

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. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte  
CHARLES J. LONG JR.

---

Appeal No. 2000-1449  
Application No. 08/838,133

---

ON BRIEF

---

Before COHEN, ABRAMS, and STAAB, Administrative Patent Judges.  
STAAB, Administrative Patent Judge.

DECISION ON APPEAL

Charles J. Long, Jr. appeals from the examiner's final rejection of claims 1-14, 16-28, 31, 32, 34-39 and 41-43. Claims 15, 29, 30, 33 and 40, the only other claims pending in the application, have been objected to as depending from a rejected claim, but are otherwise indicated as being allowable if rewritten in independent form.

Appeal No. 2000-1449  
Application No. 08/838,133

Appellant's invention pertains to threaded tamper-evident container closures, and to threaded tamper-evident closures having push-pull resealable tamper-evident pour spouts.

The references cited in the final rejection are:

Thomas et al. (Thomas)	2,998,902	Sep. 5, 1961
Arona-Delonghi	4,919,309	Apr. 24, 1990
Beck	5,456,374	Oct. 10, 1995
Sander et al. (Sander)	5,588,562	Dec. 31, 1996

Claims 42 and 43 stand rejected under 35 U.S.C. § 112, second paragraph.

Claims 1-14, 37-39 and 42 stand rejected under 35 U.S.C. § 103 as being unpatentable over Sander in view of Arona-Delonghi.

Claims 16-28 and 43 stand rejected under 35 U.S.C. § 103 as being unpatentable over Sander in view of Arona-Delonghi, and further in view of Thomas.

Claims 31, 32, 34-36 and 41 stand rejected under 35 U.S.C. § 103 as being unpatentable over Sander in view of Arona-Delonghi and Thomas, and further in view of Beck '374.

Reference is made to appellant's main and reply briefs (Paper Nos. 11 and 16) and to the examiner's answer (Paper No. 13) for the respective positions of appellant and the examiner regarding the merits of these rejections.

DISCUSSION

In reaching our decision in this appeal, we have given careful consideration to appellant's specification and claims, to the applied prior art references, to the paper styled "AFFIDAVIT PURSUANT TO 37 C.F.R. 1.132" of inventor Charles J. Long, Jr.<sup>1</sup>, and to the above noted positions articulated by appellant and the examiner. As a consequence of our review, we make the determinations that follow.

I. The rejection under 35 U.S.C. § 112, second paragraph

Claims 42 and 43 depend from claims 5 and 26, respectively, and further set forth that the closure has "at least one said first frangible element . . . connected to said annular wall from a first elevated bridge portion."

The examiner has rejected these claims because, in the examiner's view, they "raise[] issues of double inclusion" (answer, page 3). The examiner's position in this regard is not well taken.

The disclosed feature claims 42 and 43 are directed to is the location of at least one of the first frangible elements 14 (see Figures 1-3) extending from the tamper-evident band 15 to the depending annular wall or skirt 13 *at the location of the first*

---

<sup>1</sup>Attachment to appellant's response submitted April 12, 1999 (Paper No. 6). A copy thereof is attached to this decision.

Appeal No. 2000-1449  
Application No. 08/838,133

*elevated bridging portion 35*. That is, the at least one first frangible element 14 of claims 42 and 43 interconnects the tamper-evident band 15 to the depending annular wall 13 *by means of* the first elevated bridging portion 35. This is in contrast to *other* (separate and distinct) first frangible elements 14 (also seen in Figures 1-3) claimed in, for example, claims 5 and 26, that interconnect the tamper-evident band 15 to the depending annular wall 13 at locations *between* first elevated bridging portions 35. Because claims 42 and 43 are directed to different frangible elements than the frangible elements of claims 5 and 26 from which they respectively depend, and because no other claim in the chain of dependency of claims 42 or 43 is directed to the same frangible elements as claims 42 and 43, the examiner's concerns are not well founded.

Accordingly, we shall not sustain the standing rejection of claims 42 and 43 under 35 U.S.C. § 112, second paragraph.

II. The rejections under 35 U.S.C. § 103

Preliminary Matters

The paper styled "AFFIDAVIT PURSUANT TO 37 C.F.R. 1.132" filed in this application on April 12, 1999 as an attachment to Paper No. 6 does not qualify as an affidavit because it is not under oath,

Appeal No. 2000-1449  
Application No. 08/838,133

and does not qualify as a declaration because it does not include on the same document the warnings of the consequences of willful false statements set forth in 37 CFR § 1.68. This being the case, the Long "affidavit" may not properly be accorded evidentiary status. See *In re Mehta*, 347 F.2d 859, 866, 146 USPQ 284, 289 (CCPA 1965), *In re Hunter*, 167 F.2d 1006, 1009, 77 USPQ 610, 612-13 (CCPA 1948) and *Ex parte Meyer*, 6 USPQ2d 1966, 1968 (BPAI 1988). We therefore will treat Mr. Long's statements as argument in responding to the points raised therein.

*The standing rejection under 35 U.S.C. § 103 of claims 1-14, 16-20, 23-27, 31, 32, 37-39 and 42*

Considering first the § 103 rejection of claim 1, there appears to be no dispute that Sander, the examiner's primary reference, discloses a tamper-evident closure with a resealable pour spout of the type generally disclosed and claimed by appellant. With respect to claim 1, the examiner considers (answer, pages 3-4) that Sander "lacks the locking member being hook shaped and continuous."<sup>2</sup> The examiner contends, however, that

---

<sup>2</sup>Implicit in this position is the examiner's determination that claim 1 requires that the locking member be "hook shaped" and/or "continuous," a position with which we do not agree. What claim 1 does require with respect to the at least one arcuate projection is that said projection comprises a locking member

(continued...)

this feature is taught by Arona-Delonghi at locking rib 10. The examiner concludes (answer, page 4) that it would have been obvious to provide the closure of Sander with a hook-shaped locking member as taught by Arona-Delonghi in order to better secure the closure to the neck of a bottle.

Appellant argues that Arona-Delonghi is non-analogous art. Appellant further argues (1) that Arona-Delonghi teaches away from adaption of any of its features to a threaded snap-on closure, (2) that the closure of Arona-Delonghi encounters completely different types of forces during installation and removal that would not enable its use with appellant's tamper-evident closure having a threaded connection to the container, (3) that there is no suggestion that would motivate one skilled in the art to provide a hook-shaped locking member on the tamper-evident band of a threaded closure that is screwed on and off of a container, and (4) that the examiner's proposed combination is based on the use of impermissible hindsight.

---

<sup>2</sup>(...continued)

"extending radially inward from said first tamper indicating ring *with a surface at an angle to a plane normal with said first tamper indicating ring*" (emphasis added). Based on the showing in Figures 1, 2 and 7 of Sander, the arcuate projections 16 on Sander's tamper indicating ring 15 appears to meet this limitation, in which event Sander would *anticipate* claim 1.

Appeal No. 2000-1449  
Application No. 08/838,133

The question of whether Arona-Delonghi is non-analogous art as urged by appellant (see, for example, pages 7-8 of the main brief) is a threshold issue in considering the question of obviousness. Arona-Delonghi pertains to caps for collapsible bottles and containers that are manufactured to store products in liquid, semi-liquid or viscous form, in which a tamperproof detachable section is provided (see column 1, lines 6-8, and the abstract). The cap of Arona-Delonghi comprises a first member T of plastic material having on its lower part a locking rib 10 for locking the first member to the neck of the bottle, and a second member 24 rotatably mounted to the top of the first member (column 2, line 48, through column 3, line 19). To dispense the product stored in the container, the second member is rotated relative to the first member to align openings in the first and second members to form an exit orifice (column 2, lines 20-27).

In an obviousness determination under 35 U.S.C. § 103, art which is non-analogous is too remote to be treated as prior art. *In re Clay*, 966 F.2d 656, 658-59, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992). There are two criteria for determining whether art is analogous: (1) whether the art is from the field of the inventor's endeavor, regardless of the problem addressed, and (2) if the art is not within the field of the inventor's endeavor, whether it is

Appeal No. 2000-1449  
Application No. 08/838,133

reasonably pertinent to the particular problem with which the inventor was involved. *Id.*

The specification of the instant application indicates that the field of appellant's endeavor "relates to threaded tamper evident container closures" (see page 1), and that a particular problem with which appellant was involved was to provide "an improved means of locking threaded tamper-evident closures to the bottle neck" (see page 2). In our opinion, Arona-Delonghi is at least reasonably pertinent to this particular problem, and thus constitutes analogous art which was properly considered by the examiner in combination with Sander in assessing the obviousness of the subject matter recited in the appealed claims. In this regard, we do not agree with appellant's position to the effect that Arona-Delonghi must be viewed as non-analogous art simply because it pertains to a non-threaded tamper-evident container closure.

Concerning the relevance of Arona-Delonghi to the obviousness issue raised in this appeal, we regard Arona-Delonghi as being representative of the knowledge in the closure art of providing flexible, upwardly facing, locking or fastening ribs on the inner circumferential surface of a closure part for cooperating with a downwardly facing shoulder on a bottle or container in order to securely retain the closure part on the bottle or container. In

Appeal No. 2000-1449  
Application No. 08/838,133

this regard, note column 2, lines 51-55, of Arona-Delonghi ("The retention member body T has on its lower part, a plurality of vertically disposed locking or fastening ribs 10, which are relatively flexible and which lock against the neck or crown of the bottle in order to prevent its slipping upwardly . . .").

The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

In the present case, Arona-Delonghi's teaching at column 2, lines 51-55, of providing relatively flexible locking ribs 10 for retaining the lower closure part on the neck or crown of the bottle in order to prevent its slipping upwardly would have furnished the artisan with ample suggestion to substitute flexible hook-shaped locking ribs as taught by Arona-Delonghi for the projections 16 of Sander's tamper-evident band 15. Suggestion for the above is found in the advantage Arona-Delonghi's flexible hook-shaped locking ribs provide of facilitating the positioning of the locking ribs beneath

Appeal No. 2000-1449  
Application No. 08/838,133

the locking flange on the container neck, which would have been recognized by the ordinarily skilled artisan.

Concerning appellant's argument (main brief, page 8) that Arona-Delonghi "teaches away" from adaptation of any of its features to a threaded snap-on closure, "[a] reference may be said to teach away when a person of ordinary skill . . . would be lead in a direction divergent from the path that was taken by applicant." *Para-Ordnance Mfg. Inc. v. SGS Importers Int.'l Inc.*, 73 F.3d 1085, 1090, 37 USPQ2d 1237, 1241 (Fed. Cir. 1995) (quoting *In re Gurley*, 27 F.3d 551, 553, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994)). To teach away, a reference must indicate that a certain feature "should not" or "cannot" be used with other features. *Id.* Nowhere does Arona-Delonghi state or even suggest that flexible hook-shaped locking ribs 10 should not be used to retain a tamper-evident band of a threaded closure to a container. In fact, Arona-Delonghi's disclosure at column 2, lines 51-55, and column 3, lines 45-50, of how the locking ribs 10 facilitate installation and retention of the first closure member T on the neck of the bottle indicates that the result sought by Arona-Delonghi's locking ribs and Sander's arcuate projections 15 is the same. Thus, Arona-Delonghi's teaching regarding the ability of flexible locking ribs 10 to facilitate assembly and retention of a closure part on the

Appeal No. 2000-1449  
Application No. 08/838,133

neck of a bottle actually teaches an ordinarily skilled artisan to use locking ribs like the ribs 10 of Arona-Delonghi in Sander's closure.

With respect to the argument (main brief, page 9) that "the cap disclosed in Arona-Delonghi encounters completely different types of forces during installation and removal that would not enable its use with Applicant's claimed [tamper indicating closure]," we are apprised of no persuasive evidence of record to support this contention. It is well settled that an argument in the brief cannot take the place of evidence and that arguments of counsel, unsupported by competent factual evidence of record, are entitled to little weight. See *In re Payne*, 606 F.2d 303, 315, 203 USPQ 245, 256 (CCPA 1979) and *In re Pearson*, 494 F.2d 1399, 1405, 181 USPQ 641, 646 (CCPA 1974).

As for the argument that there is no suggestion provided in Arona-Delonghi which would motivate one skilled in the art to provide a hook-shaped locking member on the tamper-evident band of Sander, for the reasons discussed above we simply disagree with appellant on this point. We also disagree with appellant that the examiner employed inexpressible hindsight in rejecting the appealed claims. More particularly, we consider that the § 103 rejection of claim 1 takes into account only knowledge which was within the

Appeal No. 2000-1449  
Application No. 08/838,133

level of ordinary skill at the time the presently claimed invention was made, i.e., the teachings of Sander and Arona-Delonghi viewed as a whole, and does not include knowledge gleaned only from appellant's disclosure. Appellant's view to the contrary is not persuasive because it is predicated on the individual disclosures of Sander and Arona-Delonghi vis-a-vis the claimed invention. However, nonobviousness cannot be established by attacking the references individually where, as here, the rejection is based upon the teachings of a combination of references. *In re Merck & Co. Inc.*, 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986).

In light of the above, we consider that the reference evidence adduced by the examiner establishes a *prima facie* case of obviousness of claim 1. Notwithstanding appellant's statement on pages 6 and 13-14 of the main brief that the claims stand independently of each other, appellant has not argued the merits of claims 2-14, 16-20, 23-27, 31, 32, 37-39 and 42 with any reasonable degree of specificity. Therefore, we consider that the reference evidence adduced by the examiner also is sufficient to establish a *prima facie* case of obviousness of these claims.

Appeal No. 2000-1449  
Application No. 08/838,133

The standing rejection under 35 U.S.C. § 103 of claims  
21, 22, 28, 34-36, 41 and 43

Claims 21, 22, 28, 34-36, 41 and 43 have been separately argued. See pages 14-15 of the main brief.

Claim 21 is directed to a modification of the seal feature illustrated in Figure 10. Specifically, claim 21 sets forth that the at least one seal flange "is discontinuous."<sup>3</sup> The examiner's position (answer, page 6) to the effect that this feature is taught by Sander and/or Arona-DeLonghi is not well taken. Further, we are in agreement with appellant that this feature also is not taught or suggested by Thomas. Accordingly, it is our view that the examiner has not established a *prima facie* case of obviousness of claim 21.

Claim 22 is directed to the plug element feature of the push-pull pour spout illustrated in Figure 10A. Specifically, claim 22 calls for the plug to comprise a circular disk and a depending skirt extending from the disk to define a hollow cavity within the plug. The examiner states (answer, page 8) that this feature is taught by Sanders; however, we do not agree. Because we do not view the combined teachings of Sander, Arona-DeLonghi and

---

<sup>3</sup>In order to bring the drawings into compliance with 37 CFR § 1.83(a), this claimed feature should be illustrated in the drawings.

Appeal No. 2000-1449  
Application No. 08/838,133

Thomas as teaching or suggesting the subject matter of claim 22, we consider that the examiner has not established a *prima facie* case of obviousness of claim 22.

Claims 28 and 43 set forth that the at least one frangible element of the tamper-evident band of the pour spout is connected to the annular wall thereof "from" a second elevated bridge portion. Sander teaches (1) that the first tamper-evident band 15 carried by the annular wall 13 should include elevated bridge portions 35 for protecting the frangible elements 14 during molding and assembly (column 2, line 60 through column 3, line 3), and (2) that the frangible elements 14 may interconnect the band 15 to the annular wall 13 *either between or from* the elevated bridge portions 35 (see, for example, Figures 1-3). Sander further teaches (3) that the second tamper-evident band 30 carried by the annular wall 28 of the pour spout should include upstanding stops 29A (i.e., elevated bridge portions) (see Figures 3 and 4 and column 2, lines 18-20), which elevated stops are presumably provided for the same purpose as the elevated bridge portions 35 of the first tamper-evident band. Based on these reference teachings, we consider that it would have been an obvious matter of design choice to one of ordinary skill in the art to provide the frangible elements 29 for Sander's second tamper-evident band in the same

manner as the frangible elements 14 of the first tamper-evident band, i.e., *either between or from* the elevated bridge portions of the tamper-evident band. Our view in this regard is bolstered by the circumstance that the record before us does not indicate any particular advantage of one location over the other.<sup>4</sup> Based on this determination, we conclude that the reference evidence adduced by the examiner also is sufficient to establish a *prima facie* case of obviousness of claims 28 and 43.

Claim 34 depends from claim 32 and sets forth that the third tamper indicating ring recited in claim 32 (i.e., the tamper indicating ring for attaching the cover 90 to the closure) "includes at least one annular bead for engaging at least one annular bead positioned on said closure." The examiner has relied on Beck '374 for a teaching of this feature, referring us specifically to the showing in Beck '374 of "a cover 10; ring 36;

---

<sup>4</sup>*Compare In re Kuhle*, 526 F.2d 553, 555, 188 USPQ 7, 8-9 (CCPA 1975) ("Use of such a means of electrical connection in lieu of those used in the references solves no stated problem and would be an obvious matter of design choice within the skill of the art." (citations omitted)); *In re Dailey*, 357 F.2d 669, 672-73, 149 USPQ 47, 50 (CCPA 1966) ("Appellants have presented no argument which convinces us that the particular configuration of their container is significant or is anything more than one of numerous configurations a person of ordinary skill in the art would find obvious for the purpose of providing mating surfaces in the collapsed container of [the applied reference]." (citation omitted)).

Appeal No. 2000-1449  
Application No. 08/838,133

beads 42 and at 109" (answer, page 5). However, the ring 36 of Beck '374 is akin to the tamper-evident ring 15 of Sander. Moreover, the cover of Beck '374 is connected to the closure by a tamper indicating frangible webs 31 that do not comprise annular beads on the cover and closure. Based on the disparity between what is being claimed and that which is taught by Beck '374, we conclude that the examiner has not established a *prima facie* case of obviousness claim 34, or claims 35 and 36 that depend therefrom.

Claim 41 depends from claim 31 and calls for the cover of claim 31 to be configured for "snap-on" installation. The examiner again relies on Beck '374 for a teaching of this claim feature. Because we do not agree with the examiner that the additional "snap-on" feature for the cover called for in claim 41 is taught by Beck '374, we conclude that a *prima facie* case of obviousness of this claim has not been established.

To summarize the above, we conclude that the reference evidence adduced by the examiner is sufficient to establish a *prima facie* case of obviousness of claims 28 and 43, but is not sufficient to establish a *prima facie* case of obviousness of claims 21, 22, 34-36 and 41.

Appeal No. 2000-1449  
Application No. 08/838,133

The "AFFIDAVIT PURSUANT TO 37 C.F.R. 1.132" by inventor  
Charles J. Long, Jr.

Although the statements of Mr. Long found in the paper filed on April 12, 1999 are not evidence as earlier indicated, the points raised by Mr. Long have been considered.

At the outset, we observe that there is no factual support in the record before us for the statements made by Mr. Long in his "affidavit" regarding the revenue and market share of the "28mm Sport Cap" said to embody features of the claimed invention. In any event, assuming that over \$11 million in revenue have been derived from sales of the "28mm Sport Cap," and that such sales represent an increase in market share from zero to 15%, as alleged by Mr. Long in paragraph 2, a proper nexus between market success and the merits of the claimed invention must be established in order for any such showing of commercial success to be accorded substantial weight.<sup>5</sup> In the present case, a proper nexus has not been established. For example, in paragraph 3(a) of Mr. Long's statement, it is stated that the commercial success of the "28mm

---

<sup>5</sup>See, for example, *Simmons Fastener Corp. v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575, 222 USPQ 744, 746 (Fed. Cir. 1984), cert. denied, 471 U.S. 1065 (1985), and *Stratoflex Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539, 218 USPQ 871, 879 (Fed. Cir. 1983).

Appeal No. 2000-1449  
Application No. 08/838,133

Sport Cap" is attributable to the "hook-shaped flange of the present invention." However, the appealed claims do not require a "hook-shaped" flange on any of the tamper-evident rings. Moreover, for all the record shows, the \$11 million in revenue and increased rate of sales for the "28mm Sport Cap" could just as easily be attributable to increased popularity of the sports beverages contained in the bottles to which the closures were applied.

As to Mr. Long's statement in paragraph 5 that the advantages of the appellant's cap "satisfy a long felt need" in the art, in order to establish long felt but unresolved need it must be demonstrated that a problem has been recognized in the art and remained unsolved over a long period of time,<sup>6</sup> and that the claimed invention satisfied the long felt need.<sup>7</sup> Mr. Long's statements do not address these issues. Instead, they merely allege, without any factual support, that the claimed invention satisfied a long felt need.

---

<sup>6</sup>*Vandenberg v. Dairy Equip. Co.*, 740 F.2d 1560, 1567, 224 USPQ 195, 199 (Fed. Cir. 1984).

<sup>7</sup>*In re Cavanagh*, 436 F.2d 491, 496, 168 USPQ 466, 471 (CCPA 1971).

Appeal No. 2000-1449  
Application No. 08/838,133

In light of the above, the statements of Mr. Long found in the paper filed on April 12, 1999, do not convince us that the examiner erred in rejecting claims 1-14, 16-20, 23-28, 31, 32, 37-39, 42 and 43.

III. Remand

This case is remanded to the examiner for consideration of the following matter.

As noted above, claim 34 sets forth that the third tamper indicating ring recited in claim 32 (i.e., the tamper indicating ring for attaching the cover 90 to the closure) "includes at least one annular bead for engaging at least one annular bead positioned on said closure," and claim 41 calls for the cover of claim 31 to be configured for "snap-on" installation. U.S. Patent 5,328,063 to Beck, of record, discloses an overcap 16. As described by Beck '063 at column 3, lines 61-66:

. . . to snappingly engage the overcap **16** to the post **12**, the overcap **16** includes an internal annular rib **52**. The rib **52** seats within the recess **50** of the post **12** when the overcap **16** is assembled to the post **12**. If desired, a tamper-indicating strap or tape (not illustrated) can be utilized.

The examiner should (1) determine whether Beck '063, in combination with other prior art of record, renders any of claims 34-36 and 41 unpatentable under 35 U.S.C. § 103, and (2) take

Appeal No. 2000-1449  
Application No. 08/838,133

whatever action is deemed appropriate in view of said determination.

IV. Summary

The rejection of claims 42 and 43 under 35 U.S.C. § 112, second paragraph, is reversed.

The rejection of claims 1-14, 37-39 and 42 as being unpatentable over Sander in view of Arona-Delonghi is affirmed.

The rejection of claims 16-28 and 43 as being unpatentable over Sander in view of Arona-Delonghi and Thomas is affirmed as to claims 16-20, 23-28 and 43, but is reversed as to claims 21 and 22.

The rejection of claims 31, 32, 34-36 and 41 as being unpatentable over Sander in view of Arona-Delonghi, Thomas and Beck '374 is affirmed as to claims 31 and 32, but is reversed as to claims 34-36 and 41.

In addition, this case is remanded to the examiner for consideration of the matter noted above.

Appeal No. 2000-1449  
Application No. 08/838,133

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

AFFIRMED-IN-PART; REMANDED

IRWIN CHARLES COHEN	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
NEAL E. ABRAMS	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
LAWRENCE J. STAAB	)	
Administrative Patent Judge	)	

LJS/lp

Appeal No. 2000-1449  
Application No. 08/838,133

THOMAS C. WETTACH  
COHEN & GRINGSBY, P.C.  
11 STANWIX STREET, 15, FLOOR