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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
12/514,473	05/12/2009	Patrick Lhoyer	008165.00048	1078
22907	7590	11/09/2016	EXAMINER	
BANNER & WITCOFF, LTD. 1100 13th STREET, N.W. SUITE 1200 WASHINGTON, DC 20005-4051			STEITZ, RACHEL RUNNING	
			ART UNIT	PAPER NUMBER
			3776	
			NOTIFICATION DATE	DELIVERY MODE
			11/09/2016	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* PATRICK LHOYER

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Appeal 2015-001259<sup>1,2</sup>  
Application 12/514,473  
Technology Center 3700

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Before HUBERT C. LORIN, PHILIP J. HOFFMANN, and  
MATTHEW S. MEYERS, *Administrative Patent Judges*.

HOFFMANN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant appeals under 35 U.S.C. § 134(a) from the final rejection of claims 13, 15–23, and 25. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

According to Appellant, “[t]he invention relates to the field of applicators for fluid or pasty products, particularly onto keratinous fibers, typically applicators of cosmetic products such as mascaras.” Spec. 1, ll. 6–7. Claims 13 and 21 are the only independent claims. *See* Br., Claims

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<sup>1</sup> Our decision references Appellant’s Specification (“Spec.,” filed May 12, 2009) and Appeal Brief (“Br.,” filed June 30, 2014), as well as the Examiner’s Answer (“Answer,” mailed Aug. 21, 2014).

<sup>2</sup> According to Appellant, “[t]he real party in interest is **ALCAN PACKAGING BEAUTY SERVICES**.” Br. 3.

App. Below, we reproduce claim 13, with formatting added, as representative of the appealed claims.

13. A cosmetic product applicator comprising  
a brush made up of fibers trapped between two twisted  
arms extending in an axial direction and defining turns,

the arms on two adjacent turns being in contact on  
a portion of a turn and the fibers being driven out on either  
side of this portion of the turn.

*Id.*

#### REJECTIONS AND PRIOR ART

The Examiner rejects claims 13, 15, 18, 19, and 21–23 under 35 U.S.C. § 102(b) as anticipated by Warner (US 5,609,398, iss. Mar. 11, 1997).<sup>3</sup>

The Examiner rejects claims 16 and 17 under 35 U.S.C. § 103(a) as unpatentable over Warren.

The Examiner rejects claims 20 and 25 under 35 U.S.C. § 103(a) as unpatentable over Warren and Rousselet (US 7,089,946 B2, iss. Aug. 15, 2006).

*See Answer 2–4.*

#### ANALYSIS

Independent claim 13 recites “a brush made up of fibers trapped between two twisted arms extending in an axial direction and defining turns, the arms on two adjacent turns being in contact on a portion of a turn and the

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<sup>3</sup> Although the Answer refers to the rejection of claims 14 and 26, both of these claims are canceled. *See Answer 2; see also Br. 3.*

fibers being driven out on either side of this portion of the turn.” Br., Claims App. Appellant argues the rejection is in error because Warner fails to disclose the claimed brush. *See id.* at 6–12. Based on our review, we determine that the Examiner does not establish, based on substantial evidence, that Warner discloses the claimed brush with “the arms on two adjacent turns being in contact on a portion of a turn and the fibers being driven out on either side of this portion of the turn.” The Examiner finds that Warner’s Figure 1, column 4, lines 5–12, column 2, lines 27–28, and column 6, lines 1–3 teach the brush as set forth above. *See Answer 2, 5.* But, we find that none of these portions of Warner shows or describes the claimed brush. Warner’s Figure 1 shows legs 27 and 28 in contact with one another on a turn on a stem of the tool, but does not show fibers driven out on either side of the turn. *See Warner Figure 1.* The cited portion of column 4 describe this contact between legs 27 and 28. *See id.* at col. 4, ll. 5–12. Column 2 describes that during manufacture of the tool the clamping fixture distributes a force over the interface between the legs and the bristles—contrary to the Examiner’s finding, this portion does not describe anything about contact between legs 27 and 28 where bristles 21 are disposed between the legs. *See id.* at col 2, ll. 24–29; *see also Answer 5.* Finally, Warner’s column 6 describes swaging the legs together. *See Warner col. 6, ll. 1–3.* Thus, after reviewing the above and other portions of Warner, it appears that Warner is a tool in which only a stem portion, which is on the end of the tool and does not have bristles on either side, includes arms that contact one another.

Based on the foregoing, we do not sustain the anticipation rejection of independent claim 13. Further, we do not sustain the anticipation rejection

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of claims 15, 18, and 19 depending from claim 13. Still further, we do not sustain the anticipation rejection of independent claim 21, which includes a limitation similar to that discussed above with respect to claim 13, or the anticipation rejection of claims 22 and 23 depending from claim 21. Finally, because the Examiner does not establish that any other reference remedies the rejection of the independent claims, we do not sustain the obviousness rejections of dependent claims 16, 17, 20, and 25.

#### DECISION

We REVERSE the Examiner's anticipation and obviousness rejections of claims 13, 15–23, and 25.

REVERSED