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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte YURY SHKOLNIKOV, ANATOLY GOSIS,
MARK E. CHARPIE, and MARVIN D. BURNS

Appeal 2019-003175
Application 14/751,813
Technology Center 3700

Before LINDA E. HORNER, DANIEL S. SONG, and
LEE L. STEPINA, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1, 6–12, and 21–23.² We have jurisdiction under 35 U.S.C. § 6(b).

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Carlisle Fluid Technologies, Inc. Appeal Br. 2.

² Claims 2 and 3 are canceled; claims 4, 5, and 13–20 are withdrawn from consideration. Appeal Br. 2.

The Examiner rejected the claims as unpatentable due to obviousness-type double patenting, failure to comply with the written description requirement, indefiniteness, anticipation, and obviousness. Appellant does not contest the double patenting rejections. Appellant argues that the claims, as properly interpreted, have adequate written description support and are not indefinite. Appellant also argues that the prior art does not disclose all the elements of the independent claim on appeal.

For the reasons explained below, we do not reach one of the double patenting rejections. We sustain another double patenting rejection. We do not sustain the rejections based on written description, indefiniteness, anticipation, and obviousness. Thus, we AFFIRM IN PART.

CLAIMED SUBJECT MATTER

The claims are directed to “venting systems for liquid supply containers for spray devices.” Spec. ¶ 2. Claim 1 is the sole independent claim on appeal and is reproduced below.

1. A system, comprising:
 - a container cover configured to couple to a gravity feed spray device, comprising:
 - an inner cover comprising a first inner surface;
 - an outer cover comprising a second inner surface;
 - a buffer chamber between the first inner surface of the inner cover and the second inner surface of the outer cover;
 - a liquid conduit;
 - a first vent conduit coupled to the outer cover, wherein the first vent conduit comprises a first tube that

protrudes away from the second inner surface of the outer cover into the buffer chamber toward the first inner surface of the inner cover, and wherein the first tube is laterally offset from the liquid conduit;

a second vent conduit, wherein the second vent conduit comprises a second tube that protrudes away from the buffer chamber, wherein the liquid conduit and the second vent conduit are configured to fluidly couple to an interior volume of a liquid container, and wherein the liquid conduit and the second tube are axially offset along a central axis of the container cover;

a vent path through the first vent conduit, the buffer chamber, and the second vent conduit; and

wherein the container cover is configured to block fluid flow through the vent path when the container cover is coupled to the gravity feed spray device.

Appeal Br. 16 (Claims Appendix).

REFERENCES

The prior art relied upon by the Examiner is:

Name	Reference	Date
Grant	US 3,990,609	Nov. 9, 1976
Broccoli	US 4,832,232	May 23, 1989

REJECTIONS

The following rejections are on appeal:

1. Claims 1 and 6–12 are rejected on the ground of nonstatutory obviousness-type double patenting as unpatentable over claims 1–3 and 6–10 of U.S. Patent No. 9,079,201.
2. Claims 1, 7, and 8 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as unpatentable

over claims 1, 2, 7, 9, 10, and 12 of co-pending U.S. Patent Application No. 13/789,528.

3. Claims 1, 6–12, and 21–23 are rejected under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement.
4. Claims 8 and 12 are rejected under 35 U.S.C. § 112, second paragraph, as indefinite.
5. Claims 1, 6–12, 22, and 23 are rejected under 35 U.S.C. § 102(b) as anticipated by Grant.
6. Claim 21 is rejected under 35 U.S.C. § 103(a) as unpatentable over Grant and Broccoli.

OPINION

Double Patenting Rejections

Appellant presents no arguments contesting the obviousness-type double patenting rejection of claims 1 and 6–12 over issued claims 1–3 and 6–10 of U.S. Patent No. 9,079,201. “If an appellant fails to present arguments on a particular issue -- or, more broadly, on a particular rejection -- the Board will not, as a general matter, unilaterally review those uncontested aspects of the rejection.” *Ex parte Frye*, 94 USPQ2d 1072, 1076 (BPAI 2010) (precedential). Thus, we summarily sustain this rejection.

Appellant likewise presents no arguments contesting the provisional obviousness-type double patenting rejection of claims 1, 7, and 8 over claims 1, 2, 7, 9, 10, and 12 of co-pending U.S. Patent Application No. 13/789,528. Because this rejection is provisional, we decline to reach it.

We leave it to the Examiner to determine at the time when any claims of this application are otherwise in condition for allowance whether the obviousness-type double patenting rejection remains proper. *See Ex parte Moncla*, 95 USPQ2d 1884 (BPAI 2010) (precedential). The Manual of Patent Examining Procedure (MPEP) § 804(I)(B)(1)(b) (9th ed., January 2018 [R-08.2017]) provides guidance to examiners as to the handling of provisional nonstatutory double patenting.

Written Description Rejection

Appellant argues claims 1, 6–12, and 21–23 as a group. Appeal Br. 10–22. We select claim 1 as representative, and claims 6–12 and 21–23 stand or fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2018).

The Examiner determined that the original disclosure does not provide adequate written descriptive support for recitation that “the liquid conduit and the second tube are axially offset along a central axis of the container cover” in claim 1. Final Act. 7. The rejection is based on the Examiner reading this claim limitation as requiring that both the liquid conduit and the second tube are not coaxial with the central axis of the container cover. Ans. 16.

Appellant’s arguments evince a different reading of this claim limitation based on the requirement that the elements are offset “along a central axis of the container cover.” Appellant argues that the claim limitation requires an axial separation along the central axis between the liquid conduit and the second tube. Reply Br. 2. Appellant shows, with reference to annotated Figure 6 reproduced below, that “the liquid conduit ends before the second tube begins.” *Id.* at 2–3.

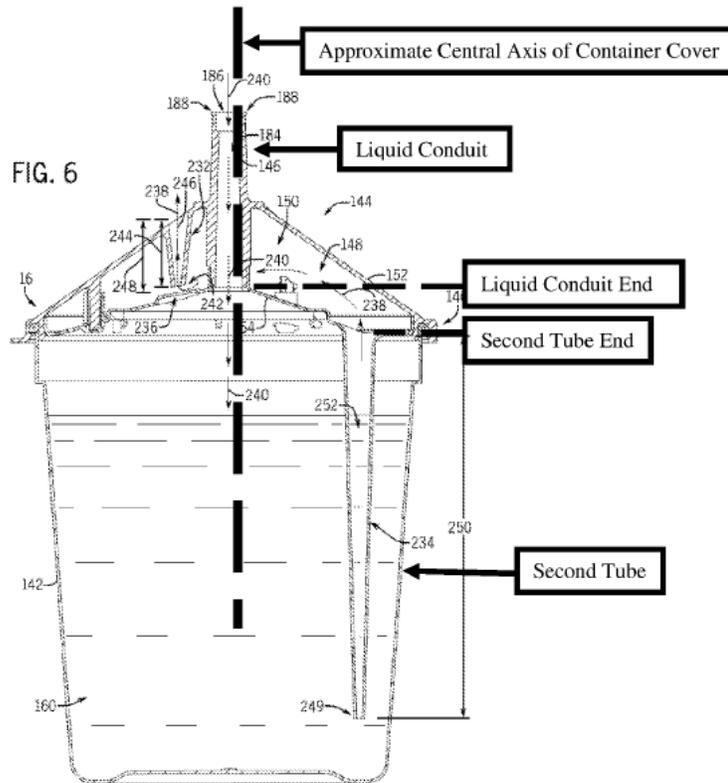


Figure 6 above, as annotated in the Reply Brief, shows an “Approximate Central Axis of Container Cover” and a gap between the lower end of the liquid conduit and upper end of the second tube. Reply Br. 3. Thus, Appellant’s reading of the claim language requires an offset between the liquid conduit and the second tube in the vertical direction.

This reading is consistent with Appellant’s Specification. For instance, the Specification similarly describes offset distance 248 between inner cover 154 and outer cover 152 as being “along the first axis 246 of the outer vent conduit 232.” Spec. ¶ 36. Thus, the Specification describes an offset along an axis in a manner consistent with Appellant’s arguments here, in referring to a gap in the direction of the noted axis. Further, original claim 7 recites the first and second vent conduits are spaced apart from one

another by an offset distance that comprises an axial offset and a lateral offset relative to the axes of the first and second vent conduits. Spec. 20 (claim 7). We understand the lateral offset of claim 7 to refer to a gap in the horizontal direction between the axes of the vent conduits. Thus, the Specification uses “axial offset” in a manner consistent with Appellant’s argument here, to refer to a gap in the vertical direction. Therefore, we agree with Appellant’s reading of “axially offset along a central axis of the container cover” to refer to a gap between the liquid conduit and the second tube in the direction of the central axis (i.e., vertically, as shown in Figure 6). Figure 6 provides adequate support for this claimed offset, as noted above in the annotated Figure. For this reason, we do not sustain the rejection of claims 1, 6–12, and 21–23 under 35 U.S.C. § 112, first paragraph.

Indefiniteness Rejection

The Examiner determined that dependent claims 8 and 12 are indefinite for lack of adequate antecedent basis, because these claims positively recite the liquid container, which is not a positively recited element of claim 1. Final Act. 7–9. The Examiner rejected claim 12 on the same reasoning as it relates to the positive recitation of “the gravity feed spray device.” *Id.* at 9. The Examiner further noted that positively reciting these components in combination with the container cover of claim 1 impermissibly directs the claimed invention to the non-elected invention of the combination of a spray gun and container system. *Id.* at 8, 9.

Appellant argues that the antecedent basis for the language of claims 8 and 12 is clear in claim 1. Appeal Br. 8. Appellant notes that the Examiner has cited nothing to support the premise that an element introduced with

functional language cannot be positively recited in a later dependent claim. Reply Br. 3. Appellant further argues that the Examiner's rejection is improper because original claims 8 and 12 positively recited "the liquid container" and the Examiner included these claims in the restriction requirement as forming part of the elected group. Appeal Br. 9. Appellant argues that the Examiner improperly rejected these claims as indefinite based on the Examiner's own restriction requirement being overinclusive. Reply Br. 4 (citing MPEP 2173.02).

We agree with Appellant that the language of claims 8 and 12 is clear. Claim 1 is directed to a "system." In claim 1, the system comprises a container cover configured to interact with a gravity feed spray device and a liquid container. In dependent claim 8, the system comprises both the container cover and the liquid container. In dependent claim 12, the system comprises the container cover, the liquid container, and the gravity feed spray device. Thus, dependent claims 8 and 12 simply add additional elements to the system of claim 1. We fail to see how these additional recitations render the claim unclear. Further, the inferential introduction of these elements in independent claim 1 provides adequate antecedent basis for their positive recitations in dependent claims 8 and 12.

As to the Examiner's reasoning that the claims are indefinite because they are directed to a non-elected invention, we disagree that this is a proper basis for finding the claims indefinite in this instance. Simply because the dependent claims are purported to cover a different scope than the elected invention does not render the claim unclear. The Examiner included original claims 1-12 in the claims identified as corresponding to Group I in the Restriction Requirement. Original claim 8 recited "the second vent conduit

is configured to extend into the liquid container a third distance that is greater than 50% of a height of the liquid container.” Spec. 20. Original claim 12 recited, “The system of claim 1, comprising the liquid container coupled to the container cover, and the gravity feed spray device coupled to the container cover.” *Id.* In response to the Restriction Requirement, Appellant elected the claims of Group I. Appeal Br. 9. We decline to sustain a rejection of claims 8 and 12 as indefinite in this instance on the basis that the claims arguably add limitations that render the claims directed to non-elected inventions, when the Examiner originally identified claims containing these limitations as being directed to the elected invention. For this reason, we do not sustain the rejection of claims 8 and 12 under 35 U.S.C. § 112, second paragraph.

Anticipation Rejection

Claim 1 recites “a first vent conduit coupled to the outer cover, wherein the first vent conduit comprises a first tube that protrudes away from the second inner surface of the outer cover into the buffer chamber toward the first inner surface of the inner cover.” Appeal Br. 16. The Examiner found that Grant anticipates the system of claim 1, including disclosing a first vent conduit 40 that comprises a tube that protrudes away from the second inner surface of the outer cover 24 into the buffer chamber 50 toward the first inner surface of the inner cover 42. Final Act. 10–11.

Appellant argues, and we agree, that Grant’s vent opening 40, which is disposed entirely within the lid 24, is not a tube that protrudes into buffer chamber 50. Appeal Br. 12. As is clear from Figure 1 of Grant, vent 40 is an opening formed through lid 24. Vent 40 is not shown or described in Grant as being formed as a tube that protrudes into chamber 50.

As discussed above, claim 1 also recites “wherein the liquid conduit and the second tube are axially offset along a central axis of the container cover.” We agree with Appellant that, when this limitation is properly construed to require a gap between the lower end of the liquid conduit and the upper end of the second tube, Grant fails to anticipate this limitation. Appeal Br. 13. The dimple 54 of Grant, identified by the Examiner as corresponding to the claimed “second vent conduit,” axially overlaps with delivery tube 26, identified by the Examiner as the claimed “liquid conduit.” Grant, Fig. 1.

For these reasons, we do not sustain the Examiner’s rejection of independent claim 1 and its dependent claims 6–12, 22, and 23 as anticipated by Grant.

Obviousness Rejection

Claim 21 depends from independent claim 1. The Examiner’s rejection of claim 21 is based on the same deficient finding that Grant discloses a first tube and an axial offset as recited in claim 1. We agree with Appellant that Broccoli does not rectify the above-noted deficiencies in Grant. Appeal Br. 14. Thus, we likewise do not sustain the Examiner’s rejection of claim 21 as unpatentable over Grant and Broccoli.

CONCLUSION

We do not reach the provisional obviousness-type double patenting rejection of claims 1, 7, and 8. We sustain the rejection of claims 1 and 6–12 under the doctrine of obviousness-type double patenting over the issued claims of U.S. Patent 9,079,201. We do not sustain the rejections claims 1, 6–12, and 21–23 under 35 U.S.C. § 112, first paragraph, of claims 8 and 12

under 35 U.S.C. § 112, second paragraph, of claims 1, 6–12, 22, and 23 under 35 U.S.C. § 102(b), and of claim 21 under 35 U.S.C. § 103(a). Thus, we affirm the Examiner’s decision on unpatentability of claims 1 and 6–12, and we reverse the Examiner’s decision on unpatentability of claims 21–23.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed	Not Reached
1, 6–12		Obviousness-type double patenting	1, 6–12		
1, 7, 8		Provisional Obviousness-type double patenting			1, 7, 8
1, 6–12, 21–23	112 ¶ 1	Written description		1, 6–12, 21–23	
8, 12	112 ¶ 2	Indefiniteness		8, 12	
1, 6–12, 22, 23	102(b)	Grant		1, 6–12, 22, 23	
21	103(a)	Grant, Broccoli		21	
Overall Outcome			1, 6–12	21–23	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED IN PART