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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte BRIAN CHAN, HAMID BADIEI, and JAMES BOTELHO¹

Appeal 2018-003029
Application 13/624,351
Technology Center 3700

Before DANIEL S. SONG, WILLIAM A. CAPP, and
BRENT M. DOUGAL, *Administrative Patent Judges*.

SONG, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

The Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's Final Office Action ("Final Act.") rejecting claims 1–20 and 139–141.

Claim 142 is indicated to be allowable if re-written in independent form (Final Act. 2). We have jurisdiction under 35 U.S.C. §§ 6(b) and 134(a).

We AFFIRM.

¹ Collectively referred to as "Appellant" herein. The Appellant identifies the real party in interest as PerkinElmer Health Sciences, Inc. (Appeal Brief ("App. Br.") 3).

The claimed invention is directed to a manifold (Abstract).

Representative independent claim 1 reads as follows (App. Br. 35, Claims App'x, emphasis added):

1. A vacuum manifold comprising:

a housing comprising a first port configured to provide fluidic coupling between a sampling interface line and the manifold;

a second port on the housing that is configured to provide fluidic coupling between a pump backing line and the manifold;

a third port on the housing that is configured to provide fluidic coupling between a mechanical roughing pump and the manifold; and

a moveable sealing member in the vacuum manifold, in which the moveable sealing member comprises a head comprising a first position configured to engage an inner surface of the housing at the second port to permit gas flow between the first port and the third port and effective to block gas flow from the second port, in which the moveable sealing member comprises a second position of the head configured to engage an inner surface of the housing at the first port to permit gas flow between the second port and the third port and effective to block fluid flow from the first port, and in which the moveable sealing member further comprises a third position of the head configured to position the head within an internal space of the housing to permit gas flow between the first port, the second port and the third port, in which the head of sealing member is configured to move incrementally away from the first port to permit gas flow through the first port at a selected gas-conductance into the housing of the vacuum manifold.

REJECTIONS

1. The Examiner rejects claims 1–3, 5, 12–13, 19–20, and 139 under 35 U.S.C. § 102(b) as anticipated by Lodolo (U.S. 2006/0130912 A1, pub. Jun. 22, 2006) (Final Act. 2).

The Examiner also rejects various claims under 35 U.S.C. § 103 as follows:

2. Claim 4 as obvious over Lodolo in view of Odaira (U.S. 5,443,241, iss. Aug. 22, 1995) (Final Act. 5).
3. Claims 6–11 as obvious over Lodolo in view of Kannoo (U.S. 2010/0108925 A1, pub. May 6, 2010) (Final Act. 6).
4. Claim 14 as obvious over Lodolo in view of Hahn (U.S. 2,916,061, iss. Dec. 8, 1959) (Final Act. 8).
5. Claims 15 and 16 as obvious over Lodolo in view of Hahn and Kannoo (Final Act. 9).
6. Claims 17 and 18 as obvious over Lodolo in view of Crochet (U.S. 6,053,200, iss. Apr. 25, 2000) (Final Act. 10).
7. Claim 139 as obvious over Lodolo (Final Act. 10).
8. Claims 1 and 140 as obvious over Seyfarth (U.S. 2011/0174969 A1, pub. Jul. 21, 2011) in view of Lodolo (Final Act. 10).
9. Claim 141 as obvious over Seyfarth in view of Lodolo and Holland (U.S. 7,438,534 B2, iss. Oct. 21, 2008) (Final Act. 12).

ANALYSIS

Only those arguments actually made by the Appellant have been considered in this decision. Arguments that the Appellant could have made but chose not to make have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv); *In re Jung*, 637 F.3d 1356, 1365–66 (Fed. Cir. 2011); *Ex parte Frye*, 94 USPQ2d 1072, 1075–76 (BPAI 2010 (precedential)).

Rejection 1

The Examiner rejects claims 1–3, 5, 12–13, 19–20, and 139 as anticipated by Lodolo (Final Act. 2–5). In rejecting independent claim 1, the Examiner identifies the elements of Lodolo that correspond to the structural limitations recited in claim 1 (Final Act. 3–4). We adopt these findings as our own, and address the Appellant’s arguments below.

Initially, the Appellant submits various arguments directed to the embodiment shown in Figure 5 of Lodolo (App. Br. 14–15), and further argues that “an outlet 308 is specified in FIG. 5 of Lodolo (and in FIGS. 1a, 1b and 3), but no such outlet is shown in FIG. 6.” (App. Br. 16). However, these arguments are unpersuasive because as the Examiner explains, “[F]igure 6 of Lodolo has been consistently used in the rejection.” (Ans. 12). In setting forth the rejection, the Examiner explained that “Lodolo discloses a vacuum manifold (generally in [F]igures 5 and 6, specifically the configuration of [F]igure 6 but with like reference numerals from [F]igure 5 being used for the purposes of clarity of portions of the

manifold.” (Final Act. 3). It is clear that the Examiner relies on Figure 5 of Lodolo to provide the reference numerals for the various ports of the valve, but relies on Figure 6 for the actual valve in rejecting claim 1 (Final Act. 2–3). Moreover, the lack of reference numerals and corresponding lead lines for outlets in Figure 6 of Lodolo does not mean such outlet is not present in Figure 6. Indeed, the presence in Figure 6 of the outlets enumerated in Figure 5 is evident by mere review of these figures. As explained, “[t]he Examiner has previously pointed out that [F]igure 6 does lack some specific reference numerals but reference numerals pointing to equivalent features from [F]igure 5 have been used. Figure 5 shows the claimed ‘third port’ at 308 which is the same location/port as shown in [F]igure 6.” (Ans. 13).

The Appellant also argues that as to the embodiment of Figure 6, because “the entire description of Lodolo is directed to liquid valves,” it “does not support use or configuration of [Lodolo’s] 3-way liquid valve in gas flows or under vacuum” as specified in claim 1 (App. Br. 15). However, we agree with the Examiner that the recitations pertaining to “gas flow” and “vacuum” in the claims “are merely intended use recitations of the claimed structure.” (Ans. 12). We also agree with the Examiner that “the recitations of the valve being configured for use with an inductively coupled plasma mass spectrometer system, or other components are intended use recitations” as well and not entitled to patentable weight (Ans. 14). Indeed, as pointed out by the Examiner,

A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

(Ans. 12). *See also In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997) (“[r]ecitation of a new intended use for an old product does not make a claim to that old product patentable”). To any extent that such language can be considered functional, we observe that “[c]laims drawn to an apparatus must distinguish from the prior art in terms of structure rather than function.” *In re Danly*, 263 F.2d 844, 848 (CCPA 1959). We agree with the Examiner’s finding that Lodolo discloses “a manifold that meets the structural limitations of the Appellant’s manifold,” and as such, it is “capable of being used ‘to provide fluidic coupling’ and ‘to permit gas flow’.” (Ans. 12). The Examiner is also correct that “[t]he Appellant has not pointed to any specific *structural limitations* in the Appellant’s claim that do not appear in the Lodolo reference.” (Ans. 12).

Accordingly, there is a reasonable basis to conclude that the structure of the prior art is capable of performing the claimed function, and the burden shifts to the Appellant to show that the claimed function patentably distinguishes the claimed structure from the prior art structure. *See Schreiber*, 128 F.3d at 1478; *In re Hallman*, 655 F.2d 212, 215 (CCPA 1981). The Appellant has not carried its burden.

As to the preamble reciting a “vacuum manifold,” we observe that “a preamble is not limiting ‘where a patentee defines a structurally complete invention in the claim body and uses the preamble only to state a purpose or intended use for the invention.’” *Catalina Marketing Int’l., Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002). Thus, we further agree with the Examiner that “titling the manifold as ‘A vacuum manifold’

does not structurally define or differentiate over the manifold of Lodolo.” (Ans. 12).

The Appellant also argues that “the valve shown in FIG. 6 of Lodolo appears to have only two operable positions - drain and fill,” and as such, Lodolo does not disclose the recited “third position.” (App. Br. 16). However, we agree with the Examiner’s finding that “Lodolo would of course have such an intermediate position when the valve is moving from closing of the first port to the closing of the second port.” (Ans. 13). The Appellant responds that the Examiner “has not provided any evidence whatsoever that such a transient position necessarily and unavoidably would result in the same position or structural configuration as the components recited in claim 1.” (Reply Br. 3). However, the Appellant entirely ignores the operation of the apparatus of Lodolo, wherein the shutters are moved from the open to the closed position, and vice versa, such that the shutters transition through a partially open/partially closed position that corresponds to the recited third position. The Appellant relatedly argues that “a vacuum manifold configured to provide a ‘selected gas conductance’ has not been properly addressed.” (Reply Br. 4). However, by the virtue of controlling the extent to which the shutters are opened, the extent of conductance is selected. Accordingly, in view of the above considerations, we are not persuaded that the Examiner erred in rejecting claim 1.

In addition to relying on the dependency on claim 1 for the patentability of claims 2, 3, 5, 12, 13, 17–20, and 139 (App. Br. 16), the Appellant argues each claim separately in its Appeal Brief, stating, for example, “[w]ith reference to claim 2, which should be considered

separately by the Board . . .” (*See* App. Br. 16, *see also, e.g.*, App. Br. 17, 18). However, the Appellant submits many of the same arguments based on the language pertaining to the intended use of the various ports, use for controlling gas flow, as well as arguments pertaining to the recited “third position.” These arguments are unpersuasive and have been already addressed above relative to claim 1. Accordingly, we generally do not repeat such arguments and analysis below with respect to the remaining dependent claims, but instead, address previously unaddressed arguments pertaining to limitations of the dependent claims.

Claim 2

The Appellant argues that “[t]he shutters 401a, 401b of Lodolo are separate elements and not properly considered a head as recited in the claims.” (App. Br. 17). However, we agree with the Examiner (Ans. 13) that shutters 401a and 401b of Lodolo sealing devices form the head in the same manner as the Appellant’s invention. The fact that Lodolo utilized the term “shutter” instead of the term “head” is not patentably significant.

The Appellant also argues that “[t]he Office bears the burden of providing some objective evidence that Lodolo’s liquid valve configurations would work as a vacuum manifold,” but that no such evidence has been provided (App. Br. 17). However, because there is a reasonable basis to conclude that the structure of the prior art is capable of performing the claimed function, it is the Appellant’s burden to show that the claimed function patentably distinguishes the claimed structure from the prior art

structure. *See Schreiber*, 128 F.3d at 1478; *In re Hallman*, 655 F.2d 212, 215 (CCPA 1981).

Claim 3

The Appellant argues that “[t]he specific structure of claim 3 which engages the inner surface of the housing to control the gas flow into the manifold through a first port is not met by anything in Lodolo.” (App. Br. 17). This assertion is unpersuasive and we agree with the Examiner’s finding that “the surface of the valve head engages an inner surface of the housing at the first port as shown in [F]igure 6 and provides a substantially fluid tight seal and also in the same manner as the Appellant’s device.” (Ans. 13; *see* Lodolo, Fig. 6).

Claim 5

The Appellant argues that the rejection refers to “screw system 416” of Lodolo, but that configuration pertains to using “external shutters” and lacks sealing members inside the manifold of Lodolo (App. Br. 18). The basis for this argument is unfounded because shutters 401a and 401b are identified in Lodolo as “internal shutters” and Figure 6 clearly show these shutters being positioned inside the manifold (Lodolo ¶ 54; Fig. 6).

Claim 12

The Appellant argues that “the shutters of Lodolo seemingly can only provide liquid flow between a fill port and a drain port. There does not appear to be any structure similar to the third port of the claims in Lodolo.”

(App. Br. 19). However, as the Examiner finds, “Lodolo discloses a third port at 308” (Ans. 14), the structure of which is also shown in Figure 6, albeit not numbered.

Claim 13

The Appellant’s arguments pertaining to claim 13 have already been substantively addressed.

Claim 19

The Appellant argues that “[i]t would be odd (and [almost] certainly inoperable) to use a liquid valve in place of the vacuum manifold of a mass spectrometer since mass spectrometers use vacuum pressure for proper operation rather than the positive pressure provided by Lodolo’s hydraulic valves,” and that the Examiner has not provided objective evidence that Lodolo’s valve would be operable with inductively coupled plasma or when used with a vacuum (App. Br. 20). However, the evidentiary burden lies with the Appellant, and mere attorney argument is no substitute for such evidence. *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005); *In re Schulze*, 346 F.2d 600, 602 (CCPA 1965) (“Argument in the brief does not take the place of evidence in the record.”).

The Appellant argues that “introducing a liquid directly into a plasma would likely extinguish the plasma.” (App. Br. 20). However, this argument is unpersuasive and misdirected because the rejection does not suggest using liquid in an inductively coupled plasma mass spectrometer system.

Claim 20

Claim 20 recites that the sealing member is moved between its positions “without using any mechanical valves.” (App. Br. 40, Claims App’x). The Appellant argues that:

It would appear that use of the screw system 416 in Lodolo to cause movement of the shutters is effectively a mechanical valve, even though it may not be called that. The Office has not addressed how this mechanical movement of shutters would not properly be considered a mechanical valve.

(App. Br. 21).

However, the Appellant’s argument that characterizes the screw system 416 as a valve is without merit. Nothing in the screw system 416 supports that characterization. While the entire device of Lodolo is a valve, same can be said of the Appellant’s claimed “manifold.” The Examiner is correct that “head of the valve in the embodiment of [F]igure 6 of Lodolo is moved by a screw wheel actuation assembly with no mechanical valves present to move the head.” (Ans. 14).

Claim 139

The Appellant’s arguments pertaining to claim 139 have already been substantively addressed above.

Therefore, in view of the above considerations, Rejection 1 is affirmed.

Rejection 2

Claim 4 stands rejected as obvious over Lodolo in view of Odaira (Final Act. 5). The Appellant submits separate arguments with respect to this rejection (App. Br. 22–23), as well as other rejections addressed below, arguing each claim separately in its Appeal Brief (*see, e.g.*, App. Br. 24–28). However, the Appellant submits many of the same unpersuasive arguments based on the language pertaining to the intended use of the various ports, use for controlling gas flow, as well as arguments pertaining to the recited “third position.” We again generally do not repeat the same arguments and analysis in addressing this rejection, and other rejections below, but limit our analysis to new arguments.

The Appellant asserts that combination of Lodolo and Odaira fails to disclose “a sealing device comprising a first O-ring that is between the head of the sealing device and the second port when the head of the sealing member is in the first position, and a second O-ring that is between the head of the sealing device and the first port when the head of the sealing member is in the second position.” (App. Br. 22–23). The basis of this assertion is unfounded. The Examiner’s rejection states “Odaira teaches the use of O-rings on sealing devices that are between the head of a sealing device and the fluid ports (see [F]ig. 2 and unlabeled O-rings on both 68 and 70 that contact 64, 66).” (Final Act. 6). Application of Odaira’s O-rings to the device of Lodolo in the manner set forth in the rejection satisfies this limitation.

The Appellant’s argument that “the valve of Odaira appears to be used to permit/prevent flow of liquid (hot water)” instead of vacuum and gas flow

(App. Br. 23) is unpersuasive for reasons similar to those discussed relative to Lodolo. Moreover, this argument is also misdirected in that the rejection merely relies on Odaira for teaching of O-rings and placement thereof, such teaching being applied to the device of Lodolo.

Therefore, in view of the above, Rejection 2 is affirmed.

Rejection 3

Claims 6–11 stand rejected as obvious over Lodolo in view of Kannoo, the Examiner finding that Lodolo discloses the claimed invention except for a step motor, Lodolo using a manually operated wheel for operation (Final Act. 6; *see also* Ans. 14). The Examiner finds that “Kannoo teaches the use of a motor that is a step motor that provides a certain amount of steps by the use of the motor (15, para. 58 describing motor as stepping motor).” (Final Act. 6). Accordingly, the Examiner concludes that it would have been obvious to a person of ordinary skill in the art to have

further modif[ied] Lodolo by having a stepping motor for the actuator as taught by Kannoo in order to provide an inexpensive, readily available, reliable means of automated actuation for the valve that provides for enhanced control of the positioning of the valve by providing a fixed amount of steps as taught by Kannoo.

(Final Act. 6; *see also* Ans. 14–15).

The Appellant argues that Kannoo’s use of a step motor “is in connection with a 4-way refrigerant valve and its use to suppress noise during operation,” that “[t]here is no suggestion in Lodolo to alter his system with a stepper motor used in the manner specified in Kannoo,” and that “no evidence has been provided that the person of ordinary skill in the art . . .

would be motivated to add or substitute Lodolo's components with components used in a 4-way refrigerant valve of Kanno." (App. Br. 24; *see also* Reply Br. 6).

The Appellant's arguments are unpersuasive because "[a] person of ordinary skill is also a person of ordinary creativity, not an automaton." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). *KSR*, 550 U.S. at 421. In addition, "when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result." *Id.* at 416. "[I]f a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill." *Id.* at 417.

The Appellant's claimed invention merely substitutes a known step motor for the manual wheel of Lodolo to automate the operation of the valve. Such a substitution using a known device in accordance with a known technique does not render the subject claim patentable. The Examiner has articulated a reason with rational underpinnings sufficient to support the conclusion of obviousness. *Id.* at 418.

Claim 7

Dependent claim 7 recites that "the sealing member comprises a plunger coupled to the actuator." (App. Br. 37, Claims App'x). The Appellant argues that:

it appears the Office is using FIG. 6 of Lodolo to be equivalent to a plunger, a disk and any other shape that it so chooses. See

pp. 6-7 of the final Office Action. It seems implausible that this single structural element in FIG. 6 could simultaneously be considered many different types of different structural configurations/components.”

(App. Br. 25).

Figure 6 of Lodolo shows the entire valve assembly with its many features. While Figure 6 does not provide reference numerals for most of these features, it nonetheless discloses them and these features satisfy the recited limitations. The Examiner is also correct that the Appellant does what it accuses the Examiner of doing in that “the claimed ‘sealing member’, ‘sealing member comprises a head’ and ‘sealing member comprises a plunger’ are in fact all the same structure.” (Ans. 15). Moreover, notwithstanding the fact that “disk” is not recited in claim 7 (“disk-shaped head” is recited in claim 8), such shape is also reasonably disclosed in Lodolo (*see* Lodolo, Figs. 2, 6; ¶ 35 (“The O-ring of the sliding shutter is indicated in the figure by reference A.”); ¶ 39 (“Therefore the abutment closure shutter allows to obtain, with the same travel and liquid passage cross-section, a smaller diameter of the opening and shutter.”)).

Claims 8–11

The Appellant’s arguments pertaining to claim 13 have already been substantively addressed above.

Therefore, in view of the above, Rejection 3 is affirmed.

Rejection 4

Claim 14 stands rejected as obvious over Lodolo in view of Hahn, the Examiner finding that Lodolo fails to disclose a bellows as recited (Final Act. 8). The Examiner finds that Hahn discloses a bellows for a shaft of a valve, and concludes that it would have been obvious to a person of ordinary skill in the art to provide a bellows in the device of Lodolo to both seal and bias the valve as taught by Hahn using “a single component instead of numerous components, [thereby] saving on cost.” (Final Act. 8).

The Appellant argues that “relief valve of [Hahn] designed to prevent overpressurization is very different than what is being claimed.” (App. Br. 28). However, this argument is unpersuasive and misdirected as the Examiner relies on Hahn for establishing that providing a bellows in a valve was well-known, and applies this teaching to Lodolo while providing a rational reason to do so. Therefore, we affirm Rejection 4.

Rejection 5

Claims 15 and 16 stand rejected as obvious over Lodolo in view of Hahn and Kannoo, the Examiner further relying on Kannoo for disclosing that its motor is a step motor, which would provide a certain amount of steps (Final Act. 9). In addition to unpersuasive arguments that have already been addressed above, the Appellant essentially reproduces claim 15, and asserts that the prior art fails to disclose the claim limitations (App. Br. 30; *see also* Reply Br. 7). However, a statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim. 37 C.F.R. 41.37(c)(1)(iv). A general allegation that the art does not

teach any of the claim limitations is no more than merely pointing out the claim limitations. Therefore, we affirm Rejection 5.

Rejection 6

Claims 17 and 18 stand rejected as obvious over Lodolo in view of Crochet (Final Act. 10), claim 17 reciting that the head of the sealing member comprises “a substantially inert metal material.” (App. Br. 39, Claims App’x). In pointing to the rejection, the Appellant argues that “fluorocarbon is not a substantially inert metal material that does not react with species in the gas flow. A fluorocarbon is not a metal material at all.” (Reply Br. 8). However, the Appellant ignores the fact that the rejection actually states that “Crochet teaches the use of substantially inert materials such as fluorocarbons for valve components and/or *stainless steel* (see col. 5, ll. 57 - col. 6, ll. 13, see also col. 4, ll. 3-8 describing valve head as being made of *stainless steel*).” (Final Act. 9, emphasis added). Therefore, because stainless steel is a substantially inert metal, we affirm Rejection 6.

Rejection 7

Claim 139 stands rejected as obvious over Lodolo (Final Act. 10). The Appellant does not submit separate arguments as to this claim, except for those addressed above relative to Rejection 1. Accordingly, we affirm Rejection 7.

Rejection 8

Claims 1 and 140 stand rejected as obvious over Seyfarth in view of Lodolo, the Examiner finding that Seyfarth discloses the invention as claimed, except that it does not disclose the details of the movable sealing member or the third position (Final Act. 10–11). The Examiner relies on Lodolo for disclosing details of the sealing member and the third position as applied relative to Rejection 1 to conclude that these claims would have been obvious to one of ordinary skill in the art (Final Act. 11).

The Appellant argues that “Seyfarth does not describe the different positions of the 3-way valve of claims 1 and 140,” or the “specific sealing member configurations specified.” (App. Br. 32). These arguments is unpersuasive because the Examiner applied the teachings of Lodolo to address these limitations. The Appellant also argues that “no objective evidence has been provided as to why the person of ordinary skill in the art would look to the liquid valves of Lodolo to cure or replace some component of the 3-way valve of Seyfarth.” (App. Br. 32). However, as explained by the Examiner,

Seyfarth discloses a vacuum manifold with a three-way valve. However, Seyfarth does not disclose the particular details of the valve components. Lodolo has been used to teach that it was known in the art to have a three-way valve with components similar to the components as claimed by the Appellant.

(Ans. 15).

We agree with the Examiner’s assessment that a person of ordinary skill would have been motivated to look in the art of fluid valves generally, both gas and liquid being fluids, in order to identify a suitable valve for the device of Seyfarth. We discern no structural difference, nor has the

Appellant apprised us of any difference, between liquid valves and gas valves, that supports the Appellant's assertion. Accordingly, we affirm Rejection 8.

Rejection 9

Claim 141 stands rejected as obvious over Seyfarth in view of Lodolo and Holland (Final Act. 12). The Appellant's arguments pertaining to claim 141 have already been substantively addressed above. Therefore, Rejection 9 is affirmed.

CONCLUSION

The Examiner's rejections of claims 1–20 and 139–141 are 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