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Husch Blackwell LLP/  
The Dow Chemical Company  
555 East Wells Street, Suite 1900  
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EXAMINER
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JUSKA, CHERYL ANN

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* RONALD J. WEEKS and YI JIN<sup>1</sup>

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Appeal 2014-008180  
Application 12/499,667  
Technology Center 1700

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Before CATHERINE Q. TIMM, MARK NAGUMO, and  
JEFFREY R. SNAY, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>2</sup>

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<sup>1</sup> Appellants identify the real party in interest as Dow Global Technologies, LLC. Appeal Br. 3.

<sup>2</sup> In our opinion below, we reference the Specification filed July 8, 2009 (Spec.), the Appeal Brief filed February 13, 2014 (Appeal Br.), the Examiner's Answer mailed May 21, 2014 (Ans.), and the Reply Brief filed July 21, 2014 (Reply Br.).

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134(a) the Examiner's decision to reject claims 1–5, 7, 9, 11, 13, 15, and 17–20 under 35 U.S.C. § 102(e) as anticipated by Pepper.<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

The claims are directed to a carpet or carpet tile. Claim 1 is illustrative:

1. A carpet or carpet tile comprising

a primary backing material having a face and a back side,  
a plurality of fibers attached to the primary backing material  
and extending from the face of the primary backing material  
and exposed at the back side of the primary backing material,

an optional precoat,

an adhesive backing material,

an optional dimensional stability layer,

an optional cap coat material, and

an optional secondary backing material adjacent to the  
dimensional stability layer or adhesive backing material,

wherein at least one of the plurality of fibers, the primary  
backing material, the optional precoat layer, the adhesive  
backing material, the optional dimensional stability layer, or the  
optional secondary backing material comprises at least one non-

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<sup>3</sup> Pepper et al., US 2010/0272946 A1, pub. Oct. 28, 2010. Appellants have made a statement that Pepper was commonly owned by Dow Global Technologies, Inc. at the time the invention in the current application (Serial No. 12/499,667) was made. Appellants' After-Final Response filed Nov. 6, 2013 at 6–7. Thus, although Pepper qualifies as prior art for use in a rejection under 35 U.S.C. § 102(e), it does not qualify as prior art under 35 U.S.C. § 103. *See* 35 U.S.C. § 103(c) (2006); MPEP § 706(l) (8<sup>th</sup> ed., rev. 7, July 2008).

chlorinated, non-polyvinyl butyral thermoplastic polymer or composition having a growth tension of 40C of less than about 25 psi and a residual stress at 25% strain of less than about 63%

wherein the at least one non-chlorinated, non-polyvinyl butyral thermoplastic polymer or composition is *an olefin block copolymer (OBC)*; and,

wherein the cap coat material or *the adhesive backing material further comprises*

*24 wt % of the OBC,*

(a) at least one filler in an amount of 60% by weight based on the total weight of the material, wherein the filler is selected from the group consisting of coal fly ash, ATH, CaCO<sub>3</sub>, talc, recycled glass, magnesium hydroxide, ground up tires, and ground up carpet,

(b) 4 wt% of at least one maleic anhydride grafted high density polyethylene (MAH-g-HDPE),

(c) 1 wt% of at least one oil,

(d) optionally, a color additive such as carbon black, and

(e) 11 wt% of at least one tackifier.

Appeal Br. 15.

## OPINION

Claim 1 requires the carpet or carpet tile include a primary backing material, a plurality of fibers, and an adhesive backing material. The carpet or carpet tile may also contain a number of other optional materials and layers. At least one of the named components must comprise “at least one non-chlorinated, non-polyvinyl butyral thermoplastic polymer or composition having a growth tension of 40C of less than about 25 psi and a

residual stress at 25% strain of less than about 63%.” Claim 1. The claim then further narrows this polymer or composition to an olefin block copolymer (OBC). *Id.* This is, for instance, an ethylene block interpolymers with particular properties. Spec. 2–3. The Specification discloses that the fibers, primary backing, adhesive backing and optional secondary backing can all comprise a polyolefin multi-block polymer (OBC), but that the olefin monomer chemistry of the adhesive backing differs from that of the fibers and the primary backing. Spec. 3:7–11; *see also* Spec. 13:15–29.

Claim 1 further recites that the cap coat material or the adhesive backing material further comprises “24 wt% of the OBC.” The claim then lists other ingredients (a) through (e). Although it is not clear from the claim, “24 wt% of the OBC” is the weight percent of OBC in the composition also containing components (a) through (e). This becomes clear upon a reading of the Specification. The only mention in the Specification of 24 wt% OBC refers to a formulation used to determine growth tension at 40 °C. Specifically, the Specification describes an example composition including 24 wt% OBC (ethylene/1-octene multiblock copolymer), 4 wt% of a maleic anhydride grafted ethylene polymer, 60 wt% coal ash, 1 wt% oil, and about 11 wt% tackifier, i.e., the components required by the (a) through (e) list of claim 1. Spec. 24:14–21.

Thus, claim 1 requires a cap coat material or adhesive backing material that comprises 24 wt% OBC along with 60 wt% filler, 4 wt% maleic anhydride grafted high density polyethylene, 1 wt% oil, and 11 wt% tackifier.

To support a finding of anticipation, the Examiner points to a disclosure in Pepper of a range of about 10–75 wt% OBC in paragraph 154

and Examples 1–3 of paragraph 220, which have 39 wt%, 31.2 wt%, and 23.2 wt% OBC, respectively. Ans. 4.

In order to anticipate, a reference must identify something falling within the claimed subject matter with sufficient specificity to constitute a description thereof within the purview of § 102. *In re Schaumann*, 572 F.2d 312, 317, (CCPA 1978). “[D]ifferences between the prior art reference and a claimed invention, however slight, invoke the question of obviousness, not anticipation.” *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008).

Looking first at the examples cited by the Examiner, we agree with Appellants that none of Examples 1–3 describe a composition having all the components required by claim 1. This is illustrated well by Appellants’ Table A. Appeal Br. 9. The closest example is Example 3, but this example has 23.2 wt% OBC instead of 24 wt% and 5.8 wt% high pressure low density ethylene polymer, instead of 4 wt% maleic anhydride grafted high density polyethylene (MAH-g-HDPE), and 10 wt% tackifier instead of 11 wt%. Pepper ¶ 220. This is not the same composition as that of claim 1.

We also agree with Appellants that paragraph 154 does not support the finding of anticipation. Reply Br. 4. Paragraph 154 is directed to an aqueous pre-coat material applied either as a final backing or before an adhesive backing material is extruded. Pepper ¶ 153. Pepper explains that the particles in the dispersion of the aqueous pre-coating can be made from OBC. *Id.* The 10–75 wt% range cited by the Examiner is for the OBC particles of the pre-coat aqueous dispersion. Pepper ¶ 154. The aqueous pre-coat described by Pepper is not the same as the adhesive backing

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material. Nor is there is description of a composition containing 24 wt% OBC with the filler, MAH-g-HDPE, oil, and tackifier required by claim 1.

#### CONCLUSION

We do not sustain the Examiner's rejection.

#### DECISION

The Examiner's decision is reversed.

REVERSED