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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KEVIN JOSEPH VOGT, PETER JOHN ALLEN,
JEFFREY DEAN HOLZ, TARA MARIE LOGUT,
ROBERT EUGENE KRAUTKRAMER, and
SAMUEL AUGUST NELSON

Appeal 2020-000175
Application 15/745,493
Technology Center 1700

Before DONNA M. PRAISS, MONTÉ T. SQUIRE, and
MERRELL C. CASHION, JR., *Administrative Patent Judges*.

PRAISS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Pursuant to 35 U.S.C. § 134(a), Appellant² appeals from the Examiner’s decision to reject claims 1–3, 5, 7–11, and 24–26. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ In this Decision, we refer to the Specification filed Jan. 17, 2018 (“Spec.”), the Final Office Action dated Jan. 25, 2019 (“Final Act.”), the Appeal Brief filed June 25, 2019 (“Appeal Br.”), and the Examiner’s Answer dated July 25, 2019 (“Ans.”).

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

STATEMENT OF THE CASE

The subject matter on appeal relates to absorbent tissue products such as facial tissue and bath tissue to absorb body fluid and leave the skin dry. Spec. 1:3–4. More particularly, the subject matter relates to a textured fibrous structure provided with a design element and an additive registered to the design element without the use of traditional printing or spraying techniques. *Id.* at 1:29–31.

A cross-sectional view of Appellant’s fibrous structure is shown in Figure 6 below. Spec. 3:24.

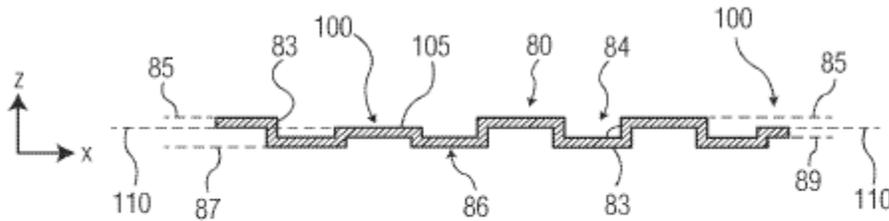


FIG. 6

Figure 6 above depicts fibrous structure 10 having alternating continuous line elements and valleys having a z-directional height. Spec. 11:30–33. Design elements 100 shown in Figure 6 are formed by subtracting a portion of line elements 80, resulting in design elements 100 lying in a third plane (design element plane 110) between upper surface plane 85 and bottom surface plane 87. *Id.* at 12:1–3. The Specification describes a line element as referring to an element, such as a design element, in the shape of a continuous, discrete, interrupted, and/or partial line with respect to a fibrous structure on which it is present. *Id.* at 5:29–31. The line element is also described as “any suitable shape such as straight, bent, kinked, curled, curvilinear, serpentine, sinusoidal, and mixtures thereof that may form

regular or irregular periodic or non-periodic lattice work of structures”
having a length of at least 10 mm. *Id.* at 5:31–33.

The Specification describes selectively applying a chemical papermaking additive in registration with a design element or those portions of the sheet supported by a protuberance on a pattern roll so that the sheet caliper is not adversely affected. *Id.* at 8:10–20.

Claim 1 is illustrative and reproduced from the Claims Appendix to the Appeal Brief (paragraphing added and disputed limitations italicized).

1. A chemically treated fibrous structure comprising
a fibrous structure having an upper surface lying in a first plane,
a first design element lying in a second plane, a bottom surface
lying in a third plane and
a second design element lying in a fourth plane above the
second plane,
where there is a z-direction height difference between the first
and third planes and
the second and fourth planes lie between the first and third
planes and
a chemical papermaking additive selected from the group
consisting of strength agents, bonding agents, softening agents,
lotions, humectants, emollients, vitamins and colorants is
*selectively disposed on the fourth plane in registration with the
second design element* and the first and second planes are
substantially free from the chemical papermaking additive.

ANALYSIS

We review the appealed rejections for error based upon the issues Appellant identifies, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011)

(“[I]t has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections.”)). After considering the argued claims and Appellant’s arguments, we are not persuaded of reversible error in the appealed rejections.

The Examiner rejects claims 1–3, 7–11, and 24–26 as follows for the reasons provided in the Final Office Action.³ Final Act. 6–15.

| Claim(s) Rejected | 35 U.S.C. § | Reference(s)/Basis |
|--------------------------|--------------------|---|
| 1 | 102(a)(1) | Hamilton ⁴ |
| 2, 3, 7, 11 | 103 | Hamilton, Hamilton ’607 ⁵ |
| 8, 9, 24–26 | 103 | Hamilton, Hamilton ’607, Lostocco ⁶ |
| 10 | 103 | Hamilton, Hilbig ⁷ |

Appellant argues the rejection of claims 8, 9, and 24–26 as a group and separately argues the rejections of claims 1–3, and 7. Appeal Br. 2–8. Accordingly, claims 9 and 24–26 will stand or fall with claim 8, claim 10 will stand or fall with claim 1, and claim 11 will stand or fall with claim 2. *See* 37 C.F.R. § 41.37(c)(1)(iv). Claims 1–3, 7, and 8 are addressed below.

³ All rejections of claim 5 were withdrawn by the Examiner following Appellant’s cancellation of claim 5. Ans. 12.

⁴ US 6,099,940, issued Aug. 8, 2000.

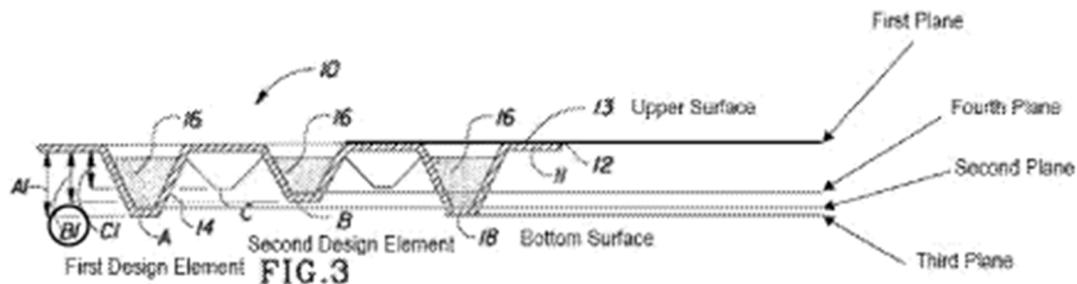
⁵ US 5,871,607, issued Feb. 16, 1999.

⁶ US 2007/0137808 A1, published June 21, 2007.

⁷ US 2004/0055721 A1, published Mar. 25, 2004.

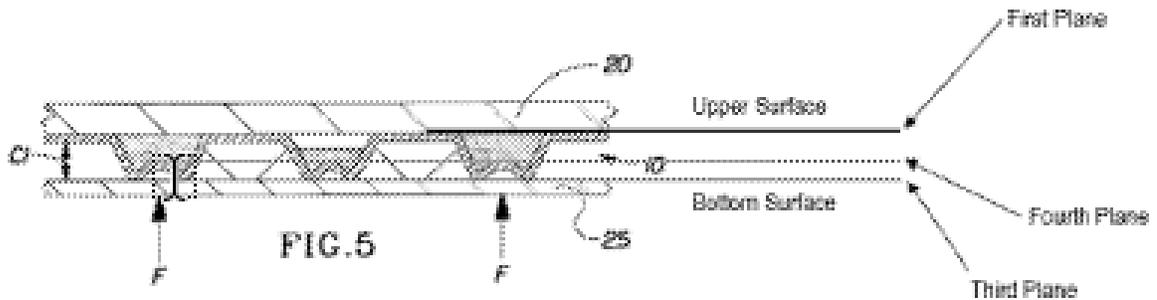
Claim 1

Appellant contends the Examiner erred in rejecting claim 1 over Hamilton because Hamilton treats all protrusions with a substance, therefore the protrusions are not selectively treated as required by claim 1. Appeal Br. 4. Appellant annotates Hamilton's Figure 3, below, which shows first and second protrusions of different heights labeled "A" and "B."



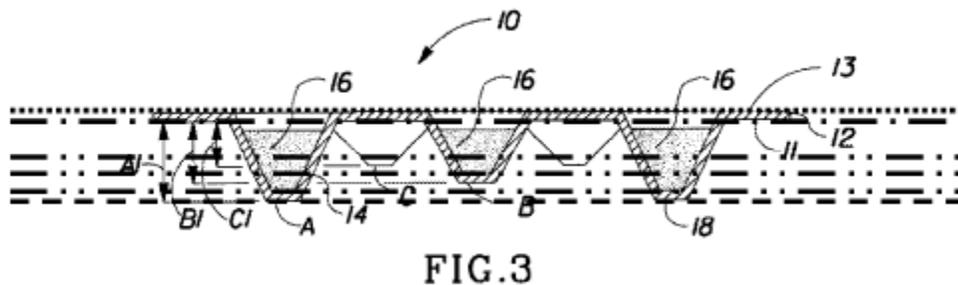
Hamilton's Figure 3 above is an elevational sectional view showing three-dimensional sheet material 12 and the location of substance 16 within hollow protrusions 14. Hamilton 4:48–51, 5:64–6:17. Appellant contends that even in embodiments where the protrusions contain different amounts of substance 16, Hamilton still teaches that all of the protrusions are treated. Appeal Br. 4 (citing Hamilton 7:50–53).

Appellant also contends the protrusions in Hamilton's Figure 5 embodiment all have an upper surface lying in the same plane in addition to all protrusions being treated with a substance. *Id.* Appellant annotates the upper surface of the protrusions' compressed state as "Fourth Plane" in Hamilton's Figure 5 below. *Id.*



Hamilton's Figure 5 above is an elevational sectional view showing increased deformation of the sheet material where additional protrusions deform to allow the substance within the protrusions to contact the target surface. Hamilton 2:58–62.

The Examiner responds that Appellant's annotations of Hamilton's Figures 3 and 5 indicate that Appellant interprets first, second, and fourth planes as being by a first side of a fibrous structure and a third plane defined by a second side of the fibrous structure. Ans. 13. The Examiner, however, determines that claim 1 does not require the second or fourth plane to correspond to any particular side of the fibrous structure. *Id.* The Examiner annotates Hamilton's Figure 3 below.



Hamilton's Figure 3 above, as annotated by the Examiner, includes a dashed line for the first plane, a dashed and single-dotted line for the second plane, a dotted line for the third plane, and a dashed and double-dotted line for the fourth plane. Ans. 14. The Examiner also determines that there is no

requirement that the second and fourth planes, or the first and second design elements, be on the same side of the fibrous structure. *Id.* at 15. Thus, design elements can be reasonably formed on opposite sides of the fibrous structure. *Id.* Referring to Hamilton's Figure 3, the Examiner finds that an additive added to depths lower than height A1, B1, C1 have first and second planes substantially free from the additive, therefore the additive is selectively disposed on the fourth plane. *Id.*

Appellant's arguments do not persuade us that the Examiner reversibly erred in rejecting the claims as anticipated by Hamilton. Appellant does not dispute the Examiner's claim construction of claim 1, namely that claim 1 does not preclude the first and second planes or the first and second design elements being on the same side of the fibrous structure. Based on the Examiner's claim construction and the Examiner's annotation of Hamilton's Figure 3, the preponderance of the evidence in this appeal record supports the Examiner's conclusion that the claimed subject matter is anticipated by Hamilton. Accordingly, we sustain the Examiner's rejections of claims 1 and 10 for the reasons given above and those expressed in the Answer, including the Response to Argument section.

Claims 2, 3, and 7

Appellant contends that the Examiner erred in rejecting claims 2, 3, and 7, each depending from claim 1, for similar reasons provided with respect to claim 1. Appeal Br. 5–6. Appellant asserts that all of Hamilton's protrusions are treated with a substance, all of Hamilton's compressed structure's elements in Figure 5 have an upper surface that lies in the same (fourth) plane, and the claims are not directed to protrusions having different amounts of additive disposed therein. *Id.* Appellant also argues that a skilled

artisan would not have been motivated to reduce the surface area occupied by protrusions (claim 2), the Examiner fails to provide reasoned analysis how a skilled artisan would have determined the claimed weight range of chemical add-on (claim 3), and Hamilton '607 teaches as a preferred material a relatively thin high density polyethylene deformed to form protrusions having heights from 100 to 300 microns (claim 7). *Id.* at 6–7.

We do not find Appellant's arguments persuasive of error for the reasons discussed above in connection with claim 1 and provided by the Examiner in the Final Office Action and Answer. Regarding claims 2 and 3, the Examiner finds Hamilton teaches protrusion density and size can be varied based on various factors to attain a useful chemically treated fibrous structure including the particular substance applied and the particular application of the fibrous structure. Ans. 16. The Examiner points out that since a protrusion can only hold a certain volume of additive, additive weight contained therein is also encompassed by Hamilton's disclosure. *Id.* The Examiner's finding is supported by the record. Hamilton 10:21–23. The Examiner's reasoning that a skilled artisan would have been motivated to optimize the chemical papermaking additive weight based on Hamilton's teaching (*id.* 17) is therefore supported by the record for the rejection of claims 2 and 3.

Regarding claim 7, the Examiner finds Hamilton '607's disclosure is not limited to the films in a preferred embodiment, but broadly discloses a fibrous structure that is alternatively used to form the features overlapping those of claim 7. Ans. 17. The Examiner's finding that Hamilton '607 broadly discloses that its deformable material is inclusive of "cellulose fiber sheets" is supported by the record. Hamilton '607, 4:55–58. Appellant does

not dispute the Examiner's finding that Hamilton '607 discloses heights for design elements comparable to those of Hamilton, wherein the heights range from about 100 to about 300 μm , which overlaps the range recited in claim 7 of "about 300 to about 1,200 μm ". Final Act. 9 (citing Hamilton '607, 9:17–19).

For these reasons and those the Examiner provides, we affirm the Examiner's rejection of claims 2, 3, 7, and 11 under 35 U.S.C. § 103.

Claim 8

Claim 8 recites "[t]he chemically treated fibrous structure of claim 1 having a basis weight from about 10 to about 50 grams per square meter (gsm), and a geometric mean tensile (GMT) from about 500 to about 1,500 g/3". Appeal Br. 9 (Claims Appendix). Appellant contends the Examiner erred in rejecting claim 8 because a skilled artisan would not have been motivated to select specific disclosures from the prior art references and combine them. Appeal Br. 7. Appellant asserts that the non-fibrous polymeric film structures and processes of Hamilton and Hamilton '607 are not applicable to Lostocco's fibrous tissue webs. *Id.* at 7–8. Appellant argues that polymeric films are essential to Hamilton '607's invention to facilitate deformation during the manufacturing process to form protrusions that stay deformed with minimal spring back and a high modulus of elasticity to minimize film stretch during use. *Id.* at 8 (citing Hamilton '607 4:1–6, 9:49–52). According to Appellant, a skilled artisan would not have been motivated to substitute polymeric films with Lostocco's tissue web and would not have reasonably expected such a substitution to be successful. *Id.*

We do not find Appellant's arguments persuasive of error for the reasons discussed above in connection with claim 7 and provided by the

Examiner in the Final Office Action and Answer. As discussed above, Hamilton '607 broadly discloses a fibrous structure that is alternatively used and, therefore, its disclosure is not limited to a preferred material, namely, high density polyethylene.

For these reasons and those the Examiner provides, we affirm the Examiner's rejection of claims 8, 9, and 24–26 under 35 U.S.C. § 103.

TIME PERIOD FOR RESPONSE

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).

CONCLUSION

In summary:

| Claims Rejected | 35 U.S.C. § | Reference(s)/Basis | Affirmed | Reversed |
|------------------------|--------------------|---|---------------------|-----------------|
| 1 | 102(1) | Hamilton | 1 | |
| 2, 3, 7, 11 | 103 | Hamilton, Hamilton '607 | 2, 3, 7, 11 | |
| 8, 9, 24–26 | 103 | Hamilton, Hamilton '607, Lostocco | 8, 9, 24–26 | |
| 10 | 103 | Hamilton, Hilbig | 10 | |
| Overall Outcome | | | 1–3, 7–11, 24–26 | |

AFFIRMED