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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JOSHUA MALONE

Appeal 2018-008578
Application 14/976,055
Technology Center 3700

Before CYNTHIA L. MURPHY, KENNETH G. SCHOPFER, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

SCHOPFER, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–7, 9–13, 15, 16, 18–21, 23, 24, and 26–30. 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. Appellant identifies the real party in interest as Tinnus Enterprises, LLC. Appeal Br. 2.

BACKGROUND

The Specification discloses “a system and method for filling containers with fluids.” Spec. ¶ 2.

CLAIMS

Claims 1, 10, 18, and 26 are the independent claims on appeal. Claim 1 is illustrative of the appealed claims and recites:

1. An apparatus for filling a plurality of balloons with a fluid, the apparatus comprising:
 - a fitting configured to couple to a fluid supply; and
 - a plurality of branch assemblies extending from the fitting, each branch assembly comprising:
 - a tube coupled to the fitting at a first end of the tube;
 - a balloon removably coupled to a second end of the tube, the balloon having a neck with an unstretched diameter greater than the diameter of the tube; and
 - a valve configured to automatically seal the opening of the balloon if the balloon is decoupled from the tube.

Appeal Br. 33.

REJECTIONS²

1. The Examiner rejects claims 10–13, 15, 16, 18–21, 23, 24, and 26–30 under 35 U.S.C. § 112(a) as failing to comply with the written description requirement.
2. The Examiner rejects claims 10–12, 15, 16, 18–20, 23, 24, and 26–30 under 35 U.S.C. § 112(a) as failing to comply with the enablement requirement.

² The Examiner’s rejection under 35 U.S.C. § 112(b) has been withdrawn. *See* Ans. 2.

3. The Examiner rejects claims 1–7 and 9 under 35 U.S.C § 102(a)(1) as anticipated by LuckyPennyShop.com.³
4. The Examiner rejects claims 10–13, 15, 16, 18–21, 23, 24, and 26–30 under 35 U.S.C. § 103 as unpatentable over Furey⁴ in view of Billon,⁵ Bonnet,⁶ Durst,⁷ Gill,⁸ and Fields.⁹
5. The Examiner rejects claims 1–7, 9–13, 15, 16, 18–21, 23, 24, and 26–30 on the ground of non-statutory double patenting as unpatentable over the claims of US Patent No. 9,242,749, US Patent No. 9,051,066, US Patent No. 9,527,612, US Patent No. 9,533,779, US Patent No. 9,682,789, US Patent No. 9,315,282, and US Patent Application No. 15/613,037.

DISCUSSION

Written Description

A. “*automatically-sealing container*”

The Examiner determines that the phrase “automatically-sealing container” in claims 10, 18, and 26 broadens the scope of the claims beyond that which is supported by the original disclosure. Final Act. 5. The Examiner relies on various references to show that there is “a very high level of structural variation within the genus of automatically-sealing containers.” *Id.* at 5–6. The Examiner determines

³ “Bunch O Balloons Review 100 water balloons in less than a minute!,” available at <https://www.youtube.com/watch?v=S1DaXYT6O2A>, pub. Aug. 5, 2014.

⁴ Furey et al., US 2005/0132821 A1, pub. June 23, 2005.

⁵ Billon, FR 2911512, pub. July 25, 2008.

⁶ Bonnet, US 5,444,962, iss. Aug. 29, 1995.

⁷ Durst, US 2014/0212074 A1, pub. July 31, 2014.

⁸ Gill, US 1,315,955, iss. Sept. 16, 1919.

⁹ Fields, US 2,629,379, iss. Feb. 24, 1953.

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Because the species of automatically-sealing container described in the original disclosure does not reflect the variety within the genus of automatically-sealing containers, and because one skilled in the art would not readily discern that other automatically-sealing containers would perform similarly to the species disclosed, claims 10-12, 15, 16, 18-20, 23, 24, and 26-30 do not comply with 112(a).

Id. at 6–7.

The test for sufficiency of the written description requires determining whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). A

sufficient description of a genus . . . requires the disclosure of either a representative number of species falling within the scope of the genus or structural features common to the members of the genus so that one of skill in the art can “visualize or recognize” the members of the genus.

Id. at 1350. Further, “the level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.* at 1351 (citing *Capon v. Eshhar*, 418 F.3d 1349, 1357–58 (Fed. Cir. 2005)).

Here, although the claim may be directed to a genus, we disagree with the Examiner that the claimed genus is any “automatically-sealing container.” Rather, the claim recites specific structure that limits the claimed genus to those “automatically-sealing container[s]” that have “a neck” that may be “disposed around and removably attached to a second end of the tube, such that the container, if sufficiently filled with water, is detachable by gravity or by gravity combined with a manually applied

acceleration of the tube.” *See* Claim 10. We note that the Examiner does not address the differences in the claimed genus and the broader genus of all “automatically-sealing container[s].”

Further, we agree with Appellant that when the appropriate genus is considered, the Specification provides adequate disclosure therefor. *See, e.g.,* Reply Br. 4–5; *see also* Appeal Br. 8–9. In particular, consistent with the claim language, the Specification discloses the genus as those containers that require force “to pull open the necks of containers 18, and removal of the force causes the necks to constrict and close.” Spec. ¶ 17. And the Specification likewise discloses several species within this disclosed genus including containers with various elastic valves including elastic fasteners, corrugations, smocking, elastic fibers, internal plugs, and external plugs through which the tubes 16 are inserted. *Id.* at ¶¶ 17, 18. The Specification further discloses that when such containers are filled with fluid they are removed from the tubes 16 and the valves automatically close. *Id.* at ¶ 18. We find this description is sufficient to reasonably convey that Appellant was in possession of the claimed genus at the time the application was filed.

Based on the foregoing, we are persuaded of reversible error with respect to this rejection of claim 10. Accordingly, we do not sustain the rejection of claim 10 as lacking adequate written description support. For the same reasons, we do not sustain this rejection of independent claims 18 and 26 or any of dependent claims 11–13, 15, 16, 19–21, 23, 24, and 27–30.

B. Claim 26 - “the fluid paths having no valve capable of stopping fluid”

The Examiner separately determines that written description support is lacking for the negative limitation “the fluid paths having no valve capable of stopping fluid” in claim 26. Final Act. 7. The Examiner finds

that this language is not supported in the original disclosure because “[t]he mere absence of a feature in the figures is not adequate support for a negative claim limitation” and “the valve is not disclosed in a list of alternative or optional elements.” *Id.*

We are persuaded of error in this rejection by Appellant’s arguments. *See* Appeal Br. 13–15. In particular, we agree with Appellant that Figures 1 and 3 depict fittings without and with a valve in the fluid path. Thus, contrary to the Examiner’s finding, the Specification does disclose a valve in the fitting as an alternative or optional element. We are not persuaded otherwise by the Examiner’s response.

In response to Appellant’s argument, the Examiner first finds that the valve depicted in Figure 3 is not in the fluid path defined by claim 26.

Claim 26 recites, *inter alia*,

a fitting comprising an inlet configured to connect to a fluid source and a bulkhead joining the at least three branch assemblies at respective second ends of their respective tubes, the fitting and the at least three branch assemblies at least partially defining fluid paths extending from a common point within the fitting to the inside of each container of the at least three branch assemblies, the fluid paths having no valve capable of stopping fluid at least while the containers of the at least three branch assemblies remain attached to their respective tubes.

Appeal Br. 37. We agree with Appellant that Figure 3 depicts a fitting 31 connecting the fluid source 14 to a bulkhead 12 that joins the branch assemblies 16. Further, this fitting at least partially defines the fluid path and includes a valve. Alternatively, Figure 1 depicts a fitting (above arrow A) that connects the fluid source to the bulkhead and does not include such a valve in the fluid path. Thus, we disagree with the Examiner that these figures do not depict alternative embodiments with and without valves.

Alternatively, the Examiner asserts that if valve 32 is considered within the fluid path, the figures do not show the entirety of the fluid path such that they cannot indicate whether a valve is present somewhere else along the fluid path in Figures 1 and 3. Ans. 10. To the extent the Examiner is asserting that a valve may be present anywhere along the fluid path of the embodiment in Figure 1 such that claim 26 would not read on this embodiment, we disagree. One would understand the claim language to require the absence of a valve within the fluid path as partially defined by the fitting and the at least three branch assemblies.

Based on the foregoing, we are persuaded of reversible error in this written description rejection of claim 26. Accordingly, we do not sustain this rejection of independent claim 26, and for the same reasons, we do not sustain this rejection of dependent claims 27–30.

Enablement

The Examiner determines that independent claims 10, 18, and 26 “contain subject matter which was not described in the specification in such a way as to enable one skilled in the art . . . to make and/or use the invention” based on the language “automatically-sealing container.” Final Act. 7. The Examiner finds that this claim language “is broad and functional terminology defining a genus of devices, whereas the pending disclosure enables only a single species of container which can seal automatically.” *Id.* Thus, the Examiner finds that “the scope of the claims is significantly greater than the scope of enablement in the application” because “[t]he claims cover every type of container that can seal automatically, including containers which have not been invented yet, and containers having structures substantially dissimilar to that enabled by the present application.” *Id.* at 7–8. Finally, the Examiner finds:

Regarding the Wands factors, the breadth of the claims is great, the nature of the invention is evident from the pending specification, the state of the prior art is evident from the cited references, the level of ordinary skill is considered to be average or moderate such as a person with an associate's degree in engineering or comparable professional experience, the level of predictability in the art is considered to be average or moderate, the amount of direction provided by the inventor and the existence of working examples consist of a single disclosed and enabled species of automatically-sealing container, and the quantity of experimentation needed to make or use the full scope of the claimed invention (*i.e.* every automatically-sealing container including those not yet invented) is very great and rises to the level undue experimentation.

Id. at 8.

The test for compliance with the enablement requirement is whether the disclosure, as filed, is sufficiently complete to enable one of ordinary skill in the art to make and use the claimed invention without undue experimentation. *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988).

“Enablement is not precluded by the necessity for some experimentation . . . However, experimentation needed to practice the invention must not be undue experimentation. The key word is ‘undue,’ not ‘experimentation.’”

Id. at 736–737 (citations omitted).

Here, we are persuaded of reversible error by Appellant's arguments. *See* Appeal Br. 15–16. Most notably, as we found above with respect to the written description rejection, we find that the Examiner's rejection focuses on a genus that is not commensurate with the narrower scope of the claims at issue. For example, claim 10 not only recites an “automatically-sealing container” but also further limits the structure and function of the container by requiring that the container includes “a neck disposed around and removably attached to a second end of the tube, such that the container, if

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sufficiently filled with water, is detachable by gravity or by gravity combined with a manually applied acceleration of the tube.” Appeal Br. 34. Further, we agree with Appellant that the Specification discloses multiple embodiments comporting with the scope of the claimed genus, which were similarly discussed above with respect to the written description rejection. *See Spec.* ¶¶ 17, 18.

Finally, the Examiner’s cursory review of the *Wands* factors with respect to the broader genus identified by the Examiner does not persuade us that undue experimentation would be required to make or use the invention as claimed. Given the narrower scope of the genus actually required by the claims, the examples provided in the Specification, and the level of predictability in the container arts especially with respect to balloons, we are not persuaded that undue experimentation would be required to make or use the full scope of the invention as claimed.

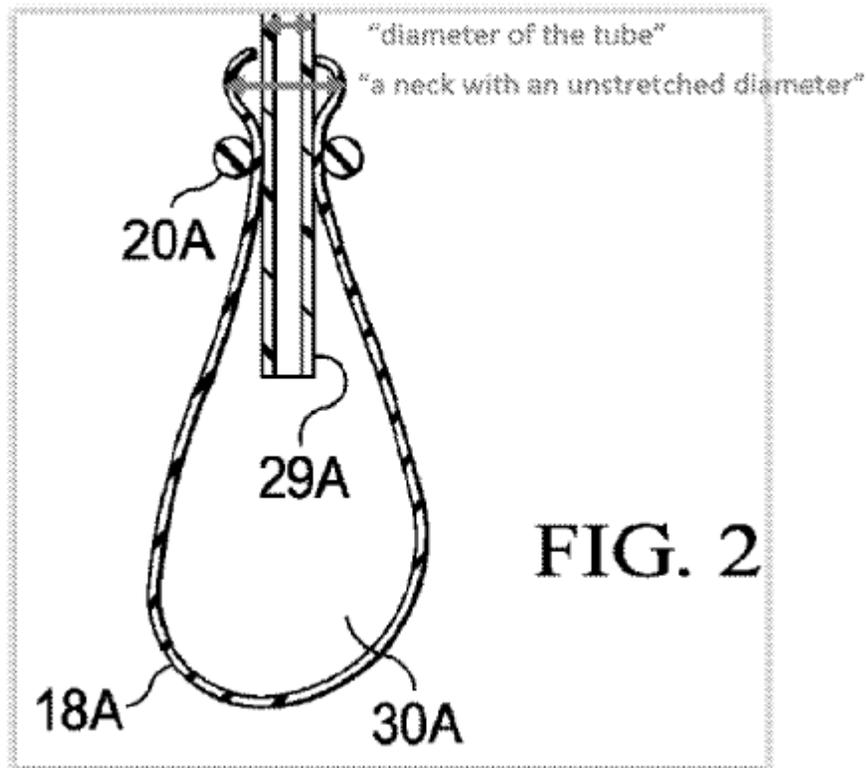
Based on the foregoing, we are persuaded of error in this rejection, and thus we do not sustain the enablement rejection of claims 10–12, 15, 16, 18–20, 23, 24, and 26–30.

Anticipation

As an initial matter, the Specification indicates that the present application is a continuation of Application No. 14/723,953, which is a continuation of Application No. 14/492,487, which claims the benefit of the filing dates for provisional Application No. 61/937,083 and provisional Application No. 61/942,193.¹⁰

¹⁰ We refer to these non-provisional and provisional applications collectively as “the priority applications” below.

With respect to this rejection, Appellant argues that all limitations of claim 1 were disclosed in two non-provisional applications from which this application is a continuation, and thus, based on the filing date of these non-provisional applications, the video relied upon in the rejection of claim 1 does not qualify as prior art under 35 U.S.C § 102(b)(1)(A). Appeal Br. 28–31. In particular, Appellant asserts that each of the non-provisional parent applications provide support for the claim limitation requiring “the balloon having a neck with an unstretched diameter that is greater than the diameter of the tube.” *Id.* In support, Appellant asserts that “[t]his limitation is unmistakably shown, for example, by Figure 2 . . . and the accompanying description.” *Id.* at 30. With respect to Figure 2, Appellant provides the following annotation:



Above is an annotated portion of Figure 2 depicts a cross-sectional portion of a balloon 18A and provides an annotation denoting an alleged

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“neck with an unstretched diameter.” *Id.* at 30. Based on this figure, Appellant argues:

As shown above, a person of ordinary skill in the art would readily recognize from the disclosure in the non-provisional parent applications that the inventor possessed the concept of a balloon with a neck that has an unstretched diameter greater than the diameter of tube. Indeed, that claim language basically describes in prose a portion of what Figure 2 shows (as emphasized by the annotations above).

Id.

A claim is entitled to priority from the filing date of an earlier filed application, but only if the earlier filed application describes the subject matter of the claim as required by 35 U.S.C. § 112(a). *See* 35 U.S.C. § 120. Thus, the priority document must provide adequate written description support for such a claim. Here, we agree with the Examiner that Appellant has not pointed to any disclosure in the priority applications that supports adequately the claim limitation at issue. *See* Ans. 20–21. Regarding the figure relied upon by Appellant, each of the priority applications contains a figure that is the same or substantially the same as Figure 2 provided in the present application, although some of these figures appear to be hand drawn while others appear to be computer-drafted. Although Appellant asserts that this figure includes “a neck with an unstretched diameter,” we see no indication in any of these figures that any neck portion is unstretched. Rather, these figures are either unlabeled, as in the provisional applications, or labeled only with reference numerals unrelated to the neck of the balloon, as in the non-provisional applications.

Regarding the portions of the Specifications that discuss these figures, we see no disclosure regarding whether the neck portion identified by Appellant is stretched or unstretched. Notably, Appellant asserts that the

limitation at issue is “unmistakably shown by Figure 2 . . . and the accompanying description,” but Appellant does not provide any portion of such description in support. And we cannot agree that one of ordinary skill in the art would readily recognize from the written disclosure that any portion of the neck is unstretched in the relevant figures. As noted by the Examiner, a priority Specification suggests that the neck portions of the balloons must be stretched to fit over the tubes 16, i.e., “a top portion may be flexible enough to be inserted around tubes 16.” *See, e.g.*, Application No. 14/723,953 Spec. ¶ 20. Further, this Specification also describes Figure 2 as “a simplified cross-sectional view of a portion of the embodiment of system 10.” *Id.* at ¶ 26. No specific description of the neck is further provided with respect to the description related to Figure 2 in this priority application, or in any of the other priority applications. *See id.* at ¶¶ 26–28. Because there is no specific disclosure regarding any portion of the neck depicted in Figure 2; because the Specification indicates Figure 2 is a simplified depiction; and because the Specification otherwise only suggests that the neck must be stretched to fit on the tubes, we disagree with Appellant that one of ordinary skill would recognize that the claim limitation at issue is “unmistakably shown” in Figure 2 in the priority applications. Rather, one cannot tell whether any neck portion in Figure 2 is stretched or unstretched.

Based on the foregoing, we find that the priority applications do not reasonably convey to those skilled in the art that the inventor had possession of the claimed subject matter at issue here. Further, because Appellant does not raise any substantive argument regarding the art relied upon in this rejection, we are not persuaded of error in the rejection of claim 1 as anticipated. Accordingly, we sustain this rejection. For the same reasons, we also sustain the rejection of dependent claims 2–7 and 9.

Obviousness

With respect to the obviousness rejection, Appellant groups all claims together. See Appeal Br. 19–28. We select claim 10 as representative of this group of claims, and claims 12, 13, 15, 16, 18–21, 23, 24, and 26–30 will stand or fall with claim 10. See 37 C.F.R. 41.37(c)(1)(iv).

With respect to claim 10, the Examiner finds that Furey discloses a fitting with branch assemblies having tubes as claimed. Final Act. 11. The Examiner also finds that Furey discloses containers, but the Examiner acknowledges that Furey does not disclose automatically-sealing containers as claimed. *Id.* Regarding the automatically-sealing containers, the Examiner finds that each of Billon, Bonnet, Durst, Gill, and Fields teaches an automatically-sealing container that may be combined with Furey to arrive at the claimed configuration. *Id.* at 12.

The Examiner concludes that it would have been obvious to modify Furey to include an automatically-sealing container “for the purpose of eliminating the need for the heat knife described in Furey and for providing an efficiently sealing container of known construction.” *Id.* The Examiner also determines that making such a modification “would merely amount to a combination of known elements according to known methods with predictable results.” *Id.* Finally, the Examiner finds that the modified device of Furey would necessarily be capable of performing the function of the claimed “automatically-sealing container” or that “these features would result from an obvious matter of non-critical scaling or relative dimensions which would not have changed the operation of the device.” *Id.* at 13.

Finally, regarding Appellant’s evidence of objective indicia of non-obvious, the Examiner finds that the scope of claim 10 is not commensurate with the commercial embodiment relied upon. *Id.* at 14 (citing the

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Declaration of Josh Malone under 37 CFR 1.132, dated March 9, 2017 (“Malone Declaration”). The Examiner finds that “[t]here is no evidence in the record to show that the facts in the declaration would also be true of a device which does not have water balloons.” *Id.* Further, the Examiner finds that the “claims do not require the fastener that is present in the commercial embodiment . . . [and t]here is no evidence in the record to show that a device without the disclosed fastener would have been operable or commercially successful.” *Id.*

As discussed below, we are not persuaded of reversible error in the obviousness rejection of claim 10.

Appellant first argues that none of the relied upon art combinations “renders obvious ‘an automatically-sealing container’ having the specific configuration claimed.” Appeal Br. 19–20. In support, Appellant asserts that the rejection does not address the requirement that the container must have “a neck disposed around and removably attached” to an end of the tube or the requirement in claim 10 that “the container, if sufficiently filled with water, is detachable by gravity or gravity combined with a manually applied acceleration of the tube.” *Id.* at 22. Appellant also asserts that the Examiner erroneously dismisses these limitations as functional language. *Id.*

We are not persuaded of error for the reasons provided by the Examiner in the Answer. *See* Ans. 15–18. In particular, the Examiner specifically identifies how the references meet the limitations addressed by Appellant in this argument, and the Examiner also explains why certain language is considered functional. *Id.* By way of Example, we agree with the Examiner that “Bonnet discloses a neck of a container (104) being removably attached to a conduit (114) to fill the container (104).” Ans. 15 (citing Bonnet Fig. 1, col. 3, ll. 49–50). We also find that Bonnet discloses a

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container that is removed by gravity from the chute when bladder 110 is deflated. Bonnet col. 3, ll. 45–51.

Next, Appellant argues that the Examiner’s reasoning is insufficient and highlights why Furey teaches away from the combinations proposed. Appeal Br. 20. Specifically, Appellant asserts that the Examiner’s reasoning “for the purpose of eliminating the need for the heat knife” in Furey is inconsistent with Furey’s explanation that severing is needed and would be vitiated by using a removably attached container as claimed. *Id.* at 20–21. We are not persuaded. Furey teaches only that severing such that the container is aseptically sealed is preferred. *See* Furey ¶ 7. We disagree that Furey’s preference for one method of attachment over another amounts to a teaching away from the use of any “automatically-sealing container” as claimed. *See DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (“A reference does not teach away [...] if it merely expresses a general preference for an alternative invention[.]”).

Finally, Appellant relies on the Malone Declaration in arguing that there is “evidence of extraordinary commercial success derived from the claimed invention,” such that the “evidence is entitled to substantial weight,” and thus, Appellant indicates that this evidence is sufficient to overcome the prima facie showing of obviousness. Appeal Br. 23–28. However, as discussed below, we are not persuaded that Appellant’s evidence is sufficient to outweigh and overcome the evidence of obviousness.

To be given substantial weight in the determination of obviousness or nonobviousness, objective evidence of non-obviousness must be relevant to the subject matter as claimed, and therefore it must be determined whether there is a nexus between the merits of the claimed invention and the evidence of secondary considerations. *Ashland Oil, Inc. v. Delta Resins &*

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Refractories, Inc., 776 F.2d 281, 305 n.42 (Fed. Cir. 1985). Objective evidence of nonobviousness including commercial success must be commensurate in scope with the claims. *In re Tiffin*, 448 F.2d 791 (CCPA 1971) (evidence showing commercial success of thermoplastic foam “cups” used in vending machines was not commensurate in scope with claims directed to thermoplastic foam “containers” broadly). In order to be commensurate in scope with the claims, the commercial success must be due to claimed features, and not due to unclaimed features. *Joy Technologies Inc. v. Manbeck*, 751 F. Supp. 225, 229 (D.D.C. 1990), *aff’d*, 959 F.2d 226, 228 (Fed. Cir. 1992) (Features responsible for commercial success were recited only in allowed dependent claims, and therefore the evidence of commercial success was not commensurate in scope with the broad claims at issue.). An inventor’s opinion as to the purchaser’s reason for buying the product is insufficient to demonstrate a nexus between the sales and the claimed invention. *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996). Further, gross sales figures do not show commercial success absent evidence as to market share, *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015 (Fed. Cir. 1985), or as to the time period during which the product was sold, or as to what sales would normally be expected in the market, *Ex parte Standish*, 10 USPQ2d 1454 (BPAI 1988).

The Malone Declaration provides evidence that the Bunch O Balloons (“BoB”) product is a commercial embodiment of the Appellant’s invention that garnered \$929,160 in pledges through a crowd-funding campaign; was the subject of “a substantial number of requests to license the patent rights” resulting in an exclusive license; and has sold over 10 million units. *See* Malone Decl. ¶¶ 2, 4–6. Additionally, the declaration states that the BoB product received multiple awards in the toy industry; extensive media praise;

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and that a preliminary injunction was awarded based on copying. *Id.* at ¶¶ 8–13.

Appellant argues that there is a presumption of a nexus between the claimed invention and the commercial success because the “evidence shows that (1) the claimed invention reads on the specific Bunch of Balloons product sold, and (2) the claimed invention is not a subcomponent of, but rather the entirety of, that product.” Appeal Br. 24. However, neither the Declaration nor any other evidence in the record shows that the alleged commercial success is *because* of the features of claim 10, and not due to other features. The declaration simply states: “BoB does not merely incorporate the claimed invention as a component, but rather is virtually described in its entirety by certain claims of the subject application.” Malone Decl. ¶ 3. This assertion falls short of stating that the BoB product contained nothing beyond what is recited in claim 10, such that the alleged commercial success would not be attributed to other features — regardless of whether those features might appear in other claims of the application.

Further, although the declaration provides evidence of the total number of sales, the record includes no evidence of market share or any other comparison of sales between the BoB product and similar products such that one could evaluate the significance of the sales data. For example, such evidence might include evidence related to sales of other water balloon products or specific evidence showing that the BoB product garnered praise or awards based on the features claimed in claim 10. Absent such evidence, even if we were to determine that the claims read on the BoB product, the record provides no basis for us to determine whether any such commercial success of the product is based on any of the features claimed in claim 10. Finally, we also agree with the Examiner that the record includes no

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evidence showing that the commercial success is commensurate with the full scope of the claims at issue, which are directed to “automatically-sealing containers . . .” more broadly than the water balloons in the BoB product. *See In re Tiffin*, 448 F.2d at 791.

Thus, when we consider totality of the obviousness evidence, the record supports the Examiner’s position that claim 10 would have been obvious over the prior art..

Based on the foregoing, we are not persuaded of reversible error with respect to representative claim 10. Accordingly, we sustain the rejection of claim 10 and claims 12, 13, 15, 16, 18–21, 23, 24, and 26–30, which fall with claim 10, as noted above.

Double Patenting

With respect to the double patenting rejection, Appellant argues only that “the claims in question are necessarily directed to different, ‘patentably distinct’ subject matter.” Appeal Br. 31; *see also* Reply 20. Further, Appellant states that a terminal disclaimer will be filed to obviate this rejection if claims are otherwise found allowable. *See* Appeal Br. 31. We are not persuaded of error. Appellant’s listing of certain claim features without further substantive discussion is not sufficient to show error in the rejection. *See* Reply Br. 20. Further, Appellant asserts that “even a cursory” comparison of the claims here with the patented claims “confirms the rejected claims are patentably distinct.” *Id.* However, a review of claim 1 of US Patent No. 9,242,749 (the 749 patent) reveals the opposite. The claim in the 749 patent reads:

An apparatus comprising:

a housing comprising an opening at a first end and a plurality of holes extending through a common face of the housing at a second end;

a plurality of hollow tubes, each hollow tube attached to the housing at a respective one of the holes at the second end of the housing;

a plurality of containers, each container removably attached to a respective one of the hollow tubes; and

a plurality of elastic fasteners, each elastic fastener clamping a respective one of the plurality of containers to a respective tube, and each elastic fastener configured to restrict detachment of its respective container from its respective tube and to automatically seal its respective container upon detachment of the container from its respective tube, the restriction of each elastic fastener being sufficiently limited to permit its respective container to detach from its respective tube upon one or more of (1) at least partially filling the container with a fluid and (2) shaking the housing;

wherein the apparatus is configured to fill the containers substantially simultaneously with the fluid.

Appellant does not identify any substantive difference between this claim and claim 1, for example. Thus, we are not persuaded of error in the rejection and we sustain it.

CONCLUSION

We REVERSE the rejections under 35 U.S.C. § 112(a). We AFFIRM the remaining rejections.

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).

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In summary:

Claims Rejected	35 U.S.C. §	Basis	Affirmed	Reversed
10–13, 15, 16, 18–21, 23, 24, 26–30	112(a)	Written description		10–13, 15, 16, 18–21, 23, 24, 26–30
10–12, 15, 16, 18–20, 23, 24, 26–30	112(a)	Enablement		10–12, 15, 16, 18–20, 23, 24, 26–30
1–7, 9	102(a)(1)	LuckyPenny.com	1–7, 9	
10–13, 15, 16, 18–21, 23, 24, 26–30	103	Furey, Billon, Bonnet, Durst, Gill, Fields	10–13, 15, 16, 18–21, 23, 24, 26–30	
1–8, 9–13, 15, 16, 18–21, 23, 24, 26–30		Double Patenting	1–7, 9–13, 15, 16, 18–21, 23, 24, 26–30	
Overall Outcome			1–7, 9–13, 15, 16, 18–21, 23, 24, 26–30	

AFFIRMED