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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/087,722	04/15/2011	Gary T. Dane	Polyvac 09.04	6858
26812	7590	12/07/2016	EXAMINER	
HAYES SOLOWAY P.C. 175 CANAL STREET MANCHESTER, NH 03101			ACKUN, JACOB K	
			ART UNIT	PAPER NUMBER
			3728	
			NOTIFICATION DATE	DELIVERY MODE
			12/07/2016	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* GARY T. DANE and VALENTINE T. FAUST III

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Appeal 2015-000930  
Application 13/087,722  
Technology Center 3700

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Before EDWARD A. BROWN, GEORGE R. HOSKINS, and  
ARTHUR M. PESLAK, *Administrative Patent Judges*.

HOSKINS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Gary T. Dane and Valentine T. Faust III (“Appellants”)<sup>1</sup> appeal under 35 U.S.C. § 134 from the Examiner’s decision rejecting claims 1–17 in this application. The Board has jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> The Appeal Brief identifies Symmetry Medical USA, Inc. as the real party in interest. Appeal Br. 3.

### CLAIMED SUBJECT MATTER

The independent claims are claims 1 and 9. Claim 1 illustrates the subject matter on appeal, and it recites:

1. A medical sterilization container corner protector comprising:
  - a corner protector structure sized to removably engage with a corner of the medical sterilization container;
  - a fastening structure disposed on the corner protector;
  - and
  - a fastening mechanism engaged with the fastening structure, wherein the fastening mechanism biases the corner protector towards the corner of the medical sterilization container.

Appeal Br. 26 (Claims App.).

### REJECTIONS ON APPEAL

All claims 1–17 stand rejected under 35 U.S.C. § 112, second paragraph, as indefinite.

All claims 1–17 stand rejected under 35 U.S.C. § 102(b) as anticipated by, or in the alternative under 35 U.S.C. § 103(a) as unpatentable over, Geary (US 6,899,946 B2, iss. May 31, 2005).

All claims 1–17 stand rejected under 35 U.S.C. § 102(b) as anticipated by, or in the alternative under 35 U.S.C. § 103(a) as unpatentable over, Smith (US 5,447,233, iss. Sept. 5, 1995).

### ANALYSIS

#### *A. Indefiniteness*

Appellants argue against the indefiniteness rejection of all claims 1–17 together as a single group. *See* Appeal Br. 22–25. Accordingly, we

select claim 1 as representative, with claims 2–17 standing or falling with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

In the Final Office Action (mailed February 4, 2014, hereafter “Final Act.”), the Examiner maintains claim 1 is indefinite, based on analysis previously provided in a Non-Final Office Action (mailed September 20, 2013, hereafter “Non-Final Act.”). Final Act. 2. The Examiner determines “it is not clear whether [claim 1 is] drawn to the **subcombination** of the corner protector only, or whether [claim 1 is] drawn to the **combination** of the corner protector and the medical sterilization container.” Non-Final Act. 2; Final Act. 2–3. The Examiner determines the claim preamble (“A medical sterilization container corner protector”) indicates the subcombination is claimed, but the claim body (“fastening mechanism biases the corner protector towards the corner of the medical sterilization container”) indicates the combination is being claimed. Non-Final Act. 2–3. In the latter regard, the Examiner states “the corner protector cannot be biased towards the corner of the sterilization container, if the sterilization container is not there.” *Id.* at 3. For purposes of examination, applying a broadest reasonable interpretation, the Examiner presumes claim 1 requires only the corner protector, and not also the container. *Id.* at 3–4.

Appellants argue the correct interpretation of claim 1 is to require only the corner protector, and not the container. Appeal Br. 23–24. Appellants contend their act of informing the Examiner of that interpretation fulfills the definiteness requirement. *Id.* Appellants further assert “[t]he reference to a ‘medical sterilization container’ [in claim 1] may be necessary to convey a complete understanding of the medical sterilization container corner protector, in that the corner protector derives its utility when used

with the medical sterilization container.” *Id.* at 24. Appellants moreover characterize the Examiner’s rejection as “based on the belief that having elements in the body of the claim that are not captured by the preamble renders the claim indefinite,” and contend such a position is foreclosed by *In re Larsen*, No. 01-1092, 10 Fed. App’x 890 (Fed. Cir. May 9, 2001) (unpublished). Reply Br. 13.

We determine claim 1 is indefinite regarding whether a container is required, or not. “[T]he statutory language of ‘particular[ity]’ and ‘distinct[ness]’” in 35 U.S.C. § 112, second paragraph, requires claims “to be cast in clear—as opposed to ambiguous, vague, indefinite—terms.” *In re Packard*, 751 F.3d 1307, 1313 (Fed. Cir. 2014). Further, “if a claim is amenable to two or more plausible claim constructions, the USPTO is justified in requiring the applicant to more precisely define the metes and bounds of the claimed invention by holding the claim unpatentable under 35 U.S.C. § 112, second paragraph, as indefinite.” *Ex parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008) (precedential).

We agree with the Examiner that claim 1 is amenable to two plausible claim constructions: one which requires a container, and one which does not require a container. In particular, in reciting affirmatively that the fastening mechanism “biases” the corner protector towards “the” container in the claim body, the claim suggests “the” container is part of the claim.<sup>2</sup> Appeal Br. 26 (Claims App.). Appellants’ stated opinion that claim 1 requires only the corner protector, and does not require the container, does not address the

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<sup>2</sup> The Examiner indicates amending claim 1 to use “‘for biasing’ (or other such terminology)” could be used “to make clear that the container is not claimed.” Ans. 5–6.

final “wherein” claim limitation, and therefore does not persuade us that claim 1 is not amenable to a construction requiring a container. *See In re Packard*, 751 F.3d at 1313 (applicant’s offering of “brief explanations of what he thought certain material in the written description and figures showed” was not an adequate response to indefiniteness rejection, because applicant “did not focus on the claim-language difficulties . . . or show why, on close scrutiny, the existing claim language really was as reasonably precise as the circumstances permitted”). Appellants’ contention that the Examiner’s rejection is “based on the belief that having elements in the body of the claim that are not captured by the preamble renders the claim indefinite” (Reply Br. 13) is also not persuasive. As set forth above, the rejection is based on claim 1 being amenable to two plausible claim constructions.

For the foregoing reasons, we sustain the rejection of claims 1–17 as indefinite.

*B. Anticipation by or Obviousness over Geary*

*Claim 1*

The Examiner finds Geary discloses each and every limitation of claim 1, including a fastening mechanism (strap 92, 116, or 118) “engaged with” a fastening structure (attachment member 36). Final Act. 2, 3–5; Non-Final Act. 5–6. The Examiner particularly cites Geary’s description that “attachment member 36 is configured to engage, e.g., releasably engage, a fastening member, such as a banding strap.” Geary, 4:42–44; *see* Final Act. 4. Geary goes on to indicate “other configurations” may be used to “engage” a fastening member, such as “a conventional buckle; a friction clip; and the like.” Geary, 4:47–51; *see* Final Act. 5.

In opposition, Appellants contend Geary fails to disclose straps 92, 116, 118 being “engaged with” attachment member 36, as claimed. Appeal Br. 13–16. Appellants acknowledge Geary uses the term “‘engaged’ or some derivative thereof” to describe the pertinent interaction, but Appellants nonetheless assert such usage is different from “engaged with” in claim 1. *Id.* at 15. Appellants describe Geary’s straps as being “positioned over, positioned through, or otherwise contacting the corner structures [10] to retain them in place,” and “merely utiliz[ing] the corner protectors [10] to retain the strapping or bands in a correct position about the object.” *Id.* Appellants contrast such a structure from the claimed fastening mechanism “engaged with” a fastening structure, “such as key-hole designs” as shown in Appellants’ Figures 1–6 which “allow actual engagement with the fastening mechanisms, not relative engagement dependent upon correct positioning.” *Id.*

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the Specification. *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). Appellants’ Specification indicates fastening structures “may include a variety of design configurations or attached structures.” Spec. 7:1–3. Appellants’ Specification further provides examples of fastening mechanisms engaged with fastening structures, including a metal hook, flat barb, or spherical ball mechanism engaging a key-slot opening structure, as well as hooks engaging loops. Spec. 7:3–7, 11:17–12:17 (describing Figs. 5–6). We do not find any disclosure in Appellants’ Specification that would lead a person of ordinary skill in the art to conclude a broadest reasonable construction of “engaged with” would exclude a strap being

engaged within a slotted structure, such as disclosed in Geary. In our view, adopting Appellants' proposed narrow claim construction would improperly read a limitation from the Specification into the claim. *See Am. Acad.*, 367 F.3d at 1369 (cautioning against reading limitations into a claim from a preferred embodiment of the Specification, absent a clear disclaimer).

For the foregoing reasons, we agree with the Examiner's finding that Geary discloses a fastening mechanism engaged with a fastening structure, and we sustain the rejection of claim 1 as anticipated by Geary. We therefore need not address the alternative rejection of claim 1 as obvious over Geary.<sup>3</sup>

#### *Claim 9*

Claim 9, somewhat similarly to claim 1, recites "a fastening mechanism *engagable between* the first and second fastening structures." Appeal Br. 28 (Claims App.) (emphasis added). Appellants rely on the same arguments presented against claim 1, which we determine are not persuasive for the reasons provided above. *See* Appeal Br. 13–16. Indeed, to the extent there is a difference in scope between claims 1 and 9 in this regard, claim 9 is the broader claim, because it only requires the components to be capable of engagement rather than actually being engaged. *See, e.g.*, Final Act. 3–4. We therefore sustain the rejection of claim 9 as anticipated by Geary, and we need not address the alternative obviousness rejection.

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<sup>3</sup> A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for anticipation is the epitome of obviousness. *See In re Pearson*, 494 F.2d 1399, 1402 (CCPA 1974); *In re Fracalossi*, 681 F.2d 792, 794 (CCPA 1982).

*Claims 2, 14, 15, and 16*

Claim 2 depends from claim 1, and specifies the fastening mechanism is “elastic.” Appeal Br. 26 (Claims App.). Claim 14 depends from claim 9, and also specifies the fastening mechanism is “elastic.” *Id.* at 29. Claim 15 depends from claim 14, and claim 16 depends from claim 15. *Id.* at 30.

The Examiner finds Geary’s straps are elastic because they are made from cloth, plastic, or metal. Ans. 10 (citing Geary, 6:23–24). Appellants contend the Examiner’s finding is not supported by a preponderance of the evidence. Appeal Br. 19–20; Reply Br. 6–7. We agree. A representative dictionary definition of “elastic” is “able to spring back to its original size, shape, or position after being stretched.” *Webster’s New World Dictionary of American English* (3rd College Ed., © 1988, Ed. Victoria Neufeldt), at 435; *see* Spec. 7:9–14. Some cloths, plastics, and metals may indeed be elastic, but the record does not establish that all such materials are necessarily elastic. The Examiner does not cite any evidence or provide any technical reasoning to indicate that the cloth, plastic, or metal of Geary is necessarily elastic. Thus, we do not sustain the rejection of claims 2, 14, 15, and 16 as anticipated by Geary.

As to obviousness, the Examiner determines: “[E]lastic flexible stringers [such as bungee cords] for use with corner protectors are conventional in the art, so it would have been obvious to provide them to” Geary’s device “for the purpose of providing an improved apparatus or for design or aesthetic reasons.” Ans. 10–11; Non-Final Act. 6. The Examiner cites no evidence to support the finding that elastic stringers are conventional in the art of corner protectors. Moreover, the stated reasons for why it would have been obvious to use elastic stringers in Geary’s device are

merely conclusory. To provide the requisite articulated reasoning with rational underpinning to support the legal conclusion of obviousness, the Examiner needs to explain how elastic stringers would improve the functioning or appearance of Geary's device. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (*cited with approval in KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)). Thus, we also do not sustain the rejection of claims 2, 14, 15, and 16 as obvious over Geary.

*Claim 5*

Claim 5 indirectly depends from claim 1, and specifies the corner protector has a textured surface comprising raised surfaces and non-raised surfaces. Appeal Br. 27 (Claims App.). The Examiner states Geary shows a textured surface, without further discussion or citation to the Geary disclosure. Final Act. 5. We decline to speculate as to what structure in Geary the Examiner believes corresponds to a textured surface. Thus, we determine the Examiner's finding in this regard is not supported by a preponderance of the evidence, and we do not sustain the rejection of claim 5 as anticipated by Geary.

As to obviousness, the Examiner determines: "since [a textured surface is] known in the relevant art, [a textured surface] would also have been obvious to provide to" Geary's device, "for the purpose of providing an improved apparatus or for design or aesthetic reasons." Final Act. 5; Non-Final Act. 6. The Examiner cites no evidence to support the finding that textured surfaces were known in the art of corner protectors. Moreover, the stated reasons for why it would have been obvious to use textured surfaces in Geary's device are merely conclusory. To provide the requisite articulated reasoning with rational underpinning to support the legal

conclusion of obviousness, the Examiner needs to explain how textured surfaces would improve the functioning or appearance of Geary's device. Thus, we also do not sustain the rejection of claim 5 as obvious over Geary.

*Claims 6 and 12*

Claim 6 depends indirectly from claim 1, and specifies "at least one cutout element." Appeal Br. 27 (Claims App.). Claim 12 depends from claim 9, and also specifies "a cutout element." *Id.* at 29.

The Examiner finds Geary's groove 56, illustrated in Figure 3, is a cutout element. Ans. 11; *see* Geary, 5:23–25. Appellants contend the Examiner's finding is not supported by a preponderance of the evidence. Appeal Br. 20. Appellants particularly contend the claimed cutout element "is best shown" in Appellants' Figures 5 and 6, and Geary does not "disclose any cutout element, a hole, or a similar structure." *Id.*

Appellants have not persuasively established why Geary's groove 56 is not a "cutout element" under a broadest reasonable construction, for example by explaining why such a finding is inconsistent with their Specification. Adopting Appellants' proposed narrow claim construction, limiting a "cutout" to the specific structure shown in their Figures 5 and 6, would improperly read a limitation from the Specification into the claim. *See Am. Acad.*, 367 F.3d at 1369. We therefore sustain the rejection of claims 6 and 12 as anticipated by Geary, and we need not address the alternative obviousness rejection.

*Claim 7*

Claim 7 depends from claim 1, and specifies the fastening mechanism comprises a third portion between first and second portions respectively

engaged with fastening structures, such that “the third portion is at least partially *retained against* the . . . container.” Appeal Br. 27 (Claims App.) (emphasis added). The Examiner finds Geary’s straps are “inherently capable of *attachment at* a third portion thereof to some . . . container.” Ans. 11–12 (emphasis added). Appellants object that they “can find no basis for the inherency” and “the stated inherency fails to disclose . . . ‘the third portion is at least partially retained against the . . . container.’” Reply Br. 9.

We are persuaded of Examiner error. The Examiner does not explain how a third portion of Geary’s straps 92, 116, 118 between fastening structures 36 is capable of attachment to a container, or, more importantly, how such attachment capability relates to the claim requirement for the straps to be retained against the container. We decline to speculate as to what the Examiner might have meant in that regard. Thus, we determine the Examiner’s finding that Geary’s straps are retained against a container is not supported by a preponderance of the evidence, and we do not sustain the rejection of claim 7 as anticipated by Geary.

The Examiner does not provide an alternative obviousness analysis directed to the limitations recited in claim 7. *See* Non-Final Act. 6; Final Act. 5; Ans. 11–12. Thus, we also do not sustain the rejection of claim 7 as obvious over Geary.

### *Claim 13*

Claim 13 depends from claim 9, and specifies fastening structures having “a keyhole element.” Appeal Br. 29 (Claims App.). The Examiner fails to identify a preponderance of the evidence to support a finding that Geary discloses a keyhole element. Final Act. 5; Ans. 12. Thus, we do not sustain the rejection of claim 13 as anticipated by Geary.

As to obviousness, the Examiner determines: “keyhole elements per se as disclosed and claimed in the subject application, are conventional mechanical fastening elements.” Ans. 12. The Examiner then determines Geary discloses “mechanical fastening elements,” so “it would have been obvious to utilize known mechanical fastening elements (such as the keyhole) in [Geary] (to attach the banding to the corner protector),” “for the purpose of providing an improved apparatus or for design or aesthetic reasons.” Ans. 12; Non-Final Act. 6. The Examiner cites no evidence to support the finding that keyhole fastening elements are conventional. Moreover, the stated reasons for why it would have been obvious to use a keyhole element in Geary’s device are merely conclusory. To provide the requisite articulated reasoning with rational underpinning to support the legal conclusion of obviousness, the Examiner needs to explain how keyhole elements would improve the functioning or appearance of Geary’s device. Thus, we also do not sustain the rejection of claim 13 as obvious over Geary.

*Claim 17*

Claim 17 depends from claim 9, and specifies a stacking element formed on one corner protector, and engagable with a structure on another corner protector when two containers are stackably configured. Appeal Br. 30 (Claims App.). The Examiner fails to identify a preponderance of the evidence to support a finding that Geary discloses a stacking element. Final Act. 5; Ans. 13. Thus, we do not sustain the rejection of claim 17 as anticipated by Geary.

As to obviousness, the Examiner determines: “support ribs are a conventional feature of corner protectors.” Ans. 13. As an example, the Examiner cites, for the first time in the Answer, Curnow (US 2009/0000982

A1, pub. Jan. 1, 2009) as disclosing a corner protector having support ribs that “elevate the corner protector from a supporting surface or other sterilization containers.” *Id.* (citing Curnow ¶ 27, Fig. 4); *see* Curnow, Fig. 2 (showing support ribs 24A–24D on bottom of corner protector).

However, the Examiner does not provide any articulated reasoning with rational underpinning to support a determination that it would have been obvious to add Curnow’s support ribs to Geary’s device, such as how such an addition would improve the functioning or appearance of Geary’s device. *See* Ans. 13. Thus, we also do not sustain the rejection of claim 17 as unpatentable over Geary.

*Claims 3, 4, 8, 10, and 11*

Appellants do not argue for the patentability of dependent claims 3, 4, 8, 10, and 11 separately from their respective parent claims. We therefore sustain the rejection of these claims as anticipated by or obvious over Geary, for the reasons provided above.

*C. Anticipation by or Obviousness over Smith*

*Claims 1 and 9*

The Examiner finds Smith discloses each and every limitation of claims 1 and 9, including a fastening mechanism (strap 59) “engaged with” or “engagable between” fastening structures (grooves 57), as claimed. Final Act. 2; Non-Final Act. 6. In opposition, Appellants rely on the same claim construction argument discussed above in connection with the Geary rejection, which we find to be unpersuasive for the reasons provided. A preponderance of the evidence supports the Examiner’s finding that Smith’s strap 59 is engaged with or engagable between grooves 57. *See* Smith,

Figs. 1–4. We therefore sustain the rejection of claims 1 and 9 as anticipated by Smith, and we need not address the alternative obviousness rejection.

*Claims 2, 14, 15, and 16*

Concerning the “elastic” fastening mechanism recited in claims 2, 14, 15, and 16, the Examiner finds “the polypropylene or similar material” of Smith’s strap is elastic. Ans. 10 (citing Smith, 3:33). Appellants contend the Examiner’s finding is not supported by a preponderance of the evidence. Appeal Br. 19–20; Reply Br. 7. We agree. Some polypropylene or similar materials may indeed be elastic, but the record does not establish that all such materials are necessarily elastic. The Examiner does not cite any evidence or provide any technical reasoning to indicate that the polypropylene or similar material of Smith is necessarily elastic. Thus, we do not sustain the rejection of claims 2, 14, 15, and 16 as anticipated by Smith. We also do not sustain the alternative obviousness rejection, for the same reasons set forth above concerning the Geary rejection.

*Claim 5*

Concerning the “textured surface” recited in claim 5, the Examiner states Smith shows such a surface, without further discussion or citation to the Smith disclosure. Final Act. 5. We decline to speculate as to what structure in Smith the Examiner might believe corresponds to a textured surface. Thus, we determine the Examiner’s finding in this regard is not supported by a preponderance of the evidence, and we do not sustain the rejection of claim 5 as anticipated by Smith. We also do not sustain the alternative obviousness rejection, for the same reasons set forth above concerning the Geary rejection.

*Claims 6 and 12*

Concerning the “cutout element” recited in claims 6 and 12, the Examiner finds the slots in Smith’s front wall 21 are cutout elements. Ans. 11; *see* Smith, Fig. 1, 2:50–56. Appellants contend the Examiner’s finding is not supported by a preponderance of the evidence, based on the same claim construction argument discussed above in connection with the Geary rejection, which we find to be unpersuasive for the reasons provided. Appeal Br. 20. A preponderance of the evidence supports the Examiner’s finding that Smith’s slots are cutout elements. *See* Smith, Fig. 1. We therefore sustain the rejection of claims 6 and 12 as anticipated by Smith, and we need not address the alternative obviousness rejection.

*Claim 7*

Concerning the third portion “retained against” the container as recited in claim 7, the Examiner finds Smith’s strap 59 is “inherently capable of use *to attach at* a third portion thereof to some . . . container.” Ans. 12 (emphasis added). For the reasons provided above in connection with the Examiner’s similar finding concerning Geary’s straps, we determine the Examiner’s finding is not supported by a preponderance of the evidence. Thus, we do not sustain the rejection of claim 7 as anticipated by Smith. We also do not sustain the alternative obviousness rejection, for the same reasons set forth above concerning the Geary rejection.

*Claim 13*

Concerning the “keyhole element” recited in claim 13, the Examiner fails to identify a preponderance of the evidence to support a finding that Smith discloses a keyhole element. Final Act. 5; Ans. 12. Thus, we do not

sustain the rejection of claim 13 as anticipated by Smith. We also do not sustain the alternative obviousness rejection, for the same reasons set forth above concerning the Geary rejection.

*Claim 17*

Concerning the third portion “stacking element” recited in claim 17, the Examiner fails to identify a preponderance of the evidence to support a finding that Smith discloses a stacking element. Final Act. 5; Ans. 13. Thus, we do not sustain the rejection of claim 17 as anticipated by Smith. We also do not sustain the alternative obviousness rejection, for the same reasons set forth above concerning the Geary rejection.

*Claims 3, 4, 8, 10, and 11*

Appellants do not argue for the patentability of dependent claims 3, 4, 8, 10, and 11 separately from their respective parent claims. We therefore sustain the rejection of these claims as anticipated by or unpatentable over Smith, for the reasons provided above.

DECISION

The rejection of claims 1–17 under 35 U.S.C. § 112, second paragraph, as indefinite, is affirmed.

The rejection of claims 1–17 as anticipated by, or in the alternative as unpatentable over, Geary, is affirmed as to claims 1, 3, 4, 6, and 8–12, and reversed as to claims 2, 5, 7, and 13–17.

The rejection of claims 1–17 as anticipated by, or in the alternative as unpatentable over, Smith, is affirmed as to claims 1, 3, 4, 6, and 8–12, and reversed as to claims 2, 5, 7, and 13–17.

Appeal 2015-000930  
Application 13/087,722

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