

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 16

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GREGORY KEVORKIAN, DAN SMOLKO
and VLADIMIR LEVITIN¹

Appeal No. 2000-1782
Application No. 08/933,639

ON BRIEF

Before ABRAMS, McQUADE and BAHR, Administrative Patent Judges.
McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Gregory Kevorkian et al. originally took this appeal from the final rejection (Paper No. 4) of claims 1 through 20, all of the claims pending in the application.² Upon review of the appellants' brief (Paper No. 8), the examiner issued an Office

¹ The record indicates that the listing of Gregory I. Kevorkian on the file jacket as a sole inventor is inaccurate.

² The references in the final rejection to nonexistent claim 21 are erroneous.

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action (Paper No. 9) reopening prosecution and entering new rejections superseding those in the final rejection. In response, the appellants reinstated the appeal (Paper No. 11) and filed a supplemental brief (Paper No. 14). The appeal is now before us for decision.

THE INVENTION

The invention relates to "beverage containers which are vented for the purpose of reducing negative pressure or vacuum which builds up inside the container when a beverage is being consumed therefrom" (specification, page 1). Representative claim 1 reads as follows:

1. A vented beverage container of the type having a drinking spout where said vent is made from a sintered macroporous substrate and said vent is permanently secured to the container so the container and vent form an integral one piece unit.

THE EVIDENCE

The items relied on by the examiner as evidence of obviousness are:

Saigne	4,271,977	Jun. 9, 1981
Bright	4,761,232	Aug. 2, 1988
Joyner et al. (Joyner)	4,865,207	Sep. 12, 1989
Rohrig	5,339,971	Aug. 23, 1994

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The item relied on by the appellants as evidence of non-obviousness is:

The 37 CFR § 1.132 Declaration of Gregory J. Kevorkian, filed August 5, 1998 (part of Paper No. 3).

THE REJECTIONS

Claims 1 through 4, 7 and 18 stand rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter the appellants regard as the invention.

Claims 1 through 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Joyner in view of Saigne and Bright.

Claims 1 through 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Joyner in view of Saigne, Bright and Rohrig.

Attention is directed to the appellants' main and supplemental briefs and to the examiner's answer (Paper No.

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15) for the respective positions of the appellants and the examiner with regard to the merits of these rejections.

DISCUSSION

I. The 35 U.S.C. § 112, second paragraph, rejection of claims 1 through 4, 7 and 18

The basis for this rejection is the examiner's determination that

[t]he term "of the type" in claim 1 is a relative term which renders the claim indefinite. The term "of the type" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention [answer, pages 3 and 4].³

This criticism is not relevant to claims 7 and 18 which do not depend from, or have any other connection to, claim 1. Moreover, contrary to the examiner's analysis, the "of the type" language at issue is neither a relative term of degree nor a term which is undefined in the claim.

Accordingly, we shall not sustain the standing 35 U.S.C.

³ According to the original explanation of this rejection (see Paper No. 9), the examiner also considered claims 3, 7 and 18 to be indefinite due to their inclusion of the term "or." Upon reconsideration, the examiner has withdrawn this concern (see page 3 in the answer).

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§ 112, second paragraph, rejection of claims 1 through 4, 7 and 18.

II. The 35 U.S.C. § 103(a) rejection of claims 1 through 20 as being unpatentable over Joyner in view of Saigne and Bright

Joyner, the examiner's primary reference, discloses an infant nursing bottle designed to prevent the buildup of negative pressure within the bottle during use. To this end, the bottle 10 includes a generally cylindrical, open-ended, plastic body 11, a nipple 12, a threaded ring 13 holding the nipple over the top of the body, a disk-shaped microporous membrane 14, a pair of protective plastic grids 18 and 19 sandwiching the membrane, and a threaded ring 16 holding the membrane and grids over the bottom 15 of the body. The microporous membrane, which preferably is made of a woven, teflon-based material (e.g., GORTEX®), contains more than one billion pores per square inch and permits the passage of air, but not liquid, under normal pressures.

As conceded by the examiner (see page 4 in the answer), Joyner does not respond to the limitation in independent claim 1 requiring the vent to be made from a sintered macroporous substrate, or the corresponding limitations in independent

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claims 5, 9, 14 and 19 requiring the vent to be a sintered macroporous plastic.

Saigne discloses a closure cap for a tank containing hydrocarbon, propane or like liquid. The cap includes a filter element providing a venting passage for maintaining the correct pressure within the tank. The filter element, which may be made of a sintered metal, a compressed plastic foam, or a sintered plastic (see column 2, lines 42 through 61; and column 6, lines 44 through 62), has a porosity allowing the passage of air, but not liquid or any other particle having a size greater than or equal to one micron.

Bright discloses a microporous structure having general utility in the field of industrial filtration (see column 1, lines 10 through 28). The structure comprises a macroporous, synthetic resin substrate 11 having pores greater than 10 microns in diameter and a microporous, synthetic resin matrix 13 cast within the macroporous structure 11 and having pores less than 10 microns in diameter. Bright teaches that the macroporous substrate 11 is formed by sintering particles of powdered synthetic resin material (see column 2, lines 25 through 32).

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In proposing to combine Joyner, Saigne and Bright to reject the appealed claims, the examiner concludes that it would have been obvious to one of ordinary skill in the art "to provide a sintered material in Joyner et al. as taught by Saigne to simplify the attachment process, i.e., to utilize one layer instead of a plurality of layers" (answer, page 4), and "to provide a sintered macroporous substrate having the claimed dimension in the container of Joyner et al. as taught by Bright to optimize the amount of air entering the container while providing a rigid support" (answer, page 4).

The disparate natures of the articles respectively disclosed by Joyner, Saigne and Bright indicate, however, that the combination proposed by the examiner stems from impermissible hindsight. In short, there is nothing in Saigne's disclosure of a filter element designed for pressure control in a propane tank and/or in Bright's disclosure of a macroporous intermediate product used to make a microporous industrial filter which would have suggested replacing the microporous membrane in Joyner's infant nursing bottle with a sintered macroporous element as recited in independent claims 1, 5, 9, 14 and 19. Thus, the combined teachings of the

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foregoing references fail to establish a prima facie case of obviousness with respect to the subject matter recited in these claims.⁴

Hence, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claims 1, 5, 9, 14 and 19, and dependent claims 2 through 4, 6 through 8, 10 through 13, 15 through 18 and 20, as being unpatentable over Joyner in view of Saigne and Bright.

III. The 35 U.S.C. § 103(a) rejection of claims 1 through 20 as being unpatentable over Joyner in view of Saigne, Bright and Rohrig

Rohrig discloses a plastic feeding bottle having micropores 5 formed directly in its bottom by a laser. The micropores are sized to permit the passage of ambient air for counteracting the buildup of negative pressure, and to prevent the leakage of water and other liquid foods. Such disclosure affords no cure for the above noted flaws in the proposed Joyner-Saigne-Bright combination.

⁴ This being so, it is unnecessary to delve into the merits of the appellants' declaration evidence of non-obviousness.

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Therefore, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claims 1 through 20 as being unpatentable over Joyner in view of Saigne, Bright and Rohrig.

IV. Remand for further consideration

The application is remanded to the examiner to consider the following matters:

A. whether the term "said vent" in claims 1 and 5 lacks a proper antecedent basis which possibly renders these claims and the claims depending therefrom indefinite under 35 U.S.C. § 112, second paragraph;

B. whether claims 1 through 4 and 20 are limited to the drinking spout embodiment shown in Figure 4, and if so, whether the recitation in parent claim 1 that the container and vent form an integral one piece unit poses an accuracy problem under 35 U.S.C. § 112, second paragraph, and/or a written description problem under 35 U.S.C. § 112, first paragraph; and

C. whether the recitation in claims 2, 6, 10 and 15 of a pore size range of from 11 to 350 microns, as opposed to the 7

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to 350 micron range originally disclosed, presents a written description problem under 35 U.S.C. § 112, first paragraph.

SUMMARY

The decision of the examiner to reject claims 1 through 20 is reversed, and the application is remanded to the examiner for further consideration.

REVERSED AND REMANDED

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NEAL E. ABRAMS)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JOHN P. McQUADE)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
JENNIFER D. BAHR)	
Administrative Patent Judge)	

JPM/gjh

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DOUGLAS A. BURCOMBE
11341 PEGASUS AVENUE
SAN DIEGO, CA 92126

GJH

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APJ McQUADE

APJ ABRAMS

APJ BAHR

REVERSED AND REMANDED

July 15, 2002