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Row 2: 27752, 7590, 11/13/2019, THE PROCTER & GAMBLE COMPANY GLOBAL IP SERVICES...
Row 3: EXAMINER OGDEN JR, NECHOLUS
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte KARL SHIQING WEI, SCOTT WILLIAM SYFERT,
SHANNON DALE WAGERS, and BRENT WILLIAM MASON

Appeal 2018-009124
Application 14/937,425
Technology Center 1700

BEFORE BRADLEY R. GARRIS, ROMULO H. DELMENDO, and
MARK NAGUMO, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from the Examiner's decision to reject claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as The Procter & Gamble Company. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Appellant claims a method for enhancing deposition of a high viscosity benefit agent in a personal care composition comprising a cleansing phase, a high viscosity benefit agent, and a low viscosity benefit agent, wherein the method comprises adding the high viscosity benefit agent and the low viscosity benefit agent separately to the cleansing phase (independent claim 1). The cleansing phase may comprise from about 5% to about 20%, by weight of the personal care composition, of an anionic surfactant (dependent claim 3). Appellant also claims a similar method wherein the high viscosity benefit agent has an average particle size of about 50 to about 500 μm and the low viscosity benefit agent has an average particle size of about 0.5 to about 10 μm (independent claim 4). Finally, Appellant claims a similar method wherein the high viscosity benefit agent and the low viscosity benefit agent are in separate physical domains (remaining independent claim 9).

A copy of representative claims 1, 3, 4, and 9, taken from the Claims Appendix of the Appeal Brief, appears below.

1. A method for enhancing deposition of a high viscosity benefit agent in a personal care composition, comprising a cleansing phase; a high viscosity benefit agent; and a low viscosity benefit agent; comprising adding the high viscosity benefit agent and the low viscosity benefit agent separately to the cleansing phase of the personal care composition.
3. The method of claim 2, wherein the cleansing phase is structured and comprises from about 5% to about 20%, by weight of the personal care composition, of an anionic surfactant; and an amphoteric surfactant, a zwitterionic surfactant, or a combination thereof.

4. A method for enhancing deposition of a high viscosity benefit agent in a personal care composition, comprising a high viscosity benefit agent and a low viscosity benefit agent comprising, formulating a personal care composition with a cleansing phase; a first benefit phase having an average particle size of about 50 μ m to about 500 μ m and comprising a high viscosity benefit agent; and a second benefit phase having an average particle size of about 0.5 μ m to about 10 μ m and comprising a low viscosity benefit agent.
9. A method for enhancing deposition of a high viscosity benefit agent in a personal care composition, comprising a cleansing phase, a high viscosity benefit agent, and a low viscosity benefit agent, comprising formulating the personal care composition so that the high viscosity benefit agent and low viscosity benefit agent are in separate physical domains within the personal care composition.

REJECTION

The Examiner rejects claims 1–20 under 35 U.S.C. § 103 as unpatentable over Hilliard (US 2012/0276177 A1, pub. Nov. 1, 2012) in view of Tsaur (US 2011/0245125 A1, pub. Oct. 6, 2011) (Final 2–3).

The Examiner finds that Hilliard discloses all aspects of Appellant's claimed method and personal care composition except for benefit agent particle sizes in the claim 4 range of about 0.5 to about 10 μ m (*id.* at 2). However, the Examiner finds that Tsaur discloses a personal care composition having cationic guar in combination with benefit agent particle sizes within the claim 4 range (*id.* at 2–3). The Examiner concludes that it would have been obvious to provide Hilliard with such a combination of

cationic guar and benefit agent particle sizes in order to aid in benefit agent delivery as taught by Tsaur (*id.* at 3 (citing Tsaur ¶ 77)).

OPINION

We sustain the Examiner’s rejection for the reasons given in the Final Office Action, the Examiner’s Answer, and below.

Appellant argues that the applied references contain no teaching or suggestion of certain invention features (e.g., emollient having particle sizes within the claim 4 range of about 50 to about 500 μm) without identifying any specific claim requiring such features except for separately argued dependent claim 3 (Br. 5–6). For example, Appellant concedes that Example 1 of Hilliard discloses adding and stirring a petrolatum premix into a composition containing sunflower oil but argues that “no separate petrolatum/sunflower oil-based zones are contemplated” (*id.* at 5).

The Examiner responds by explaining that a number of the features (e.g., emollient having particle sizes within the claim 4 range of about 50 to about 500 μm) mentioned in Appellant’s arguments are not required by the claims under review (Ans. 6–7). In response to the argument regarding Hilliard’s Example 1, the Examiner points out that claim 1 does not require “separate petrolatum/sunflower oil-based zones” as argued but instead merely requires adding high viscosity benefit agent and low viscosity benefit agent separately (*id.* at 6). We agree with the Examiner that the separate addition requirement of claim 1 is satisfied by Example 1 of Hilliard wherein high viscosity petrolatum and low viscosity sunflower oil are added separately (*id.*). As noted above, Appellant seems to concede that the petrolatum and sunflower oil of Example 1 are added separately. Additionally, we emphasize that Appellant does not dispute any of the

Examiner's responses to arguments in the record of this appeal (i.e., no Reply Brief has been filed).

Regarding the Examiner's proposed combination of Hilliard and Tsaur, Appellant states that "Tsaur . . . adds nothing to the overall disclosures of Hilliard . . . with regard to a '2-phase/2-viscosity' benefit component" (Br. 5).

As previously indicated, Appellant fails to identify any specific claim requiring "a '2-phase/2-viscosity' benefit component." Moreover, Appellant does not identify, with any reasonable specificity, harmful error in the Examiner's determination that Tsaur would have suggested providing Hilliard with benefit agent particle sizes in the claim 4 range of about 0.5 to about 10 μm (*see* Br. 5–6).

Regarding dependent claim 3, Appellant argues that Tsaur "minimizes the use of (no higher than 3%) alkyl anionics . . . [whereas] [c]laim 3 herein requires a range of anionic surfactant whose lower end is about 5%" (*id.* at 6 (citing Tsaur ¶¶ 34–35)).

For a number of reasons, Appellant's argument is not persuasive of harmful error in the Examiner's rejection of claim 3. As pointed out by the Examiner in responding to this argument, "Tsaur . . . is not relied upon to show the inclusion or proportions of anionic surfactants" (Ans. 8). Rather, the Examiner relies on Hilliard concerning the use of anionic surfactants (Final 2). In any event and as noted in the Examiner's response to argument, Tsaur broadly teaches 1 to 30% by weight of a surfactant system comprising anionic surfactants (Ans. 7–8; *see also* Tsaur ¶¶ 27–28). While Tsaur may disclose no higher than 3% of lauric acid specifically (Tsaur ¶¶ 32, 35), Tsaur expressly requires the use of mild anionic surfactants (*id.* at ¶¶ 28, 37–

38) including anionic surfactants (e.g., lauroyl sarcosinates) disclosed by Appellant (*see, e.g.*, Spec. 7:3–12).

Finally, Appellant argues that, while no showing of superior results is required because no prima facie case of obviousness exists, nonetheless, such a showing is made in the subject Specification at page 5, lines 23–28 and at page 5, line 30 to page 6 (Br. 4–5).

In response, the Examiner criticizes Appellant’s showing as not commensurate in scope with the claimed invention, not based on a comparison with the closest prior art, and/or not supported by factual evidence/data (Ans. 4–5). We agree with the Examiner’s criticisms and emphasize that Appellant has filed no Reply Brief addressing these criticisms.

We determine that, on balance, the evidence and arguments in favor of an obviousness conclusion outweigh those against such a conclusion.

CONCLUSION

We sustain the Examiner’s rejection under 35 U.S.C. § 103 of claims 1–20 as unpatentable over Hilliard in view of Tsaur and correspondingly affirm the Examiner’s decision to reject these claims.

DECISION SUMMARY

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
1–20	103	Hilliard, Tsaur	1–20	

Appeal 2018-009124
Application 14/937,425

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). *SEE* 37 C.F.R. § 1.136(A)(1)(IV).

AFFIRMED