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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* ZACHARY BRADFORD BARRETT

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Appeal 2018-001451  
Application 14/680,347<sup>1</sup>  
Technology Center 1700

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Before MICHAEL P. COLAIANNI, MONTÉ T. SQUIRE, and  
SHELDON M. McGEE, *Administrative Patent Judges*.

McGEE, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134, Appellant seeks our review of the Examiner's rejection of claims 1, 3–19, 22, and 23, as well as the Examiner's objection to the Specification under 35 U.S.C. § 132. App. Br. 7–14.

We have jurisdiction. 35 U.S.C. § 6.

We affirm.

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<sup>1</sup> Appellant identifies Zachary Bradford Barrett as the real party in interest. App. Br. 2.

## BACKGROUND

The subject matter on appeal is directed to a dechlorinator unit for water discharged from a fire hydrant. Spec. ¶ 2.

Claim 1 is illustrative of the appealed subject matter, and is copied below from the Claims Appendix to the Appeal Brief, with emphasis added to relevant limitations at issue in this appeal:

1. A fire hydrant water discharge dechlorinator unit, comprising:

a body having a first end adapted to be removably coupled to a fire hydrant, the body defining a water passageway between an inlet and an outlet thereof; and

a chamber *fixedly extending through* a side wall of the body and having a bottom surface *fixedly suspended in* the water passageway, the chamber defining an inner cavity configured for reception of dechlorinating material therein, the inner cavity being in fluid communication with the water passageway through only a single aperture in the bottom surface of the chamber, whereby water from the water passageway is drawn into the inner cavity, circulated over the dechlorinating material to create a homogeneous mixture of dechlorinating material and water, and returned to the water passageway through the single aperture in the bottom surface of the chamber with solute from the dechlorinating material so as to neutralize chlorine in the water before it is discharged from the body.

App. Br. 15.

## STATEMENT OF THE CASE

The Examiner objects to the amendment to paragraph 27 of the Specification filed January 18, 2017 as adding new matter. Final 2.

The Examiner rejects claim 22 under 35 U.S.C. § 112, first paragraph as lacking written description for the recitation of “the bottom surface of the chamber is fixedly suspended approximately half of the distance between the side wall of the body and a central axis of the water passageway.” *Id.* at 2–

3. The Examiner also rejects claim 23 as lacking written descriptive support for reciting a “side wall of the body” because the Examiner finds a lack of antecedent basis for this language. *Id.* at 3.

The Examiner furthermore rejects claims 1, 3–19, 22, and 23 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Just,<sup>2</sup> either alone or in combination with other prior art. *Id.* at 4–20.

## OPINION

### *Objection to the Specification*

We first address the Examiner’s objection to the Specification, noting that, although objections are normally petitionable (not appealable) matters, objections are properly before the Board if such objections “are [] directly connected with the merits of issues involving rejections of claims.” *In re Hengehold*, 440 F.2d 1395, 1403 (CCPA 1971). Here, the objection is sufficiently connected because Appellant relies on the objected-to language to support its argument that claim 22, currently rejected under 35 U.S.C. § 112, first paragraph, does not contain new matter. App. Br. 8. Thus, this objection is properly before us.

On January 18, 2017, Appellant filed an amended Drawing to Figure 3, as well as an amendment to paragraph 27 of the Specification. The amendment to Figure 3 added center axis 51 to previous Figure 3 as depicted below:

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<sup>2</sup> US 2011/0094949 A1, published April 28, 2011.

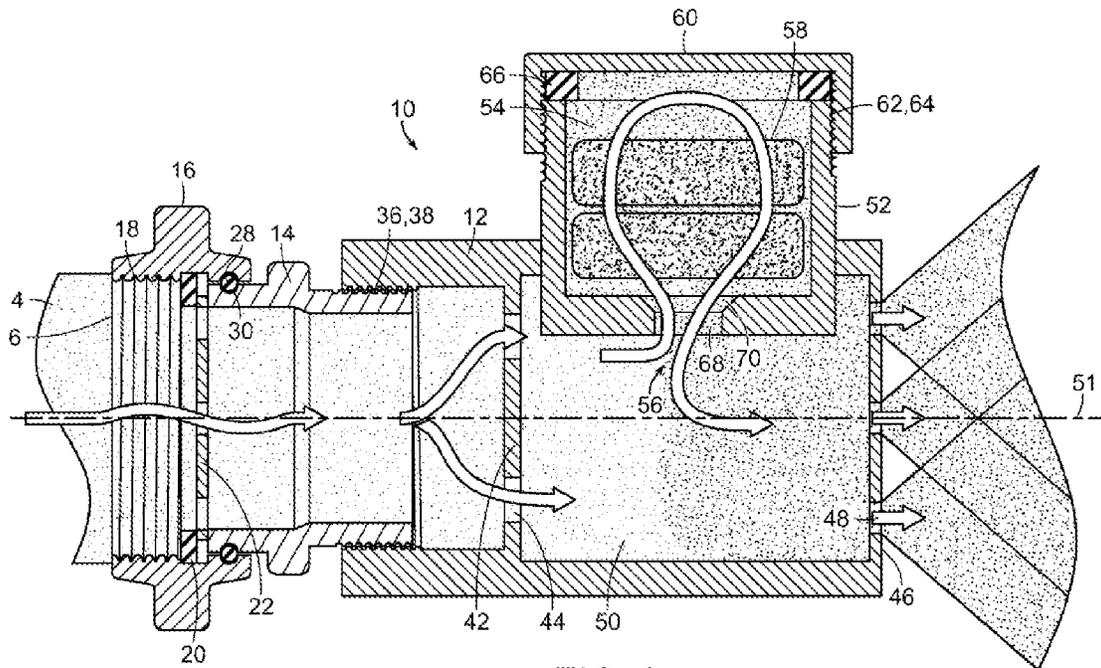


FIG. 3

As amended, Figure 3 illustrates a cross-sectional view of the dechlorinator unit illustrating water flow from left to right. Spec. ¶ 18. Appellant also amended the last sentence of the Specification's paragraph 27 by adding the following language as underlined:

The chamber 52 protrudes through the side wall of the barrel 12 . . . such that the bottom wall of the chamber 52 is fixedly suspended approximately half of the distance between the side wall and the center axis 51 of the water passageway as shown in FIG. 3.

Regarding the amendment to paragraph 27, the Examiner finds that “the bottom wall of the chamber 52 is fixedly suspended approximately half of the distance between the side wall and the central axis of the water passageway” is new matter. Final 2. Appellant argues that “the entirety of the original disclosure, including the depiction of FIG. 3, provides sufficient support for this amendment to paragraph 27” because “the chamber 52 is shown as protruding through the side wall of the barrel 12” and “the bottom

wall of the chamber 52 is suspended at some point between the side wall and the center of the passageway 50. FIG. 3 depicts that this point as approximately half of the distance between the side wall and the center axis 51.” App. Br. 7.

Appellant’s argument is not persuasive. Our reviewing “court has repeatedly cautioned against overreliance on drawings that are neither expressly to scale nor linked to quantitative values in the specification.” *Krippelz v. Ford Motor Co.*, 667 F.3d 1261, 1268 (Fed. Cir. 2012) (citing *Hockerson-Halberstadt, Inc. v. Avia Grp. Int’l, Inc.*, 222 F.3d 951, 956 (Fed. Cir. 2000))

(HHI’s argument thus hinges on an inference drawn from certain figures about the quantitative relationship between the respective widths of the groove and fins. Under our precedent, however, it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.); *see also In re Wright*, 569 F.2d 1124, 1127 (CCPA 1977) (declining to find that, based on a comparison of the relative dimensions of appellant’s and patentee’s drawing figures, patentee’s disclosure “clearly point[ed] to the use of a chime length of roughly  $\frac{1}{2}$  to 1 inch for a whiskey barrel”); *In re Wilson*, 312 F.2d 449, 454 (CCPA 1963) (noting that specific dimensions could not be established based on measurements of patent drawings); *In re Reynolds*, 443 F.2d 384 (CCPA 1971) (considering the issue of whether drawings supported claim language in an appeal from the Examiner’s rejection under 35 U.S.C. § 112, first paragraph).

Here, Appellant has neither alleged nor persuasively shown that originally filed Figure 3 or its amended counterpart adding center axis 51 is to scale or has quantitative markings sufficient to establish defined

proportions to the individual elements depicted therein. App. Br., *generally*. Further, Appellant’s argument relying on “the entirety of the original disclosure” for support (App. Br. 7) lacks sufficient specificity and amounts to an invitation for us to review the entire disclosure to find such support. This we decline to do.

Without some reference to the scale of the drawings, or quantitative relationships between components depicted therein, our reviewing court’s precedent is clear — mere drawings, without more, are insufficient to establish “precise proportions of the [depicted] elements and may not be relied on to show particular sizes if the specification is completely silent on the issue.” *Hockerson-Halberstadt, Inc.*, 222 F.3d at 956. We, therefore, sustain the Examiner’s objection to the Specification.

*Rejection under 35 U.S.C. § 112, 1<sup>st</sup> paragraph*

We sustain the Examiner’s rejection of claims 22 and 23 for lacking written description support.

Regarding claim 22, Appellant relies on the amendment to paragraph 27 to demonstrate written descriptive support for “the bottom surface of the chamber is fixedly suspended approximately half of the distance between the side wall of the body and a central axis of the water passageway.” App. Br. 8. We have found, however, that the Examiner properly objected to Appellant’s amendments to paragraph 27 adding such language. Appellant cannot now rely on improperly added subject matter to serve as the basis of adequate written description support. Thus, the rejection of claim 22 under 35 U.S.C. § 112 is sustained.

Regarding claim 23, Appellant does not contest this rejection, so we summarily sustain it. App. Br. 8.

*Rejection of claims 1, 3–12, and 22 under 35 U.S.C. § 103(a)*

With respect to the rejection of claims 1, 3, 9–12, and 22, Appellant presents arguments only directed to independent claim 1. We, therefore, select this claim as representative and decide the appeal on the basis of claim 1 alone.<sup>3</sup> 37 C.F.R. § 41.37(c)(1)(iv). Appellant also does not separately argue the rejections of claims 4–8, dependent from claim 1. Thus, the rejections of claims 3–12, and 22 stand or fall with the rejection of claim 1.

Relevant to this appeal, the Examiner finds that Just discloses a chamber 21 fixedly extending through a side wall of body 56 and having a bottom surface suspended in the water passageway. Final Act. 4–5. The Examiner finds Just’s chamber 21 is “fixed by a suspending lip [25].” *Id.* at 4. The Examiner finds that although Just does not expressly state that the bottom of chamber 21 is “fixedly suspended,” Just suggests a desire to “maintain the bottom height of [chamber 21] at a specific [point] both high enough, and low enough, so that there is desired contact between the tablets and the water.” *Id.* at 6 (citing Just ¶ 75). The Examiner determines that it would have been obvious to the skilled artisan to have provided chamber 21’s “bottom to be fixedly suspended in the water passageway in Just or Just and LaCrosse<sup>[4]</sup> in order to provide for a desired height of the tablets in [chamber 21] . . . as suggested by Just.” *Id.*

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<sup>3</sup> We need not consider Appellant’s argument regarding claim 22 because the argument relies on limitations appearing in the claim that lack written descriptive support. App. Br. 10–11.

<sup>4</sup> US 7,137,568 B1, issued November 21, 2006.

Appellant argues that the prior art does not “teach and/or show a chamber **fixedly extending through** a side wall and having a bottom surface **fixedly suspended in** the water passageway.” App. Br. 9; Reply Br. 5–6. In the Answer, the Examiner observes that the claims do not require the chamber to be fixedly attached to the side walls of the body — rather, the chamber must be fixedly extending through the body, which Just teaches by virtue of chamber 21 being at least partially fixed by lip 25 and ridge 50. Ans. 25–26. The Examiner also determines it would have been obvious to “completely fix[] the location of the [chamber’s] bottom” surface. *Id.* at 26. In the Reply Brief, Appellant urges that Just fails to meet these limitations because its chamber 21 “loosely hangs from a ledge” and is “certainly not fixed to the side wall nor relative to any other structure insofar as the [chamber] may raise above the ledge.” Reply Br. 6.

We have considered Appellant’s arguments (App. Br. 9–11; Reply Br. 5–7) and are unpersuaded that Appellant has identified reversible error in the Examiner’s rejection. *See In re Jung*, 637 F.3d 1356, 1365–66 (Fed. Cir. 2011). Therefore, we sustain the obviousness rejection of these claims based on the findings of fact, conclusions of law, and rebuttals to arguments expressed by the Examiner in the Final Action and in the Answer. We add the following.

Appellant does not point to a definition of the term “fixed” — in the Specification or otherwise — that excludes how chamber 21 of Just is arranged within body 56. Here, the Examiner finds that chamber 21 is “at least partially fixed by a lip [25] and ridge [50].” Ans. 26; *see also* Final Act. 4 (explaining how chamber 21 fixedly extends through a side wall of Just’s body because “the location of the chamber is fixed by a suspending lip” (citing Just, Figs. 3A and 3B; ¶ 72)). Appellant argues that Just’s

chamber 21 “loosely hangs from a ledge,” but “is certainly not fixed *to* the side wall nor relative to any other structure insofar as the basket may raise above the ledge.” Reply Br. 6 (emphasis added); *see also id.* at 5 (urging that “[f]ixedly’ is clear in that it requires attachment without relative movement.”). Without a firm definition in the Specification or other suitable evidence regarding the meaning of the term “fixed” which excludes the “partially fixed” arrangement disclosed in Just as found by the Examiner, such arguments amount to no more than mere attorney argument.

“Attorney’s argument in a brief cannot take the place of evidence.” *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Moreover, the claim does not require the chamber to be fixed “*to* the side wall,” as Appellant argues (Reply Br. 6), but rather requires the chamber to fixedly extend *through* a side wall. *See In re Self*, 671 F.2d 1344, 1348 (CCPA 1982) (“[A]ppellant’s arguments fail from the outset because . . . they are not based on limitations appearing in the claims.”).

Furthermore, to the extent Appellant is arguing for a construction of the term “fixed” to mean “completely fixed,” the Examiner applies additional obviousness rationale in the Answer regarding the chamber’s “bottom surface fixedly suspended in the water passageway” that Appellant does not fully address. *See Ans. 26*

(Furthermore, completely fixing the location of the bottom is considered to be obvious to a person having ordinary skill in the art . . . [because] Just suggests . . . a desire to maintain the bottom height of the basket at a specific location both high enough, and low enough, so that there is desired contact between the tablets and the water (See [0075]). Accordingly, it would have been obvious to a person having ordinary skill to provide for the bottom to be fixedly suspended in the water passageway in Just or Just and Lacrosse in order to provide for a desired height of

the tablets in the basket at both a high and low enough level for desired usage as suggested by Just.)

Appellant's argument in reply (Reply Br. 7) focuses on one embodiment expressly disclosed in Just, and does not address the Examiner's rationale to modify Just, or Just in view of Lacrosse, to provide such "complete" fixing. Here, the Supreme Court of the United States counsels us that the "obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007). Thus, to the extent that "fixedly" is even properly construed as "complete" fixing as seemingly argued by Appellant, the Examiner has set forth an obviousness rationale that Appellant does not fully address. Ans. 26; Reply Br. 7.

For these reasons, and those provided by the Examiner, Appellant has not identified reversible error in the Examiner's obviousness rejections of claims 1, 3–12, and 22. We, therefore, sustain the Examiner's rejections of these claims.

*Rejection of claims 13–19 and 23 under 35 U.S.C. § 103(a)*

Appellant presents arguments only directed to independent claim 13. We, therefore, select this claim as representative and decide the appeal on the basis of claim 13 alone.<sup>5</sup> 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>5</sup> We need not consider Appellant's argument regarding claim 23 because the argument relies on limitations appearing in the claim that lack written descriptive support. App. Br. 13.

Appellant relies on the same deficient arguments for reversal of the rejection of claim 13 as relied on for claim 1. App. Br. 12–13. Having found such arguments to be unpersuasive for claim 1, we likewise find them unpersuasive for claim 13 for the same reasons.

Thus, the Examiner’s rejections of claims 13–19 and 23 are sustained.

#### DECISION

The Examiner’s objection to the Specification is affirmed.

The Examiner’s final decision to reject claims 1, 3–19, 22, and 23 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).

AFFIRMED