustrated as being stepped. *See* Branz Figures 2 and 6. The lower step supports countertop 26 thereon while the upper step supports louvers 90, 92 underneath. Branz Figures 2, 6. The Examiner is clearly identifying the “top” as being the lower stepped region of wall 70 where countertop 26 is found and as such, the Examiner is comparing the elevated position of louvers 90, 92 (located adjacent the higher stepped portion) to this lower portion of wall 70. *See* Final Act. 6–7, 14–15; Ans. 23. Thus the Examiner is not contrasting the position of louvers 90, 92 to that portion of wall 70 that is most adjacent thereto (i.e., the upper stepped portion). Further, the Examiner does not provide a reason why the lower stepped portion (where the louvers are not found) was selected instead of the upper stepped portion (where the louvers are found). On this point, Appellant contends that “the highest or loftiest point of the front wall 70 is above the pan 80” (i.e., referencing the upper stepped portion). Reply Br. 5; *see also* App. Br. 10.

Regarding the upper stepped portion of wall 70, Branz’s louvers are clearly below this wall, and not above it as asserted by the Examiner or as required by claims 1 and 7. The Examiner does not explain how one skilled in the art, looking at Branz’s drawings, would reach the conclusion that louvers 90, 92 are actually above that portion of wall 70 from which they depend (other than by arbitrarily referencing a differently stepped portion of wall 70). We are instructed that “[t]he Patent Office has the initial duty of supplying the factual basis for its rejection. It may not, because it may doubt that the invention is patentable, resort to speculation, unfounded assumptions

or hindsight reconstruction to supply deficiencies in its factual basis. . . . Likewise, we may not resolve doubts in favor of the Patent Office determination when there are deficiencies in the record as to the necessary factual bases supporting its legal conclusion of obviousness.” *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967). Additionally, “[i]n rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a, prima facie case of obviousness. . . . Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993). In the matter before us, the Examiner has not come forward with evidence or argument indicative that one skilled in the art would ascertain louvers 90, 92 as being above that portion of wall 70 they are associated with and supported therefrom. We reverse the Examiner’s rejection of independent claims 1 and 7, and also claims 2–6 and 8–14 that depend therefrom.

DECISION

The Examiner’s rejection of claims 15 and 16 as anticipated by Lee is reversed, however, *see infra*.

The Examiner’s rejection of claims 1–14 as obvious over Lee, Kennedy, and Branz is reversed.

The Examiner’s rejection of claims 17–20 as obvious over Lee and Kennedy is affirmed.

We also enter a NEW GROUND of rejection regarding claim 15 under 35 U.S.C. § 103(a). This New Ground of Rejection is entered because it relies on reasons different from and/or additional to those stated by the Examiner and also to provide Appellants a fair opportunity to respond.

Further, 37 C.F.R. § 41.50(b) provides that, “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” 37 C.F.R. § 41.50(b) also provides that Appellants must, WITHIN TWO MONTHS, exercise one of the following options:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should Appellants elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless the affirmed rejection is overcome.

If Appellants elect prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Patent Trial and Appeal Board for final action on the affirmed rejection, including any timely request for rehearing thereof.

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; 37 C.F.R. § 41.50(b)