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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL BUCHOLTZ, RONALD SUPRANOWICZ,
and JOHN BELFANCE

Appeal 2018-002139
Application 12/992,749
Technology Center 3700

Before BRUCE T. WIEDER, AMEE A. SHAH, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

SHAH, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), the Appellant¹ appeals from the Examiner's decision to reject claims 14–21, 23, 25, 27, 29, 33, and 36–46, which are all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. The Appellant identifies the real party in interest as “the assignee of the instant application, CSP Technologies, Inc.” Appeal Br. 2.

CLAIMED SUBJECT MATTER

The Appellant's invention "relates to containers that can be used, for example, to house test strips, pills, capsules, particulate materials, liquids, or other objects or materials and control the ingress and/or egress of moisture." Spec. ¶ 2. Particularly, the invention relates to "a moisture proof, resealable non-cylindrical container and lid assembly." *Id.* ¶ 4

Claims 14 and 38 are the independent claims. Claim 14 is illustrative of the subject matter on appeal and is reproduced below:

14. A moisture-tight, re-sealable container comprising:
 - a. a body that is generally elliptical in cross-section having a generally tubular sidewall with first and second axially opposed ends, a base, and a dispensing opening axially spaced from the base and at least adjacent to the second end;
 - b. an interior space disposed generally within the sidewall and at least generally between the base and the dispensing opening;
 - c. the generally tubular sidewall having a generally elliptical cross-section having a major diameter and a minor diameter, wherein the ratio between the major diameter and the minor diameter of the sidewall cross-section is a value between 1.1 : 1 and 10 : 1, inclusive;
 - d. a generally elliptical body sealing surface located on an exterior portion of the body and disposed about the dispensing opening, the body sealing surface having a major diameter and a minor diameter, wherein the ratio between the major diameter and the minor diameter of the body sealing surface is a value between 1.1 : 1 and 10 : 1, inclusive;
 - e. a lid configured to seat on the body, the lid being linked to the body by a hinge;
 - f. a lid sealing surface located on an interior portion of the lid, the lid comprising a lid sidewall extending from the lid sealing surface and terminating at a lid underside;

g. the body sealing surface and the lid sealing surface being configured to mate to form a seal between the lid and the body when the lid is seated on the body; and

h. the lid and lid sealing surface at least substantially closing the dispensing opening and isolating the interior space from ambient conditions, wherein the container is configured to store test strips such that exposed ends of the test strips extend beyond the entire dispensing opening of the body and wherein the exposed ends are positioned within the lid when the lid is seated on the body without damaging the exposed ends;

the container having a moisture ingress rate of 100–1000 micrograms per day, at 80% relative humidity and 22.2°C.

Appeal Br. 23 (Claims App.).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Moon	US 2,727,547	Dec. 20, 1955
Hagen et al. ("Hagen")	US 2003/0133847 A1	July 17, 2003
Giraud et al. ("Giraud")	US 7,059,492 B2	June 13, 2006
Boozer et al. ("Boozer")	US 2007/0080093 A1	Apr. 12, 2007

REJECTIONS

Claims 14, 27, 36–39, and 42–44 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hagen in view of Boozer.

Claims 14–21, 23, 25, 27, 33, and 36–46 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Giraud in view of Hagen.²

² We consider the Examiner's inclusion of claim 47 as harmless error.

Claim 29 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Giraud, Hagen, and further in view of Moon.

OPINION

*Hagen in view of Boozer*³

The Appellant argues claims 14, 27, 36–39, and 42–44 as a group. *See* Appeal Br. 14–21. We select claim 14 as representative of the group with the remaining claims standing or falling therewith. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Hagen teaches the limitations of the moisture-tight, re-sealable container of claim 14 except for “the lid being linked to the body by a hinge,” as recited in limitation e. Non-Final Act. 9. The Examiner finds that Boozer cures this deficiency and determines that “it would be known to one of ordinary skill in the art of moisture tight, non-round containers to provide hinge connections between lids and caps while maintaining the moisture-tight seal.” *Id.*

“The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious.” MANUAL OF PATENT EXAMINING PROCEDURE § 2142 (Jan. 2018) (“MPEP”). “[R]ejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

³ The rejections are considered in the order presented by the Examiner in the Non-Final Action.

Here, we agree with the Appellant’s contention that the Examiner does not provide adequate reasoning why one of ordinary skill in the art would combine Hagen and Boozer to reach the claimed invention. *See* Appeal Br. 19; Reply Br. 2. The Examiner concludes that it would be obvious to provide hinge connections, but does not identify a reason that would have prompted a person of ordinary skill in the art to combine Boozer’s living hinge element with Hagen’s container. *See KSR*, 550 U.S. at 418 (the analysis of “whether there was an apparent reason to combine the known elements in the fashion claimed . . . should be made explicit”).

Thus, based on the record before us, we are persuaded of Examiner error, and we do not sustain the obviousness rejection over Hagen and Boozer of claim 14 and of claims 27, 36–39, and 42–44, the rejection of which falls with claim 14.

Giraud in view of Hagen

Claims 14–21, 23, 25, 27, 33, 36, and 37⁴

The Appellant contends that the Examiner’s rejection of independent claim 14 as obvious over Giraud and Hagen is in error because “Hagen discourages a POSA [person of ordinary skill in the art] from using a hinge (Flip-Top feature) with the disclosed vial due to concerns surrounding achieving moisture tightness and is thus not properly combined with Giraud.” Appeal Br. 11. After careful review of the record, including the

⁴ Although the Appellant combines the arguments for independent claims 14 and 38 (Appeal Br. 11–14), we note they recite different limitations (*see id.* at 23 (Claims App.)). Thus, we separate the arguments based on our understanding of which arguments relate to which limitations of each claim.

Declarations, we are not persuaded that the Examiner erred for at least the reasons below.

The Examiner finds that Giraud teaches a moisture-tight re-sealable container with the claimed moisture ingress rate and having a body with a sidewall and ends, a base, a dispensing opening, an interior space, a lid sealing surface, and a body sealing surface as recited in limitations a through g. *See* Non-Final Act. 4–6. The Examiner further finds that Giraud teaches “the lid and lid sealing surface closes the dispensing opening and isolates the interior space from ambient conditions,” as partially recited in limitation h, but does not teach the remainder of limitation h reciting that “the container is configured to store test strips such that the entire exposed ends of the test strips extend beyond the dispensing opening of the vial body and wherein the exposed ends are positioned within the lid when the lid is seated on the body without damaging the exposed ends.” *Id.* at 6. The Examiner finds that Hagen teaches “a similar vial for test strips” where “the container is configured to store test strips such that exposed ends of the test strips extend beyond the dispensing opening of the vial body and wherein the ENTIRE exposed ends are positioned within the lid when the lid is seated on the body without damaging the exposed ends.” *Id.* (citing Hagen ¶ 60); *see also id.* at 13 (“it is the Hagen reference which discloses the positioning of the test strips and such is known in the art.”). The Examiner determines that one of ordinary skill in the art would “modify the container of Giraud with the configuration of test strips shown in Hagen that exposes the entire ends of the test strip beyond the dispensing opening of the vial body and are positioned within the lid, as such a configuration allows for easy manipulation of individual test strips.” *Id.* at 6 (citing Hagen ¶ 60).

The Appellant does not contest the Examiner's findings. *See* Appeal Br. 11 (“The issue is not that Hagen does not teach the Heightened Lid feature,” which the Appellant identifies as “where test strip ends extend beyond the dispensing opening and are positioned within the lid when closed without damaging the strip ends”). Rather, the Appellant argues that Hagen “teaches that a container having the features the Examiner purports are disclosed (Elliptical and Heightened Lid) best not include a hinge, if moisture tightness is desired.” *Id.* at 12 (citing Hagen ¶ 59). The Appellant argues that, thus, the combination would not have been “predictably capable of being combined to achieve moisture tightness.” *Id.*

The Examiner's rejection is not based on a bodily incorporation of Hagen's test strip dispenser (*see* Hagen, Abstract) into Giraud's “moisture proof re-sealable non-cylindrical container and cap assembly” (Giraud, Abstract). *See In re Keller*, 642 F.2d 413, 425 (CCPA 1981) (“The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference. . . Rather, the test is what the combined teaching of those references would have suggested to those of ordinary skill in the art.”). Here, the Examiner modifies Giraud's container with Hagen's teaching of a container configured to store test strips with exposed ends extending some amount beyond the body and not damaged when then the lid is closed. Hagen's “separable configuration” (Appeal Br. 11 (quoting Hagen ¶ 59)) is not relied upon or combined into Giraud's device. *See In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) (“Combining the teachings of the references does not involve an ability to combine their specific structures.”).

Thus, we are not persuaded of error by the Appellant's argument (*see* Appeal Br. 11–12; Reply Br. 6–7) that because Hagen's paragraph 59 provides that its "separable configuration advantageously enables substantially air and moisture tight seals to be created and maintained between the cover and base by a variety of means," one of ordinary skill in the art would be discouraged from combining Hagen's ability to store test strips with exposed ends that are not damaged when the lid is closed with Giraud's container.

We are also not persuaded of error by the Appellant's argument that because "the accepted wisdom in the art at the time the application was filed was that a POSA would not have reasonably expected to succeed in creating a moisture-tight container having (i) an elliptical shape with (ii) a flip-top and (iii) heightened lid," it would not have been obvious to combine Giraud and Hagen. Reply Br. 2 (citing Declaration of Michael Bucholz, Nov. 8, 2011); *see also* Appeal Br. 7–12. Here, the Examiner relies on Giraud for teaching a moisture-tight container having the features of an elliptical shape, a flip-top, and the lid as claimed. *See* Non-Final Act. 4–5. The Appellant argues that the difficulties in combining a "heightened lid" feature with the flip-top and elliptical features would have discouraged a person of ordinary skill in the art "because (s)he would have not expected to achieve moisture tightness with all Three Features." Appeal Br. 11 (emphases omitted); *see also* Reply Br. 6. The Appellant similarly argues that "[t]he Examiner's rejection failed to sufficiently articulate reasoning and evidence that a POSA would have viewed all Three Features **together** as **predictably** capable of being combined to achieve moisture tightness." *Id.* at 12; *see also* Reply Br. 2–3. However, the Appellant's premises for these arguments are not

commensurate with the scope of the claim. Claim 14 does not recite a limitation of “a heightened lid.” Although the Appellant defines the “Heightened Lid feature” as “where test strip ends extend beyond the dispensing opening and are positioned within the lid when closed without damaging the strip ends (*id.*), the Appellant describes the challenges with having a “heightened lid” being “designed such that the strips would somehow be rendered accessible and easily extractable, particularly by a patient who has finger swelling and/or arthritis secondary to diabetes,” such as by “vaulting the lid [to] reduce[] hoop strength (resistance to inward deflection) in the lid, particularly around the longer arcs of the elliptical cross-section” (*id.* at 10). And, these challenges are why “a POSA would expect the combination of all Three Features to disrupt the delicate balance maintained to achieve moisture tightness present in a container with only one or two of the Three Features.” *Id.* (emphases omitted). However, claim 14 recites only that “the container is configured to store test strips such that exposed ends of the test strips extend beyond the entire dispensing opening of the body and wherein the exposed ends are positioned within the lid when the lid is seated on the body without damaging the exposed ends.” *Id.* at 23 (Claims App.). The claim does not recite a specific part of the container and how it is so configured or designed, such as the lid having a specific height or structural vaulting designed to reduce hoop strength. Thus, the Appellant’s Declaration and argument are unpersuasive because they are not commensurate with the scope of claim 14.

The Appellant also argues that Giraud does not provide for a heightened lid. *See* Appeal Br. 12–13. Notwithstanding that the claim does not recite a heightened lid, *see supra*, we note that Giraud provides for a

container that can hold glucose test strips (Giraud, col. 2, ll. 56–60) with a cap having a seal that can be proportional to the height to the cap (*id.* at col. 3, l. 65–col. 4, l. 13). In other words, Giraud provides for a cap capable of many heights and having a recess of some height. *See also* Non-Final Act. 13 (the Examiner “disagrees” with the Appellant’s contention “that Giraud does not disclose a space between the lid sealing surface and the lid underside” and points the Giruad’s gap 81 and skirt 87 as that space). As such, Giruad teaches a lid as claimed that is capable of being able to store test strip ends.

Thus, based on the record before us, we are not persuaded of Examiner error, and we sustain the obviousness rejection over Giraud and Hagen of independent claim 14 and of dependent claims 15–21, 23, 25, 27, 33, 36, and 37, the rejection of which was not argued separately and thus stands with claim 14. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claims 38–46

The Appellant contends that the rejection of independent claim 38 is in error for the same reason the rejection of claim 14 is in error, i.e., because “Hagen discourages a POSA from using a hinge (Flip-Top feature) with the disclosed vial due to concerns surrounding achieving moisture tightness and is thus not properly combined with Giraud.” Appeal Br. 11; *see also id.* at 12–13. For the same reasons as discussed with reference to claim 14 above, we are not persuaded of error by this argument. We note that claim 38 does not recite a “heightened lid” as defined by the Appellant. *See id.* at 26 (Claims App.).

The Appellant also contends that Giraud, alone or in combination with Hagen, does not teach “the lid having a lid underside that is axially spaced

from the lid sealing surface and from the entire dispensing opening when the lid is seated on the body,” as recited in limitation f of independent claim 38. *See* Appeal Br. 12–13. Specifically, the Appellant argues that Giraud teaches that “[t]he ridge (74), the gap (81) and the skirt (87) combine to form an annular region for interlocking with the upper edge (62) . . . [such that] when the container in the above figure is closed, the lid underside (70) is flush with the upper edge (62) and the dispensing opening - not axially spaced therefrom, as claims 14 and 38 require.”⁵ *Id.* at 12–13.

The Examiner finds that “Giraud discloses a moisture-tight, re-sealable container comprising a body (Elements 10 and 12) having a generally tubular sidewall with first and second axially opposed ends, a base (Element 28), and a dispensing opening axially spaced from the base.” Non-Final Act. 4. The Examiner relies on Hagen as “disclos[ing] an alternative lid sealing surface (Element 8) located on an interior portion of the lid, the lid having a closed surface, and at least a portion of the lid closed surface is axially spaced from the dispensing opening when the lid is seated on the body.” *Id.* at 6.

The Appellant’s argument is unpersuasive because it is an argument against Giraud individually when the Examiner relies on the combination of Giraud and Hagen for this limitation. The test for obviousness is not what any one reference would have suggested, but rather what the combined teachings of the references would have suggested to those of ordinary skill in the art. *See In re Keller*, 642 F.2d at 426. “[O]ne cannot show non-

⁵ Although the Appellant includes claim 14 in this argument (Appeal Br. 13–14), claim 14 does not recite this limitation (*see id.* at 23 (Claims App.)).

obviousness by attacking references individually where, as here, the rejections are based on combinations of [the] references.” *Id.* The Appellant does not contest the Examiner’s finding regarding Hagen. Other than the argument that one of ordinary skill in the art would not combine Giraud with Hagen, which we find unpersuasive for the reasons discussed above, the Appellant has not provided reasoning or argument why the combination of Giraud and Hagen does not teach “the lid having a lid underside that is axially spaced from the lid sealing surface and from the entire dispensing opening when the lid is seated on the body,” as recited in limitation f.

Thus, based on the record before us, we are not persuaded of Examiner error, and we sustain the obviousness rejection over Giraud and Hagen of independent claim 38, and of dependent claims 39–46, the rejection of which was not argued separately and thus stands with claim 38. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Giraud in view of Hagen and further in view of Moon

The Examiner rejects claim 29, which ultimately depends from independent claim 14, as obvious over Giraud, Hagen, and Moon. The Appellant provides no separate argument for this rejection. Thus, for the same reasons we sustain the rejection of claim 14 as obvious over Giraud and Hagen, we also sustain the obviousness rejection of claim 29 over Giraud, Hagen, and Moon.

CONCLUSION

The Examiner’s decision to reject claims 14–21, 23, 25, 27, 29, 33, and 36–46 is sustained.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
14, 27, 36–39, 42–44	103(a)	Hagen, Boozer		14, 27, 36–39, 42–44
14–21, 23, 25, 27, 33, 36–46	103(a)	Giraud, Hagen	14–21, 23, 25, 27, 33, 36–46	
29	103(a)	Giraud, Hagen, Moon	29	
Overall Outcome			14–21, 23, 25, 27, 29, 33, 36–46	

TIME PERIOD FOR RESPONSE

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