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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* LUC MARIE GHISLAIN DHEUR, BENOIT KOCH,  
and STEFAN KLAUS SPITZMESSER

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Appeal 2017-011619  
Application 13/808,767  
Technology Center 1700

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Before CATHERINE Q. TIMM, JEFFREY R. SNAY,  
and MICHAEL G. McMANUS, *Administrative Patent Judges*.

McMANUS, *Administrative Patent Judge*.

DECISION ON APPEAL

The Examiner finally rejected claims 18, 19, 23, 24, 26, 27, 29–31, 34 and 36 of Application 13/808,767 under 35 U.S.C. §§ 102, 103, and 112. Final Act. (Aug. 22, 2016) 4–15. Appellants<sup>1</sup> seek reversal of these rejections pursuant to 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

For the reasons set forth below, we AFFIRM.

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<sup>1</sup> INEOS Europe AG is identified as the real party in interest. Appeal Br. 3.

## BACKGROUND

The present application generally relates to a polyethylene composition useful in making pipes. Spec. 1. The composition includes two different polyethylene fractions with different molecular weights. *Id.* Such a composition is referred to as a “bimodal polyethylene composition.” *Id.* Known bimodal polyethylene compositions have a number of favorable properties, but lack flexibility. *Id.* at 2. The named inventors assert that they have “found a polyethylene which has a good balance of flexibility, mechanical strength and processability.” *Id.* at 3.

Claim 18 is illustrative of the subject matter on appeal and is reproduced below:

18. Polyethylene composition comprising:

(a) 40–55wt% of a copolymer fraction (A) comprising ethylene and 0.1 to 1.3 mol% of a C<sub>4</sub>-C<sub>10</sub> alpha-olefin, and having an MI<sub>2</sub> of from greater than 320 to 500g/10min and a density of 963 – 973 kg/m<sup>3</sup>; and

(b) 45–60wt% of a copolymer fraction (B) comprising ethylene and 0.1 to 1.3 mol% of a C<sub>4</sub>-C<sub>10</sub> alpha-olefin, wherein the composition has an unpigmented density of 940 to 956 kg/m<sup>3</sup>, an MI<sub>5</sub> of 0.2 to 0.7 g/10 min and an  $\eta_{210\text{kPa}}$  of 2-6 kPa.s, and a comonomer distribution in both of fractions (A) and (B) such that either the comonomer content of the polymer fraction across its molecular weight range varies by less than 10wt%, or the lower molecular weight fraction has a proportionally lower comonomer content and the higher molecular weight fraction has a proportionally higher comonomer content, but excluding compositions in which the Mw(HMW):Mw(LMW) is 30 or more.

Appeal Br. 28 (Claims App.).

## REJECTIONS

The Examiner maintains the following rejections:

1. Claims 18 and 23 are rejected under 35 U.S.C. § 112, first paragraph (pre-AIA), as failing to comply with the written description requirement.
2. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected under 35 U.S.C. § 102(b) (pre-AIA) as anticipated by, or in the alternative, under § 103(a) (pre-AIA) as obvious over, Lambert et al. (US 2007/0287798 A1, published Dec. 13, 2007 (“Lambert”)).
3. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected under 35 U.S.C. § 102(b) (pre-AIA) as anticipated by, or in the alternative, under § 103(a) (pre-AIA) as obvious over, Godon et al. (WO 2008/006487 A1, published Jan. 17, 2008 (“Godon”)<sup>2</sup>).
4. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected under 35 U.S.C. § 103(a) (pre-AIA) as obvious over, Kwalk (US 2006/0036041 A1, published Feb. 16, 2006 (“Kwalk”)).
5. Claims 30 and 31 are rejected under 35 U.S.C. § 103(a) (pre-AIA) as obvious over Godon in view of Kwalk.
6. Claims 30 and 31 are rejected under 35 U.S.C. § 103(a) (pre-AIA) as obvious over Lambert in view of Kwalk.
7. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected on the ground of nonstatutory obviousness-type double patenting over claims 1–6 and 9 of US Patent No. 7,807,770 alone or, alternatively, in view of Kwalk.

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<sup>2</sup> The Examiner cites to US counterpart application US 2009/0286029, published Nov. 19, 2009. For ease of reference, we will do likewise.

8. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected on the ground of nonstatutory obviousness-type double patenting over claims 1–15 of US Patent No. 7,714,074 alone or, alternatively, in view of Kwalk.
9. Claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are rejected on the ground of nonstatutory obviousness-type double patenting over claims 1–13 of US Patent No. 7,812,095 alone or, alternatively, in view of Kwalk.

## DISCUSSION

**Rejection 1.** The Examiner rejected claims 18 and 23 for failure to comply with the written description requirement. Final Act. 3–4. The Examiner determined that the limitation “excluding compositions in which the  $M_w(\text{HMW}) : M_w(\text{LMW})$  is 30 or more” (where “ $M_w(\text{HMW})$ ” represents the molecular weight of the high molecular weight fraction and “ $M_w(\text{LMW})$ ” represents the molecular weight of the low molecular weight fraction) was not described in the Specification. *Id.* Appellants concede that the limitation is not described *ipsis verbis* but argue that it may be derived from melt flow index information included in the application. Appeal Br. 7–14.

Appellants argue that the application includes sufficient information to calculate the molecular weight ratios of the fractions as follows:

The invention as claimed specifies a composition having a final  $MI_5$  of 0.2-0.7 g/10min and comprising 40-55wt% of fraction (A) with an  $MI_2$  of 320-500 g/10min (and therefore 45-60wt% of fraction (B)). In a bimodal composition containing two fractions, if the ratio of the fractions is known as well as the

overall melt index and also the melt index of one of the fractions, it is possible to calculate the melt index of the other fraction, in this case fraction (B). The melt indexes of both fractions can then be converted into molecular weights and a molecular weight ratio derived. In other words, as of the effective date of this application, it was well within the skill of one of ordinary skill in this art to estimate the range of molecular weight ratios covered by the invention as presently claimed.

Appeal Br. 8.

For an applicant to comply with the written description requirement of 35 U.S.C. § 112, first paragraph, “the disclosure of the application relied upon [must] reasonably convey[ ] to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc).

Here, Appellants assert that they find support for the “Mw(HMW): Mw(LMW) is 30 or more” limitation in the “invention as claimed” without specific citation to any particular document, page, or claim. As each of the cited values is found in new claim 18 (which was added by amendment), Appellants seem to argue that the amended claims (including the molecular weight ratio limitation) are described by other portions of the amended claims. To the extent this is Appellants’ contention it is inadequate as it does not specify support in the application *as filed*.

One can, however, find the cited values in various parts of the original application. The melt index (MI<sub>5</sub>) range of 0.2 to 0.7 g/10 min for the composition is set forth in the Specification and original claims. *See* Spec. 4:31–32, 29:31–32 (claim 16). A content of copolymer fraction (a) of 40–55wt% is described in the Abstract and Specification. *Id.* at 3:31–32, 4:7–8.

The melt index ratio (MI<sub>2</sub>) range of 320–500 g/10 min of copolymer (A) is set forth in the Specification. *Id.* at 5:10–11. Accordingly, there is support for the disclosed melt index, copolymer fraction, and melt index ratio ranges.

In calculating the molecular weight ratio, Appellants next look to a formula that is not included in the Specification. Appellants describe such formula as “a well-known relationship developed by Hagstrom.” Appeal Br. 8. The formula is reproduced from Appellants’ brief:

$$MFR = \left[ w \left( \frac{1}{MFR_1} \right)^{\frac{w-b}{a}} + (1-w) \left( \frac{1}{MFR_2} \right)^{\frac{w-b}{a}} \right]^{-aw^b}$$

*Id.* at 9. In order to use such equation, Appellants converted the value for MI<sub>2</sub>(A) to MI<sub>5</sub>(A)<sup>3</sup> by multiplying by 4 so that the melt indexes would be stated in equivalent terms. *Id.* Appellants state that this is a “well known” relationship but do not support such assertion with documentary or declaratory evidence. *Id.* Appellants additionally multiply melt index values by 30 to calculate HLMI (high load melt index). *Id.* Appellants assert that this is supported by a technical treatise. *Id.* Specifically, Appellants allude to a statement that the “FRR of the components is close to 30 in this case (Ziegler-Natta catalyst).” *See id.* (citing Hagström, The Polymer Processing Society, Extended Abstracts & Final Programme, Aug. 19–21, 4:13). The Specification indicates that “conversion between different

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<sup>3</sup> The subscript in, for example, “MI<sub>2</sub>,” indicates the mass of the load under which the polymer flowing through a capillary is extruded. *See* Spec. 19.

melt index measurements is familiar to the person skilled in the art.”<sup>4</sup> Spec. 5.

Appellants use the foregoing equation to calculate a range of the melt index of copolymer fraction (B) of 0.015–0.185 g/10 min. Appeal Br. 9. Appellants then rely upon “**internal modeling**” to determine “that the claimed MI<sub>2</sub>(A) range of 320-500 g/10 min corresponds to an Mw of 20-24 kDa” and “the MI<sub>5</sub>(A) range of 0.015-0.185 g/10 min corresponds to an Mw of about 280-600 kDa.” *Id.* at 9–10 (emphasis added). Appellants then conclude that “calculation of the molecular weights of the individual fractions which are covered by the invention as claimed corresponds to a broadest possible range of Mw(HMW):Mw(LMW) covered by claim 18 of 280:20–600:24 or 14–30.”<sup>5</sup> *Id.* at 10.

“One shows that one is ‘in possession’ of the invention by describing the invention, with all its claimed limitations, **not that which makes it obvious.**” *Lockwood v. American Airlines Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) (emphasis added). Similarly, “[t]he knowledge of ordinary artisans may be used to inform what is actually in the specification, **but not to teach limitations that are not in the specification**, even if those limitations would be rendered obvious by the disclosure in the specification.” *Rivera v. Int’l Trade Comm’n*, 857 F.3d 1315, 1322 (Fed. Cir. 2017) (internal citation omitted) (emphasis added).

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<sup>4</sup> In a Response After Final Action dated Jan. 23, 2017 (page 6), Appellants stated “while the ratios are not 4 and 30 exactly, they are close to those values.”

<sup>5</sup> We note that “600:24” does not equate to 30.

Here, in converting from MI<sub>2</sub> to MI<sub>5</sub> Appellants rely upon a conversion factor unsupported by evidence apart from attorney argument that such conversion factor is “well known.” Appellants additionally rely upon “internal modeling” not found in the Specification. This goes well beyond any textual support found in the Specification. Accordingly, Appellants have failed to show reversible error in the Examiner’s rejection of claims 18 and 23 for failure to comply with the written description requirement.

It is not enough that an ordinary artisan might be able to piece together ratios meeting the Mw(HMW):Mw(LMW) range of the claim from the examples and other portions of the written description: the written description must reasonably convey that Appellants viewed compositions with ratios of less than 30 as part of Appellants’ invention. *See Purdue Pharma L.P. v. Faulding Inc.*, 230 F.3d 1320, 1326 (Fed. Cir. 2000) (“Although the examples provide the data from which one can piece together the C<sub>max</sub>/C<sub>24</sub> limitation, neither the text accompanying the examples, nor the data, nor anything else in the specification in any way emphasizes the C<sub>max</sub>/C<sub>24</sub> ratio.”). Similarly, “one cannot disclose a forest in the original application, and then later pick a tree out of the forest and say here is my invention.” *Id.* Appellants’ original written description did not emphasize compositions with ratios meeting the claim.

**Rejection 2.** The Examiner rejected claims 18, 19, 23, 24, 26, 27, 29-31, 34, and 36 as anticipated by, or in the alternative, as obvious over, Lambert. Final Act. 4–9. In making this rejection (and each prior art based rejection at issue) the Examiner determined that there was a prima facie case

of anticipation or obviousness sufficient to shift the burden of proof to the applicants. *See* Final Act. 6–8.

Where all limitations are taught by a prior art reference except for a property characteristic, the PTO can require an applicant “to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.” *In re Best*, 562 F.2d 1252, 1254–55 (CCPA 1977) (internal quotation marks omitted). The court noted that “[w]hether the rejection is based on ‘inherency’ under 35 U.S.C. § 102, [or] on ‘prima facie obviousness’ under 35 U.S.C. § 103 . . . the burden of proof is the same.” *Id.* (quoted with approval in *Southwire Co. v. Cerro Wire LLC*, 870 F.3d 1306, 1311 (Fed. Cir. 2017)).

Appellants present three arguments in favor of reversal. Appeal Br. 20–21. First, Appellants argue that Lambert teaches only the use of Ziegler-Natta catalysts which “do not give a substantially uniform or reverse comonomer distribution in the polymer as now defined in claims 18 and 23.” *Id.* at 20. A reverse comonomer distribution is a “comonomer distribution in which the lower molecular weight fraction has the lower comonomer content and the higher molecular weight fraction has the proportionally higher comonomer content.” Spec. 7. A uniform comonomer distribution is defined in the Specification as follows:

A uniform comonomer distribution is defined as a comonomer distribution in which there is no increasing or decreasing trend across the full width of the molecular weight distribution of the polymer fraction. A uniform comonomer distribution may alternatively be defined as meaning that comonomer content of the polymer fractions across the molecular weight range of the particular fraction varies by less than 10wt%, preferably by less than 8wt%, more preferably by less than 5wt%, and most preferably by less than 2wt%.

*Id.* at 8.

The Specification tends to support Appellants' assertion that Ziegler-Natta catalysts do not yield a uniform or reverse distribution of comonomers. *Id.* at 7–8. Appellants' representations regarding Lambert are similarly supported by the Specification. Lambert does not use the term “Ziegler-Natta,” but does include a description of a preferred catalyst that is similar to the Specification's description of Ziegler-Natta catalysts.

*Compare* Lambert ¶¶ 33–36 *with* Spec. 18–19.

Despite the foregoing, Lambert (Table 1) teaches a composition (Example No. 6) where the C6 content of Polymer A is 0.5 wt% and the C6 content of Polymer B is 2.4 wt%. Final Act. 5, ¶ 7. The Examiner determined that this falls within the “uniform” distribution limitation. *Id.* This is not persuasively rebutted. Accordingly, we determine that Appellants have not shown reversible error in the Examiner's finding that Lambert teaches a reverse or uniform comonomer distribution.

For their second argument, Appellants assert that Lambert does not teach the viscosity at high shear stress range required by the claims (indicated by the “ $\eta_{210\text{kPa}}$ ” limitation). Lambert includes viscosity at high shear stress range values expressed as  $\eta_{100\text{kPa}}$  rather than  $\eta_{210\text{kPa}}$ . *See* Lambert ¶ 53 (Table 1). Appellants purport to correlate such values “based on internal data of the Appellant.” Appeal Br. 20. Appellants do not supply declaratory or other evidence in support of the internal data. Lacking such support, the data supplied is mere attorney argument. *See, e.g., Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (“[U]nsworn attorney argument . . . is not evidence and cannot rebut . . . other admitted evidence . . .”).

In their Reply Brief, Appellants seek to offer new evidence based upon information “published by Borealis Technology Oy (during an EP opposition).” Reply Br. 6. Appellants argue that such information corroborates “the reliability of the correlation” between  $\eta_{100\text{kPa}}$  and  $\eta_{210\text{kPa}}$  described in their initial brief. *Id.* Appellants have not provided any explanation as to why such evidence was omitted from the Appeal Brief. Accordingly, it will not be considered. *See* 37 CFR §§ 41.33(d) (providing that new evidence will not be admitted except in limited circumstances) and 41.41(b)(2) (providing that new argument will not be considered by the Board absent a showing of good cause).

In view of the foregoing, Appellants have failed to show reversible error in the Examiner’s findings regarding Lambert’s teaching of viscosity at high shear stress.

For their third argument regarding Lambert, Appellants offer a single sentence: “Moreover, Lambert does not disclose compositions containing 0.1-1.3 mol% comonomer in fraction (A) in combination with the overall  $MI_5$  of 0.2-0.7 g/10min as well as a melt index or molecular weight of fraction (A) in the claimed range.” Appeal Br. 21. A mere allegation that a limitation is not taught by a reference is inadequate to show error. *See In re Lovin*, 652 F.3d 1349, 1357 (Fed. Cir. 2011) (“[W]e hold that the Board reasonably interpreted Rule 41.37 to require more substantive arguments in an appeal brief than a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the prior art.”); *cf. In re Baxter Travenol Labs.*, 952 F.2d 388, 391 (Fed. Cir. 1991) (“It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for non-obvious distinctions over the prior art.”). To the extent Appellants’ third argument is intended as rebuttal to the

Examiner's findings regarding Lambert teaching a uniform comonomer distribution, it is not directly responsive to the Examiner's findings and is not persuasive of error.

In view of all of the foregoing, we determine that Appellants have failed to show reversible error in the Examiner's determination that claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 are obvious over Lambert.

**Rejection 3.** The Examiner rejected claims 18, 19, 23, 24, 26, 27, 29-31, 34, and 36 as anticipated by, or in the alternative, as obvious over, Godon. Final Act. 9–13, 22–25. Appellants make a number of arguments in support of reversal. Appeal Br. 21–22, 26.

First, Appellants make a bare statement that “[i]n order to make a composition as claimed, the skilled person would have had to (amongst other things) select a composition as defined having a density below 973 kg/m<sup>3</sup>, as well as ensuring that the final composition has an  $\eta_{210\text{kPa}}$  between 2 and 6 kPa.s.” *Id.* at 21. As above, absent further analysis, this is insufficient to show reversible error in the Examiner's findings. *In re Lovin*, 652 F.3d at 1357.

Appellants additionally argue that the main thrust of Godon teaches that polymer (A) is a homopolymer rather than a copolymer including olefin monomers. Appeal Br. 21–22. Appellants cite Godon's teaching that “ethylene polymer (A) is an ethylene polymer comprising monomer units derived from ethylene **and possibly monomer units derived from other olefins.**” Godon ¶ 10 (emphasis added). Appellants conclude that “[i]t is clear, therefore, that Godon is concerned principally with homopolymers for polymer (A), not copolymers.” Appeal Br. 22. This statement may be accurate, but does not show error in the Examiner's determination. Godon

must be considered for all of its teachings, including those regarding olefin monomer units in polymer (A). *See In re Mouttet*, 686 F.3d 1322, 1331 (Fed. Cir. 2012) (“A reference may be read for all that it teaches”).

Appellants additionally argue that Godon does not teach to use a catalyst known to yield the claimed composition. Appeal Br. 22. Appellants concede that Godon teaches the use of metallocene “which may be capable of producing a composition as claimed.” *Id.* Appellants assert that Godon teaches that “both polymers A and B have a molecular weight distribution (MWD) of above 4.” Appellants further assert that, “[a]s is well known,” metallocene catalysts “produce narrow MWDs” so one of ordinary skill in the art would not be led to use metallocene to achieve the molecular weight distribution taught by Godon.

Appellants make various unsupported factual assertions in support of their arguments regarding the catalysts taught by Godon. In particular, their assertion that it is “well known” that metallocene catalysts produce narrow molecular weight distributions is unsupported. Lacking adequate declaratory or other support, we regard such assertions as mere attorney argument. *See, e.g., Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d at 1380.

Appellants additionally include a brief argument regarding viscosity at high shear stress (represented by  $\eta_{210\text{kPa}}$ ). Appeal Br. 22. Appellants assert that viscosity at high shear stress is influenced by a number of factors and that there is, therefore, no guarantee that any composition taught by Godon would satisfy the viscosity at high shear stress limitation as well as other limitations of the claims. *Id.* This is not directly responsive to the Examiner’s findings. Absent further analysis, this is insufficient to show

reversible error in the Examiner's findings. *In re Lovin*, 652 F.3d at 1357; *In re Baxter Travenol Labs*, 952 F.2d at 391.

Appellants make similar arguments regarding hindsight. Appeal Br. 26. Such arguments are mere summary allegations and are inadequate to persuade us of reversible error. *See* 37 CFR 41.37(c)(1)(iv) (“the brief shall contain . . . . The arguments of appellant with respect to each ground of rejection, and the basis therefor, with citations of the statutes, regulations, authorities, and parts of the Record relied on. **The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant.**”) (emphasis added).

**Rejection 4.** The Examiner rejected claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 as obvious over, Kwalk. Final Act. 14–18. Appellants make several arguments in support of reversal. Appeal Br. 17–20.

First, Appellants argue that the low molecular weight fraction (fraction A in Kwalk) will have a density below the claimed  $963 \text{ kg/m}^3$ . *Id.* at 17. Specifically, Appellants argue that “it is well known that metallocene catalysts incorporate monomer very efficiently.” *Id.* Thus, when a bimodal polyethylene is made in a single reactor “it is essentially inevitable” that the low molecular weight fraction will contain significant monomer and, thus, have a low density. *Id.*

This argument is not adequately supported. In particular, Appellants' assertion as to the characteristics of metallocene catalysts (said to be “well known”) is unsupported. Appellants similarly fail to support their assertions regarding monomer quantity and the resultant density of the low molecular weight fraction. Lacking adequate declaratory or other support, we regard such assertions as mere attorney argument. *See, e.g., Gemtron Corp. v.*

*Saint-Gobain Corp.*, 572 F.3d at 1380. Accordingly, Appellants have failed to show reversible error in the Examiner's findings regarding Kwalk's teachings relating to the density of the low molecular weight fraction.

Second, Appellants argue that Kwalk is directed toward compositions that have a large ratio of the molecular weight of the HMW fraction to that of the LMW fraction. Appeal Br. 18. Appellants argue that the claims at issue exclude compositions "in which the Mw(HMW):Mw(LMW) is 30 or more," therefore Kwalk does not teach the claimed ratio. Appellants argue that the examples of Kwalk each teach a Mw(HMW): Mw(LMW) ratio of at least 43. *Id.*

The Examiner acknowledges that none of the examples of Kwalk teach a ratio below 43, but finds that other portions of Kwalk teach a lower ratio (30). Answer 14; Final Act. 15. Kwalk, in relevant part, provides as follows:

In one or more of the high strength compositions disclosed herein, the spread, the ratio of  $Mw_{HMW}:Mw_{LMW}$  as defined previously, **can be 30 or more**, or 32 or more, or 35 or more, or 37 or more, or 40 or more, or 45 or more.

Kwalk ¶ 39 (emphasis added). As noted above, a reference must be considered for all that it teaches. *In re Mouttet*, 686 F.3d at 1331. Here, Kwalk teaches that the ratio in question "can be 30 or more." Claims 18 and 23 exclude compositions having a ratio of "30 or more." The Examiner has determined that this is "close enough" that one of ordinary skill in the art would have expected the claimed and prior art compositions to have the same properties. Final Act. 15 (citing *Titanium Metals Corp. of America v. Banner*, 778 F. 2d 775, 783 (Fed. Cir. 1985)). Appellants do not appear to dispute such finding. Accordingly, Appellants have not shown reversible

error in the Examiner's determination that Kwalk teaches or suggests the limitation "the Mw(HMW):Mw(LMW) is 30 or more."

For their third argument regarding Kwalk, Appellants argue that "it cannot be assumed" that the compositions of Kwalk would have viscosity values  $\eta_{210\text{KPa}}$  of 2–6 kPa. Appeal Br. 18–19. In support, Appellants refer to US 2010/0178443 ("Backman").<sup>6</sup> There is some disagreement between the Appellants and the Examiner regarding the viscosity values taught by Backman, but there appears to be agreement that at least some of the values of Backman are outside the claimed range of 2–6 kPa. *See* Answer 14–15; Reply Br. 4–5. Appellants argue that Backman's teaching of a similar composition with differing viscosity values indicates that viscosity may not be inferred from the general similarity of the compositions.

Backman is not relied upon by the Examiner in the instant rejection. Nor have Appellants shown that Backman is more like the claimed compositions than Kwalk is. Accordingly, we accord Appellants' argument in this regard little weight. Additionally, the Examiner has determined that the viscosity values of Backman overlap those of the claims. Answer 14–15. Appellants do not dispute such finding. Reply Br. 4–5. Accordingly, the Examiner's *prima facie* case is not rebutted.

**Rejections 5 and 6.** The Examiner rejected claims 30 and 31 as obvious over Godon in view of Kwalk (Rejection 5). Final Act. 25–27. The Examiner additionally rejected claims 30 and 31 as obvious over Lambert in view of Kwalk (Rejection 6). Final Act 27–29. Appellants do not address

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<sup>6</sup> Appellants indicate that Backman was discussed in the Specification as EP 1909013A. *See* Spec. 8.

these rejections with specificity beyond as stated in their prior arguments, discussed above. *See* Appeal Br. 24–26. As we have not found such arguments to be persuasive, we determine that Appellants have failed to show error in the rejection of claims 30 and 31 as obvious over Godon in view of Kwalk or the rejection of claims 30 and 31 as obvious over Lambert in view of Kwalk.

**Rejections 7–9.** The Examiner rejected claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–6, 9 of U.S. Patent No. 7,807,770 alone or, in the alternative, in view of Kwalk (Rejection 7). The Examiner further rejected claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 on the ground of nonstatutory obviousness-type double patenting over claims 1–15 of US Patent No. 7,714,074 alone or, alternatively, in view of Kwalk (Rejection 8).<sup>7</sup> The Examiner further rejected claims 18, 19, 23, 24, 26, 27, 29–31, 34, and 36 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–13 of U.S. Patent No. 7,812,095 alone or, alternatively, in view of Kwalk (Rejection 9).

Obviousness-type double patenting prohibits the issuance of claims in a second patent that are “not patentably distinct from the claims of the first patent.” *In re Longi*, 759 F.2d 887, 892 (Fed. Cir. 1985) (citations omitted).

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<sup>7</sup> The Examiner states that the rejection is applicable to claims 18–27, 29–31, 34, and 36. As claims 20–22, and 25 were cancelled by amendment dated June 21, 2016, we construe this as applicable to the claims as listed above.

Appellants argue the foregoing rejections collectively. Appeal Br. 25–26. The thrust of their argument is that “based on the claim amendments presented herewith, it is clear that the scope of present invention as now claimed is not rendered obvious by the claims of the cited patents.” *Id.* (emphasis omitted).

The language “based on the claim amendments presented herewith” is somewhat confusing. First, we note that Appellants’ Remarks dated June 21, 2016 included this same statement. *See* Amendment dated June 21, 2016 (in response to the Office Action dated Dec. 21, 2015) at 19. Similarly, Appellants’ remarks dated January 23, 2017 included this same statement. *See* Response dated Jan. 23, 2017 (in response to the Advisory Action dated Dec. 14, 2016) at 20.

Second, in the Final Rejection (dated Aug. 22, 2018), the Examiner indicated that “[t]he amendment filed on June 21, 2016 has been fully considered.” Final Act. 2. The June 21, 2016 amendment is consistent with the Claims Appendix submitted with the Appeal Brief. Accordingly, we conclude that Appellants’ statement regarding the “claim amendments presented herewith” is made in error and the Examiner has considered, and rejected, the current claims. Further, Appellants fail to articulate any specific argument in response to the Examiner’s findings regarding obviousness type double patenting. Accordingly, Appellants have failed to persuade us of reversible error in the Examiner’s rejection.

In addition to the foregoing, we adopt the findings and analysis of the Examiner as set forth in the Final Office Action and the Examiner’s Answer. Any argument made by Appellants but not addressed in the foregoing is deemed not to comply with 37 CFR § 41.37(c)(1)(iv).

CONCLUSION

The rejection of all claims is affirmed.

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