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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MICHAEL MOLEND, LIKE TIETJEN, and EIJI TERADA¹

Appeal 2015-002786
Application 13/062,017
Technology Center 1600

Before LORA M. GREEN, MELANIE L. McCOLLUM,
and TIMOTHY G. MAJORS, *Administrative Patent Judges*.

MAJORS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a
cleansing composition, which have been rejected as obvious. We have
jurisdiction under 35 U.S.C. § 6(b).

We affirm.

¹ Appellants identify the Real Party in Interest as KAO GERMANY GMBH.
(App. Br. 2.)

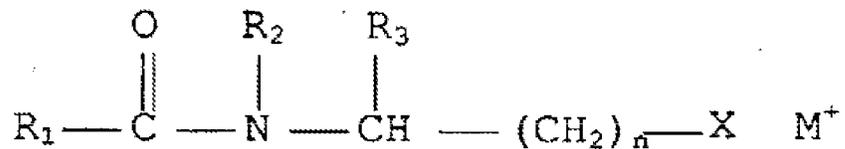
STATEMENT OF THE CASE

Appellants' "invention is related to an aqueous cleansing composition for keratin fibres, especially human hair, comprising at least one amino acid surfactant, at least one alkyl glyceryl ether and at least one fatty alcohol."

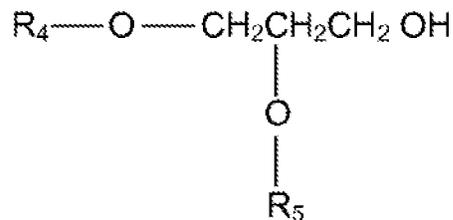
(Spec. 1.) According to the Specification, the "[a]im of the present invention is to provide a cleansing composition having improved foam properties in terms of its volume and creaminess as well as improved conditioning effects." (*Id.*)

Claims 1–12 are on appeal. Claim 1 is illustrative:

1. An aqueous cleansing composition for keratin fibres comprising at least one amino acid surfactant of the following structure

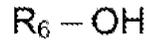


wherein R_1 is a saturated or unsaturated, straight or branched alkyl chain with 7 to 17 C atoms, R_2 is H or a methyl, R_3 is H, $\text{COO}^- \text{M}^+$, $\text{CH}_2\text{COO}^- \text{M}$ or COOH , n is 0 to 2, X is COO^- or SO_3^- and M is independent from each other H, sodium or potassium, at least one glyceryl ether of the following formula



wherein R_4 is straight or branched, saturated or unsaturated alkyl chain with 4 to 24 C atoms and R_5 is H, or straight or branched,

saturated or unsaturated alkyl chain with 4 to 24 C atoms, and at least one fatty alcohol of the following formula



wherein R_6 is straight or branched, saturated or unsaturated alkyl chain with 8 to 24 C atoms.

(App. Br. 9–10 (Claims App'x).)

The claims stand rejected as obvious under 35 U.S.C. § 103(a) over Goddinger² and Terada.³

DISCUSSION

Issue

Has the Examiner established by a preponderance of the evidence that claims 1–12 would have been obvious over Goddinger and Terada?

Findings of Fact (FF)

FF 1. The Examiner's findings of fact and statement of the rejection may be found at pages 3–6 of the Final Rejection dated November 5, 2013. (*See also* Ans. 2–5.) We adopt the Examiner's findings concerning the scope and content of the prior art and provide the following for emphasis.

FF 2. Goddinger teaches compositions useful as a cosmetic hair treatment agent, such as a shampoo. (Goddinger Abstract.) Goddinger teaches the composition comprises

² Goddinger et al., US 2006/0251602 A1, published Nov. 9, 2006 (“Goddinger”).

³ Terada, US 2007/0031365 A1, published Feb. 8, 2007 (“Terada”).

a) a surfactant mixture containing: A) at least one anionic surfactant; B) at least one amphoteric surfactant, and; C) at least one additional surfactant selected from the group consisting of acyl glutamates, amino oxides and of alkyl polyglucosides. The surfactant mixture also contains: b) at least one additional hair care substance selected from the group consisting of fatty alcohols

(*Id.*)

FF 3. Goddinger teaches example hair-cleaning compositions as depicted below.

EXAMPLES

[0211]

	A wt %	B wt %	C wt %
Sodium laureth sulfate	10	12	9
Cocamidopropyl betaine	4	2	6
Disodium cocoyl glutamate	1	1	2
Cocamidopropyl aminoxide	1		2
Coco-glucoside		2	
Behentrimonium chloride	1	1.5	1
Cetyl alcohol	0.3		0.3
Stearyl alcohol		0.7	0.3
Polyquaternium-10	0.1	0.2	0.1
Glycol distearate			1
Caprylyl methicone	0.5		0.4
Laurdimonium hydroxypropyl hydrolyzed wheat protein		0.5	
Panthenol			0.3
Preservative	q.s.	q.s.	q.s.
Perfume	q.s.	q.s.	q.s.
Water	to make 100	to make 100	to make 100

(Goddinger ¶¶ 210–211.) As shown, composition “A” includes, among other ingredients, disodium cocoyl glutamate (1 wt %) and cetyl alcohol (0.3 wt %). (*Id.*) Composition “C” includes, among other ingredients, disodium

cocoyl glutamate (2 wt %), cetyl alcohol (0.3 wt %), and stearyl alcohol (0.3 wt %). (*Id.*)

FF 4. Terada teaches a “water-based shampoo of the present invention may further contain a nonionic surfactant or an amphoteric surfactant to improve washing performance Among these nonionic surfactants, preferred are alkyl glucosides . . . monoalkyl glyceryl ethers and monoalkenyl glyceryl ethers.” (Terada ¶¶ 41–42.) Terada also teaches:

In the case where the water-based shampoo of the present invention is used in the form of an aqueous shampoo solution, the fatty amide propyl betaines, the fatty acid alkanol amides or the *monoalkyl glyceryl ethers* are more preferably used therein because of not only good foamability but also adequate liquid properties of the obtained shampoo solution.

(*Id.* at ¶ 46 (emphasis added).)

Principles of Law

“[W]hen unexpected results are used as evidence of nonobviousness, the results must be shown to be unexpected compared with the closest prior art.”) *In re Baxter Travenol Labs.*, 952 F.2d 388, 392 (Fed. Cir. 1991).

Analysis

Appellants argue the patentability of the pending claims as a group. We select claim 1 as representative.

Claim 1 generally recites a cleansing composition for hair comprising at least three ingredients: an amino acid surfactant, a glyceryl ether, and a fatty alcohol.

The Examiner finds that Goddinger teaches a shampoo and conditioning composition that includes, *inter alia*, an amino acid surfactant and fatty alcohol as recited in claim 1. (Final Act. 4.) More specifically, according to the Examiner, Goddinger teaches

a hair (i.e., a type of keratin fiber) treatment composition capable of cleaning and conditioning the hair simultaneously comprising 1-2 wt% disodium cocoyl glutamate (amino acid surfactant component of claim[] 1 . . .), 0.3 wt% cetyl alcohol and/or 0.3-0.7 wt% stearyl alcohol (fatty alcohol component of claim[] 1 . . .), [and other ingredients]

(*Id.*)

The Examiner finds that “Goddinger [] does not specifically teach incorporation of a glyceryl ether as recited in instant claim 1” and so turns to Terada. (*Id.* at 5.) According to the Examiner, “Terada teaches water-based shampoos comprising a non-ionic surfactant such as monoalkyl glyceryl ethers, wherein the alkyl is preferably a linear or branched alkyl group having 4 to 10 carbons,” thus disclosing a glyceryl ether as in claim 1. (*Id.*)

The Examiner concludes “it would have been *prima facie* obvious . . . to incorporate the monoalkyl glyceryl ethers of Terada into the compositions of Goddinger.” (*Id.*) The Examiner reasons that the skilled artisan “would have been motivated to do so because Terada teaches that the aqueous shampoo solution . . . [with] monoalkyl glyceryl ethers produce good foamability and adequate liquid properties.” (*Id.*)

Appellants do not dispute the Examiner’s findings that the combination of Goddinger and Terada disclose hair-cleaning compositions comprising an amino acid surfactant, glyceryl ether, and fatty alcohol as in

claim 1. Appellants further do not dispute the Examiner's rationale for combining the glyceryl ether from Terada in a composition of Goddinger.

Appellants instead argue "the Examiner failed to consider the evidence that the presently claimed invention exhibits [] unexpected and surprising synergistic characteristics." (App. Br. 3; *see also* Reply Br. 1–3.) According to Appellants, "formulations according to the present claims showed the highest foam volume, highest foam speed and creamiest foam when compared with formulations according to the prior art." (App. Br. 4.) Appellants cite experiments and data provided in Example 1 of the Specification in support. (*Id.* at 4–6; *see also* Spec. 24–25.)

We have considered Appellants' data but, like the Examiner, we are unpersuaded that it shows unexpected or surprising synergistic effects sufficient to overcome the Examiner's *prima facie* case.

None of the comparative compositions against which the allegedly inventive composition was tested included both an amino acid surfactant and a fatty alcohol.⁴ This renders Appellants' data unpersuasive for at least two reasons. First, as the Examiner points out,

when comparing composition B [amino acid surfactant only] and E [claimed composition], it is unclear if the effect observed in composition E, with regards to foam speed, foam stability and foam creaminess, is due to ethylhexyl glycerin, the myristyl alcohol or both agents.

⁴ Composition A included no amino acid surfactant, glyceryl ether, or fatty alcohol. (Spec. 24 (Table A).) Comparative composition B, C, and D included only one of the amino acid surfactant, glyceryl ether, or fatty alcohol; for example, composition B included an amino acid surfactant, but no glyceryl ether or fatty alcohol. (*Id.*)

(Ans. 3.) In other words, Appellants' data does not demonstrate that an improved and nonobvious effect occurs only when the three ingredients are combined — as opposed to the effect observed with a composition including two of the three ingredients. Second, as determined by the Examiner, by failing to provide testing of a composition comprising an amino acid surfactant and fatty alcohol components, Appellants have not shown unexpected results compared to the closest prior art. (*Id.*; FF 2–3.)⁵ See *In re Baxter Travenol Labs.*, 952 F.2d at 392.

Appellants contend unexpected synergy is shown because the foam speed and volume in composition E (the claimed composition) is greater than the sum of foam speed and volume of comparative compositions B, C, and D. (App. Br. 6.) But this argument suffers from the same problems identified above — it fails to account for the effect observed in a composition including two, but not all three, of the supposed key ingredients. Appellants cite no other persuasive evidence that makes up for this deficiency. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“[A]ttorney argument [is] not the kind of factual evidence that is required to rebut a prima facie case of obviousness”).

We also agree with the Examiner that Appellants' evidence of alleged unexpected synergy is not commensurate in scope with the claims. *In re Lindner*, 457 F.2d 506, 508 (CCPA 1972) (“It is well established that the objective evidence of nonobviousness must be commensurate in scope with

⁵ Although not specifically cited by the Examiner, we note that Terada discloses compositions comprising a glyceryl ether and fatty alcohols. (Terada ¶¶ 120–121 (Examples 8 and 9).)

the claims.”). The claims cover compositions including broad categories of compounds, yet “the compositions compared in Table I of the Appeal Brief [Example 1 of the Specification] are limited to only one type of amino acid surfactant, glyceryl ether and fatty alcohol.” (Ans. 4–5; *see* Spec. 24.) Appellants have not persuasively shown that the effects observed in one example that includes sodium lauroyl glutamate, ethylhexyl glycerin, and myristyl alcohol would also be expected when any of the number of ingredients encompassed by claim 1 are used.

Conclusion of Law

For the above reasons, we conclude the Examiner established by a preponderance of the evidence that claim 1 would have been obvious over Goddinger and Terada. Claims 2–12 have not been argued separately and therefore fall with claim 1. 37 C.F.R. § 41.37(c)(1)(iv).

SUMMARY

We affirm the rejection of claims 1–12 under 35 U.S.C. § 103(a) over Goddinger and Terada.

TIME PERIOD FOR RESPONSE

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

AFFIRMED