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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO. Includes application details for BEMIS COMPANY, INC. and examiner information.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JULIO SALVADOR

Appeal 2019-006759
Application 15/123,117
Technology Center 3700

Before JOHN C. KERINS, WILLIAM A. CAPP, and LEE L. STEPINA,
Administrative Patent Judges.

CAPP, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant¹ seeks our review under 35 U.S.C. § 134(a) of the final rejection of claims 1, 4–6, 9–11, 14–19, and 21–23 as unpatentable under 35 U.S.C. § 103 over Davis (US 3,375,969, iss. Apr. 2, 1968), Tucker (US 2012/0057811 A1, pub. Mar. 8, 2012), and Snyder (US 1,671,050, iss. May 22, 1928).² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Bemis Company, Inc. as the applicant and real party in interest. Appeal Br. 2.

² Grounds of rejection of certain claims under 35 U.S.C. § 112 have been withdrawn by the Examiner. Ans. 3.

THE INVENTION

Appellant's invention is a bread bag. Spec. ¶ 1. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

1. A double-bottom bread bag having an open mouth, an opposing bottom and a width, comprising:
 - a. an outer web comprising a heat-fusible flexible thermoplastic film, the outer web having a first side edge, an opposing second side edge and folded upon itself thereby defining:
 - i. a front panel having a length;
 - ii. a back panel having a length;
 - iii. an inward-facing cross-sectional gusset opposite the open mouth and centered along the width of the bag which joins the front panel to the back panel and forms an outer bottom portion of the bag;
 - b. an inner web comprising a heat-fusible flexible thermoplastic film, the inner web having a thickness of at least 20 microns, a first side edge, an opposing second side and folded upon itself thereby defining:
 - i. a front panel having a length which is less than the length of the front panel of the outer web;
 - ii. a back panel having length which is less than the length of the back panel of the outer web;
 - iii. an inward-facing cross-sectional gusset opposite the open mouth and centered along the width of the bag which joins the front panel to the back panel and forms an inner bottom portion of the bag;
 - c. a first side-seam affixing the first side edge of both the inner and outer webs together, and affixing the front and back panels of the outer web together along the first side edge;
 - d. an opposing second side-seam affixing the opposing second side edge of both the inner and outer webs together, and affixing the front and back panels of the outer web together along the opposing second side edge; and
 - e. wherein the inward-facing cross-sectional gussets of both the inner and outer webs expand to form a square or rectangular cross-sectional bag bottom upon receiving a material to be packaged.

OPINION

Appellant argues claims 1, 4–6, 9–11, 14–19, and 21–23 as a group. Appeal Br. 7–10. Claim 1 is representative. *See* 37 C.F.R. § 41.37(c)(1)(iv).

The Examiner finds that Davis discloses the invention substantially as claimed except for a 20 micron inner web that is shorter than the outer panels of the bag. Final Act. 5. The Examiner relies on Tucker and Snyder as disclosing an inner reinforcing web to mitigate against failure of the bottom of the bag due to the force of gravity. *Id.* The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify Davis with an inner reinforcing web as taught by Tucker and Snyder. *Id.* at 8. According to the Examiner, a person of ordinary skill in the art would have done this to reinforce the bottom of the bag. *Id.*

Appellant initially argues that the claimed bread bag inhibits moisture concentration on the bottom of the bag, which is where labeling and advertisements are placed. Appeal Br. 7. According to Appellant,

[t]he claimed bag provides a superior appearance over previous bread bags. The location of the inner web is important for providing the improvements since the bottom gusset of the bag is the main advertisement for the bread as it is typically placed on the retail shelf, thus of utmost importance from a visual aspect.

Id.

There is no limitation in claim 1 directed to moisture resistance or the appearance of labeling or advertising placed on the bottom of the bag. Claims App. Appellant’s argument is not commensurate with the scope of the claim and, therefore, is unpersuasive.

Appellant next challenges the Examiner's rationale for combining the prior art in the manner proposed in the rejection. Appeal Br. 7. Appellant argues that, although Davis may be directed to a bread bag, Tucker and Snyder are directed to "heavy duty" bags, such as trash can liners. *Id.* at 6. Appellant argues that a skilled practitioner would not have made the proposed combination to strengthen the bottom of the bread bag because the practitioner would not have recognized that it would have resulted in an improved product. *Id.* at 8.

As applied to the present case, deficiencies in current bread bags that would prompt one skilled in the art to apply the teachings of reinforcement have not been established as factual. The office action cites no evidence that a need for reinforcing bread bags would be recognized by one skilled in the art. Bread bags today (without reinforcement) provide adequate durability and no motivation exists to add additional complexity to the product.

Id. at 8–9.

In response, the Examiner points out that an implicit motivation to combine exists when the improvement is technology-independent and the combination of references results in a product that is more desirable. Ans. 5.

In reply, Appellant argues that there is no implicit motivation here because conventional bread bags do not require additional strength in the first place. Reply Br. 3.

Moreover, adding an 'improvement' such as strength to something that does not need more strength will not result in "a product or process that is more desirable." . . . [E]xcept for the discovery of improved aesthetics, a bread bag with a second bottom is less desirable than a single bottom bread bag.

Id.

Appellant's arguments against the combinability of the references are not persuasive. It does not matter that the Examiner's reason for combining is increased strength, whereas Appellant's reason for improving the bag is aesthetics. It is well settled that a skilled artisan need not be motivated to combine the prior art for the same reason contemplated by an inventor. *In re Kahn*, 441 F.3d 977, 990 (Fed. Cir. 2006).

The mere prospect that Appellant believes that conventional bread bags are already strong enough does not undermine the Examiner's rationale for combining the prior art. It is well settled that the mere fact that the prior art may already perform adequately does not preclude a skilled artisan from seeking to improve upon it. *See DyStar Textilfarben GmbH & Co. v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006) (explaining that the desire to enhance commercial opportunities by improving a product or process is universal—and even common-sensical). Appellant's position that conventional bags are already "strong enough" and, therefore, could not be improved by reinforcement, is mere attorney argument that is entitled to little, if any, weight. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (explaining that attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value).

As persons of scientific competence in the fields in which they work, examiners are responsible for making findings, informed by their scientific knowledge, as to the meaning of prior art references to persons of ordinary skill in the art and the motivation those references would provide to such persons. *In re Berg*, 320 F.3d 1310, 1315 (Fed. Cir. 2003). Absent legal error or contrary factual evidence, those findings can establish a prima facie case of obviousness. *Id.* The Examiner's stated rationale is sufficient to

support the rejection. *See In re Kahn*, 441 F.3d at 988 (requiring an obviousness conclusion to be based on explicit articulated reasoning with rational underpinning) cited with approval in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007). Appellant presents neither evidence nor persuasive technical reasoning to rebut the Examiner's well-reasoned determination that reinforcing the bottom of a bread bag is a product improvement.

Next, Appellant argues that the prior art fails to disclose an inner web of at least 20 microns. Appeal Br. 7. Appellant argues that Tucker discloses an inner web of only about 15 microns. *Id.*

In response, the Examiner states that Tucker discloses a reinforcing strip that may comprise the same materials as its sidewalls and, in addition, may be of the same or different thickness. Ans. 11 (citing Tucker ¶ 65). The Examiner further finds that the sidewalls of Tucker's bag may have a thickness of about 13 to 36 microns. *Id.* at 11–12 (citing Tucker ¶ 67).

In reply, Appellant argues that the Examiner fails to consider the teachings of Tucker “as a whole.” Reply Br. 5. Appellant directs our attention to a different passage in paragraph 67 of Tucker as teaching that the inner web “should be” 15 microns or less. *Id.* at 5–6.

Tucker is directed to a bag with reinforcing features. Tucker, Abstract. The Examiner's findings that Tucker's reinforcing strip may have the same thickness as its sidewalls and that such sidewalls may be from about 13 to 36 microns thick is supported by the record before us. Tucker ¶¶ 65, 67.

Elsewhere in paragraph 67, Tucker discloses that its single layer reinforcing strip 130 “may” have a thickness of up to about 15 microns. *Id.*

at ¶ 67. The operative word in this passage is “may.” Contrary to Appellant’s misrepresentation of the record before us, Tucker does not state that it “should” be only 15 microns. *Id.* It certainly does not teach that it “must” be less than 20 microns. *Id.* The fact that, in one passage, Tucker discloses a reinforcement strip thickness that “may” be 15 microns does not contradict the Examiner’s determination that it “may” also be 20 microns.

The Examiner’s findings of fact are supported by a preponderance of the evidence and the Examiner’s legal conclusion of unpatentability is well-founded. Accordingly, we sustain the Examiner’s unpatentability rejection of claims 1, 4–6, 9–11, 14–19, and 21–23.

CONCLUSION

Claims Rejected	§	Reference(s)	Affirmed	Reversed
1, 4-6, 9-11, 14-19, 21-23	103	Davis, Tucker, Snyder	1, 4-6, 9-11, 14-19, 21-23	

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