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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/681,339	04/08/2015	Carl E. Whitcomb	WHIT/0057.B	4285
153901	7590	01/16/2019	EXAMINER	
Jeffrey L. Streets 20319 Corbin Creek Drive Cypress, TX 77433			PARSLEY, DAVID J	
			ART UNIT	PAPER NUMBER
			3643	
			NOTIFICATION DATE	DELIVERY MODE
			01/16/2019	ELECTRONIC

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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* CARL E. WHITCOMB<sup>1</sup>

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Appeal 2018-004669  
Application 14/681,339  
Technology Center 3600

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Before MICHAEL L. HOELTER, JEREMY M. PLENZLER, and  
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

Opinion for the Board filed by *Administrative Patent Judge* HOELTER

Opinion Dissenting-in-Part filed by *Administrative Patent Judge*  
PLENZLER

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from the Examiner's Non-Final Rejection of claims 1–21, which constitute all the claims pending in this application. App. Br. 2. We have jurisdiction under

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<sup>1</sup> The Application Data Sheet dated April 8, 2015 identifies Lacebark, Inc. as the applicant by way of an assignment. Thus, in accordance with 37 C.F.R. § 1.46, we understand Lacebark, Inc. is the Appellant. *See also* App. Br. 2.

35 U.S.C. § 6(b). For the reasons explained below, we AFFIRM the Examiner's rejections.

#### THE CLAIMED SUBJECT MATTER

The disclosed subject matter "relates generally to devices for watering a plant, and more particularly to devices for watering a plant growing in an individual container." Spec. ¶ 2. Apparatus claim 1 and system claim 11 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A water retention device for use with a plant container, comprising:

a plate structure including a central cover and a sidewall extending from a perimeter of the central cover, wherein the sidewall supports the central cover above a growth medium in the plant container; and

a linear trough formed in the central cover for receiving water from a drip tube, wherein the trough includes a plurality of holes for the passage of water from the trough to the growth medium within the plant container.

#### REFERENCES RELIED ON BY THE EXAMINER

Valente	US 4,403,443	Sept. 13, 1983
Meharg	US 5,184,421	Feb. 9, 1993
Peng	US 5,315,783	May 31, 1994
Manning	US 2005/0145716 A1	July 7, 2005

#### THE REJECTIONS ON APPEAL

Claims 7 and 17 are 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 applicant regards as the invention.

Claims 1–4, 8, and 11–14 are rejected under 35 U.S.C. § 102(b) as anticipated by Peng.

Claims 5–7 and 15–17 are rejected under 35 U.S.C. § 103(a) as unpatentable over Peng and Meharg.

Claims 9 and 18 are rejected under 35 U.S.C. § 103(a) as unpatentable over Peng and Valente.

Claims 10 and 19–21 are rejected under 35 U.S.C. § 103(a) as unpatentable over Peng and Manning.

### ANALYSIS

#### *The rejection of claims 7 and 17 as being indefinite*

With respect to each claim, the Examiner addresses the limitation “the slot” recited therein. *See* Non-Final Act. 3. The Examiner states, “[t]here is insufficient antecedent basis for this limitation in the claims.” Non-Final Act. 3. Appellant does not address this rejection in the Appeal Brief. *See* App. Br. 4. In the subsequent Examiner’s Answer, the Examiner states that “[i]t is noted that appellant has not provided any arguments with respect to the 35 U.S.C. 112(b) rejections of claims 7 and 17 detailed in the office action dated 12-19-17.”<sup>2</sup> Ans. 3. Appellant, again, does not address this rejection in the Reply Brief. *See* Reply Br. 2. Accordingly, we summarily sustain the Examiner’s rejection of claims 7 and 17 as being indefinite for the reasons expressed by the Examiner above.

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<sup>2</sup> Although the Examiner refers to 35 U.S.C. § 112(b), we understand the Examiner’s rejection is based on the pre-AIA version of this statute, namely 35 U.S.C. § 112, second paragraph. *See* Non-Final Office 2 (“The present application is being examined under the pre-AIA first to invent provisions.”).

*The rejection of claims 1–4, 8, and 11–14  
as anticipated by Peng*

Appellant argues claims 1–3, 8, and 11–13 together. App. Br. 12–16. Appellant also presents separate arguments for claims 4 and 14 (together). App. Br. 15–16. We select claims 1 and 4 for review, with the remaining claims (i.e., claims 2, 3, 8, and 11–14) standing or falling with their respectively grouped claim. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1

Independent claim 1 includes the limitation of “a plate structure.” The Examiner correlates this limitation to Peng’s “plant container comprising a plate structure – at 13.” Non-Final Act. 3. Claim 1 further recites that this “plate structure” includes “a central cover and a sidewall extending from a perimeter of the central cover.” The Examiner also correlates this limitation to Peng stating “see sides of 13 extending upward and downward along the thickness of 13 from the top and bottom perimeter.” Non-Final Act. 3. Appellant, however, contends that Peng “does not identify any portion of the pot cover 13 that disclose the claimed ‘central cover,’” and further, “any exposed edge or thickness of Peng’s pot cover 13 is merely a part of the pot cover and does not extend from any portion of the pot cover 13.” App. Br. 12, 13; *see also* Reply Br. 4.

In response, the Examiner addresses Figure 1C of Peng which, according to the Examiner, discloses multiple perimeters including “the perimeter around the top edge and another perimeter around the bottom edge.” Ans. 3. The Examiner reaffirms the recited “sidewall” as “being the thickness of the cover – at 13, extending downwardly from the top edge perimeter and upwardly from the bottom edge perimeter.” Ans. 3.

Appellant objects stating “the ‘thickness of the cover’ is not a sidewall.” Reply Br. 3. According to Appellant, “[t]he Examiner’s interpretation of the term ‘sidewall’ is unreasonably broad, since it would mean that every material having more than an infinitesimal thickness would have a sidewall.” Reply Br. 3. However, Appellant does not explain how there is not a sidewall associated with every material that has more than an infinitesimal thickness.

Appellant also contends that one skilled in the art “would consider a sidewall to be a separate structure having its own thickness, not merely formed by the thickness of the cover 13.” Reply Br. 3. However, this requirement of a sidewall being a separate structure and having its own thickness is not consistent with the language of claim 1 as presently presented. As indicated above, claim 1 merely recites “a plate structure including a central cover and a sidewall extending from a perimeter of the central cover.” There is no requirement that the sidewall be a “separate structure” as Appellant argues (*see* Reply Br. 3), only that the “plate structure” includes a sidewall (extending from the cover), and Appellant does not explain how Peng’s corresponding “plate structure” 13 lacks this structure. Regarding the claim recitation of the “sidewall extending from a perimeter of the central cover,” it is clear from the Examiner’s findings that the Examiner correlates the top of Peng’s pot cover 13 as the “central cover,” with Peng’s sidewall extending therefrom.<sup>3</sup> *See* Ans. 3.

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<sup>3</sup> It may be that Appellant is confused as to what the sidewalls are to extend from. Claim 1 recites the sidewall extending from “a perimeter of the central cover” and not from a perimeter of the “plate structure.” This is evident from Appellant’s assertion, “[r]ather, any exposed edge or thickness

Appellant further contends, “Peng does not disclose ‘wherein *the sidewall supports the central cover above a growth medium in the plant container.*’” App. Br. 13. More specifically, Appellant asserts that Peng’s “pot cover 13 does not include any structure that [meets this limitation].” App. Br. 14; Reply Br. 5. However, with the understanding of the recited “central cover” corresponding to the top of Peng’s plate structure 13 as expressed by the Examiner (*see supra*), Appellant does not explain how the thickness of Peng’s plate structure 13 fails to support that top surface above the growth medium. *See also* Ans. 3 (“As seen in [Peng] figure 4, the sidewall not labeled but shown at the edge of the top cover, contacts the upper portion of the plant container and upper ledge of the plant container – at 1D *and this connection/contact between the cover sidewall and the plant container allows for the entire cover – at 13 to be supported above the growth medium*” (emphasis added)).

Appellant also contends, “Peng does not disclose ‘a **linear trough formed in the central cover.**’” App. Br. 14. The Examiner finds that “linear troughs are formed at items 133” and that “[i]tems 133 of Peng, have gaps between them [such that] any water from rain or dew on the cover is funneled to opening – at 132.” Ans. 4; *see also* Non-Final Act. 4. In short, “items 133 of Peng in combination form a trough structure that functions as a trough.” Ans. 4. Appellant states that a skilled person “would understand the word ‘trough’ to refer to **an elongate and shallow receptacle that is open along the length of the top.**” App. Br. 14; Reply Br. 6. Accordingly,

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of Peng’s pot cover 13 merely defines a perimeter of the pot cover and does not in any way ‘extend’ from any portion of the pot cover 13.” Reply Br. 4; *cf.* Non-Final Act. 3 (“Peng’s pot cover 13” being equated to Peng’s “plate structure – at 13.”).

as per Appellant, a skilled person “would not interpret a flat surface having a plurality of protrusions 133, as disclosed by Peng, to include or be ‘a trough’” and that “[t]here is nothing about Peng’s ‘pot cover 13’ or the asserted ‘between items 133’ that disclose ‘a trough.’” App. Br. 14. Appellant further states, “[t]here is nothing about [Peng’s] cover 13 that would form a receptacle.” Reply Br. 6.

Regarding only the requirement of a “trough” (the “linear” component of this trough will be discussed below), Appellant does not make clear how a combination of Peng’s protrusions 133, having a valley between them, is not, as defined, a “shallow receptacle that is open along the length of the top.” *See supra*. Peng specifically describes the purpose of protrusions 133 and bottom holes 132 as being “to collect rain water and dews effectively” and to channel such moisture “onto the soil **90** through the water dropping holes **132**.” Peng 3:4–11; *see also* Non-Final Act. 4. Hence, we do not find the Examiner erred in ascertaining that Peng’s protrusions 133 “function[] as a trough” as this term is defined by Appellant. Ans. 4.

Regarding the requirement of this “trough” be “linear,” Appellant contends that “those arcuate protrusions 133 do not form a ‘linear trough’” (App. Br. 14) and that claim 1 is “directed to ‘a linear trough’” (Reply Br. 6). The Examiner disagrees stating, “[a]s seen in figures 1C and 4 of Peng, linear troughs are formed at items 133.” Ans. 3–4.

A review of Peng’s figures shows protrusions 133 being arranged in a distinct row and column formation, i.e., they are not randomly located. As to be expected, such rows and columns are each arranged linearly in an orthogonal pattern with respect to each other, with holes 132 likewise being linearly aligned between the protrusions 133. The Examiner notes this

stating that Peng's "troughs" "are long as seen in figures 1C and 4 where the troughs extend[] along the length/width of the cover assembly at 13."

Ans. 4. Accordingly, Appellant's arguments to the contrary are not persuasive.

#### Claim 4

Claim 4 includes the additional recitation of the trough having "first and second ends that have a tapered depth." The Examiner references Figure 4 of Peng as disclosing "tapered troughs." Non-Final Act. 4; *see also* Ans. 4 (finding "the troughs formed at 133, taper down from the top of the trough to the bottom of the trough along the length of the trough including the ends of the troughs"). Appellant contends, "it must be kept in mind that the pot cover 13 has a plurality of 'arcuate protrusions 133' spread out across the surface of the pot cover 13 as shown in FIG. 1C." App. Br. 15; *see also* Reply Br. 7. While this is indeed the case (i.e., Peng's protrusions 133 are spread out across a surface), Appellant's contention has no bearing on whether these protrusions that form the recited "trough" are "tapered" or not. Figure 4 of Peng clearly discloses protrusions 133 being tapered from an apex to the valley between adjacent protrusions. Thus, Appellant's contention that "[t]he rejection is merely conclusory" and that a skilled person "would not understand Peng as disclosing a linear trough having first and second ends that have a tapered depth" is not persuasive of Examiner error. App. Br. 16; *see also* Reply Br. 7.

Accordingly, and based on the record presented, we sustain the Examiner's rejection of claims 1-4, 8, and 11-14 as being anticipated by Peng.

*The rejection of claims 5–7 and 15–17  
as being unpatentable over Peng and Meharg*

Appellant contends “[c]aims 5–7 and 15–17 depend from independent claims 1 and 11, respectively, and are asserted to be patentable for at least the same reasons as independent claims 1 and 11.” App. Br. 17. For the reasons previously expressed, we do not find fault with the Examiner’s rejection of claims 1 and 11. Accordingly, we likewise sustain the Examiner’s rejection of claims 5–7 and 15–17 as being unpatentable over Peng and Meharg.

*The rejection of claims 9 and 18  
as unpatentable over Peng and Valente*

Appellant argues claims 9 and 18 together. App. Br. 17–19. We select claim 9 for review, with claim 18 standing or falling therewith.

Claim 9 depends directly from claim 1 and includes the additional limitation, “wherein the sidewall includes an outwardly-extending rim, and wherein at least a portion of the rim engages an inner surface of the plant container.” The Examiner relies on the teachings of Valente for this additional limitation, noting Valente’s “outwardly-extending rim – at 3, 13.” Non-Final Act. 6. The Examiner’s reason for adding Valente’s rim is “so as to yield the predictable result of removably securing the device to the pot as desired.” Non-Final Act. 6; *see also* Ans. 5 (“Having an outwardly extending sidewall as disclosed by Peng and enhanced by the disclosure of Valente yields the predictable result of ensuring there is a larger surface area of the sidewall contacting the plant container to ensure that there is a secure connection.”). Appellant disagrees stating, “there is no suggestion to combine: (a) Valente’s integral, one-piece construction with a central portion 5 coupled to a peripheral flange ring 13 by a plurality of springs 11,

with (b) Peng's multi-piece pot cover 13." App. Br. 19; *see also* Reply Br. 8. "Appellant continues to assert that Valente's springs and peripheral ring would interfere with Peng's multi-piece pot cover" and that "Valente's integral, one-piece construction would change the principle of operation of Peng's multi-piece pot cover." Reply Br. 8; *see also* App. Br. 19. To be clear, Appellant states, "the rejection is really asserting that it would be obvious to add a sidewall to Peng and further [] to include the sidewall securing springs and peripheral ring of Valente." App. Br. 19.

Appellant's argument is not aligned with the Examiner's rejection. The Examiner is silent as to incorporating any additional structure from Valente (i.e., springs, etc.) other than Valente's "outwardly-extending rim." Non-Final Act. 6. Instead, Appellant is incorporating structure from Valente beyond that which the Examiner is relying upon, and presenting arguments based on the inclusion of such additional structure. Appellant does not explain how, focusing solely on Valente's rim, the incorporation of such rim into Peng would not have been obvious for the reasons stated. Appellant also contends that "Peng does not even have the necessary sidewall" (App. Br. 19), but this matter has been discussed and resolved above. In summation, Appellant's contention is not persuasive of Examiner error because Appellant is not arguing the Examiner's rejection.

Accordingly, and based on the record presented, we sustain the Examiner's rejection of claims 9 and 18 as being obvious over Peng and Valente.

*The rejection of claims 10 and 19–21  
as unpatentable over Peng and Manning*

Appellant separately argues each of dependent claims 20 and 21 and does not argue claim 10 (which depends from claim 1) or claim 19 (which depends from claim 20). We address claims 20 and 21 below. We also summarily sustain the Examiner’s rejection of claim 10 for lack of any argument and, as regarding claim 19, this claim stands or falls with claim 20.

Claim 20

Claim 20 depends from claim 11 and includes the additional limitation of “a drip tube extending through the linear trough and having at least one hole for supplying water into the linear trough.” The Examiner relies on Manning for disclosing “a drip tube – at 12, extending through the linear trough.” Non-Final Act. 7. However, the Examiner’s reason to combine the teachings of Peng and Manning is directed to Manning’s “staples” and how such staples “yield the predictable result of removably securing the device to a location as desired.” Non-Final Act. 7. It should be noted that claim 19 (which depends from claim 20) is directed to “staples,” but not claim 20. Appellant notes that the Examiner fails to provide any reason why it might have been obvious to combine the teachings of Peng and Manning with respect to a drip tube extending through the linear trough as recited in parent claim 20. *See App. Br. 20.*

In response, the Examiner again directs attention to the various structures disclosed in both Peng and Manning, i.e., that Peng’s troughs “are designed to collect water” and that Manning discloses a cover “having a drip tube.” Ans. 5. This time, however, the Examiner explains “adding a drip tube such as disclosed by Manning into the troughs – at 133 of Peng, allows

for the user to add water as desired such as [after] periods of drought and periods of little rain.” Ans. 5.

In reply, Appellant contends, “there is no evidence in Peng or Manning to support” the Examiner’s contentions that Peng’s troughs are sized to receive a drip tube and that the drip tubes in Peng’s troughs will be held via gravity and/or a contact/friction between Manning’s tube and Peng’s protrusions. Reply Br. 8, 9. In other words, “[n]either Peng nor Manning discuss their relative dimensions in a manner that would support these conclusions.” Reply Br. 9.

Appellant’s contentions are not persuasive. The Examiner notes Peng’s trough (as depicted in Figures 1C and 4 of Peng) is “designed to collect water.” Ans. 5. The Examiner further notes that Peng’s troughs “are sized to receive a round drip tube given the open top structure tapering downwardly as seen in figure 4 of Peng.” Ans. 5. Appellant argues that the cited art fails to “discuss their relative dimensions,” but Appellant does not dispute Peng’s teaching of a tapered, open-topped trough or the ability to insert a drip tube therein so as to allow a user to add water during dry periods. *See supra*.

Moreover, we do not understand the Examiner’s proposed combination as relying on bodily incorporation of Manning’s drip tube into Peng’s planting system. Rather, the Examiner properly took into account “the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007); *see also id.* at 421 (“A person of ordinary skill is also a person of ordinary creativity, not an automaton.”). In other words, based on the teachings Peng and Manning regarding watering, we find the Examiner’s determination that

one having ordinary skill in the art would have found it obvious to apply this technique to Peng's planting system is based on rational underpinning and is supported adequately by the teachings of the prior art.

Accordingly, we are not persuaded of Examiner error. We sustain the Examiner's rejection of claims 19 and 20.

Claim 21

Claim 21 depends from claim 20 and includes the limitation, "the linear trough has a diameter providing a friction fit with the drip tube." Similar to the above, the Examiner finds "where [Peng's] trough is of sufficient size to contact the drip tube with friction between the contacting surfaces." Non-Final Act. 7. The Examiner explains that the troughs of Peng "would allow for a friction fit between the drip tube and the troughs in that drip tubes placed in the troughs of Peng will be held in place via gravity forcing the drip tubes into contact with the walls of the troughs." Ans. 6. The Examiner states that this "contact/friction between the contacting surfaces keep[s] the drip tubes in place until the user decides to move the drip tubes." Ans. 6.

Appellant contends "that Peng does not teach 'a drip tube' and does not teach a 'friction fit' between a drip tube and the arcuate protrusions 133." App. Br. 21; *see also* Reply Br. 9. However, the Examiner is relying on Manning for disclosing the drip tube and that due to the open and tapered configuration of Peng's troughs, Manning's drip tube would have been held in place via a friction fit when inserted thereinto. *See supra*. Accordingly, we sustain the Examiner's rejection of claim 21 as being unpatentable over Peng and Manning.

Appeal 2018-004669  
Application 14/681,339

DECISION

The Examiner's rejection of claims 7 and 17 as being indefinite is affirmed.

The Examiner's art rejections of claims 1–21 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)(1)(iv).

AFFIRMED

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* CARL E. WHITCOMB

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Appeal 2018-004669  
Application 14/681,339  
Technology Center 3600

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Before MICHAEL L. HOELTER, JEREMY M. PLENZLER, and  
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*, dissenting-in-part.

I join the majority in summarily affirming the Examiner’s rejection of claims 7 and 17 as being indefinite based on failure by Appellant to respond to that rejection. Because I would determine that Appellant has identified reversible error in the Examiner’s rejection of claims 1–21 under 35 U.S.C. §§ 102(b) and 103(a), however, I respectfully dissent-in-part.

Claims 1 and 11 each require “a plate structure including a central cover and a sidewall extending from a perimeter of the central cover, wherein the sidewall supports the central cover above a growth medium in the plant container.”

The Examiner finds that Peng discloses each limitation recited in independent claims 1 and 11. Non-Final Act. 3–4. Peng’s Figure 1C and Figure 4 are reproduced below for reference.

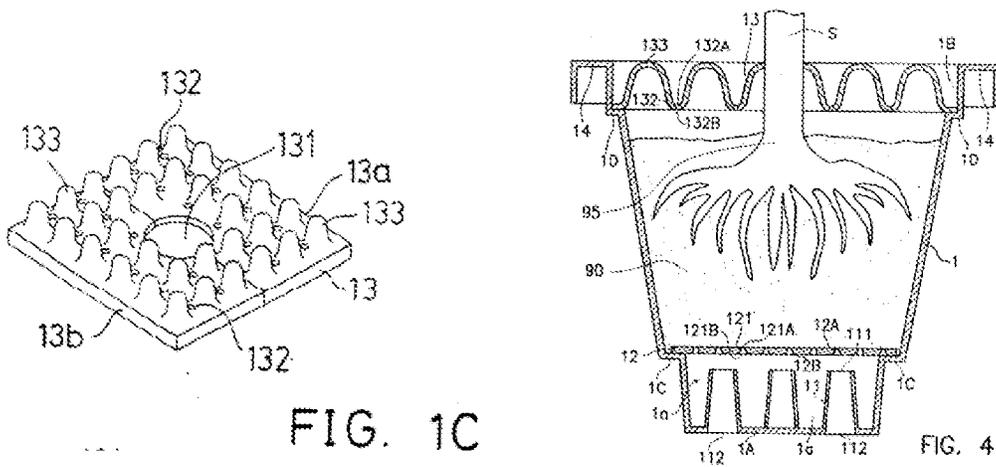


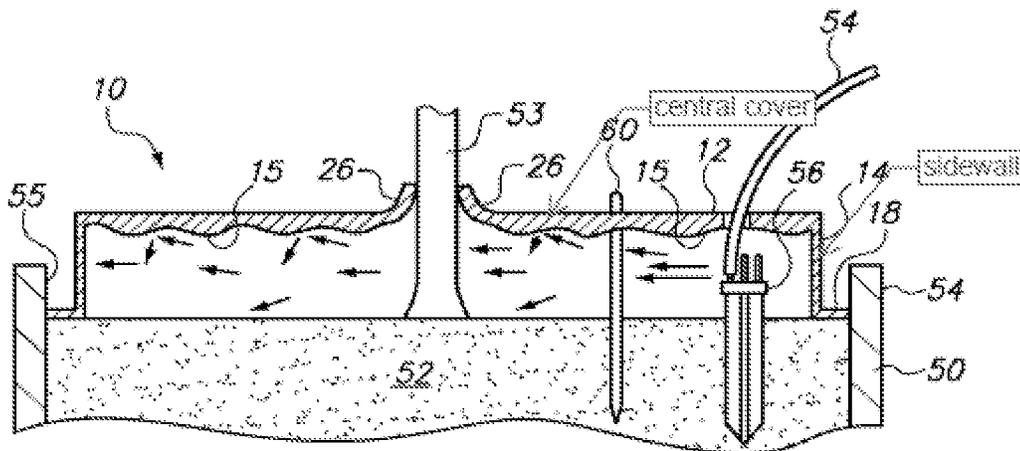
Figure 1C is a perspective view of a flower pot cover and Figure 4 is a section view of a flower pot with the cover from Figure 1C. The Examiner finds that

Peng discloses a water retention device for use with a plant container comprising, a plate structure - at 13, including a central cover and a sidewall extending from a perimeter of the central cover - see sides of 13 extending upward and downward along the thickness of 13 from the top and bottom perimeter, wherein the sidewall supports the central cover above a growth medium in the plant container - see figures 1 and 4.

Non-Final Act. 3-4. That is, the Examiner finds that the upper surface of cover 13 is the “central cover” portion of the “plate structure” and the longitudinal extent of its perimeter is the “sidewall extending from a perimeter of the central cover” because that perimeter portion extends from the upper surface of cover 13. *See* Ans. 3.

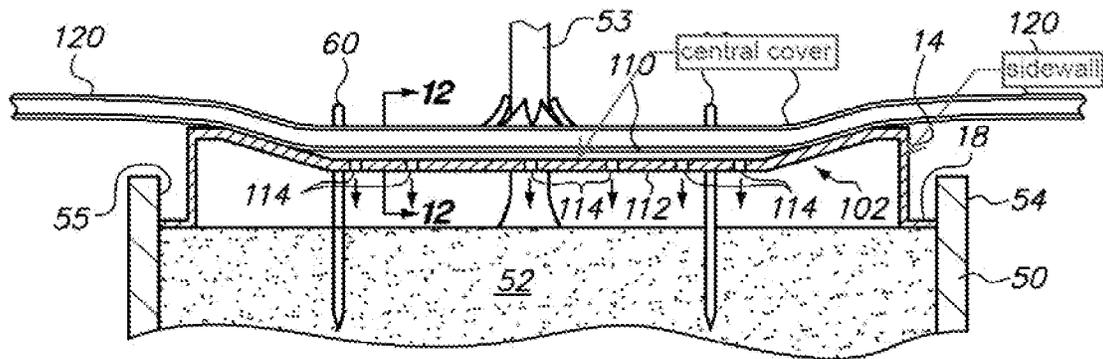
Appellant disputes the Examiner’s findings noted above, contending that those findings are based on an unreasonable construction of “central cover” and “sidewall.” Appeal Br. 12-14. I agree.

Based on the plain language of claims 1 and 11, we know that the sidewall portion of the plate structure is different than the perimeter of the central cover portion because the claims specifically recite that the “sidewall extend[s] from a perimeter of the central cover.” The “central cover” also requires something more than merely an upper surface of the plate structure. This is consistent with Appellant’s Specification, which explains, for example, that “plate structure 10 ha[s] . . . a sidewall 14 extending from a perimeter of the central cover 12” that “supports the central cover 12 at a sufficient distance above a growth medium in the plant container.” Spec. ¶ 30. This is illustrated, for example, in Figures 6 and 11, reproduced below, with annotations labeling the “central cover” and “sidewall.”



**FIG. 6**

Figure 6 a section view of one embodiment of Appellant’s water retention device with annotations labeling the “central cover” and “sidewall.”



**FIG. 11**

Figure 11 a section view of another embodiment of Appellant's water retention device with annotations labeling the "central cover" and "sidewall."

The "central cover" is the central portion of the "plate structure" (i.e., a three dimensional object) and cannot be considered, in any reasonable manner consistent with the Specification, as merely being a surface of that "plate structure." I would determine that the Examiner's rejections are deficient because the Examiner has failed to identify the structure of a "sidewall" required by claims 1 and 11.