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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 13/018,018 | 01/31/2011 | Andrei Faraon | 82275878 | 7792 |
| 56436 | 7590 | 11/23/2016 | EXAMINER | |
| Hewlett Packard Enterprise 3404 E. Harmony Road Mail Stop 79 Fort Collins, CO 80528 | | | RAKOWSKI, CARA E | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 2872 | |
| | | | NOTIFICATION DATE | DELIVERY MODE |
| | | | 11/23/2016 | ELECTRONIC |

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte ANDREI FARAON, DAVID A. FATTAL,
and RAYMOND G. BEAUSOLEIL

Appeal 2015-005827
Application 13/018,018
Technology Center 2800

Before LINDA M. GAUDETTE, KAREN M. HASTINGS, and
JEFFREY W. ABRAHAM, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants¹ appeal under 35 U.S.C. § 134(a) from the Examiner's decision² finally rejecting claims 1–3 and 5–31.³ App. Br. 4. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

Of the appealed claims, claims 1, 11, and 21 are independent. Claim 1 is representative, and is reproduced below (App. Br. 29, Claims App'x):

1. An optical system comprising:

a sub-wavelength grating disposed on a planar surface of a substrate having a planar geometry and a grating pattern associated with a particular cross sectional shape of, and direction in which, a wavefront is to emerge from the grating having a plurality of elements, when the grating is illuminated by a beam of light that is incident on the planar surface of the substrate; and

a heating element separately connected to a current source, the current source to inject a current into the heating element to selectively heat a proper subset of the plurality of elements of the grating and to produce a desired change in at least one of the particular cross sectional shape of and direction in which the wavefront is to emerge from the grating.

¹ Appellants identify the real party in interest as Hewlett-Packard Development Company, LP. Appeal Brief filed Dec. 29, 2014 (“App. Br.”), 3.

² Final Office Action mailed Aug. 20, 2014 (“Final Act.”).

³ Claim 4 is also pending, and indicated as allowable if rewritten in independent form to include the limitations of independent claim 1. Final Act. 14.

The claims stand rejected under pre-AIA 35 U.S.C. § 103(a) as follows:

1. claims 1–3, 5, 6, 8–27, and 31 over Shaner et al. (US 8,009,356 B1, iss. Aug. 30, 2011 (“Shaner”)) in view of Hansen et al. (US 7,375,887 B2, iss. May 20, 2008 (“Hansen”)); and

2. claims 7 and 28–30 over Shaner and Hansen, further in view of Magnusson (US 2009/0067774 A1, pub. Mar. 12, 2009 (“Magnusson”)). Final Act. 3–14; Examiner’s Answer mailed April 2, 2015 (“Ans.”), 2.⁴

We have considered the arguments advanced by Appellants in the Appeal and Reply Briefs. We agree with the Examiner that these arguments are not persuasive of reversible error in the Examiner’s conclusion of obviousness for the reasons well-stated by the Examiner in the Response to Argument section of the Answer. *See* Ans. 7–18. As explained by the Examiner (*see id.*), Appellants (1) attempt to distinguish the invention from the prior art based on features that are not within the scope of the claim language, (2) rely on attorney argument rather than evidence to support assertions that the ordinary artisan would not have combined or modified the prior art to achieve the claimed invention, and (3) fail to address the facts and reasons relied on by the Examiner in support of the obviousness determination. *See In re Geisler*, 116 F.3d 1465, 1471 (Fed. Cir. 1997) (explaining that arguments of counsel cannot take the place of factually supported objective evidence).

⁴ The Examiner has withdrawn the rejection of claims 29 and 30 under 35 U.S.C. § 112(b) or 35 U.S.C. § 112 (pre-AIA), second paragraph, as indefinite (*see* Final Act. 2–3). Ans. 2.

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We adopt the Examiner's fact finding and reasoning, as set forth in the Final Office Action and the Answer, in sustaining the Examiner's rejections of claims 1–3 and 5–31.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a)(1)(iv).

AFFIRMED