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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte STEPHANIE VON DER FECHT,
SVENJA LENA MOELLGAARD,
ISABEL BALCKE, and PETRA KOCH¹

Appeal 2018-009084
Application 14/376,981
Technology Center 1600

Before ULRIKE W. JENKS, JOHN G. NEW, and
ELIZABETH A. LAVIER, *Administrative Patent Judges.*

NEW, *Administrative Patent Judge.*

DECISION ON APPEAL

¹ We use the word “Appellant” to refer to the “applicant” as defined in 37 C.F.R. § 1.142. Appellant identifies Beiersdorf AG as the real party-in-interest. App. Br. 3.

SUMMARY

Appellant files this appeal under 35 U.S.C. § 134(a) from the Examiner's Final Rejection of claims 58–75, 78, and 79 as unpatentable under 35 U.S.C. § 103(a) as being obvious over the combination of Giuliani et al. (US 2012/0020902 A1, January 26, 2012) (“Giuliani”) in view of Degussa, *Isolan*[®] *GPS, Emulsifier for Low Viscous W/O Lotions*, (of record) (“Degussa”), and J. Meyer et al., *A Novel-PEG Free Emulsifier Designed for Formulating W/O Lotions with a Light Skin Feel*, 131(11) J. SEIFEN, OELE, FETTE, WACHSE 20–28 (2005) (“Meyer”).

Claims 58–75, 78, and 79 also stand provisionally rejected under the nonstatutory doctrine of obviousness-type double patenting over claims 20–38 of copending US Appl. Ser. No. 14/376,977 (the “’977 application”).

We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

NATURE OF THE CLAIMED INVENTION

Appellant's claimed invention is directed to cosmetic and/or dermatological preparations based on a water-in-oil emulsion comprising at least two W/O emulsifiers which differ in their HLB value up to a maximum of 1, which lead to sensorily acceptable preparations, and at the same stable W/O emulsions. Spec. Abstr.

REPRESENTATIVE CLAIM

Independent claim 58 is representative and recites:

58. A cosmetic and/or dermatological preparation, wherein the preparation is flowable at room temperature and is a water-

in-oil emulsion comprising least two W/O emulsifiers, which at least two W[O] emulsifiers comprise from 0.1% to 1.5% by weight of polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate and from 0.1% to 3% by weight of diisostearyl polyglyceryl-3 dimer dilinoleate, based on the total weight of the preparation.

App. Br. 17.

ISSUES AND ANALYSES

We agree with, and adopt, the Examiner's findings, reasoning, and conclusion that the claims on appeal are obvious over the combined cited prior art. We address the arguments raised by Appellant below.

A. Claims 58–75, 78, and 79 under 35 U.S.C. § 103

Issue 1: Claims 58–75, 78, and 79

Appellant argues that the Examiner erred because a person of ordinary skill in the art would not have been motivated to replace PEG-30 dipolyhydroxystearate with diisostearyl polyglyceryl-3 dimer dilinoleate to arrive at the claimed invention. App. Br. 6.

Analysis

The Examiner finds that Giuliani teaches cosmetic compositions for the treatment of skin, including exemplary embodiments comprising two emulsifiers, PEG-30 dipolyhydroxystearate and polyglyceryl-4 diisostearate polyhydroxystearate sebacate. Final Act. 3 (citing Giuliani Abstr., Exs. 1–3). The Examiner finds that Giuliani teaches that these compositions are described as a “milk” and “cream” and are liquid, which the Examiner finds

corresponds to the limitation of claim 58 reciting “is flowable at room temperature.” *Id.* The Examiner finds that Giuliani teaches in its examples polyglyceryl-4 diisostearate polyhydroxystearate sebacate at 2–6% and 1–5% and PEG-30 dipolyhydroxysterate at 2–5% and 1–5%. *Id.* at 3–4 (citing Giuliani Exs. 1–3).

The Examiner acknowledges that Giuliani does not teach that its composition comprise distearoyl polyglyceryl-3 dimer dilinoleate. Final Act. 4. However, the Examiner finds that Meyer teaches that PEG-30 dipolyhydroxysterate is not efficient in providing stable W/O emulsions, and that formulating stable W/O emulsions with an oils phase below 25% and a light skin feel is a challenge. *Id.* (citing Meyer 20). The Examiner finds that Meyer teaches that PEG-30 dipolyhydroxysterate provides the desired low viscosity, but performs poorly in terms of stability under heat and freezing conditions. *Id.* (citing Meyer 23, Fig. 3).

The Examiner finds that Degussa teaches that polyglyceryl-4 diisostearate polyhydroxystearate sebacate is specially designed for W/O emulsions and, in combination with distearoyl polyglyceryl-3 dimer dilinoleate, can be used to obtain W/O emulsions with a lower viscosity. Final Act. 4.

The Examiner therefore concludes that it would have been obvious to a person of ordinary skill in the art at the time of invention to replace the emulsifier PEG-30 dipolyhydroxystearate of Giuliani with distearoyl polyglyceryl-3 dimer dilinoleate, as taught by Degussa and suggested by Meyer, because the latter is a better-performing emulsifier. Final Act. 4. The Examiner notes that Degussa teaches that polyglyceryl-4 diisostearate polyhydroxystearate sebacate in combination with distearoyl polyglyceryl-3

dimer dilinoleate can be used to obtain W/O emulsions with a lower viscosity. *Id.* The Examiner therefore concludes that a person of ordinary skill in the art would have been motivated to replace the PEG-30 dipolyhydroxystearate with distearoyl polyglyceryl-3 dimer dilinoleate, because the combination of polyglyceryl-4 diisostearate polyhydroxystearate sebacate and distearoyl polyglyceryl-3 dimer dilinoleate is expressly taught together by Degussa. *Id.* at 4–5.

The Examiner further concludes that a person of ordinary skill in the art would have had a reasonable expectation of success in combining the references, because all of the references teach W/O emulsions of low viscosity. Final Act. 5. Furthermore, the Examiner notes, Giuliani teaches, in Examples 1–3, exemplary embodiments containing polyglyceryl-4 diisostearate polyhydroxystearate sebacate at 2–6% and 1–5% and PEG-30 dipolyhydroxystearate at 2–5% and 1–5%, which overlap the ranges recited in the claims. *Id.*

Appellant argues that Giuliani is not directed to improving the properties of emulsions, let alone W/O emulsions. App. Br. 7. Rather, Appellant argues, Giuliani relates to pharmaceutical, dermatological, or cosmetic compositions for combating the immunosuppressive action of aggressive agents on the skin by employing a mixture of catechin and quercetin in a molar ratio varying between 3:1 and 6:1. *Id.* (citing Giuliani Abstr.). According to Appellant, Giuliani neither teaches nor suggests that its compositions are not sufficiently suitable for the intended purpose and/or are in need of improvement. *Id.*

Appellant also argues that Giuliani does not teach a single specific composition for application to skin, nor does it provide general information

concerning its disclosed compositions. App. Br. 7. Appellant points to paragraphs [0001] to [0018] of Giuliani, which precede the examples, and argues that they are devoid of any technical information other than the molar ratio of catechin and quercetin. *Id.* Appellant argues that the same applies to the claims of Giuliani. *Id.*

More specifically, argues Appellant, Giuliani's Examples 1–5 teach concentration ranges of the components of the exemplary topical compositions. App. Br. 7. By way of example, Appellant points to Example 1, which teaches no less than 40 components, and also teaches that, based on the highest and lowest concentrations of the various components of the composition, the composition may contain more than 60 % by weight of water or no water at all. *Id.*

In summary, Appellant argues, Giuliani's teachings with respect to the possible components of its compositions are very broad, and each of the exemplified compositions encompasses thousands, if not millions, of individual compositions. App. Br. 8. Appellant asserts that only a fraction of these compositions, if any, are emulsions and, specifically, W/O emulsions. *Id.* Indeed, Appellant notes, Giuliani does not mention W/O emulsions. *Id.*

Therefore, argues Appellant, even if the compositions taught by Examples 1–3 of Giuliani could be assumed to be W/O emulsions, there would be no apparent reason for a person of ordinary skill in the art to concentrate on possibly improving the properties of these compositions with respect to those aspects which are unrelated to the actual purpose of the compositions taught by Giuliani. App. Br. 8.

Appellant next argues although Meyer teaches that polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate has advantages compared to PEG-30 dipolyhydroxystearate, nevertheless, Examples 1–3 of Giuliani teach that both of these emulsifiers are employed, and not only PEG-30 dipolyhydroxystearate. App. Br. 9. Appellant contends that Meyer was published approximately 5 years before Giuliani was filed and, therefore, it is reasonable to infer that the inventors of Giuliani were aware of the teachings of Meyer (and also those of Degussa, which similarly antedates Giuliani was filed) and nevertheless elected not to use polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate to improve the combination of emulsifiers contained therein, despite its alleged advantages. *Id.* This omission, argues Appellant, provides evidence that it would not have been obvious to one of ordinary skill in the art to employ a combination of polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate and diisostearyl polyglyceryl-3 dimer dilinoleate in a cosmetic or dermatological preparation. *Id.*

Appellant argues further that Degussa mentions only in passing that polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate can be used in combination with other emulsifiers, such as, e.g., cetyl PEG/PPG-10/1 dimethicone or diisostearyl polyglyceryl-3 dimer dilinoleate, to obtain W/O emulsions with a lower viscosity. App. Br. 10. Appellant contends that it is unclear what exactly “lower viscosity” means in light of the fact that Degussa also teaches that the inclusion of polyhydroxystearic moieties in the polymeric structure of Isolan GPS[®] “leads to minimized interaction of emulsion droplets resulting in low viscous W/O emulsions.” *Id.* Appellant points out that only one of the exemplary compositions of Degussa contains

a corresponding combination, which makes it evident that, without the benefit of hindsight, a skilled artisan would have had no apparent reason to replace the PEG-30 dipolyhydroxystearate in the compositions of Examples 1–3 of Giuliani with diisostearyl polyglyceryl-3 dimer dilinoleate. *Id.*

Appellant disputes the Examiner’s finding that “Giuliani need not teach methods of improving emulsions for one of ordinary skill in the art to be motivated to improve the emulsions disclosed therein. It is obvious to apply a known technique to a known device (in this case cosmetic composition) ready for improvement to yield predictable results.” App. Br. 10–11 (quoting Final Act. 9). Appellant again argues that the compositions of Giuliani are not even necessarily emulsions, let alone W/O emulsions. *Id.* at 11. Appellant contends that, even if a person of ordinary skill in the art wishing to improve the compositions of Giuliani were aware of the teachings of Meyer, the many variables in terms of the concentrations of the numerous individual components of Giuliani’s compositions provide countless different ways of tailoring the properties of the composition to match these properties without having to resort to replacing one or more of the components by one or more different components. *Id.*

We are not persuaded by Appellant’s arguments. As an initial matter, Giuliani teaches topical skin compositions comprising water and water-soluble agents (e.g., batyl alcohol), oils (and water-insoluble compounds e.g., *Butyrospermum parkii* butter, *Zea mays* oil, and emulsifying agents (PEG-30 dipolyhydroxystearate, polyglyceryl-4 diisostearyl polyhydroxystearate sebacate), which it refers to as “milk[s]” and “cream[s].” *See* Giuliani ¶ 16 (“The composition according to the invention can be formulated for topical use on the skin or for systemic use, e.g.,] in a

form suitable for oral administration”); Exs. 1–3. We agree with the Examiner that a person of ordinary skill in the art would have understood that these compositions of Giuliani are emulsions, a finding that Appellant has not provided evidence to rebut. *See* Ans. 5.

Meyer expressly teaches that:

PEG-30 Dipolyhydroxystearate is not as efficient [as cetyl PEG/PPG-10/1 dimethicone] in providing stable W/O emulsions, but it is well known for its ability to form W/O lotions with a very low viscosity.

However, formulating stable W/O lotions with an oil phase content below 25 wt% is still a big challenge. In systems with such a low oil content either the currently available emulsifiers do not provide sufficient stability or the resulting emulsion viscosity is too high.

Meyer 20 (internal citation omitted). We observe that the emulsions taught by Giuliani possess a cumulative oil wt% that is less than 25%, a point not disputed by Appellant.

Meyer further teaches that:

It can clearly be seen (Fig. 3) that Polyglyceryl-4 Diisostearate/Polyhydroxystearate/Sebacate results in lower emulsion viscosities than other PEG-free emulsifiers. This difference is especially pronounced when the oil phase is reduced to 21 wt%. The emulsion viscosity of the Polyglyceryl-4 Diisostearate/Polyhydroxystearate/Sebacate containing formulation at 21 wt% is comparable to the emulsion viscosities available with the other polyglycerine-based emulsifiers at 25 wt% oil phase content.

The reduction in oil phase content is beneficial with respect to a lighter skin feel and cost minimization potential. Additionally, Polyglyceryl-4 Diisostearate/Polyhydroxystearate/Sebacate gives improved freeze stability in comparison to Polyglyceryl-2 Dipolyhydroxystearate.

Id. at 23; *see also* Fig. 3.

Degussa teaches that “ISOLAN[®] GPS [i.e., polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate] is suitable for the formulation of cosmetic W/O creams and lotions. It is especially designed for the formulation of low viscous W/O lotions,” and that “ISOLAN[®] GPS is particularly suitable for the formulation of low viscous W/O lotions including light emollients ... in order to obtain W/O lotions with a pleasant very light, non-oily skin feel.” Degussa 2. Degussa further teaches that “[i]n combination with other emulsifiers, e.g.[,] ... ISOLAN[®] PDI (Diisostearoyl Polyglyceryl-3 Dimer Dilinoleate), ISOLAN[®] GPS can be used to obtain W/O emulsions with a lower viscosity.” *Id.*

We agree with the Examiner that a person of ordinary skill in the art would have found it obvious, based upon the combined teachings of the references cited by the Examiner, to replace PEG-30 dipolyhydroxystearate in the compositions taught by Giuliani with diisostearoyl polyglyceryl-3 dimer dilinoleate, as taught by the combined teachings of Meyer and Degussa, not least because the latter combination was already known in the art. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) (holding that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results”); *see also id.* at 417 (“If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability”). We further agree with the Examiner that a person of ordinary skill would have been motivated to combine the teachings of Meyer and Degussa with those of Giuliani, because the former references teach the combination of polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate and diisostearoyl polyglyceryl-3

dimer dilinoleate as being advantageous in that the combination provides low viscosity in compositions with a low oil wt%, and also provides a pleasant feel when applied to the skin.

Nor are we persuaded by Appellant's argument that Giuliani's failure to teach the combination of polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate and diisostearyl polyglyceryl-3 dimer dilinoleate in its exemplary embodiments in view of the prior teachings of Meyer and Degussa is evidence of non-obviousness. The test for obviousness is not whether a prior art teaching is incorporated into the teachings of a subsequently-published reference. Rather, "[t]he test for obviousness is ... what the combined teachings of the references would have suggested to those of ordinary skill in the art." *In re Keller*, 642 F.2d 413, 425 (C.C.P.A. 1981). In the appeal before us, the Examiner has shown that the combination of polyglyceryl-4 diisostearate/polyhydroxystearate/sebacate and diisostearyl polyglyceryl-3 dimer dilinoleate was known in the art to be an advantageous combination of emulsifying agents, and has articulated a reason why a skilled artisan would have been motivated to replace the emulsifying agents in Examples 1–3 of Giuliani with this combination, as expressly taught by the combination of Meyer and Degussa.

Issue 2: Claims 65–67

Appellant additionally argues these claims separately. App. Br. 12. Claim 65 is representative and recites: "The preparation of claim 58, wherein the preparation further comprises a total of from 7% to 20% by weight, based on the total weight of the preparation, of at least one skin

moisturizer.” *Id.* at 18. Appellant argues that Examples 1–3 of Giuliani neither teach nor suggest this limitation. *Id.* at 12.

Analysis

Appellant argues that the concentration of glycerol in the compositions of Examples 1–3 of Giuliani, upon which the Examiner relies, is not greater than 5% by weight, and can be as little as 1% by weight. App. Br. 12.

Appellant argues further that the Examiner has also failed to demonstrate why a person of ordinary skill in the art would have been motivated to significantly increase the concentration of glycerol (skin moisturizer) in the compositions of Giuliani beyond the maximum concentration of glycerol taught by the reference. App. Br. 13.

Appellant disputes the Examiner’s finding that “Giuliani et al. exemplify 9.8–40% skin moisturizers (i.e., the] sum of C10–18 triglycerides, C12–15 alkyl benzoate, butylene glycol dicaprylate/dicaprate, diisopropyl sebacate, behenyl alcohol, glycerin and squalane in Example 2.” App. Br. 13 (quoting Final Act. 6). According to Appellant, none of the substances listed by the Examiner, with the exception of glycerol, would have been considered to be a skin moisturizer by a person of ordinary skill in the art. *Id.* Rather, argues Appellant, such constituents would have been considered to be constituents of the oil phase of a corresponding emulsion. *Id.*

We do not find Appellant’s arguments persuasive. The Examiner has made a finding of fact that “C10–18 triglycerides, C12–15 alkyl benzoate, butylenes glycol dicaprylate/dicaprate, diisopropyl sebacate, behenyl

alcohol, glycerin and squalene” listed in Example 2 are agents acting as skin moisturizers. Appellant adduces no evidence to rebut the Examiner’s finding, or to establish that a skilled artisan would not have considered these compounds as being capable of acting as skin moisturizers. Instead, Appellant merely gainsays the Examiner’s finding of fact. Nor does Appellant offer any proof why the “constituents of the oil phase” of Example 2 could not also act as skin moisturizers. Such assertions, unsupported by factual evidence or testimony are inadequate to overcome the Examiner’s findings. *See In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984) (holding that arguments and conclusions unsupported by factual evidence carry no evidentiary weight).

Similarly, Appellant disputes the Examiner’s finding that:

As defined by the instant Specification, glycerin is a moisturizer. Further, as evidenced by EWG, all other ingredients recited in the rejection as being moisturizers are defined by EWG as emollients and/or skin conditioning agents (see references provided). Further as Giuliani et al. exemplify several other moisturizers and it would have been obvious to remove or replace them with glycerin through routine experimentation.

App. Br. 13–14 (quoting Final Act. 10) (emphasis removed). Appellant contends that the Examiner thus concedes that the C10–18 triglycerides, C12-15 alkyl benzoate, butylene glycol dicaprylate/dicaprate, diisopropyl sebacate, behenyl alcohol, glycerin and squalane employed in Example 2 of Giuliani are not moisturizers but emollients and/or skin conditioning agents. *Id.* at 14.

We do not find this argument persuasive. In the passage from the Final Office Action quoted *supra*, the Examiner has presented evidence from

the EWG references² that “all other ingredients recited in the rejection as being moisturizers are defined by EWG as emollients and/or skin condition agents (i.e., are] all ‘skin moisturizers’”). Again, Appellant adduces no evidence to rebut the Examiner’s findings, but relies upon attorney argument, unsupported by evidence of record. That is not sufficient to overcome the Examiner’s findings of fact and the conclusion of obviousness derived from those findings. We consequently affirm the Examiner’s rejection of claims 65–67 on this basis.

Issue 3: Claim 67

Appellant makes additional arguments with respect to claim 67. App. Br. 14. Claim 67 recites: “The preparation of claim 66, wherein at least 10% by weight of glycerol is present.” *Id.* at 18. Appellant argues that the concentration of glycerol in the compositions of Examples 1–3 of Giuliani relied upon by the Examiner is no greater than 5 % by weight. *Id.* at 14.

Analysis

Appellant argues that the Examiner has failed to articulate a reason why a person of ordinary skill in the art would have been motivated to

² The “EWG” references constitute entries for “Behenyl Alcohol,” “Butylene Glycol Dicaprylate/Dicaprate,” “C10–C18 Triglycerides,” “C12–C15 Alkyl Benzoate,” “Diisopropyl Sebacate,” “Squalane,” and “Mineral Oil” from EWG, *EWG’s Skin Deep® Cosmetics Database*, <https://www.ewg.org/skindeep/> (of record, filed October 22, 2015, October 13, 2017).

significantly increase the maximum concentration of glycerol in the compositions of Examples 1–3 of Giuliani from 5 wt% to at least 10 wt%.
App. Br. 14.

We do not find Appellant’s argument persuasive. As we have explained *supra*, Examples 1–3 of Giuliani list a series of constituents, including glycerin, that were well known in the art to constitute skin moisturizers. We agree with the Examiner that altering the weight percentage of glycerol, among the other moisturizers taught by the Examples of Giuliani, would be a matter of routine optimization, and that obtaining a balance of moisturizers in the composition would be a matter of balancing result-effective variables to provide a preferred final composition. Furthermore, Appellant does not argue, nor can we discern from Appellant’s Specification, that there is any criticality to the properties of the composition resulting from having at least 10% glycerol present. The possibility of such routine optimization is sufficient to render the compositions of claim 67 obvious over the compositions of Examples 1–3 of Giuliani. *See In re Boesch*, 617 F.2d 272, 276 (C.C.P.A. 1980) (holding that “discovery of an optimum value of a result effective variable ... is ordinarily within the skill of the art”).

Issue 4: Claims 78 and 79

Appellant also argues these claims separately. App. Br. 15. Claim 78 is representative and recites: “The preparation of claim 58, wherein the preparation does not contain ethoxylated emulsifiers, polyethylene glycols and/or polyethylene glycol derivatives.” *Id.* at 19. Appellant argues that none of the references relied upon by the Examiner teaches or suggests that

the compositions of Giuliani should be free of the substances recited in claims 78 and 79. *Id.* at 15.

Analysis

Appellant points to the Examiner's finding that "after replacing the PEG-30 Dipolyhydroxystearate as described *supra*, Giuliani teaches preparations comprising no polyethylene glycol derivatives (e.g., [Examples 1 and 2]) and does not otherwise require their presence." App. Br. 15 (quoting Final Act. 15). Appellant contends that the question at issue is not whether, after replacing the PEG-30 dipolyhydroxystearate, Giuliani teaches preparations comprising no polyethylene glycol derivatives, but is rather whether Giuliani provides an apparent reason for one of ordinary skill in the art to forego the use of polyethylene glycol derivatives in the compositions disclosed therein. *Id.*

We do not find Appellant's argument persuasive. We have explained *supra* why a person of ordinary skill in the art would have been motivated by the combined teachings of Giuliani, Meyer, and Degussa to replace PEG-30 dipolyhydroxystearate in Examples 1–3 of Giuliani with diisostearyl polyglyceryl-3 dimer dilinoleate. Consequently, we affirm the Examiner's rejection of the claims.

B. Claims 58–75, 78, and 79 under the doctrine of obviousness-type double patenting

Appellant states that it will decide on an appropriate response to this rejection once an agreement regarding allowable subject matter has been reached in this and the co-pending application. App. Br. 16.

Because we affirm the Examiner’s conclusion that the claims on appeal are *prima facie* obvious over the combined cited prior art, we summarily affirm the Examiner’s rejection of claims 58–75, 78, and 79 upon this ground.

CONCLUSION

The Examiner’s rejection of claims 58–75, 78, and 79 under 35 U.S.C. § 103 is affirmed.

The Examiner’s rejection of claims 58–75, 78, and 79 under the nonstatutory doctrine of obviousness-type double patenting is affirmed.

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).

AFFIRMED

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
58–75, 78, 79	103	Giuliani, Meyer, Degussa	58–75, 78, 79	
58–75, 78, 79		Obviousness-type double patenting over claims 20–38 of	58–75, 78, 79	

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		copending US Appl. Ser. No. 14/376,977		
Overall Outcome			58-75, 78, 79	