

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Fitesa Simpsonville, Inc.
Petitioner,

v.

The Proctor & Gamble Company,
Patent Owner.

Case IPR: 2023-01451
U.S. Patent No. 11,326,276

**PETITIONER'S AUTHORIZED REPLY
TO PATENT OWNER'S PRELIMINARY RESPONSE**

The Board should institute after considering § 325(d). First, Petitioners' arguments and cited references are not substantially the same as during prosecution because they were either not considered by the Examiner or are used for a different purpose. For example, an important anticipatory reference (also used for obviousness), McDowall, was never before the Examiner and is not substantially the same as art considered. Second, the Examiner erred in allowing the claims.

In evaluating arguments under § 325(d), the Board uses

[a] two-part framework: (1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and (2) if either condition of first part of the framework is satisfied, whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.

Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential).

A. Petitioners' Arguments and References Relied Upon Are Not Substantially the Same

In evaluating Patent Owner's ("P&G") 325(d) arguments, it is critical to first understand how references were used during examination and how Petitioner uses references for a different purpose. As P&G notes, the Examiner cited Schwarz '616 during prosecution of both the '276 patent and its grandparent, the '474 patent, along with references, including Anderson and Pomplun, that taught "knife-edge" meltblown dies for preparing a coform nonwoven, and argued it would be

obvious to modify these “knife edge” references for use with the meltblown die of Schwarz ’616.

P&G traversed such rejections by arguing that “knife-edge” meltblown dies result in the formation of microfibers, which is undesirable. For the ’474 patent, P&G argued the proposed combination “would render Anderson’s die inoperable for its intended purpose; namely to have converging gas streams converge upon polymer streams exiting its filament-forming holes to break the polymer streams into microfibers.” Ex. 1013, p. 35 (emphasis added). For the ’276 patent, P&G argued that Schwarz ’616 cannot be combined with Anderson or Pomplun because “Anderson teaches the importance of its converging air flows that results in the breaking of its polymer streams into discontinuous microfibers” and that “Pomplun fails to overcome this deficiency.” Ex. 1028, p. 147 (emphasis added). The Examiner subsequently withdrew rejections based on the combination of Schwarz ’616 with Anderson or Pomplun. *Id.* at p. 80.

P&G’s arguments that “knife-edge” dies of Anderson or Pomplun could not be combined with Schwarz ’616 because it would result in discontinuous microfibers was critical in allowance of both the ’474 and ’276 patents. In contrast, the references relied on by Petitioner are different as they teach continuous meltblown fibers and do not rely on “knife-edge” meltblown dies.

P&G attempts to construe the art cited by the Petitioner as being limited to

teaching knife-edge dies and therefore suffers the same allegedly undesirable results of combining Schwarz or Fabbriante with Anderson. That is, P&G contends that if a reference mentions a knife-edge die for preparing meltblown fibers, it must be cumulative of Anderson or Pomplun. That is incorrect.

1. McDowall is Not Substantially the Same as Art Cited in Prosecution

It is inappropriate to consider a reference that teaches each and every element of a claim as being cumulative because the examiner did not use McDowall for an anticipation rejection. See *Samsung Electronics Co., Ltd., v. Netlist, Inc.*, IPR2023-00847, Paper 13 at 12 (PTAB Dec. 12, 2023) (finding arguments presented in IPR were different from those in prosecution because the argument and evidence presented in IPR was for an obviousness challenge rather than anticipation challenge as during prosecution). Second, McDowall is fundamentally different from the prior art cited during examination.

McDowall (Ex. 1003) was never considered by the Examiner in the prosecution of the '276 patent or its family. Nor is it cumulative. As discussed in Dr. Bhat's Declaration, McDowall teaches each and every element of Claim 1 of the '276 patent. Ex. 1015, ¶ 150. It is inappropriate to consider a reference that teaches each and every element of a claim as being cumulative because the examiner did not use McDowall for an anticipation rejection. Second, McDowall is fundamentally different from the prior art cited during examination.

P&G extensively argued that Anderson teaches discontinuous microfibers, and it is this argument that the Examiner found persuasive in withdrawing the rejections based on Anderson and Pomplun. P&G now argues McDowall is cumulative of Keck, Anderson, or Pomplun by misconstruing McDowall as only teaching meltblown fibers prepared with a “knife-edge” die.

P&G’s characterization of McDowall is misleading because it does not consider the teachings of McDowall as a whole. McDowall anticipates at least claim 1 of the ’276 patent and is different from Anderson and Pomplun because it teaches a coform process having continuous filaments (Ex. 1003, p. 4, lines 19-20, p. 6, lines 1-8, and p. 10), and a coform process that utilizes a non-knife-edge spinning die. See the examples of McDowall, which generally relate to a process of injecting a stream containing particles, such as pulp fibers, into a stream of continuous filaments prepared from a spunbond die, which is a non-knife-edge die. See Ex. 1003, page 6, lines 1-4, page 8, lines 1-4, and page 15, line 21 – page 6, line 6. For at least these reasons, McDowall is not cumulative of the art cited in the prosecution of the patent family of the ’276 patent.

There is no support for P&G’s position that McDowall is limited to the use of a knife-edge die. Indeed, as the examples of McDowall explicitly teach a coform process that does not include a knife-edge die, P&G’s interpretation and reliance on McDowall are in direct opposition to the teachings of McDowall.

2. Reliance by Petitioner on Schwarz '616 and '223 patents is Not Cumulative

P&G argues that reliance on any one of the Schwarz patents (Schwarz '223 and Schwarz '616) is merely cumulative as Schwarz '616 was considered during prosecution of the '474 and '276 patents.

Petitioner disagrees. First, there is no evidence that Schwarz '223 was ever considered by the Examiner. P&G asserts that the Examiner must have been aware of Schwarz '223 because he examined the '223 patent. This is mere speculation on part of P&G as nearly a decade had passed between issuance of the '223 patent and the first office action in the '474 patent. As the Examiner did not cite the '223 patent, it is impossible to know whether he recalled the '223 patent.

Second, Schwarz '223 includes additional teachings with respect to improvements in fiber tenacity and high production rates that are achieved using the Schwarz die. As explained in Dr. Bhat's Declaration (Ex. 1015), these teachings provide a strong motivational basis for using the Schwarz dies in a coform process. See Ex. 1015, ¶¶ 118 and 200-201.

Further, the issues considered during prosecution between the Examiner and P&G are fundamentally different than the issues presented in the Petitioner's Request. As discussed previously, P&G distinguished Anderson by arguing that Anderson required discontinuous fibers and use of a knife-edge die, and therefore combining Schwarz '616 with Anderson or Pomplun would result in these

references being unsatisfactory for their intended purposes. Such arguments are not relevant to the issues presented by the Petitioner in the Request.

As discussed previously, McDowall teaches a process of preparing a coform with continuous filaments using a non-knife-edge die. As such, P&G's arguments in overcoming rejections based on Schwarz '616 with any one of Anderson or Pomplun are not relevant to the grounds of invalidity presented by the Petitioner. The unique grounds of obviousness based on the combination McDowall with any one of the Schwarz patents was never considered or addressed during prosecution of the applications that led to the '474 and '276 patents. That is, the Examiner did not consider McDowall or a similar reference (a reference that teaches continuous fibers and a coform process utilizing a non-knife edge die) in combination with any one of the Schwarz patents. Determining the cumulative nature of references involves examining allegedly overlapping disclosure, with particular focus on the material relied upon. *Meta Platforms, Inc. v. Immersion Corporation*, Paper 9 at 42 (December 7, 2023). Here, Petitioner presents new issues that were not considered in the prosecution of the '474 or '276 patents so the combination of McDowall with Schwarz '616 or Schwarz '223 is not cumulative. See *Id.*, at 43 (finding different prior art, combined in different ways is not cumulative).

3. Keck is Not Cumulative

Turning now to Keck, Petitioner also submits that the combination of Keck is not cumulative when considered in combination with any one of the Schwarz patents as the issues presented in Petitioner's Request were never addressed during the prosecution of either the '474 or '276 patents. P&G narrowly characterizes Keck as teaching a knife-edge die and as such, as being cumulative to the teachings of Anderson and Pomplun. Such a characterization is misleading.

Keck does disclose that exemplary coform materials are disclosed in Anderson and also describes an exemplary process that utilizes a meltblown die having two streams of gas that converge. However, the teachings of Keck are not limited to the use of a knife-edge die. Keck further states that the term meltblown includes both continuous and discontinuous fibers, and that the term "meltblown" covers "other processes in which a high velocity gas (generally air) is used to aid in the formation of the filaments, such as melt spraying or centrifugal spinning." Ex. 1004, ¶ [0035]. Accordingly, Keck explicitly teaches preparation of melt-blown fibers that are continuous and can be prepared using a non-knife-edge melt-blown die. The teachings of Keck, when considered as a whole, contradict P&G's narrow interpretation that Keck only teaches a knife-edge die.

In view of this understanding of the teachings of Keck, the issues raised in Petitioner's Request with respect to the combination of Keck with Schwarz '616, Schwarz '223, or Fabbriante (discussed below) were not considered during

prosecution of the '474 and '276 patents. As the issues presented by the Petitioner in the Request were never considered, the combination of Keck with any one of Schwarz '616, Schwarz '223, or Fabbriante, and the grounds of invalidity based on these combinations is not cumulative to what was argued during the prosecution of the '474 and '276 patents.

4. Fabbriante is not Cumulative

U.S. Patent No. 6,114,017 to Fabbriante was never cited during the prosecution of the '276 patent or any of its family members. Contrary to P&G's assertions, Fabbriante's teachings are not cumulative of the prior art considered in the prosecution of the '474 or '276 patents.

As in the discussion above, the issues raised by the Petitioner in the Request were not considered during the prosecution of the '474 and '276 patents. P&G's arguments that the combination of Keck in view of Fabbriante is cumulative of the rejections based on Anderson or Pomplun in combination with Schwarz '616 rely on a mischaracterization of both Keck and Fabbriante.

As noted previously, P&G overcame the rejections based on Anderson and Pomplun by arguing that these references required the formation of discontinuous fibers (Anderson) or converging streams of gas (Anderson and Pomplun) to be operative. However, the teachings of Fabbriante and/or Keck are not limited to discontinuous fibers or the use of a knife-edge meltblown die. Again, Keck

specifically teaches the fibers may be continuous, contrary to P&G's arguments made in prosecution, and that the term "meltblown" includes other non-knife-edge processes of preparing meltblown fibers. See Ex. 1004, ¶ [0035]. As such, P&G's arguments that combining Fabbriante and Keck is cumulative to the rejections based on Anderson or Pomplun is without merit.

Petitioner further submits that Fabbriante provides teachings not presented in the Schwarz patents. Notably, Fabbriante teaches strong motivational factors for use of Fabbriante's process for preparation of absorbent articles, such as wipers. See Ex. 1015, ¶¶ 402-406 (discussing improvements in strength, throughput, and combination with cellulose fibers). In particular, Fabbriante describes that the meltblown fibers described therein may be used in combination with cellulose fibers and may be used in a wiper application. See Ex. 1018, col. 7, lines 60-65, Abstract. As explained by Dr. Bhat, this teaching provides motivation to use Fabbriante's multirow melt blown die in a process to prepare a coform nonwoven, such as the coform process disclosed in Keck. See Ex. 1015, ¶ 406.

Petitioner also notes that P&G includes an incorrect statement regarding the teachings of Fabbriante. On page 41 of its POPR, P&G states that the die of Fabbriante "introduces air streams at angles of not less than 10° relative to the polymer filament." (Citing Ex. 1018, column 5:24-42 of Fabbriante). This is not correct. Fabbriante specifically teaches that the axis of the die holes and the air

nozzles varies between 0° and 60°. See Ex. 1018, column 5, lines 43-46. In the examples of Fabbicante, the air nozzles were placed such that their axes were parallel to the axis of the die hole. See *Id.* at column 8, lines 65-67.

Accordingly, the issues raised in the combination of Keck and Fabbicante are substantially different than those presented in the prosecution of the '474 patent and the '276 patent. Neither Fabbicante nor the combination of Keck and Fabbicante is cumulative of the references cited in prosecution.

B. The Examiner Committed a Material Error During Prosecution

By failing to combine Schwarz '616 with different coform art that taught continuous meltblown filaments and other methods of preparing coform fabrics, the Examiner committed an error that was material to the patentability of the claims. Specifically, the examination focused narrowly on “old” coform art (Anderson and Pomplun) and did not consider more recent prior art, such as Keck, that taught melt blown coform fabrics can include continuous filaments and can be prepared using non-knife-edge dies (see discussion above).

When P&G argued that Anderson requires short fibers to be operative and/or converging air, the Examiner should have immediately pivoted his analysis to prior art references, such as Keck, that showed that P&G's arguments presented in prosecution were without merit. This was error committed by the Examiner during prosecution of both the '474 and '276 patents that was material to patentability.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this **Petitioner's Authorized Reply to Patent Owner's Preliminary Response**, excluding the parts of the brief exempted by 37 C.F.R. § 42.24, complies with the page limits provided by the Board in Exhibit 3001, which stated: "Petitioner is authorized to file a Preliminary Reply, limited to addressing the 325(d) arguments raised by Patent Owner, not exceeding 10 pages in length."

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to 37 C.F.R. § 42.6(e), a copy of this **Petitioner's Authorized Reply to Patent Owner's Preliminary Response** has been electronically filed using P-TACTS on February 9, 2024 and served electronically on counsel of record for Patent Owner:

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