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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ERIC WARREN FOGLE

Appeal 2019-006837
Application 14/590,352
Technology Center 3600

Before JOHN C. KERINS, JILL D. HILL, and GEORGE R. HOSKINS,
Administrative Patent Judges.

KERINS, *Administrative Patent Judge.*

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–12, the only claims pending in the application. We have jurisdiction under 35 U.S.C. § 6(b). A telephonic oral hearing was conducted on September 10, 2020, with Mary J. Breiner, Esq., appearing on behalf of Appellant.

We REVERSE.

¹ The term “Appellant” is used herein to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as the named inventor, Eric Warren Fogle. Appeal Br. 1–2.

THE CLAIMED SUBJECT MATTER

Appellant's invention relates to a pet litter box cleaning system.

Claim 1 is illustrative, and is reproduced below:

1. A pet litter box comprising, in combination:

(a) a base structure comprising

(i) a first bottom wall having a first perimeter defining an interior area of the first bottom wall,

(ii) at least one side wall which adjoins and extends upward from a substantial portion of the first perimeter of the first bottom wall so as to leave a portion of the first perimeter free, on the first bottom wall, of said at least one side wall, and wherein said at least one side wall does not extend beyond said first perimeter,

(iii) a second bottom wall extending continuously from or in an abutting joined manner outward from said first bottom wall in said portion of the first perimeter which is free of said at least one side wall, wherein said second bottom wall does not include upstanding side walls and is not directly connected to said at least one side wall;

(b) a sieve member comprising

(i) a horizontally planar sifting portion, wherein the sifting portion has a second perimeter smaller than said first perimeter of the first bottom wall and has a configuration which allows insertion of the sifting portion through the portion of the first perimeter free of said at least one side wall,

(ii) a back wall extending upward from one end of the sifting portion so that when the sifting portion is within the base structure the back wall substantially fills said portion of the first perimeter free of said at least one side wall; and

(iii) a handle member extending upward of the sifting portion and the back wall.

THE REJECTIONS

The Examiner rejects:

(i) claims 1–4 and 7–9 under 35 U.S.C. § 103 as being unpatentable over Hecht (US 8,851,014 B2, issued Oct. 7, 2014) in view of van Zuilekom (US 8,336,497 B2, issued Dec. 25, 2012), and Sheriff (US 5,921,596, issued July 13, 1999);

(ii) claims 5 and 6 under 35 U.S.C. § 103 as being unpatentable over Hecht in view of van Zuilekom, Sheriff, and Neil (US 2004/0244708 A1, published Dec. 9, 2004);

(iii) claims 10 and 12 under 35 U.S.C. § 103 as being unpatentable over Hecht in view of van Zuilekom, Sheriff, and Larson (US 6,820,628 B2, issued Nov. 23, 2004); and

(iv) claim 11 under 35 U.S.C. § 103 as being unpatentable over Hecht in view of van Zuilekom, Sheriff, and Ball (US 3,851,763, issued Dec. 3, 1974).

ANALYSIS

Claims 1–4 and 7–9--§ 103--Hecht/van Zuilekom/Sheriff

The Examiner finds that Hecht discloses a pet litter box cleaning system that includes a base structure and a sieve member, but that these components lack certain structural features required by claim 1. Final Act. 2–3. In particular, the Examiner finds that Hecht does not teach that a first bottom wall of the base structure has at least one side wall extending around a first perimeter, yet having a portion of the first perimeter free of the at least one side wall, and a second bottom wall that extends continuously outwardly from the first bottom wall at the region of the first perimeter having no

upwardly extending side wall, and that the second bottom wall has no upstanding side wall or walls. *Id.* The Examiner turns to van Zuilekom as disclosing an animal waste management device that includes a first bottom wall and a second bottom wall having the claim elements found missing in Hecht. *Id.* at 3. The Examiner concludes that it would have been obvious to modify the base structure of Hecht to have a portion of its first perimeter free of the at least one side wall, and to provide a second bottom wall extending continuously outwardly from the first bottom wall in the portion of the first perimeter that is free of a side wall, “because doing so would have provided an easy to use solution for small animal waste that can be used to enhance, replace, or compliment [sic] current products that are designed or used for small animal waste management.” *Id.* at 3.

The Examiner also finds that Hecht lacks an upwardly-extending handle on its sieve member, cites to Sheriff as disclosing such a handle, and concludes that it would have been obvious to modify the Hecht sieve member to include a handle. Final Act. 3–4. Because we determine that the Examiner has not provided a viable reason to modify Hecht in view of van Zuilekom that is supported by rational underpinnings, as discussed below, we need not reach the issue as to the propriety of the additional proposed modification in view of Sheriff.

Appellant points out that the base structure of Hecht has four side walls around the perimeter of the interior of the structure, including a front wall that is shorter than the other walls, and that the short front wall is required in order to aid in the proper reinsertion of the sifting insert (corresponding to the sieve member in claim 1) at an angle relative to the base member. Appeal Br. 14, citing Hecht, col. 4, ll. 44–64, Fig. 8; *see also*

Reply Br. 2–3. Appellant asserts that, were the shortened front wall or any of the other walls removed, as proposed by the Examiner, Hecht would no longer be suitable for its intended use in the containment of the litter material. Appeal Br. 14.

The passage in Hecht cited by Appellant, as well as the ensuing discussion at column 4, line 65 to column 5, line 28, do evidence that Hecht attaches some importance to having the shortened front wall interact with the bottom surface of the sifting insert during reinsertion of the insert into the base structure. In particular, the height of the front wall is selected so that the sifting insert remains oriented at an angle relative to the base structure as it is slid over the top edge of the front wall and into the base, to thereby scoop and otherwise manage the litter material present in the base structure, and so that, ultimately, the sifting insert nests into the base structure. Hecht, col. 4, l. 44–col. 5, l. 28.

The Examiner replies that removal of the front wall of the base structure of Hecht would not render the Hecht apparatus unsuitable for containing litter material, in that the back wall of the sifting insert would contain the litter at that side of the nested base and insert. Ans. 5. This position, although responsive to part of Appellant’s argument, does not address the effect of removing the front wall of the Hecht base on the process of reinserting the sifting insert into the base, taught by Hecht to preferably be done with the sifting insert at an angle to the base structure.² It

² We are cognizant that, in the absence of any front wall on the Hecht base structure, a user would be able, to some extent, to maintain the sifting insert at a desired angle as it is reinserted simply by holding it in such position and sliding the leading edge of the insert along the base structure. For that matter, it appears that, with the front wall removed, the sifting insert could

also fails to consider that Hecht relies on the front wall to retain the litter remaining in the base structure once the sifting insert is removed for cleaning. *See* Hecht, col. 3, ll. 35–39 (minimum height of front wall selected to retain desired volume/height of litter material).

This loss of some degree of functionality in Hecht is to be evaluated in terms of what is gained by making the modification. Our reviewing court has recognized that a given course of action often has simultaneous advantages and disadvantages, and this does not necessarily obviate any or all reasons to combine teachings. *See Winner Int’l Royalty Corp. v. Wang*, 202 F.3d 1340, 1349 n.8 (Fed. Cir. 2000) (“The fact that the motivating benefit comes at the expense of another benefit, however, should not nullify its use as a basis to modify the disclosure of one reference with the teachings of another. Instead, the benefits, both lost and gained, should be weighed against one another.”).

The above-quoted reason advanced by the Examiner for removing the front wall of Hecht, and extending, from that wall-free portion of the perimeter, an exterior area of the bottom wall, is excerpted directly from column 1, lines 48–62 of van Zuilekom. In van Zuilekom, small animal toilet pads are disclosed as being a replacement for traditional litter boxes, or being positioned as a liner inside a conventional litter box. van Zuilekom, col. 3, ll. 1–2; *see also* Figs. 3, 4. van Zuilekom is devoid of any suggestion that any of the several constructions of the toilet pads disclosed therein would have any application to the construction of a litter box itself. The

be reinserted with its bottom surface essentially parallel to the base structure. However, the Examiner does not provide an assessment as to the effect the proposed modification would have on the relative ease or difficulty with which the sifting insert would be reinserted in the absence of a front wall.

Examiner does not identify, and we are at a loss in identifying, what problem exists in the Hecht construction for which any of the van Zuilekom pad configurations provide the so-called “easy to use solution for small animal waste,” as recited in van Zuilekom and parroted by the Examiner in articulating the reason for the proposed modification. *See* Final Act. 3.

It appears to be no more than happenstance that van Zuilekom might be viewed as disclosing structure that corresponds to only a part of the claimed structure, i.e., upright walls, partial absence of an upright wall, and a bottom wall bounded in part by the upright walls and extending outwardly from the portion unbounded by upright walls. van Zuilekom, Fig. 7. The upright walls are repeatedly and consistently described as being provided to protect building wall structure in a corner of a room, whereas the bottom wall appears to simply be of sufficient area that a small animal will fit thereon, so as to protect the floor as well. van Zuilekom, *passim*. These considerations do not appear to have any particular applicability to the construction of the Hecht litter box and cleaning device, and particularly not to the configuration and function of the upright walls and bottom wall of the Hecht base structure.

Accordingly, we do not sustain the rejection of claim 1 as being unpatentable over Hecht, van Zuilekom, and Sheriff. Claims 2–4 and 7–9 depend from claim 1, and the rejection is not sustained as to those claims, either.

Claims 5 and 6--§ 103--Hecht/van Zuilekom/Sheriff/Neil

The Examiner does not rely on Neil in any manner that cures the deficiencies in the combination of Hecht and van Zuilekom. The rejection of claims 5 and 6 is therefore not sustained.

Claims 10 and 12--§ 103--Hecht/van Zuilekom/Sheriff/Larson

The Examiner does not rely on Larson in any manner that cures the deficiencies in the combination of Hecht and van Zuilekom. The rejection of claims 10 and 12 is therefore not sustained.

Claim 11--§ 103--Hecht/van Zuilekom/Sheriff/Ball

The Examiner does not rely on Ball in any manner that cures the deficiencies in the combination of Hecht and van Zuilekom. The rejection of claim 11 is therefore not sustained.

DECISION

The rejections of claims 1–12 under 35 U.S.C. § 103 are reversed.

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–4, 7–9	103	Hecht, van Zuilekom, Sheriff		1–4, 7–9
5, 6	103	Hecht, van Zuilekom, Sheriff, Neil		5, 6
10, 12	103	Hecht, van Zuilekom, Sheriff, Larson		10, 12
11	103	Hecht, van Zuilekom, Sheriff, Ball		11

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Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
Overall Outcome				1-12

REVERSED