

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VINCENT HERI BARRE, JEFF NAIM,
MICHAEL ALLEN McLEOD and LAYNE LUMAS

Appeal 2008-5897
Application 10/813,513
U.S. Patent Publication 2005/0249900
Technology Center 1700

Decided: October 30, 2008

Before: FRED E. McKELVEY, *Senior Administrative Patent Judge*,
and RICHARD E. SCHAFER and JAMES T. MOORE, *Administrative
Patent Judges.*

McKELVEY, *Senior Administrative Patent Judge.*

DECISION ON APPEAL

1 **A. Statement of the case**

2 Fina Technology Inc. ("**Fina**"), the real party in interest, seeks review
3 under 35 U.S.C. § 134(a) of a final rejection of claims 2-12, 15-19 and 24-27

1 as being unpatentable (1) over the prior art, (2) for failure to comply with the
2 written description requirement and (3) as being indefinite.

3 In view of our disposition of the appeal, it is not necessary to list or
4 otherwise discuss the prior art.

5 We have jurisdiction under 35 U.S.C. § 6(b).

6 We affirm the written description and indefinite rejections.

7 **B. Findings of fact**

8 The following findings of fact are believed to be supported by a
9 preponderance of the evidence. References to the specification are to U.S.
10 Patent Publication 2005/0249900. To the extent that a finding of fact is a
11 conclusion of law, it may be treated as such. Additional findings as
12 necessary may appear in the Discussion portion of the opinion.

13 The invention

14 The present invention relates to molded polymer articles and methods
15 of making same. Specification, ¶ 0002.

16 The polymer article of the Fina invention includes (1) an injection
17 molded substrate and, adherent thereto, (2) a polymer film. The injection
18 molded substrate is prepared using a polymer selected so that adhesion
19 occurs with the film under injection molding temperature and pressure
20 conditions. The polymer used to prepare the substrate is also selected to
21 have the physical properties necessary to meet the specifications of the
22 items being molded. For example, if the object being molded is a milk jug,
23 the polymer used to prepare the milk jug must have the dimensional
24 stability, impact resistance, and cold temperature fracture resistance to be
25 useful for preparing a milk jug. Specification, ¶ 0024.

1 The polymer film of the method of the Fina invention is selected to be
2 thermally bonded to the injection molded substrate under injection molding
3 temperature and pressure conditions. According to Fina, thermally bonding
4 (or heat sealing) is a process wherein two materials are brought together at
5 a temperature wherein one or both of the materials become tacky and
6 adhere one to another. Further according to Fina, the bond between the two
7 materials generally strengthened when the temperature of the two materials
8 is lowered. The polymer film is also selected to impart some desirable
9 property to surface of the injection molded substrate. For example,
10 it may be necessary to further attach a label to the injection molded
11 substrate and it may be desirable to use heat sealing to do so. A polymer
12 film could be selected that would facilitate such a subsequent heat sealing.
13 For example, the present invention can be used with film laminates such as
14 FLUOREX® Exterior film laminates that are said to be described at:

15 <http://www.paintfilm.com/pdf/techhowto.pdf>
16 Specification, ¶ 0025.¹

17 The pairing of the polymers used to prepare the injection molded
18 substrate and the polymer film of the present invention can be done by
19 taking into consideration the compatibility of the two polymers. For
20 example, a polypropylene is more likely to be compatible with another
21 polypropylene than a very different polymer such as, for example,

¹ We have not found it necessary to consult this internet site, or any other internet site mentioned in the specification. Accordingly, we have no occasion to determine whether the internet site today is the same as the internet site on the day Fina filed its application, *i.e.*, 4 May 2004.

1 polystyrene. It is therefore one embodiment of the Fina invention to use
2 similar, or compatible, polymers types to prepare both the injection molded
3 substrate and the polymer film of the present invention. Specification,
4 ¶ 0026.

5 The polymers used to prepare the polymer films and inserts of the
6 present invention are selected so that they will impart a desirable property
7 to the injection molded object, namely providing a surface that can make a
8 good heat seal. A good heat seal means that the material has a low heat seal
9 initiation temperature as determined using ASTM F88. Or stated another
10 way, the polymer films and inserts of the present invention are said to have
11 a lower heat seal initiation temperature than the substrates upon which they
12 are bound. Specification, ¶ 0027.

13 Four figures accompany the specification.

14 Fig. 1 is said to be a photograph of an injection molded part of the
15 Fina invention. Specification, ¶ 0013.

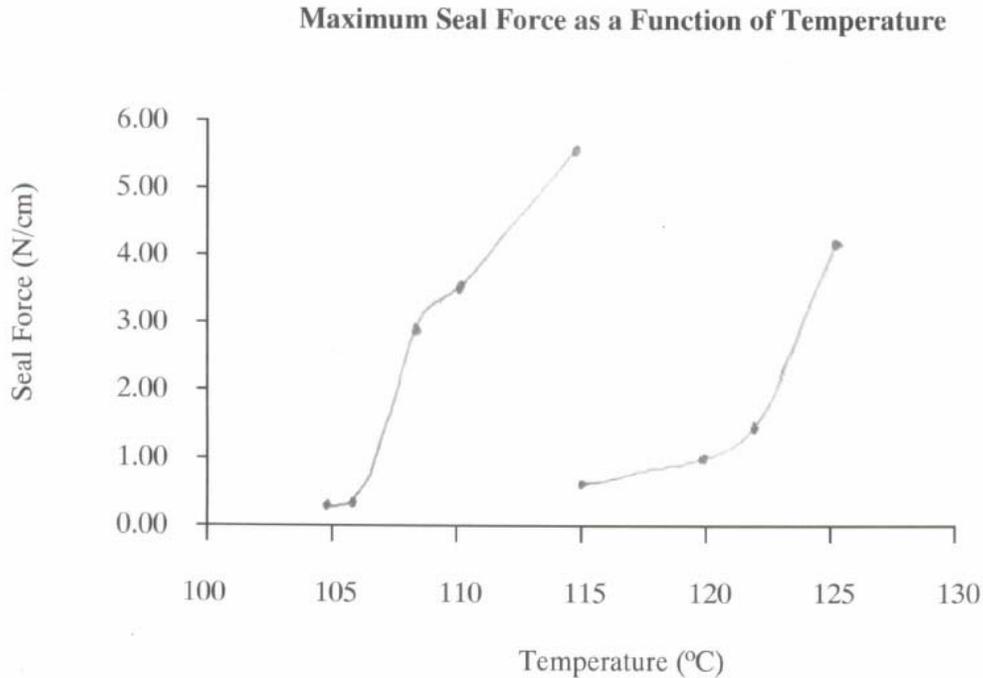
16 Fig. 2 is said to be a photograph of an injection molded plaque of the
17 Fina invention including a label. Specification, ¶ 0014.

18 Fig. 3 is said to be a graph of the maximum seal force as a function of
19 temperature for an example of the present invention and a comparative
20 example. Specification, ¶ 0015.

21 Fig. 4 is said to be a photograph of a blow molded bottle of the Fina
22 invention. Specification, ¶ 0016.

1 We pause at this point to note that Figs. 1-2 and 4 as they appear in
2 the official USPTO IFW record² of the application on appeal are unclear.

3 Fig. 3, which becomes important in view of arguments on appeal
4 made by Fina, is also somewhat unclear. We have taken Fig. 3, as it
5 appears in the IFW record, and tried our best to make a "readable" version
6 of Fig. 3. Our version, and not that of the IFW record, is reproduced below.



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Fig. 3 shows seal force data as a function of temperature
for both a Fina article and a comparison article

² The IFW [image file wrapper] is the official file for all purposes. Notification of United States Patent and Trademark Office Patent Applications Records, being Stored and Processed in Electronic Form, 1271 Off. Gaz. Pat. & Tm Office 100 (17 June 2003).

1 the application as filed. *Hyatt v. Dudas*, 492 F.3d 1365, 1370 (Fed. Cir.
2 2007).

3 The dependent claims stand or fall with independent claim 24 since
4 the limitation in question applies to all claims.

5 How does Fina respond?

6 *First*, Fina says that Fig. 4 illustrates the maximum seal force of each
7 sample and a corresponding temperature. Appeal Brief, page 5. *Second*,
8 Fina further says in the Appeal Brief that "[a]s known to one skilled in the
9 art and recited in Figure 2, the seal initiation temperature is a seal force of
10 1.93 N/cm." *Id.* *Third*, Fina still further says that "[a] heat seal initiation
11 temperature of less than about 115 °C is further supported by the Examples
12 [Example 4 and Comparative Examiner II] which state that a trace [of seal
13 force as a function of temperature] is shown in Fig. 3. *Id.*

14 The examiner was not impressed with Fina's arguments. The
15 examiner correctly points out that Fig. 4 "does not disclose anything with
16 regard to a maximum seal force." Examiner's Answer, page 13. Fig. 4, as
17 the examiner notes, shows a photograph of a blow-molded bottle. *Id.* As we
18 have noted earlier, it is hard to tell from the official PTO record what Fig. 4
19 shows. The examiner could have stopped with Fina's Fig. 4 argument.
20 Commendably, however, the examiner reached the merits and determined
21 that what Fina probably meant was Fig. 3. The examiner noted that Fig. 3
22 "shows a graph of the maximum seal force of each sample and the
23 corresponding temperature, but does not give any correlation between the
24 force and heat seal force initiation temperatures." Examiner's Answer,
25 page 13. Fina utterly fails to explain why the examiner is wrong. We note

1 that there is an incomplete sentence in the Answer: "Also, it is unclear from
2 the graph" *Id.* We need not speculate how the examiner intended to
3 complete the sentence, because it does not matter.

4 In its Reply Brief, Fina asserts that "the correlation is known to one
5 skilled in the art. In particular, the temperature required to activate the heat
6 sealable initiation temperature is defined as the minimum temperature for
7 1.94 lb/in seal strength. See examples." Reply Brief, page 3. We find no
8 reference in any example to "1.94 lb/in." Fina's "evidence" is nothing more
9 than an argument of counsel and we decline, as did the examiner, to give any
10 weight to counsel's unsupported argument.

11 (2)

12 Claim 24 refers to a "second article."

13 Claim 25 reads:

14 The article of claim 24 wherein the second article
15 comprises a second portion of the injection molded substrate.

16 The examiner with good reason was totally confused about the
17 meaning of "second article." Examiner's Answer, page 4. At the outset, it is
18 facially apparent that there is no antecedent in claim 24 of "the second
19 article." In fact, insofar as we can tell the phrase "second article" did not
20 appear in the specification as filed. The examiner goes on to say that it is
21 unclear from the language of claim 24 (or for that matter claim 25) how the
22 "second article" is a "second portion" of the substrate. The examiner
23 reasonably asks "How can both the first and second surfaces of the polymer
24 film be adhered to the same article?" What is Fina's response? According to
25 Fina, the "second portion" (a phrase which does not appear in the

1 specification as filed) can be the second surface when the injection molded
2 article is a "case" (a word which does not appear in the specification as
3 filed). Fina's response is not convincing.

4 Other rejections

5 The examiner made § 102 rejections, § 103 rejections and other § 112
6 rejections. We find it unnecessary to reach or discuss those rejections.

7 Fina's other arguments

8 We have considered Fina's remaining arguments related to the § 112
9 rejections which we affirm. We find none of those other arguments warrant
10 reversal. *Cf. Hartman v. Nicholson*, 483 F.3d 1311, 1315 (Fed. Cir. 2007).

11 **D. Decision**

12 Appellant has not sustained its burden on appeal of showing that the
13 examiner erred in rejecting the claims on appeal as being unpatentable under
14 § 112.

15 Upon consideration of the appeal, and for the reasons given herein,
16 it is

17 ORDERED that the decision of the Examiner rejecting all the
18 claims for failure to comply with first and second paragraph 35 U.S.C. § 112
19 is *affirmed*.

20 FURTHER ORDERED that no time period for taking any
21 subsequent action in connection with this appeal may be extended under
22 37 C.F.R. § 1.136(a)(1)(iv) (2008).

AFFIRMED

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ack

cc (via First Class mail)

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