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Abel Schillinger, LLP 8911 N. Capital of Texas Hwy Bldg 4, Suite 4200 Austin, TX 78759			CHUI, MEI PING	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEFANIE VON THADEN and MANUELA KOEHLER

Appeal 2018-007435
Application 14/124,096
Technology Center 1600

Before DONALD E. ADAMS, TAWEN CHANG, and
MICHAEL A. VALEK, *Administrative Patent Judges*.

VALEK, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant¹ requests rehearing of the Decision entered November 18, 2019. Appellant argues “that from the Decision it appears that the Board has overlooked and misapprehended several important facts.” Req. Reh’g 1. As explained below, we determine Appellant has not persuasively shown that the Board overlooked or misapprehended the matters alleged.

Appellant contends the Board incorrectly determined that because claim 34 “is a comprising claim; it does not exclude urethane foam from the claimed preparation.” *Id.* at 2 (quoting Decision 8). According to Appellant, “while it may be reasonable to consider [the] expanded

¹ We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies Beiersdorf AG as the real party in interest. Appeal Br. 3.

polyurethane foam which has been impregnated with the claimed preparation to ‘comprise’ the preparation, it clearly is not reasonable to consider the preparation which has been impregnated into the polyurethane foam to ‘comprise’ the polyurethane foam.” *Id.* We are not persuaded. As explained in the Decision, “Choi’s polyglycerol-10 stearate emulsion both alone, and when impregnated in expanded foam, reads on the preparation in claim 34.” Decision 8. Appellant has not persuasively shown that the broadest reasonable interpretation of “preparation,” as recited in claim 34, excludes a “cosmetic product” composed of a polyurethane foam impregnated with an emulsion as taught in Choi. *Id.* at FF3.

Appellant next argues the Board overlooked that Choi “exclusively discloses UV-blocking W/O or OW compositions of low viscosity in impregnated form” and, therefore, Choi teaches away from providing “the compositions disclosed therein . . . in unimpregnated form.” *See* Req. Reh’g 2–3. This argument is unpersuasive. First, as explained above, claim 34 does not exclude urethane foam preparations. Second, Choi does not “criticize, discredit, or otherwise discourage” the use of its emulsions outside a urethane foam. *Galderma Labs., L.P. v. Tolmar, Inc.*, 737 F.3d 731, 738 (Fed. Cir. 2013) (quotations omitted). Instead, Choi acknowledges that UV blocking W/O and O/W emulsions are generally prepared as creams or lotions. *See* Decision 3 (FF1). While it is true Choi teaches that impregnating such emulsions into urethane foam provides certain advantages over other types of preparations, Choi’s expression of “a general preference” for the urethane foam preparation is not a teaching away. *See Galderma*, 737 F.3d at 738–39 (“A teaching that a composition may be

optimal or standard does not criticize, discredit, or otherwise discourage investigation into other compositions.”).

Finally, with respect to claims 35, 36, and 48, Appellant argues the Board misapprehended Knuppel’s teaching of foam stabilizers and, thus, there is no reason to combine a film former as taught in Knuppel with Choi’s emulsion. *See* Req. Reh’g 3–4. Specifically, Appellant contends “the foam stabilizers mentioned in Knuppel are stabilizers which may be used for stabilizing the foam of foaming cosmetic or dermatological compositions, i.e., not for solid, impregnatable foams like the expanded polyurethane foam of Choi.” *Id.* at 4. Again, we are not persuaded. The record lacks sufficient evidence to support the distinction Appellant draws regarding foam stabilizers. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“An assertion of what seems to follow from common experience is just attorney argument and not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness.”).

Moreover, as explained in the Decision, the record supports Examiner’s finding that a skilled artisan would be motivated to add a film-forming polymer to “‘improve the water-resistance property’ of an O/W or W/O emulsion” and that one “would reasonably expect the addition of a film former to improve water resistance of an O/W or W/O emulsion *whether used in a lotion or cream* as taught in Knuppel (FF5) *or in a foam* as taught in Choi (FF3).” Decision 11 (emphases added). Appellant provides no persuasive evidence or argument to support a different finding.

In conclusion, Appellant has not identified an issue of fact or law that was overlooked or misunderstood. Therefore, the Request for Rehearing is denied.

Appeal 2018-007435
Application 14/124,096

Outcome of Decision on Rehearing:

Claims	35 U.S.C. §	Reference(s)/Basis	Denied	Granted
34, 37-43, 45	103	Choi	34, 37-43, 45	
34-53	103	Choi, Knuppel, De La Poterie	34-53	
Overall Outcome			34-53	

Final Outcome of Appeal after Rehearing:

Claims	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
34, 37-43, 45	103	Choi	34, 37-43, 45	
34-53	103	Choi, Knuppel, De La Poterie	34-53	
Overall Outcome			34-53	

REHEARING DENIED