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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* DAVID P. TUSA, KHAIRAN ALADWANI,  
GREG C. DAVIS, and JAN HARRIS<sup>1</sup>

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Appeal 2019-006012  
Application 14/533,381  
Technology Center 1700

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Before CATHERINE Q. TIMM, CHRISTOPHER C. KENNEDY, and  
BRIAN D. RANGE, *Administrative Patent Judges*.

KENNEDY, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 4, 5, 24, 28, 30, 31, 33, and 37–44. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

BACKGROUND

The subject matter on appeal relates to systems that comprise containers for collecting waste pharmaceutical materials. *E.g.*, Spec. ¶ 2;

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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. The Appellant identifies the real party in interest as Sharps Compliance, Inc. Appeal Br. 3.

Claim 1. Claim 1 is reproduced below from page 24 (Appendix A) of the Appeal Brief:

1. A system comprising:
  - a collection subsystem comprising:
    - a plurality of collection apparatuses, each of the apparatuses including:
      - (a) an outer container having:
        - (i) at least one door hinged to the outer container, and
        - (ii) at least one lock mounted on the at least one door to engage a side of the outer container to lock and unlock the at least one door,
      - (b) a single manually operated unidirectional depositing member disposed in an exterior surface of the outer container, and
      - (c) a single transportable inner container contained within the outer container,

wherein:

the single unidirectional depositing member comprises a manually rotatable member having an opened interior and a handle so that rotating the rotatable member with the handle allows used, unused, and/or waste pharmaceutical containing materials to be deposited into the interior and manually rotating the rotatable member back deposits the used, unused, and/or waste pharmaceutical containing materials into the single inner container, while restricting withdrawal of the used, unused, and/or waste pharmaceutical containing materials from the single inner container,

the at least one lock is selected from the group consisting of combination locks, shielded combination locks, pad locks, shielded pad locks, ring locks, key locks, or biometric locks, and

the at least one lock are locked during use so that the unidirectional depositing member provides the only access for the used, unused, and/or waste pharmaceutical containing

materials to be deposited into the single transportable inner container.

### REJECTIONS ON APPEAL

The claims stand rejected as follows:

1. Claims 1, 4, 5, 24, 28, 30, 31, 33, and 37–44 under 35 U.S.C. § 112, ¶ 2 as indefinite. Final Act. 3–4.
2. Claims 1, 4, 5, 24, 28, 30, 31, 33, and 37–44 under 35 U.S.C. § 102(b) as anticipated by Mallett '140 (US 2007/0278140 A1, published Dec. 6, 2007). Final Act. 9.
3. Claims 1, 4, 5, 24, 28, 30, 31, 33, and 37–44 under 35 U.S.C. § 103(a) as unpatentable over Mallett '140. Final Act. 9.<sup>2</sup>
4. Claims 1, 4, 5, 24, 28, 30, 31, 33, and 37–44 under 35 U.S.C. § 102(b) as anticipated by Mallett '640 (US 2005/0065640 A1, published Mar. 24, 2005). Final Act. 18.
5. Claim 24 under 35 U.S.C. § 103(a) as unpatentable over Mallett '640 optionally in view of Poadiama (US 2009/0043253 A1, published Feb. 12, 2009), optionally further in view of Madruga (US 2012/0004761 A1, published Jan. 5, 2012). Final Act. 40.<sup>3</sup>

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<sup>2</sup> The Examiner characterizes Rejections 2 and 3 as “alternative” rejections, i.e., anticipated by, or alternatively obvious over, Mallett '140. Final Act. 9. For clarity, we have listed the Examiner’s alternative rejections as two separate rejections.

<sup>3</sup> In the header setting forth this rejection, the Examiner also lists claim 24 as being anticipated under § 102(b) by Mallett '640. Final Act. 40. Because the Examiner already included a rejection of claim 24 as anticipated by Mallett '640 as part of Rejection 4, the anticipation component of the Examiner’s header for Rejection 5 appears to be redundant of Rejection 4, and we have omitted it here for clarity.

## ANALYSIS

After review of the cited evidence in the appeal record and the opposing positions of the Appellant and the Examiner, we determine that the Appellant has not identified reversible error in the Examiner's rejections. Accordingly, we affirm the rejections for reasons set forth below, in the Final Action dated June 19, 2018, and in the Examiner's Answer dated February 8, 2019.

### *Rejection 1*

In the Appeal Brief, the Appellant fails to acknowledge, address, or otherwise assert error in the Examiner's rejection under 35 U.S.C. § 112, ¶ 2. *See generally* Appeal Br.

In the Answer, the Examiner observes that “[t]he appellant has not responded to the rejections under section 112 in the appeal brief[;] as such no further comment is made as to these rejections. Said rejections are maintained.” Ans. 4.

Although the Appellant files a Reply Brief, the Appellant again fails to acknowledge, address, or otherwise assert error in the rejection under § 112, ¶ 2, notwithstanding the fact that, as set forth above, the Examiner expressly maintains the rejection in the Answer. *See generally* Reply Br.

We summarily affirm the Examiner's rejection under § 112, ¶ 2 because the Appellant fails to assert error in that rejection. *See Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“[I]t has long been the Board's practice to require an applicant to identify the alleged error in the examiner's rejections.”)).

*Rejection 2*

The Appellant argues the claims as a group. We select claim 1 as representative of the claims subject to Rejections 2 and 3. The remaining claims will stand or fall with claim 1.

We begin with a discussion of claim interpretation. Claim 1 recites a “system” that comprises a “subsystem” that itself comprises “a plurality of collection apparatuses.” Appeal Br. 24. Thus, claim 1 is an apparatus claim. “[A]pparatus claims cover what a device *is*, not what a device *does*.”

*Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990).

Claim 1 includes recitations concerning structure and function/intended use. As to structure, claim 1 recites that each collection apparatus includes “an outer container.” Appeal Br. 24. The “outer container” includes “at least one door hinged to the outer container,” and it includes “at least one lock mounted on the door to engage a side of the outer container.” *Id.* The “outer container” also includes “a single manually operated unidirectional depositing member disposed in an exterior surface of the outer container.” *Id.* The “unidirectional depositing member comprises a manually rotatable member having an opened interior and a handle.” *Id.* The “outer container” also includes “a single transportable inner container contained within the outer container.” *Id.*

As to the functional language of claim 1, to the extent that it implies required structure, it “may be used to add limitations to an apparatus claim.” *See Textron Innovations Inc. v. Am. Eurocopter Corp.*, 498 F. App’x 23, 28 (Fed. Cir. 2012); *see also K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999). Claim 1 recites that the function of the “lock” is “to lock

and unlock the at least one door.” Appeal Br. 24. That functional recitation does not further specify the structure of the term “lock.”

Claim 1 recites that the function of the “unidirectional depositing member” is to “allow[] . . . materials to be deposited into the interior” of the depositing member when the rotatable member is rotated in one direction, and to then “deposit[] the . . . materials into the single inner container” when the rotatable member is rotated “back,” while restricting withdrawal of the . . . materials from the single inner container.” *Id.* That functional language implies that the unidirectional depositing member must be structurally capable of rotating to open and closed positions, and that it must be structurally capable of receiving material and depositing the material into the inner container.

As to language concerning intended use, claim 1 recites that the lock is “locked during use so that the unidirectional depositing member provides the only access for the . . . materials to be deposited into the single transportable inner container.” *Id.* That language does not appear to further limit the structure of the apparatus.

With that understanding of the structure required by claim 1, we turn to the Examiner’s rejection. The rejection appears at pages 9–18 of the Final Action. The Examiner finds, *inter alia*, that Mallett ’140 discloses waste sorting stations that comprise outer containers with single transportable inner containers. Final Act. 9–11 (citing, e.g., Mallett ’140 ¶¶ 12, 20–26). The Examiner reproduces Figure 32 of Mallett ’140 as exemplary of Mallett ’140’s sorting stations. Ans. 12. Figure 32 of Mallett ’140 is reproduced below.

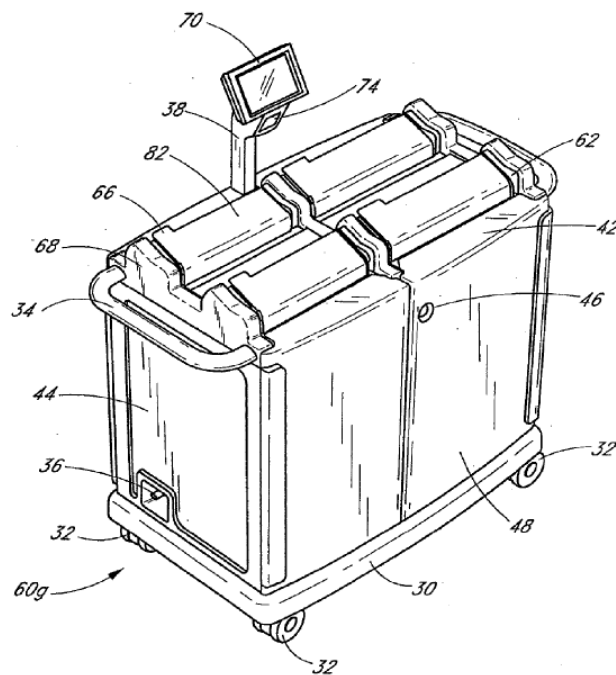


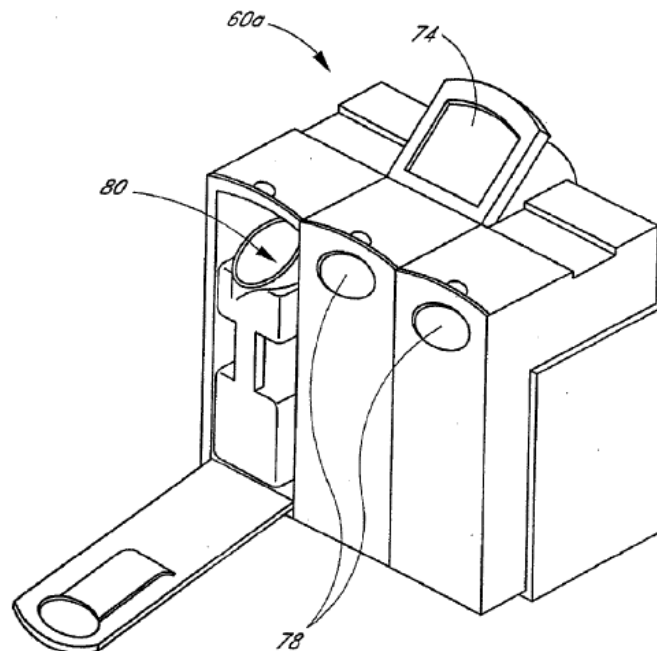
Figure 32, above, depicts wheeled cart 60g with lids 82 and levers 66. Mallet '140 ¶¶ 140–141. The lids 82 “rotate” to open and closed positions. *Id.* The lids 82 may be caused to automatically open by “electronics, a solenoid, and a spring,” and “the user closes the lid 82 by applying hand pressure to a lever 66.” *Id.* ¶ 141. The Examiner determines that “[i]t is obvious that the apparatus is capable of manual operation as to the opening, closing, locking, etc. as one of ordinary skill in the art at the time of the invention would know that handles, doors, lids, lock with keys, etc. may be operated by hand/manually.” Final Act. 10.

The Appellant first argues that “Mallet [’140] includes no disclosure and describes no embodiment that includes a single inner container . . . and a single unidirectional depositing member.” Appeal Br. 14. According to the Appellant, Mallet ’140 “relates expressly and exclusively to sorting apparatuses that include an electronic system to identify waste material and a plurality of inner containers.” *Id.*



That argument is not persuasive of reversible error. Claim 1 recites “a plurality of collection apparatuses” that each includes “an outer container” and “a single transportable inner container.” *Id.* at 24. The Examiner finds, and the Appellant does not persuasively dispute, that the claim language encompasses “multiple outer containers with inner containers (i.e. a series of containers).” Ans. 6–7. Consistent with the Examiner’s findings, Mallett ’140 discloses “a plurality of container compartments, with each container compartment configured to receive a removable container.” Mallett ’140 ¶ 20.

Mallett ’140 depicts a variety of embodiments that appear to constitute “a plurality of collection apparatuses,” as recited by claim 1, that each include “an outer container” and “a single transportable inner container.” For example, Figure 3 is reproduced below.



**FIG. 3**

Figure 3, above, depicts unit 60a with “apertures 78 configured to reveal openings to respective containers 80.” *Id.* ¶¶ 130–131. In the Answer, the

Examiner finds that Figure 3 shows “a single container [80] inside an outer compartment.” Ans. 12. The visual impression given by Figure 3, which is consistent with the textual disclosures of Mallett ’140, is that a “plurality of container compartments,” i.e., three side-by-side compartments (not identified by a reference numerals), each house individual inner removable containers 80, which each have individual depositing members 78. *See, e.g.*, Mallett ’140 ¶ 20, Fig. 3. In other words, consistent with the Examiner’s discussion, *e.g.*, Ans. 6–7, Figure 3 depicts a series of containers (i.e., “a plurality of collection apparatuses” as recited by claim 1): three outer containers side-by-side, each having its own inner container 80, which each has its own depositing member 78.

Figure 32, also relied on by the Examiner and reproduced above, is similar. Although neither the Examiner nor the Appellant identifies an interior or “open” view of Figure 32, a person of ordinary skill in the art reasonably would have inferred that each lid 82 would be associated with its own inner container, as depicted in Figure 3 and contemplated by ¶ 20, because that is consistent with Mallett ’140’s goal of sorting waste. *See* Mallett ’140 Fig. 32.

Particularly under the claim construction standard applicable to this proceeding (broadest reasonable construction consistent with the specification, *see In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1379 (Fed. Cir. 2007)), we are not persuaded that Mallett ’140 fails to teach or suggest an outer container having a single inner container and a single depositing member. The plain language of the claim is broad enough to encompass the side-by-side arrangement of outer containers each having individual inner containers shown and described above.

The Appellant also argues that Mallett '140 is limited to apparatuses in which depositing members open automatically, and, therefore, that all of Mallett '140's embodiments fall beyond the scope of the term “*manually* operated unidirectional depositing member.” Appeal Br. 16–19.

That argument is not persuasive. As the Appellant acknowledges, Mallett '140 discloses embodiments in which it does not expressly specify whether opening is automatic or manual. *See* Appeal Br. 16 (citing Mallett '140 ¶ 22). Paragraph 22 of Mallett '140 describes three embodiments: (1) an embodiment in which “the control system may be configured to indicate the appropriate container by opening a door,” (2) an embodiment in which “the control system may be configured to indicate the appropriate container by illuminating a light,” and (3) an embodiment in which “the control system may be configured to indicate the appropriate container by both opening a door and illuminating a light.” Mallett '140 ¶ 22. A person of ordinary skill in the art would immediately recognize that those three embodiments, in combination, imply that a door in embodiment (2) may be manually opened, given that embodiments (1) and (3) specify that the control system opens a door, but embodiment (2) specifies only indicating a container by illuminating a light.

Moreover, there is no dispute that Mallett '140 discloses manually closing a lid. Appeal Br. 17 (acknowledging that Mallett '140 “does disclose manually closing a lid to a container”). Nor is there any dispute that Mallett '140 discloses structures in which the lid has a “lever.” *See* Ans. 10–11; Mallett '140 Fig. 32 (depicting lever 66). It appears that lid 82 (which the Examiner finds corresponds to a rotatable unidirectional depositing member as claimed, Final Act. 13) is structurally capable of being

manually opened by lever 66, regardless of whether Mallett '140 expressly states as much.

Finally, we observe that, in the Answer, the Examiner finds that the claim does not recite a depositing member that must be manually *opened*, but, rather, that it recites a “manually *operated*” depositing member.

Ans. 10. The Examiner determines that “a single step of manual operating will meet this limitation (i.e. manually closing).” *Id.*

In the Reply Brief, the Appellant argues that “manual” means “operated by hand without the use of a mechanical or electrical device.”

Reply Br. 3.

Even accepting that definition as accurate, the Appellant’s argument fails to show that Mallett '140’s lid 82 falls beyond the scope of the term “manually operated unidirectional depositing member.” As noted above, there is no dispute that Mallett '140 discloses that its lid 82 may be manually closed by hand without the use of a mechanical or electrical device. *See* Mallett ¶ 141; *see also id.* Fig. 34C (depicting manual closing by applying pressure with a finger). Additionally, claim 1 recites that the rotatable member is “manually rotat[ed]” to close it, but as to opening, claim 1 recites only that the rotatable member is “rotat[ed],” i.e., the word “manually” is omitted. *See* Appeal Br. 24 (claim 1). The fact that claim 1 specifies “manually” rotating the rotating member to close the depositing member, but omits the word “manually” when referring to opening the depositing member, supports the Examiner’s interpretation of the term “manually operated unidirectional depositing member” as being broad enough to encompass only manual closing.

Particularly under the broadest reasonable interpretation standard, and in the absence of persuasive argument as to why “manually operated” should be interpreted to require *both* manually opening *and* manually closing, we are not persuaded that Mallett ’140 fails to teach or suggest a “manually operated unidirectional depositing member.”

The Appellant does not meaningfully raise any other arguments concerning the disclosures of Mallett ’140. Thus, we are not persuaded of reversible error in the Examiner’s determination that Mallett ’140 teaches each limitation of claim 1. However, that does not fully resolve the issues raised by the Appellant with respect to this rejection because, in the “Legal Standard” section of the Appeal Brief (but not in the “Argument” section of the brief), the Appellant appears to take issue with the fact that the Examiner relies on different embodiments of Mallett ’140 in issuing the anticipation rejection. Appeal Br. 12. In the Answer, the Examiner responds to that concern by citing *Kennametal, Inc. v. Ingersoll Cutting Tool Co.*, 780 F.3d 1376, 1381 (Fed. Cir. 2015). Ans. 6. *Kennametal* states that “a reference can anticipate a claim even if it does not expressly spell out all the limitations arranged or combined as in the claim, if a person of skill in the art, reading the reference, would ‘at once envisage’ the claimed arrangement or combination.” See *Kennametal*, 780 F.3d at 1381 (some internal quotation marks and citation omitted). The Examiner’s reliance on *Kennametal* indicates that the Examiner finds that a person of ordinary skill in the art would have “at once envisaged” that different embodiments of Mallett ’140 could be combined as desired, e.g., that the rotating lids 82 of Figure 32 could be used instead of the apertures of Figure 3, resulting in a structure that falls within the scope of claim 1. See Ans. 6. That finding is

consistent with Mallett '140's express statement that "many aspects of the methods and devices shown and described in the present disclosure may be differently combined." Mallett '140 ¶ 306.

In the Reply Brief, the Appellant argues that, even under an "at once envisage" analysis, *Kennametal* requires a single prior art reference to disclose each and every claim limitation. See Reply Br. 2 (citing *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 851 F.3d 1270 (Fed. Cir. 2017)). The Appellant argues that *Kennametal*'s "at once envisage" rationale is inapplicable here because Mallett '140 is missing required claim elements (i.e., a "single" inner container and a "single" manually operated unidirectional depositing member). Reply Br. 2. The Appellant, however, does not argue that a person of ordinary skill in the art would not "at once envisage" combining different embodiments of Mallett '140. See *id.* at 2–3.

We agree with the Appellant that *Kennametal* does not permit the Examiner to supply limitations that are missing from a reference. See *Nidec*, 851 F.3d at 1274–75 ("*Kennametal* does not permit the Board to fill in *missing limitations* simply because a skilled artisan would immediately envision them." (emphasis added)). As set forth above, however, we are not persuaded by the Appellant's arguments that Mallett '140 is missing any elements of claim 1. Even were we to agree with the Appellant that Mallett '140 does not disclose a single embodiment that itself includes each and every limitation, as noted above, the Appellant has not argued that a person of ordinary skill in the art would not "at once envisage" combining different embodiments of Mallett '140. Accordingly, the Appellant's argument concerning different embodiments of Mallett '140 does not

persuade us of reversible error in the Examiner's rejection under § 102(b).  
*See Jung*, 637 F.3d at 1365.

We affirm the Examiner's rejection of claim 1 under § 102(b).

### *Rejection 3*

As to the § 103(a) basis for the Examiner's rejection over Mallett '140, the Examiner relies on the findings concerning Mallett '140 as described above, and, in the Answer, the Examiner further determines that combining different embodiments of Mallett '140 is simply "[t]he selection of a known material based on its suitability for its intended use." Ans. 8. Thus, the Examiner concludes that, even if Mallett '140 does not anticipate claim 1, the subject matter of claim 1 would have been obvious in view of Mallett '140.

The Appellant does not meaningfully distinguish between the Examiner's § 102(b) and § 103(a) analyses. *See generally* Appeal Br. Beyond the arguments discussed above, which we find unpersuasive, the Appellant argues that "commercial success, long felt need, and copying" weigh in favor of a conclusion of nonobviousness.<sup>4</sup> *See* Appeal Br. 20–21. The burden of showing that objective indicia support a conclusion of nonobviousness rests with the Appellant. *In re Huang*, 100 F.3d 135, 139 (Fed. Cir. 1996).

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<sup>4</sup> Objective indicia of nonobviousness cannot overcome rejections based on anticipation. *See, e.g., In re Malagari*, 499 F.2d 1297, 1302 (CCPA 1974). Thus, even were we to find the Appellant's arguments concerning objective indicia to be persuasive, we would affirm the Examiner's rejection on the basis of the § 102(b) rejection.

The Appellant has not carried that burden in this case at least because the Appellant's assertions concerning objective indicia are not adequately developed to meaningfully weigh in favor of the Appellant's position. In particular, we note that, although the Appellant refers to a declaration, the Appeal Brief does not provide citations to the declaration or otherwise identify specific pages or paragraphs that might support the contentions made in the Appeal Brief. *See* Appeal Br. 20–21. The relevant declaration is attached to the Appeal Brief as Appendix C. The declaration and supporting attachments are more than 30 pages long. The Appellant argues, for example, that the declaration includes attachments showing “that the system satisfied a long felt and unanswered need.” Appeal Br. 21. No further explanation or argument is provided. *See id.* Nor does Appellant provide citations to the allegedly relevant portions of the declaration or the attachments. *See id.* The Appeal Brief includes similar conclusory allegations, also lacking citations, concerning copying and commercial success. *See id.* We decline to attempt to locate, in the first instance, support in the declaration and attachments for the Appellant's arguments. *See In re Borkowski*, 505 F.2d 713, 719 (CCPA 1974) (explaining that “[i]t was appellant's burden to explain the content of” the relied upon evidence). On this record, we determine that the Appellant has not carried its burden of showing that objective indicia support a conclusion of nonobviousness.

For the foregoing reasons, we are not persuaded of reversible error in the Examiner's rejection of claim 1 under § 103(a).

#### *Rejections 4 and 5*

Rejection 4 is similar to Rejection 2 but relies on Mallett '640 instead of Mallett '140. *Compare* Final Act. 9–18 (rejection based on Mallett '140),



with Final Act. 18–40 (rejection based on Mallett ’640). Rejection 4 is based on § 102(b) alone and does not include an alternative rejection based on § 103(a). Final Act. 18. Rejection 5 concerns only claim 24 and also involves Mallett ’640 as the primary reference, alone or in combination with other references. *Id.* at 40.

Neither the Examiner nor the Appellant specifically identifies any noteworthy differences between Mallett ’140 and Mallett ’640, and the Appellant largely groups the two Mallett references together and argues against them collectively. *See, e.g.*, Appeal Br. 14–15, 18–19 (stating that “Mallett [’640] is substantially similar to Mallett [’140],” and raising the same arguments against Mallett ’640 as were raised against Mallett ’140, i.e., that it fails to teach a “single” inner container and manually opening a depositing member).

Because we affirm the Examiner’s rejections of all claims on appeal as set forth above in our discussion of Rejections 1, 2, and 3, and because our discussion of Mallett ’140 also provides the Appellant with guidance as to the rejections based on Mallett ’640, we decline to reach a decision as to Rejections 4 and 5.

## CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 4, 5, 24, 28, 30, 31, 33, 37–44	112, ¶ 2	Indefiniteness	1, 4, 5, 24, 28, 30, 31, 33, 37–44	
1, 4, 5, 24, 28, 30, 31, 33, 37–44	102(b)	Mallett ’140	1, 4, 5, 24, 28, 30, 31, 33, 37–44	

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 4, 5, 24, 28, 30, 31, 33, 37-44	103(a)	Mallett '140	1, 4, 5, 24, 28, 30, 31, 33, 37-44	
1, 4, 5, 24, 28, 30, 31, 33, 37-44	102(b)	Mallett '640		
24	103(a)	Mallett '640, Poadiama, Madruga		
<b>Overall Outcome</b>			1, 4, 5, 24, 28, 30, 31, 33, 37-44	

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

**AFFIRMED**