

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant	: Derrick T. Miller
App. No	: 13/868,855
Filed	: April 23, 2013
For	: Improved Beverage Container
Examiner	: Chun Hoi Cheung
Art Unit	: 3728
Conf No.	: 5254

PETITION TO DIRECTOR OF TECHNOLOGY CENTER 3700

Mail Stop Amendment

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

Dear Madam:

The applicants hereby petition the Director under 37 C.F.R. § 1.144 and 37 C.F.R. § 1.181 of the Patent and Trademark Office Rules of Practice for reversal of the Examiner's restriction requirement made final on April 17, 2015. The petition is directed to the Director of Technology Center 3700. See MPEP 1002.02(c).

Background:

On April 23, 2013, the applicant filed U.S. Non-Provisional Patent 13/868,855 for an Improved Beverage Container. The application, as filed included claims 1-35 with claims 1-31 being directed to a beverage container and claims 32-35 being directed to a process for making a beverage container. At a very high level, there are five features claimed in the first 16 claims: the contoured bottom edge, the spout, the inverted seal, the tab and the mural. The remainder of apparatus claims simply resort these limitations in a number of combinations. On December 4,

2014 the examiner issued a restriction requirement separating the apparatus and process claims and further separating the apparatus claims into four species (claims 1-16, 17-24, 25-28 and 29-31).

The applicant responded on December 11, 2014, with, “Invention I and Species I is elected with traverse. Claims 1-31 are generic to all species. To the extent the examiner believes that this is not so, the restriction requirement is traversed.” The Applicant went on to provide a page of remarks showing that claim 16 had all the limitations of claims 1-28 and that claims 29-30 were proper dependent claims, simply explaining the tab and the mural in more detail as is permitted under Rule 71(c). Claim 31 was simply a bunch of cans having the limitations of claim 30 used in concert.

The examiner responded on February 9, 2015 that the response was non-responsive because, “Applicant fails to properly elect a single species for examination as required by the Restriction/Election requirement of 12/4/2014.” The undersigned called the examiner to see how, “Invention I and Species I is elected with traverse” could possibly be deceptive and was told that it failed to adequately identify the claims which related to the identified species. The applicant tried again with, “Invention I and Species I is elected with traverse. This includes claims 1-28. We would like to add some linking claims, if that would be permissible.” The remarks included similar arguments about how claims 1-31 should be searched. The examiner responded in a non-final office action, “Applicant’s election without traverse of Invention I and Species I (claims 1-28) in the reply filed on 04/03/2015 is acknowledged.”

Applicant treats this comment as making the restriction requirement final and petitions the director for modification of the restriction requirement.

Argument:

The Director has authority to alter a restriction requirement under 37 C.F.R. § 1.144 when the applicant has first sought review of the restriction requirement under 37 C.F.R. § 1.143. The Applicant has twice sought such review and, having received no substantive response on the merits, now seeks the review of the director. Applicant is requesting that claims 29-31 be rejoined to the application. Applicant does not contest the propriety of restricting the remainder of the claims.

This petition should be granted because (i) the restricted claims presently contested simply provide a cascading from a single genus (a tab and a mural) to a single species (the

material on the tab and on the mural) which is permissible under 37 C.F.R. § 1.71(c), (ii) the applicant identified this in two papers to the examiner indicating that there was no additional burden for searching this species element as required under MPEP 821.01, and (iii) the examiner failed to address this argument as required under MPEP 818.03(c). Therefore, the Examiner has failed to carry his burden of production that searching two limitations would create an undue burden for the examiner.

Respectfully submitted,

s/Michael O'Brien/

Dated: June 16, 2015

By: _____

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