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Nelson Mullins Riley & Scarborough LLP IP Department One Wells Fargo Center 301 South College Street, 23rd Floor Charlotte, NC 28202			STINSON, CHELSEA E.	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SCOTT W. HUFFER and JACOB DONALD PRUE BRANYON

Appeal 2017-006558¹
Application 13/584,931
Technology Center 3700

Before MICHAEL C. ASTORINO, SHEILA F. McSHANE, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), the Appellants appeal from the Examiner's decision rejecting claims 1–4, 7, 9, 10, 13–18, and 21.² Ans. 2. Claims 5, 6, 8, 11, 12, 19, 20, and 22 are withdrawn. Non-Final Act. 1, 2. We have jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Our decision refers to the Appellants' Reply Brief ("Reply Br.," filed Mar. 14, 2017), Appeal Brief ("Appeal Br.," filed Nov. 11, 2016), and Specification ("Spec.," filed Aug. 14, 2012), and to the Examiner's Answer ("Ans.," mailed Feb. 23, 2017) and Non-Final Office Action ("Non-Final Act.," mailed Aug. 11, 2016).

² According to the Appellants, "[t]he real party in interest in this appeal is Sonoco Development, Inc." Appeal Br. 1.

STATEMENT OF THE CASE

Subject Matter on Appeal

The Appellants' invention is directed to "a method of manufacturing a packaging bag that is reclosable after initial opening." Spec. ¶ 1. Claim 1, the sole independent claim, is representative of the subject matter on appeal and is reproduced below.

1. A method comprising:
 - layering multiple sections of thermoplastic film, wherein said multiple sections are continuous and integral parts of said film, to form a first multi-layer portion;
 - conglomerating said multiple sections of said first multi-layer portion together to form a unitary first thicker portion of said film; and
 - shaping a first closure strip into said first thicker portion.

Rejection

Claims 1–4, 7, 9, 10, 13–18, and 21 under (pre-AIA) 35 U.S.C. § 103(a) as unpatentable over Dais et al. (US 5,405,561, iss. Apr. 11, 1995) ("Dais"), Forman (US 5,937,615, iss. Aug. 17, 1999), and Ausnit (US 4,235,653, iss. Nov. 25, 1980).

ANALYSIS

The Appellants argue that the Examiner relies on impermissible hindsight by dissecting and evaluating the claim steps in isolation and gathering knowledge solely from the Appellants' disclosure. *See* Appeal Br. 9. The Appellants support this argument by asserting that the Examiner relies on Forman to teach the layering step, Ausnit to teach the conglomerating step, and Dais to teach the shaping step. *Id.* The Appellants also support this argument by asserting that the Examiner erred "when

combining the D[ai]s and Forman references (and before introducing the Ausnit reference)” by determining “that it would be obvious to combine D[ai]s and Forman references ‘in order to create a stronger conglomerated film.’” Reply Br. 3–4 (citing Non-Final Act. 4). The Appellants contend that “the Examiner uses Appellant[s’] conglomeration concept as the rationale for combining two admittedly non-conglomerating references[, i.e., Dais and Forman].” *Id.* at 4. The Appellants’ argument is not persuasive of Examiner error.

In the Non-Final Office Action, the Examiner’s reasoning — particular to the modification of Dais’ method of manufacturing a bag with Forman’s teaching of layering multiple sections of thermoplastic film — is “to create a stronger conglomerated film and help to have the material be more air-tight by having it made of a continuous material rather than separate materials.”³ Non-Final Act. 4. In the Answer, the Examiner amends this reason by removing the reference to conglomeration, i.e., “to produce a stronger and more air-tight closure strip since it is made of a continuous material rather than separate materials.” Ans. 3. The Appellants do not persuasively explain how this amended reasoning shows Examiner error.

³ The reasoning is identical to the reason provided in the Final Office Action at page 3 (mailed November 19, 2015), where the Examiner’s rejection relied on Forman to teach the conglomerating step. In the Non-Final Office Action at page 4 (mailed August 11, 2016, and after the Final Office Action), the Examiner relied on Ausnit rather than Forman to teach the conglomerating step. It appears that the Examiner failed to update the reasoning in the Non-Final Office Action to account for the reliance on Ausnit to teach the claimed conglomerating step.

Additionally, we disagree with the Appellants that the Examiner dissects and evaluates the claim steps in isolation. Rather, as pointed out by the Examiner, the rejection is based on a modification of Dais' method of manufacturing a bag in view of the teachings of Forman and Ausnit. *See* Ans. 5. We determine that the Examiner's conclusion of obviousness articulates reasoning with some rational underpinning. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“[R]ejections on obviousness grounds . . . [require] some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”) (cited with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007)).

The Appellants argue that one of ordinary skill in the art would not have combined the teachings of Dais and Forman because doing so would remove the taper between Dais' portions 41 and 42 central web area 43 to be a drop-off. *See* Appeal Br. 7; Dais, Fig. 5. The Appellants support this argument by asserting that the Dais' taper is accomplished by an extrusion process and that a layering process — as claimed — would result in a drop-off, not a taper. *See* Appeal Br. 7 (The Appellants cite to Figure 7 of the Specification, which depicts a drop-off in the layered and conglomerated film); Reply Br. 2. The Appellants' argument is not persuasive of Examiner error.

Dais teaches that extrusion is an example of a suitable manufacturing method to prepare film stock materials and closure fastening devices. *See* Dais, col. 6, ll. 18–23. However, Dais does not limit extrusion to be the only suitable manufacturing method. *See id.* (“film web stock materials and closure fastening devices . . . may be prepared by any suitable manufacturing method” that includes extrusion, blow molding, “or other known methods of

producing such film web stock materials and closure fastening devices.”) Hence, the premise of the Appellants’ argument — i.e., that Dais’ taper is accomplished by extrusion — is not precise. As for the Appellants’ assertion that the layering step in a manufacturing process would result in a drop-off rather than a taper, the assertion does not explain why a taper could not be provided by another step or steps while manufacturing a bag. For example, pressure and heat may be applied to the multi-layered portion to create a taper between Dais’ portions 41 and 42 and central web area 43.

The Appellants argue that Ausnit fails to teach the claimed conglomerating step, i.e., “conglomerating said multiple sections of said first multi-layer portion together to form a unitary first thicker portion of said film.”⁴ Appeal Br. 7–8. The Appellants contend that Ausnit teaches “merely seal[ing] a surface of one layer **23** to a surface of another layer **25**,” which does not result in a unitary body. *Id.* at 7 (citing Ausnit, col. 5, ll. 48–54). The Appellants add support to this contention by comparing unitary area 125, as shown by the Specification at Figure 7, with “a line designating the interface between layer **23**[] and **25**[],” as shown by Ausnit’s Figure 13. *See id.* at 7–8. The Appellants also assert that Ausnit “does not describe . . . that the layers cannot be separated.” Reply Br. 3. The Appellants’ argument is not persuasive of Examiner error.

The Examiner finds that Ausnit’s teaching of substantially fusing areas 23 and 25 together teaches the claimed conglomerating step. *See Non-*

⁴ The Appellants define “conglomerating” as “to gather into a mass or coherent whole.” Appeal Br. 5 (citing Meriam-Webster.com). This definition was provided as a response to a rejection of claims 1–4, 7, 9, 10, 13–18, and 21 under (pre-AIA) 35 U.S.C. § 112, second paragraph, as indefinite. The Examiner has withdrawn this rejection. Ans. 2.

Final Act. 5 (citing Ausnit, col. 5, ll. 48–55, col. 5, l. 67– col. 6, l. 4); Ans. 4 (citing Ausnit, col. 5, ll. 50–58, col. 6, ll. 2–4). Notably, Ausnit describes using a fusing device for heat sealing, including “hot air nozzles **48** . . . [that] impinge hot air jet streams **49** against the outer areas **23** to soften and substantially fuse the areas **23** to the areas **25**.” Ausnit, col. 5, ll. 50–54; *see id.* at col. 5, ll. 54 – col. 6, l. 5. Once areas 23 and 25 are substantially fused (i.e., melted) together they “provide double thickness flanges **28**” (i.e., a unitary thicker structure). *Id.* at col. 3, ll. 42–43; *see id.* at col. 4, ll. 17–19. Further, although we appreciate the Appellants’ position that Ausnit’s Figure 13 depicts a line designating an interface between areas 23’ and 25’, we determine that one of ordinary skill in the art would understand that substantially fusing areas 23 and 25 together to bond the two areas together conglomerates areas 23 and 25, i.e., fused areas 23 and 25 are gathered into a mass or coherent whole.

Thus, we sustain the Examiner’s rejection of claim 1 as unpatentable over Dais, Forman, and Ausnit. We also sustain the rejection of claims 2–4, 7, 9, 10, 13–18, and 21, as these claims are not separately argued.

DECISION

We AFFIRM the Examiner’s decision rejecting claims 1–4, 7, 9, 10, 13–18, and 21.

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

AFFIRMED