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THE PROCTER & GAMBLE COMPANY GLOBAL IP SERVICES CENTRAL BUILDING, C9 ONE PROCTER AND GAMBLE PLAZA CINCINNATI, OH 45202			BREDEFELD, RACHAEL EVA	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* VALERIE JEAN BRADFORD, ALISON FIONA STEPHENS,  
and MARTIN STEPHEN WILLIAMSON

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Appeal 2019-000684  
Application 15/193,214  
Technology Center 1600

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Before FRANCISCO C. PRATS, DEBORAH KATZ, and DAVID COTTA,  
*Administrative Patent Judges.*

KATZ, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellant<sup>1</sup> seeks our review<sup>2</sup>, under 35 U.S.C. § 134(a), of the Examiner’s decision to reject claims 1–11, 13, and 15–17. We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

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<sup>1</sup> We use the word “Appellant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party-in-interest as The Gillette Company LLC. (Appeal Br. 1.)

<sup>2</sup> We consider the Final Office Action issued December 1, 2017 (“Final Act.”), the Amended Appeal Brief filed April 2, 2018 (“Appeal Br.”), and the Examiner’s Answer issued on September 5, 2018 (“Ans.”).

Appellant's specification is directed to liquid compositions, and hair removal devices that dispense them, comprising silicone polyether block copolymer to improve the lubricating properties of the composition. (*See* Spec. 1:4–5.)

Appellant's claim 17 recites<sup>3</sup>:

A personal care composition comprising  
[1] from about 40% to about 95% by weight of water,  
[2] about 1% to about 6% by weight of a volatile post foaming agent and  
[3] from about 0.1 % to about 60% by weight of silicone polyether block copolymer, wherein said silicone polyether block copolymer comprises  
[a] from about 1 to about 50%, by weight of polyethylene oxide,  
[b] from about 20% to about 90% by weight of polypropylene oxide and  
[c] from about 1 to about 20%, by weight of silicone.

(Appeal Br. 7, Claims App'x.) Appellant's claim 1 recites<sup>4</sup>:

A composition dispensing hair removal device, said device comprising  
a handle connected to a hair removal head, said handle comprises a cavity for housing a composition disposed within said handle and  
an actuator adapted to displace said composition from said cavity to a fluid dispensing member, said composition comprising

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<sup>3</sup> Claim 17 has been modified by adding indentations to separate elements of the claimed composition and by adding bracketed numbers and letters for reference purposes. *See* 37 C.F.R. § 1.75(i).

<sup>4</sup> Claim 1 has been modified by adding indentations to separate elements of the claimed device and by adding bracketed numbers and letters for reference purposes. *See* 37 C.F.R. § 1.75(i).

- [3] from about 0.1 % to about 60% by weight of a silicone polyether block copolymer wherein said silicone polyether block copolymer comprises
- [a] from about 1 to about 50%, by weight of polyethylene oxide,
  - [b] from about 20% to about 90% by weight of polypropylene oxide and
  - [c] from about 1 % to about 20%, by weight of silicone.

(Appeal Br. 5.) Thus device of claim 1 dispenses a silicone polyether block copolymer as recited in claim 17.

*Prior Art Rejections*

The Examiner made two prior art rejections of Appellant's claims. First, the Examiner rejected claim 17 under 35 U.S.C. 103 as being unpatentable over Alwattari,<sup>5</sup> Hendrix,<sup>6</sup> and Trinh.<sup>7</sup> (*See* Final Act. 6–8.) Second, the Examiner rejected claims 1–11, 13, and 15–17 under 35 U.S.C. 103 as being unpatentable over Alwattari, Hendrix, Trinh, and Royle.<sup>8</sup> (*See* Final Act. 8–13.)

Findings of Fact

1. Alwattari teaches shaving compositions with about 1% to about 6% volatile post-foaming agent, the same range recited in claim 17. (Alwattari abstract.)

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<sup>5</sup> US Patent Application Publication 2006/0257350 A1, published November 16, 2006.

<sup>6</sup> US Patent Application 2002/0192407 A1, published December 19, 2002.

<sup>7</sup> US Patent No. 6,790,819 B2, issued September 14, 2004.

<sup>8</sup> U.S. Patent Application Publication 2011/0219621 A1, published September 15, 2011.

2. Alwattari provides examples of shaving compositions that are 75.02–78.24% water, a range encompassed by the range recited in claim 17. (*See* Alwattari ¶ 23.)

3. Alwattari does not teach compositions comprising silicone polyether block copolymer as recited in claim 17.

4. Alwattari does teach compositions with a water dispersible surface active agent selected from mixtures of non-ionic surfactants. (*See* Alwattari ¶¶ 9–10.)

5. Hendrix teaches wipes that include a substrate and lotion. (*See* Hendrix abstract.)

6. The lotion taught in Hendrix includes a softness and feel improving agent, a surfactant, and an aqueous carrier. (*See* Hendrix abstract.)

7. Hendrix teaches that suitable surfactants in the lotion can be mixtures of non-ionic surfactants comprising Silwet L-7210 and block copolymers of propylene oxide and ethylene oxide. (*See* Hendrix ¶¶ 74, 75, and 80.)

8. Appellant’s Specification provides that Silwet L-7210 is a silicone polyether block copolymer with polyethylene oxide at 20 w/w%, polypropylene oxide at 65 w/w%, and silicone at 20 w/w%, each being within the ranges recited in claim 17. (*See* Spec. 23.)

9. The Specification discloses that “[s]ilicone polyether block copolymers have been described in the literature to provide a number of benefits such as foaming, defoaming, wetting, deaeration and lubricity.” Spec. 2:30–31.

Analysis

The Examiner determines that it would have been obvious to one of ordinary skill in the art to have used Silwet L-7210 in the shaving composition of Alwattari because Alwattari teaches the use of non-ionic surfactants and Hendrix teaches Silwet L-7210 is a suitable non-ionic surfactant in cosmetic compositions applied to the skin. (*See* Final Act. 7.) The Examiner finds that both Alwattari and Hendrix are directed to cosmetic compositions and applications comprising non-ionic surfactants and, therefore, one of ordinary skill in the art would have had a reason to combine their teachings. (*See* Ans. 4.) Because Alwattari envisages non-ionic surfactants in the post-foaming gels it teaches, the Examiner determines that it would have been obvious to incorporate the non-ionic surfactant, Silwet L-7210, taught by Hendrix into a post-foaming gel.

Appellant argues that the Examiner provided no motivation why one of ordinary skill in the art would have considered the wipes of Hendrix when formulating a shave composition as taught in Alwattari. (*See* Appeal Br. 3.) Appellant acknowledges that Alwattari is interested in improved lubricity for shave compositions, but argues there has been no reason why an ordinarily skilled artisan would look to Hendrix, an invention directed to wipes. (*See id.*) Appellant argues further that even if there would have been a reason to look to the field of wipes, one of ordinary skill reading Alwattari would not have done so because Hendrix does not address improving lubricity, rather Hendrix is directed to such as eliminating greasy feel for the user. (*See id.*)

Appellant notes in the background section of the Specification that “[s]ilicone polyether block copolymers have been described in the literature to provide a number of benefits such as foaming, defoaming, wetting,

deaceration and lubricity.” (FF9.) Thus, even if Hendrix does not teach the use of silicone polyether block copolymers for improved lubrication, this property was previously known in the art. Appellant states that the concentrations of silicone block copolymer is the basis for the claimed invention. (*See* Spec. 2:31–3:2 (“it has been now been surprisingly found that the selection of silicone block copolymers having from 20% to 90% by weight of polypropylene, from 1 % to 50% by weight of polyethylene oxide and from 1 % to 20% by weight of silicone unexpectedly provide improved lubrication while ensuring the required level of water dispersion without impacting stringiness or residue or skin irritation.”).)

The Supreme Court has explained that

[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.

*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). We are not persuaded that the Examiner erred in rejecting claim 17 because: 1) Alwattari contemplates non-ionic surfactants in the shaving compositions, 2) it was known in the art that silicone polyether block copolymers were useful for lubricity of compositions, and 3) Hendrix teaches that Silwet L-7210, a copolymer as recited in claim 17, was known to be useful in cosmetic products. Accordingly, we affirm the Examiner’s rejection of claim 17.

Claims 1, 2, 4–9, 13, 15, and 16 are drawn to a device with a cavity that holds a composition with a silicone polyether block copolymer as

recited in claim 17. (*See* Appeal Br. 5–7.) The Examiner rejected these claims, as well as claim 17, under 35 U.S.C. § 103, as being obvious over the teachings of Alwattari, Hendrix, Trinh, and Royle. (*See* Final Act. 8–13.) Appellant argues that for the reasons argued against the rejection of claim 17, “Trinh and Royle each fail to provide the necessary missing elements of Alwattari and Hendrix to render the composition housed in the cavity of the device of claim 1 obvious.” (*See* Appeal Br. 3.)

As explained above, we are not persuaded by Appellant’s arguments against claim 17. Accordingly, we are not persuaded that the Examiner erred in rejecting claims 1–2, 4–9, 13, and 15–17 over Alwattari, Hendrix, Trinh, and Royle.

*Other Rejections*

The Examiner rejected claims 10 and 11 under 35 U.S.C. 112(b) or 35 U.S.C. 112 (pre-AIA), second paragraph, as being indefinite. (*See* Final Act. 3–4; *see also* Ans. 3 (noting that indefiniteness rejection remains pending).) Claim 10, and therefore claim 11, which depends on claim 10, recites “polyethylene oxide has an average molecular weight of at least about 300000.” (Appeal Br. 7.) Claim 10 depends on claim 5, which recites the device of claim 1, “wherein said silicone polyether block copolymer has a molecular weight of from about 10000 to about 15000.” (Appeal Br. 6.) The Examiner finds that claim 10 is indefinite because “it is unclear how the polyethylene oxide could have a molecular weight of at least 300000 within the copolymer.” (*See* Ans. 5.) Appellant presents no arguments against the Examiner’s rejection. Arguments or authorities not included in the appeal brief “will be refused consideration.” *See* 37 C.F.R. § 41.37(c)(1)(iv); *see also* MPEP § 1205.02 (“If a ground of rejection stated by the examiner is

not addressed in the appellant’s brief, appellant has waived any challenge to that ground of rejection and the Board may summarily sustain it, unless the examiner subsequently withdrew the rejection in the examiner’s answer.”). Accordingly, we affirm the rejection.

The Examiner also provisionally rejected claims 1–7, 10–11, and 15–16 over the claims of copending application 15/193,177 in view of Royle under the doctrine of obviousness-type patenting. (*See* Final Act. 18–19.)

Appellant presents no arguments against the Examiner’s rejection and has waived an appeal of it. (*See* Ans. 5.) Since the Examiner’s Answer in this appeal, claims were issued in application 15/193,177 as U.S. Patent 10,457,888. Thus, we do not render an opinion on the patentability of Appellant’s current claims over the claims of 15/193,177 because they may not be the same as the issued claims. If prosecution should continue in the current application, the Examiner may wish to revisit a rejection for obviousness-type double-patenting over U.S. patent 10,457,888. *See Ex parte Moncla*, Appeal No. 2009-006448 (PTAB June 22, 2010) (holding that it is premature to address a provisional rejection) (designated precedential).

*Conclusion*

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

In summary:

<b>Claims</b>	<b>35 U.S.C. §</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
<b>Rejected</b>				

17	103	Alwattari, Hendrix, and Trinh	17	
1–11, 13, and 15-17	103	Alwattari, Hendrix, Trinh, and Royle	1–11, 13, and 15-17	
10, 11	112(b)		10, 11	
1–7, 10–11, and 15–16	Provisional Obviousness- type Double Patenting <sup>9</sup>	15/193,177 and Royle		
<b>Overall Outcome</b>			1–11, 13, and 15–17	

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

AFFIRMED

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<sup>9</sup> As explained above, we do not reach this rejection per *Ex parte Moncla*, Appeal No. 2009-006448 (PTAB June 22, 2010) (holding that it is premature to address a provisional rejection) (designated precedential).