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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* PATRICK E. EDDY

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Appeal 2018-002034  
Application 13/780,500  
Technology Center 3700

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Before MICHAEL L. HOELTER, BRETT C. MARTIN, and  
JILL D. HILL, *Administrative Patent Judges*.

HOELTER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is a decision on appeal, under 35 U.S.C. § 134(a), from the Examiner's Final Rejection of claims 1–8, 10, 11, 13–15, 17, 18, and 21. Final Act. 1 (Office Action Summary), 2. We have jurisdiction under 35 U.S.C. § 6(b). For the reasons explained below, we do not find error in the Examiner's rejections. Accordingly, we AFFIRM.

THE CLAIMED SUBJECT MATTER

The disclosed subject matter “generally relate[s] to an adhesive formulation for a film dressing, and to an adhesive-coated film dressing.”

Spec. ¶ 2. Claims 1, 6, and 15 are independent. Claim 1 is illustrative of the claims on appeal and is reproduced below.

1. A film dressing for adhering over a wound site, the film dressing comprising:
  - a film having a first side and a second side;
  - an adhesive formulation coated on at least one of said sides of said film; and
  - a release liner applied over said adhesive formulation and held in place by the adhesive formulation,
    - wherein said adhesive formulation comprises a mixture of a medical-grade adhesive and an antimicrobial substance that is mixed before coating on the at least one of said sides of said film,
    - wherein said adhesive formulation includes about 0.01% to about 60% of said antimicrobial substance,
    - wherein said antimicrobial substance is a silane quaternary ammonium salt comprising 3- (trimethoxysilyl) propyldimethyloctadecyl ammonium chloride, and
    - wherein said medical-grade adhesive comprises an acrylic adhesive.

#### REFERENCES RELIED ON BY THE EXAMINER

Grossmann et al.	US 4,372,303	Feb. 8, 1983
Ansell	US 5,183,664	Feb. 2, 1993
Carte et al.	US 6,495,229 B1	Dec. 17, 2002
Schonemyr et al.	US 2007/0042198 A1	Feb. 22, 2007
Leonard et al.	US 2009/0312684 A1	Dec. 17, 2009
El-Naggar et al.	US 8,440,217 B1	May 14, 2013

### THE REJECTIONS ON APPEAL<sup>1</sup>

Claims 1–3, 6–8, 10, 13–15, 17, and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ansell and Schonemyr, as evidenced by Grossmann and El-Naggar.

Claim 4 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Ansell and Schonemyr (as evidenced above) and Carte.

Claims 5, 11, and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Ansell and Schonemyr (as evidenced above), and Leonard.

### ANALYSIS

*The rejection of claim 1–3, 6–8, 10, 13–15, 17, and 21 as unpatentable over Ansell and Schonemyr, as evidenced by Grossmann and El-Naggar*

Appellant argues independent claims 1, 6, and 15 together, and further “acknowledges that the three independent claims rise or fall together.” App. Br. 7. Accordingly, we select independent claim 1 for review, with the remaining claims (i.e., claims 2, 3, 6–8, 10, 13–15, 17, and 21) standing or falling with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claim 1 is directed to a film dressing having an acrylic adhesive formulation mixed with a particular antimicrobial substance. The Examiner

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<sup>1</sup> As understood, the Examiner fully withdrew the written description rejection and both double patenting rejections. *See* Ans. 13. However, the actual claims rejected and those indicated as being subsequently withdrawn from rejection are not identical. Compare, for example, the listing on Final Act. 3 with that on Ans. 13. However, the Examiner does not address any of these rejections in the Examiner’s Answer, or otherwise provide any indication that the rejection of these missing claims is maintained. Thus, we consider this discrepancy to be an oversight and agree with Appellant that, in each case, the rejection of all the claims has been withdrawn. *See* Reply Br. 2.

relies on Ansell for teaching both the dressing and the acrylic adhesive (“Ansell’s wound dressing . . . serves as a *carrier* (emphasis added”). Final Act. 5, 6. The Examiner also relies on it being obvious “to substitute” Ansell’s antibacterial agent for that disclosed in Schonemyr “to yield predictable result.” Final Act. 6, 7. The Examiner’s reliance on Grossmann and El-Naggar are provided “as evidence[]” of the teachings of Ansell. Final Act. 5.

Regarding the “acrylic adhesive” limitation, Appellant contends, “Ansell states repeatedly that the adhesive gel is a ‘polyurethane gel adhesive,’ never once referring to it as an ‘acrylic adhesive.’” App. Br. 12; *see also id.* at 13–15, Reply Br. 2, 5. Appellant’s Specification does not provide any special definition of the claim term “acrylic adhesive” (*see* Spec. ¶¶ 3, 15), and as such, the Examiner provides an explanation of this term.<sup>2</sup> Ans. 16. The Examiner references “<http://www.tech-faq.com/acrylic-adhesives.html>” which describes “acrylic adhesive” as “a resin-based adhesive that is comprised of acrylic or methylacrylic polymers.” Ans. 16. The Examiner thereafter points out that the adhesive teachings of Ansell coincide with this definition. Ans. 16 (referencing Ansell 8:15–22); *see also* Final Act. 5. Ansell states:

*Polyurethane gel adhesives useful for the dressings of the present invention may be prepared by reacting isocyanate prepolymer, which is itself the reaction product of polyfunctional isocyanate and polyoxyalkylene diol monoalkyl ether, with acrylate comprising hydroxyl-containing ester of*

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<sup>2</sup> We are instructed that if the Specification does not define or suggest a particular meaning for a term, it is appropriate to consult a general dictionary definition of the word for guidance. *See Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1348 (Fed. Cir. 2010).

*acrylic or methacrylic acid* and other hydroxyl containing compounds.

Ansell 8:15–21 (emphasis added). Hence, while it may be true, as Appellant states, that Ansell “never once refer[ed] to it as an ‘acrylic adhesive’” (*see supra*), that lack of identification does not negate Ansell’s teaching of what one skilled in the art would understand to be an “acrylic adhesive.”

Appellant also “objects to the Examiner’s submission of random website ‘evidence.’” Reply Br. 4. However, as previously noted, it is appropriate to consult external sources for guidance, and Appellant does not explain how the Examiner can be faulted for doing so (or how the Examiner’s citation is “random”). We also note that Appellant does not proffer a competing or more compelling definition of this claim term.

Besides Ansell not referring to the adhesive as an “acrylic adhesive,” Appellant also contends that Ansell’s adhesive is, in actuality, not an acrylic adhesive but instead a polyurethane adhesive, “because the vast majority of the isocyanate prepolymer is reacted with polyols (thus creating the polyurethane).” App. Br. 13. According to Appellant, “[t]he acrylates are used in a limited amount” and “react with only 15–25% of the isocyanate prepolymer.” App. Br. 13; *see also* Ansell 8:22–23, Reply Br. 3, 4. Thus, “[a]lthough acrylates are added . . . the polymer at its core is a polyurethane polymer.” App. Br. 13 (referencing Ansell 9:61–62); *see also* Reply Br. 4.

From the above, it appears that Appellant does not dispute Ansell’s use of acrylates in the adhesive, but instead argues that only a small percentage is employed. However, the claim language does not impose any minimum threshold on the amount of acrylates to be employed (only that the “adhesive comprises an acrylic adhesive”). In other words, it appears Appellant is arguing a matter of degree, not kind. Further, the Examiner’s

reference to El-Naggar (*see* Final Act. 5) is useful in this matter because this reference expressly describes the use of acrylic adhesives while also stating, the “adhesives can be based on a variety of systems such silicone, polyurethane, chloroprene, butyl, polybutadiene, isoprene or neoprene.” El-Naggar 11:16–17, 11:53–55. In view of these teachings, Appellant’s attempt to make a distinction because Ansell’s acrylates “react with only 15–25% of the isocyanate prepolymer” (*see supra*) is not persuasive of Examiner error.

Appellant also contends, “the process **Ansell** describes to make the polyurethane gel adhesive does not use the process that El-Naggar describes.” App. Br. 13; *see also id.* at 14, Reply Br. 3, 6–8. However, the Examiner has not relied on El-Naggar for its particular process; instead, the Examiner relies on El-Naggar as evidence in support of the findings regarding Ansell’s adhesive formulation. *See* Final Act. 5.

Appellant further contends, “[a]crylic acid is not the same thing [as] ester of acrylic acid, and methylacrylic acid is not the same thing as ester of methylacrylic acid.” App. Br. 14 (citing Ansell 8:15–21); *see also* Reply Br. 4 (“the Examiner never demonstrates that Ansell’s process makes acrylic or methylacrylic polymers”), 6. To be clear, Ansell teaches an adhesive prepared by reacting a prepolymer “with acrylate comprising hydroxyl-containing ester of acrylic or methacrylic acid and other hydroxyl containing compounds.” Ansell 8:15–21. Without attempting to become too technical, an “acrylate” is understood to be “acrylic resin.”<sup>3</sup> The Examiner’s definition provided above describes “acrylic adhesive” as “a resin-based adhesive that is comprised of acrylic or methylacrylic polymers.” Ans. 16. Thus, it is not clear, based on Ansell’s direct teaching of employing an “acrylate” (i.e., an

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<sup>3</sup> *See* <https://www.merriam-webster.com/dictionary/acrylate>

acrylic resin) in the formulation of the adhesive, how that expressed usage fails to conform to the above understanding of an “acrylic adhesive.” Hence, Appellant’s contentions are not persuasive of Examiner error.

Appellant also contends, “**Schonemyr** does not disclose that the adhesive and the quaternary ammonium salt are mixed together, as claim 1 requires.” App. Br. 14. Appellant’s contention is not persuasive because, although the Examiner relied on Schonemyr for disclosing a certain antimicrobial agent, the Examiner did not rely on Schonemyr for teaching the agent and the adhesive as being “mixed together.” *See* Final Act. 7. Instead, the Examiner states that this “mixed” limitation “is being treated as a product by process limitation.” Final Act. 7. The Examiner states that “product by process claims are not limited to the manipulation of the recited steps, only the structure implied by the steps.” Final Act. 7. Thus, once the recited product appears to be substantially the same as the prior art product, “a 35 USC [§§] 102/103 rejection may be made and the burden is shifted to applicant to show an unobvious difference.” Final Act. 7 (referencing *In re Thorpe*, 777 F.2d 695, 698 (Fed. Cir. 1985)).

Appellant argues that upon “reading **Schonemyr**, an ordinarily skilled artisan may think to coat **Ansell’s** film dressing” but, “there is nothing in **Schonemyr** that would prompt the artisan to substitute the antibacterial agent in the gel of Ansell's film.” App. Br. 16; *see also* Reply Br. 8, 10. Although Appellant’s argument identifies another way one skilled in the art might be prompted to combine Ansell’s adhesive with Schonemyr’s antimicrobial substance (i.e., “to coat”), Appellant still fails to resolve (or even address) the Examiner’s finding that the manner by which the compounds are combined is deemed to be a product by process limitation.

Hence, Appellant's contention is not persuasive of either an "unobvious difference" (*see supra*) or of Examiner error.

Appellant also contends that a skilled person, reading Schonemyr, would have no reason "to substitute the antibacterial agent contained in the adhesive gel of **Ansell's** film dressing with" Schonemyr's agent. App. Br. 16; *see also* Reply Br. 8. However, as indicated above, the Examiner's stated reason is that the substitution would "yield predictable result," i.e., "prevent microbiological contamination" of the site. Final Act. 7. Appellant does not address this expressed reason or otherwise explain how Schonemyr's agent (substituted for Ansell's agent) would fail to prevent microbiological contamination. Accordingly, Appellant's contention is not persuasive of Examiner error.

Appellant also addresses the hydrophobic/hydrophilic properties of the various adhesive/antimicrobial substances discussed in Ansell and Schonemyr. App. Br. 16–17; Reply Br. 8–10. Appellant contends that Ansell "requires the conclusion that hydrophilicity and water absorbing properties" of the adhesive "were very important" whereas Schonemyr teaches that its antimicrobial agent has "hydrophobicity and poor water/blood absorption capacity." App. Br. 17 (referencing Schonemyr ¶ 13). Thus, the two "are the very opposite" of each other and would not be combined together. App. Br. 17.

The Examiner explains that Paragraph 13 of Schonemyr clearly states that it is "the surface of a material coated with" Schonemyr's agent that gives "the material a rather poor absorption capacity." Ans. 21 (also referencing Schonemyr ¶ 57). The Examiner explains that it is not Schonemyr's agent that imparts that property but, instead, the material upon

which it is coated. *See* Ans. 21. According to the Examiner, Appellant has interpreted Paragraph 13 of Schonemyr “to mean applying a surface with [Schonemyr’s agent] renders the surface hydrophobic which is an error.”<sup>4</sup>

Ans. 21. Appellant disagrees contending, “the Examiner is playing semantics” and that “the Examiner never actually addresses the substance of Applicant’s point - namely, that a PHOSITA would have been dissuaded from substituting the antibacterial in the adhesive gel of Ansell’s film dressing with” Schonemyr’s antibacterial agent. Reply Br. 9.

As noted above, the Examiner referenced Paragraph 57 of Schonemyr in rendering the rejection. *See* Ans. 21. This paragraph provides examples of such suitable substrates as a “liquid absorbing material in food packages,” “sanitary napkins,” “diapers, and incontinence guards.” Ans. 21.

Additionally, Paragraph 55 of Schonemyr states that wood, leather, paper, non-woven fabrics of inorganic or organic fibers, cotton, wool, and other such liquid absorbing items are each a suitable “surface of the substrate.” In view of the various substrates suggested for use with Schonemyr’s agent in Paragraphs 55 and 57, Appellant’s contention that a skilled person “would have been dissuaded” from substituting Schonemyr’s antibacterial for that of Ansell because of the asserted hydrophobic/hydrophilic reasons, is not persuasive.

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<sup>4</sup> Although not mentioned by the Examiner, we note that Paragraph 13 of Schonemyr (relied on by Appellant as disclosing that Schonemyr’s agent is hydrophobic) addresses past problems associated with antimicrobial agents (*see also* App. Br. 11) and does not address Schonemyr’s preferred agent that was relied on by the Examiner. *See* Final Act. 6 (referencing Schonemyr ¶ 25); *see also* Schonemyr ¶ 46.

Appellant also alleges, “the Examiner's proposed substitution changes the principle of operation of the antibacterial component of Ansell.” App. Br. 17; *see also id.* at 18, Reply Br. 11–12. However, Appellant does not make clear how the substitution and use of Schonemyr’s antimicrobial substance would fail to likewise prevent unwanted growth. In other words, as per the Examiner, after Schonemyr’s agent “is applied, it would not change or alter the efficacy of the antimicrobial substance in killing bacteria or microbes.” Ans. 21. Appellant does not explain how Schonemyr’s compound would fail in this endeavor, nor does Appellant effectively explain how “Schonemyr teaches away from making the Examiner’s substitution.” Reply Br. 12.

Accordingly, and based on the record presented, we are not persuaded the Examiner erred in rejecting claims 1–3, 6–8, 10, 13–15, 17, and 21 as unpatentable over Ansell and Schonemyr, as evidenced by Grossmann and El-Naggar.

*The rejection of (a) claims 4 as being unpatentable over Ansell and Schonemyr (as evidenced above) and Carte; and, (b) claims 5, 11, and 18 as being unpatentable over Ansell and Schonemyr (as evidenced above), and Leonard*

Appellant does not present separate arguments regarding dependent claims 4, 5, 11, and 18. Thus, lacking any reason why the additionally cited art fails to teach/disclose the additionally cited limitations, we likewise sustain the Examiner’s rejections of these claims.

#### DECISION

The Examiner’s rejections of claims 1–8, 10, 11, 13–15, 17, 18, and 21 are affirmed.

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No time period for taking any subsequent action in connection with this appeal (*see* 37 C.F.R. § 1.136(a)(1)) may be extended (*see* 37 C.F.R. § 1.136(a)(1)(iv)).

AFFIRMED