

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CURT G. JOA, INC.,
Petitioner,

v.

FAMECCANICA.DATA S.P.A.,
Patent Owner.

Case IPR2016-00906
Patent 6,994,761 B2

Before JO-ANNE M. KOKOSKI, KRISTINA M. KALAN, and
JENNIFER MEYER CHAGNON, *Administrative Patent Judges*.

CHAGNON, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
Inter Partes Review
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

We have jurisdiction to hear this *inter partes* review under 35 U.S.C. § 6. This Final Written Decision is issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73. For the reasons discussed herein, we determine that Petitioner has not shown, by a preponderance of the evidence, that claims 1–19 of U.S. Patent 6,994,761 B2 (Ex. 1001, “the ’761 patent”) are unpatentable.

A. Procedural History

Curt G. Joa, Inc. (“Petitioner”) filed a Petition for *inter partes* review of claims 1–19 (“the challenged claims”) of the ’761 patent. Paper 1 (“Pet.”). Petitioner provided a Declaration of Robert E. Andrews¹ (Ex. 1003) to support its positions. Fameccanica.Data S.p.A. (“Patent Owner”) filed a Preliminary Response. Paper 14.

Pursuant to 35 U.S.C. § 314(a), on October 14, 2016, we instituted *inter partes* review to determine whether claims 1–7, 9–16, and 19 are unpatentable under 35 U.S.C. § 102(b) as anticipated by Coslett²; and whether claims 1–19 are unpatentable under 35 U.S.C. § 102(b) as

¹ Patent Owner argues that we should give Mr. Andrews’s testimony “little to no weight,” at least in part because Mr. Andrews is employed as Vice President of Petitioner and, as such, “his opinions are obviously subject to profound bias due to his lack of independence.” See PO Resp. 16–21. We have considered Patent Owner’s arguments in this regard, and have given Mr. Andrews’s testimony appropriate weight in rendering this Final Written Decision. As discussed in detail in our analysis, even ignoring any potential bias on the part of Mr. Andrews, we find Mr. Blevins’s testimony to be more persuasive.

² EP Publication 0 685 586 A2, published Dec. 6, 1995 (Ex. 1004).

anticipated by Kielpikowski.³ See Paper 16 (“Inst. Dec.”). Subsequent to institution, Patent Owner filed a Patent Owner Response (Paper 27, Paper 28 (redacted version) (“PO Resp.”))⁴, along with a Declaration of John Blevins (Ex. 2011) to support its positions. Petitioner filed a Reply (Paper 39 (“Pet. Reply”)) to the Patent Owner Response. An oral hearing was held on June 30, 2017. A transcript of the hearing is included in the record. Paper 72, Paper 73 (non-confidential version) (“Tr.”).

Also before us is Patent Owner’s Motion to Exclude (Paper 49, Paper 50 (redacted version), “Mot. Exclude”), Petitioner’s Opposition (Paper 69⁵), and Patent Owner’s Reply (Paper 53) thereto.

B. Related Proceedings

The parties do not identify any other proceedings related to the ’761 patent.

C. The ’761 Patent

The ’761 patent relates to a method of forming a “breathable, stretchable section of a disposable absorbent garment, such as a stretchable side panel or ear region” of “disposable diapers, training pants, adult incontinence garments and other pull-on garments.” Ex. 1001, 4:60–63, 5:24–27. The method of the ’761 patent results in a “stretchable section . . . which provides improved comfort and functionality, among other attributes.” *Id.* at 5:20–21.

³ U.S. Patent No. 4,842,596, issued June 27, 1989 (Ex. 1005).

⁴ All citations herein are to the non-confidential versions of documents.

⁵ Petitioner originally filed its Opposition as Paper 51, which has been expunged from the record. Paper 69 is a later-filed corrected version (see Paper 54, authorizing the corrected filing).

Figure 1 of the '761 patent is reproduced below.

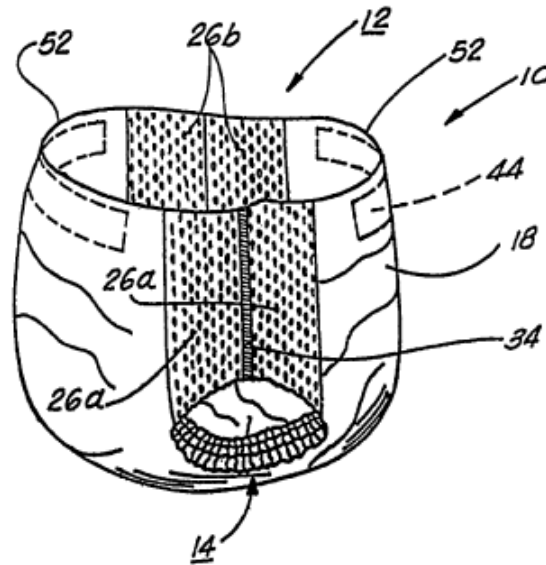
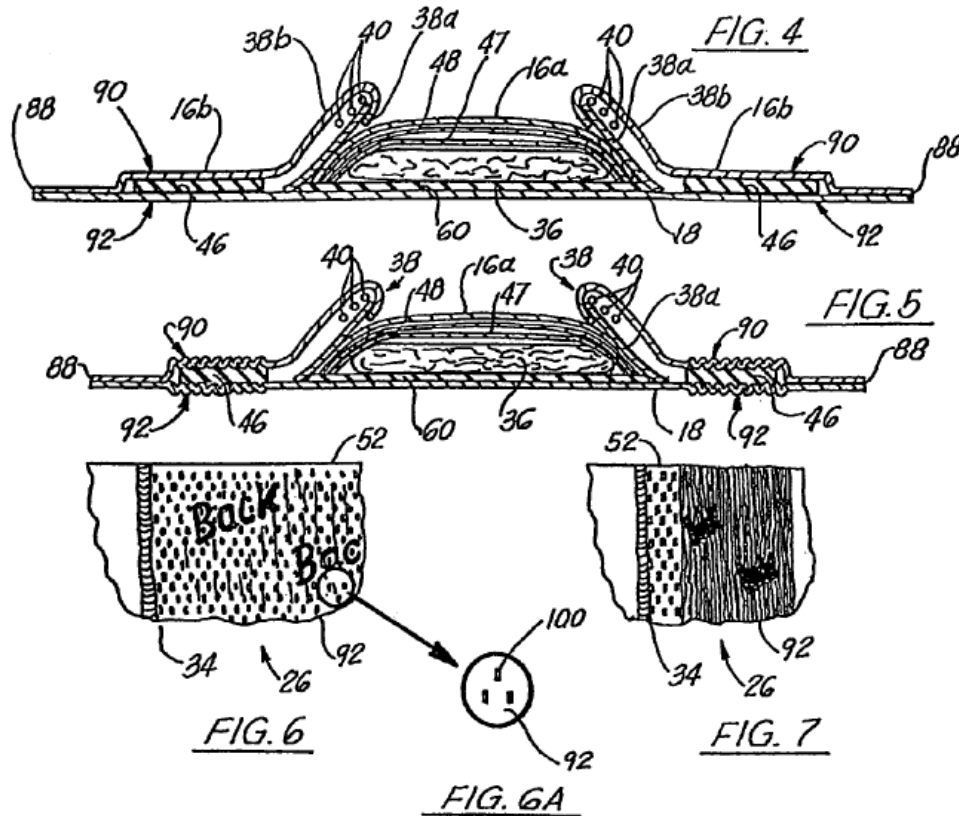


FIG. 1

Figure 1 is a perspective view of a disposable absorbent garment incorporating a breathable, stretchable section formed in accordance with an embodiment of the '761 patent. *Id.* at 5:35–38. During manufacturing of disposable absorbent garment 10, respective pairs of ear regions 26a, 26b are joined together to form side seams 34 and leg openings 14, as well as waist opening 12. *Id.* at 5:57–62, 6:48–54. Ear regions 26, when joined, form stretchable side waist regions of absorbent garment 10. *Id.* at 10:61–64.

These stretchable side waist regions may be formed by the claimed methods. Figures 4–7 of the '761 patent are reproduced below.



Figures 4 and 5 are cross sectional views of a disposable garment in accordance with the '761 patent, with ear regions 26 (not identified) in extended and relaxed configurations, respectively. *Id.* at 5:45–48. Figures 6 and 7 are bottom plan views of a portion of the side waist region of the garment of Figures 4 and 5, in extended and contracted configurations, respectively. *Id.* at 5:49–51, 5:52–53. Figure 6A is a close-up view of a portion of Figure 6 showing bond sites 100. *Id.* at 5:51.

As can be seen in the figures, topsheet 16 is bonded to backsheet 18 at localized bond sites 100. *Id.* at 12:46–48. Stretchable member 46 is positioned between topsheet 16 and backsheet 18. *Id.* at 12:48–50.

Preferably, and as claimed, “an ultrasonic bonding process is employed to bond the topsheet 16 and the backsheet 18, through the stretchable member 46.” *Id.* at 12:50–52. According to the ’761 patent, “[e]mployment of this bonding process, creates holes or apertures at the bond sites 100 and through the stretchable member 46,” the holes providing breathability or air permeability to the stretchable side waist regions of the garment. *Id.* at 12:52–56.

As described in the ’761 patent, “the level of ultrasonic bonding that is sufficient to bond the non-woven materials also causes the material for the elastic member 46 to fracture and/or disintegrate. As a result, the two non-woven layers bond together, but trap the . . . elastic member 46 therewith.” *Id.* at 12:64–13:2. As further described in the ’761 patent, “the hole that is blown or created through the elastic member 46 is larger than the bond site, and the two non-woven layers bond with each other through the center of the hole.” *Id.* at 13:2–5.

D. Illustrative Claim

Of the challenged claims, claims 1, 11, and 19 are independent. Claims 2–10 depend, directly or indirectly, from claim 1; and claims 12–18 depend, directly or indirectly, from claim 11. Claim 1 of the ’761 patent, reproduced below, is illustrative of the challenged claims:

1. A method of forming a breathable, stretchable section of a disposable absorbent garment, said method comprising the steps of:

- selecting a first material for a first material layer and a second material for a second material layer, whereby said first and second material layers are bondable by an ultrasonic bonding process;

- selecting an elastic material for a stretchable material layer;

positioning the stretchable material layer between the first and second material layers to form a layer assembly;

targeting one or more bond sites on the layer assembly for bonding one or more of the material⁶ layers together; and

securing the first, second, and stretchable layers together by ultrasonically bonding the first material layer with the second material layer at the one or more sites, whereby an aperture is formed through the stretchable material and whereby the first material layer and the second material layer substantially, completely bond through the aperture at the one or more bond sites, and such that the aperture provides a breathable passage therethrough.

Ex. 1001, 15:31–53.

II. ANALYSIS

A. *Principles of Law*

To prevail in its challenges to the patentability of the claims, a petitioner must establish facts supporting its challenges by a preponderance of the evidence. 35 U.S.C. § 316(e); 37 C.F.R. § 42.1(d). “In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)). This burden of persuasion never shifts to Patent Owner. *See Dynamic Drinkware, LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1378–79 (Fed. Cir. 2015) (citing *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d

⁶ Claim 1 was corrected via a Certificate of Correction issued May 13, 2017.

1316, 1326–27 (Fed. Cir. 2008)) (discussing the burdens of persuasion and production in *inter partes* review).

To establish anticipation, each and every element in a claim, arranged as recited in the claim, must be found in a single prior art reference. *See Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008); *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1383 (Fed. Cir. 2001). A “claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631 (Fed. Cir. 1987). Although the elements must be arranged or combined in the same way as in the claim, “the reference need not satisfy an *ipsissimis verbis* test,” i.e., identity of terminology is not required. *In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009); *accord In re Bond*, 910 F.2d 831, 832–33 (Fed. Cir. 1990). Further, to be anticipating, a prior art reference must be enabling and must describe the claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention. *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1346 (Fed. Cir. 2000); *In re Paulsen*, 30 F.3d 1475, 1479 (Fed. Cir. 1994).

At this final written decision stage, we determine whether a preponderance of the evidence of the record shows that the challenged claims are anticipated by the asserted prior art. We analyze the asserted grounds of unpatentability in accordance with those principles.

B. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. *See* 37 C.F.R. § 42.100(b); *Cuozzo Speed*

Techs., LLC v. Lee, 136 S. Ct. 2131, 2144–46 (2016) (upholding the use of the broadest reasonable interpretation standard). Pursuant to that standard, the claim language should be read in light of the specification, as it would be interpreted by one of ordinary skill in the art. *In re Suitco Surface, Inc.*, 603 F.3d 1255, 1260 (Fed. Cir. 2010). We generally give claim terms their ordinary and customary meaning. *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007) (“The ordinary and customary meaning ‘is the meaning that the term would have to a person of ordinary skill in the art in question.’” (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc))).

The claims, however, “should always be read in light of the specification and teachings in the underlying patent,” and “[e]ven under the broadest reasonable interpretation, the Board’s construction ‘cannot be divorced from the specification and the record evidence.’” *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1298 (Fed. Cir. 2015) (citations omitted). In other words, “[u]nder a broadest reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification and prosecution history.” *TriVascular, Inc. v. Samuels*, 812 F.3d 1056, 1062 (Fed. Cir. 2016) (citing *Straight Path IP Grp., Inc. v. Sipnet EU S.R.O.*, 806 F.3d 1356, 1362 (Fed. Cir. 2015)). Any special definition for a claim term must be set forth in the specification with reasonable clarity, deliberateness, and precision. *See In re Paulsen*, 30 F.3d at 1480. However, limitations are not to be read from the specification into the claims. *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993).

The parties propose constructions for various claim terms. *See* Pet. 8–10; PO Resp. 11–15. For purposes of this Final Written Decision, we

discuss claim construction only for the terms discussed below; no other terms require express construction.⁷ See, e.g., *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011) (“[C]laim terms need only be construed ‘to the extent necessary to resolve the controversy.’”) (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999)).

1. “whereby” clauses

Petitioner argues the various “whereby” clauses in the claims “simply express the intended result of a process step” and should not be given patentable weight. Pet. 10. In our Institution Decision, we determined that at least the following whereby clause, recited in claims 1, 11, and 19, is limiting: “bonding the first material layer with the second material layer at one or more sites, whereby an aperture is formed through the stretchable material . . . and such that the aperture provides a breathable passage therethrough.” Inst. Dec. 8–9 (citing Ex. 1011, at JOA-001205–06 (Examiner’s reasons for allowance, identifying this whereby clause as allowable over the prior art)). The parties do not dispute this determination, and we see no reason based on the complete record now before us to alter this determination for purposes of this Final Written Decision.

We did not make a determination regarding the other “whereby” clauses at institution. Patent Owner argues that “at least the following three whereby clauses are each also material to patentability and should be given patentable weight” (see PO Resp. 13–15):

⁷ In the Institution Decision, we also discussed the construction of the “targeting” limitation (Inst. Dec. 9–10); however, express construction of this limitation is not necessary for purposes of this Final Written Decision.

“whereby the first material layer and the second material layer substantially, completely bond through the aperture at the one or more bond sites” (claim 1);

“whereby the first material layer and the second material layer substantially, completely bonds through the aperture at the one or more bond sites” (claim 11); and

“whereby the first material layer and the second material layer bond through the aperture in a substantially complete manner” (claim 19).

We refer to these clauses collectively as the “bonding through the aperture” clauses. According to Patent Owner, the Examiner also relied on these whereby clauses in finding the claims allowable over the prior art. *Id.* at 14 (citing Ex. 1011, at JOA-001205 (Examiner’s reasons for allowance, identifying these whereby clauses as allowable over the prior art)).

“A whereby clause in a method claim is not given weight when it simply expresses the intended result of a process step positively recited.” *Minton v. Nat’l Ass’n of Sec. Dealers, Inc.*, 336 F.3d 1373, 1381 (Fed. Cir. 2003). “However, when the ‘whereby’ clause states a condition that is material to patentability, it cannot be ignored in order to change the substance of the invention.” *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1329 (Fed. Cir. 2005). Determining whether to give a “whereby” or “wherein” clause patentable weight, if any, is done on a case-by-case basis. *Id.*; *Minton*, 336 F.3d at 1381; *see also Griffin v. Bertina*, 285 F.3d 1029, 1033–34 (Fed. Cir. 2002) (holding that the Board did not err by giving limited effect to the “wherein” clauses in an interference count because the wherein clauses “giv[e] meaning and purpose to the manipulative steps” rather than “merely stat[ing] the inherent result of performing the manipulative steps”).

Based on the facts and circumstances of this case, we agree with Patent Owner, and determine that the “bonding through the aperture” clauses also are limiting. *See* Ex. 1011, at JOA-001205–06 (Examiner’s reasons for allowance, identifying these whereby clauses as allowable over the prior art). The Examiner’s determination and our own review of the record indicate that these clauses are material to patentability, and should be considered limiting.

2. “*elastic material for a stretchable material layer*”

Each of independent claims 1, 11, and 19 recites “selecting an elastic material for a stretchable material layer.” Petitioner did not propose a construction for this limitation in the Petition, and we did not provide an express construction of this limitation in our Institution Decision. *See generally* Pet. 8–10; Inst. Dec. 7–10.

Patent Owner argues that “under its broadest reasonable interpretation, the term ‘stretchable material layer’ should be construed as an ‘elastomeric film.’” PO Resp. 11–12. According to Patent Owner, “[t]his construction is consistent with [the Specification of the ’761 patent], which states, for example, ‘a stretchable ear region or side panel, is therefore, created that is made up of an elastomeric film laminated between the full width backsheet and the full width topsheet.’” *Id.* (quoting Ex. 1001, 14:40–42; citing Ex. 2011 ¶ 44).

We disagree. As noted by Petitioner in its Reply (Pet. Reply 6–7), the ’761 patent discloses that “[t]he stretchable member 46 may be formed from an elastic material, . . . any other material with the appropriate stretch and return properties[, or] may also be formed from a heat-activated elastomeric material.” Ex. 1001, 12:11–16. Although the ’761 patent

describes one appropriate material stretchable member 46 as being an elastomeric film, we decline to limit the claims to one disclosed embodiment. *See In re Van Geuns*, 988 F.2d at 1184 (holding that limitations are not to be read from the specification into the claims); *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1433 (Fed. Cir. 1988) (holding that reading an “extraneous limitation” into a claim from the specification is improper)

3. “*through the aperture*”

Each of independent claims 1 and 11 recites “the first material layer and the second material layer . . . bond *through the aperture* [formed through the stretchable material] at the one or more bond sites.”

Independent claim 19 includes a similar limitation. Petitioner did not propose an express construction for “through the aperture” in the Petition, and we did not provide an express construction of this limitation in our Institution Decision. *See generally* Pet. 8–10; Inst. Dec. 7–10.

Patent Owner argues that the recitation of bonding of the first and second material layers “through the aperture” requires bonding of the first and second material layers “within the aperture.” PO Resp. 12–13 (citing Ex. 2011 ¶¶ 45–46). Patent Owner distinguishes its proposed construction from a construction “which could include ‘through the stretchable material,’” arguing this alternative construction

would be as nonsensical as the suggestion that a basketball had passed “through” a basketball hoop to score a point when in fact it merely came to rest on the rim of the basketball hoop, or that a person has walked “through” a doorway by running into the door frame, or that a car has passed “through” a tunnel by crashing into the tunnel wall.

Id. at 13.

In support of its proposed construction, Patent Owner points to the Specification, which states, in describing the bonding process of the '761 patent (Ex. 1001, 12:46), that “the hole that is blown or created through the elastic member 46 is larger than the bond site, and the two non-woven layers bond with each other *through the center of the hole*” (*id.* at 13:2–5 (emphasis added)). PO Resp. 12. Patent Owner also argues that its proposed construction

is consistent with the ordinary and customary meaning of “through” as “a function word to indicate penetration of or passage within, along, or across an object, substance, or space” and the ordinary and customary meaning of “aperture” as “an opening or open space”.

Id. (citing Ex. 2007⁸; Ex. 2008⁹; Ex. 2011 ¶ 45).

In discussing the invention of the '761 patent generally, Patent Owner refers to Mr. Blevins’s Declaration, in which he provides an illustration of a “trilaminate made according to an exemplary embodiment of Claim 1 of the '761 Patent.” Ex. 2011 ¶ 34; *see* PO Resp. 7–8. Mr. Blevins’s illustrations are reproduced below.

⁸ WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2384–85 (Philip Babcock Gove, Ph.D. Ed. 1993) (definition of “through”).

⁹ WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 99 (Philip Babcock Gove, Ph.D. Ed. 1993) (definition of “aperture”).

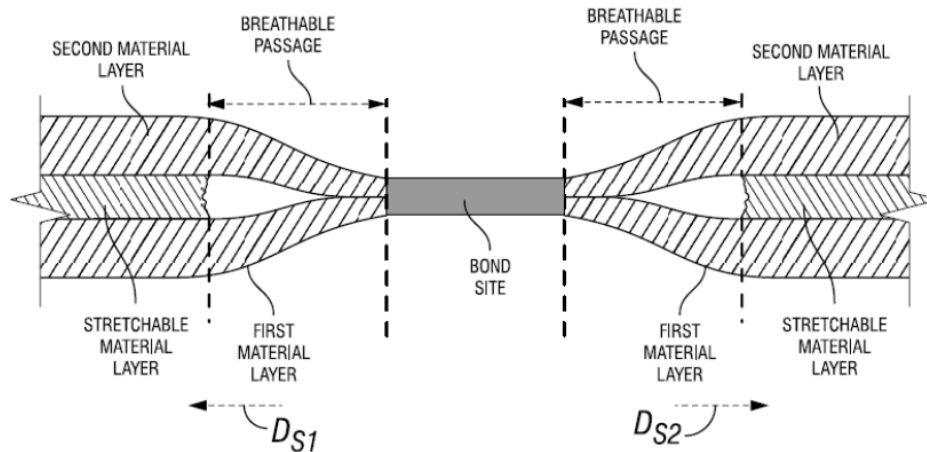


Figure 2: Cross-sectional view of a bonded trilaminate, which is illustrated in a stretched configuration, formed according to an embodiment of claim 1 of the '761 Patent.

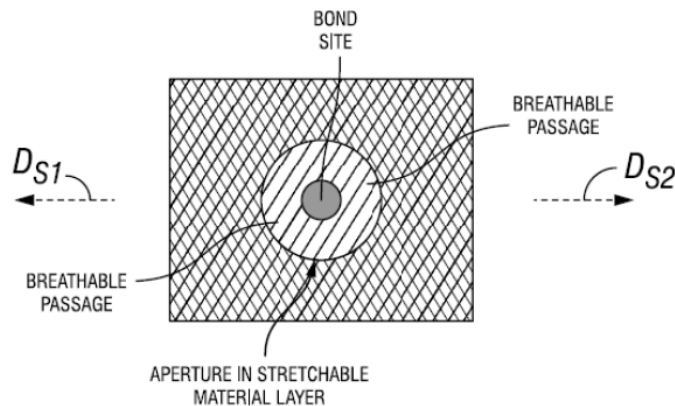


Figure 3: A top view of a bonded trilaminate, which is illustrated in a stretched configuration, formed according to an embodiment of claim 1 the '761 Patent.

Figures 2 and 3 of Mr. Blevins’s Declaration, reproduced above, illustrate a cross-sectional view and a top view, respectively, of a bonded trilaminate, depicted in a stretched configuration.¹⁰ Ex. 2011 ¶ 34. In explaining these figures, Mr. Blevins testifies:

¹⁰ Petitioner refers to this configuration as a “fiber covered vent bond.” See, e.g., Pet. 6–7; Ex. 1003 ¶ 24.

In contrast to prior art methods which could only produce breathable stretchable trilaminates by using elastic materials with pre-formed holes (such as elastic scrims) or by creating holes through all three layers of the trilaminate, the '761 Patent discloses a method of making a breathable, stretchable trilaminate structure wherein the breathable non-woven materials are bonded to each other *through an aperture* formed in the elastomeric material during the ultrasonic bonding process, thereby providing a breathable passage through the elastomeric material, such that air can pass through the aperture in the elastomeric material and through the breathable non-woven materials. . . . Therefore, the '761 Patent discloses a method of making a breathable, stretchable trilaminate structure which can be made using a *non-breathable* elastomeric film without forming holes through all three layers of the trilaminate, because the aperture formed in the film provides a breathable passage between the bond site and the elastic film.

Ex. 2011 ¶ 34 (emphasis in original).

In its Reply, Petitioner counters Patent Owner's proposed construction, arguing that "[c]laims 7, 8, 11, and 16, all of which depend from claim 1, each refer to vent sites at the bond sites."¹¹ Pet. Reply 2. According to Petitioner, a "fiber covered vent bond does not cover such an arrangement, as argued by Patent Owner. Patent Owner's limited scope for claim 1 necessarily make[s] claims 7, 8, 11, and 16 inoperable and therefore cannot be the broadest reasonable construction." *Id.*

We do not understand Patent Owner to argue that the exemplary illustration provided by Mr. Blevins is the *only* possible embodiment covered by the language of claim 1. *See, e.g.*, Tr. 31:10–32:7, 32:21–23

¹¹ We note that claims 11 and 16 do not depend from 1, but instead claim 11 is independent and claim 16 depends therefrom. These claims do, however, recite "vent sites" as noted by Petitioner.

(Patent Owner’s counsel arguing, “[t]his figure [(e.g., Figure 2 of Mr. Blevins’s Declaration)] is designed to illustrate the breadth of the claims of the ’761 patent. Not to demonstrate every possible embodiment.”). Patent Owner’s discussion of “an exemplary embodiment of Claim 1” is provided in a general discussion of the ’761 patent, and is not directly referenced in the claim construction section of its Patent Owner Response. Further, Mr. Blevins testified during his deposition that

there is another bond that it [(i.e., the method of claim 1)] could also create [in addition to the bond shown in Figures 2 and 3 of the Blevins Declaration]. By increasing energy, I can also create an aperture where it says bond site, but then the bonds would be around the periphery of that hole that I just created in the middle of the materials. So it can make those two.

Ex. 1016,¹² 89:5–12. We are not persuaded that Patent Owner’s proposed construction—namely, that bonding of the first and second material layers “through the aperture” requires bonding of the first and second material layers “within the aperture”—is limited to a fiber covered vent bond configuration.¹³ Thus, we are not persuaded by Petitioner’s argument that “Patent Owner’s limited scope for claim 1 necessarily make[s] claims 7, 8, 11, and 16 inoperable” (Pet. Reply 2).

Petitioner further disagrees with Patent Owner’s assertion that “‘through the aperture’ . . . should mean ‘within the aperture’ but not ‘through the stretchable material.’” Pet. Reply 5–6. Petitioner asserts that

¹² Citations to the transcript of Mr. Blevins’s deposition are in the format page:line(s) of the court reporter’s original pagination.

¹³ Petitioner also argues that the ’761 patent does not disclose an embodiment similar to that discussed in Figures 2 and 3 of Mr. Blevins’s Declaration. See Pet. Reply 3–5. We need not decide this issue for purposes of this Final Written Decision.

“‘through the aperture’ is not defined by the specification . . . as having any meaning other than its ordinary meaning.” *Id.* at 6. Petitioner further contends that Patent Owner’s citation to the ’761 patent’s teaching that “the two nonwoven layers bond with each other through the center of the hole” (Ex. 1001, 13:2–5) as support for its construction is flawed because “both a fiber covered vent bond and a hole vent bond^[14] fit that description.” Pet. Reply 6.

Although we agree with Petitioner that “through the aperture” is not expressly defined in the Specification of the ’761 patent, the Specification provides guidance as to the meaning of this claim term. In describing the embodiments utilizing ultrasonic bonding as claimed, the Specification of the ’761 patent describes the following:

Preferably, this stretchable layer assembly includes a plurality of breathing or vent sites which are spaced from one another to present a staggered pattern of vent sites on the ear portions. At the vent sites, an outer material layer of the ear portion (e.g., an extension of the backsheet) is bonded with an inner material layer of the ear portion (e.g., an extension of the topsheet). As a result of a bonding process, such as ultrasonic bonding, vent sites are created which include a hole(s) or aperture(s) through the stretchable material layer (and through the inner material layer and the outer material layer) and through which air is passable.

Ex. 1001, 3:8–18.

The method then includes securing the first, second, and stretchable layers together by ultrasonically bonding the first material layer with the second material layer at the one or more [bond] sites. Accordingly, *an aperture is formed through the*

¹⁴ Mr. Andrews testifies that a “hole vent bond” is a bond where “[a] hole is formed through all three layers of material during the bonding process.” Ex. 1003 ¶ 24. Mr. Andrews’s testimony does not describe any specifics of the bonding of the particular layers.

stretchable material and the first material layer and the second material layer bond through the aperture, such that the aperture provides a breathable passage therethrough.

Id. at 5:6–13 (emphasis added).

In any of the above bonding processes, the topsheet 16 is mechanically bonded to the backsheet 18 at localized bond sites or bond points 100, at which the topsheet 16 and backsheet 18 are joined together through the stretchable member 46 (see FIGS. 6 and 7). Preferably, an ultrasonic bonding process is employed to bond the topsheet 16 and the backsheet 18, through the stretchable member 46. *Employment of this [ultrasonic] bonding process, creates holes or apertures at the bond sites 100 and through the stretchable member 46.* These holes or apertures at the bond sites 100 provide breathability or air permeability to the ear regions 26a, 26b (see also FIG. 6). More particularly, *the holes at the bond sites 100 are created as a result of the selection of materials for the topsheet 16, backsheet 18 and stretchable member 46, and use of the ultrasonic bonding process.* In this process, the non-woven materials (i.e., topsheet 16 and backsheet 18) requires substantially more energy to bond than the material selected for the elastic member 46 (i.e., a polymeric material). Accordingly, *the level of ultrasonic bonding that is sufficient to bond the non-woven materials also causes the material for the elastic member 46 to fracture and/or disintegrate.* As a result, the two non-woven layers bond together, but trap the polymeric material of the elastic member 46 therewith. Further, the hole that is blown or created through the elastic member 46 is larger than the bond site, and *the two non-woven layers bond with each other through the center of the hole.*

Id. at 12:46–13:5 (emphases added).

As described previously, energy from the preferred bonding process *creates a hole in the stretchable member and allows for the topsheet material and the backsheet material to bond therethrough.* This also creates a vent at the bond site through which air may pass.

Id. at 14:53–57 (emphasis added).

Based on the language of the Specification, it is clear that bonding “through the aperture” requires in each case that first and second material layers bond directly with each other at the aperture formed in the stretchable material layer. *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (“[T]he specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.”). We, thus, determine that the broadest reasonable interpretation of bonding of the first and second material layers “through the aperture,” in view of the Specification, requires that first and second material layers bond directly with each other at the aperture formed in the stretchable material layer. Our construction of “through the aperture” does not encompass bonding occurring at a location of the stretchable material layer where no aperture is formed in the stretchable material layer (e.g., where the stretchable material layer exists between the first and second material layers).

C. Anticipation by Coslett

Petitioner asserts that claims 1–7, 9–16, and 19 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by Coslett. Pet. 11–22. Patent Owner argues that Coslett does not provide an enabling disclosure,¹⁵ and also that it does not disclose all the features of the claims. PO Resp. 40–49. We have reviewed the entire record before us, including the parties’ contentions and supporting evidence presented during this trial. For the reasons explained below, we determine that Petitioner has not demonstrated,

¹⁵ Because we determine that Coslett does not disclose all the features of the claims, we do not reach Patent Owner’s argument regarding the enablement of Coslett’s disclosure.

by a preponderance of the evidence, that claims 1–7, 9–16, and 19 are unpatentable as being anticipated by Coslett.

1. Summary of Coslett

Coslett “relates to elastomeric laminates in which nonwoven gatherable webs are laminated on both sides of a layer of elastomeric material.” Ex. 1004, 2:4–5.¹⁶ As described in Coslett, stretchable composite materials made of such elastomeric laminates “are ideally suited for use in consumer disposable articles such as diapers.” *Id.* at 2:9–10. In particular, the “elastomeric nonwoven-film-nonwoven (A-B-A) laminate [of Coslett] is ideally suited for use in the waist band or leg cuff of disposable diapers, training pants and other similar products.” *Id.* at 3:45–46. As further described in Coslett, “[a]n elastomeric layer is sandwiched between the nonwoven webs and laminated thereto. The elastomeric layer may take the form of a film or a scrim (i.e., network) made of elastomeric material.” *Id.* at 3:48–49.

Coslett describes that, during the manufacturing process, the two layers of inelastic, nonwoven material are laminated together with the elastomeric material sandwiched between them. *Id.* at 3:7–8. “In accordance with the method of [Coslett], the nonwoven webs are ultrasonically pattern bonded to each other, with the elastomeric layer therebetween, using a patterned bonding roll.” *Id.* at 3:56–57. Coslett further describes that, when an elastomeric film is used, “[t]he film is composed of compounds which melt at a lower temperature than the melting point of the polymeric material used to bond the nonwoven webs together.

¹⁶ Citations to Coslett (Ex. 1004) are in the format “page:line(s)” throughout this Final Written Decision.

Thus, the film does not contribute to the bond integrity of the laminate.” *Id.* at 6:37–39.

Further, “[t]he nonwoven webs are ultrasonically bonded to the elastomeric web while the latter is in a stretched state.” *Id.* at 4:3; *see id.* at 3:9–10. The bonding roll of Coslett is described as having “a pattern of discrete bonding protuberances protruding radially outward.” *Id.* at 4:18–19. Ultrasonic bonding occurs at these protuberances, but not between them. *Id.* at 4:19–20; *see id.* at Fig. 2 (illustrating the bonding pattern).

2. Analysis

Petitioner asserts that Coslett discloses all elements of claims 1–7, 9–16, and 19. Pet. 11–22. An annotated version of Figure 1 of Coslett, as provided by Petitioner (*id.* at 13), is reproduced below.

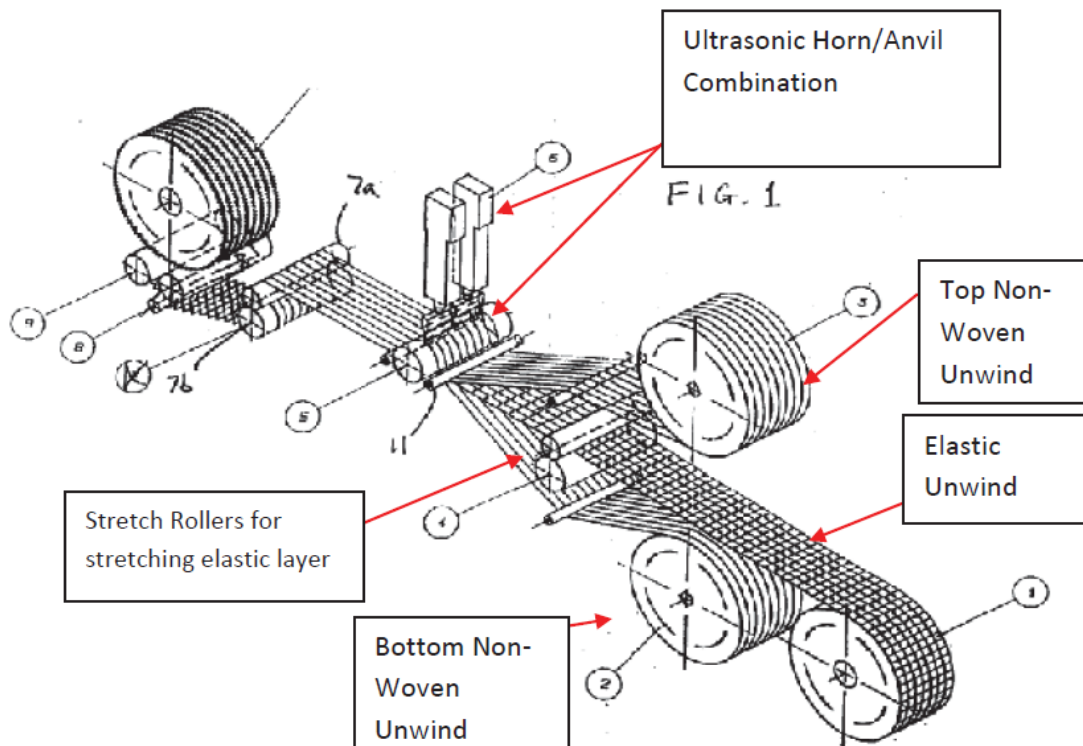


Figure 1 illustrates a perspective view of a machine for use in manufacturing the stretchable fabric in accordance with the embodiments of Coslett.

Ex. 1004, 3:38–39. As recited in independent claim 1,¹⁷ Coslett discloses a method of forming a stretchable laminated fabric, including inelastic material layers 2, 3 (the claimed first and second material layers) and scrim or elastomeric film 1 (the claimed elastic material for a stretchable material layer). *Id.* at 4:7–9, 6:35–36; Pet. 12–13. As can be seen in Figure 1, scrim/film 1 is positioned between inelastic material layers 2, 3. Ex. 1004, 3:7–8, 4:15–16; Pet. 12–13. According to Coslett, inelastic material layers 2, 3 and scrim/film 1 are secured together by “ultrasonically bonding the first material layer with the second material layer at the one or more sites,” as claimed. Ex. 1004, 4:7–9, 4:18–20; Pet. 13.

Claim 1 further requires that that the ultrasonic bonding results in “an aperture [being] formed through the stretchable material . . . such that the aperture provides a breathable passage therethrough.” Based on the evidence available at institution, we considered Coslett’s teaching that, when an elastomeric film is used, “[t]he film is composed of compounds which melt at a lower temperature than the melting point of the polymeric material used to bond the nonwoven webs together. Thus, the film does not contribute to the bond integrity of the laminate,” sufficient to demonstrate a reasonable likelihood that Coslett discloses the claimed apertures being formed in the stretchable material, and providing a breathable passage

¹⁷ Although Patent Owner presents arguments directed only to claims 1–4 and 6 in its Patent Owner Response, Petitioner bears the ultimate burden to show the claims are unpatentable by a preponderance of the evidence. See *Dynamic Drinkware*, 800 F.3d at 1378–79 (holding that the burden of persuasion never shifts to Patent Owner). We discuss claim 1 as representative in our analysis. Claims 11 and 19, however, have similar limitations.

therethrough. Inst. Dec. 13 (citing Ex. 1004, 6:37–39). We note, however, that this disclosure of Coslett does not expressly state that an aperture is formed in the elastomeric film.

On this point, Patent Owner, relying on testimony from Mr. Blevins, contends that:

Coslett offers no disclosure or suggestion that its methods create holes through the elastomeric material and provide breathable passages through the elastomeric material, such that air can pass through these holes and through the non-woven layers, and one of ordinary skill in the art would have understood that laminates produced according to the methods of Coslett are not *necessarily* or *inevitably* breathable.

PO Resp. 44–45 (citing Ex. 2011 ¶ 75).

In Reply, Petitioner argues that “[a] person of skill in the art with [Coslett] before him or her would have known how to choose among materials and processes available in the year 2000 in order to create a disposable absorbent garment having a breathable bond.” Pet. Reply 8 (citing Ex. 1016, 99:12–15, 100:3–4, 101:14–19). Petitioner further points to the same disclosure of Coslett upon which we relied in our Institution Decision. *Id.* at 9 (citing Ex. 1004, 6:37–39). Petitioner argues, without citation to any additional evidence, that “[a] person of ordinary skill in the art would immediately understand that a trilaminate material in which the middle elastomeric layer melts at a lower temperature and does not contribute to the bond integrity must be either a hole vent bond or a fiber covered vent bond, and therefore breathable.” *Id.* at 10.

Although Petitioner does not cite to the Mr. Andrews’s Declaration on this point, he provides testimony that, in this instance, “the elastic material will disintegrate from the spot at which the ultrasonic bond is applied” and

that “it would be known that through the use of polypropylene as the non-woven layers and the elastic materials as provided in . . . Coslett . . . would result in the creation of all the bond types claimed in the ’761 Patent.” Ex. 1003 ¶¶ 25, 30. Beyond assertions that both the ’761 patent and Coslett disclose polypropylene as the material for the non-woven layers (*id.* ¶¶ 26–27) and that both the ’761 patent and Coslett disclose using a stretchable material having “appropriate stretch and return properties” for the elastic material (*id.* ¶¶ 28–29), Mr. Andrews does not provide other support or explanation for his testimony that the method of Coslett would result in the creation of all the bond types claimed in the ’761 patent.

Mr. Blevins, on the other hand, provides extensive testimony supporting his assertion that “one of ordinary skill could not conclude, based on the disclosure of Coslett, that the materials and process parameters of Coslett would necessarily or inevitably result in the creation of all of the bond types of the ’761 Patent.” Ex. 2011 ¶ 67; *see id.* ¶¶ 53–67. For example, Mr. Blevins testifies that “one of skill in the art would readily understand that each of these fiber types [disclosed for use for the first and second non-woven webs of Coslett] has different properties, and will therefore react differently when subjected to ultrasonic bonding.” *Id.* ¶ 56; *see also id.* ¶¶ 57–58 (regarding the effects methods of making the non-woven webs, and the particular characteristics thereof (such as thickness) would have on ultrasonic bonding). Mr. Blevins testifies similarly with respect to the elastomeric materials of Coslett. *See id.* ¶ 59. Mr. Blevins further testifies that Coslett does not disclose critical material properties (such as the thickness or toughness) or the necessary process parameters (such as pin height, shape of the bonding surface of the pins, the

gap between the ultrasonic bond roll and the horn, welding time, generator power, generator frequency, vibration amplitude, sonotrode width, or sonotrode length) and, therefore, one of skill in the art would not be able to determine the structure of the bond formed between the materials. *Id.*

¶¶ 61–63, 65. According to Mr. Blevins, Coslett also “does not disclose the structure of the resulting bond produced according to its methods.” *Id.* ¶ 64.

Mr. Blevins further testifies that one of ordinary skill in the art would have understood that “a trilaminate could be formed with an elastomeric film having a lower melting point than the outer nonwoven layers where the elastomeric film did not contribute to the bond integrity [as taught in Coslett (Ex. 1004, 6:37–39),] without the nonwoven layers bonding directly to each other *through an aperture* in the elastomeric film” as required by the claims. Ex. 2011 ¶ 66. In other words, Coslett’s teaching also “could refer to a laminate where the outer nonwoven layers are bonded with a softened elastomeric film between them.” *Id.*

Weighing the evidence presented by the parties, we credit Mr. Blevins’s testimony in this regard, and are not persuaded that Petitioner has shown that Coslett discloses that the ultrasonic bonding results in “an aperture [being] formed through the stretchable material . . . such that the aperture provides a breathable passage therethrough,” as claimed.¹⁸ Even if Petitioner established that apertures *may be* formed through the stretchable material during the ultrasonic bonding, that is not sufficient to establish

¹⁸ Although Petitioner relies on the film embodiments of Coslett, we note we also are not persuaded that the scrim embodiments of Coslett disclose this limitation, because the holes in the elastomeric scrim are pre-formed, and are not formed as a result of the ultrasonic bonding process. *See* Ex. 2011 ¶ 54.

inherency. *See Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 639 (Fed. Cir. 2011) (“The mere fact that a certain thing may result from a given set of circumstances is not sufficient.” (citation omitted)). Given Coslett’s failure to disclose such apertures expressly,¹⁹ Petitioner needed to do more than merely assume the ultrasonic bonding results in “an aperture [being] formed through the stretchable material” without explaining why this must be the case. Mr. Andrews’s testimony on this point is conclusory and not supported by additional evidence or explanation. *See* 37 C.F.R. § 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”).

Claim 1 further requires that that the ultrasonic bonding results in “the first material layer and the second material layer substantially, completely bond[ing] *through the aperture* at the one or more bond sites.” Because we are not persuaded that Petitioner has shown that Coslett discloses that the ultrasonic bonding results in “an aperture [being] formed,” we also are not persuaded that Petitioner has shown that Coslett discloses that the first

¹⁹ We note that although Coslett expressly discloses “first and second nonwoven webs of inelastic material ultrasonically *bonded directly to each other* at spaced intervals *through holes* in an elastomeric scrim sandwiched therebetween” (Ex. 1004, 7:13–15 (emphases added)), Coslett does not contain such express disclosure for embodiments utilizing a film instead of a scrim. We note, specifically, that the description of embodiments utilizing a film lacks both the “bonded *directly to each other*” and “*through holes* in [the layer] sandwiched therebetween” language found in the description of embodiments utilizing a scrim. *See, e.g., id.* at 7:39–42 (“The invention further extends to a laminated fabric comprising first and second nonwoven webs of inelastic material ultrasonically *bonded to each other* at spaced intervals with an *elastomeric film* sandwiched therebetween.”).

material layer and the second material layer are bonded “through the aperture.”

Accordingly, for the reasons discussed, we determine that Petitioner has not shown, by a preponderance of the evidence, that claim 1, or claims 2–7, 9, and 10 which depend therefrom, is anticipated by Coslett.

Independent claims 11 and 19 include limitations similar to those we found missing from Coslett with respect to claim 1. Accordingly, and for similar reasons, we also determine that Petitioner has not shown, by a preponderance of the evidence, that claims 11 and 19, or claims 12–15 which depend therefrom, are anticipated by Coslett.

D. Anticipation by Kielpikowski

Petitioner asserts that claims 1–19 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by Kielpikowski. Pet. 22–34. Patent Owner argues that Kielpikowski does not disclose all the features of the claims. PO Resp. 49–57. We have reviewed the entire record before us, including the parties’ contentions and supporting evidence presented during this trial. For the reasons explained below, we determine that Petitioner has not demonstrated, by a preponderance of the evidence, that claims 1–19 are unpatentable as anticipated by Kielpikowski.

1. Summary of Kielpikowski

Kielpikowski relates to a “method for making a breathable elastomeric nonwoven laminar fabric for use in a personal absorbent article.” Ex. 1005, 3:24–25, Abstract. As described in Kielpikowski, “the elastomeric laminar fabric produced by the present method may be incorporated into a personal absorbent article such as a diaper outer cover material or elastic leg and waist gathers.” *Id.* at 3:44–48.

Figures 16–18 of Kielpikowski are reproduced below.

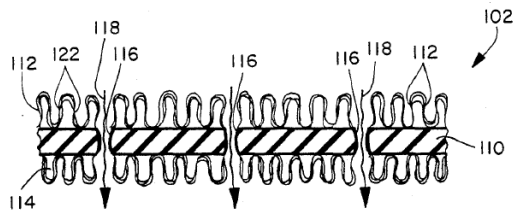


FIG. 16

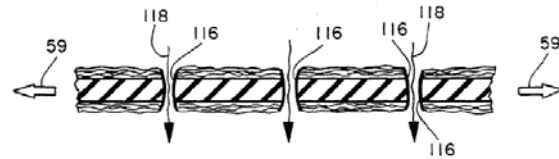


FIG. 17

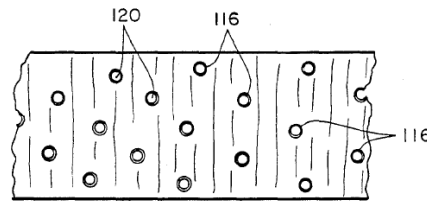


FIG. 18

Figures 16 and 17 show side elevational views of the breathable elastomeric nonwoven laminar fabric of Kielpikowski, in unstretched and stretched configurations, respectively, and Figure 18 shows a top plan of the fabric. *Id.* at 4:37–40. As described in Kielpikowski, the method includes “sandwiching a liquid impermeable and nonself-adhering elastomeric film or nonwoven carrier sheet 110 between at least a pair of nonwoven facing sheets 112, 114 and bonding the facing sheets 114 together” using, for example, “ultrasonically . . . generated bonds, through the carrier sheet [110] at spaced apart sites 116, thereby forming breathable apertures 120 through the carrier sheet which laminate the carrier and facing sheets together at the spaced apart sites 116.” *Id.* at 10:15–24. Kielpikowski describes that the carrier and facing sheets “can be bonded together while the carrier sheet is stretched.” *Id.* at 10:24–26, Fig. 17. Kielpikowski further describes that the “ultrasonically generated bonds 116 of the invention should be of sufficient strength to bond the facing sheets 112, 114 together through the []

elastomeric film 110 while simultaneously creating breathable apertures [120] through the film 110.” *Id.* at 10:47–52.

2. Analysis

Petitioner asserts that Kielpikowski discloses all elements of claims 1–19. Pet. 22–34. As re(in independent claim 1,²⁰ Kielpikowski discloses a method of forming a breathable cloth-like elastic nonwoven laminar fabric, including a pair of nonwoven facing sheets 112, 114 (the claimed first and second material layers) and elastomeric film or nonwoven carrier sheet 110 (the claimed elastic material for a stretchable material layer). Ex. 1005, 10:13–18; Pet. 22–23. As described in Kielpikowski, carrier sheet 110 is sandwiched between nonwoven facing sheets 112, 114. Ex. 1005, 10:13–18; Pet. 22–23. The layers are secured together by “autogenous bonds, shown by the arrows 118 [Figs. 16, 17, above], such as ultrasonically or thermally-generated bonds, through the carrier sheet 112 at spaced apart sites 116.” Ex. 1005, 10:18–21; Pet. 22–23. Kielpikowski also discloses that the bonding “form[s] breathable apertures 120 through the carrier sheet.” Ex. 1005, 10:21–22; Pet. 22–23.

Claim 1 further requires that the ultrasonic bonding results in “the first material layer and the second material layer substantially, completely bond[ing] *through the aperture* at the one or more bond sites.” (emphasis added). Based on the evidence available at institution, we considered Kielpikowski’s teaching that the facing sheets 112, 114 are bonded together through carrier sheet 110 and that breathable apertures 120 are formed through the carrier sheet (Ex. 1005, 10:47–52), and Mr. Andrews’s

²⁰ Again, we discuss claim 1 as representative in our analysis. Claims 11 and 19, however, have similar limitations.

testimony that multiple bond types (including the types recited in the claims of the '761 patent) would result through the use of polypropylene as the non-woven layers and the elastic materials provided in Kielpikowski (Ex. 1003 ¶¶ 27, 29, 30), sufficient to demonstrate a reasonable likelihood that Kielpikowski discloses the claimed bonding “through the aperture.” Inst. Dec. 20–21. We note, however, that this disclosure of Kielpikowski does not state expressly that nonwoven facing sheets 112, 114 are bonded with each other through the *aperture* formed in carrier sheet 110.

Upon consideration of the complete record as developed at trial, based on our construction of “through the aperture,” and for the reasons discussed below, we are not persuaded that Kielpikowski discloses bonding “through the aperture” as claimed. As discussed above in section II.B.3, we determine that the broadest reasonable interpretation of bonding of the first and second material layers “through the aperture,” in view of the Specification, requires that first and second material layers bond directly with each other at the aperture formed in the stretchable material layer. As also discussed, our construction of “through the aperture” does not encompass bonding occurring at a location of the stretchable material layer where no aperture is formed in the stretchable material layer (e.g., where the stretchable material layer exists between the first and second material layers).

As seen in Figures 16 and 17 of Kielpikowski (reproduced above), carrier sheet 110 (the stretchable material layer) exists between nonwoven facing sheets 112, 114 (the first and second material layers) at all areas of bonding. In other words, Kielpikowski does not show nonwoven facing sheets 112, 114 being bonded directly with each other at the aperture formed

in carrier sheet 110. We are not persuaded by Petitioner’s argument made at the oral hearing that “if you look at . . . Figure 17 [of Kielpikowski], you’ll see that dark line connects all the way up from the top layer to the bottom layer on Figure 17. They are clearly connecting the two nonwoven layers together.” Tr. 15:19–22. We find more credible and persuasive Patent Owner’s observation that

of course there is [a vertical line at the periphery of each aperture]. It’s the periphery of the aperture, and there’s a material on this side. There has to be a line there. This line is simply the boundary of the periphery of the aperture and the remaining material on each side of the aperture. Of course there’s a line there. There is no indication whatsoever in Kielpikowski that there is any direct bonding between these two outer layers.

Id. at 47:7–14. Instead, as Patent Owner notes, the “aperture in the elastic layer is the same size as or smaller than the aperture in the outer facing sheets” (PO Resp. 53).

We recognize the language in Kielpikowski stating that “ultrasonically generated bonds 116 of the invention should be of sufficient strength to bond the facing sheets 112, 114 together *through the [] elastomeric film 110* while simultaneously creating breathable apertures [120] through the film 110.” Ex. 1005, 10:47–52 (emphasis added); *see* Pet. 22–23; Tr. 17:22–18:6. However, based on the teachings of Kielpikowski as a whole, we agree with Patent Owner that, in this instance, “through” means “by means of,” as the facing sheets and carrier sheet are sandwiched together (i.e., each facing sheet is bonded to the carrier sheet). *See* PO Resp. 50–53 (citing Ex. 2011 ¶¶ 77–87; Ex. 2007 (alternatively defining “through” as “by means of”)).

At the oral hearing, Petitioner focused on Kielpikowski's disclosure regarding "autogenous bonds" to assert that "the facing sheets, the nonwovens are expressly disclosed as being bonded to each other in the Kielpikowski reference." Tr. 16:15–17:12. We disagree. The complete sentence to which Petitioner refers states:

A method for making such a breathable cloth-like elastic nonwoven laminar fabric comprises the steps of sandwiching a liquid impermeable and nonself-adhering elastomeric film or nonwoven carrier sheet 110 between at least a pair of nonwoven facing sheets 112, 114 and bonding the facing sheets 114 together by autogenous bonds, shown by the arrows 118, such as ultrasonically or thermally-generated bonds, through the carrier sheet 112 at spaced apart sites 116, thereby forming breathable apertures 120 through the carrier sheet which laminate the carrier and facing sheets together at the spaced apart sites 116.

Ex. 1005, 10:11–22. This disclosure is at best ambiguous regarding which specific layers are being "autogenous[ly] bond[ed]." Although Petitioner's reading of the sentence is one possible interpretation, this sentence could just as easily be read as teaching that facing sheets 112, 114 are each autogenously bonded with carrier sheet 110. The second reading more closely corresponds to the disclosure in the Figures of Kielpikowski. Further, in the Petition, Petitioner merely cites the above portion of Kielpikowski, asserting "Kielpikowski provides the elements of claim 1 in the passage above and also as illustrated in Figures 16–18," without further analysis or explanation. See Pet. 22–23; 37 C.F.R. § 42.22(a)(2) (A Petition for *inter partes* review "must include . . . [a] full statement of the reasons for the relief requested, including a detailed explanation of the evidence.").

Finally, for reasons similar to those discussed above with respect to Mr. Andrews's and Mr. Blevins's testimony regarding the types of bonds

one of skill in the art would expect to be created by Coslett, we credit Mr. Blevins's testimony with respect to the types of bonds one of skill in the art would expect to be created by Kielpikowski as well. *Compare* Ex. 2011 ¶¶ 55–59, 80–84, 86–87 (Mr. Blevins's testimony), *with* Ex. 1003 ¶¶ 26–30 (Mr. Andrews's testimony). Specifically, we credit Mr. Blevins's testimony that “[w]ithout any disclosure of at least the foregoing material properties and ultrasonic bonding process parameters or a clear written description of the structure of the bonds formed by its methods, one of ordinary skill would have had to look to the figures of Kielpikowski to determine the structure of bonds formed according to its methods.” Ex. 2011 ¶ 83.

Weighing the evidence presented by the parties, we are not persuaded that Petitioner has shown that Kielpikowski discloses that the ultrasonic bonding results in “the first material layer and the second material layer substantially, completely bond[ing] *through the aperture* at the one or more bond sites,” as claimed. Accordingly, for the reasons discussed, we determine that Petitioner has not shown, by a preponderance of the evidence, that claim 1, or claims 2–10 which depend therefrom, is anticipated by Kielpikowski. Independent claims 11 and 19 include a limitation similar to that we found missing from Kielpikowski with respect to claim 1. Accordingly, and for similar reasons, we also determine that Petitioner has not shown, by a preponderance of the evidence, that claims 11 and 19, or claims 12–18 which depend therefrom, are anticipated by Kielpikowski.

III. MOTION TO EXCLUDE

Patent Owner seeks to exclude Exhibits 1002, 1009, and 1015 in their entirety, and portions of Exhibit 1003. Mot. Exclude 1. We address each of these exhibits in turn.

Exhibits 1002 and 1009

Exhibit 1002 is the File History of European Patent Application EP01939659.7, the European counterpart of the '761 patent. Exhibit 1009 is the File History of European Patent EP0494941. Patent Owner moves to exclude each of these exhibits as “irrelevant, confusing, and of minimal probative value under FRE 401, 402, and 403.” Mot. Exclude 2, 4. Patent Owner additionally moves to exclude Exhibit 1009 as “inadmissible hearsay under FRE 801 and 802.” *Id.* at 4. We have not relied on either of these exhibits in rendering our Final Written Decision. Accordingly, Patent Owner’s Motion to Exclude Exhibits 1002 and 1009 is *dismissed* as moot.

Exhibit 1003

Exhibit 1003 is Mr. Andrews’s Declaration. Patent Owner moves to exclude portions of the declaration “to the extent that it offered evidence regarding whether non-instituted grounds invalidated the '761 Patent as irrelevant, confusing, and of minimal probative value under FRE 401, 402, and 403.” *Id.* at 3. Specifically, Patent Owner moves to exclude the discussion of prior art references which were declined as grounds of institution, in paragraphs 9, 12, 13, 15, 16, 20, 21, 22, 27, 29, and 30 of Exhibit 1003. We have not relied on these portions of Mr. Andrews’s Declaration in rendering our Final Written Decision. Accordingly, Patent Owner’s Motion to Exclude portions of Exhibit 1003 addressing non-instituted prior art references is *dismissed* as moot.

Exhibit 1015

Exhibit 1015, which was an excerpt of selected portions of the deposition transcript of Mr. Andrews, was previously expunged. *See*

Paper 71. Accordingly, Petitioner's Motion to Exclude Exhibit 1015 is *dismissed* as moot.

IV. CONCLUSION

For the foregoing reasons, we determine that Petitioner has not demonstrated, by a preponderance of the evidence, that claims 1–7, 9–16, and 19 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by Coslett. We also determine that Petitioner has not demonstrated by a preponderance of the evidence that claims 1–19 are unpatentable under 35 U.S.C. § 102(b) as being anticipated by Kielpikowski. Patent Owner's Motion to Exclude is *dismissed* as moot.

V. ORDER

Accordingly, it is:

ORDERED that claims 1–19 of U.S. Patent No. 6,994,761 B2 have not been shown to be unpatentable by a preponderance of the evidence;

FURTHER ORDERED that Patent Owner's Motion to Exclude is *dismissed*; and

FURTHER ORDERED that, because this is a Final Written Decision, parties to the proceeding seeking judicial review of the decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

IPR2016-00906
Patent 6,994,761 B2

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