

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CARL E. WHITCOMB

Appeal 2007-0116
Application 10/446,987
Technology Center 3600

Decided: January 31, 2008

Before TERRY J. OWENS, MURRIEL E. CRAWFORD, and DAVID B.
WALKER, *Administrative Patent Judges*.

CRAWFORD, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134 (2002) from a final rejection of claims 1-3, 5-9, 11, 14, 18, 20, 22-25, 27-31, 33, 34, 36, 40, 42, 44-47, 49, 56, 58, 59, 61, 62, 64, 68, 70, 72, and 73. Claims 4, 12, 13, 15-17, 19, 21, 26, 35, 37-39, 41, 43, 48, 50-55, 57, 63, 65-67, 69, 71 and 74-76 have

been withdrawn from consideration. Claims 10, 32, and 60 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

Appellant invented a method and container for growing transplantable plants (Specification 1).

Claim 1 under appeal reads as follows:

1. An apparatus, comprising:
a plant container including a sidewall formed by a sheet having a plurality of hollow outwardly extending protuberances; each of the protuberances having a proximal opening in communication with a distal opening, the center of the proximal opening being positioned higher than the center of the distal opening when the sheet is positioned vertically, wherein the proximal opening of each protuberance is larger than the distal opening.

The Examiner rejected claims 1-3, 5-9, 11, 14, 18, 20, and 22 under 35 U.S.C. § 103(a) as being unpatentable over Mendes in view of Garden and Felknor.

The Examiner rejected claims 23-25, 27-31, 40, 42, 44, 45-47, 49-56, 58, 59, 61, 68, 70, 72, and 73 under 35 U.S.C. § 102(b) as being anticipated by Lawton ('005).

The Examiner rejected claims 36 and 64 under 35 U.S.C. § 103(a) as being unpatentable over Lawton ('005) in view of Lawton ('339).

The Examiner rejected claims 33 and 34 under 35 U.S.C. § 103(a) as being unpatentable over Lawton ('005).

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

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Garden	US 4,920,695	May, 1, 1990
Mendes	US 5,333,409	Aug. 2, 1994
Lawton (Lawton '005)	WO 97/00005	Jan. 3, 1997
Lawton (Lawton '339)	WO 97/21339	Jun. 19, 1997
Felknor	US 6,874,278 B2	Apr. 5, 2005

Appellant contends that Mendes is non analogous art and that there is no suggestion to combine the teachings of Mendes, Gardner, and Felknor.

Appellant further contends that if one combined the teachings of Mendes, Gardner, and Felknor, the operation of Mendes and Gardner, would be destroyed and that the Felknor protuberance is not a hollow tube.

Appellant also contends that Mendes does not disclose a protuberance that has a upper profile that slopes downwardly at an angle in the range of approximately 110 to 150 degrees measured from the plane as required by claim 22.

Lastly Appellant contends that Lawton '005 does not disclose a generally cylindrical side wall having a plurality of hollow protuberances.

ISSUES

The first is issue is whether the Appellant has shown that the Examiner erred in finding that there is a reason to combine the teachings of Mendes, Gardner, and Felknor.

The second issue is whether the Appellant has shown that the Examiner erred in finding that Lawton '005 discloses a generally cylindrical side wall having a plurality of hollow protuberances.

FINDINGS OF FACT

Appellant's invention relates generally to a container for growing plants (Specification 1). The container promotes air-root pruning and includes a sheet having a plurality of hollow protuberances (Specification 4). The Appellant defines a sheet as a thin, flexible plastic material having an elongated length to facilitate rolling in a cylindrical fashion (Specification 5).

Mendes describes a circular container for growing plants (col. 1, ll. 5-7). The container includes a plurality of hollow outwardly extending protuberances 16 (Figure 1). Each of the protuberances has a proximal opening in communication with a distal opening with the center of the proximal opening being positioned higher than the center of the distal opening. The protuberances are secured to the outer wall by any suitable means such as by plastic, cement, or other epoxy resins (col. 2, ll. 47-49). In use, plants are inserted through the protuberances so that the root portion is positioned inside the pot and the stems of the plants extend outwardly through the protuberances (col. 2, ll. 55-62). The protuberances function to support and protect the plant stalks from breaking under their own weight (col. 3, ll. 2-4).

Garden describes a container for growing plants (col. 1, ll. 4-5). The Garden container is formed by flat sheets or panels 10 connected edge to edge by connector means (Figure 1; col. 1, ll). The container includes hinged closure flaps 16 through which the stalks of plants 40 may be positioned (Figure 13). Garden teaches that the flat sheets or panels with the hinged closures 16 in a flat position may be packaged and shipped in convenient stacks (col. 2, ll. 11-13).

Lawton '005 describes a container for growing plants (Page 1, l. 1). The container is formed by a sheet or sidewall 3. The bottom of the container is formed by plate 2 which has a plurality of hollow protuberances formed therein (Figure 5). The protuberances have a proximal opening near 21 and a distal opening 23. The protuberances do not extend outwardly from the sidewall 3.

Lawton '339 describes a container for growing plants (Page 1, l. 1). The container is formed by a sheet or sidewall 3. The bottom of the container is formed by a plate 2 which has a plurality of hollow protuberances formed therein (Figure 4). The protuberances have a proximal opening that is rectangular in shape (Page 6, ll. 17-20).

The Examiner relies on Lawton '005 for teaching a generally cylindrical sidewall having a plurality of hollow protuberances in the rejections of claims 33, 34, 36, and 64 under 35 U.S.C. § 103.

ANALYSIS

Propriety of the combination of Mendes, Garden, and Felknor

Appellant contends that the Mendes container even if formed as a sheet as taught by Garden would not be flat because of the protuberance 16 and, if the protuberances were put on after shipping, such added production costs may offset any savings on shipping. As such, in Appellant's view, there is no motivation to combine the teachings of Mendes, Garden, and Felknor. We agree.

We find no reason to modify the Mendes container so as to include a sidewall formed by a sheet. The Examiner is of the opinion that a person of ordinary skill in the art would have been motivated to modify the Mendes

container so as to be formed of a sheet in order to reduce shipping costs. However, Garden teaches that the reduction in shipping costs is realized by the flat nature of the sheets when the flaps 16 are laid flat. In Mendes, the protuberances 16 prevent the sidewall of the Mendes container from assuming a flat shape. Therefore, we do not find the motivation articulated by the Examiner for the modification of the Mendes container to be sound.

We find no reason to modify Mendes so as to have sidewalls formed of sheets especially since such modification would affect the angle the protuberances extend from the container, and therefore the forces on the stalks and may obviate the objective of the Mendes device of protecting the plant stalks.

In view of the foregoing, we will not sustain the Examiner's rejection of claims 1-3, 5-9, 11, 14, 18, 20, and 22 under 35 U.S.C. § 103(a) as being unpatentable over Mendes in view of Garden and Felknor.

Rejections based on Lawton '005

We will not sustain the rejections under 35 U.S.C. §§ 102(b) and 103(a) based on Lawton '005, because Lawton '005 does not disclose a plurality of protuberances in the side wall. Rather, the protuberances are disposed in the bottom or base of the container.

We likewise will not sustain the 35 U.S.C. § 103(a) rejection based on Lawton '005 in view of Lawton '339 for the same reason and because Lawton '339 does not cure the deficiencies of Lawton '005.

The decision of the Examiner is reversed.

REVERSED

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