



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
**United States Patent and Trademark Office**  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/948,305	07/23/2013	George Roussos	FLX-1001-CON	4170
42419	7590	11/03/2017	EXAMINER	
PAULEY ERICKSON & KOTTIS 2800 WEST HIGGINS ROAD SUITE 365 HOFFMAN ESTATES, IL 60169			KRUER, KEVIN R	
			ART UNIT	PAPER NUMBER
			3649	
			MAIL DATE	DELIVERY MODE
			11/03/2017	PAPER

**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.

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* GEORGE ROUSSOS

---

Appeal 2016-005524  
Application 13/948,305<sup>1</sup>  
Technology Center 3600

---

Before LINDA E. HORNER, JEFFREY B. ROBERTSON, and  
ERIC C. JESCHKE, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

George Roussos (Appellant) seeks our review under 35 U.S.C. § 134(a) of the Examiner’s decision rejecting claims 26–33 and 37–44. Final Office Action (July 2, 2015) [hereinafter “Final Act.”]. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

---

<sup>1</sup> Appellant identifies Flexopack S.A. Plastics Industry of Koropi, Greece as the real party in interest. Appeal Brief 1 (November 19, 2015) [hereinafter “Appeal Br.”].

### CLAIMED SUBJECT MATTER

Appellant's claimed subject matter "relates to multilayer heat shrinkable films" such as "films for use in packaging or foods such as meat, poultry and the like." Spec. 1.<sup>2</sup> Claims 26 and 37 are independent. Claim 26 is illustrative of the subject matter on appeal and is reproduced below.

26. A multilayer film, comprising:

a) an outer layer comprising styrene-butadiene block copolymer;

b) a first tie layer adjacent the outer layer comprising ethylene-vinyl acetate;

c) a gas barrier layer adjacent the first tie layer comprising polyvinylidene chloride;

d) a second tie layer adjacent the gas barrier layer comprising ethylene vinyl acetate; and

e) a sealing layer adjacent the second tie layer selected from the group consisting of metallocene-catalyzed ethylene-alpha olefin copolymers alone or combined with additional ethylene-alpha olefin copolymers and not including ethylene-vinyl acetate, wherein the metallocene-catalyzed ethylene-alpha olefin copolymer has a density less than about 0.905 grams/cm<sup>3</sup> and the additional ethylene-alpha olefin copolymer is not an ethylene-propylene copolymer;

f) wherein the film is heat shrinkable and shrinks at temperatures of about 90°C.

Appeal Br. 7, Claims Appendix.

---

<sup>2</sup> In this Decision, "Spec." refers to the clean copy of the Substitute Specification filed on September 30, 2013.

### EVIDENCE

The Examiner's decision relies upon the following evidence:

Wolf et al. [hereinafter "Wolf"]	US 6,406,763 B1	June 18, 2002
Tatarka et al. [hereinafter "Tatarka"]	US 6,777,046 B1	Aug. 17, 2004
Kallio et al. [hereinafter "Kallio"]	US 7,018,710 B2	Mar. 28, 2006

### REJECTIONS

The Final Office Action includes the following rejections:

1. Claims 26–31 and 37–42 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Tatarka and Wolf.
2. Claims 32, 33, 43, and 44 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Tatarka, Wolf, and Kallio.

### ANALYSIS

The Examiner finds that Tatarka discloses the sealing layer as recited in independent claims 26 and 37.<sup>3</sup> Final Act. 2–3. In particular, the Examiner finds that “[t]he heat sealable layer [of Tatarka] further comprises a third polymer which is not EVA or ethylene-propylene copolymer.” *Id.* at 3 (citing Tatarka, col. 12, lines 45+). The Examiner further explains that “the Markush groups of claims 26 and 37 preclude any polymer that is not an ethylene-alpha olefin polymer” and “the broadest reasonable interpretation of the term ‘ethylene-alpha olefin copolymers’ includes the

---

<sup>3</sup> Independent claim 37 is directed to a bag comprising a sealed multilayer film that comprises a sealing layer identical to the sealing layer recited in independent claim 26. Appeal Br. 8–9, Claims Appendix.

third polymers disclosed in Tatarka.” Examiner’s Answer 6 (April 6, 2016) [hereinafter “Ans.”]. In support of this interpretation, the Examiner cites to five patent documents<sup>4</sup> that include a copolymer of ethylene and a vinyl ester, acrylic acid, methacrylic acid, or an alkyl acrylate as an ethylene-alpha olefin copolymer. *Id.* at 6–7.

Appellant argues that none of the polymers disclosed in Tatarka as the third polymer is an ethylene-alpha olefin copolymer, and, as such, Tatarka’s third polymer does not fall within the scope of the claimed “sealing layer.” Appeal Br. 4. Specifically, Appellant contends that “[a]lpha-olefins do not include acrylic acid, methacrylic acid, alkyl acrylates or the like, which do not have the olefin-defining formula  $C_xH_{2x}$ .” Reply Br. 2; *id.* at 4 (citing a Google search for the definition of “alpha olefin,” attached as Exhibit A).

We first address the procedural issue raised by the Examiner’s belated citation to new Evidence in the Examiner’s Answer.<sup>5</sup> Our rules provide that “[f]or purposes of the examiner’s answer, any rejection that relies upon any Evidence not relied upon in the Office action from which the appeal is taken (as modified by an advisory action) shall be designated by the primary examiner as a new ground of rejection.” 37 C.F.R. § 41.39(a)(2). The rules exclude dictionaries from the definition of “Evidence.” 37 C.F.R. § 41.30.

---

<sup>4</sup> The Examiner cites to U.S. Patent No. 6,034,162 (claims 2 and 14); U.S. Patent No. 6,436,557 B1 (claim 2); U.S. Patent Application Publication No. 2012/0128906 A1 (claim 16); U.S. Patent Application Publication No. 2009/0117454 A1 (¶¶ 24, 26); and U.S. Patent Application Publication No. 2012/0205151 A1 (¶ 29).

<sup>5</sup> It is undisputed that the five patent documents cited by the Examiner for the first time in the Examiner’s Answer were not relied upon by the Examiner previously in this application.

Thus, for purposes of claim interpretation, an examiner may include citations to dictionaries that were not relied upon the Office action from which the appeal was taken. An examiner cannot, however, newly cite to patent documents not relied upon previously without designating the Answer as including a new ground of rejection. The meaning of “relied upon” is not confined to use of new Evidence in combination with the prior art used to reject the claims in a new ground of rejection. The meaning of “relied upon” broadly includes any Evidence submitted by the Examiner for the purpose of proving the existence of an alleged fact. Thus, the Examiner “relied upon” these five new patent documents because the Examiner provided the documents to the Board for the purpose of proving how the term “ethylene-alpha olefin copolymer” is understood in the art. The Examiner failed to comply with the Office’s rules by failing to designate the Answer as containing a new ground of rejection.

As provided for in 37 C.F.R. § 41.40, Appellant could have petitioned under 37 C.F.R. § 1.181 to have the undesignated new ground properly designated, in order to avail itself of the ability to reopen prosecution. Appellant chose, however, to continue with the present appeal and filed a Reply Brief addressing the new Evidence. Appellant’s response included the submission of various definitions of the disputed term, at least some of which come from dictionaries and are thus permitted under our rules. As such, so as not to unnecessarily delay resolution of the appeal and because Appellant affirmatively indicated its desire to proceed with the appeal by filing a Reply Brief that addresses the new Evidence, we turn to the merits of the appeal.

A Markush group is a list of specified alternatives of a group, typically expressed in the form: a member selected from the group consisting of A, B, and C. *Abbott Labs. v. Baxter Pharm. Prods., Inc.*, 334 F.3d 1274, 1280 (Fed. Cir. 2003). As indicated by the use of “consisting of,” a claim incorporating a Markush group is “closed.” *Id.* at 1280. Independent claims 26 and 37 employ a Markush group to define the claimed “sealing layer” as being a layer “selected from the group consisting of metallocene-catalyzed ethylene-alpha olefin copolymers alone or combined with additional ethylene-alpha olefin copolymers.” Thus, this claim language excludes from the scope of the claimed sealing layer any material that is not an ethylene-alpha olefin copolymer.

We interpret “ethylene-alpha olefin copolymer” in light of Appellant’s Specification. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Appellant’s Specification defines this phrase by reference to example materials:

As used herein the phrase “ethylene alpha-olefin copolymer” refers to such heterogeneous materials as linear low density polyethylene (LLDPE), linear medium density polyethylene (LMDPE) and very low and ultra low density polyethylene (VLDPE and ULDPE), as well as homogeneous polymers such as TAFMER™ supplied by Mitsui Petrochemical corporation and metallocene catalyzed polymers such as Exact materials supplied by Exxon. Other ethylene alpha olefin copolymers such as the long chain branched homogeneous alpha olefin copolymers available from Dow Chemical Company, known as Affinity resins, are also included in the present invention. Homogeneous ethylene alpha olefin copolymers with a density less than about 0.905 are generally called plastomers.

Spec. 4. Notably, Appellant’s Specification also contains separate definitions for the phrases “ethylene vinyl acetate” or “EVA” and “ethylene

methyl acrylate” or “EMA.” *Id.* at 5. The definition of “ethylene-alpha olefin copolymer” provided in Appellant’s Specification does not list EVA or EMA as examples. *Id.* at 4. In light of the description provided in Appellant’s Specification, we agree with Appellant that the Specification uses the term “ethylene alpha-olefin copolymer” in keeping with its ordinary meaning of a copolymer of ethylene with another alpha-olefin of the family of alkenes with a chemical formula  $C_xH_{2x}$ . Reply Br. 2–4. In support of a broader interpretation, the Examiner cites to other patents that use the term “ethylene alpha-olefin copolymer” in a manner inconsistent with its conventional meaning. Ans. 6–7. We are not convinced by these patents to adopt a broader definition of the term in this instance, in which it is clear from Appellant’s Specification that a broader unconventional definition was not intended.

Tatarka’s third polymer, which comprises a copolymer of ethylene and a vinyl ester, acrylic acid, methacrylic acid, or an alkyl acrylate, is not an ethylene alpha-olefin copolymer as claimed. In fact, Tatarka distinguishes between copolymers of ethylene and at least one alpha olefin and copolymers of ethylene and a vinyl ester, acrylic acid, methacrylic acid or an alkyl acrylate. Specifically, Tatarka discloses “[v]arious copolymers of ethylene and at least one alpha olefin are employed in the film of the invention” and describes that “[s]uitable alpha olefins include C3 to C10 alpha-olefins such as propene, butene-1, pentene-1, hexene-1, methylpentene-1, octene-1, decene-1 and combinations thereof.” Tatarka, col. 10, ll. 52–53, 57–60. Tatarka does not include acrylic acid, methacrylic acid or an alkyl acrylate in the list of suitable alpha olefins. Notably, in the

discussion of its preferred embodiment, Tatarka distinguishes the first and second polymers from the third polymer. Tatarka characterizes only the first and second polymer as ethylene-alpha olefin copolymers, disclosing that “[t]wo of the required polymers of the preferred inventive blend are ethylene  $\alpha$ -olefin copolymers and one is an ethylene copolymer with a vinyl ester[,] acrylic acid, methacrylic acid or an alkyl acrylate.” Tatarka, col. 11, ll. 12–13, 18–21.

Thus, the Examiner erred in finding that Tatarka discloses the sealing layer as recited in claims 26 and 37. The Examiner does not rely on Wolf to cure this deficiency. Final Act. 3. For this reason, we do not sustain the rejection of independent claims 26 and 37, and their dependent claims 27–31 and 38–42, as unpatentable over Tatarka and Wolf. The Examiner also does not rely on Kallio to cure the deficiency in Tatarka. Final Act. 5. Accordingly, we likewise do not sustain the rejection of claims 32, 33, 43, and 44 as unpatentable over Tatarka, Wolf, and Kallio.

#### DECISION

The decision of the Examiner rejecting claims 26–33 and 37–44 is reversed.

REVERSED