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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes details for application 14/559,692 filed 12/03/2014 by Milos Coric, attorney MCANDREWS HELD & MALLOY, LTD, examiner TATE-SIMS, CRISTI J, art unit 1711, and notification date 11/01/2019.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MILOS CORIC

Appeal 2019-001076
Application 14/559,692
Technology Center 1700

Before MONTÉ T. SQUIRE, MICHAEL G. McMANUS, and
MERRELL C. CASHION, JR., *Administrative Patent Judges*.

McMANUS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ seeks review of the Examiner's decision to reject claims 1, 3–14, 16, and 17. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE. In addition, we enter a NEW GROUND OF REJECTION.

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 Sears Brands, L.L.C. Appeal Br. 2.

BACKGROUND

The present Application generally relates to an apparatus “which may be used to facilitate laundry and clothes washing in portable and convenient manner, such as using commonly available buckets (e.g., 5-gallon buckets).” Spec. ¶ 1. The apparatus includes a “washing attachment” that may be designed for use with tools such as a power drill. *Id.* ¶ 10. Figure 1 of the Application is reproduced below.

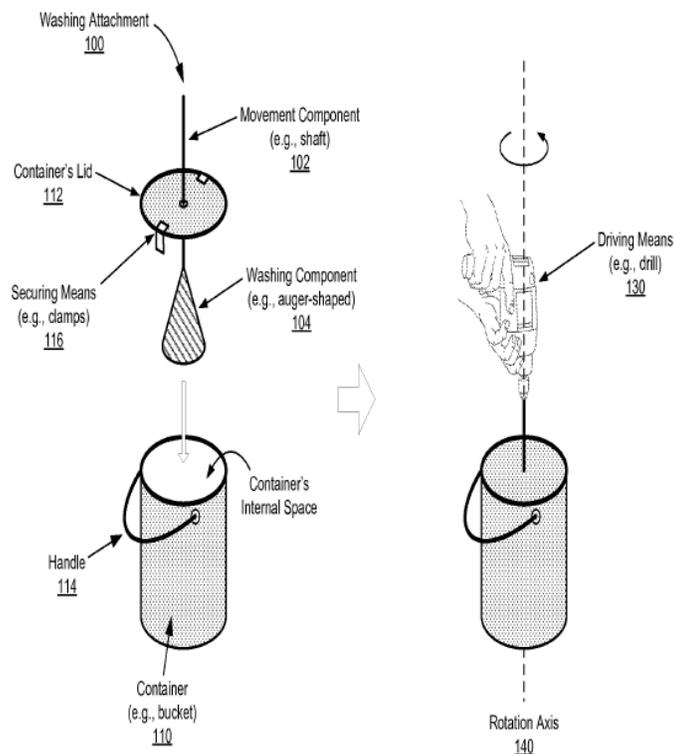


FIG. 1

Figure 1 “illustrates an example use of a washing auger attachment, in accordance with an embodiment of the present invention.” *Id.* ¶ 5.

Claim 1 is illustrative of the subject matter on appeal and is reproduced below with certain limitations bolded for emphasis:

1. An apparatus, comprising:

a driving device configurable to operate in a portable manner using a portable power source that is coupled to or integrated into the driving device; and

a washing attachment that is configured to be applied to a particular container, the washing attachment comprising:

a movement component adapted to connect the washing attachment to the driving device that is operable to provide a driving force to the washing attachment; and

a washing component, adapted to fit within a space in the container when the washing attachment is applied to the container, wherein:

the washing component is configured to generate a washing movement within the space when the driving force is applied to the washing attachment; and

the washing component is configured to generate the washing movement by converting the driving force such that the washing movement matches predetermined parameters associated with laundry washing operations.

Appeal Br. 24 (Claims App.) (emphasis added).

REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Reh	US 4,506,989	Mar. 26, 1985
Eickelmann	US 4,472,063	Sept. 18, 1984
Hamilton	US 2007/0086271 A1	Apr. 19, 2007

REJECTIONS

The Examiner maintains the following rejections:

1. Claims 1, 8–11, 13, 14, 16, and 17 are rejected under 35 U.S.C. § 102(a)(1) as anticipated by Hamilton. Final Act. 3–6.
2. Claim 3 is rejected under 35 U.S.C. § 103 as obvious over Hamilton. *Id.* at 7.
3. Claims 4–7 are rejected under 35 U.S.C. § 103 as obvious over Hamilton in view of Eickelmann. *Id.* at 7–9.
4. Claim 12 is rejected under 35 U.S.C. § 103 as obvious over Hamilton in view of Reh. *Id.* at 9–10.

DISCUSSION

Rejection 1.

The Examiner rejects claims 1, 8–11, 13, 14, 16, and 17 as anticipated by Hamilton. *Id.* at 3–6.

Hamilton is directed to “stirrer tools for mixing a variety of products having various viscosities, sedimentation, and/or levels of separation of different constituent parts of the product.” Hamilton ¶ 2. Figure 8 of Hamilton is reproduced below.

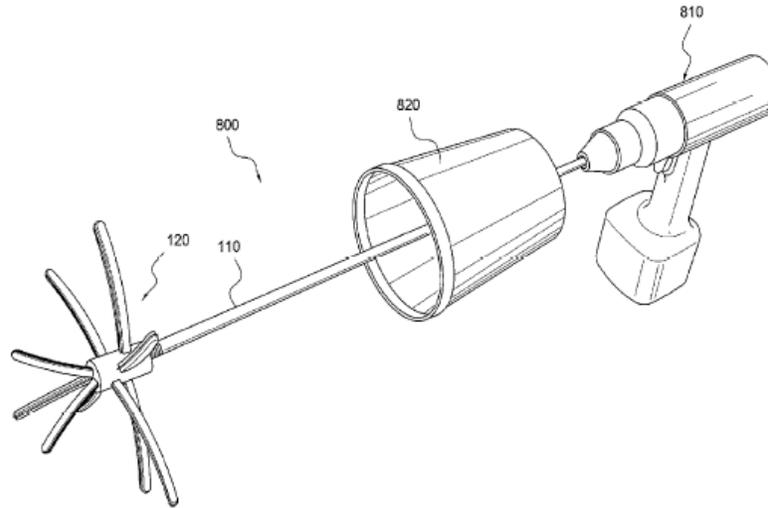


Figure 8 “is a side perspective view of a stirrer tool fastened into a cordless electric drill.” *Id.* ¶ 12.

In the Final Action, the Examiner determines as follows:

Hamilton teaches in figures 17, 22, and 26 the electric drill creates a vortex mixing action imparted to the liquid by the operation of the stirrer tool in the small container thereby suggesting the stirrer tool of Hamilton generates a washing movement by converting the driving force.[0026] **As to the limitation of the washing movement matches predetermined parameter[s] associated with the laundry washing operations, it is unclear as to what predetermined parameters are matched to the washing movement.**

Final Act. 4–5 (emphasis added).

In its opening brief, Appellant observes that “in rejecting claim 1, the Examiner seemingly fails to account for the limitation that the washing movement be configured for washing operations, and to specifically be configured to generate washing movements that match predetermined parameters associated with laundry washing operations.” Appeal Br. 7–8.

In the Answer, the Examiner takes the position that the limitation requiring “converting the driving force such that the washing movement matches predetermined parameters” is directed toward the intended use of the claimed invention and, accordingly, “does not differentiate the apparatus claim for the prior art.” Answer 3.

In order to be accorded patentable weight, functional language in an apparatus claim must limit the claim in terms of structure rather than function. *In re Schreiber*, 128 F.3d 1473, 1477–78 (Fed. Cir. 1997). Further, a claim containing a “recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus” if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1647 at *1 (BPAI 1987); *see also Research Corp. Techs., Inc. v. Gensia Labs., Inc.*, 10 F. App’x 856, 861–62 (Fed. Cir. 2001).

Here, the claimed washing component is “configured” to generate a washing movement that “matches predetermined parameters.” Although there may be ambiguity as to such configuration, the recited language is directed to the *configuration* of the washing movement and not the *use* of the washing component. Accordingly, for purposes of the present rejection, we accord patentable weight to the limitation in question. In view of the Examiner’s failure to establish that Hamilton teaches such a limitation (Final Act. 4–5), we determine that the Examiner has failed to make out a prima facie case of anticipation as to claim 1 under section 102.

Claims 8–11, 13, 14, 16, and 17 are each subject to the same rejection. *Id.* at 3. These claims each depend from claim 1 and include the same

limitation. Accordingly, the Examiner has not established anticipation of claims 8–11, 13, 14, 16, and 17.

Rejections 2–4

The Examiner rejects claim 3 as obvious over Hamilton and claims 4–7 and 12 as obvious over Hamilton in view of certain secondary references. *Id.* at 6–10. In doing so, the Examiner does not explicitly address the limitations of claim 1 (from which each claim at issue depends), apparently relying on the findings made in regard to Rejection 1. *Id.* Accordingly, the rejections for obviousness suffer from the same defect (lack of sufficient findings regarding the “predetermined parameters” limitation) described above. As a result, the Examiner has not shown claims 3–7 and 12 to be obvious.

New Ground of Rejection

Pursuant to 37 C.F.R. § 41.50(b), we issue a new ground of rejection. Pursuant to 35 U.S.C. § 112(b), we determine claims 1, 3–14, 16, and 17 to be indefinite for failing to particularly point out and distinctly claim the subject matter which the inventor regards as the invention.²

We determine that the following limitation of claim 1 is ambiguous:

the washing component is configured to generate the washing movement by converting the driving force **such that the washing movement matches predetermined parameters associated with laundry washing operations.**

Appeal Br. 24 (Claims App.) (emphasis added).

² The Examiner issued a similar rejection in the Final Action but withdrew that rejection in the Answer. Final Act. 2–3; Answer 3.

During prosecution, a claim is examined for compliance with 35 U.S.C. § 112(b) by determining whether the claim meets threshold requirements of clarity and precision. *In re Skvorecz*, 580 F.3d 1262, 1268 (Fed. Cir. 2009) (quoting MPEP § 2173.02). A claim should be rejected as indefinite when it is amenable to two or more plausible claim constructions. *Ex Parte Miyazaki*, 89 USPQ2d 1207, 1211 (BPAI 2008); *In re Packard*, 751 F.3d 1307, 1324 (Fed. Cir. 2014) (“There are good reasons why unnecessary incoherence and ambiguity in claim constructions should be disapproved”).

A claim term is functional when it recites a feature “by what it does rather than by what it is.” *In re Swinehart*, 439 F.2d 210, 212 (CCPA 1971). Here, the limitation “configured . . . such that the washing movement matches predetermined parameters” is a functional limitation. Apparatus claims are not necessarily indefinite for using functional language. *See Halliburton Energy Servs. Inc. v. M-I LLC*, 514 F.3d 1244, 1255 (Fed. Cir. 2008); *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997) (“A patent applicant is free to recite features of an apparatus either structurally or functionally.”); *In re Swinehart*, 439 F.2d at 212 (“[T]here is nothing intrinsically wrong with the use of [functional language] in drafting patent claims”).

However, as noted above, functional language in an apparatus claim must limit the claim in terms of structure rather than function to be accorded patentable weight. *In re Schreiber*, 128 F.3d at 1477–78; *In re Gardiner*, 171 F.2d 313, 315–16 (CCPA 1948) (“It is trite to state that the patentability of apparatus claims must be shown in the structure claimed and not merely

upon a use, function, or result thereof.”); MPEP § 2114(I) (9th ed., Rev. 11.2013).

In the portion of its Appeal Brief seeking review of the Examiner’s indefiniteness rejection (prior to the rejection being withdrawn), Appellant refers to several parts of the Specification that teach that the washing component may be designed to provide “optimal” washing conditions. Appeal Br. 5 (referring to Spec. ¶¶ 11, 13, 22, 26). For example, paragraph 13 of the Specification provides as follows:

As described in more detail below, the shape and related characteristics of the washing component 104 may be particularly designed to create **pre-determined washing movement that is optimal** based on the driving force (e.g., the rotation speed/power of the driving drill 130) and the internal space of the anticipated containers.

Spec. ¶ 13. In a subsequent teaching, the Specification describes an exemplary embodiment with specific spacing between spiral blades, drill speed, and axial speed of agitation. *Id.* ¶¶ 23–26.

Appellant argues that the term “parameters” corresponds to the optimal washing conditions based on the teaching of the Specification. Appeal Br. 6.

The foregoing is insufficient to provide a structural definition of the washing component configuration. Appellant has not cited, nor have we located, any clear teaching as to what the optimal washing conditions are nor what configuration yields a washing movement that matches any optimal or “predetermined” parameters. The embodiment described in paragraph 26 is specifically taught to be an “example implementation” and we will not read such parameters into

the claim. *See SuperGuide Corp. v. DirecTV Enterprises, Inc.*, 358 F.3d 870, 875 (Fed. Cir. 2004).

Accordingly, we determine claim 1 to be indefinite.

Claims 3–14, 16, and 17 each depend from claim 1 and incorporate its limitations. Certain of these dependent claims include more specific limitations regarding the configuration of the washing component. *See* Appeal Br. 24–25 (claims 4–7). These claims nonetheless require that the washing component be configured to generate a washing movement that matches unknown “predetermined parameters.” Accordingly, claims 3–14, 16, and 17 are indefinite.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed	New Ground
1, 8–11, 13, 14, 16, 17	102(a)(1)	Hamilton		1, 8–11, 13, 14, 16, 17	
3	103	Hamilton		3	
4–7	103	Hamilton, Eickelmann		4–7	
12	103	Hamilton, Reh		12	
1, 3–14, 16, 17	112(b)	Indefiniteness			1, 3–14, 16, 17
Overall Outcome				1, 3–14, 16, 17	1, 3–14, 16, 17

TIME PERIOD FOR RESPONSE

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new Evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the prosecution will be remanded to the examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record. . . .

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

REVERSED; 37 C.F.R. § 41.50(b)