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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DENNIS G. SCHLISNER

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Appeal 2017-011688  
Application 13/865,627  
Technology Center 1700

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Before KAREN M. HASTINGS, JAMES C. HOUSEL, and  
JEFFREY R. SNAY, *Administrative Patent Judges*.

SNAY, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

Appellant<sup>2</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's decision rejecting claims 10–12 under 35 U.S.C. § 103(a) as unpatentable

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<sup>1</sup> We cite to the Specification (“Spec.”), filed April 18, 2013; Non-Final Office Action (“Non-Final Act.”), dated November 28, 2016; Appellant’s Appeal Brief (“Appeal Br.”), filed April 11, 2017; Examiner’s Answer (“Ans.”) dated July 21, 2017, and Appellant’s Reply Brief (“Reply Br.”), filed September 21, 2017.

<sup>2</sup> Appellant is the applicant, Base King, LLC. The inventor, Dennis G. Schlisner, is identified as the real party in interest. Appeal Br. 2.

over Hahn,<sup>3</sup> Giles,<sup>4</sup> and Whelan.<sup>5</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

## BACKGROUND

The subject matter on appeal relates to a method for producing polyvinyl chloride (PVC) free decorative flooring. Spec. ¶¶ 7, 8. Claim 12 is illustrative:

12. A method of making a polyvinyl chloride free flexible sheet flooring without the use of adhesive, consisting essentially of the steps of:

providing an uppermost layer of the flooring consisting essentially of a decorative nonwoven fabric layer consisting essentially of a fabric having a decorative pattern printed on the fabric to provide a decorative finish and appearance;

extruding an intermediate polymeric layer using a first sheet die and joining the upper decorative nonwoven fabric layer to the extruded polymeric layer to bond the intermediate polymeric layer to the upper decorative fabric layer without the use of adhesive by passing the extruded polymeric layer and the nonwoven fabric layer through a first nip to provide a first composite;

extruding a lower base layer using a second sheet die having a die temperature and joining the intermediate polymeric layer of the first composite to a surface of the base layer to bond the lower base layer to the intermediate polymeric layer without the use of adhesive by passing the extruded base layer and the first composite with the decorative pattern exposed through a second nip comprising a first roller having a roller temperature lower than the die temperature, and a second roller

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<sup>3</sup> US 2011/0268933 A1, published November 3, 2011.

<sup>4</sup> Giles Jr. Harold F., John R. Wagner Jr., and Eldridge M. Mount III. *Extrusion: The Definitive Processing Guide and Handbook*, William Andrew Publishing, pp. 465–468.

<sup>5</sup> US 3,616,020, issued October 26, 1971.

having a roller temperature greater than the temperature of the first roller, but less than the die temperature; and  
selecting and maintaining the die temperature, the temperature of the first roller, and the temperature of the second roller to enable bonding of the base layer and the intermediate polymeric layer without the use of adhesive, without disrupting the bond between the decorative layer and the intermediate polymeric layer, and without causing heat degradation of the decorative finish and appearance of the decorative layer.

Appeal Br. 18–19 (Claims Appendix).

### OPINION

Appellant argues claims 10–12 as a group, directing the arguments to recitations found in each of independent claims 10 and 12. *See* Appeal Br. 9–16. We select claim 12 as representative of the group. Claims 10 and 11 stand or fall with claim 12.

Relevant to Appellant’s arguments on appeal, the Examiner finds that Hahn discloses a method for producing sheet flooring that includes laminating a decorative layer to an extruded intermediate polymer layer, and laminating an extruded base polymer layer to the intermediate polymer layer. Non-Final Act. 3–4. The Examiner finds that Whelan provides a reason why one of ordinary skill in the art would have performed Hahn’s base layer/intermediate layer lamination using paired chill and nip rollers maintained at different temperatures—namely, to optimize melt-bonding between the intermediate and base polymer layers. *Id.* at 5 (“As taught by Whelan, proper selection of the chill roll and the nip roll temperatures allows for the heat of the extruded polymeric layer to melt a thin layer of the substrate so that bonding occurs.” (citing Whelan 1:69–72)).

Appellant argues that Hahn requires provision of a wear layer over the decorative layer, and that such a wear layer is precluded by the transitional phrase “consisting essentially of” in the claims. Appeal Br. 11–12.

According to Appellant, Hahn’s wear layer “would protect the decorative layer and eliminate the need to maintain process conditions as required by Applicant.” Reply Br. 2.

The “phrase ‘consisting essentially of’ limits the scope of a claim to the specified ingredients and those that do not materially affect the basic and novel characteristic(s) of a composition.” *In re Herz*, 537 F.2d 549, 551–52 (CCPA 1976); *see also PPG Indus., Inc. v. Guardian Indus. Corp.*, 156 F.3d 1351, 1354 (Fed. Cir. 1998) (“By using the term ‘consisting essentially of,’ the drafter signals that the invention necessarily includes the listed ingredients and is open to unlisted ingredients that do not materially affect the basic and novel properties of the invention”). Appellant has the burden of showing the basic and novel characteristics of their claimed invention. *In re DeLajarte*, 337 F.2d 870, 873–74 (CCPA 1964).

Here, Appellant does not expressly identify the basic and novel characteristics of the invention. According to the Specification, “the present disclosure advantageously enables the provision of flooring that is free of polyvinyl chloride.” Spec. ¶ 3. Similarly, each of independent claims 10 and 12 is directed to “A method of making a polyvinyl chloride free flexible sheet flooring.” Appellant does not contend that Hahn’s wear layer would materially affect the ability to produce flooring that is free of polyvinyl chloride. Even if we were to infer from Appellant’s argument that the recited differential roller temperature is a basic and novel characteristic of the claimed invention, Appellant does not point to evidence of record to

support the argument that Hahn's wear layer would eliminate any need for maintaining such roller temperatures. Attorney's arguments in a brief cannot take the place of evidence. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Moreover, Hahn expressly teaches that "the respective layers can be connected to each other in sequential or non-sequential order." Hahn ¶ 54. "[N]o particular order of operative steps for product formation is required to practice the present invention." *Id.* Thus, Hahn's disclosure contemplates performing the steps of laminating a decorative layer, intermediate layer, and base layer prior to addition of any wear layer.

For the foregoing reasons, Appellant has not met its evidentiary burden of showing Hahn's disclosed wear layer would have materially affected the basic and novel characteristic of the claimed invention.

Appellant also argues Hahn discloses use of a fiberglass mat layer in conjunction with the primary backing layer which the Examiner relies upon as the recited intermediate layer. Appeal Br. 12. However, Appellant does not point to any language in the claims that would preclude fiberglass from the recited intermediate layer. Moreover, as the Examiner finds (Ans. 4), Hahn identifies the disclosed fiberglass layer as optional. *See* Hahn Fig. 2.

Appellant contends that the Examiner improperly dismissed the claim recitation regarding bonding of the base and intermediate layers without disrupting the bond between the decorative layer and the intermediate layer. Appeal Br. 15. We disagree. The Examiner finds that Whelan teaches selecting differential roller temperatures to achieve enhanced bonding by melting a thin layer of the substrate to which extruded polymer is to be laminated. Non-Final Act. 5. The Examiner also reasons that one skilled in the art would have selected differential roller temperatures in Hahn's process

that would achieve the above-mentioned bonding of intermediate and base layers without damaging the decorative fabric layer because “Hahn intends to produce a useful and undamaged flooring material.” *Id.* at 5–6.

Appellant argues that “Applicant did not initially believe it would be possible to make such a flooring.” Appeal Br. 10 (citing the inventor’s Declaration, filed September 10, 2015). Appellant does not state the relevance of this argument. To the extent Appellant alleges secondary considerations of nonobviousness, the Declaration is insufficient when viewed together with the remaining evidence of record. For example, the Declaration does not relate the inventor’s belief to the scope of the claims. *See In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011) (“Evidence of secondary considerations must be reasonably commensurate with the scope of the claims.”). Nor does the Declaration present persuasive evidence in support of the inventor’s stated initial belief. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (“It is well settled that unexpected results must be established by factual evidence.”). A party asserting unexpected results as evidence of nonobviousness has the burden of proving that the results are unexpected. *In re Geisler*, 116 F.3d 1465, 1469–70 (Fed. Cir. 1997). Such burden requires Appellant to proffer factual evidence that actually shows unexpected results relative to the closest prior art, *see In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991).

For the foregoing reasons, Appellant does not persuade us of reversible error. The rejection of claims 10–12 is sustained.

#### DECISION

The Examiner’s decision rejecting claims 10–12 is affirmed.

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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