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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* ANTHONY EDWARD DZIKOWICZ,  
MATTHEW BLAKE RODGERS, JOHN JOSEPH WOLF, and  
JOEL DEAN GENAW JR.

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Appeal 2019-001968  
Application 14/549,693  
Technology Center 1700

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Before JEFFREY T. SMITH, CHRISTOPHER L. OGDEN, and  
JANE E. INGLESE, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 5, 7, 8, 19, 20, and 24. We have jurisdiction under 35 U.S.C. § 6(b).

We Affirm.

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<sup>1</sup> 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 Nestec S.A. (Appeal Br. 1).

## STATEMENT OF THE CASE

Appellant's invention is generally directed to a spill-resistant adapter assembly connected to a fill-through fitment package used with current filling nozzles. (Spec. ¶¶ 5–7).

Claim 24 illustrates the subject matter on appeal and is reproduced below:

24. A package for use with a filling nozzle, comprising:  
a flexible pouch housing an edible consumable product, the pouch having an opening;  
a fill-through fitment sealed to the pouch at the opening, the fitment having a first  
flow passage with a diameter extending therethrough, the fitment comprising:  
a base portion positioned at the opening of the pouch;  
and  
a spout portion having a proximal end connected to the base portion, a distal end, a length, an external threading positioned at the proximal end, and a smooth, non-threaded external surface extending along a majority of the length of the spout portion from the threading to the distal end in a way that forms a first smooth mouthpiece,  
wherein the fitment is configured to cooperate with the filling nozzle to receive an unobstructed flow of a consumable product from the filling nozzle through the fitment and into the pouch; and  
an adapter assembly comprising:  
a valve component comprising:  
a tubular body portion having a width, a proximal end positioned on the base of the fitment, a distal end, an external surface, and an internal surface defining a second flow passage extending through the body portion from the proximal end of the tubular body to the distal end, the external surface of the tubular body having a threading positioned near the proximal end and a smooth, non-threaded portion extending from the threading to the distal end of the tubular body in a way that

forms a second smooth mouthpiece having a length to sealingly receive the lips of a consumer of the edible consumable product to facilitate application of suction at the second mouthpiece by the consumer of the edible consumable product; and

a diaphragm positioned in the second flow passage and connected to the body portion in communication with the internal surface of the body portion, the diaphragm including an outlet having a width,

wherein the second flow passage is in a coaxial relationship with the first flow passage of the fitment, and

wherein the width of the outlet is less than the diameter of the fitment to restrict the flow of the consumable product from the pouch relative to the fitment; and

a cap configured to threadingly connect to the threading of the external surface of the tubular body portion to close the pouch.

(Appeal Br. 45–46, Claims Appendix).

The following rejections are presented for our review:<sup>2</sup>

I. Claims 5, 7, 8, 19, 20, and 24 under 35 U.S.C. § 112(b), as being indefinite.

II. Claims 7, 8, 20, and 24 are rejected under 35 U.S.C. § 103 as unpatentable over Hagihara (US 2003/0071059 A1, published April 17, 2003) in view of Last (US 7,232,042, issued June 19, 2007), Gross (US 6,439,429 B1, issued August 27, 2002), Laudenberg (US 6,805,261 B1, issued October 19, 2004), and Ankney (RE 25,765, reissued April 20, 1965).

III. Claims 5, 19, and 20 are rejected under 35 U.S.C. § 103 as unpatentable over Hagihara, Last, Gross, Laudenberg, Ankney, Socier (US 2002/0121530 A1, published September 5, 2002), Stull (US 2006/0006202

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<sup>2</sup> The complete statement of the rejections on appeal appears in the Final Office Action. (Final Act. 3–20).

A1, published January 12, 2006), Lampe (US 5,954,237, issued September 21, 1999), and Brown (US 2001/0025862 A1, published October 4, 2001).

IV. Claims 7, 8, 20, and 24 are rejected under 35 U.S.C. § 103 as unpatentable over Viegas (US 5,307,955, issued May 3, 1994) in view of Last, Gross, Laudenberg, Pritikin (US 2008/0073348 A1, published March 27, 2008), Arai (US 2004/0251278 A1, published December 16, 2004), and in further view Brown.

V. Claims 5, 19, and 20 are rejected under 35 U.S.C. § 103 as unpatentable over Viegas, Last, Gross, Laudenberg, Pritikin, Arai, Brown, Lampe, and Socier.

## OPINION

### **Rejection I (Indefiniteness)**

In the Appeal Brief, the Appellant does not provide any substantive arguments on the merits against Rejection I. (Appeal Br. 38–39). Instead, the Appellant, when discussing the Viegas reference, states that an amendment was proposed on May 3, 2018, after closing of prosecution, in an effort to obviate this rejection. (Appeal Br. 38–39). Noting that the amendment was refused entry,<sup>3</sup> the Appellant states that “Appellant invites the Board to consider or comment on this amendment.” (Appeal Br. 39).

The Examiner states:

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<sup>3</sup> The amendment was not entered on the basis that “while the amendment overcomes the rejection under 35 U.S.C. 112b, this amendment raises new issues because the claim now requires the diaphragm to extend from the internal surface of the body portion, as opposed to only being in communication with the internal surface of the body portion.” (Advisory Action entered June 5, 2018 at 2).

It is noted that the amendment after final, filed May 3, 2018 was not entered. Due to the amendment not being entered, the rejection of claims 5, 7, 8, 19, 20 and 24 under 35 U.S.C. 112b has been maintained.

(Ans. 3) (emphasis omitted).

We agree with the Examiner. The record does not indicate that a petition pursuant to 37 C.F.R. § 1.181 was filed to initiate review of the Examiner's refusal to enter the amendment. As we discussed above, the Appellant offers no substantive arguments on the merits in the Appeal Brief (Appeal Br. 38–39). Under these circumstances, summary affirmance is appropriate. *See* 37 C.F.R. § 41.37(c)(1)(iv) (“Except as provided for in §§ 41.41, 41.47 and 41.52, any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal.”). *See also Hyatt v. Dudas*, 551 F.3d 1307, 1314 (Fed. Cir. 2008) (“In the event of . . . a waiver, the [Board] may affirm the rejection of the group of claims that the examiner rejected on that ground without considering the merits.”).

For these reasons, we sustain Rejection I without considering the substantive merits.

### **Prior Art**

The Examiner finds Hagihara teaches a package capable of being used with a filling nozzle, comprising a flexible pouch suitable for housing an edible consumable product. (Final Act. 4; Hagihara ¶ 57, Fig 1). The Examiner finds Hagihara teaches that a portion of a tubular body above a threading, which does not have threads, forms a smooth second mouthpiece. (Final Act. 7). The Examiner finds Hagihara teaches an adapter assembly comprising a valve component comprising a tubular body having a distal

end, an external surface, and an internal surface defining a second flow passage, extending through the body portion from the proximal end to the distal end, and a diaphragm positioned in the second flow passage. (Final Act. 4; Hagihara ¶ 47, Fig. 4a). The Examiner finds Hagihara teaches a cap that is threaded to the external surface of the tubular body. (Final Act. 8; Hagihara Fig. 1).

The Examiner finds Viegas teaches a package capable of being used with a filling nozzle, comprising a flexible pouch suitable for housing an edible consumable product. (Final Act. 12–13; Viegas Figs. 2, 3). The Examiner finds Viegas also teaches an adapter assembly comprising a valve component comprising a tubular body having a width, a proximal end positioned on base of the fitment, a distal end, an external surface, and an internal surface defining a second flow passage extending through the body portion from the proximal end to the distal end. (Final Act. 13; Viegas Fig. 1, item 31, Fig. 3, items 60, 61). The Examiner finds Viegas teaches a diaphragm positioned in the second flow passage in communication with the internal surface of the body portion. (Final Act. 13; Viegas Fig. 3, item 50).

The Examiner finds Last teaches a fill-through fitment pouch that comprises a spout portion, and where a threading on the spout portion does not extend to the proximal end of the spout portion. (Final Act. 5; Last col. 5, ll. 53–56; Figs. 2a–2b).

The Examiner finds Gross teaches a fill-through fitment pouch that comprises a spout portion, and where a threading on the spout portion does not extend to the proximal end of the spout portion. (Final Act. 5; Gross Fig. 4, item 120).

The Examiner finds Laudenberg teaches an external threading on a spout portion of a base portion of a fitment which does not extend to the distal end of the spout portion and where the external threading is also at the proximal end of the spout. (Final Act. 6; Laudenberg Fig. 2, item 32). The Examiner also finds Laudenberg shows a threaded portion near a proximal end of the tubular body and a smooth non-threaded portion extending from the threading to the distal end of the tubular body, and where the external threads are near the proximal end of the tubular body portion. (Final Act. 7; Laudenberg Fig. 2, item 22).

The Examiner finds Ankney shows a threaded portion near a proximal end of a tubular body and a smooth non-threaded portion extending from the threading to the distal end of the tubular body, and where the external threads are near the proximal end of the tubular body portion. (Final Act. 7; Ankney Figs. 1, 2, items 11, 28). The Examiner finds Ankney also teaches that an overcap can be attached to the pouring spouts structure. (Final Act. 7; Ankney col. 1, ll. 13–15).

The Examiner finds Brown teaches a flexible pouch package, including a diaphragm valve for controlled dispensing of the contents, where the contents can be a variety of products including shampoo and edible consumables. (Final Act. 14; Brown ¶¶ 48, 59).

The Examiner finds Pritikin teaches a closure secured to a tubular body of a valve component, and where an external surface of the tubular body comprises threads that are positioned near the proximal end of the tubular body for the purpose of securing an overcap via a tether. (Final Act. 16; Pritikin Fig. 12, item 34a).

The Examiner finds Arai is further evidence of hinged caps versus screw-on type caps as functional equivalents for performing the same function. (Final Act. 16; Arai Figs. 6, 7).

### **Obviousness**

We limit our discussion to independent claim 24 as argued by Appellant. 37 C.F.R. § 41.37(c)(1)(iv). Claims 5, 7, 8, 19, and 20 stand or fall with independent claim 24. Appellant has failed to present arguments addressing separately rejected dependent claims 5, 19, and 20. The patentability of dependent claims 5, 19, and 20 will also stand or fall with independent claim 24.<sup>4</sup> The Examiner has reproduced the rejections on appeal in the Examiner's Answer. (Ans. 3–23).

Upon consideration of the evidence of record and each of Appellant's contentions as set forth in the Appeal Brief, we determine that Appellant has not demonstrated reversible error in the Examiner's rejections of claims 5, 7, 8, 19, 20, and 24. *In re Jung*, 637 F.3d 1356, 1365–66 (Fed. Cir. 2011) (explaining the Board's long-held practice of requiring Appellant to identify the alleged error in the Examiner's rejection). We sustain the rejections of these claims generally for the reasons expressed by the Examiner in the Final Office Action and the Answer. (Ans. 3–23; Final Act. 3–20). We add the following primarily for emphasis.

We perceive no convincing merit in Appellant's argument that the number of references cited by the Examiner is evidence that the invention is not obvious. (Appeal Br. 11, 30–31). This is because the test for

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<sup>4</sup> The additional references cited by the Examiner to reject claims 5, 19, and 20 will not be addressed.

obviousness is not the number of references, but what they would have meant to a person of ordinary skill in the field of the invention. *In re Gorman*, 933 F.2d 982, 986 (Fed. Cir. 1991).

### **Rejections II and III**

The Examiner rejects independent claim 24 under 35 U.S.C. § 103 as unpatentable over the combination of Hagihara, Last, Gross, Laudenberg, and Ankney.

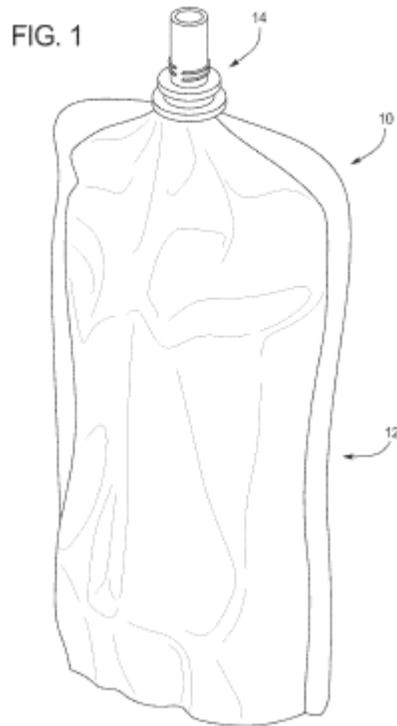
Appellant argues Hagihara fails to disclose (1) a fill-through fitment having a spout portion having a proximal end connected to the base portion, a distal end, a length, an external threading positioned near the proximal end, and a smooth, non-threaded external surface extending along a majority of the length of the spout portion from the threading to the distal end in a way that forms a first smooth mouthpiece; (2) an adapter assembly having a valve component having a tubular body portion with a proximal end positioned on the base of the fitment; and (3) an adapter assembly having a tubular body having a threading positioned near the proximal end and a smooth, non-threaded portion extending from the threading to the distal end of the tubular body in a way that forms a second smooth mouthpiece having a length to sealingly receive the lips of a consumer of the edible consumable product to facilitate application of suction at the second mouthpiece by the consumer of the edible consumable product, as required by claim 24. (Appeal Br. 15–25).

Appellant’s arguments do not persuade us of reversible error in the Examiner’s rejection. In assessing the obviousness of the subject matter recited in the claims on appeal, “[o]ften, it will be necessary for [us] to look to interrelated teachings of [the] multiple [prior art references relied upon by

the Examiner] . . . in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). These prior art references must be read in context, taking into account “demands known to the design community,” “the background knowledge possessed by a person having ordinary skill in the art,” and “the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, 550 U.S. at 401, 418; *see also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (“[A] prior art reference must be ‘considered together with the knowledge of one of ordinary skill in the pertinent art.’” (quoting *In re Samour*, 571 F.2d 559, 562 (CCPA 1978))). The background knowledge attributable to one of ordinary skill in the art includes what was admittedly known in the art at the time of the invention. *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1570 (Fed. Cir. 1988) (“A statement in a patent that something is in the prior art is binding on the applicant and patentee for determinations of anticipation and obviousness.”); *In re Nomiya*, 509 F.2d 566, 570–71 (CCPA 1975) (holding that admitted prior art in applicant’s Specification may be used in determining the patentability of a claimed invention); *In re Fout*, 675 F.2d 297, 301 (CCPA 1982) (“It is not unfair or contrary to the policy of the patent system that appellants’ invention be judged on obviousness against their actual contribution to the art.” (footnote omitted)).

The present Specification discloses the invention as “directed to the use of custom designed adapters that may be used in combination with known FTF packages (e.g., pouches).” (Spec. ¶ 179). Hagihara is exemplary of a type of fill-through-fitment similar to the package described in the present Specification as admitted prior art. The instant Specification

describes “a ‘fill-through-fitment’ package is a flexible, plastic pouch having a fitment located at an edge of the pouch through which a consumable product is filled during production.” (Spec. ¶ 178). Specification figure 1 is reproduced below:



Specification figure 1 depicts the prior art fill-through-fitment package. The instant Specification describes the prior art package as follows:

[A] prior art package 10 for storing consumable products is provided. Package 10 includes a body 12 defining an interior compartment for containing a product, and a fitment 14 for filling package 10 with a product and/or for emptying package 10 of its products. An example of such a known package 10 is a fill-through-fitment package.

(Spec. ¶ 178).

Thus, the prior art exhibits that a fill-through fitment having a spout

portion having a proximal end connected to the base portion, a distal end, a length, an external threading positioned near the proximal end, and a smooth, non-threaded external surface extending along a majority of the length of the spout portion from the threading to the distal end in a way that forms a first smooth mouthpiece, was known to persons of ordinary skill in the art.

Last, Gross, Laudenberg, and Ankney each describe a fill-through-fitment pouch arrangement that comprises a spout portion and threading on the spout portion at various locations. A person of ordinary skill in the art would have had sufficient skill to form a fill-through-fitment pouch arrangement that comprises a spout portion having threading located as depicted by the admitted prior art of the Specification. The present Specification acknowledges that persons of ordinary skill in the art would have had sufficient skill to form adapters suitable for use with known FTF packages. (Spec. ¶ 179).

Appellant argues that the small portion of the tubular body cannot be construed as having a length to sealingly receive the lips of a consumer of the edible consumable product to facilitate application of suction at the second mouthpiece by the consumer of the edible consumable product, as required by amended claim 24. (Appeal Br. 23). Appellant argues that the Laudenberg and Ankney references do not disclose a mouthpiece having a length to sealingly receive the lips of a consumer of the edible consumable product to facilitate application of suction at the mouthpiece by the consumer of the edible consumable product. Rather, according to Appellant, both references disclose pouring spouts which are not configured for applying suction. (Appeal Br. 25).

Appellant's arguments are not persuasive of reversible error. Appellant has not disputed that the cited prior art describes a structure equivalent to a "second mouthpiece" which comprises a smooth portion. Appellant has not adequately explained the dimensions required to meet the claimed invention. All lips are not created equal, that is, the lips of a man, woman, and child do not necessarily have the same dimensions. Notwithstanding this, the cited prior art establishes that a person of ordinary skill in the art would have had sufficient skill to design the mouthpiece to have an appropriate size for the intended user. One with ordinary skill in the art possesses a certain basic level of skill. *See, e.g., In re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985) ("[Applicant's] argument presumes stupidity rather than skill."). A conclusion of obviousness also may be made based on the common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference. *In re Bozek*, 416 F.2d 1385, 1390 (CCPA 1969).

For the foregoing reasons and those presented by the Examiner, we sustain appealed rejections II and III.

#### **Rejections IV and V**

The Examiner rejects independent claim 24 under 35 U.S.C. § 103 as unpatentable over the combination of Viegas, Last, Gross, Laudenberg, Pritikin, Arai, and Brown.

Appellant argues Viegas fails to disclose (1) a fitment having a spout portion having a proximal end connected to the base portion, a distal end, a length, an external threading positioned at the proximal end, and a smooth, non-threaded external surface extending along a majority of the length of the spout portion from the threading to the distal end in a way that forms a first

smooth mouthpiece; and (2) an adapter assembly having a valve component having a tubular body portion having a width, a proximal end positioned on the base of the fitment, a distal end, an external surface, and an internal surface defining a second flow passage extending through the body portion from the proximal end of the tubular body to the distal end, the external surface of the tubular body having a threading positioned near the proximal end and a smooth, non-threaded portion extending from the threading to the distal end of the tubular body in a way that forms a second smooth mouthpiece having a length to sealingly receive the lips of a consumer of the edible consumable product to facilitate application of suction at the second mouthpiece by the consumer of the edible consumable product; and (3) a diaphragm positioned in the second flow passage and connected to the body portion in communication with the internal surface of the body portion, the diaphragm including an outlet having a width, as required by claim 24. (Appeal Br. 29–42).

Appellant's arguments regarding (1) the structure of the fitment and (2) the adapter assembly having a valve component having a tubular body portion as required by independent claim 24 are not persuasive of reversible error.

The Examiner finds Viegas also teaches an adapter assembly comprising a valve component comprising a tubular body having a width, a proximal end positioned on base of the fitment, a distal end, an external surface and an internal surface defining a second flow passage extending through the body portion from the proximal end to the distal end. As set forth above, the prior art exhibits a fill-through fitment having a spout portion having a proximal end connected to the base portion, a distal end, a

length, an external threading positioned near the proximal end, and a smooth, non-threaded external surface extending along a majority of the length of the spout portion from the threading to the distal end in a way that forms a first smooth mouthpiece was known to persons of ordinary skill in the art. (*slip op.* 11–12.).

Appellant argues the cited prior art does not describe a diaphragm positioned in the second flow passage and connected to the body portion in communication with the internal surface of the body portion, the diaphragm including an outlet having a width, as required by claim 24. (Appeal Br. 40–41).

The Examiner finds Viegas, Brown, and Aria teaches a diaphragm positioned within a valve assembly. (Final Act. 13–14). A person of ordinary skill in the art would have reasonably expected from the teachings of the cited references that the location of the diaphragm within the valve assembly could have been varied. Appellant acknowledges Viegas discloses the arrangement of the diaphragm can be modified. (Appeal Br. 39–40). Appellant has not directed us to evidence that establishes the location of the diaphragm provides unexpected results. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. at 417 (“[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.”).

For the foregoing reasons and those presented by the Examiner, we sustain appealed rejections IV and V.

CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
5, 7, 8, 19, 20, 24	112(b)	Indefiniteness	5, 7, 8, 19, 20, 24	
7, 8, 20, 24	103	Hagihara, Last, Gross, Laudenberg, Ankney	7, 8, 20, 24	
5, 19, 20	103	Hagihara, Last, Gross, Laudenberg, Ankney, Socier, Stull, Lampe, Brown	5, 19, 20	
7, 8, 20, 24	103	Viegas, Last, Gross, Laudenberg, Pritikin, Arai, Brown	7, 8, 20, 24	
5, 19, 20	103	Viegas, Last, Gross, Laudenberg, Pritikin, Arai, Brown, Lampe, Socier	5, 19, 20	
<b>Overall Outcome</b>			5, 7, 8, 19, 20, 24	

No period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED