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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KENNETH EUGENE KYTE III
and TIMOTHY WOODROW COFFINDAFFER

Appeal 2015-004161
Application 12/768,042
Technology Center 1600

Before DEMETRA J. MILLS, MELANIE L. McCOLLUM, and
JEFFREY N. FREDMAN, *Administrative Patent Judges*.

FREDMAN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal¹ under 35 U.S.C. § 134 involving claims to a shave preparation. The Examiner rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

Statement of the Case

Background

“Shave preparations are known in the art. However, problems remain with these preparations. Irritation and lack of shave closeness remain problems of these preparations.” (Spec. ¶ 2).

¹ Appellants identify the Real Party in Interest as The Procter & Gamble Company (*see* App. Br. 1).

The Claims

Claims 1–10 and 19 are on appeal. Claim 1 is representative and reads as follows:

1. A shave preparation comprising:
water;
one or more lipophilic skin conditioning agents;
one or more thickening agents;
one or more emulsifying agents; and
one or more lubricants, wherein the one or more lubricants is a lubricious water soluble polymer selected from the group consisting of polyethylene oxide, polyvinylpyrrolidone and polyacrylamide, wherein the shave preparation is substantially free of a gel network.

App. Br. 7 (Claims Appendix).

The Issues

- A. The Examiner rejected claims 1–6, 8, 9,² 10–16, 18, and 19 under 35 U.S.C. § 103(a) as obvious over Coffindaffer³ (Final Act. 2–3).
- B. The Examiner rejected claims 1, 6, 7, 10, 16, and 17 under 35 U.S.C. § 103(a) as obvious over Coffindaffer and McAtee⁴ (Final Act. 4–5).

Because the same issue is dispositive for both rejections, we will consider the rejections together.

² The Examiner inadvertently omitted claim 9 from the statement of rejection, but addressed the claim limitation in the body of the rejection, rendering the error harmless (*see* Final Act. 3).

³ Coffindaffer et al., US 2006/0251606 A1, published Nov. 9, 2006 (“Coffindaffer”).

⁴ McAtee et al., US 5,811,111, issued Sept. 22, 1998 (“McAtee”).

The Examiner finds Coffindaffer teaches “skin cleansing compositions comprising the components of instant claim 1, wherein the skin conditioning agent, i.e. petrolatum, is present at 7%; thickening agent, i.e. Carbomer, is present at 0.2%; emulsifying agent, i.e. steareth, is present at 1.1 % and the lubricant, i.e. glycerin is present at 4%” (Final Act. 2).

The Examiner finds Coffindaffer “teaches that a gel network is not required. i.e., is optional” (Ans. 3). The Examiner finds it obvious “to have omitted the structuring agent and other components that form gel network. Therefore, the features recited in the claims are suggested by the reference. The fact that a gel network might be preferred and used in the working examples does not negate this clear teaching” (Ans. 3–4).

The issue with respect to this rejection is: Does the evidence support the Examiner’s conclusion that Coffindaffer renders obvious a shave preparation “substantially free of a gel network” as required by claim 1?

Findings of Fact

1. The ingredient table for compositions 712 of Coffindaffer is reproduced, in part, below:

Ingredients	EX 7	EX 8	EX 9	EX 10	EX 11	EX 12
<u>Mix A</u>						
Carbomer ¹¹	0.15	0.16	0.16	0.14	0.2	0.2
Water	19.85	19.8	19.85	19.86	19.85	19.85
<u>Mix D</u>						
Water	QS 100					
Disodium EDTA	0.1	0.1	0.1	0.1	0.1	0.1
Glycerin	4	4	6	4	4	4

Mix E

Isopropyl Palmitate ¹²	10	7.5	10	15	15	15
Mineral Oil ¹³	1.75	0.875	1.75	1.75
Petrolatum	3.25	1.625	3.25	3.25	7	7
Stearyl alcohol	0.875	0.875	0.875	0.875	1	1
Cetyl alcohol	0.875	0.875	0.875	0.875	1	1
Stearic Acid	0.11	0.11	0.11	0.11	0.2	0.2
Steareth-21 ¹⁴	0.5	0.5	0.5	0.5	0.7	0.7
Steareth-2 ¹⁵	0.25	0.25	0.25	0.25	0.4	0.4

(Coffindaffer ¶ 104).

2. Coffindaffer teaches the

present invention optionally comprises no more than about 20%, preferably no more than about 10%, and more preferably no more than about 7.5%, by weight of the composition, of an aqueous phase hydrophobic structuring agent . . . the present invention optionally, but preferably, comprises at least 0.5%, more preferably at least 1 %, and even more preferably at least 2%, by weight of the composition, of an aqueous phase hydrophobic structuring agent.

(Coffindaffer ¶ 29).

3. Coffindaffer teaches “the present compositions preferably comprise a gel network” (Coffindaffer ¶ 29).

4. Coffindaffer teaches a “gel network in the present compositions tends to provide a rich creamy feel and to allow good application of the product without causing damage to the skin” (Coffindaffer ¶ 29).

5. The Specification teaches:

the shave composition is substantially free from a gel network. As used herein, the term “gel network” refers to a lamellar or vesicular solid crystalline phase which comprises at least one fatty amphiphiles. In one embodiment, the present invention contains less than about 5%, alternatively less than about 3%,

alternatively less than about 1%, alternatively less than about 0.5% of at least one fatty amphiphiles.

(Spec. 5:1–6).

Principles of Law

“All the disclosures in a reference must be evaluated, including nonpreferred embodiments, and a reference is not limited to the disclosure of specific working examples.” *In re Mills*, 470 F.2d 649, 651 (CCPA 1972).

Analysis

We adopt the Examiner’s findings of fact and reasoning regarding the scope and content of the prior art (Ans. 4–10; FF 1–5) and agree that the claims are rendered obvious by Coffindaffer. We address Appellants’ arguments below.

Appellants contend “the composition disclosed in Coffindaffer requires the presence of a surfactant, specifically hydrophobic structuring agents forming gel networks. . . . Each of the compositions disclosed in the examples includes structuring agents that form gel networks” (App. Br. 4).

Appellants contend:

not only is the desirability of the gel network in the Coffindaffer composition apparent from the aforementioned examples, the function of the gel network in the composition is desired in order to provide a rich creamy feel on the skin. See Coffindaffer [0009] and [0029]. In fact, for this reason, paragraph [0029] of Coffindaffer states that the gel network is preferred in the composition.

(*Id.*).

We do not find this argument persuasive because Coffindaffer repeatedly identifies the hydrophobic structuring agents as “optional” (FF 2)

and states the presence of a gel network is “preferred” (FF 3). Thus, as the Examiner notes, Coffindaffer is directly suggesting that hydrophobic structuring agents may be omitted from the composition and that the composition need not comprise a gel network (FF 2–3; Ans. 3–4). Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or non-preferred embodiments. *See In re Susi*, 440 F.2d 442, 446 n.3 (CCPA 1971).

We further note that Appellants’ preferred amounts of fatty amphiphiles ranges from 0.5% to less than 5% (FF 5), amounts that overlap the range disclosed by Coffindaffer of 0.5 to less than 20% (FF 2). Indeed, examples 14 to 19 of Appellants’ own Specification disclose the presence of 3% cetyl alcohol, an amphiphile (*see* Spec. 8–10). *See In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003) (“In cases involving overlapping ranges, we and our predecessor court have consistently held that even a slight overlap in range establishes a prima facie case of obviousness.”) This supports the Examiner’s position that selection of lower or optionally absent amounts of hydrophobic structuring agents for the compositions of Coffindaffer, an alternative recognized by Coffindaffer (FF 2), reasonably renders claim 1 obvious.

Conclusion of Law

The evidence supports the Examiner’s conclusion that Coffindaffer renders obvious a shave preparation “substantially free of a gel network” as required by claim 1.

SUMMARY

In summary, we affirm the rejection of claims 1–6, 8, 9, 10–16, 18, and 19 under 35 U.S.C. § 103(a) as obvious over Coffindaffer.

We affirm the rejection of claims 1, 6, 7, 10, 16, and 17 under 35 U.S.C. § 103(a) as obvious over Coffindaffer and McAtee.

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