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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte MARTIN ALBRECHT
(APPLICANT: KUHS GMBH)

Appeal 2018-002048
Application 14/845,651¹
Technology Center 1600

Before DONALD E. ADAMS, RICHARD M. LEBOVITZ, and
DAVID COTTA, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This Appeal under 35 U.S.C. § 134(a) involves claims 1–19 (Br. 5; *see also* Final Act.² 2; *see generally* Ans.³ 5).⁴ Examiner entered a rejection under 35 U.S.C. § 103(a). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ Appellant identifies “Kuhls, GMBH . . . a whole owned subsidiary of GlaxoSmithKline plc.” as the real party in interest (*see* Appellant’s March 20, 2017 Appeal Brief (Br.) 3).

² Examiner’s June 17, 2016 Final Office Action.

³ Examiner’s September 22, 2017 Answer.

⁴ Examiner denied entry of Appellant’s claim 20 (*see* Examiner’s September 23, 2016 Advisory Action). Therefore, we decline Appellant’s request for “the Board to enter claim 20 into the record for this appeal” (Br. 5).

STATEMENT OF THE CASE

Appellant’s disclosure “relates to a cosmetic or pharmaceutical composition, to be applied topically” (Spec. 1:3–4). Claim 1 is representative and reproduced below:

1. A cosmetic composition for topical application, said composition comprising:

a hydrophilic outer phase comprising water;

at least one cosmetic active ingredient which is *rice bran wax*; and

at least one carrier substance for the active ingredient;

wherein:

a) the carrier substance forms a planar structure which comprises at least two lamellar double membrane layers, arranged one over another in the manner of a sandwich;

b) between adjacent double membrane layers, aligned parallel to each other, a layer of an inner phase comprising water is arranged;

c) *the active ingredient is distributed in the double membrane layer and in the layer of the inner phase such that the layer of the inner phase contains the active ingredient in a concentration range between 2% by weight and 98% by weight, and the double membrane layer contains the active ingredient in a concentration between 98% by weight and 2% by weight, respectively, in relation to the total concentration of the active ingredient;*

d) *the outer phase comprises the active ingredient in a concentration between 0% by weight and 2% by weight, in relation to the total concentration of the active ingredient;* and

e) the carrier substance comprises hydrogenated phosphatidylcholine.

(Br. 14 (emphasis added).) Appellant’s claims 2–19 depend directly or indirectly from Appellant’s claim 1 (*see id.* at 14–17).

Ground of rejection before this Panel for review:⁵

Claims 1–19 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Albrecht,⁶ De Souza Costa,⁷ and Arquette.⁸

ISSUE

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

ANALYSIS

Examiner finds that Albrecht discloses a cosmetic composition for topical application of an active ingredient, wherein the composition comprises a lamellar structure (*see* Final Act. 5; *see generally id.* at 5–8; *see also* Br. 9 (“Albrecht . . . discloses a carrier system containing a number of similar components necessary to construct a lamellar system as that herein”)). Although Examiner recognizes that Albrecht is “silent as to the amount of active ingredient present in the double membrane layer and the inner and outer phase” of its composition, Examiner concludes that because Appellant’s claimed composition appears to be the same as Albrecht’s, “absent a showing of unapparent differences . . . the burden is on the [Appellant] to prove that the composition of the claimed method is different from those taught by the prior art and to establish patentable differences” (Ans. 7–8 (citing *In re Best*, 562 F.2d 1252 (CCPA 1977))). We are not persuaded.

⁵ We recognize that Examiner objects to several claims in this Appeal (*see* Final Act. 2–3; Ans. 3–5; *cf.* Br. 8–9). These objections are petitionable rather than appealable. Therefore, we decline to address the merits of these objections.

⁶ Albrecht et al., US 2005/0208012 A1, published Sept. 22, 2005.

⁷ De Souza Costa et al., WO 2007/033453 A1, published Mar. 29, 2007.

⁸ Arquette, US 2004/0265249 A1, published Dec. 30, 2004.

Notwithstanding Examiner's assertion that Albrecht's composition is the same as Appellant's, Examiner recognizes that "Albrecht does not teach rice bran wax," which is a required component of claim 1 (Final Act. 8; *see also* Br. 9). Thus, we are not persuaded that Examiner established a sufficient evidentiary basis on this record to shift the burden to Appellant to prove that Appellant's claimed composition is different than Albrecht's composition (*cf.* Final Act. 7–8).

In this regard, we note Examiner's reliance on Arquette to make up for Albrecht's failure to disclose rice bran wax (Final Act. 8 ("[t]he compositions of Arquette also contain rice bran wax"); *see also* Ans. 6 ("rice bran wax [is] taught by Arquette")).⁹ As Appellant explains, however, Appellant's

[c]laim 1 [] requires components for a skin care formulation that produce a bilayer lamellar system containing a cosmetic active ingredient, e.g. rice bran wax. Lamellar systems such as this one are not the traditional w/o or o/w emulsion as the Examiner appears to confuse with the use of the secondary references of De Souza [Costa] and Arquette. Nor are the lamellar systems such as this the same as a liposome.

(Br. 9–10; *see also id.* at 10–11.) Thus, Appellant contends that "[t]he use of rice bran wax in an o/w or w/o emulsion does not mean that their incorporation into another type of formulation (e.g., the instant lamellar structure) would be obvious, nor would its incorporation into such a lamellar system produce a stable formulation with skin protective effects" (*id.* at 12). In addition, Appellant contends that "Albrecht . . . when fairly and reasonable interpreted by the person of ordinary skill in the art (and without

⁹ Examiner relies on De Souza Costa to disclose cupuacu butter and shea butter, which relates to subject matter in Appellant's dependent claims (*see* Final Act. 8 and 9; *see generally* Ans. 6 and 8).

impermissible use of hindsight) does not describe, teach or reasonably suggest the claimed combination of rice bran wax in a lamellar system with the particular concentration[] ranges” required by Appellant’s claimed invention and neither De Souza Costa nor Arquette remedy these deficiencies in Albrecht (*id.* at 13). We agree.

Simply stated, Examiner failed to establish an evidentiary basis on this record to support a conclusion that a product resulting from Examiner’s combination of prior art would have, *initer alia*, distributed Appellant’s active ingredient, rice bran wax, across the double membrane layer, layer of the inner phase, and outer phase in the identical, or substantially identical, manner as required by Appellant’s claimed invention. *See Best*, 562 F.2d at 1255 (permitting the PTO to shift the evidentiary burden to Appellant only when “the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes”).

For the foregoing reasons, we find that Examiner failed to establish an evidentiary basis on this record to support a conclusion that the combination of Albrecht, De Souza Costa, and Arquette makes obvious Appellant’s claimed invention (*see* Final Act. 4–9; *see also* Ans. 5–8).

CONCLUSION

The preponderance of evidence relied upon by Examiner fails to support a conclusion of obviousness. The rejection of claims 1–19 under 35 U.S.C. § 103(a) as unpatentable over the combination of Albrecht, De Souza Costa, and Arquette is reversed.

REVERSED