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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* WILLIAM A. GALLOP and ASHISH K. MITHAL

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Appeal 2016-000430  
Application 13/102,569  
Technology Center 3700

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Before MICHAEL L. HOELTER, LYNNE H. BROWNE, and  
GORDON D. KINDER, *Administrative Patent Judges*.

BROWNE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants appeal under 35 U.S.C. § 134 from the rejection of claims 1–5, 7–11, and 17.<sup>1</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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<sup>1</sup> Claims 6, 12–16, 18–32, 49, and 59 are canceled and claims 33–48, 50–58, and 60 are withdrawn from consideration by the Examiner. Appeal Br. 23–28 (Claims App.).

### CLAIMED SUBJECT MATTER

Independent claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A tightly nestable, injection molded container with enhanced resistance to sidewall compression, the container comprising:
  - a base defining a bottom closed end of said container and having four peripheral edges, said base being approximately square in shape;
  - four sidewalls, each sidewall comprising a top edge, a bottom edge and a pair of side edges,
  - said four sidewalls rising upwardly from said base with the bottom edges of the four sidewalls being respectively joined to said four peripheral edges of said base,
  - said four sidewalls being joined to each other at their side edges and defining an interior closed space for containing a substance therein,
  - the top edges of the four sidewalls being joined together to form a top inner periphery and defining a top open end of said container; and
  - an upper rim circumscribing said top inner periphery and attached thereto at said top open end of said container, said upper rim having a top outer periphery, said upper rim being adapted to resist deformation thereof,
  - said four sidewalls having a thickness in in the range of about 0.2 mm to about 0.25 mm, said container having a fluid capacity of less than about 3 oz and greater than about 1 oz,
  - said four sidewalls being strong enough to resist substantial deformation or collapse when grasped and held by a user's hand.

### REFERENCES

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

Fletcher	US 4,831,840	May 23, 1989
Harod	US 6,358,516 B1	Mar. 19, 2002
Stephens	US 2003/0141218 A1	July 31, 2003

Morgan	US 2004/0182257 A1	Sept. 23, 2004
Van Handel	US 2005/0011898 A1	Jan. 20, 2005

## REJECTIONS

- I. Claims 1–5, 7–11, and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Van Handel and Stephens.<sup>2</sup>
- II. Claims 1–5, 7–11, and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Van Handel, Stephens, Fletcher, Morgan, and Harod.<sup>3</sup>

## DISCUSSION

### *Rejection I*

Appellants' arguments are directed to claim 1. *See* Appeal Br. 10–18. Appellants do not mention claims 2–5, 7–11, and 17, which are subject to this ground of rejection.<sup>4</sup> *See generally id.* Accordingly, claims 2–5, 7–11, and 17 to stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>2</sup> Bay is listed in the statement of this rejection and is cited for a feature that is not recited in any of the pending claims. Non-Final Act. 3, 5; *see* Appeal Br. 23–28 (Claims App.). As noted by Appellants, “[s]ince claim 1 does not recite that the sidewalls are bowed inward, it would appear that Bay is cited with regard to currently withdrawn claims 40 and 53.” Appeal Br. 17. Accordingly, we understand the inclusion of Bay in the statement of this rejection to be a typographical error and the inclusion of Bay in the rejection to be an artifact left over from when claims 40 and 53 were not withdrawn from consideration. Accordingly, we do not address Appellants' arguments pertaining to Bay.

<sup>3</sup> *See* note 3.

<sup>4</sup> Appellants do mention claims 40 and 53; however, as noted by Appellants, these claims are withdrawn from consideration. Appeal Br. 10, 17. Accordingly, we do not consider Appellants' arguments pertaining to claims 40 and 53.

The Examiner finds that Van Handel discloses all of the limitations of claim 1 except for the claimed sidewall thickness. *See* Non-Final Act. 4. The Examiner further finds that “Stephens teaches a tray 10 having a nominal thickness of about 0.2 to about 3.0 mm.” *Id.* (citing Stephens ¶ 22). The Examiner determines that “the claimed range of about 0.2 mm to about 0.25 mm lies inside the range specified by Stephens.” *Id.* Based on these findings and the determination that Stephens’ range overlaps/encompasses the claimed range, the Examiner reasons that it would have been obvious “to modify the wall thickness of the container of Van Handel to be from .2 mm - .25 mm thick to conserve on material yet provide a strong enough sidewall to prevent damage or crushing.” *Id.*

Appellants contend that “[t]he clear implication by the Examiner is that virtually any container volume can be combined with virtually any wall thickness to produce a satisfactory food service container.” Appeal Br. 11. In support of this contention, Appellants note that “Van Handel is silent regarding the thickness of the side walls” and assert that “[i]t would appear, therefore, that Van Handel is cited as prior art only because it teaches the claimed container capacity for a container that is handled by its sidewalls, despite the lack of any teaching or suggestion as to wall thickness.”<sup>5</sup> *Id.*

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<sup>5</sup> Appellants state that it is their position that “any assertion of obviousness of claim 1 under 35 USC § 103(a) must include a showing that the cited combination of prior art is relevant to the problem addressed by the present invention.” Appeal Br. 8. However, it is not necessary for the prior art to serve the same purpose as that disclosed in Appellants’ Specification in order to support the conclusion that the claimed subject matter would have been obvious. *See In re Linter*, 458 F.2d 1013, 1016 (CCPA 1972); *see also KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 419 (2007) (“[N]either the particular motivation nor the avowed purpose of the [Appellants] controls” in an obviousness analysis.).

Although we agree with Appellants that Van Handel does not address sidewall thickness<sup>6</sup> and that Van Handel was cited for its disclosures pertaining to container capacity and capability of being handled by its sidewalls, we find Appellants' characterization of the rejection untenable. Appellants provide no evidence that the implication of the rejection is that any container volume can be combined with virtually any wall thickness to produce a satisfactory food service container. Rather, the implication of the rejection is that it would have been obvious to modify Van Handel's container to have a wall thickness in the range 0.2–0.25 mm in view of Stephen's teachings of an overlapping range. *See* Non-Final Act. 4–5. Furthermore, Appellants' contentions separately attack Van Handel. Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). Thus, Appellants do not apprise us of error.

Appellants further contend that a “passing reference to a nominal thickness range in Stephens cannot be cited as anticipating any aspect of claim 1 because it is much too vague to allow for any reasonable interpretation that does not rely on the application of hindsight.” Appeal Br. 12; *see also id.* at 15 (“the claimed subject matter must be disclosed in the reference with ‘sufficient specificity to constitute an anticipation under the statute.’” (emphasis omitted)); *see also* Reply Br. 8.<sup>7</sup>

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<sup>6</sup> We note that this fact is not in dispute. Non-Final Act. 4.

<sup>7</sup> Appellants' arguments in this section of the Appeal Brief rely on *Clear Value Inc. v. Pearl River Polymers Inc.*, 668 F.3d 1340 (Fed. Cir. 2012). However, *ClearValue* pertains to anticipation of ranges, not obviousness of ranges and therefrom is inapposite.

Appellants' arguments attack Stephens separately, and thus, as discussed *supra*, cannot apprise us of error. Further, we note that the rejection at issue is based on obviousness not anticipation.<sup>8</sup> Moreover, when claimed ranges overlap or lie inside ranges disclosed by the prior art for every component in a claim, a prima facie case of obviousness is established. *See In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003); *In re Geisler*, 116 F.3d 1465, 1469–70 (Fed. Cir. 1997). Such overlap itself provides sufficient motivation to optimize the ranges. *See Peterson*, 315 F.3d at 1330 (“The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of . . . ranges is the optimum combination . . .”). In the present case, because the prior art disclosed values overlapping the claimed ranges, the “general conditions” of the claim are disclosed. *See In re Aller*, 220 F.2d 454, 456 (CCPA 1955); *see also In re Boesch*, 617 F.2d 272, 276 (CCPA 1980). Thus, Appellants do not apprise us of error.

In addition, Appellants argue that “Stephens does not teach a container that is handled by its sidewalls.” Appeal Br. 14 (emphasis omitted); *see also* Reply Br. 9. Appellants' argument is not indicative of error because claim 1 does not require a container that is handled by its sidewalls. Rather, claim 1 requires “four sidewalls being strong enough to resist substantial deformation or collapse when grasped and held by a user's hand.” Appeal Br. 23 (Claims App.). Appellants do not explain why Van Handel's container as modified to have the claimed wall thickness

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<sup>8</sup> As the rejection does not rely on a theory of inherency, we do not address Appellants' further arguments pertaining to anticipation and inherency. *See* Appeal Br. 13.

would not “resist substantial deformation or collapse when grasped and held by a user’s hand” as required by claim 1. Moreover, the rejection relies on the combined teachings of Van Handel and Stephens to meet this limitation. As discussed *supra*, Appellants’ separate attack on Stephens cannot establish nonobviousness. Thus, Appellants do not apprise us of error.

For these reasons, we sustain the Examiner’s decision rejecting claim 1, and claims 2–5, 7–11, and 17, which fall therewith.

*Rejection II*

Having sustained the Examiner’s decision rejecting claims 1–5, 7–11, and 17 based on the combined teachings of Van Handel and Stephens, we need not reach the Examiner’s alternative rejection of these claims based on the combined teachings of Van Handel, Stephens, Fletcher, Morgan, and Harod.

DECISION

The Examiner’s rejection of claims 1–5, 7–11, and 17 as unpatentable over Van Handel and Stephens is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED