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MOMENTIVE PERFORMANCE MATERIALS INC. c/o Dilworth & Barrese, LLP 1000 Woodbury Road Suite 405 Woodbury, NY 11797			BOYLE, KARA BRADY	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

Ex parte WILLIAM L. BROWN, PAUL L. MATLOCK,
LOUIS MULLER, and FABRICE PONTNET

Appeal 2011-013620
Application 11/900,374
Technology Center 1700

Before BRADLEY R. GARRIS, CHUNG K. PAK, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 the final rejection of claims 1, 3-10, 13, 15-22, and 25-34. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

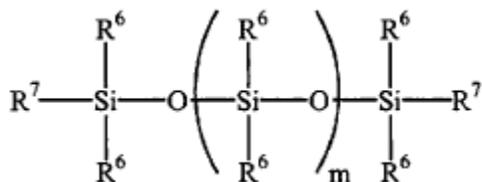
We REVERSE.

Appellants' invention is directed to open-cell polyurethane foams and methods for their production where the stability of the foams are improved by using a polyether-polysiloxane ABA'-type polymer surfactant (Spec. paras. [0001], [0006]).

Claim 1 is illustrative:

1. A predominantly open-cell rigid, stable polyurethane foam obtained from a predominantly open-cell rigid polyurethane foam-forming reaction medium which comprises:

- a) at least one polyol;
- b) at least one polyisocyanate;
- c) at least one catalyst;
- d) water;
- e) a predominantly open-cell rigid, stable polyurethane foam-forming amount of at least one surfactant which is a balanced, substantially linear polyether-polysiloxane ABA' block copolymer represented by the general formula:



wherein:

each R⁶ independently is alkyl or aryl of up to 18 carbon atoms; and,

each R^7 independently is a non-hydrolyzable, hydroxyl-terminated polyether moiety of either random or blocked structure $-\text{CHR}^1\text{CHR}^2\text{CR}^3\text{R}^4-(\text{R}^5)_p\text{O}-(\text{C}_2\text{H}_4\text{O})_x(\text{C}_y\text{R}^8_{2y}\text{O})_z\text{H}$ in which R^1 , R^2 , R^3 and R^4 each independently is hydrogen or a monovalent hydrocarbon group of up to 8 carbon atoms which is free of aliphatic carbon-to-carbon multiple bonds, R^5 is a divalent hydrocarbon group of up to 12 carbon atoms which is free of aliphatic carbon-to-carbon multiple bonds and p has a value of 0 or 1, each R^8 independently is hydrogen, alkyl of up to 18 carbon atoms, phenyl or alkyl-substituted phenyl in which the alkyl substituent(s) independently contain up to 4 carbon atoms, x is from 5 to 50, Y is from 2 to 6, z is from 0 to 25, and $x + z$ is from 5 to 50, and,

m is from 10 to 40; and,

f) optionally, at least one additional component selected from the group consisting of other polymer and/or copolymer, chain extender, crosslinker, non-aqueous blowing agent, filler, reinforcement, pigment, tint, dye, colorant, flame retardant, antioxidant, antiozonant, UV stabilizer, anti-static agent, biocide and biostat.

Appellants appeal the following prior art rejections:

1. Claims 1, 3-10, 13, 15-22, and 25-34 are rejected under 35 U.S.C. § 102(b), as being unpatentable over Schlak (US 5,112,874 issued May 12, 1992).
2. Claims 1, 3-10, 13, and 15-22 are rejected under 35 U.S.C. § 103(a), as being unpatentable over GB '784 (GB 1,006,784 published Oct. 6, 1965).

REJECTION (1): § 102

ISSUE

Did the Examiner reversibly err in finding that Schlak anticipates the rigid, stable polyurethane foam of claim 1? We decide this issue in the affirmative.

FINDINGS OF FACT & ANALYSIS

The Examiner finds, in relevant part, that Schlak does not expressly teach the foams are rigid (Ans. 6). Nevertheless, the Examiner finds that, based on Schlak, it would have been inherent to produce a “rigid” foam because Schlak teaches that depending on the choice of starting compounds and mixing ratios, Schlak’s process is suitable for producing hard microcellular moldings or for the production of hard integral moldings (*id.*). The Examiner finds that rigid and flexible are relative terms such that Schlak’s foam, which may be hard, is considered rigid within the meaning of the claims (*id.* at 7-8).

Appellants argue that Schlak does not teach rigid, open cell polyurethane foam (App. Br. 13-14). Appellants contend that the Declaration of William L. Brown (hereinafter the “Brown Declaration”) establishes that Schlak’s Example 4 composition produces a flexible foam, not a rigid foam and the open cell content is less than that required for a flexible, open cell foam as defined in paragraph 10 of the Specification (*id.* at 15-16). Appellants argue that the Examiner’s anticipation rejection is impermissibly based on picking and choosing the various discrete disclosures from Schlak and fails to address where Schlak teaches the

claimed foam composition arranged in the manner specified in the claims (Reply Br. 4-6).

The preponderance of the evidence favors Appellants' argument and evidence of novelty. The Examiner's rejection fails to direct us to a teaching in Schlak where the claim elements, including the inherently disclosed rigid feature, are arranged as in the claims. *Therasense Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1332 (Fed. Cir. 2010). Rather, the Examiner picks and chooses various discrete and distinct teachings of the Schlak reference to arrive at the claimed rigid, open cell polyurethane foam. Picking and choosing various distinct disclosures may be entirely proper in formulating an obviousness rejection, but is not appropriate for an anticipation rejection which requires identical disclosure or description. *In re Arkley*, 455 F.2d 586, 587-88 (CCPA 1972).

Schlak's disclosure, that whether a "hard" (i.e., "rigid" according to the Examiner (Ans. 5)) foam is achieved depends upon the choice of starting materials and their mixing ratios without further explanation, underscores that Schlak fails to teach a rigid, open cell polyurethane foam within the meaning of § 102. Indeed, contrary to the Examiner's finding (*id.* at 9), paragraph 7 of the Brown Declaration provides factually based evidence that the foam produced by Schlak's Example 4 embodiment is a flexible foam. The Examiner does not explain why the Brown Declaration's evidence that the foam is flexible should be discounted.

On this record and for the above reasons, we reverse the Examiner's § 102 rejection over Schlak.

REJECTION (2): § 103

ISSUE

Did the Examiner reversibly err in failing to specifically address the claim limitation that element (e) of the foam composition includes “a predominately *open-cell rigid, stable polyurethane foam-forming amount* of at least one surfactant which is a balanced, substantially linear polyether-polysiloxane ABA’ block copolymer” (emphasis added) as recited in claim 1? We decide this issue in the affirmative.

FINDINGS OF FACT & ANALYSIS

The Examiner’s findings and conclusions may be located on pages 6-7 of the Answer.

Appellants argue that GB ‘784 does not teach or suggest using the hydroxyl-terminated polysiloxane in “an open-cell polyurethane foam-forming amount” as defined by Appellants in paragraph 14 of the Specification (App. Br. 22). The Specification defines “open-cell polyurethane foam-forming amount” as:

an amount of this surfactant that in a particular open-cell polyurethane foam-forming reaction medium and under a particular set of polyurethane foam-forming reaction conditions will effect the stabilization of the foam as it forms thereby resulting in a predominately open-cell polyurethane foam and excludes those amounts of surfactant (e), either too small or too large, which fail to achieve such stabilization

(Spec. para. [0014]).

Appellants correctly point out that the Examiner never explained whether GB ‘784 teaches that the surfactant (e) is present in the composition in an “open-cell polyurethane foam-forming amount” as that phrase is

defined in the Specification. The Examiner's stated rejection does not specifically address the argued limitation. The Examiner does find that GB '784 teaches "identical amounts of identical materials as disclosed in the instant claims" (Ans. 14). However, the Examiner does not explain or provide a comparison of how the cited GB '784 disclosures correspond to identical amounts of the claimed materials. The Examiner has not provided any evidence to substantiate the unsupported assertion that the foam composition of Appellants' claims and GB '784 use identical amounts of the same materials. Moreover, the Examiner does not make any findings that GB '784 teaches or suggests an open-cell foam structure.

On this record, we reverse the Examiner's § 103 rejection over GB '784.

DECISION

The Examiner's decision is reversed.

ORDER REVERSED

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