

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 31

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte SERGE CADIEUX and YVON LEVESQUE

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Appeal No. 96-1410  
Application No. 08/321,384<sup>1</sup>

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ON BRIEF

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Before STAAB, McQUADE, and NASE, Administrative Patent Judges.

NASE, Administrative Patent Judge.

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<sup>1</sup> Application for patent filed October, 11, 1994. According to the appellants, the application is a continuation of Application No. 08/161,995, filed December 2, 1993, now abandoned, which was a continuation of Application No. 07/979,369, filed November 20, 1992, now abandoned, which was a continuation of Application No. 07/851,270, filed March 13, 1992, now abandoned, which was a continuation of Application No. 07/601,491, filed October 22, 1990, now abandoned, which was a continuation of Application No. 07/389,701, filed August 4, 1989, now abandoned.

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DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 13, 15 through 17 and 19, which are all of the claims pending in this application.

We AFFIRM-IN-PART.

BACKGROUND

The appellants' invention relates to a unitized absorbent structure. Claim 1 is representative of the subject matter on appeal and a copy of claim 1 is attached to this decision.

The prior art references of record relied upon by the examiner as evidence of anticipation under 35 U.S.C. § 102(e) and/or obviousness under 35 U.S.C. § 103 are:

Levesque	4,507,122	Mar. 26, 1985
Morris	4,755,413	July 5, 1988
Meyer et al. (Meyer)	4,798,603	Jan. 17, 1989 (filed Oct. 16, 1987)

Claims 1 through 6, 8, 10, 13, 15 through 17 and 19 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Meyer.

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Claim 9 stands rejected under 35 U.S.C. § 103 as being unpatentable over Meyer.

Claim 7 stands rejected under 35 U.S.C. § 103 as being unpatentable over Meyer in view of Morris.

Claims 11 and 12 stand rejected under 35 U.S.C. § 103 as being unpatentable over Meyer in view of Levesque.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the § 102 (e) and the § 103 rejections, we make reference to the final rejection (Paper No. 20, mailed January 23, 1995) and the examiner's answer (Paper No. 27, mailed November 6, 1995) for the examiner's complete reasoning in support of the rejections, and to the appellants' brief (Paper No. 26, filed September 11, 1995) for the appellants' arguments thereagainst.

#### OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art references, and to the

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respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

We will not sustain the examiner's rejection of claim 1 as being anticipated by Meyer. In that regard, we agree with the appellants that the "positive density gradient" recited in claim 1 is not anticipated by Meyer.

Claim 1 recites, inter alia,

A unitized absorbent structure having respective cover, transfer, and reservoir layers, . . .  
[wherein] said respective layers have a predetermined positive density gradient from the cover layer to the reservoir layer.

Thus, claim 1 requires both a predetermined positive density gradient from the cover layer to the transfer layer and a predetermined positive density gradient from the transfer layer to the reservoir layer.

Initially, we note that the examiner's rationale for this rejection in the final rejection is different from the rationale set forth in the examiner's answer.

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We turn first to the rejection of claim 1 as being anticipated by Meyer for the reasons set forth by the examiner in the final rejection. In the final rejection, the examiner stated

The component layers of Examples 2 and 3 (columns 15 and 17) have a positive density gradient from the topsheet layer to the absorbent pad, because the bulk density of the topsheet layer is computed to be about 0.097 g/cc (column 15, lines 13-16), the bulk density of the transport layer is around 0.101 g/cc (column 15, lines 37-39), and the bulk density of the absorbent pad is about 0.15 g/cc (column 15, lines 26-27). [pp. 2-3]

Meyer discloses in Example 7 (column 17) that an absorbent article was constructed comprising the transport layer of Example 3 (column 15) interposed between the topsheet and the absorbent pad described in Example 2 (column 15). Example 3 disclosed a transport layer formed from a powder-bonded-carded-web having a basis weight of about 30 g/yd<sup>2</sup>, a bulk thickness of about 0.014 inch and a bulk density of approximately 0.10 g/cc. Example 2 disclosed a topsheet layer composed of bilobal polypropylene fibers spunbond to form a web having a bulk thickness of about 0.011 inch and a basis weight of about 0.8 oz/yd<sup>2</sup>. In addition, the absorbent pad in Example 2 was composed of about 36 grams of woodpulp fluff and about 5 grams of polyacrylate superabsorbent polymer. The absorbent pad had a bulk thickness of approximately 0.24 inch and a bulk density of about 0.15 g/cc.

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Thus, the issue presented by this rationale is whether Example 7 of Meyer provides a predetermined positive density gradient from the topsheet layer to the transport layer.

We agree with the appellants' argument (brief, pp. 4-6) that the disclosure in Examples 2, 3 and 7 of Meyer does not clearly disclose a predetermined positive density gradient from the topsheet layer to the transport/transfer layer. The examiner computed the bulk density of the topsheet layer to be about 0.097 g/cc from Meyer's disclosure that the topsheet has a bulk thickness of about 0.011 inch and a basis weight of about 0.8 oz/yd<sup>2</sup>. However, we agree with the appellants that this computed bulk density is not scientifically accurate since the computed bulk density can only be accurate to one significant figure. Thus, when the examiner's computed bulk density of about 0.097 g/cc is rounded to one significant figure, the resulting bulk density of about 0.1 g/cc is the same as the disclosed bulk density of the transport/transfer layer. Accordingly, it is our opinion that the limitation "said respective layers have a predetermined positive density gradient from the cover layer to the reservoir layer" of claim 1 is not anticipated by Examples 2, 3 and 7 of Meyer.

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Next we turn to the rationale for the rejection of claim 1 as being anticipated by Meyer as set forth by the examiner in the examiner's answer. In the examiner's answer, the examiner stated

Based upon preferred ranges, Meyer et al. set forth preferred embodiments in which the density of the transfer layer is, in some instances, as high as 0.12 g/cc (column 7, lines 9-13). However, in any preferred embodiment, the density of the reservoir layer is no lower than about 0.15 g/cc, because the preferred basis weight is about 800 g/m<sup>2</sup> and the bulk thickness ranges from 0.17 to 0.21 inches (column 5, lines 15-21), and the density of the cover layer is no greater than about 0.11 g/cc, because the preferred basis weight is about 0.8 ounces/yd<sup>2</sup> and the preferred bulk thickness ranges from 0.010 to 0.012 inches (column 4, lines 41-46). Therefore, numerous embodiments in the preferred realm defined by Meyer et al. possess a positive density gradient from the cover layer to the reservoir layer. [p. 2]

We will not support this rationale for the rejection of claim 1. For this rationale for the rejection under 35 U.S.C. § 102(e) to have been proper, Meyer must clearly and unequivocally disclose the claimed subject matter without any need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of Meyer. Such picking and choosing may be entirely proper in the making of a 35 U.S.C. § 103, obviousness rejection, where the applicant must be afforded an opportunity to rebut with objective evidence any

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inference of obviousness which may arise from the similarity of the subject matter which he claims to the prior art, but it has no place in the making of a 35 U.S.C. § 102, anticipation rejection. See In re Arkley, 455 F.2d 586, 587, 172 USPQ 524, 526 (CCPA 1972). It is our opinion that Meyer does not clearly and unequivocally disclose the claimed subject matter without any need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of Meyer. Meyer does not disclose selecting the density of the transport/transfer layer as 0.12 g/cc. Meyer actually discloses the preferred density of the transport/transfer layer to be within the range of about 0.08-0.12 g/cc (column 7, lines 9-13). Thus, the density of the preferred transport/transfer layer can be lower than the density of the topsheet layer. Accordingly, Meyer does not disclose a predetermined positive density gradient from the topsheet layer to the transport/transfer layer.

For the reasons stated above, we will not sustain the examiner's rejection of independent claim 1, and dependent claims 2 through 6, 8, 10, 13 and 15 through 17, under 35 U.S.C. § 102(e) as being anticipated by Meyer.

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Claims 7, 9, 11 and 12, which depend from claim 1, have been rejected under 35 U.S.C. § 103 as being unpatentable over Meyer alone or with additional prior art. With regard to the question of obviousness of these claims, we conclude that the examiner has not presented any evidence<sup>2</sup> to support the conclusion that it would have been obvious to one of ordinary skill in the art to modify Meyer to provide a positive density gradient from the topsheet layer to the transport/transfer layer. Accordingly, the examiner's rejection of claims 7, 9, 11 and 12 under 35 U.S.C. § 103 is also reversed.

Lastly, we turn to the rejection of claim 19 as being anticipated by Meyer. We will sustain this rejection of claim 19, noting simply that the appellants' argument that Meyer does not disclose the "positive density gradient" is not germane to claim 19 since such a limitation is not recited in this claim and that the appellants have not otherwise contested the correctness of this rejection.

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<sup>2</sup> The conclusion that the claimed subject matter is obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

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CONCLUSION

To summarize, the decision of the examiner to reject claims 1 through 6, 8, 10, 13 and 15 through 17 under 35 U.S.C. § 102(e) is reversed; the decision of the examiner to reject claims 7, 9, 11 and 12 under 35 U.S.C. § 103 is reversed; and the decision of the examiner to reject claim 19 under 35 U.S.C. § 102(e) is affirmed.

No period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

LAWRENCE J. STAAB	)	
Administrative Patent Judge	)	
	)	
	)	
	)	
	)	BOARD OF PATENT
JOHN P. McQUADE	)	APPEALS
Administrative Patent Judge	)	AND
	)	INTERFERENCES
	)	
	)	
	)	
JEFFREY V. NASE	)	
Administrative Patent Judge	)	

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AUDLEY A CIAMPORCERO JR  
JOHNSON AND JOHNSON  
ONE JOHNSON AND JOHNSON PLAZA  
NEW BRUNSWICK , NJ 08933-7003

APPENDIX

1. A unitized absorbent structure having respective cover, transfer, and reservoir layers, characterized in that:

a) at least two of said respective layers are in physical contact with one another such that fluid transfer is promoted therebetween;

b) said respective layers have a predetermined positive density gradient from the cover layer to the reservoir layer;

c) each of said layers has preselected fluid retention and transfer capacity;

d) said cover and transfer layers tend to promote transfer to the next subsequent layer in preference to dispersion of fluid over their length and breadth, while said reservoir layer tends to promote dispersion and retention of fluid throughout its length and breadth,

e) said transfer layer comprises hydrophilic material, and

f) said fluid reservoir layer has a pore size distribution in the wet state such that between about 90% and 100% of the pores are less than 300 Fm in radius and about between 0% and 10% of the pores are greater than 300 Fm in radius.

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APJ NASE

APJ McQUADE

APJ STAAB

DECISION: **AFFIRMED-IN-PART**

Prepared By: Delores A. Lowe

**DRAFT TYPED:** 02 Oct 97  
1st Rev. 10 Oct 97

**FINAL TYPED:**

**3 MAN CONF**