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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte FRANK E. SEMERSKY and WILLIAM D. VOYLES

Appeal 2016-006534
Application 12/144,885[1]
Technology Center 1700

Before DONNA M. PRAISS, BRIAN D. RANGE, and MICHAEL G. McMANUS, *Administrative Patent Judges*.

RANGE, *Administrative Patent Judge*.

DECISION ON APPEAL

SUMMARY

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 1, 2, 4, 6–8, 11, 22, 23, and 28–38. We have jurisdiction. 35 U.S.C. § 6(b). We AFFIRM.

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[1] According to the Appellants, the real party in interest is Plastic Technologies, Inc. Appeal Br. 1.

STATEMENT OF THE CASE[2]

Appellants describe the invention as relating to a plastic container having a foam layer. Spec. ¶ 2. The foam layer provides the container with thermal insulating properties. *Id.* ¶¶ 4–5. Claim 1, reproduced below with emphases added to certain key recitations, is illustrative of the claimed subject matter:

> 1. A blow molded container, comprising:
>
> a blow molded container formed from **an inner layer of plastic suitable for blow molding and an outer layer of plastic suitable for blow molding** ove1molded over and directly contacting said inner layer, **said outer layer of plastic fanned as a foam** wherein the foam cells contain one of carbon dioxide and nitrogen, said container made by blow molding a preform formed from said inner layer of plastic and said outer layer of plastic ove1molded over and directly contacting said inner layer, said inner layer of plastic comprising **biaxially oriented polyethylene terephthalate**; and
>
> a threaded portion formed at an end of the container adapted to receive a cooperating closure;
>
> wherein the outer layer comprises a polyester and forms a portion of an exterior surface of the container and the threaded

[2] In this opinion, we refer to the Final Office Action dated September 17, 2015 ("Final Act."), the Appeal Brief filed January 22, 2016 ("Appeal Br."), the Examiner's Answer dated June 3, 2016 ("Ans."), and the Reply Brief filed June 16, 2016 ("Reply Br.").

We note that in Appeal 2016-001862, March 2, 2017, we addressed the claims of a continuation-in-part application referencing the present application. Appeal Br. 2; *see also* Appeal 2007-0404 (March 23, 2007), Appeal 2008-0736 (January 31, 2008), and Appeal 2010-008123 (August 25, 2010).

portion provides an opening between an interior and an exterior of the container.

Appeal Br. 16 (Claims App'x).

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

Plymale et al. (hereinafter "Plymale")	US 3,277,220	Oct. 4, 1966
Snyder et al. (hereinafter "Snyder")	US 4,318,489	Mar. 9, 1982
Daubenbüchel et al. (hereinafter "Daubenbüchel")	US 4,874,649	Oct. 17, 1989
Yoshimi et al. (hereinafter "Yoshimi")	US 5,618,486	Apr. 8, 1997
Desoutter et al. (hereinafter "Desoutter")	US 6,153,145	Nov. 28, 2000
Schloss	US 6,406,661 B1	June 18, 2002

REJECTIONS

The Examiner maintains the following rejections on appeal:

Rejection 1. Claims 1, 6–8, 11, 22, 23, and 36–38 under 35 U.S.C. § 103 as unpatentable over Snyder in view of Plymale, Daubenbüchel, and Yoshimi. Ans. 3.

Rejection 2. Claims 2 and 4 under 35 U.S.C. § 103 as unpatentable over Snyder in view of Plymale, Daubenbüchel, and Yoshimi in further view of Desoutter. *Id.* at 7.

Rejection 3. Claims 2 and 28–35 under 35 U.S.C. § 103 as unpatentable over Snyder in view of Plymale, Daubenbüchel, and Yoshimi in further view of Schloss. *Id.* at 7–8.

ANALYSIS

We review the appealed rejections for error based upon the issues identified by the Appellants and in light of the arguments and evidence produced thereon. *Cf. Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) ("it has long been the Board's practice to require an applicant to identify the alleged error in the examiner's rejections")). After considering the evidence presented in this Appeal and each of Appellants' arguments, we are not persuaded that Appellants identify reversible error. Thus, we affirm the Examiner's rejections for the reasons expressed in the Final Office Action and the Answer. We add the following primarily for emphasis.

Appellants do not present separate arguments with respect to the Examiner's second and third rejections (except to argue that secondary references do not cure issues Appellants argue with respect to the Examiner's first rejection), and Appellants argue all claims as a group. *See* Appeal Br. 7–8, 14. Therefore, consistent with the provisions of 37 C.F.R. § 41.37(c)(1)(iv) (2013), we limit our discussion to claim 1. All other claims on appeal stand or fall together with claim 1.

The Examiner finds that Snyder discloses a bottle for holding beverages that is made of biaxially orientated polyethylene, is blow molded, and has a threaded neck. Ans. 3 (providing citations to Snyder). Snyder states that the biaxial orientation provides "adequate yield strength and, thus, bottle stability." Snyder 2:14–16. The Examiner finds that Snyder does not disclose an overmolded outer foam layer as recited in claim 1. Ans. 4.

The Examiner finds, however, that Plymale teaches a plastic container having an outer foam layer. *Id.* (citing Plymale). The Examiner concludes

that "[i]t would have been obvious to one of ordinary skill in the art at the time the invention was made to use an outer foam layer as taught by Plymale in the container of Snyder in order to provide a container with the advantage of being rigid, lightweight, resistant to mechanical shock and thermally insulative." *Id.*

The Examiner also finds that Daubenbüchel teaches a technique for blow-molding a co-extruded multilayer thermoplastic preform in which the outer layer is foamed and the inner layer is not foamed. *Id.* (citing Daubenbüchel).

The Examiner concludes that it would have been obvious to utilize stretch blow molding to produce the container of modified Snyder because Daubenbüchel teaches blow molding generally and Snyder "discloses that the inner layer is biaxially oriented and . . . one of ordinary skill in the art would recognize that stretch blow molding would be required to provide a biaxially orientated inner layer." *Id.* at 5; *see also id.* at 9 (stating that Daubenbüchel "is merely used to evidence the fact that it is known to blow mold a pre-form having an outer foam layer to form a container"). A preponderance of the evidence supports the Examiner's findings and conclusions.

Appellants argue that the Examiner errs by relying upon rationales to modify Snyder in view of Plymale that are "not pertinent." Appeal Br. 8–9; *see also* Reply Br. 2–3. The Examiner, however, finds that one reason to add the foam of Plymale to the container of Snyder is to provide thermal insulation. Ans. 9. The Examiner also finds that "it is well known to one of ordinary skill in the art that foam layers provide thermally insulative properties. . . ." *Id.* Appellants do not argue that this finding is incorrect.

Instead, Appellants argue that the Examiner lacks evidence to support this finding. Appeal Br. 9; Reply Br. 3. A preponderance of the evidence in the present record, however, supports the Examiner's finding. In particular, Daubenbüchel indicates that foam layers provide thermal insulation. Daubenbüchel 3:50–54. Appellants' argument thus does not establish Examiner error.

Appellants also argue that the Examiner's rationale for modifying Snyder in view of Daubenbüchel is erroneously based on benefits that would only arise from Daubenbüchel's extrusion blow molding (in contrast to claim 1 which recites "biaxially orientated polyethylene terephthalate"—a product of stretch blow molding) and that the Examiner does not provide adequate rationale for stretch blow molding the preform of Daubenbüchel. Appeal Br. 10–14; Reply Br. 4–5. These arguments, however, do not fairly meet the Examiner's rejection. The Examiner proposes modifying Snyder to include a foamed layer as taught by Plymale. Ans. 3–5. Snyder already suggests stretch blow molding by teaching biaxial orientation (*id.*), and the Examiner uses Daubenbüchel to further support that blow molding techniques could also be used for a two-layer system where a foam layer is added to the Snyder product (*id.* at 9). Appellants do not dispute that stretch blow molding is a known technique (*see* Spec. ¶ 27 ("The overmolded container 20 may be formed by conventional blow molding techniques, such as reheat stretch blow molding.")), and Appellants present no persuasive argument as to why a person of skill in the art would not expect that stretch blow molding could be used to form a Snyder bottle as modified with a foam layer as taught by Plymale.

We note that our present decision is distinguishable from our decision in *Ex parte Semersky*, Appeal 2016-001862 (PTAB March 2, 2017). There, the Examiner's rejection was based upon Daubenbüchel in view of other references. We reversed the rejection because the Examiner did not adequately explain why a person of skill in the art would have reasonably expected a stretch blow molding process to be able to create the Daubenbüchel product or why a person of skill would have expected that stretch blow molding would be interchangeable with Daubenbüchel's extrusion blow molding. *Ex parte Semersky*, Appeal 2016-001862, slip op. at 4–5 (PTAB March 2, 2017). In contrast, the Examiner's rejection here is primarily based upon modifying Snyder (a biaxially orientated plastic bottle) to include the foam layer of Plymale. For the reasons explained above, Appellants fail to establish error in that rejection.

DECISION

For the above reasons, we affirm the Examiner's rejection of claims 1, 2, 4, 6–8, 11, 22, 23, and 28–38.

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