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LONDA, BRUCE S. NORRIS MCLAUGHLIN & MARCUS, PA 875 THIRD AVE, 8TH FLOOR NEW YORK, NY 10022			HANLEY, SUSAN MARIE	
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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* INA BRAUTIGAM and FRANK HERMES

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Appeal 2012-000386  
Application 11/001,840  
Technology Center 1600

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Before DEMETRA J. MILLS, ERIC GRIMES, and JEFFREY N. FREDMAN, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a hair conditioning composition, which have been rejected for obviousness. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

The Specification states that “[i]t has surprisingly been found out that by incorporating yoghurt powder into a hair cleansing and/or caring/conditioning compositions such as shampoo, conditioner, rinse off treatment, [or] leave-in treatment, properties of hair is improved dramatically in terms

of smoothness, combability, shine, volume and body and elasticity” (Spec. 2).

Claims 1-3, 8, 11, 12, 17, and 18 are on appeal. Claim 1 is the only independent claim and reads:

1. Conditioning composition for hair, comprising spray dried yoghurt powder and at least one cationic polymer.

The Examiner has rejected all of the claims on appeal under 35 U.S.C. § 103(a) as obvious based on Quest International<sup>1</sup> and Schmucker-Castner<sup>2</sup> (Answer 4). The Examiner finds that “Quest International teaches a conditioning composition . . . that is a homogenate comprising Yogurtene (powdered yogurt)” and other ingredients, but not a cationic polymer (*id.* at 5). The Examiner finds that Schmucker-Castner discloses that Polyquaternium-10 is a cationic conditioning agent for hair (*id.* at 6), and concludes that it would have been obvious to include Polyquaternium-10 in the conditioning composition of Quest International (*id.*).

Appellants do not dispute the Examiner’s prima facie case, but argue that they have presented evidence of unexpected results that demonstrates nonobviousness (Appeal Br. 5-7).

We agree with Appellants that the evidence of unexpected results is sufficient to outweigh the evidence tending to show obviousness. Appellants have provided declaratory evidence showing a comparison of a conditioning composition comprising 0.5% by weight of yogurt powder and 0.5% by weight of a cationic polymer (i.e., a composition encompassed by the claims)

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<sup>1</sup> Quest International, *Yogurtene*, COSMETIC INGREDIENTS 1/17 (June 2000)

<sup>2</sup> Schmucker-Castner et al., US 6,635,702 B1, Oct. 21, 2003

with otherwise identical compositions that contain either 1% by weight yogurt powder and no cationic polymer or 1% by weight cationic polymer and no yogurt powder. *See* the Declarations under 37 C.F.R. § 1.132 of Frank Hermes (Appeal Br. Evidence Appendix). Collectively, the five Hermes Declarations show comparisons of compositions containing each of the following cationic polymers: Polyquaternium-10, Polyquaternium-11, Polyquaternium-16, Polyquaternium-37, and hydroxypropylguar hydroxypropyl trimonium chloride. The results consistently show the effect of the claimed composition to be rated superior to the other compositions in eleven out of thirteen categories, as well as “Preference.”

The Examiner acknowledges that the declarations show “superior unexpected conditioning effects” (Answer 9). The Examiner, however, finds the evidence of unexpected results insufficient to overcome the rejection because “[t]he data in the declaration[s] is limited to the combination of a single concentration for each of the cationic polymer and the yoghurt powder, each at 0.5% by weight of the composition. Hence, the showing of unexpected results is not commensurate in scope.” (*id.* at 8.)

We do not agree with the Examiner’s analysis of Appellants’ evidence. While it is true that the claims are not limited to particular amounts of yogurt powder and cationic polymer, the Examiner has not provided a reasonable basis for concluding that the results shown in the Hermes Declarations are not representative of what would be expected at other concentrations of yogurt powder and cationic polymer. Providing evidence that is commensurate in scope with the claims

does not mean that an applicant is required to test every embodiment within the scope of his or her claims. If an

applicant demonstrates that an embodiment has an unexpected result and provides an adequate basis to support the conclusion that other embodiments falling within the claim will behave in the same manner, this will generally establish that the evidence is commensurate with [the] scope of the claims.

*In re Kao*, 639 F.3d 1057, 1068 (Fed. Cir. 2011).

Here, Appellants have shown unexpected results for five different embodiments encompassed by the claims; based on the five examples provided, it is reasonable to expect that other embodiments falling within the scope of the claims will behave similarly. The Examiner has not provided a reasonable basis for concluding otherwise. The Examiner therefore has not shown that the evidence of unexpected results is not commensurate in scope with the claims.

In summary, we agree with the Examiner that the cited references support a prima facie case of obviousness but Appellants have provided evidence of unexpected results of sufficient weight to overcome the prima facie case. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992) (“After evidence or argument is submitted by the applicant in response [to the prima facie case], patentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.”).

#### SUMMARY

We reverse the rejection of claims 1-3, 8, 11, 12, 17, and 18 under 35 U.S.C. § 103(a).

REVERSED

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