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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* DIMITRIS GKINOSATIS

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Appeal 2019-003426  
Application 12/957,947  
Technology Center 1700

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Before GEORGE C. BEST, DONNA M. PRAISS, and  
MICHAEL G. McMANUS, *Administrative Patent Judges*.

BEST, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 1, 2, 4, 5, 10, 14, 16, 18, 29–32, and 37–51 of Application 12/957,947. Final Act. (May 7, 2018). We have jurisdiction under 35 U.S.C. § 6.

For the reasons set forth below, we *affirm*.

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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 Flexopack S.A. Plastics Industry as the real party in interest. Appeal Br. 1.

## I. BACKGROUND

The '947 Application describes a polymeric film comprising an odor barrier material that can be used to pack malodorous waste. Spec. 1. For example, the film can be shaped into a tube and stored in a compressed form in a cassette. *Id.* at 1–2. The tube of material can then be dispensed from the cassette and used to, e.g., dispose of soiled diapers. *Id.*

Claim 1 is representative of the '947 Application's claims and is reproduced below from the Claims Appendix of the Appeal Brief.

1. A multilayer film having a weight less than 15 g/m<sup>2</sup> for use in malodorous item packaging, where the film comprises at least
  - (a) an outer layer consisting of polypropylene,
  - (b) a layer comprising an oxygen barrier material, wherein the layer comprising the oxygen barrier material comprises a saponified ethylene vinyl ester copolymer (EVOH) and/or a polyamide,
  - (c) an inner layer comprising an ethylene alpha olefin copolymer, and
  - (d) two intermediate layers comprising maleic anhydride modified polyolefin; and

further wherein the multilayer film is produced by a hot blown film method.

Appeal Br. 30 (paragraphing and indentation added).

During prosecution of the '947 Application, Appellant entered three declarations from George Roussos into the record. We refer to these declarations as Roussos I (entered June 13, 2013), Roussos II (August 1, 2016), and Roussos III (March 24, 2017).

## II. REJECTIONS

On appeal, the Examiner maintains the following rejections:

1. Claims 1, 2, 5, 14, 18, 30, 32, 37–48, and 50 are rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Wuest<sup>2</sup> and Gkinosatis.<sup>3</sup> Final Act. 3.
2. Claims 4, 10, 16, 29, and 31 are rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Wuest, Gkinosatis, and Wolf.<sup>4</sup> Final Act. 13.
3. Claim 37 is rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Wuest, Gkinosatis, and either Rasanen<sup>5</sup> or Nair.<sup>6</sup> Final Act. 15.
4. Claims 49 and 51 are rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Wuest, Gkinosatis, and Anzawa.<sup>7</sup> Final Act. 17.

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<sup>2</sup> US 2004/0043238 A1, published March 4, 2004.

<sup>3</sup> US 2009/0191392 A1, published July 30, 2009.

<sup>4</sup> US 6,406,763 B1, issued June 18, 2002.

<sup>5</sup> US 2007/0178285 A1, published August 2, 2007.

<sup>6</sup> US 2003/0124452 A1, published July 3, 2003.

<sup>7</sup> US 4,619,849, issued October 28, 1986.

### III. DISCUSSION

*A. Rejection of claims 1, 2, 5, 14, 18, 30, 32, 37–48, and 50 over Wuest and Gkinosatis*

For the purposes of this appeal, Appellant divides the claims subject to this ground of rejection into three groups. Appeal Br. 5–23. We address each group of claims individually.

*1. Claims 1, 2, 5, 14, 18, 30, 32, and 37–42*

Appellant argues for reversal of the rejection of these claims on the basis of limitations found in independent claims 1 and 38. Appeal Br. 5–19. Accordingly, we limit our discussion to these claims. Claims 2, 5, 14, 18, 30, 32, 37, and 39–42 will stand or fall with the independent claim from which they directly or indirectly depend.

The Examiner rejected independent claims 1 and 38 as unpatentable over the combination of Wuest and Gkinosatis. Final Act. 3–13.

The Examiner found that Wuest describes a multilayer polymeric film having an inner layer, an outer layer, and an oxygen barrier layer having the composition recited in in claims 1 and 38. *Id.* at 3. The Examiner further found that Wuest does not explicitly disclose both the specific polymeric material required for its tie layers—which correspond to the claimed intermediate layers—and a multilayer polymeric film meeting the weight per unit area limitations recited in claims 1 and 38. *Id.* at 4.

The Examiner found that Gkinosatis describes a multilayer polymeric film used to pack malodorous waste comprising an oxygen barrier layer and having a weight of less than 16 g/m<sup>2</sup>, which overlaps with the weight limitations recited in claims 1 and 38. *Id.* The Examiner further found that Gkinosatis describes the production of lightweight multilayer polymeric films as extremely beneficial for the environment. *Id.* at 5 (citing Gkinosatis

¶ 13). The Examiner also found that Gkinosatis's multilayer polymeric film includes an intermediate layer comprised of maleic anhydride modified polyolefin, which is the material recited in claims 1 and 38. *Id.* at 4–5.

The Examiner found that it would be obvious to a person of ordinary skill in the art to use Gkinosatis's intermediate layer material in Wuest's multilayer polymeric film because Gkinosatis describes the intermediate layer material as a useful tie layer in a multilayer polymeric film. *Id.* at 5. The Examiner further found that Gkinosatis's statement regarding the environmental benefits of making lighter weight multilayer polymeric films would have motivated a person of ordinary skill in the art at the time of the invention to manufacture such films with the weight of less than 15 g/m<sup>2</sup>. *Id.*

Appellant alleges the following errors in the rejection of independent claims 1 and 38: (1) at the time of the invention, a person having ordinary skill in the art would not have had a reasonable expectation that Wuest and Gkinosatis could be combined successfully in the manner relied upon by the Examiner, Appeal Br. 6–10; (2) the Examiner made erroneous factual findings regarding the content of the prior art, *id.* at 10–13; (3) the Examiner did not consider Appellant's evidence of unexpected results properly, *id.* at 11–18; and (4) the Examiner did not consider properly the evidence offered in Roussos III, *id.* at 18–19. We address these arguments in turn.

*First*, Appellant argues that the manufacture of very thin multilayer polymer packaging films is unpredictable. *Id.* at 6–7. Because of this unpredictability, Appellant asserts that a person of ordinary skill in the art would not have had a reasonable expectation that Wuest and Gkinosatis could be successfully combined in the manner proposed by the Examiner. *Id.* at 7–10.

In making this argument, Appellant relies upon the opinion testimony and evidence provided in Roussos III. *Id.* at 7–8 (citing Roussos III ¶¶ 5, 7, 9, 10). The cited portions of Roussos III state nothing more than the unsurprising propositions that (1) making extremely thin films is difficult and (2) decreasing a film’s thickness film changes the film’s mechanical properties. Roussos III ¶¶ 7, 10. In our view, the cited portions of Roussos III are not sufficient to establish that the manufacture of thin multilayer polymeric films is especially unpredictable.

*Second*, Appellant argues that the Examiner made erroneous factual findings regarding the content of the prior art. Appeal Br. 10–13. In particular, Appellant argues that the Examiner erred by finding that Wuest recognizes the criticality of using polypropylene in the outer layer. *Id.* at 10. Appellant argues that Wuest does not recognize that the use of polypropylene in the outer layer provides superior results in the context of multilayer films weighing less than 15 g/m<sup>2</sup>. *Id.* at 10–11.

We agree with Appellant.

In the Final Action, the Examiner relied upon Wuest’s paragraph 33 to find that “Wuest does recognize the criticality of using polypropylene in the outer layer.” Final Act. 23. This portion of Wuest, however, merely states that a biaxially oriented polypropylene homopolymer or copolymer can be used in “a certain preferred embodiment of the invention.” Wuest ¶ 33. Wuest, however, describes a large number of polymers as potentially useful as the outer layer of its multilayer polymeric film. *Id.* (“The outer layer **112** may include any polymeric layer that provides resistance to the packaging film and may also provide dimensional stability, machinability, and abuse and heat resistance.”). Without more, a statement that a particular polymer is used in a preferred embodiment is not a recognition of criticality. Thus, the

Examiner erred by finding that Wuest recognizes the alleged criticality of using polypropylene in the outer layer of the multilayer polymeric film.

This error, however, does not mandate reversal of the rejection of claims 1 and 38 unless Appellant has shown that using polypropylene as the outer layer of the multilayer film actually is critical—i.e., provides unexpected results.

*Third*, Appellant argues that the Examiner did not consider Appellant’s evidence of unexpected results properly. Appeal Br. 7–18. In particular, Appellant argues that the claimed multilayer polymeric film unexpectedly combines a weight of less than 15 g/m<sup>2</sup> and suitable mechanical properties for use in packaging malodorous waste. *Id.* at 7 (citing Roussos III ¶ 7).

We are not persuaded by Appellant’s arguments. Rather, we agree with the Examiner that the results presented in the ’947 Application’s Specification<sup>8</sup> are insufficient to establish unexpected results with respect to the full scope of claims 1 and 38. *See* Answer 19 (“The data [are] not commensurate in scope with the scope of the present claims.”). For example, Appellant presents experimental data from two exemplary multilayer polymeric films. Appeal Br. 9 (Examples 1 & 2). In both these examples, the same polypropylene copolymer of unspecified composition is used as the outer layer. *See* Spec. 12 (describing PP 1 as “Polypropylene copolymer”). Claims 1 and 38 recite that the outer layer consists of polypropylene. The Specification defines polypropylene:

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<sup>8</sup> These results are presented on pages 11–17 of the Specification. We thank Appellant’s counsel for compiling the results in a single table. *See* Appeal Br. 9.

As used herein, the term “polypropylene” refers to polymers incorporating propylene structural units. Examples of these, [sic] are homo polypropylenes, random copolymers of propylene and ethylene, block copolymers of propylene and ethylene, copolymers or blends of propylene and rubber[ ](such as blends of propylene and ethylene propylene rubber), propylene ethylene alpha olefin terpolymers and others.

These polymers may be isotactic, syndiotactic or atactic. Isotactic configuration is preferred.

Spec. 6. Given the essentially limitless number of possible polypropylene copolymers that could be used as the outer layer of the claimed multilayer polymeric film, a pair of examples using the same unspecified polypropylene copolymer can hardly be said to be commensurate in scope with claims 1 and 38.

*Fourth*, Appellant argues that the Examiner did not consider evidence offered in Roussos III. Appeal Br. 18–19. In particular, Appellant notes that the Examiner has objected to the use of terms like ‘believe’ in the Third Roussos Declaration.” *Id.* at 18 (citing Final Act. 26). Appellant argues that the Examiner’s objection indicates that the Examiner did not give any weight to Roussos III.

We are not persuaded by this argument. In the passage in question, the Examiner states that Appellant has only presented evidence of Roussos’s belief and has not presented definitive evidence on the point at issue. *See* Final Act. 26. The Examiner goes on to state that “even if there was [a] proper side-by-side comparison, the data still would not be persuasive, given that the data remains not commensurate in scope with the scope of the claims.” *Id.* This indicates that the Examiner has considered the evidence in question and found it wanting. We do not discern reversible error in the Examiner’s consideration of Roussos III.

For the reasons set forth above, we affirm the rejection of independent claims 1 and 38. Thus, we also affirm the rejection of dependent claims 2, 5, 14, 18, 30, 32, 37, and 39–42.

2. *Claims 43–46*

Claims 43–45 depend, directly or indirectly, from independent claim 38. Claim 46 depends from independent claim 1. Appellant argues that these claims are patentable over the asserted prior art for the same reasons that the parent independent claims are patentable. Appeal Br. 19. In particular, Appellant argues that the experimental data presented in the Specification demonstrates unexpected results with respect to the subject matter of these claims.

This argument is not persuasive because the experimental results still are not commensurate in scope with the breadth of the claims for at least the reasons discussed above.

Thus, we affirm the rejection of claims 43–46.

3. *Claims 47, 48, and 50*

Appellant argues that the rejection of independent claim 47 and its dependent claims 48 and 50 should be reversed for essentially the same reasons we have discussed in connection with independent claim 1. *See* Appeal Br. 21–23.

Appellant’s arguments with respect to these claims are not persuasive because the evidence of unexpected results remains incommensurate with the scope of the claims.

*B. Rejection of claims 4, 10, 16, 29, and 31 over Wuest, Gkinosatis, and Wolf*

Appellant notes that claims 4, 10, 16, 29, and 31 depend, directly or indirectly, from claim 1.<sup>9</sup> Appeal Br. 23. Appellant argues that Wolf does not cure the alleged defects in the rejection of claim 1 over the combination of Wuest and Gkinosatis. *Id.* Thus, Appellant argues that the rejection of claims 4, 10, 16, 29, and 31 should be reversed for the same reasons that the rejection of claim 1 should have been reversed. *Id.*

For the reasons set forth above, we have affirmed the rejection of claim 1. Thus, we also affirm the rejection of claims 4, 10, 16, 29, and 31.

*C. Rejection of claim 37 over Wuest, Gkinosatis, and either Rasanen or Nair*

Appellant notes claim 37 depends from claim 1. Appeal Br. 24. Appellant argues that neither Rasanen nor Nair cure the alleged defects in the rejection of claim 1 over the combination of Wuest and Gkinosatis. *Id.* Thus, Appellant argues that claim 37's rejection should be reversed for the same reasons that the rejection of claim 1 should have been reversed. *Id.*

For the reasons set forth above, we have affirmed the rejection of claim 1. Thus we also affirm the rejection of claim 37.

*D. Rejection of claims 49 and 51 over Wuest, Gkinosatis, and Anzawa*

Appellant presents separate arguments for the patentability of claims 49 and 51. Appeal Br. 25–28. Thus, we address each of these claims separately.

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<sup>9</sup> We assume that the Appeal Brief's omission of claim 10 is an inadvertent error.

1. *Claim 49*

Appellant argues that the rejection of claim 49 should be reversed because the combination of Wuest, Gkinosatis, and Anzawa does not teach or suggest each and every element of claim 49. Appeal Br. 26. In particular, Appellant argues that Anzawa does not cure the failure of Wuest and Gkinosatis to describe or suggest a multilayer film having a weight of less than 15 g/m<sup>2</sup>. *Id.* at 25.

We are not persuaded by this argument. In rejecting independent claim 47—from which claim 49 depends—the Examiner found that the combination of Wuest and Gkinosatis suggested making a multilayer film having a weight of less than 15 g/m<sup>2</sup> to reduce the environmental impact of such films. Final Act. 9–11. The Examiner also found that the weight range for the claimed multilayer polymeric film was *prima facie* obvious by virtue of Gkinosatis’s description of its film as having a weight in a range that overlaps the range recited in claim 47. *Id.* at 9.

Appellant further argues that it submitted evidence of unexpected results with respect to the polymer films recited in claim 49. Appeal Br. 26.

Neither are we persuaded by this argument. For the reasons we have discussed in connection with claim 1, we determine that the data presented by Appellant are not commensurate in scope with the claims at issue.

For the reasons set forth above, we affirm the rejection of claim 49.

2. *Claim 51*

Appellant argues that the rejection of claim 51 should be reversed because the combination of Wuest, Gkinosatis, and Anzawa, does not teach or suggest each and every element of claim 51. Appeal Br. 28. In particular, Appellant argues that Anzawa does not cure the failure of Wuest and

Gkinosatis to describe or suggest a multilayer film having a weight of less than 15 g/m<sup>2</sup>. *Id.* at 26–27.

We are not persuaded by this argument. In rejecting independent claim 47 (from which claim 51 ultimately depends), the Examiner found that the combination of Wuest and Gkinosatis suggested making a multilayer film having a weight of less than 15 g/m<sup>2</sup> to reduce the environmental impact of such films. Final Act. 9–11. The Examiner also found that the weight range for the claimed multilayer polymeric film was *prima facie* obvious by virtue of Gkinosatis’s film description as having a weight in a range that overlaps the range recited in claim 47. *Id.* at 9.

Appellant further argues that it submitted evidence of unexpected results with respect to the polymer films recited in claim 51. Appeal Br. 26.

Neither are we persuaded by this argument. For the reasons we have discussed in connection with claim 1, we determine that the data presented by Appellant are not commensurate in scope with the claims at issue.

For the reasons set forth above, we affirm the rejection of claim 51.

#### IV. CONCLUSION

In summary:

| Claims Rejected                    | 35 U.S.C. § | Reference(s)/Basis               | Affirmed                                 | Reversed |
|------------------------------------|-------------|----------------------------------|--|----------|
| 1, 2, 5, 14, 18, 30, 32, 37–48, 50 | 103(a)      | Wuest, Gkinosatis                | 1, 2, 5, 14, 18, 30, 32, 37–48, 50       |          |
| 4, 10, 16, 29, 31                  | 103(a)      | Wuest, Gkinosatis, Wolf          | 4, 10, 16, 29, 31                        |          |
| 37                                 | 103(a)      | Wuest, Gkinosatis, Rasanen, Nair | 37                                       |          |
| 49, 51                             | 103(a)      | Wuest, Gkinosatis, Anzawa        | 49, 51                                   |          |
| <b>Overall Outcome</b>             |             |                                  | 1, 2, 4, 5, 10, 14, 16, 18, 29–32, 37–51 |          |

Appeal 2019-003426  
Application 12/957,947

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