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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHARLES A. HODGE, JULIO R. PANAMA,
AMANDA R. BLATTNER, NICHOLAS A. POPP, and
DAVID W. GOHL

Appeal 2015-004939
Application 13/116,746
Technology Center 1700

Before TERRY J. OWENS, ROMULO H. DELMENDO, and BRIAN D.
RANGE, *Administrative Patent Judges*.

RANGE, *Administrative Patent Judge*.

DECISION ON APPEAL

SUMMARY

Appellants¹ appeal under 35 U.S.C. § 134(a) from the Examiner's
decision rejecting claims 3–8. We have jurisdiction. 35 U.S.C. § 6(b).

We AFFIRM.

¹ According to the Appellants, the real party in interest is Ecolab Inc.
Appeal Br. 3.

STATEMENT OF THE CASE

Appellants describe the present invention as relating to a method of treating a fabric to impart softness with reduced yellowing. Spec. 1:13–17. In particular, the invention relates to treating the textile with a composition comprising an amino-functional silicone and a quaternary ammonium. *Id.* Claim 3, reproduced below with emphases added to certain key recitations, is illustrative of the claimed subject matter:

3. Method of conditioning fabrics, comprising:
 - (a) **washing cotton fabric with a wash pH greater than 9,**
 - (b) contacting the washed fabric with a liquid composition, the composition **consisting of**
 - (i) an amino-functional silicone, an amidoamine quaternary ammonium, up to 95 wt. % water, salt, viscosity controlling agent, fragrance, and
 - (ii) one or more dye transfer inhibition/color protection agent, odor removal/odor capturing agent, soil shielding/soil releasing agent, ultraviolet light protection agents, sanitizing agent, disinfecting agent, anti-pilling agents, souring agent, mildew removing agent, enzyme, starch agent, bleaching agent, and mixtures thereof;
 - (c) **drying said fabric so that the fabric temperature is 200 degrees** or greater wherein the delta b* of cotton fabric is greater (more negative) than the delta b* of a control when subjected to at least 15 cycles, a cycle is comprised of a wash step according to step (a) followed by a conditioning step according to step (b) and drying step according to step (c) and the softness of the fabric does not decrease.

Appeal Br.² 21 (Claims Appendix).

REFERENCES

The Examiner relies upon the prior art below in rejecting the claims on appeal:

Wentz	US 3,257,739	June 28, 1966
Gangwisch et al., (hereinafter “Gangwisch”)	US 3,748,093	July 24, 1973
Sunder et al., (hereinafter “Sunder”)	US 6,737,390	May 18, 2004
Lentsch et al., (hereinafter “Hubig” ³)	US 2004/0167056 A1	Aug. 26, 2004
Sajic et al., (hereinafter “Sajic”)	US 2006/0264352 A1	Nov. 23, 2006

REJECTIONS

The Examiner maintains the following rejections on appeal:

Rejection 1. Claims 3–8 under 35 U.S.C. § 103(a) as unpatentable over Sajic in view of Sunder and further in view of Wentz. Ans. 2.

Rejection 2. Claims 3–8 under 35 U.S.C. § 103(a) as unpatentable over Sajic in view of Gangwisch and Wentz in further view of Hubig. *Id.* at 4.

ANALYSIS

After having considered the evidence presented in this Appeal and each of Appellants’ contentions, we are not persuaded that Appellants

² In this decision, we refer to the Final Office Action mailed April 10, 2014 (“Final Act.”), the Appeal Brief filed September 2, 2014 (“Appeal Br.”), the Examiner’s Answer mailed January 30, 2015 (“Ans.”), and the Reply Brief filed March 30, 2015 (“Reply Br.”).

³ Lentsch is the first named inventor, but the Examiner refers to the reference as Hubig. Ans. 4. To avoid confusion, we also refer to the reference as Hubig.

identify reversible error, and we affirm the Examiner's § 103(a) rejections for the reasons expressed in the Final Office Action and the Answer. We add the following primarily for emphasis.

We review the appealed rejections for error based upon the issues identified by Appellants and in light of the arguments and evidence produced thereon. *Cf. Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (“it has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections”)). Appellants do not separately argue claims 4–8. We therefore limit our discussion to claim 3. Claims 4–8 stand or fall with claim 3. 37 C.F.R. § 41.37(c)(1)(iv) (2013). Each of the Examiner’s two rejections are discussed below.

Rejection 1. The Examiner rejects claims 3–8 as obvious over Sajic in view of Sunder and further in view of Wentz. Ans. 2. The Examiner finds that Sajic teaches a liquid fabric softener including “amido-amine quats” and “aminofunctional silicones.” *Id.*; *see also, e.g.*, Sajic ¶¶ 26, 56–58, 66, 70, 76, 77. The Examiner finds that Sajic does not explicitly teach washing with alkaline detergent at pH greater than 9 or 10, drying the fabrics so that the fabric temperature is 200 degrees Fahrenheit or greater, or the recited delta *b. Ans. 2. The Examiner, however, finds that Sunder teaches “conventional” washing with alkaline detergent at pH above 11, 10, or 9 and that Wentz teaches drying so that the garment temperature reaches about 220° F in order to avoid wrinkles. Ans. 3; *see also* Sunder 18:25–55; 63:65–64:3; Wentz 4:48–55. The Examiner also finds that the proposed combination would maintain or increase softness while providing the claimed delta *b because the prior art teaches similar materials and methods.

The preponderance of the evidence supports Examiner's findings and obviousness conclusion.

Appellants argue that a person of skill in the art would not combine the references because "while it may be known in the consumer and residential sector to use fabric softening compositions comprising quaternary ammoniums and silicones as softening agents," a person of skill would not have used such a composition in "the harsher conditions found in industrial and institutional settings" due to premature yellowing. Appeal Br. 12, 14 (*italics omitted*). The Examiner, however, finds that pH above 9 is conventional "for washing in residential as well as commercial conditions" and finds that drying at temperatures of 220 degrees F "is conventional" and beneficially provides material with "a wrinkle free condition." Ans. 7; *see also* Sunder 1:13–17 (suggesting that its teachings apply in both commercial and consumer settings); 60:3–7 (same); Wentz 4:48–55 (explaining that high temperature drying results in "a substantially wrinkle-free condition"). These factual underpinnings adequately support the Examiner's obviousness conclusion.

Appellants' argument does not persuasively rebut the Examiner's rationale for combining references because the argument is not well-supported by evidence. *See Estee Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997) ("Counsel's argument cannot take the place of evidence lacking in the record."). Appellants rely on Table 8 of the Specification as evidence and state that state that Table 8 shows "comparative data exemplifying how combining consumer softening compositions with commercial conditions provides deleterious results." Appeal Br. 12–13; *see also* Spec. 29:8–31:1. We agree with the Examiner, however, that the Table

8 results are not commensurate in scope with claim 3. Ans. 8. Rather, the Table 8 results relate to specific compositions, conditions, and concentration ranges while claim 3 is broader. *Id.* Moreover, Appellants present no evidence that the results of Table 8 are unexpected. Also, according to the Specification, a low Δb value is desirable because a low Δb indicates less yellowing. Spec. 11:24–30. Table 8, however, indicates that, at a drying temperature of 200° F and 240° F, the control not having amino functional silicone (Basic Conditioner 1) has a lower Δb than the invention having the amino functional silicone (Composition A). Spec. 29:8–17. Thus, the Table does not establish unexpectedly improved results for the invention over the scope of claim 3.

Appellants also emphasize that claim 3 recites “the liquid composition *consisting of* an amino-functional silicone . . . bleaching agent, and mixtures thereof” and emphasize that its claims “do not include optical brightening agents and surfactants.” Appeal Br. 13. The Examiner, however, finds that the cited references also do not require surfactants or optical brightening agents (Ans. 8), and Appellants fail to persuasively rebut this finding of fact. Rather, Appellants argue that the cited art does not recognize “*excluding* such yellow-masking components.” Reply Br. 2. But because the prior art teaches does not teach that the liquid composition having amino-functional silicone and amidoamine quaternary ammonium requires such components, the preponderance of the evidence supports that those components are not included in the prior art composition. *Cf. Süd-Chemie, Inc. v. Multisorb Technologies, Inc.*, 554 F.3d 1001, 1004-05 (Fed. Cir. 2009) (finding claim requiring “uncoated” film satisfied where prior art “plainly teaches that containers can be made of films that are heat sealed

without the use of adhesives, and thus without coatings” and where patent owner “has not offered any evidence that a reference to a microporous or laminate film would be understood by one of skill in the art as contemplating a film with an adhesive coating attached”). Indeed, Sajic teaches that “other additives” are optional (Sajic ¶ 25), and this suggests that such other additives may be excluded. *See Upsher-Smith Labs., Inc. v. PamLab, L.L.C.*, 412 F.3d 1319, 1322-23 (Fed. Cir. 2005) (holding that prior art disclosing optional addition of antioxidants read on claim recitation “essentially free of antioxidants”).

Because Appellants fail to identify reversible Examiner error, we sustain the Examiner’s rejection of claims 3–8 as obvious over Sajic in view of Sunder and further in view of Wentz.

Rejection 2. The Examiner also rejects claims 3–8 as obvious over Sajic in view of Gangwisch and Wentz in further view of Hubig. *Id.* at 4. The teachings of Sajic and Wentz are discussed above. The Examiner finds that Gangwisch teaches wash water of pH 8.9 to 9.8 up to pH 10.4. Ans. 5; *see also* Gangwisch 11:3–11. The Examiner relies on Hubig to demonstrate that the claimed whiteness (delta b*) “is known and desired in repeated industrial launderings.” Appeal Br. 5–6, 9; Hubig ¶ 45. The Examiner’s findings and conclusion regarding motivation to combine are similar to those explained with respect to rejection 1 (Ans. 5–6, 9), and the preponderance of the evidence again supports the Examiner’s findings and conclusion.

Appellants argue that Gangwisch relies upon optical brighteners and that claim 3 excludes optical brighteners. Appeal Br. 16–17. The Examiner, however, relies on Sajic as providing the liquid fabric softener composition which includes amino-functional silicone and amidoamine quaternary

ammonium. Ans. 4. The Examiner uses Gangwisch as teaching a high pH washing step. *Id.* at 5. Appellants' claims do not exclude use of an optical brightener during the washing step. Rather, the Examiner correctly concludes that the composition of claim 3's "step (a) in which the cotton fabric is washed at a pH greater than 9 is open to any detergent." Ans. 8–9. Thus, claim 3 does not distinguish Gangwisch use of a washing detergent which includes an optical brightener.

Appellants also argue that Hubig teaches a solid softener rather than a liquid softener and is therefore irrelevant. Appeal Br. 17; Reply Br. 2–3. The Examiner, however, relies on Sajic as teaching the liquid softening composition. Ans. 4. The Examiner relies on Hubig "to demonstrate the claimed whiteness retention using softeners of similar components is known and desired in repeated industrial launderings." Ans. 9. Appellants do not persuasively dispute the teachings of Hubig with respect to this more narrow point.

Because Appellants do not demonstrate reversible Examiner error, we sustain the Examiner's rejection of claims 3–8 as obvious over Sajic in view of Gangwisch and Wentz in further view of Hubig.

DECISION

For the above reasons, we affirm the Examiner's rejection of claims 3–8.

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