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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* TIMOTHY ALAN SCAVONE, MICHAEL JUDE LEBLANC,  
LOWELL ALAN SANKER, and ADRIAN GREGORY SWITZER

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Appeal 2015-006715  
Application 13/101,865  
Technology Center 1600

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Before DONALD E. ADAMS, ULRIKE W. JENKS, and JOHN G. NEW,  
*Administrative Patent Judges.*

ADAMS, *Administrative Patent Judge.*

DECISION ON APPEAL<sup>1</sup>

This appeal under 35 U.S.C. § 134(a) involves claims 1–3, 7–9, and 19–21 (Final Act. 1). Examiner entered rejections under 35 U.S.C. § 103(a) and obviousness-type double patenting. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> Appellants identify the real party in interest as “The Procter & Gamble Company” (Br. 1).

STATEMENT OF THE CASE

Appellants disclose “personal care products containing cyclodextrin complexing material and a fragrance material complexed with the same” (Spec. 1: 11–12). Claim 1 is representative and reproduced below:

1. A personal care product, comprising:

(a) a composition that is applied to the body;

(b) a plurality of spray dried particles associated with the composition, the plurality of spray dried particles comprising a cyclodextrin complexed with a first fragrance material, wherein the percent of the first fragrance material that is complexed with the cyclodextrin is greater than about 75%, so that the perceptibility of the first fragrance is minimized prior to its release;

wherein the cyclodextrin is encapsulated with an encapsulating material prior to association with the composition in order to prevent premature release of the first fragrance material; and

wherein the particle cannot be perceived by a consumer.

(Br. 15.)

The claims stand rejected as follows:

Claims 1–3, 7, 9, and 19–21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Bacon,<sup>2</sup> Strassburger,<sup>3</sup> and Hedges.<sup>4</sup>

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<sup>2</sup> Bacon et al., US 6,110,449, issued Aug. 29, 2000.

<sup>3</sup> Strassburger, WO 2006/137958 A1, published Dec. 28, 2006.

<sup>4</sup> Allan R. Hedges, *Industrial Applications of Cyclodextrins*, 98 Chem. Rev. 2035–44 (1998).

Claims 1, 2, 7, 8, and 19–21 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Buchanan,<sup>5</sup> Strassburger, and Hedges.

Claims 1–3, 8, and 9 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1–3, 8, and 9 of Scavone '147.<sup>6</sup>

Claims 1 and 2 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 37–39, and 43 of Scavone '191<sup>7</sup> in view of Bacon.

*Obviousness-type Double Patenting:*

“Appellants respectfully reserve their right to respond to the provisional rejections until such time as the provisional rejections are no longer provisional” (Br. 13). We interpret Appellants’ contention as a waiver of the appeal of the obviousness-type double patenting rejections. Therefore, we summarily affirm, and will not further discuss, the obviousness-type double patenting rejections of record.

*Obviousness:*

ISSUE

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

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<sup>5</sup> Buchanan et al., US 2002/0025946 A1, published Feb. 28, 2002.

<sup>6</sup> Scavone et al., US 2011/0212147 A1, published Sept. 1, 2011.

<sup>7</sup> Scavone et al., US 2008/0213191 A1, published Sept. 4, 2008.

FACTUAL FINDINGS (FF)

FF 1. Examiner relies on Bacon or Buchanan to disclose Appellants' claimed invention with the exception of a disclosure that: (1) "the percent of the fragrance material that is complexed with the cyclodextrin is greater than about 75%" and (2) "the cyclodextrin material is encapsulated with encapsulating material prior to association with the composition" (Ans. 5; *see generally id.* at 3–5; *see also id.* at 16–17).

FF 2. Examiner relies on Strassburger to make up for the failure of Bacon and Buchanan to disclose that the percent of the fragrance material that is complexed with the cyclodextrin is greater than about 75% (Ans. 5–8; *see also id.* at 17–19).

FF 3. Examiner relies on Hedges to disclose the encapsulation of a complex in a wax coating (*see* Ans. 9, citing Hedges 2043).

FF 4. Examiner finds that Hedges discloses that

A wax coating can be placed over a complex to protect it from the effects of water. In applications, such as the use of fragrance complexes in laundry dryer sheets, the dryer sheet comes into contact with the clothing when it is wet enough to release fragrance from the complex. The complex is encased in a wax which does not melt until certain temperature conditions are met. While there is still some water in the clothing being dried, some of the fragrance is release[d] as the wax melts, exposing the complex, but a sufficient amount of fragrance remains to obtain the intended effect.

(Ans. 9 (emphasis removed); *see* Hedges 2043.)

FF 5. Examiner finds that "body heat would [] be able to heat the wax--melting would just depend on the melting point of the selected wax" (Ans. 16).

## ANALYSIS

### *The combination of Bacon or Buchanan with Strassburger and Hedges:*

Based on the combination of Bacon or Buchanan with Strassburger and Hedges, Examiner concludes that, at the time Appellants' invention was made, it would have been prima facie obvious to, *inter alia*, encapsulate a plurality of spray dried particles comprising a cyclodextrin complexed with a first fragrance material, as suggested by the combination of Bacon or Buchanan with Strassburger in wax as suggested by Hedges (*see* Ans. 11–13 and 23–24). In this regard, Examiner finds that, while Hedges suggests that the wax must melt before a fragrance containing composition that is encased in the wax is released, a person of ordinary skill in this art would select a wax capable of melting when exposed to body heat (*see* FF 4–5; *see also* Br. 5–7, 11, and 13). Examiner, however, failed to: (a) explain why a person of ordinary skill in this art would have found it prima facie obvious to formulate a personal care product, as suggested by the combination of Bacon or Buchanan with Strassburger, with wax encapsulated particles comprising a cyclodextrin complexing material or, if such a reason existed, (b) establish an evidentiary basis on this record to support a conclusion that a person of ordinary skill in this art would have had knowledge of a wax that is capable of: (i) encapsulating a composition within the scope of Appellants' claimed invention and (ii) melting in the presence of body heat (*see generally* Br. 6–7; *cf.* FF 5). *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (“rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.”).

### CONCLUSION OF LAW

The preponderance of evidence relied upon by Examiner fails to support a conclusion of obviousness.

The rejection of claims 1–3, 7, 9, and 19–21 under 35 U.S.C. § 103(a) as unpatentable over the combination of Bacon, Strassburger, and Hedges is reversed.

The rejection of claims 1, 2, 7, 8, and 19–21 under 35 U.S.C. § 103(a) as unpatentable over the combination of Buchanan, Strassburger, and Hedges is reversed.

### SUMMARY

We reverse the obviousness rejections of record and affirm the provisional obviousness-type double patenting rejections of record.

### 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)(1)(iv).

### AFFIRM-IN-PART