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EXAMINER

SMITH, SCOTT A.

ART UNIT PAPER NUMBER

3721

NOTIFICATION DATE DELIVERY MODE

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ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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The present application is being examined under the pre-AIA first to invent provisions.

DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory double patenting rejection is appropriate where the claims at issue are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the reference application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement. A terminal disclaimer must be signed in compliance with 37 CFR 1.321(b).

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The USPTO internet Web site contains terminal disclaimer forms which may be used. Please visit <http://www.uspto.gov/forms/>. The filing date of the application will determine what form should be used. A web-based eTerminal Disclaimer may be filled out completely online using web-screens. An eTerminal Disclaimer that meets all requirements is auto-processed and approved immediately upon submission. For more information about eTerminal Disclaimers, refer to <http://www.uspto.gov/patents/process/file/efs/guidance/eTD-info-I.jsp>.

2. Claims 21-30 are provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over claims 21-38 of copending Application No. 12/282,494. Although the claims at issue are not identical, they are not patentably distinct from each other because they are substantially co-extensive in scope in differ merely in the terminology used. For example, claim 21 of the present application recites a rotary drive and a linear member coupled thereto which moves axially, whereas claim 21 of application 14/282,494 recites an axial drive supported for axial travel upon application of a rotary motion of a shaft. These are the same components, merely worded differently; i.e. the rotary shaft and rotary drive are equivalent, as is the axial drive and linear member which moves axially. The remaining claims are co-extensive in scope, or differ in the omission or addition of typical and well known surgical stapler components not critical to the invention, and such deviations would have been obvious to the skilled artisan.

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This is a provisional nonstatutory double patenting rejection because the patentably indistinct claims have not in fact been patented.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of pre-AIA 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 31-36 are rejected under pre-AIA 35 U.S.C. 102b as being anticipated by Alesi et al. 5,779,130.

Alesi et al. 5,779,130 discloses a stapling attachment 10 configured to be operably attached to a surgical instrument system 12, 15, 17, said stapling attachment comprising a staple cartridge carrier 34; a staple cartridge body 52 supported by said staple cartridge carrier, wherein said staple cartridge body 52 comprises a proximal end and a distal end; a plurality of staples removably stored in said staple cartridge body; an anvil 64 supported relative to said staple cartridge carrier and movable from an open position to a closed position; a housing 22, wherein said staple cartridge carrier extends from said housing, and wherein said housing is removably attachable to the surgical instrument system; an electric motor system 86 configured to produce rotational motion; and drive means 80, 84 for converting the rotational motion produced by said electric motor to translational motion to eject said staples from said staple cartridge body, a sled 74, a knife 62, wherein different cartridge bodies could be utilized, and wherein the

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