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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* KATRIN WILKE,  
BJOERNA WINDISCH, PETER MAURER, CLAUDIA MUELLER,  
NORMAN LIPINSKI, MICHAEL URBAN, NICOLE MUEHLEN,  
SABINE HEINS, and ANNIKA MANNES<sup>1</sup>

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Appeal 2014-009815  
Application 12/740,504  
Technology Center 1600

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Before FRANCISCO C. PRATS, MELANIE L. McCOLLUM and  
JOHN E. SCHNEIDER, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134(a) involves claims to methods of reducing required shaving frequency, softening hair to be shaved, and reducing the cutting force required to shave. The Examiner rejected the claims as anticipated and for obviousness.

We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

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<sup>1</sup> Appellants state that “real party in interest in this appeal is Beiersdorf AG of Hamburg, Germany.” App. Br. 3.

STATEMENT OF THE CASE

The following rejections are before us for review:

(1) Claims 30–35, 42, 43, and 46, under 35 U.S.C. § 102(b), as anticipated by Scavone<sup>2</sup> (Final Action 2–4);

(2) Claims 30–38, 43–45, and 47–49, under 35 U.S.C. § 102(b), as anticipated by Kux<sup>3</sup> (Final Action 7);

(3) Claims 30–35, 40, 42, 43, and 46, under 35 U.S.C. § 102(b), as anticipated by Kealey<sup>4</sup> (Final Action 8–9);

(4) Claims 30–35, 39, and 46, under 35 U.S.C. § 102(b), as anticipated by Ohmori<sup>5</sup> (Final Action 8–9); and

(5) Claims 30–49, under 35 U.S.C. 103(a), for obviousness over Scavone, Kux, Kealey, Ohmori, and Banowski<sup>6</sup> (Final Action 10–12).

Claims 30, 32, and 43 are representative, and read as follows (App. Br. 32, 34):

30. A method of at least one of reducing a required shaving frequency, softening hair to be shaved, and reducing a required shaving cutting force provided by a topical composition for shaving human skin, wherein the method comprises incorporating in the composition at least one acidic aluminum compound in an amount which is effective for at least one of reducing the required shaving frequency, softening hair to be shaved, and reducing the required shaving cutting force provided by the composition.

32. The method of claim 30, wherein the required shaving cutting force provided by the composition is reduced.

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<sup>2</sup> U.S. Patent No. 6,495,149 B1 (issued Dec. 17, 2002).

<sup>3</sup> U.S. Patent No. 7,282,196 B2 (issued Oct. 16, 2007).

<sup>4</sup> U.S. Patent No. 5,378,455 (issued Jan.3, 1995).

<sup>5</sup> U.S. Patent App. Pub. No. 2003/0180335 A1 (published Sep. 25, 2003).

<sup>6</sup> WO 2006/136330 A1 (published Dec. 28, 2006).

43. The method of claim 30, wherein the composition is alcohol-free, surfactant-free, and soap-free.

#### ANTICIPATION—SCAVONE

The Examiner found that Scavone describes a process, encompassed by claims 30–35, 42, 43, and 46, of preparing a composition for application to the underarms, the composition including an acidic aluminum compound (e.g. aluminum chlorohydrate), wherein application of the compound results in softened underarm hair, and makes shaving the underarm hair easier. Final Action 2–4.

As stated in *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992):

[T]he examiner bears the initial burden . . . of presenting a *prima facie* case of unpatentability. . . .

After evidence or argument is submitted by the applicant in response, patentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.

We select claim 30 as representative of the claims subject to this rejection. 37 C.F.R. § 41.37(c)(1)(iv). Appellants’ arguments do not persuade us that a preponderance of the evidence fails to support the Examiner’s *prima facie* case of anticipation as to representative claim 30.

Scavone discloses “topical leave-on compositions, including antiperspirant and deodorant compositions, that contain selected acid-stable pantothenic acid derivatives.” Scavone 1:7–10.

As required by the sole step recited in Appellants’ claim 30, Scavone discloses incorporating into those compositions from about 0.1 to about 30% by weight of an antiperspirant active, which may be an acidic aluminum

compound, aluminum chlorohydrate being among the preferred compounds. Scavone 3:58–5:16.

As to claim 30’s requirement that the composition be “a topical composition for shaving human skin” (App. Br. 32), as the Examiner points out, Scavone discloses on a number of occasions that its compositions are to be applied to the underarms (axilla), resulting in the softening of the underarm hair, thereby making shaving easier. *See, e.g.*, Scavone 10:17–22:

The antiperspirant and deodorant embodiments of the present invention can also be applied topically to the axilla as noted above, with the additional purpose or intention of providing a method of softening or conditioning the underarm hair, and thus also providing a method of enhancing the ease of shaving such underarm hair.

Given the discussed teachings, we agree with the Examiner that Scavone describes a process that includes all of the steps and features required by claim 30.

Appellants’ arguments do not persuade us to the contrary.

In particular, Appellants do not persuade us that Scavone fails to describe a process of incorporating an acidic aluminum compound into “a topical composition for shaving human skin” as claim 30 requires. App. Br. 32. To the contrary, as discussed above, Scavone discloses that its compositions are applied to the skin with the express purpose of enhancing the ease of shaving underarm hair. Scavone 10:17–22. Because Scavone’s compositions are compositions that enhance shaving, and because claim 30 broadly requires only that the recited composition be “for shaving human skin” (App. Br. 32), we agree with the Examiner (Ans. 4) that Scavone’s compositions meet the requirements of the composition recited in claim 30.

That Scavone discloses that its compositions are “leave-on” compositions, which Scavone expressly distinguishes from “rinse-off” applications (*see* Scavone 3:37–32), does not persuade us that claim 30 excludes Scavone’s compositions. *See* App. Br. 9–10, 14–16; Reply Br. 2–3.

Claim 30 does not limit the recited composition to a particular structure, such as a shaving foam or gel. Rather, as noted above, the only requirement in claim 30 regarding the recited topical composition is that it is “for shaving human skin” (App. Br. 32). As noted above, Scavone’s compositions are for that express purpose.

It is well settled, moreover, that during examination the PTO must interpret terms in a claim using “the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant’s specification.” *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

As stated in *In re Zletz*, 893 F.2d 319, 322 (Fed. Cir. 1989), the reason for this rule of interpretation is that “during patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.”

In addition, “[a]bsent claim language carrying a narrow meaning, the PTO should only limit the claim based on the specification or prosecution history when those sources expressly disclaim the broader definition.” *In re Bigio*, 381 F.3d 1320, 1325 (Fed Cir. 2004).

In the instant case, Appellants do not direct us to a definition in the Specification that expressly, or even implicitly, excludes Scavone's topical "leave-on" composition from being a composition for shaving human skin. To the contrary, the Specification suggests that any topically applied composition that prepares the skin for shaving by softening the hair, and thereby eases shaving effort, is a composition for shaving human skin, as required by claim 30. *See* Spec. ¶ 17 ("The object of the present invention is therefore to provide cosmetic shaving preparations, which prepare the skin in the armpits for shaving and which improve the sliding and cutting properties during shaving.").

Indeed, as the Examiner points out, Appellants' claim 46 (which depends from claim 30) expressly recites that the composition may be an aerosol, a roll-on, or a stick (App. Br. 46), which are formulations expressly described in Scavone. *See, e.g.*, Scavone 10:35–38.

Accordingly, for the reasons discussed, Appellants do not persuade us that, when claim 30 is given its broadest reasonable interpretation consistent with Appellants' Specification, the composition recited in claim 30 fails to encompass Scavone's compositions.

We acknowledge, but are not persuaded by, Appellants' contention that, because Scavone discloses that pantothenic acid derivatives produce the skin-softening effect of its compositions, Scavone fails to anticipate claim 30. App. Br. 10–12. Regardless of what Scavone discloses about its pantothenic acid derivatives, Scavone, as discussed above, describes incorporating the ingredient required by claim 30 into a composition encompassed by claim 30, and therefore describes a process that includes every step and feature required by claim 30.

We acknowledge, but are not persuaded by, Appellants' contentions that the holdings in *Jansen v. Rexall Sundown Inc.*, 342 F.3d 1329 (Fed. Cir. 2003) and *Rapoport v. Dement*, 254 F.3d 1053 (Fed. Cir. 2001) demonstrate that Scavone fails to anticipate claim 30. App. Br. 12–14; Reply Br. 3.

In both *Jansen* and *Rapoport*, the court found a lack of anticipation because the prior art did not administer the drugs in question to the patient populations required by the claims at issue. *See Jansen*, 342 F.3d at 1334 (“[T]he ’083 patent claims are properly interpreted to mean that the combination of folic acid and vitamin B<sub>12</sub> must be administered to a human with a recognized need to treat or prevent macrocytic-megaloblastic anemia.”); *see also Rapoport*, 254 F.3d at 1061 (“The Board also correctly found that the [prior art] FPR Publication does not show administering buspirone in any specific amounts to patients suffering from sleep apnea.”).

In contrast, in the instant case, Scavone describes incorporating an ingredient, undisputedly encompassed by claim 30, into a composition which, as discussed above, is also encompassed by claim 30. Scavone, therefore, describes performing a process that includes every step and feature required by claim 30.

In sum, for the reasons discussed, Appellants do not persuade us that a preponderance of the evidence fails to support the Examiner’s finding that Scavone anticipates claim 30. We, therefore, affirm the Examiner’s anticipation rejection of claim 30 over Scavone. Because claims 31, 33–35, 42, and 46 were not argued separately, they fall with claim 30. 37 C.F.R. § 41.37(c)(1)(iv).

Claim 32 recites “[t]he method of claim 30, wherein the required shaving cutting force provided by the composition is reduced.” App. Br. 32.

Appellants, however, argue that the Examiner failed to explain why Scavone describes a process that “necessarily reduces the required shaving frequency” (*id.* at 16), which is actually the result required in claim 31, which also depends from claim 30. *See* App. Br. 32.

In any event, contrary to Appellants’ arguments, the Examiner explained that, because Scavone describes applying its aluminum-containing compositions to the underarm hair, Scavone’s process will “will inherently result in at least one of reducing a required shaving frequency, softening hair to be shaved, and reducing a required shaving cutting force.” Final Action 4. Because Scavone discloses incorporating an ingredient encompassed by claim 30 into a composition also encompassed by claim 30, we find that the Examiner had sufficient evidence to find that the functional result of claim 30’s process, recited in either claim 31 or 32, would inherently be produced by Scavone’s process.

Appellants have not advanced persuasive evidence to rebut the Examiner’s reasonable finding of inherency. *See In re Best*, 562 F.2d 1252, 1255 (CCPA 1977) (where examiner has reasonable basis to conclude that functional limitation is inherently present in the prior art, applicants bear the burden of proof to the contrary). Accordingly, we also affirm the Examiner’s rejection of claim 32 over Scavone.

Claim 43 recites “[t]he method of claim 30, wherein the composition is alcohol-free, surfactant-free, and soap-free.” App. Br. 34. The Examiner found that Scavone describes compositions encompassed by claim 43 in its Examples 1–5 and 7. Final Action 4.

Appellants’ arguments do not persuade us the Examiner erred in finding that Examples 1–5 and 7 of Scavone anticipate claim 43. Each of

Examples 1–5 includes aluminum zirconium tetrachlorohydrate glycinate (Scavone 11:60–14:17), the same acidic aluminum compound used in Appellants’ Example 6 (Spec. ¶ 85 (antiperspirant stick)), and Scavone’s Example 7 uses aluminum chlorohydrate (Scavone 15:20). Appellants do not direct us to any disclosure of an alcohol, surfactant, or soap in any of the embodiments identified by the Examiner. App. Br. 17.

That Scavone might elsewhere describe composition embodiments that contain alcohol, surfactant, or soap (*see id.*), does not negate Scavone’s disclosure of specific embodiments that include all of the ingredients required by claim 43, and which do not include the ingredients excluded by claim 43. We, therefore, also affirm the Examiner’s rejection of claim 43 for anticipation over Scavone.

#### ANTICIPATION—KUX

In rejecting claims 30–38, 43–45, and 47–49 as anticipated by Kux, the Examiner found that Kux describes topical antiperspirant compositions that include aluminum chlorohydrate, avocado oil, octyldodecanol, and dicaprylyl carbonate. Final Action 7 (citing Examples 1–8 of Kux).

We again select claim 30 as representative of the rejected claims. For reasons similar to those discussed above as to Scavone, Appellants’ arguments (App. Br. 18–20; Reply Br. 3–4) do not persuade us that a preponderance of the evidence fails to support the Examiner’s finding that Kux discloses a process having all of the steps and features required by claim 30.

Kux discloses “a cosmetic deodorant product which is a combination of packaging and application means and a thin-liquid oil-in-water microemulsion with a high content of antiperspirant salt, and can be applied

evenly with the help of an atomizer pump.” Kux 1:14–18. As the Examiner found, and as required by claim 30, Kux discloses incorporating aluminum chlorohydrate into its compositions. Kux 13:6–67 (Examples 1–8). In particular, Kux describes incorporating into its compositions a 50% aqueous solution of aluminum chlorohydrate in amounts ranging from 16% to 40% by weight of the total composition. *See id.* Accordingly, we agree with the Examiner that Kux discloses incorporating into its compositions an aluminum compound encompassed by claim 30, in an amount encompassed by the claim.

Kux, unlike Scavone, does not expressly state that its compositions’ intended use is for improving shaving efficacy. Nonetheless, as discussed above, claim 30 encompasses adding the aluminum compound to any composition that is a “topical composition for shaving human skin.” App. Br. 32. As discussed above, when given its broadest reasonable interpretation consistent with the Specification, that language encompasses any topically applied composition that will “prepare the skin in the armpits for shaving and . . . improve the sliding and cutting properties during shaving.” Spec. ¶ 17. As Appellants’ Specification makes clear, topical compositions, in the form of an aerosols (like that described in Kux), inherently prepare the skin in the armpits for shaving and improve the sliding and cutting properties during shaving, and also inherently possess the properties, recited in claim 30, of reducing the required shaving frequency, softening hair to be shaved, and reducing the required shaving cutting force. *See Spec.* ¶ 84 (Example 5).

Thus, we agree with the Examiner that, when Kux incorporates its aluminum compounds into its compositions, it incorporates those

compounds into compositions encompassed by claim 30. Moreover, for the reasons discussed above, we are not persuaded that, when given its broadest reasonable interpretation consistent with the Specification, claim 30 excludes the leave-on compositions Appellants assert are described by Kux.

Accordingly, because Appellants do not persuade us, for the reasons discussed, that the Examiner erred in finding that Kux describes a process having all of the steps and features required by claim 30, we affirm the Examiner's rejection of claim 30 as anticipated by Kux. Because they were not argued separately, claims 31–38, 44, 45, and 47–49 fall with claim 30.

As noted above, claim 43 recites “[t]he method of claim 30, wherein the composition is alcohol-free, surfactant-free, and soap-free.” App. Br. 34. The Examiner found that Kux describes compositions encompassed by claim 43 in its Examples 1–8. Final Action 7.

Appellants' arguments do not persuade us the Examiner erred in finding that Examples 1–8 of Kux anticipate claim 43. As noted above, each of Examples 1–8 includes aluminum chlorohydrate. Appellants do not direct us to any disclosure of an alcohol, surfactant, or soap in any of the embodiments identified by the Examiner. App. Br. 20–21.

That Kux might elsewhere describe composition embodiments that contain alcohol, surfactant, or soap (*see id.*), does not negate Kux's disclosure of specific embodiments that include all of the ingredients required by claim 43, and which do not include the ingredients excluded by claim 43. We, therefore, also affirm the Examiner's rejection of claim 43 for anticipation over Kux.

ANTICIPATION—KEALEY

In rejecting claims 30–35, 40, 42, 43, and 46 as anticipated by Kealey, the Examiner found that Kealey describes topically applied compositions that include agents that retard or eliminate hair growth, and which also include antiperspirant agents such as aluminum chlorohydrate, the compositions being of particular value when applied to the underarm. Final Action 8.

We again select claim 30 as representative of the rejected claims. For reasons similar to those discussed above as to Scavone and Kux, Appellants' arguments (App. Br. 22–24; Reply Br. 3–4) do not persuade us that a preponderance of the evidence fails to support the Examiner's finding that Kealey discloses a process having all of the steps and features required by claim 30.

Kealey discloses compositions “suitable for topical application to mammalian skin for reducing, retarding or eliminating hair growth.” Kealey, abstract. As the Examiner found, and as required by claim 30, Kealey discloses incorporating aluminum chlorohydrate into its compositions (*id.* at 6:6–9), “which can be of particular value if the composition is to be used on the underarm (axilla).” *Id.* at 5:67–6:1. Kealey discloses that “[s]uch compositions can thus be used regularly, for example on a daily basis on the underarm, not only to prevent unwanted hair growth, but also to reduce or eliminate perspiration and/or to reduce or eliminate body malodour.” Kealey 6:1–5. Kealey includes an example of a roll-on antiperspirant that contains a 50% aqueous solution of aluminum chlorohydrate at a concentration of 40% by weight. *Id.* at 15:44–57 (Example 12).

While Kealey states that its objective is to reduce the frequency of required shaving (*see id.* at 1:23–30), Kealey does not appear to state expressly state that its compositions improve shaving efficacy. Nonetheless, as discussed above, claim 30 encompasses adding the aluminum compound to any composition that is a “topical composition for shaving human skin.” App. Br. 32.

As discussed above, when given its broadest reasonable interpretation consistent with the Specification, that language encompasses any topically applied composition that will “prepare the skin in the armpits for shaving and . . . improve the sliding and cutting properties during shaving.” Spec. ¶ 17. As Appellants’ Specification makes clear, topical compositions, in the form of roll-on antiperspirants (like that described in Kealey), inherently prepare the skin in the armpits for shaving and improve the sliding and cutting properties during shaving, and also inherently possess the properties, recited in claim 30, of reducing the required shaving frequency, softening hair to be shaved, and reducing the required shaving cutting force. *See* Spec. ¶¶ 81–83 (Examples 2–4).

Thus, we agree with the Examiner that, when Kealey incorporates its aluminum compounds in its compositions, it incorporates those compounds into compositions encompassed by claim 30. Moreover, for the reasons discussed above, we are not persuaded that, when given its broadest reasonable interpretation consistent with the Specification, claim 30 excludes the leave-on compositions Appellants assert are expressly described by Kealey.

Accordingly, because Appellants do not persuade us, for the reasons discussed, that the Examiner erred in finding that Kealey describes a process

having all of the steps and features required by claim 30, we affirm the Examiner's rejection of claim 30 as anticipated by Kealy. Because they were not argued separately, claims 31–35, 40, 42, and 46 fall with claim 30.

As to claim 43, the Examiner found that Kealey's Example 12 is a compositions that is free of alcohol, surfactant, and soap. Final Action 9.

Appellants' arguments do not persuade us the Examiner erred in finding that Example 12 of Kealey anticipates claim 43. As noted above, Example 12 includes aluminum chlorohydrate. Appellants do not direct us to any disclosure of an alcohol, surfactant, or soap in Kealey's Example 12. App. Br. 24–25.

That Kealey might elsewhere describe embodiments that contain alcohol, surfactant, or soap (*see id.*), does not negate Kealey's disclosure of specific embodiments that include all of the ingredients required by claim 43, and which do not include the ingredients excluded by claim 43. We, therefore, also affirm the Examiner's rejection of claim 43 for anticipation over Kealey.

#### ANTICIPATION—OHMORI

In rejecting claims 30–35, 39, and 46 as anticipated by Ohmori, the Examiner found that Ohmori describes topically applied deodorant compositions that include aluminum chlorohydrate and liquid paraffin. Final Action 9.

We again select claim 30 as representative of the rejected claims. For reasons similar to those discussed above as to the other references, Appellants' arguments (App. Br. 26–27; Reply Br. 4–5) do not persuade us that a preponderance of the evidence fails to support the Examiner's finding

that Ohmori discloses a process having all of the steps and features required by claim 30.

Ohmori discloses “an external composition for skin comprising an alkylene oxide derivative as an effective ingredient and having a moisturizing effect, a rough skin improving effect, a favorable feeling of use, a transdermal absorption promoting effect, a durability of refreshing effect, and no skin stimulation.” Ohmori, abstract. As the Examiner found, and as required by claim 30, Ohmori discloses incorporating aluminum chlorohydrate (23% by weight) into its compositions when the compositions are in the form of a deodorant wax type stick. *Id.* ¶ 280.

As discussed above, claim 30 encompasses adding the aluminum compound to any composition that is a “topical composition for shaving human skin.” App. Br. 32. As also discussed above, when given its broadest reasonable interpretation consistent with the Specification, that language encompasses any topically applied composition that will “prepare the skin in the armpits for shaving and . . . improve the sliding and cutting properties during shaving.” Spec. ¶ 17.

As Appellants’ Specification makes clear, a topical composition in the form of an antiperspirant stick (like that described in Ohmori) inherently prepares the skin in the armpits for shaving and improves the sliding and cutting properties during shaving, and also inherently possesses the properties, recited in claim 30, of reducing the required shaving frequency, softening hair to be shaved, and reducing the required shaving cutting force. *See* Spec. ¶¶ 85 (Example 6).

Thus, we agree with the Examiner that, when Ohmori incorporates its aluminum compounds in its compositions, it incorporates those compounds

into compositions encompassed by claim 30. Moreover, for the reasons discussed above, we are not persuaded that, when given its broadest reasonable interpretation consistent with the Specification, claim 30 excludes the leave-on compositions Appellants assert are described by Ohmori.

Accordingly, because Appellants do not persuade us, for the reasons discussed, that the Examiner erred in finding that Ohmori describes a process having all of the steps and features required by claim 30, we affirm the Examiner's rejection of claim 30 as anticipated by Ohmori. Because they were not argued separately, claims 31–35, 39, and 46 fall with claim 30.

#### OBVIOUSNESS

In rejecting claims 30–49 for obviousness over Scavone, Kux, Kealey, Ohmori, and Banowski, the Examiner found that Scavone describes a process differing from the claimed process in that Scavone does not disclose that its compositions include avocado oil, octyldodecanol, caprylyl carbonate, paraffinum liquidum, papaya extract, carica papaya, celandine extract, or chelidonium extract. Final Action 11. The Examiner cited Kux, Kealey, Ohmori, and Banowski as evidence that it would have been obvious to include those ingredients in Scavone's compositions. *Id.* at 11–12.

We again select claim 30 as representative of the rejected claims. Appellants' arguments do not persuade us that a preponderance of the evidence fails to support the Examiner's prima facie case of obviousness as to claim 30.

As discussed above, we agree with the Examiner that Scavone anticipates representative claim 30. As our reviewing court has stated, “[i]t is well settled that ‘anticipation is the epitome of obviousness.’” *In re*

*McDaniel*, 293 F.3d 1379, 1385 (Fed. Cir. 2002) (quoting *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

For the reasons discussed above, moreover, we are not persuaded by Appellants' contention (App. Br. 28–29) that, because Scavone describes its skin-softening effect as inhering from the pantothenic acid derivatives included in its compositions, Scavone fails to anticipate claim 30. For the reasons discussed above also, we are not persuaded by Appellants' contention (App. Br. 29–30) that claim 30 excludes the leave-on compositions allegedly suggested by Scavone, even if combined with Kux, Kealey, Ohmori, and Banowski.

In sum, because Appellants' arguments do not persuade us that the Examiner erred in finding that the cited combination of references suggests a process having all of the steps and features required by claim 30, we affirm the Examiner's obviousness rejection of that claim over the cited references. Because they were not argued separately, claims 31–49 fall with claim 30.

#### SUMMARY

We affirm each of the Examiner's rejections.

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

AFFIRMED