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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SABINE PAIN, COLETTE DEZUTTER, VALERIE ANDRE,
CORINNE REYMERMIER, ISABELLE ORLY, and ERIC PERRIER

Appeal 2015-004525
Application 12/663,015
Technology Center 1600

Before DONALD E. ADAMS, JOHN G. NEW, and
TIMOTHY G. MAJORS, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

This appeal under 35 U.S.C. § 134(a) involves claims 18–20, 22–26, 29–32, and 34–38 (App. Br. 2). Examiner entered a rejection under 35 U.S.C. § 103(a).² We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ Appellants identify “[t]he real party in interest [as] BASF Beauty Care Solutions France, S.A.S.” (App. Br. 1).

² Application 12/663,021 stands abandoned, therefore, the provisional rejection over Application 12/663,021 is moot (*see* Ans. 2).

STATEMENT OF THE CASE

Appellants' disclosure "concerns the active components modulating the expression of neuromediating receptors coded by the POMC (proopiomelanocortin) gene" (Spec. 1:3–5). As Appellants explain, "*Achillea millefolium* is the species that was elected in response to the Restriction Requirement dated September 18, 2012" (App. Br. 8). Thus, we limit the scope of our review to Appellants' elected invention. *Ex parte Ohsaka*, 2 USPQ2d 1460, 1461 (BPAI 1987). Claims 18, 31, and 32 are representative and reproduced, in the context of Appellants' elected species, below:

18. A cosmetic method of stimulating the expression of a receptor of a neuromediator coded by the POMC gene chosen from among MC-1[R, MC-2R, and μ opioid R, it at least one type of skin cell[] expressing at least one of these receptors and a product of the POMC gene comprising applying to skin in need thereof an effective amount of a topical cosmetic composition comprising . . . an aqueous extract of common yarrow plant (*Achillea millefolium*) obtained by macerating the plant in water.

(App. Br. A-1; *see generally* App. Br. 8.)

31. The method according to claim [18], wherein the extract is a whole plant extract.

(App. Br. A-3.)

32. The method according to claim 18, wherein the ingredient is in an amount between 0.01% and 5% (v/v) of the total volume of the composition.

(*Id.*)

The claims stand rejected as follows:

Claims 18–20, 22–26, and 29–38 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Mulvanerty,³ Grollier,⁴ Fiume,⁵ and Naydenov.⁶

ISSUE

Does the preponderance of evidence relied upon by Examiner support a conclusion of obviousness?

FACTUAL FINDINGS (FF)

FF 1. Appellants disclose, the use of a topical composition comprising, *inter alia*, an aqueous extract of common yarrow plant (*Achillea millefolium*) obtained by macerating the plant in water “to encourage epithelialization, or to improve cellular proliferation and differentiation, notably at the epidermal level” (Spec. 12:13–15).

FF 2. Mulvanerty discloses a “topical composition[] compris[ing] at least two, more preferably at least three, and most preferably all four extracts selected from the group consisting of calendula, yarrow, wild rose, and plantain extracts,” wherein the topical composition comprises “about 10-30%” yarrow extract (Mulvanerty 2:21–28 and 9:3–4; *see generally* Ans. 3; App. Br. 9).

³ Mulvanerty, WO 2007/030666 A2, published Mar. 15, 2007.

⁴ Grollier et al., US 4,948,583, issued Aug. 14, 1990.

⁵ Monice Zondlo Fiume, *Final Report on the Safety Assessment of Yarrow (Achillea millefolium) Extract*, 20(Suppl. 2) *International Journal of Toxicology* 79–84 (2001). On this record, this document is, alternatively, referred to by the title of the Journal or as “Toxicology.” The document, however, is a report prepared by “Monice Zondlo Fiume” (*see* 79: n.1). Therefore, we elect to refer to this document by the name of its author.

⁶ Naydenov et al., WO 2005/063266 A1, published July 14, 2005.

FF 3. Mulvanerty’s extract “may be made with a menstruum comprising alcohol and water” (Mulvanerty 3:1–2; *see also id.* at 8:12 (Mulvanerty exemplifies “steep[ing] [yarrow] in a liquid menstruum (50% alcohol and 50% water (50A: 50W; 100 proof)), thereby infusing the liquid with the active constituents of the herb”); *see* Ans. 3; App. Br. 9).

FF 4. Mulvanerty discloses that “[i]n a preferred embodiment, the extracts are made from yarrow petals, leaves, and/or whole flowers” (Mulvanerty 2:23–24; Ans. 11; App. Br. 10).

FF 5. Mulvanerty discloses a method of “promoting wound healing by administering the topical compositions of [Mulvanerty’s] invention to a wound site” (Mulvanerty 2:3–5; *id.* at 9:33–34; *see* Ans. 3).

FF 6. Mulvanerty’s composition “may further comprise at least one additional therapeutic agent,” such as “anti-aging agents” (Mulvanerty 4: 10–11, 20–21; *id.* at 9:21–27; *see* Ans. 3).

FF 7. Examiner relies on Grollier “to show that it is known to macerate the yarrow flower to obtain an extract used in cosmetics” (Ans. 11; *see generally* Ans. 3).

FF 8. Fiume discloses the use of yarrow extract, as an ingredient in skin treatment, in the cosmetic industry at concentrations ranging from 0–0.1%, 0.1–1%, 1–5% and 10–25% (*see generally* Ans. 4 and 10).

FF 9. Naydenov discloses a therapeutic composition comprising *Achillea millefolium* L. (Naydenov 12:20).

ANALYSIS

Based on the combination of Mulvanerty, Grollier, Fiume, and Naydenov, Examiner concludes that, at the time Appellants’ invention was made, it would have been *prima facie* obvious to topically administer an

effective amount of an extract comprising an aqueous extract of common yarrow plant (*Achillea millefolium*) obtained from macerating the plant in water to skin cells at a wound site in order “to encourage epithelialization, or to improve cellular proliferation and differentiation, notably at the epidermal level” (*see generally* Ans. 5–6; FF 2–8; *see* FF 1).

Claim 18:

We recognize, but are not persuaded by, Appellants’ contention that “a topical cosmetic composition comprising an aqueous extract of *Achillea millefolium* that is obtained by macerating the plant in water is not taught by the cited art” (App. Br. 8–9). Initially, we note that Appellants’ claim 18 relates to a composition *comprising* an aqueous extract of *Achillea millefolium* that is obtained by macerating the plant in water (App. Br. A-1). A composition obtained by macerating *Achillea millefolium* in, for example, “a liquid menstruum (50% alcohol and 50% water (50A: 50W; 100 proof))” will *comprise* ingredients obtained from the water portion of the extract and the alcohol portion of the extract. Absent evidence, and notwithstanding Appellants’ contentions, to the contrary, Appellants’ claim 18 does not exclude an aqueous extract obtained by macerating *Achillea millefolium* in “a liquid menstruum (50% alcohol and 50% water (50A: 50W; 100 proof)),” as disclosed by Mulvanerty (*see* FF 3; *see* Ans. 7 (Appellants failed to establish that a product “obtained by macerating the plant in water’ provides a structurally different product than one found in the prior art”); *cf.* App. Br. 8–10; *see also* Reply Br. 2–3). *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974) (“Attorney’s argument in a brief cannot take the place of evidence.”).

Mulvanerty discloses that topical administration of a composition comprising an aqueous extract of common yarrow plant (*Achillea millefolium*) obtained by macerating the plant in water to skin (*see, e.g.*, FF 5). Absent evidence to the contrary, we find no error in Examiner's conclusion that an individual who topically applies Mulvanerty's composition to skin will achieve the same benefit from the composition as required by Appellants' claimed invention (Ans. 3).

Appellants' claim 18 does not require an anti-aging effect, therefore, we are not persuaded by Appellants' contentions regarding the anti-aging components of Mulvanerty's composition (App. Br. 9).

Claim 31:

We recognize, but are not persuaded by, Appellants' contention that "*Mulvanerty* does not disclose obtaining an *Achillea Millefolium* extract using the whole plant, as recited in [Appellants'] claim 31" (App. Br. 10–11). To the contrary, we agree with Examiner's conclusion that absent evidence to the contrary, a person of ordinary skill in the art would have reasonably expected that an *Achillea Millefolium* extract of petals, leaves, and/or whole flowers would provide the same benefit as an extract of the whole plant (*see* Ans. 12–13).

Claim 32:

Fiume discloses the use of *Achillea Millefolium* extract, in the cosmetic industry, as an ingredient of skin care products at a variety of ranges, including ranges that encompass Appellants' claimed range (*see* FF 8; *cf.* App. Br. A-3). "[W]here there is a range disclosed in the prior art, and

the claimed invention falls within that range, there is a presumption of obviousness.” *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1322 (Fed. Cir. 2004). Further, “where[, as here,] the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456 (CCPA 1955).

For the foregoing reasons, we are not persuaded by Appellants’ contention that the combination of Mulvanerty, Grollier, Fiume, and Naydenov fails to suggest the subject matter of Appellants’ claim 32 (App. Br. 10).

CONCLUSION OF LAW

The preponderance of evidence relied upon by Examiner supports a conclusion of obviousness. The rejection of claims 18, 31, and 32 under 35 U.S.C. § 103(a) as unpatentable over the combination of Mulvanerty, Grollier, Fiume, and Naydenov is affirmed. Claims 19, 20, 22–26, 29, 30, and 33–38 are not separately argued and fall with claim 18.

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