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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* MICHAEL DAVID SANDERS and  
EBONY NICOLE SANDERS

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Appeal 2017-003128  
Application 13/537,896  
Technology Center 3700

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Before MICHELLE R. OSINSKI, THOMAS F. SMEGAL, and  
LISA M. GUIJT, *Administrative Patent Judges*.

OSINSKI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Michael David Sanders and Ebony Nicole Sanders (Appellants)<sup>1</sup>  
appeals under 35 U.S.C. § 134(a) from the Examiner's rejection of claims 1,  
2, and 4–19, which are all of the pending claims. We have jurisdiction under  
35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> Appellants identify the real party in interest as The Procter & Gamble  
Company. Appeal Br. 1.

## THE CLAIMED SUBJECT MATTER

Claim 1, the sole independent claim, is reproduced below and is representative of the claimed subject matter on appeal.

1. A laundry detergent package comprising:

a container having a container interior surface and an opposing container exterior surface, wherein said container exterior surface has a primary label face; and

a dosing cap comprising a base and a vessel wall extending from said base, said base having a base interior surface and an opposing base exterior surface, said vessel wall having a vessel wall interior surface and an opposing vessel wall exterior surface, wherein said base exterior surface comprises a region of surface irregularities;

wherein said dosing cap is releasably engaged with said container;

wherein said region of surface irregularities is positioned such that when said primary label face is aligned with a line of sight of an observer having her eye level with said base exterior surface said region of surface irregularities is visible to said observer; and

wherein said region of surface irregularities has a centroid in a plane orthogonal to a longitudinal axis of said dosing cap, wherein said centroid is more than about  $\pi/8$  radians away from said line of sight as measured about said longitudinal axis of said dosing cap.

## EVIDENCE

The Examiner relied on the following evidence in rejecting the claims on appeal:

Weiby	US 3,090,067	May 21, 1963
Kafkis	US 4,974,984	Dec. 4, 1990
Maloney	US 6,739,781 B2	May 25, 2004
Darr	US 6,964,359 B1	Nov. 15, 2005
Yang	US 2008/0289987 A1	Nov. 27, 2008
Hood	US 2010/0036352 A1	Feb. 11, 2010

THE REJECTIONS<sup>2</sup>

- I. Claims 1, 2, and 4–19 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement based on an angle of a centroid of a region of surface irregularities in relation to (i) a line of sight (claim 1) and (ii) a common line of alignment (claim 12). Non-Final Act. 2–3.
- II. Claims 1, 2, and 4–19 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement based on the angle of the centroid in relation to (i) the line of sight (claim 1) and (ii) the common line of alignment (claim 12). *Id.* at 3–4.
- III. Claims 1, 2, and 4–19 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which is regarded as the invention. *Id.* at 4–5.
- IV. Claims 1, 2, 4–6, and 19 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney and Weiby. *Id.* at 6–9.
- V. Claim 7 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, and Hood. *Id.* at 9–10.
- VI. Claim 8 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, and Kafkis. *Id.* at 10.
- VII. Claim 9 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, and Darr. *Id.* at 10–11.

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<sup>2</sup> The rejection of claims 1, 2, and 4–19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description and enablement requirements based on calculation of the location of the centroid of the region of surface irregularities is withdrawn. Ans. 2.

- VIII. Claims 10–14, 17, and 18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, and Yang. *Id.* at 11–13.
- IX. Claim 15 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, Yang, and Hood. *Id.* at 13–14.
- X. Claim 16 stands rejected under 35 U.S.C. § 103(a) as unpatentable over Maloney, Weiby, Yang, and Kafkis. *Id.* at 14.<sup>3</sup>

## OPINION

### *Rejection I*

The Examiner rejects claims 1, 2, and 4–19 as failing to comply with the written description requirement because “it is unclear from the [S]pecification how [Appellants] calculate the angle of the centroid in relation with the line of sight” and “it is unclear from the [S]pecification how [Appellants] calculate the angle of the centroid in relation with the common line of alignment.” Non-Final Act. 3.

As to the line of sight, Appellants point to Figures 2–4 and page 8, line 29 to page 10, line 2 of the Specification. Appeal Br. 3. The Specification describes how centroid 23 is “more than about  $\pi/8$  radians away from the line of sight 19 as measured about the longitudinal axis L of the dosing cap 10.” Spec. 8:29–9:4. The Specification also describes that “[t]he centroid 23 can be about  $\pi/2$  radians away from the line of sight 19 as measured about the longitudinal axis L of the dosing cap 10.” *Id.* at 9:15–16. In our view, the Specification describes that, using the longitudinal axis

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<sup>3</sup> Even though the Examiner does not specifically identify Weiby as part of Rejections IX and X, each rejection refers to the claims as being unpatentable over Maloney and Yang “as applied to claim 10 above” (Final Act. 13, 14), and the rejection of claim 10 includes Weiby (*id.* at 11).

as a vertex and moving away from a line of sight about the longitudinal axis L until reaching a plane of the centroid, the angle  $\beta$  between the line of sight and a plane of the centroid must be more than  $\pi/8$  radians. *See, e.g., id.* at Fig. 3. We find that the disclosure reasonably conveys to a person of ordinary skill in the art that Appellants were in possession of the claimed subject matter as of the filing date. *See Ariad Pharm., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010).

As to the common line of alignment, Appellants point to Figure 4 and pages 10 and 11 of the Specification. Appeal Br. 3. The Specification describes that the longitudinal axis of each of a plurality of dosing caps are substantially aligned within a common line of alignment and that “[e]ach centroid 23 can be positioned about zero radians away from the common line of alignment 210.” Spec. 10:14–15, 11:4–5, Fig. 4. In our view, the Specification describes that a plane of each centroid is substantially aligned with (i.e., about zero radians away from) the common line of alignment. *See, e.g., id.* at Fig. 4. We find that the disclosure reasonably conveys to a person of ordinary skill in the art that Appellants were in possession of the claimed subject matter as of the filing date.

Thus, the rejection of claims 1, 2, and 4–19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is not sustained.

#### *Rejection II*

The Examiner rejects claims 1, 2, and 4–19 as failing to comply with the enablement requirement. Non-Final Act. 3–4. In particular, the Examiner determines that Appellants’ “written description fails to disclose how the location of the centroid of the surface of irregularities is  $\pi/8$  radians

away from the line of sight” and “how to calculate the angle from where the line of sight is away from the surface of irregularities enabling an ordinary artisan to build the package.” *Id.* at 4. The test for enablement is whether Appellants’ disclosure is sufficient for one of ordinary skill in the art to make and use the invention without undue experimentation. *In re Wands*, 858 F.2d 731, 737 (Fed Cir. 1988). The rejection states that Appellants’ disclosure does not identify how to calculate the angle of the centroid from the line of sight or the common line of alignment. Non-Final Act. 4. The rejection, however, fails to discuss the disclosure in terms of undue experimentation or address any *Wands* factors.

The Examiner did not articulate sufficient findings or analysis to show that a person of ordinary skill in the art would have been unable to make and use the claimed invention without *undue experimentation*. *See Wands*, 858 F.2d at 737. As such, the Examiner has not met the initial burden to establish a reasonable basis to question the enablement. *In re Wright*, 999 F.2d 1557, 1561–62 (Fed. Cir. 1993) (when rejecting a claim for lack of enablement, the USPTO bears the initial burden of setting forth a reasonable explanation as to why the scope of the claim is not adequately enabled by the description provided in the Specification).

Accordingly, we do not sustain the Examiner’s rejection of claims 1, 2, and 4–19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement.

### *Rejection III*

Claims 1, 2, and 4–19 stand rejected as being indefinite for failing to particularly point out and distinctly claim the subject matter which is regarded as the invention. Non-Final Act. 4–5. Claims, when read in light

of the Specification, must “reasonably apprise those skilled in the art both of the utilization and scope of the invention” using language “as precise as the subject matter permits.” *In re Packard*, 751 F.3d 1307, 1313 (Fed. Cir. 2014). In determining whether a claim is definite under 35 U.S.C. § 112, second paragraph, “[t]he USPTO, in examining an application, is obliged to test the claims for reasonable precision according to [this principle].” *Id.*

The Examiner finds that the recitation in claim 1 that “when said primary label face is aligned with a line of sight of an observer having her eye level with said base exterior surface” is indefinite because “the primary label face is not defined in relation to the container in the claim” and “[t]he claim recites primary label face[,] but the primary label face does not include a label.” Non-Final Act. 4–5.<sup>4</sup>

Appellants respond that “the primary label face is structurally related to the container” in that “[c]laim 1 states that the container has a primary

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<sup>4</sup> As to the limitations relating to the centroid’s relation to the line of sight or the common line of alignment also identified by the Examiner in this rejection (Non-Final Act. 5), we are not persuaded that these limitations render the claims indefinite for similar reasons as discussed above in connection with 35 U.S.C. § 112, first paragraph. As to the Examiner’s additional statements with respect to claim 10 that “it is unclear how the longitudinal axis (L) of the cap could be aligned with common line of alignment” and “[i]t appears the longitudinal axis of the dosing cap is perpendicular to the common line of alignment of the plurality of laundry packages” (*id.*), we are not persuaded that the limitation in claim 10 is indefinite. We agree with the Examiner that the longitudinal axis of each dosing cap is perpendicular to the common line of alignment. *See* Spec. Fig. 4. We, however, do not read the claim as requiring the longitudinal axis of each dosing cap being aligned *with* the common line of alignment as set forth in the Examiner’s rejection, but rather that the longitudinal axis of each dosing cap is aligned *within* the common line of alignment. *See* Spec. 10:14–15, Fig. 4.

label face.” Appeal Br. 2. Appellants also state that page 3, line 30 to page 4, line 9 of the Specification “amply describes what the primary label face is.” *Id.* The Examiner replies that “claim 1 does not specify the shape of the container,” nor “a location of the primary label face” other than that it be on the exterior surface of the container. Ans. 14–15; *see also id.* at 15 (“In case the container is cylindrical, the question arises as to which exterior surface of the container [is the primary label face] or where would be the primary label face?”).

We agree with the Examiner that the claim does not require the primary label face to have any particular structure relative to the rest of the exterior surface of the container and/or to have a label attached thereto. In addition, the Specification only describes that “[t]he primary label face 2 is the part of the container exterior surface 111 that is presented to the consumer when the product is on a shelf in a store”; “is the front of the package”; and “includes the name of the product.” Spec. 3:30–4:3. Accordingly, one of ordinary skill in the art does not know which portion of a container is the primary label face to be aligned with a line of sight of an observer, until the container is placed on a store shelf for presentation to a consumer, and it is known which portion of the exterior surface (i) is presented to the consumer, (ii) is the front of the package, and (iii) includes the name of the product.

Consequently, one of ordinary skill in the art also does not know where the region of surface irregularities must be positioned on the dosing cap so as to be visible to a user when the primary label face is aligned with a line of sight of an observer, until the container is placed on a store shelf for presentation to a user so as to reveal what is the primary label face. Because

it is unclear where the region of surface irregularities must be positioned on the dosing cap to meet the language of the claim until the container is placed on a store shelf for presentation to a user, the metes and bounds of the claimed invention are not clear.

In other words, it is not apparent how one of ordinary skill in the art would be able to determine whether a particular laundry detergent package (e.g., a package comprising a cylindrical container, as recognized by the Examiner) would be covered by claim 1. For example, we are unable to determine with any certainty whether Maloney's laundry detergent package, once modified by Weiby so that only a portion of the base exterior of Maloney's dosing cap has surface irregularities, would have surface irregularities that (i) are visible to an observer aligning his or her line of sight with a primary label face and (ii) have a centroid positioned more than about  $\pi/8$  radians away from a line of sight that is aligned with the primary label face. That is, although not disclosed as having a particular relationship between the primary label face and the location of the centroid of the region of surface irregularities, we cannot ascertain with certainty whether modified Maloney inherently possesses surface irregularities positioned as claimed, because it appears that any portion of an exterior of Maloney's container 41 may be considered the primary label face, when the primary label face is not claimed as having any particular structure and any portion of the exterior of Maloney's container could arbitrarily be selected as the front of the container for presentation to the consumer on a store shelf and for inclusion of the product name in accordance with the Specification.

We find the claims are indefinite because they do not reasonably apprise those of skill in the art of the scope of the claimed invention.

Accordingly, we sustain the rejection of claims 1, 2, and 4–19 under 35 U.S.C. § 112, second paragraph.

*Rejections IV–X*

We do not sustain the Examiner’s rejections of claims 1, 2, and 4–19 under 35 U.S.C. § 103(a). For the reasons discussed above, claims 1, 2, and 4–19 are indefinite. Before a proper review of these rejections can be performed, the subject matter encompassed by the claims on appeal must be reasonably understood without resort to speculation. Therefore, since the claims fail to satisfy the requirements of 35 U.S.C. § 112, second paragraph, we are constrained to reverse the prior art rejections because they necessarily are based on speculative assumptions as to the scope of the claims. *See In re Steele*, 305 F.2d 859, 862–63 (CCPA 1962) (holding that the Board erred in affirming a rejection of indefinite claims because the rejection was based on speculative assumptions as to the meaning of the claims). We emphasize, however, that our decision in this regard is based solely on the indefiniteness of the claimed subject matter, and does not reflect on the adequacy of the prior art evidence applied in support of the rejections.

DECISION

The Examiner’s decision to reject claims 1, 2, and 4–19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement is reversed.

The Examiner’s decision to reject claims 1, 2, and 4–19 under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement is reversed.

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Application 13/537,896

The Examiner's decision to reject claims 1, 2, and 4–19 under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter which is regarded as the invention is affirmed.

The Examiner's decision to reject claims 1, 2, and 4–19 under 35 U.S.C. § 103(a) is reversed.

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