

***THIS OPINION WAS NOT WRITTEN FOR PUBLICATION***

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ROBERT BABROWICZ

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Appeal No. 1996-4036  
Application 08/078,479<sup>1</sup>

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ON BRIEF

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Before JOHN D. SMITH, WARREN and SPIEGEL, *Administrative Patent Judges*.

WARREN, *Administrative Patent Judge*.

*Decision on Appeal and Opinion*

This is an appeal under 35 U.S.C. § 134 from the decision of the examiner finally rejecting claims 1 through 26, which are all of the claims in the application.<sup>2</sup>

We have carefully considered the record before us, and based thereon, find that we cannot sustain either of the grounds of rejection of claims 1 through 26 under 35 U.S.C. §§ 102(a) or 102(b)

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<sup>1</sup> Application for patent filed June 22, 1993. According to appellant, this application is a continuation-in-part of application 07/907,725, filed July 2, 1992, now abandoned.

<sup>2</sup> See specification, pages 20-23, the amendment of March 24, 1994 (Paper No. 5) and the amendment of September 12, 1994 (Paper No. 7).

over EPA '988 and over Ferguson, respectively (answer, pages 3 and 4).<sup>3</sup>

It is well settled that the examiner must carry the initial burden of establishing a *prima facie* case of anticipation by showing that all of the elements of the claimed invention are described in a single reference sufficiently to have placed a person of ordinary skill in the art in possession of it. *In re Spada*, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990). “[W]hen the PTO shows sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not.” *Spada*, 911 F.2d at 709, 15 USPQ2d at 1658.

Appellant submits that the references do not anticipate the appealed claims because while the films disclosed therein comprise an ethylene vinyl acetate copolymer having a percent by weight vinyl acetate which falls within the range of “nine to twenty percent by weight” specified in appealed claim 1, there is no teaching in either reference that the ethylene vinyl acetate copolymers further meet the specified limitation of a “narrow molecular weight distribution defined by a polydispersity ratio ( $M_z/M_n$ ) of 5 to 10 wherein the number average molecular weight ( $M_n$ ) is between 15,000 and 30,000” (brief, page 11). Appellant points out that there is evidence in the specification that ethylene vinyl acetate copolymers having a vinyl acetate content falling within the claimed range “do not all fall within the narrow molecular weight distribution range as defined in the claims,” relying on the “comparative examples” (brief, page 12). We observe similar disclosure to the same effect at page 10 of the specification. Appellant alleges that “neither of these references discloses the advantages of the invention as now claimed” (brief, page 13).

The examiner has taken the position that since the vinyl acetate content of the ethylene vinyl acetate copolymers of the references fall within the range specified in claim 1, “the narrow molecular weight distribution would be inherent” in the copolymers, and has required appellant to “provide convincing factual evidence to the contrary or a side-by-side comparison of” the claimed and prior art film to establish that the ethylene vinyl acetate copolymer taught by the references “is different from that

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<sup>3</sup> The references relied on by the examiner with respect to the grounds of rejection are listed at page 2 of the answer. We refer to these references in our opinion by the name associated therewith by the examiner.

recited in the instant claims” (answer, pages 4, 5 and 6).

We cannot agree with the examiner’s position for the reasons advanced by appellant, and add the following for emphasis. It clear from evidence in the specification that ethylene vinyl acetate copolymers with the same or similar vinyl acetate content do not necessarily have the same “polydispersity ratio” and there is no other evidence in the record that establishes that the ethylene vinyl acetate copolymers forming the claimed film reasonably appear to be identical to the ethylene vinyl acetate copolymers forming the film disclosed in the prior art. Accordingly, on this record, the examiner has not made out a *prima facie* case of anticipation by establishing a “sound basis for believing that the products of the applicant and the prior art are the same,” and thus the burden has not shifted to appellant to present additional evidence “that they are not.” *Spada, supra*.

The examiner’s decision is reversed.

*Reversed*

JOHN D. SMITH	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	
CHARLES F. WARREN	)	BOARD OF PATENT
Administrative Patent Judge	)	APPEALS AND
	)	INTERFERENCES
	)	
	)	
CAROL A. SPIEGEL	)	
Administrative Patent Judge	)	

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