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14/454,283	08/07/2014	Jay S. Swamy	5723-230961	7875
23643	7590	11/27/2019	EXAMINER	
Barnes & Thornburg LLP (IN) 11 S. Meridian Street Indianapolis, IN 46204			HOCK, ELLEN SUZANNE	
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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* JAY S. SWAMY

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Appeal 2019-002599  
Application 14/454,283  
Technology Center 1700

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BEFORE JEFFREY B. ROBERTSON, N. WHITNEY WILSON, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

ROBERTSON, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>2</sup> appeals from the Examiner's decision to reject claims 1–20. Appeal Br. 5–15. We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> This Decision includes citations to the following documents: Specification filed August 7, 2014 (“Spec.”); Final Office Action mailed May 16, 2017 (“Final Act.”); Appeal Brief filed May 25, 2018 (“Appeal Br.”); Examiner’s Answer mailed December 14, 2018 (“Ans.”); and Reply Brief filed February 13, 2019 (“Reply Br.”).

<sup>2</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Berry Plastics Corporation. Appeal Br. 2.

We REVERSE.

### CLAIMED SUBJECT MATTER

Appellant states the invention relates to packages including a container and a cover mounted on top of the container. Spec. ¶ 2. Claim 1, the only independent claim on appeal reproduced below, is illustrative of the claimed subject matter (Appeal Br. 16, Claims Appendix):

1. A package comprising
  - a container formed to include an interior product-storage region and a brim arranged to surround an opening that opens into the interior product-storage region and
  - a multilayer sheet including a sealant layer mated in direct contact with the brim of the container to close the opening that opens into the interior product-storage region formed in the container, a skin layer, an adhesive layer directly adjacent the sealant layer and arranged to interconnect the sealant layer and the skin layer, the sealant layer including a removable portion adapted to mate with the brim of the container and separate therefrom during removal of the multilayer sheet from the brim and a leave-behind portion adapted to separate from the adhesive layer and the removable portion of the sealant layer to expose a portion of the adhesive layer during removal of the multilayer sheet from the brim and to remain in a stationary position on the brim of the container after removal of a pad comprising the skin layer, adhesive layer, and the removable portion of the multilayer sheet, and sealant-layer bond means for establishing an anchor bond between the leave-behind portion of the sealant layer and a mating portion of the brim of the container that has a bond strength that is greater than an interfacial bond strength of a releasable bond between the leave-behind portion of the sealant layer and a mating portion of the adhesive layer to cause the leave-behind portion of the sealant layer to break away from the adhesive layer due to cohesive bond failure to expose a portion of the adhesive layer and to separate from the removable portion of the sealant layer in response to application of a peeling force

to the multilayer sheet when the multilayer sheet occupies a container-closing position on the brim of the container,

wherein the sealant layer comprises a polypropylene homopolymer having a melt flow rate of about 12 g/10 min to about 40 g/10 min measured according to ASTM D1238.

Claim 13 is also independent and recites a container closure having similar limitations to claim 1, including a sealant layer comprising polypropylene. *Id.* at 17–18.

### REFERENCES

The prior art relied upon by the Examiner is:

<b>Name</b>	<b>Reference</b>	<b>Date</b>
Haedt et al. hereinafter “Haedt”	US 2006/0172131 A1	August 3, 2006
Kataoka et al. hereinafter “Kataoka”	US 6,905,744 B1	June 14, 2005
Chang et al. hereinafter “Chang”	US 2010/0247824 A1	September 30, 2010
“Atmeyer <sup>TM</sup> Effective anti-fog for polypropylene” hereinafter “Polyvel”	<a href="http://www.croda.com/assets/dpV1/files/Atmer_7373.pdf">http://www.croda.com/assets/dpV1/files/Atmer_7373.pdf</a>	September 2012

### REJECTIONS<sup>3</sup>

1. The Examiner rejected claims 1–10 and 13–18 under 35 U.S.C. § 103 as obvious over Haedt and Kataoka. Final Act. 4–9.
2. The Examiner rejected claims 11 and 12 under 35 U.S.C. § 103 as obvious over Haedt, Kataoka, and Chang. Final Act. 9–10.
3. The Examiner rejected claims 19 and 20 under 35 U.S.C. § 103 as obvious over Haedt, Kataoka, Chang, and Polyvel. Final Act. 10–11.

#### *Rejection 1*

We limit our discussion to claim 1, which is sufficient for disposition of this rejection.

### OPINION

#### *The Examiner's Rejection*

The Examiner found Haedt discloses a multilayer film suitable for packaging applications having the package structure recited in claim 1, with the exception that Haedt is silent as to the first layer (sealant layer)

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<sup>3</sup> In the Final Action, the Examiner rejected claims 1 and 13 under 35 U.S.C. § 112(b) or § 112 (pre-AIA) second paragraph and claim 8 under 35 U.S.C. § 112(d) or § 112 (pre-AIA) fourth paragraph. Final Act. 2–3. Appellant filed an amendment after final on August 16, 2017 amending claims 1, 8, and 13, which was entered by the Examiner. Advisory Action mailed August 16, 2017. The Examiner did not specifically withdraw the rejections under 35 U.S.C. § 112 in the Advisory Action or Answer. However, because claims 1, 8, and 13 no longer contain the language forming the basis of the rejections, we treat these rejections as having been withdrawn by the Examiner.

comprising a polypropylene homopolymer having the melt flow rate recited in claim 1. Final Act. 4–5. The Examiner found Kataoka discloses multilayered films used in containers including a second and fourth layer made of a mixed resin comprising 35 to 55% of polypropylene having a MFR of 1 to 40 g/10 minutes. *Id.* at 5. The Examiner determined it would have been obvious to have used a polypropylene homopolymer disclosed by Kataoka in combination with polyester peelable heat seal layer of Haedt to form a heat seal layer that maintains a sufficient heat resistance and sealability. *Id.* at 6.

*Appellant's Contentions*

Appellant argues the Examiner does not provide sufficient reasoning as to why one of ordinary skill in the art would modify the sealant layer of Haedt with the polypropylene of the second and fourth layers of Kataoka. Appeal Br. 7. Appellant argues the polypropylene homopolymer in Kataoka is used in an interior layer and not in a sealant layer, and as such serves a different purpose and function than the polyester sealant layer in Haedt. *Id.* at 8. Appellant contends the Examiner has relied upon an unreasonably broad interpretation of Haedt, and specifically that any polymeric material could be used in the first layer 11 (sealant layer) disclosed in Haedt. Reply Br. 2–4. In addition, Appellant argues there are no teachings that adding a polypropylene in combination with a polyester would still work in a sealant layer as it is not clear that the combination would allow the sealant layer to bond to the brim with sufficient strength and still separate from the remaining film to expose the adhesive layer. Appeal Br. at 8–11. Appellant argues polypropylene and polyester are incompatible, such that the

modification proposed by the Examiner would render Haedt unsatisfactory for its intended purpose. *Id.* at 12–13.

*Issue*

The dispositive issue is:

Has Appellant identified reversible error in the Examiner’s determination that it would have been obvious to have combined the polypropylene homopolymer disclosed in Kataoka with the polyester in the peelable heat seal layer of Haedt to provide a package having a sealant layer comprising polypropylene homopolymer as recited in claim 1?

*Discussion*

We are persuaded by Appellant’s argument the Examiner’s combination of Haedt and Kataoka is not based on sufficient reasoning. In particular, we agree with Appellant that Haedt, in disclosing a “polymeric first layer 11,” does not disclose the use of any polymer including polypropylenes, rather Haedt discloses the polymeric first layer 11 is an *alkyl-aromatic ester*, where the *alkyl-aromatic ester* may be a homopolymer, copolymer, or polymer blend. Haedt, ¶ 47. In this regard, although Haedt discloses the terms “polymeric,” “copolymer,” “polyolefin,” and “polyester” are broad terms (Haedt, ¶¶ 23, 24, 26, and 27) that include blends of two or more polymers, we do not agree with the Examiner’s position that such disclosures indicate that Haedt discloses polymers of alkyl-aromatic esters may be blended with polymers not containing ester groups such as the polypropylene polymers disclosed in Kataoka. Ans. 3–4. We also observe that although Kataoka discloses the second and fourth layers may be mixed

resins, such mixed resins are polyolefin copolymers and elastomers, and do not include ester groups. Kataoka, col. 2, ll. 29–48, col. 4, ll. 1–7; col. 6, ll. 1–32. Thus, neither Haedt nor Kataoka discloses mixtures of polyolefins or polyesters in the particular layers pointed to by the Examiner. In this regard, we agree with Appellant that the Examiner’s statements that blending polypropylene and polyester is known (Ans. 5) are not supported by sufficient evidence (Reply Br. 5–6), particularly in view of the disclosures of Haedt and Kataoka discussed above.

In addition, we agree with Appellant the Examiner has not provided sufficient reasoning to explain how the combination of polyolefin polymers from the second and fourth layers of Kataoka with the ester containing polymers disclosed in Haedt would be expected to provide the resealable effect desired in Haedt (*see* Haedt ¶ 10). Kataoka only generally discusses the improvements in sealability as a result of the multilayered film as a whole, and discloses that the second and fourth layers “impart the flexibility without impairing the heat resistance of the multilayered film.” Kataoka, col. 3, ll. 28–33, col. 6, ll. 1–6, 28–32. Further, the Examiner’s position that the mixed resins of alpha-olefin elastomer in combination with polypropylene homopolymer provides strength to the film and pinhole resistance (Ans. 4, citing Kataoka, col. 5, ll. 25–28) pertains to mixed resin (D), which is used in the third layer, rather than the second and fourth layers in Kataoka relied upon by the Examiner. Kataoka, col. 2, ll. 28–49.

Accordingly, we reverse the Examiner’s rejection of claims 1–10 and 13–18 as obvious over Haedt and Kataoka.

*Rejections 2 and 3*

Claims 11, 12, 19, and 20, which depend indirectly from independent claims 1 and 13, stand rejected based on the same combination of Haedt and Kataoka discussed above. Final Act. 9–11. The citation to Chang and Polyvel fail to remedy the deficiencies identified above with respect to Haedt and Kataoka. Accordingly, we reverse Rejections 2 and 3 for similar reasons discussed above with respect to Rejection 1.

**CONCLUSION**

The Examiner’s rejections of claims 1–20 under 35 U.S.C. § 103(a) are reversed.

**DECISION SUMMARY**

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1–10, 13–18	103	Haedt, Kataoka		1–10, 13–18
11, 12	103	Haedt, Kataoka, Chang		11, 12
19, 20	103	Haedt, Kataoka, Chang, Polyvel		19, 20
<b>Overall Outcome</b>				1–20

**REVERSED**