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KIMBERLY-CLARK WORLDWIDE, INC. Patent Docketing 2300 Winchester Rd. NEENAH, WI 54956			YAGER, JAMES C	
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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* BRENT MERRIK THOMPSON,  
JAMES HONGXUE WANG, and  
GREGORY JAMES WIDEMAN

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Appeal 2019-001159  
Application 14/138,325  
Technology Center 1700

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Before MICHAEL P. COLAIANNI, MONTÉ T. SQUIRE, and  
MERRELL C. CASHION, JR., *Administrative Patent Judges*.

CASHION, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from a Final Action rejecting claims 9, 10, and 12–26. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Kimberly-Clark Worldwide, Inc. Appeal Br. 2.

The invention is directed to compositions including virgin polymers and recycled material obtained from an industrial waste stream and articles made therefrom. Spec. 1. The Specification describes as known the use of compositions comprising virgin polymers and recycled-content polymers from post-consumer plastic waste to make injection-molded packaging and other articles. *Id.* at 1–2. The Specification, however, describes that reliance on post-consumer waste for the recycled content polymers of the compositions does not necessarily result in a desired injection-molded article because the resulting article may not be able to withstand a certain level of impact without cracking or otherwise failing. *Id.* Appellant addresses the deficiency of prior art packaging materials by using a thermoplastic composition comprising virgin polymers and a recycled content polymer from a post-industrial-recycled material comprising a spun-bonded laminate comprising a thermoplastic polyolefin elastomer and a spunbonded fiber layer or an adhesive spun-bond film laminate comprising a polyolefin film layer and a spunbonded fiber layer. *Id.* at 5–7. The Specification explains that articles made from compositions comprising the noted recycled content polymers have physical properties that are the same as or improved over articles made from 100% virgin polymer or 100% spunbonded laminate. *Id.* at 26. Claim 9 illustrates the subject matter claimed and is reproduced below:

9. A thermoplastic material comprising:

30 to 70 parts by weight of 100% virgin polymer selected from the group consisting of polypropylene, polyethylene, polystyrene, acrylonitrile-butadiene-styrene copolymers, polylactic acid, blends of polylactic acid and polyolefins and combinations thereof; and

the remaining parts by weight of a post-industrial-recycled material (PIR),

wherein the PIR comprises a spun-bonded laminate comprising a thermoplastic polyolefin elastomer and a spunbonded fiber layer or an adhesive spun-bond film laminate comprising a polyolefin film layer and a spunbonded fiber layer.

Independent claim 16 is directed to articles comprising the thermoplastic material of claim 9. Independent claim 21 is similar to claim 1 but further recites the use of an optional gatherable fiber layer.

Appellant requests review of the following rejections maintained by the Examiner:

I. Claims 21–26 rejected under 35 U.S.C. § 112(a), as failing to comply with the written description requirement.

II. Claims 9, 10, 12–14, and 16–25 rejected under 35 U.S.C. § 103 as unpatentable over Kneale et al. (US 5,128,212, issued July 7, 1992) and Banerjje (US 5,030,662, issued July 9, 1991).

III. Claims 9, 10, 12–15, and 21–26 rejected under 35 U.S.C. 103 as unpatentable over Yoshimura et al. (US 4,134,957, issued January 16, 1979) and Banerjje.

#### OPINION

##### *Rejection I (35 U.S.C. § 112(a) - Written Description Requirement)<sup>2</sup>*

After review of the respective positions the Appellant provides in the Appeal Brief and the Examiner provides in the Final Action and the Answer, we reverse the Examiner’s rejection of claims 21–26 under 35 U.S.C. § 112(a) for lack of written description. We add the following for emphasis.

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<sup>2</sup> We limit our discussion to claim 21.

The Examiner finds that there is no express support in the Specification, as originally filed, for the limitation in claim 9 of a “gatherable fiber layer.” Final Act. 3; Ans. 13. Appellant argues that the Specification includes a number of U.S. patents incorporated by reference that provide written descriptive support for the disputed claim language. Appeal Br. 3–4; Spec. 7. Appellant specifically points to US 4,720,415 to Vander Wielen as describing a gatherable web as a spunbonded polyester fiber material. Appeal Br. 3; Vander Wielen Abst., col 2, ll. 12–45. Thus, Appellant contends that this disclosure describes sufficiently the disputed claim language. Appeal Br. 4.

We agree with Appellant that there is reversible error in the Examiner’s determination that the disputed language lacks adequate descriptive support.

Our reviewing court stated in *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983):

The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language.

*See also Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). “This inquiry . . . is a question of fact. . . . [T]he level of detail required [in the Specification as originally filed] to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.* Whether the written description requirement is complied with is a

question of fact, judged from the perspective of one of ordinary skill in the art as of the relevant filing date. *See Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563–64 (Fed. Cir. 1991).

The claimed subject matter need not be described *in haec verba* in the Specification in order for that Specification to satisfy the description requirement. *In re Smith*, 481 F.2d 910, 914 (CCPA 1973). That is, it is enough that one of ordinary skill in the art would recognize that the inventor invented what is claimed without a claim using the same words as the Specification. *Union Oil Co. of Cal. v. Atlantic Richfield Co.*, 208 F.3d 989, 997 (Fed. Cir. 2000). However, our reviewing court has also explained that, when relying on extrinsic evidence “[t]o establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999; internal quotation and citation omitted).

As Appellant argues that the U.S. patents incorporated by reference provide sufficient written descriptive support for the disputed term. In view of this, and on this record, the Examiner has not explained adequately why the disputed claim language lacks adequate descriptive support.

Accordingly, we reverse the Examiner’s rejection of claims 21–26 under 35 U.S.C. § 112 (a) as lacking written descriptive support for the reasons presented by Appellant and given above.

*Rejection II (35 U.S.C. § 103 based on Kneale)*<sup>3, 4</sup>

After review of the respective positions the Appellant provides in the Appeal Brief and the Examiner provides in the Final Action and the Answer, we reverse the Examiner's prior art rejections of claims 9, 10, 12–14, and 16–25 under 35 U.S.C. § 103 essentially for the reasons the Appellant presents in the Appeal Brief. We add the following for emphasis.

The Examiner finds that Kneale discloses a thermoplastic material comprising virgin polymer and recycled material that differs from the subject matter of claim 9 in that Kneale does not disclose the claimed recycled material comprising a thermoplastic polyolefin elastomer and a spunbonded fiber layer or an adhesive spun-bond film laminate comprising a polyolefin film layer and a spunbonded fiber layer. Final Act. 2–3, 6; Kneale col. 2, ll. 29–51. The Examiner finds that the claimed recycled material is a precursor material for the thermoplastic material and that the way the recycled material is made before it is used in the claimed thermoplastic material has no bearing on the claimed thermoplastic material. Final Act. 6. Alternatively, the Examiner finds that Kneale discloses using recycled material and that it is within the ordinary artisan's skill to recognize the type of recyclable material, including a spun-bond laminate and a spunbonded fiber layer or an adhesive spun-bond film laminate and a spunbonded fiber layer or a spunbonded laminate, to provide an environmental benefit of reducing waste. *Id.* at 7. Thus, the Examiner determines that one skilled in the art would arrive at the claimed invention

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<sup>3</sup> We limit our discussion to independent claim 9.

<sup>4</sup> A discussion of the secondary reference to Banerjie is unnecessary for disposition of this rejection. The Examiner relied on Banerjie for features not related to the claimed recycled content polymers. *See* Final Act. 5.

from Kneale's teachings absent any evidence of criticality for the recycled material used. *Id.* at 6.

Appellant argues Kneale does not disclose, teach, or suggest the claimed recycled material as defined in the present application (see, e.g., pages 5–7). Appeal Br. 5–6. According to Appellant, Kneale does not disclose, teach or suggest any material including fibers, much less a fiber layer, such as the spunbonded fiber layer of claim 9. *Id.* at 6. In the context of the recycled materials, Appellant argues that different materials will produce different results and one precursor material does not make obvious all other precursor materials. *Id.*

We agree with Appellant that there is reversible error in the Examiner's determination of obviousness. “[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *quoted with approval in KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

The premise of the Examiner's rejection is that

[o]nce the material is melt processed and extruded, the former structure of the material (i.e. a spun-bonded laminate or an adhesive spun-bond film laminate or fibrous) would no longer be intact in the final composition/article. Therefore, the claims are broad enough to encompass a final material/article that does not comprise a spun-bonded laminate or an adhesive spun-bond film laminate or fibers and this appears to be Appellant's intent based on the disclosures in the instant specification.

Ans. 15. That is, the Examiner asserts that one skilled in the art can arrive at the claimed invention using any recycled content polymer as part of the claimed thermoplastic material.

The Examiner's assertion is not well-founded. The Examiner has not directed us to any portions of the cited art, the Specification, or other objective evidence in support of the stated assertion. Instead, the Examiner merely speculates that one skilled in the art could arrive at the claimed invention using any type of recycled content polymers in the thermoplastic material.

Moreover, as we note above, the Specification distinguishes between types of recycled contents for the thermoplastic material. For example, the Specification describes that the use of compositions comprising virgin polymers and recycled-content polymers from post-consumer plastic waste can lead to the production of injection-molded articles having less than desirable properties. Spec. 1–2. The Specification also describes that using a thermoplastic composition comprising virgin polymers and a recycled content polymer from a post-industrial-recycled material comprising a spun-bonded laminate comprising a thermoplastic polyolefin elastomer and a spunbonded fiber layer or an adhesive spun-bond film laminate comprising a polyolefin film layer and a spunbonded fiber layer results in articles having physical properties that are the same as or improved over articles made from 100% virgin polymer or 100% spunbonded laminate. *Id.* at 5–7, 26. Thus, contrary to the Examiner's assertion, the Specification would not lead one skilled in the art to use any recycled content polymers for the thermoplastic material. Therefore, the Examiner has not provided an adequate technical explanation with the requisite rational underpinning of why or how one

skilled in the art would have arrived at the claimed invention from the combined teachings of the cited art.

Accordingly, we reverse the Examiner's prior art rejection under 35 U.S.C. § 103(a) for the reasons Appellant presents and we give above.

*Rejection III (35 U.S.C. § 103 based on Yoshimura)*

After review of the respective positions the Appellant provides in the Appeal Brief and the Examiner provides in the Final Action and the Answer, we reverse the Examiner's prior art rejections of claims 9, 10, 12–15, and 21–26 under 35 U.S.C. § 103 essentially for the reasons the Appellant presents in the Appeal Brief. We add the following for emphasis.

We refer to the Examiner's Final Action for a statement of this rejection. Final Act. 9–13. The premise of this rejection is the same as the one for Rejection II. Final Act. 11–12.

Accordingly, we reverse the Examiner's prior art rejection under 35 U.S.C. § 103(a) based on Yoshimura (Rejection III, stated above) for the reasons Appellant presents and we give above in discussing and reversing the Examiner's Rejection II.

## CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
21–26	112(a)	Written description		21–26
9, 10, 12–14, 16–25	103	Kneale, Banerjje		9, 10, 12–14, 16–25

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<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
9, 10, 12–15, 21–26	103	Yoshimura, Banerjie		9, 10, 12–15, 21–26
<b>Overall Outcome</b>				<b>9, 10, 12–26</b>

REVERSED