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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
14/613,420	02/04/2015	Shannon Elizabeth Klingman	Klingman-U3	3514
66125	7590	12/30/2019	EXAMINER	
JEFFREY DEAN LINDSAY 20 DIANE LANE APPLETON, WI 54915			CHANG, KYUNG SOOK	
			ART UNIT	PAPER NUMBER
			1613	
			NOTIFICATION DATE	DELIVERY MODE
			12/30/2019	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte SHANNON ELIZABETH KLINGMAN

Appeal 2019-000606
Application 14/613,420
Technology Center 1600

Before FRANCISCO C. PRATS, RAE LYNN P. GUEST,
and DEBORAH KATZ, *Administrative Patent Judges*.

KATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant seeks our review under 35 U.S.C. § 134(a), of the Examiner’s decision to reject claims 15–26.^{1,2} We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

¹ We use the word “Appellant” as defined in 37 C.F.R. § 1.42. Inventor Shannon Klingman is identified as the real party in interest. (App. Br. 4.)

² We consider the Final Office Action mailed October 3, 2017 (“Final Act.”), the Appeal Brief filed January 31, 2018 (“Appeal Br.”), the Examiner’s Answer mailed May 3, 2018 (“Ans.”), the Reply Brief filed June 6, 2018 (“Reply Br.”).

The Examiner rejected claims 15–26 as being obvious under 35 U.S.C. § 103(a) over So,³ Hart,⁴ Klier,⁵ Casas-Sanchez,⁶ and Vagisil.⁷ (*See* Final Act. 4–13.)

Appellant’s Specification is directed to products and methods for personal care, particularly for reducing or preventing unwanted odor from the “pudendum,” which is the external genitalia and surrounding regions of the body. (Spec. ¶¶ 2 and 19.) The methods provided involve alpha-hydroxy acids such as mandelic acid to control the pH in the area. (*See id.* ¶ 18.)

Appellants’ claim 15 recites:

A method for reducing fishy odor from the pudendum due to sources other than vaginosis, comprising:

(a) providing a user with a product comprising an acidifying composition having at least 1 % by weight of mandelic acid, said acidifying composition having a pH between 2.8 and 5 in a viscous, lipophilic carrier, and

(b) providing directions to the user to apply the acidifying composition to the entire pudendum and not inside the vagina, wherein the mandelic acid is present in the product prior to application to the pudendum.

(App. Br. 57.) Claim 15 recites a method of reducing fishy odor, not caused by vaginosis, from the pudendum by providing an acidifying composition of

³ So and Jeon, WO 2006/132515 A1, published December 14, 2006.

⁴ Hart, U.S. Patent 4,078,050, issued March 7, 1978.

⁵ Klier et al., EP 0775486 A1, published May 28, 1997 (English Translation).

⁶ Casas-Sanchez et al., EP 1982689 A1, published October 22, 2008.

⁷ Vagisil Medicated Wipes (pramoxine hydrochloride) cloth, (2005) retrieved from <http://dailymed.nlm.nih.gov/dailymed/lookup.cfm?setid=5df5243a-30ef-4c54-b19b-50335bac0d84>.

mandelic acid and direction to apply it to the entire pudendum, not the inside of the vagina.

Findings of Fact

1. So teaches mandelic acid for the treatment of vaginitis. (So abstract and 30 (claim 1).)
2. So teaches that bacterial vaginitis causes bad odors and an increase in pH. (So 2:15–21.)
3. So teaches a cream including mandelic acid at a concentration of 0.1-10.0%. (See So 28, Table 4.)
4. Hart teaches the application of deodorant to the genital and anal areas of cats and dogs to control offensive odors. (See Hart 2:25–32.)
5. Hart teaches that the effectiveness of compositions toward specific odors is increased by incorporation of acidic or basic components. (See Hart abstract.)
6. Hart teaches that suitable acidic deodorant components are organic carboxylic acids, including mandelic acid to control pH. (See Hart 3:24–26, 8:26–39 (claim 7).)
7. Hart teaches that the pH control compound, including carboxylic acids, of a deodorant composition can be present at 1–10%. (See Hart 8:26–39 (claim 7).)
8. Klier teaches cosmetic deodorants that control body odor arising when sweat is decomposed by particular gram-positive microorganisms. (Klier ¶ 10.)
9. Klier teaches that antibacterial, antimycotic and antiviral compositions include α -hydroxycarboxylic acids, such as mandelic acid. (See Klier Abstract and ¶ 47.)

10. Casas-Sanchez teaches a mild and gentle antimicrobially active wet wipe comprising a substrate and a lotion with a pH that ranges from 2.5 to 5.4. (*See* Casas-Sanchez Abstract.)

11. Casas-Sanchez teaches that low pH is known to aid the antimicrobial properties of wipes and to counteract the increased pH of the skin caused by urine and feces. (*See* Cases-Sanchez ¶ 23.)

12. Casas-Sanchez teaches that wet wipes can be used for feminine hygiene. (*See* Cases-Sanchez ¶ 3.)

13. Casas-Sanchez teaches that wet wipes can be used for cleaning the peri-anal area post defecation and the external genitalia post urination in infants and young children. (*See* Casas-Sanchez ¶ 16.)

14. Cases-Sanchez teaches that acidic adjustment to the lotion in a wet wipe can be achieved with acids including maleic acid, malic acid, and glycolic acid. (*See* Casas-Sanchez ¶ 24.)

15. Appellant's Specification indicates that the alpha-hydroxy acids of the claimed methods include glycolic acid and lactic acid, as well as mandelic acid. (*See* Spec. ¶¶ 22 and 27.)

16. Vagisil teaches using a towelette for blocking odor on the external genitalia. (*See* Vagisil 1–2.)

Analysis

The Supreme Court explains that

[o]ften, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007). Furthermore,

[w]hen there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.

Id. at 421. Thus, even if it was not described in a single reference, the method of claim 15 is not patentable if the teachings of separate prior references would have been combined to arrive at the claimed process.

The Examiner cites to several such prior art references. Briefly, the Examiner cites to So, which teaches using mandelic acid for the treatment of vaginitis. (*See* FFs 1 and 3; *see* Final Act. 5.) So teaches that vaginitis can cause bad odors and an increase in pH (*see* FF 2; *see* So 2:15–21), but So does not expressly teach a method of reducing fishy odor from pudendum by a product comprising mandelic acid. (*See* Final Act. 9.) The Examiner finds that one of ordinary skill in the art would have modified the teachings of So to a method comprising providing directions to the user to apply the acidifying composition to the entire pudendum, not inside the vagina, thus reducing malodor in light of the teachings of Hart, Klier, and Casas-Sanchez. (*See id.* at 10.)

The Examiner finds that Hart teaches using mandelic acid to reduce malodor and acidify the genital area of cats and dogs (*See* Final Act. 5–7; *see* FFs 4–7.) The Examiner also finds that Klier teaches using mandelic acid to control body odor as an antibacterial composition. (*See* Final Act.

10; *see* FFs 8 and 9.) In addition, the Examiner finds that Casas-Sanchez teaches alpha-hydroxyl acids similar to mandelic acid to provide antimicrobial activity in an acidic environment. (*See* Final Act. 10; *see* FFs 10–15.) The Examiner concludes that it was known in the art that mandelic acid is an antimicrobial and pH control agent used to reduce malodor in the external genital area and vagina, and that, therefore, there would have been a reason for ordinarily skilled artisans to have applied mandelic acid to the pudendum to maintain an acidic pH and reduce fishy odor. (*See* Final Act. 10–11.)

Appellant argues that the Examiner erred by “cherry-picking small portions of the references from widely varying environments dealing with unrelated problems to create an implausible case of obviousness that would not occur to one skilled in the art.” (Appeal Br. 12.) Appellant also argues that the Examiner erred in assuming that compounds effective for solving a problem in one environment would inherently be effective in a different environment. (*See* Appeal Br. 12.) We are not persuaded by these arguments because they do not address what would have been suggested to one of ordinary skill in the art from the combination of the references, instead focusing on what is expressly taught separately in each reference.

For example, Appellant argues that Hart does not teach the benefits of mandelic acid or low pH in general, but instead teaches the use of dioxane derivatives as deodorants against odors from animals. (*See* Appeal Br. 13, 34.) According to Appellant, the dioxane compounds are the only active compounds taught in Hart and mandelic acid is merely one of many possible adjuvants. (*See* Appeal Br. 13–14.) Appellant argues further that Hart

teaches using mandelic acid only for human odors on laundry. (*See* Appeal Br. 14.)

We are not persuaded by these arguments because the Examiner did not rely on Hart for a teaching of using mandelic acid alone as a deodorant on human skin. Instead, the Examiner relied on So to show that it was known in the art that mandelic acid could treat vaginitis, which can cause bad odors. (*See* Final Act. 5.) The Examiner relied on Hart to show that mandelic acid was known to work with other ingredients in the genital/anal area of animals. (*See* Final Act. 6.) Thus, although Appellant is factually correct about Hart, the argument does not address the combination of So and Hart, which is the basis for the Examiner's rejection.⁸ Appellant's argument does not acknowledge that So teaches use of mandelic acid for humans, whereas Hart teaches that mandelic acid can be applied to areas other than the vagina. Thus, each teach a different element of claim 15. (*See* Final Act. 5–6.) Appellant's argument also fails to address Klier, which teaches using α -hydroxycarboxylic acids, including mandelic acid, as a cosmetic deodorant for body odor for humans. (*See* Final Act. 7.)

Appellant's focus on the use in laundry as the "sole teaching on human odor" in Hart (Reply Br. 11) is an example of individually, and unpersuasively, attacking a single reference that has been cited along with

⁸ We note that Appellant's independent claim 15 does not expressly recite human subjects. Appellant's definition of the term "pudendum" also fails to include a limitation to humans. (*See* Spec. ¶ 19.) Claim 15 refers to a "user" and "providing directions to the user," but this could be a pet owner or veterinarian. Claim 18 expressly recites the human body, but it is not clear whether claim 18 narrows the scope of claim 15 to only humans.

other references. Hart may not teach using mandelic acid in exactly the same way as claimed, but its teachings of the use of mandelic acid on the external genitalia of animals are cited along with the teachings of So and Klier for using mandelic acid in humans to suggest the claimed method. The *combination* of the teachings renders the claimed method obvious.

Appellant does not persuasively argue that the Examiner erred in relying on this combination.

Appellant argues that the Examiner inappropriately relies on *In re Keller*, 642 F.2d 413 (CCPA 1981), when asserting that Appellant has attacked references individually. (*See* Appeal Br. 40–47; *see also* Reply Br. 53–57.) According to Appellant, *Keller* stands only for the proposition that when a rejection is based on a primary reference coupled with a secondary reference, attacking the secondary reference alone is an inadequate response. (*See* Appeal Br. 42–43.)

Keller explains that “the test [of obviousness] is what the combined teachings of the references would have suggested to those of ordinary skill in the art.” *Keller*, 642 F.2d at 425. The test in *Keller* was not whether one prior art reference suggested an element of the claimed apparatus, but rather what the combination of teachings would have suggested to one of ordinary skill in the art. *See id.* at 426. “[O]ne cannot show non-obviousness by attacking references individually where, as here, the rejections are based on combinations of references.” *Id.*; *see also In re Merck & Co., Inc.*, 800 F.2d 1091, 1097–98 (Fed. Cir. 1986).

Appellant is correct that when a rejection is based on both a primary and a secondary reference, attacking the secondary reference alone is an inadequate response. But Appellant fails to direct us to, and we do not find,

anything in *Keller* indicating its holding is limited to isolated arguments against a secondary reference. Rather, *Keller*, and *Merck*, stand for the proposition that a persuasive argument against an obviousness rejection must address the combination of all references cited.

Thus, when Appellant argues that “Hart provides no enabling direction about the odor controlling efficacy of mandelic acid or lactic acid on animal genitalia, much less human genitalia” and that “Hart says her compounds can deal with human perspiration odor, it is for treating laundry, not human skin” (Appeal Br. 14), Appellant is arguing about the specific teachings of Hart in isolation, not about what is suggested by the combination of Hart with the other cited references. Appellant is not arguing against the rejection made by the Examiner. Thus, we are not persuaded that the Examiner inappropriately relied on *Keller* to address Appellant’s arguments.

We are also not persuaded by Appellant’s arguments regarding the alleged non-enablement of Hart because “[w]hile a reference must enable someone to practice the invention in order to anticipate under § 102(b), a non-enabling reference may qualify as prior art for the purpose of determining obviousness under § 103.” *Symbol Tech., Inc. v. Opticon, Inc.* 935 F.2d 1569, 1578 (Fed. Cir. 1991). (See Appeal Br. 14–15; see Reply Br. 16–29.)

Appellant’s argument that Hart teaches away from the claimed method is also unpersuasive because even though Hart teaches alkaline formulations, it also teaches acidic ones. (See Appeal Br. 16.) Appellant does not direct us to any teaching in Hart that discourages or warns against acidic formulations when treating malodor from animal genitalia. The

“mere disclosure of more than one alternative” does not amount to teaching away from one of the alternatives where the reference does not “criticize, discredit, or otherwise discourage the solution claimed.” *In re Fulton*, 391 F.3d 1195, 1201 (Fed.Cir.2004). Appellant’s focus on alkaline formulations to treat laundry from humans does not address the teachings of Hart that the Examiner relied upon — the use of mandelic acid as part of a composition to treat malodor from the genitalia of animals.

We note that Appellant’s claims recite a product “comprising” mandelic acid. (*See* Appeal Br. 57; *see* Ans. 6.) Thus, Appellant’s claims encompass products that include mandelic acid along with other components. Contrary to Appellant’s argument, one need not remove or abandon the dioxane from the treatments taught in Hart for Hart to have been properly cited. (*See* Appeal Br. 15; *see also* Reply Br. 12.) Even though Hart teaches using dioxane compounds to treat malodor, it also teaches that the effectiveness of such compositions is increased by adding acidic components, such as mandelic acid. (*See* FF 6; *see* Hart Abstract, 3:24–26.)

Appellant argues further that the Examiner erred because there would not have been a motivation to combine Hart with So. (*See* Appeal Br. 16–17.) According to Appellant, because Hart does not teach putting dioxane compounds on human skin, one of ordinary skill in the art would not have considered it obvious to do so. (*See id.*) This argument is unpersuasive because it does not accurately reflect the Examiner’s rejection. The Examiner determined that because So teaches using mandelic acid to treat vaginitis in humans, which can cause bad odor, and Hart teaches using it to control pH and odor in formulations applied to the genital area, along with

the teachings of the other prior art, there would have been reason for one of ordinary skill in the art to apply mandelic acid to the pudendum to control pH and odor in humans. (*See* Final Act. 10.) The Examiner’s rejection is a modification of the method of So, by applying the mandelic acid to the external genitalia as taught in Hart. The rejection is not expressed as a modification of Hart by the teachings of So, as Appellant argues.

Appellant also argues that the Examiner erred by relying on So for a teaching to use mandelic acid to reduce malodor from vaginitis because So does not enable such a method. (*See* Appeal Br. 17–18.) According to Appellant, So shows results only in *in vitro*, laboratory settings, which would not guarantee *in vivo* success with all bacteria species. (*See id.* at 18–19.)

We note, again, that references need not be enabling to be properly cited in an obviousness rejection. *See Symbol Tech., supra.* The suggestion in So that vaginitis causes malodor and that mandelic acid can be used to treat vaginitis is the teaching that the Examiner relied upon — not the experimental evidence reported. (*See* Final Act. 5 (citing So 2:15–21 (claim 1)).) That suggestion, combined with the other prior art teachings is what would have rendered Appellant’s claimed method obvious. Furthermore, the alleged nonenabled “extension” of the teachings in So regarding vaginitis, which Appellant argues is improper, is not an “extension.” (*See* Appeal Br. 19–20.) Rather, it is part of the Examiner’s rejection of the claimed method in light of the combination of the prior art.

Appellant’s arguments that So alone does not lead one to the claimed method are similarly unpersuasive. (*See* Appeal Br. 20–21.) Appellant questions “why would one skilled in the art be motivated to apply a

treatment for vaginitis to anywhere but the internal vagina” (Appeal Br. 21), but fails to acknowledge that Hart teaches applying the same compound, mandelic acid, to the external genitalia as part of a treatment for malodor. (*See* Final Act. 10.) As explained above, “one cannot show non-obviousness by attacking references individually where, as here, the rejections are based on combinations of references.” *Keller*, 642 F.2d at 426.

Appellant argues further that the Examiner erred in relying on Casas-Sanchez. (*See* Appeal Br. 22–25.) According to Appellant, Casas-Sanchez is non-analogous art because it teaches using mandelic acid in an environment unrelated to that of So or Appellant’s claimed method. (*See* Appeal Br. 22–23 and 35; *see also* Reply Br. 33–34.) Appellant argues that Casas-Sanchez seeks to reduce bacterial growth in a package of wet wipes, but also acknowledges that such wipes would be used on a human body. (*See id.*)

We are not persuaded by Appellant’s argument because Casas-Sanchez was cited for its teaching of using a wipe for cleaning and lowering the pH of the peri-anal and external genitalia. (*See* Final Act. 8.) Thus, Casas-Sanchez is analogous art to Appellant’s claimed method, which includes “providing directions to the user to apply the acidifying composition to the entire pudendum and not inside the vagina.” (Appeal Br. 57.)

Appellant argues further that the Examiner improperly combined Casas-Sanchez with the other references because it teaches a wet wipe with lotion that is free from preservatives. (*See* Appeal Br. 23–24; *see also* Reply Br. 35–36.) According to Appellant, Casas-Sanchez lists preservatives that are “forbidden,” but which are listed in Vagisil. (*See* Appeal Br. 24.)

Appellant asserts further that the dioxane derivatives taught in Hart are “strong chemical agents, never said to be suitable for use on human skin, [which] would be contrary to the intent of Casas-Sanchez and would frustrate their purpose.” (Appeal Br. 24, 27–28 (regarding Vagisil).)

We are not persuaded by these arguments. Casas-Sanchez was not cited by the Examiner for the presence or absence of preservatives. Instead, it was cited to show that wipes with a pH between 2.5 and 5.4 were known to be used on the external genitalia of humans. (*See* Final Act. 7–8 (citing Casas-Sanchez abstract).)

Appellant also argues that Vagisil does not enable odor control. (*See* Appeal Br. 25–27; *see also* Reply Br. 37.) According to Appellant, it is not clear that the product described in Vagisil actually treats odor because the active ingredient is not known to be an acidifying agent and is not relevant to the claimed method. (*See id.*)

Vagisil was not cited for its ingredients, but rather as evidence that wipes intended for use on the external genitalia were considered to be useful for blocking odor. (*See* Final Act. 8.) Whether or not the product described in Vagisil actually works, it demonstrates what was understood in the art at the time — that external-use wipes could be useful in preventing odor. Appellant “freely recognizes” this fact. (Appeal Br. 27.) Thus, Appellant’s argument is unpersuasive.

Appellant argues further that Vagisil cannot be properly combined with So because So teaches an internal treatment for vaginitis, whereas Vagisil teaches external application. (*See* Appeal Br. 29.) The Examiner’s rejection is not based on So and Vagisil alone. The Examiner cites Hart and

Klier, which relate to external application of mandelic acid to reduce odor. (See Final Act. 6–7.) Thus, Appellant’s argument is not persuasive.

Appellant argues that Klier does not contribute to a *prima facie* case for the obviousness of the claimed method because it teaches forms of deodorant that are not relevant to the method, as well as thousands of other possible active ingredients. (See Appeal Br. 29–31; see also Reply Br. 43–49.) Appellant argues that Klier also teaches using mandelic acid at concentrations lower than recited in the claimed methods. (See Appeal Br. 30–31.) Appellant argues further that the teachings of Klier would not lead one to the claimed method because the discussion of body odor refers to only Gram-positive bacteria, which, according to Appellant, are not likely to cause fishy odor. (See Appeal Br. 31–32.) Appellant argues that Klier is not enabled for odor control with mandelic acid. (See Appeal Br. 32.)

None of these arguments are persuasive because although Klier teaches many things, it teaches alpha-hydroxyalkanoic acid, such as mandelic acid, as deodorants and “intimate cleansing agents.” (See Final Act. 7 (citing Klier ¶¶ 11 and 47).) Klier is not cited as an anticipatory reference and, as explained above, it need not be enabled. Rather, Klier is cited as providing suggestions that, along with the other cited references, renders the claimed methods obvious. In addition, although Appellant cites to references regarding the involvement of Gram-positive bacteria in vaginosis, we are not directed to evidence that such bacteria are not also involved in malodor not caused by vaginosis.

Appellant argues that

[o]ne aspect of the Applicant’s invention is recognizing that such diagnoses are often in error, and that the source of the odor

may be the pudendum, not an infected vagina. Without that knowledge, those of ordinary skill in the art would not necessarily be motivated to even consider a treatment of the external pudendum, and even if they did, the cited prior art would not lead them the Applicant's method without undue experimentation.

(Appeal Br. 35; *see also* Reply Br. 52.) Regardless of the basis for it, Appellant's claimed method is to provide an acidifying composition of mandelic acid with the recited limitations and instructions to apply it to the entire pudendum, not inside the vagina, in order to reduce fishy odor due to sources other than vaginosis. (*See* Appeal Br. 57.) Although Appellant asserts that there would have been no motivation to do this without the Appellant's discovery of the sources of odor, the prior art cited by the Examiner shows otherwise.

As the Examiner explains:

So teaches reducing fishy odor by application [of] the mandelic acid in the form of e.g., cream or ointment to the inside of vagina for the treatment of vaginitis; Hart teaches reducing malodor of genital/anal area of animal by applying the mandelic acid to the external genital/anal areas of animal origin; Klier teaches the composition comprising 0.3-5% of alpha-hydroxy acid such as mandelic acid is used as deodorant to control body odor at pH 3.5-7.5, preferably 4. . . . From the teachings of at least the said references, it is well known that mandelic acid is effective to reduce fishy odor in human or animal and thus, wherever it would be placed in e.g., external genital area, it would also have reduced the fishy odor on that area with a reasonable expectation of success, in the absence of evidence to the contrary.

(Ans. 27–28.) Thus, even if the use of mandelic acid to treat malodor from the pudendum was not expressly taught in the literature, the demand for a

treatment and the knowledge in the art would have rendered Appellant's claimed method obvious. *See KSR*, 550 U.S. at 419 ("In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends.").

The prior art cited by the Examiner persuades us that even if one of ordinary skill in the art did not know of the exact cause of bad odor, it would have been obvious to have applied mandelic acid as recited in claim 15 to the entire pudendum and not only inside the vagina to reduce bad odors. Thus, even giving weight to the step in claim 15 of providing directions to the user (step (b)), we agree with the Examiner that the process of claim 15 would have been obvious in view of the cited prior art. (*See Reply Br. 38–42 (citing King Pharmaceuticals Inc. v. Eon Labs Inc.*, 616 F.3d 1267 (Fed. Cir. 2010).)

Dependent Claims

Appellant argues for the separate patentability of claims 16 and 17, but presents "[e]ssentially the same arguments for Claim 15." (*See Appeal Br. 36; see also Reply Br. 51–52.*) As explained above, these arguments are not persuasive.

Appellant also argues separately for the patentability of claim 18. (*See Appeal Br. 36–39; see also Reply Br. 52–53.*) Claim 18 recites:

The method of Claim 15 wherein said acidifying composition has a nonzero yield stress and wherein the directions are adapted to cause said acidifying composition to effectively remain in contact with the human body for a period of at least

10 minutes after applying said acidifying composition according to the directions.

(Appeal Br. 57.) Appellant argues that Vagisil teaches a wipe that has an aqueous solution and that there is no apparent reason to modify the pH of the skin or to provide a non-zero yield stress to help maintain the presence of the acidifying composition on the body for prolonged periods of time. (*See* Appeal Br. 36–39.)

We are persuaded by the Examiner’s reasoning that the method of claim 18 would have been obvious. The Examiner explains that because mandelic acid was known to be effective in reducing malodor from both the internal and external genitalia (in light of the teachings of So, Klier, and Hart), applying it to the pudendum area according to the direction of Vagisil, the composition would implicitly reveal such properties of non-zero yield stress and remaining time of at least 10 minutes as a natural result of the combination of elements. (*See* Ans. 24.) The Examiner is not citing the composition of Vagisil as a composition with a non-zero yield stress, but is rather relying on the inherent property of a composition as recited in claim 15, which is directed to be applied to the pudendum. Appellant’s argument that “[a]bsent the knowledge obtained from Applicants’ investigation, there would seem to be no motivation in the cited art to provide the type of directions claimed,” is unpersuasive as discussed above. (Appeal Br. 37.) We are persuaded that if the method of claim 15 would be obvious, which we find, using a composition with a non-zero yield stress would be the only way to achieve the intended results. We note also that So teaches a cream, which would have non-zero yield stress according to Appellant’s explanation. (*See* So 10:5–11:12; *see also* Appeal Br. 38.)

Appellant argues for the separate patentability of claim 19. (*See* Appeal Br. 39–40; *see also* Reply Br. 52.) Claim 19 recites: “The method of Claim 15, wherein said acidifying composition comprises a lipophilic carrier.” (Appeal Br. 57.) Appellant argues that because the compositions taught in Casas-Sanchez and Vagisil are not lipophilic, comprising high concentrations of water, the claimed method would not have been obvious. (*See id.*)

We are not persuaded by this argument because neither Casas-Sanchez nor Vagisil were cited for the compositions they teach. Instead, the Examiner relied on So, Hart, and Klier for compositions that comprise mandelic acid. So teaches a lipophilic carrier, such as a cream, which is also provided in Appellant’s Specification. (*See* So 10:5–11:12; *see also* Spec. ¶ 22; and Final Act. 6.)

Appellant argues that claim 21 is patentable with respect to Betts, a reference that is not cited in the Final Office Action. (*See* Appeal Br. 40; *see also* Reply Br. 53.) According to Appellant, the argument still applies to the current combination of references because they do not teach maintaining “the mandelic acid of the acidifying composition . . . effectively in contact with the pudendum of the user throughout the entire time from application until the period of at least 10 minutes thereafter” as recited in claim 21. (*See* Appeal Br. 40, and 58.)

We are not persuaded by this argument because even though Appellant asserts that Casa-Sanchez and Vagisil teach “brief treatment (the action of a wipe),” Appellant fails to direct us to sufficient evidence that the compositions taught in Casas-Sanchez or Vagisil are in contact with the skin only when the wipe is used and do not remain for a period of time after,

providing treatment for a period of time. Furthermore, because the Examiner did not cite Casas-Sanchez or Vagisil for the compositions they teach, Appellant's argument fails to consider how long a composition such as taught in So, Hart, or Klier would remain in contact. (*See* Ans. 26.)

Appellant does not raise separate arguments against the rejection of any other dependent claims. Accordingly, we are not persuaded that the Examiner erred in rejecting them.

Other Arguments

Appellant argues that the Examiner improperly entered a Final Office Action with the rejection discussed above. (*See* Appeal Br. 47–53; *see also* Reply Br. 57–60.) As noted by the Examiner, the finality of a rejection is not an issue for appeal. *See* MPEP § 706.07(c) (“Any question as to prematureness of a final rejection should be raised, if at all, while the application is still pending before the primary examiner. This is purely a question of practice, wholly distinct from the tenability of the rejection. It may therefore not be advanced as a ground for appeal, or made the basis of complaint before the Patent Trial and Appeal Board.”) Accordingly, we do not address this argument.

Conclusion

Upon consideration of the record and for the reasons given, we affirm the Examiner's rejection.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
15-26	103(a)	So, Hart, Klier, Casas-Sanchez, and Vagisil	15-26	
Overall Outcome			15-26	

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136.

AFFIRMED