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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte PETER MARTIN

Appeal 2019-004680
Application 14/942,420
Technology Center 1700

Before GEORGE C. BEST, N. WHITNEY WILSON, and
MICHAEL G. McMANUS, *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 1–8. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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 the named inventor, Peter Martin. Appeal Brief dated Jan. 18, 2019 (“Appeal Br.”) 4.

CLAIMED SUBJECT MATTER

The present application generally relates to an apparatus for promoting the pourability of beverages “from beverage containers used in the preparation and blending of semi-frozen and semi-fluidic beverages.” Specification filed Nov. 16, 2015 (“Spec.”) ¶2. The Specification teaches that “[a]n exemplary beverage container for a blender includes one or more vibrating mechanisms coupled to a bottom portion of the beverage container or integrated within one or more walls of the beverage container.” *Id.* ¶6. A beverage container of this type is shown in Figure 3, reproduced below.

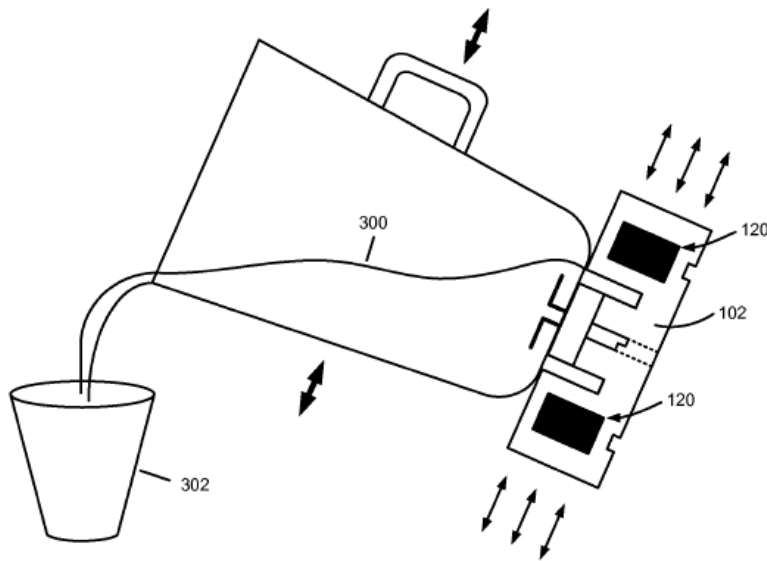


Figure 3 depicts pouring a semi-fluidic beverage 300 such as a smoothie into cup 302. *Id.* ¶27. Figure 3 shows vibrating mechanisms 120 with vibrations shown as opposing arrows. *Id.*

Claims 1 and 7 are illustrative of the subject matter on appeal and are reproduced below with certain limitations bolded for emphasis:

1. A smoothie blender and smoothie pouring apparatus, comprising:
 - a blending pitcher including a removable blending pitcher lid and **a pouring spout** formed in a lip of the blending pitcher, said pouring spout configured to channel a thick, viscous smoothie, as the thick, viscous smoothie is being dispensed from the blending pitcher;
 - a cutting blade** configured to be disposed inside the blending pitcher during blending of the thick, viscous smoothie, said cutting blade operable to cut and crush ice, fruit, and other solid smoothie ingredients;
 - a blender docking station including **a blender motor** that turns said cutting blade during blending of the thick, viscous smoothie;
 - a blending pitcher attachment configured to dock and undock the blending pitcher to and from the blender docking station, said blending pitcher attachment configured to remain attached to the blending pitcher both when the blending pitcher is docked in the blender docking station and the thick, viscous smoothie is being prepared and when the blending pitcher is undocked from the blender docking station and the thick, viscous smoothie is being dispensed from the blending pitcher; and
 - one or more **vibrating mechanisms** housed within or attached to the blending pitcher attachment configured to aggressively shake and vibrate the blending pitcher attachment and the blending pitcher when the blending pitcher attachment and blending pitcher are undocked from the blender docking station and a human pourer is dispensing the thick, viscous smoothie from the blending pitcher,wherein the one or more vibrating mechanisms has/have a physical constitution and vibrational capacity sufficient to generate and mechanically transmit **vibrations** to the blending pitcher that are **of a magnitude necessary to dislodge and**

extricate accumulations of the thick, viscous smoothie that accumulated in a bottom of the blending pitcher during blending and compel the thick, viscous smoothie to pour from the blending pitcher.

7. The smoothie blender and smoothie pouring apparatus of Claim 5, wherein the one or more vibrating mechanisms further comprises **a motor** and the moveable mass comprises a weight that is coupled to a shaft of **the motor** and offset from a longitudinal axis of a shaft of **the motor**.

Appeal Br. 38–39 (Claims App.) (reformatted for clarity; emphasis added).

REFERENCES

The Examiner relies upon the following prior art:

Name	Reference	Date
Fleming	US 2,829,529	Apr. 8, 1958
Eckert	US 3,465,974	Sept. 9, 1969
Rothley	US 5,797,313	Aug. 25, 1998
Montgomery	US 5,842,901	Dec. 1, 1998

REJECTIONS

The Examiner maintains the following rejections:

1. Claims 1–8 are rejected under pre-AIA 35 U.S.C. § 112, ¶ 1 as failing to comply with the written description requirement. Non-Final Action dated June 8, 2018 (“Non-Final Act.”) 4-5.
2. Claim 7 is rejected under pre-AIA 35 U.S.C. § 112, ¶ 2 for failure to particularly point out and distinctly claim the subject matter which the inventor regards as the invention. *Id.* at 5–6.

3. Claims 1–4 and 8 are rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Montgomery in view of Rothley. *Id.* at 6–9.
4. Claims 5 and 6 are rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Montgomery in view of Rothley and further in view of Eckert. *Id.* at 9–10.
5. Claims 5–7 are rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Montgomery in view of Rothley and further in view of Fleming. *Id.* at 10–11.

DISCUSSION

Rejection 1. The Examiner rejects claims 1–8 for failure to comply with the written description requirement. *Id.* at 4–5. The Examiner determines that the term “pouring spout” as used in claim 1 is new matter and that “Applicant’s original specification filed 2/15/2010 is silent with respect to any ‘pouring spout’.” *Id.* at 4.

Appellant contends that the rejection is in error. Appeal Br. 7–8. Appellant asserts that, although the Specification as filed does not use the term “pouring spout” or textually describe such feature, one of the originally filed drawings depicts a pitcher with a projecting lip. *Id.* Appellant further contends that one of ordinary skill in the art would understand the projecting

lip to be a pouring spout. *Id.* at 8. Figure 12, showing the projecting lip, is reproduced, in part, below.

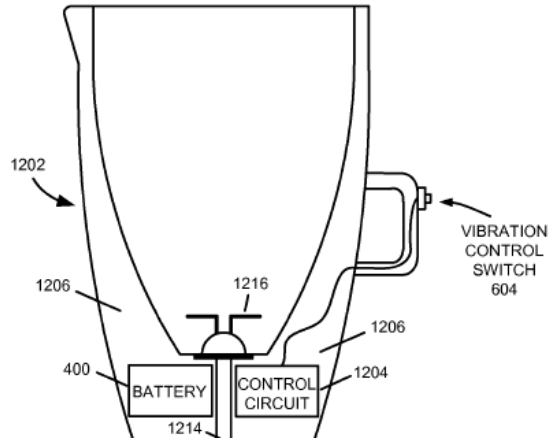


Figure 12 is “a side sectional drawing of a beverage blender.” Spec. ¶ 19.

In the Answer, the Examiner determines that “Figure 12 merely appears to show a cosmetic projection in the upper, outer surface of the pitcher 1202, which has no contact with the inner surface contacting the internal liquid within their pitcher.” Answer 11. The Examiner further indicates that “[t]he projection shown in the figure would not facilitate pouring, and Appellant’s original specification filed 2/15/2010 does not describe this projection or some other ‘pouring spout’ in any detail.”

Answer 11–12.

To satisfy the written description requirement of 35 U.S.C. § 112, the inventor must “convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention.”

Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991)

(emphasis omitted). “One shows that one is ‘in possession’ of the invention by describing the invention, with all its claimed limitations.” *Lockwood v.*

Am. Airlines, Inc., 107 F.3d 1565, 1572 (Fed. Cir. 1997). Possession may be shown “by such descriptive means as words, structures, figures, diagrams,

formulas, etc., that fully set forth the claimed invention.” *Lockwood*, 107 F.3d at 1572.

Here, Figure 12 shows a projection located in the upper left portion of the drawing. Spec., Fig. 12. The projection is located on the side opposite the handle as one would expect for a pouring spout. Given the appearance and location of the projection, it is reasonable to conclude that one of ordinary skill in the art would regard such feature as a spout to facilitate pouring, notwithstanding the apparent drafting error in the figure which depicts the inner surface of the container as substantially vertical near the spout. Accordingly, Appellant has shown error in this regard.

Rejection 2. The Examiner rejects claim 7 as indefinite. Non-Final Act. 5. Claim 7 provides as follows:

The smoothie blender and smoothie pouring apparatus of Claim 5, wherein the one or more vibrating mechanisms further comprises **a motor** and the moveable mass comprises a weight that is coupled to a shaft of **the motor** and offset from a longitudinal axis of a shaft of **the motor**.

Appeal Br. 40 (Claims App.) (emphasis added). The Examiner determines that the term “the motor” as used in claim 7 is indefinite because claim 1 (from which claim 7 depends) also uses the term “motor” and “it is unclear which of the previously recited ‘a motor’ from line 2 of claim 7 and ‘a blender motor’ from line 9 of independent claim 1 are being referenced.” Non-Final Act. 5.

Appellant argues that “those of ordinary skill in the art readily understand that ‘the motor’ in [c]laim 7 refers to one of the motors attached to or included within the ‘blending pitcher attachment.’” Appeal Br. 9. Appellant additionally argues that one of ordinary skill in the art “would

further understand, without any uncertainty or confusion, that ‘the motor’ in Claim 7 is different from the ‘blender motor’ in Claim 1, especially since the words ‘blender motor’ are used consistently throughout the claims.” *Id.*

During prosecution, a claim is examined for compliance with 35 U.S.C. § 112, ¶ 2 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 U.S.P.Q.2d 1207, 1211 (B.P.A.I. 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”). Here, the “motor” limitation of claim 7 is sufficiently clear. Read in context, it is apparent that the motor of claim 7 is a component of the “one or more vibrating mechanisms” which claim 1 requires to be “housed within or attached to the blending pitcher attachment.” This contrasts with the “blender motor” which “turns said cutting blade” and is located in the docking station. Accordingly, Appellant has shown error in this regard.

Rejection 3. The Examiner rejects claims 1–4 and 8 as obvious over Montgomery in view of Rothley. Non-Final Act. 6–9.

In support of the rejection, the Examiner finds, inter alia, that Rothley discloses a blender docking station (base 12) comprising a motor (motor 32) having a drive shaft (shaft 31) which rotates a cutting blade (blades of

impeller 30) in a container. *Id.* at 8. Rothley’s Figure 1 is reproduced, in part, below.

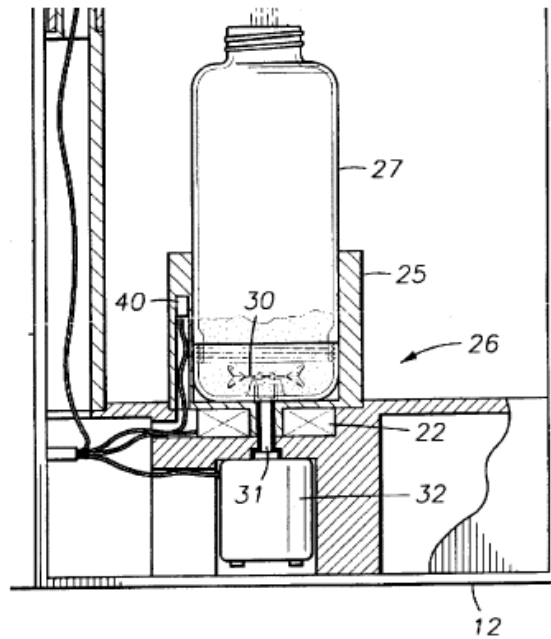


Figure 1 of Rothley shows “an overall view of a baby formula brewing device according to an aspect of the present invention.” Rothley, col. 2:20–21.

Rothley teaches that a mixing means “is operatively associated with the bottle 27 so that . . . the liquid residing therein will be agitated to blend the formula with the water.” *Id.* at col. 2:56–60. Rothley further teaches that the mixing means may be “of a blender-type, with a shaft-mounted impeller 30 sealed through a passageway in the bottom of the bottle 27 in the manner of a conventional blender.” *Id.* at col. 2:62–65. Rothley also teaches that, “[a]lternatively, a magnetic stirrer could be used, thus obviating the need for a specially manufactured bottle.” *Id.* at col. 3:6–7.

Appellant alleges error on several bases. Appeal Br. 10–27. Among its arguments, Appellant contends that Montgomery in view of Rothley fails to teach a “cutting blade . . . operable to cut and crush ice, fruit and other

solid smoothie ingredients.” *Id.* at 15–16. Appellant asserts that “the impeller 30 [of Rothley] is designed only to mix water with a baby formula powder to form a low-viscosity beverage that is capable of being dispensed through a nipple of the baby bottle.” *Id.* at 16. Appellant further asserts that “the words ‘cutting’ and ‘blade’ do not even appear in the Rothley patent.” *Id.*

We find these arguments to be persuasive. Rothley teaches an “impeller” or, alternatively, a “magnetic stirrer.” Neither component has been shown to be synonymous with a blade nor has either been shown to be “operable to cut and crush ice.” Accordingly, Appellant has shown error in the *prima facie* case of obviousness of claim 1. As claims 2–4 and 8 depend from claim 1 and incorporate each of its limitations, we further determine that the determination of obviousness with regard to such claims is in error. In view of such determination, we need not consider Appellant’s additional arguments.

Rejections 4 and 5. The Examiner rejects claims 5–7 over the combination of Montgomery, Rothley, and certain additional references. Non-Final Act. 9–11. In making these rejections, the Examiner relies on Rothley as teaching the “cutting blade” limitation. *Id.* As we have determined such finding to be in error, we also reverse the rejections of claims 5–7.

CONCLUSION

The Examiner's rejections are reversed.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1-8	112, ¶ 1	Written Description		1-8
7	112, ¶ 2	Indefiniteness		7
1-4, 8	103(a)	Montgomery, Rothley		1-4, 8
5, 6	103(a)	Montgomery, Rothley, Eckert		5, 6
5-7	103(a)	Montgomery, Rothley, Fleming		5-7
Overall Outcome				1-8

REVERSED