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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
95/002,200	09/12/2012	7922614	386736-614RX (121158)	7772

27526 7590 09/30/2019

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EXAMINER
ENGLISH, PETER C

ART UNIT	PAPER NUMBER
3993	

MAIL DATE	DELIVERY MODE
09/30/2019	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
90/012,374	06/22/2012	7,922,614 B2	469506.10026	8487

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

CP PACKAGING, LLC
Appellant and Third Party Requester

v.

MULTIVAC, INC.
Respondent and Patent Owner

Appeal 2019-004953
Reexamination Control 95/002,200 and 90/012,374
Patent US 7,922,614 B2
Technology Center 3900

Before JEFFREY B. ROBERTSON, BRETT C. MARTIN, and JON M. JURGOVAN, Administrative Patent Judges.

Administrative Patent Judge MARTIN.

DECISION ON APPEAL

STATEMENT OF THE CASE

This proceeding is a Reexamination of U.S. Patent 7,922,614 B2, issued April 12, 2011 to Ivo Ruzic and Elmar Ehrmann ("'614 patent"). In a "New Decision under 37 C.F.R. § 41.77(f)," mailed September 11, 2018 ("New Decision,"), the Board reversed the Examiner's decision favorable to the patentability of claims 1, 21, and 23. The Board entered new grounds of

rejection against claim 21 under § 112, second paragraph, for failure to particularly point out and distinctly claim the subject matter that the Patent Owner regards as the invention; against claims 1 and 21 under § 103(a) as being unpatentable over either Hepner (US 3,029,007, issued Apr. 10, 1962) or Lovas (US 3,303,628, issued Feb. 14, 1967) in view of Petershack (US 4,353,459, issued Oct. 12, 1982); and against claims 1, 21, and 23 under § 103(a) as being unpatentable over Lovas in view of either Grevich (US 4,336,680, issued June 29, 1982) or Arnold (US 3,868,053, issued Feb. 25, 1975).

The Board granted Patent Owner's request to reopen prosecution and remanded the case to the Examiner on January 18, 2019 ("Dec.") to determine whether the proposed claim amendments place the claims in condition for allowance. The Examiner issued an Examiner's Determination ("Det.") on February 5, 2019 considering the amendments made along with Patent Owner's Response after Board Decision, dated November 12, 2018 and Requester's Comments after Board Decision, dated December 12, 2018 ("Req. Comments"). The Examiner determined that Patent Owner's amendment to claim 21 overcame the indefinite rejection of claim 21 due to lack of antecedent basis, the amendments of claims 21 and 23 fail to overcome the art of record, and the amendment of claim 23 introduces indefinite claim language. Det. 4, 5.

We AFFIRM.

CLAIMED SUBJECT MATTER

The claims are directed "to a chain for a machine drive, transport of material in a machine or the like, and to a packaging machine having one such chain." Spec., col. 1, ll. 8–10. Claim 21, reproduced below with

underlining and strikethrough to indicate the most recent amendment, is illustrative of the claimed subject matter:

> 21. A packaging machine having a chain for transporting a continuous food packaging film through a plurality of work stations of the packaging machine, wherein the chain has a series of successive rigid chain links connected to one another in a movable manner, and flexible chain links provided between the rigid chain links and are fixed to the rigid chain links, and wherein at least some of the rigid chain links include a clamping unit, each clamping unit having a pair of opposing clamping lips for gripping a portion of the continuous food packaging film, the packaging machine further comprising a guide rail, and wherein at least some of the rigid links having a pair of opposing downwardly extending legs configured to straddle and engage the guide rail to substantially prevent displacement of the chain and the gripped portion of the continuous food packaging film in a direction substantially transverse to a direction of travel of the chain, wherein the chain transports the gripped portion of the continuous food packaging film through the plurality of workstations of the ~~thermoforming~~ packaging machine by a movement of the chain.

REJECTIONS

Claim 21 stands rejected under 35 U.S.C. § 112, second paragraph, as indefinite. Det. 4.

Claims 1 and 21 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lovas or Hepner and Petershack. *Id.*

Claims 1, 21, and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lovas and Grevich or Arnold. *Id.*

OPINION

As an initial matter, as discussed in our Remand Decision, we note that Patent Owner both amended certain claims and presented arguments as to unamended claims as well as arguments unrelated to the amendments made to allow for reopening of prosecution. Dec. 5. We reopened prosecution solely "to consider the patentability of claims 1, 21 and 23 in view of the newly-submitted amendments in the Patent Owner's Second Request to Reopen." Dec. 6. We note that claim 1, however, was not amended and the amendments to claims 21 and 23 do not alter the scope or interpretation of claim 1 that led to the new grounds rejecting claim 1. Accordingly, we will address only arguments that pertain to the amendments made to claims 21 and 23.

Claim 1

As noted above, Patent Owner made no amendments with regard to claim 1. As such, we will not address any arguments as to the patentability of claim 1. The previous rejections of claim 1 stand.

Claim 21

Indefiniteness

Patent Owner amended claim 21 to remove the term "thermoforming" so as to overcome an indefiniteness rejection for lack of antecedent basis. We agree with the Examiner that this amendment overcomes the prior indefinite rejections and sustain the Examiners' determination that the claim no longer lacks antecedent basis. Accordingly, we withdraw our previous indefiniteness rejection.

Obviousness

We agree with the Examiner "that this newly-added limitation is obvious in view of both (a) the teachings of Lovas, which is already relied upon in GROUNDS 2 and 3, and (b) the additional teachings of Buchko ['114[1], which is already of record and has already been considered by the PTAB." Det. 7. Patent Owner alleges that the amended language overcomes the rejection because, as Requester notes, legs 245 of Lovas that straddle guide 225 are mounted on the packaging machine and not the rigid link. Req. Comments 14. We agree with Requester, however, that "Patent Owner has simply inverted the orientation of the guide and legs, requiring the straddling legs to be mounted on the rigid link and guide to be mounted on the machine." *Id.* This is merely a reconfiguration of the structure in Lovas to achieve the same result, namely to reduce potential lateral movement of the chain, a modification that would have been obvious to one of ordinary skill in the art. We further agree that Buchko already teaches the claimed configuration via legs 268 that straddle guide rail element 272. Buchko, Figs. 14, 16, col. 8, ll. 10–18. Accordingly, although the amendment raises new issues not previously addressed, it does not overcome the prior art of record and, therefore, does not overcome the rejections.

Claim 23

Indefiniteness

The Examiner determined "that the scope of this newly-added limitation cannot be ascertained with a reasonable degree of certainty." Det. 8. Requester points out that the limitation is indefinite because "[t]here is no

[1] Buchko. US 7,575,114 B2, Aug. 18, 2009.

benchmark(s) against which to test to determine if a machine (or a chain or a closed surface) is 'more' hygienic and 'easier' to clean or not," "[t]here are no standard units that quantify how 'hygienic' something is, nor how 'easy' it is to clean," and "[t]here is no accepted testing method to determine 'hygiene' nor 'easiness of cleaning.'" Req. Comments 21. We agree with Requester on all of these points. The Specification provides no basis on which to determine what is being compared when determining hygiene or ease of cleaning. Although it would make sense that a closed surface is easier to clean than an open surface, such may not be the case. Nor are we provided with any manner to determine the level of cleanliness in comparing two closed surfaces. As to closed versus open, it is entirely possible that a closed surface would be more difficult to clean than an open surface because it could have surface depressions that could hold dirt whereas dirt accumulated in an open space may be more easily removed. In sum, we have no way to know how to determine whether any particular surface is more or less hygienic or easier to clean, thus rendering the term indefinite.

Obviousness

Focusing specifically on the claimed "closed surface" separately from the additional, indefinite language, we agree with Requester that the '614 patent defines this term as "lacking any gaps." Req. Comments 29 (citing Spec., col. 1, ll. 48–49). Arnold's integral construction provides a surface that lacks gaps and, thus, meets the claims. *See* Req. Comments 30. Likewise, Grevich has rigid and flexible links that are fixed together in a continuous, integral surface, therefore, also lacking gaps. As the Examiner states, "Grevich is specifically concerned with replacing prior art roller chains with an endless conveyor band in order to improve cleanability and

provide sanitary (hygienic) conditions." Det. 8 (citing Grevich, col. 1, ll. 21–31, col. 2, ll. 12–1, 28–31). As such, this modification would have been within the ordinary skill in the art. Accordingly, the amendment to claim 23 does not overcome the prior art of record and the rejections stand.

Conclusion

Patent Owner's remaining arguments address alleged deficiencies either in the teachings of the references themselves, unrelated to the amended claim language, or generally as to the combination thereof. Such argument would have been proper for a rehearing, but is not proper once Patent Owner chose to reopen prosecution. As noted above, after reopening prosecution, we only deal with arguments related to the actual amended claim language. Accordingly, we agree with Requester and the Examiner that Patent Owner's amendments do not result in claims that are patentable over the prior art of record. As such, we affirm the Examiner's determination as to all outstanding rejections and sustain those rejections.

DECISION

The Examiner's determination is AFFIRMED.

More specifically, we withdraw the indefiniteness rejection of claim 21 and AFFIRM the Examiner's determination as to the remaining rejections, thus, maintaining the prior art rejections of claims 1, 21, and 23 with the additional conclusion that the new language included in claim 23 is indefinite.

FINALITY AND 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

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